

GST on trading of Transferable Development Rights (TDR's)

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I. Introduction

- a. State Governments across India have evolved a method of compensating the loss for acquisition of land / building for developmental purposes. Till recently, the State would pay monetary compensations to the land owner on compulsory acquisition of land / building. This methodology envisaged huge cash outflows in the hands of the State, apart from leading to prolonged litigations on the ground that the landowner has not been compensated market values. In order to arrest this trend, States have come out with a concept of issue of “Transferable Development Rights (i.e., TDR)” to the property owner. Based on the intensity of development, the city **in a State** is normally divided into:
 - i. Intensively developed (A-zone);
 - ii. Moderately developed (B-zone); and
 - iii. Sparsely developed (C-zone);
 - iv. Others (D-zone).
- b. The transfer of Development Rights shall be from intensely developed zone to other zones and not vice versa. It is pertinent to understand and analyse the meaning of TDR and the relevant provisions of the law which are as follows:
- c. Transferable Development Right (TDR) means making available certain amount of additional built up area in lieu of the land area relinquished or surrendered by the owner of the land, so that he can use the permissible extra built up area (on account of allotment of

TDR) either by himself or transfer it to another person in need of the extra built up area for an agreed sum of money.

- d. If the owner of any piece and parcel of land / property is required to surrender the same to the Government or Governmental Agency for the purposes of road widening, formation of new roads or development of parks, play grounds, civic amenities etc., as per the proposed plan of the said Government or Governmental Agency he shall be eligible for the award of Transferable Development Rights. Such award will entitle the owner of the land in the form of a Development Rights Certificate (DRC) which he may use for himself or transfer it to any other person.
- e. The main purpose of the entire process is to acquire the required amount of land in a hassle free manner. The DRC is like a scrip, which once received, will allow the land owner an additional built up area in return of the area for which he has relinquished his rights. It also enables him to either develop the given area by himself or transfer/ trade in the market wherein the holder of DRC can sell the same to local builder or any other person for a consideration. DRC issued to land owners, if transferable, is known as Transferable Development Rights (TDR).

II. Taxability of TDR's in a GST Regime

1. The moot question that arises is whether the transfer of TDR amounts to supply and whether the same shall be liable to GST. To answer this question, we need to analyse the provisions of the GST law as under:
2. As per Section 9 of the Central Goods and Service Tax Act, 2017 (CGST Act), Central GST shall be levied on all intra-state **supply of goods or services or both**. Section 2(52) of the CGST Act defines the term 'goods' as **“every kind of moveable property other than.....”**. Further, 'service' as defined under Section 2(102) of the CGST Act covers **“anything other than goods,.....”**.

3. As such, it becomes necessary to understand the meaning of the expression "movable property". In as much as the tax enactments do not define the said expression, one has to adopt the definition in the respective State's General Clauses Act. But these definitions in the General Clauses Act too, are not very helpful. All that they say is that movable property means property of every kind except immovable property.
4. It would be appropriate to notice the definition of "property" in clause (11) of section 2 of the Sale of Good Act, 1930. It reads: " 'property' means the general property in goods, and not merely a special property". It is noteworthy that both these definitions seek to spread the net as wide as possible. While the definition of "goods" includes every kind of movable property within its ambit, the definition of "property" says that it includes not merely special property, but general property in goods as well.
5. In the above backdrop, the relevant question that arises here is that if service covers anything other than goods, then does this mean that immovable property is service and hence liable for GST and - if yes, whether TDR's can be considered as an immovable property.
6. The term 'immovable property' has not been defined under GST law. The General Clauses Act, 1987 defines "immovable property" as to include land, **benefits to arise out of land**, and things attached to the earth, or permanently fastened to anything attached to the earth. Section 2(6) of the Registration Act, 1908 defines "immovable property" to include land, buildings, hereditary allowances, rights to ways, lights, ferries, fisheries or any **other benefit to arise out of land**, and things attached to the earth or permanently fastened to anything which is attached to the earth, but not standing timber, growing crops nor grass.
7. In order to further understand the meaning of the term 'benefits to arise out of land', The interpretations of the Hon'ble Supreme Court on the various judicial rulings must be read as under:

- a. Lake is an immovable property and therefore the petitioner's right to enter in that estate, which he does not own and take away fish from the lake is a 'Profit a Prendre' and in India it is regarded as a benefit to arise out of the land and hence it is immovable property. - **Anand Behera v. State of Orissa (1955) 2 SCR 919.**

- b. Felling, cutting and removing bamboos from forest for the manufacture of paper is a **benefit to arise out of land and hence it would be an interest in immovable property.** - State of Orissa v. Titagarh Paper Mills Company Limited AIR 1985 SC 1293. Right to enter upon land and cut trees is a benefit arising out of land - **Shantabai V. State of Bombay AIR 1958 SC 532.**

- c. Congregation of buyers and sellers is enough to constitute a bazaar and the right to hold a bazaar is an interest in the land - **Bibi Sayeeda v. State of Bihar (1996) 9 SCC 516.** Further, Hon'ble Mumbai High Court in a case of **Chhada Housing Development Corporation v. Bibijan Shaikh Farid** reported in 2007 (3) Mah. L.J.P. 402 lay down that *"the expression TDR, is transfer of development rights, which enables the FSI to be used on any other plot of land generated from some other plot and can be used in terms of DC Regulations in force. It is the benefit arising out of land and is immovable property.*

On an understanding of the law laid down by various Courts, of the term 'immovable property, it can be safely stated that TDR's are **the benefits arising out of the land and the same is an immovable property.** However, it may be noted that all immovable properties are not liable for GST, as supply of service under GST Law.

8. It would be interesting to note that Schedule III to the CGST Act contains a negative list, enlisting activities which shall neither be treated as supply of goods nor supply of services.
 - ✓ Paragraph 5 of Schedule III covers 'sale of land and, subject to clause (b) of paragraph 5 of Schedule II, sale of building'.
 - ✓ Paragraph 6 covers Actionable claims, **other than lottery, betting and gambling.**

- i. At this juncture, it shall be important to understand whether the grant of development right and subsequent transfer of interest in land by land owner **amounts to sale of land or not?** It may be noted that the expressions ‘land’ or ‘sale of land’ has not been defined under the GST Law.
 - a. Let us first analyse the word ‘sale’. As per Section 54 of Transfer of Property Act, 1882, ‘sale’ is a transfer of ownership in exchange for a price paid or promised or part-paid and part-promised. Hon’ble Bombay High Court in the case of **Provident investment Co. Ltd vs Commissioner of income tax – AIR 1954 Bom 95** observed that a sale or transfer presupposes the existence of the property which is sold or transferred. It presupposes the transfer from one person to another of the right in the property.
 - b. Hon’ble Guwahati High Court in the case of **Nagen Hazarika vs Manorama Sharma – AIR 2007 Gau 62** held that the expression ‘title’ is a broad expression in law which cannot always be understood as akin to ownership. It conveys different forms of a right to a property which can include right to possess such property.
 - c. As per Aiyar’s Law Dictionary, the expression ‘**title**’ in the general proposition means that, when equities are equal that he has the legal title will be preferred, includes in its broadest sense all rights capable of being enjoyed and secured under the law. One holding a legal title of lands is certainly included but rights amounting to less than the full legal title are equally included with it. Title to land is the evidence of his right or the extent of his interest.
 - d. The apex Court in the case of **Sunil Siddhartha Bhai v. CIT – AIR 1986 SC 368** observed that in its general sense, the expression ‘**transfer of property**’ connotes passing of the entire bundle of rights from the transferor to the transferee. In another case, the transfer may consist of one of the estates only, out of all may be a reduction of the exclusive interest in the totality of rights of the original property is a larger interest than a share in that property. To the extent to which exclusive interest is reduced to a shared interest it would seem that there is transfer of interest.

- e. In **Syndicate Bank vs Estate Officer – AIR 2007 SC 3169**, the Supreme Court held that a jurisprudential title to a property may not be title of an owner. A title which is subordinate to an owner and which need not be created by reason of a registered deed of conveyance may at times create title. The title which is created in a person may be a limited one, although conferment of full title may be governed upon fulfilment of certain conditions. Whether all such conditions have been fulfilled or not would essentially be a question of fact in each case.
- ii. On an understanding of the above judgements, we can infer that the word ‘sale’ denotes transfer of title which is irrevocable and permanent. Hence ‘sale of land’ denotes ‘transfer of title in land’.
- ✓ Now coming to the meaning of the term ‘**land**’, it is pertinent to note that the term ‘land’ has also not been defined in the GST law. Therefore, the question arises as to whether ‘land’ means only full title in land or even other interest in land? For this, we need to rely on definition of land under other laws.
 - ✓ As per Section 3(a) of Land Acquisition Act, 1894, the expression ‘**land**’ **includes benefits that arise out of land** and things attached to earth or permanently fastened to anything attached to the earth.
 - ✓ As per Section 3(4) of Bombay Land Revenue Code, 1879 ‘**land**’ **includes benefits to arise out of land** and things attached to the earth or permanently fastened to anything attached to the earth and also shares in or charges on the revenue or rent of village or other defined portions of territory.
 - ✓ In the case of **Safiya Bee vs Mohd. Vajahath Hussain – (2011) 2 SCC 94**, the Apex court held that ‘land’ includes rights in or over land, **benefits to arise out of land**. The Apex court in the case of **Pradeep Oil Corporation vs Municipal Corporation of Delhi – (2011) 5 SCC 270** observed that land includes **benefits to arise out of land**.

- ✓ Land development right is a right to carry out development or to develop the land or building or both - **Girnar Traders vs State of Maharashtra – (2011) 3 SCC 1**. It is thus a benefit out of land included within the word ‘land’. One can also refer for similar observation in **S.N. Chandrasekhar vs State of Karnataka – (2006) 3 SCC 208** as well as **Dena Bank vs B.B.P.Parekh & Co. – (2000) 5 SCC 694**.

On an understanding of the law laid down in the above judgements, one can infer that the word ‘**land**’ not just includes full title in land but also rights which gives benefits associated with it. Hence, the expression ‘sale of land’ connotes ‘transfer (irrevocably and permanently) of title in land including rights in the form of benefits arising from it’. Since, TDR’s are in the nature of a benefit arising out of land, the same could be squarely covered under paragraph 5 of schedule III of the CGST, Act and hence it can be argued that TDRs can neither be regarded as supply of goods nor supply of services or both.

Similarly, in terms of paragraph 6 of the III Schedule to the CGST Act, 2017 actionable claims (other than lottery, betting and gambling) are neither goods nor services. As such, if an argument is taken that TDRs can be construed as an actionable claim, it would fail the test of taxability since actionable claims other than lottery, betting and gambling are not liable to tax under the GST Laws.

- iii. We need to analyse whether grant of land development right is covered under Entry No. 2(a) of Schedule II of CGST Act or not? Schedule II to CGST Act deems certain specified transactions as supply of goods or services. Entry No. 2(a) deems any lease, tenancy, easement, license to occupy land as supply of service.

- ✓ Section 105 of Transfer of Property Act, 1882 defines lease as a transfer of a right to enjoy immovable property made for a certain time, express or implied, or in perpetuity, in consideration of price paid or promised, or money, a share of crops, service or any other thing of value, to be rendered periodically or on specified occasions to the transferor by the transferee, who accepts the transfer on such terms’.

- ✓ A license is defined in Section 52 of Indian Easements Act, 1882 as a right to do or continue to do, in or upon the immovable property of the grantor, something which would in the absence of such right be unlawful, and such right does not amount to an easement or an interest in the property.
- ✓ In **Hill & Redman's law of landlord and tenant (Seventeenth Edition, Vol. 1)** detailed discussion laying down the determinative tests have been laid down. One of the test is to see "if the effect of the instrument is to give the holder the exclusively right of occupation of the land, though subject to certain reservations, or to a restriction of the purposes for which it may be used, it is prima facie a lease; and if the contract is merely for the use of the property in a certain way and on certain terms, while it remains in the possession and under the control of the owner, it is a license."
- ✓ Transfer of land development rights is not a lease transaction because it is a right to develop a land. Lease is a right to enjoy the immovable property. Moreover, the transfer of land development right is permanent and irrevocable right on the land subject to agreed terms and conditions. It grants right to the developer to also sell the said rights. Lease is always for a specified duration and at the end of the same, the possession vests with the owner. Lessee has no right to sell the property.
- ✓ Further, license is a permission to use the land without the right to exclusive possession. Since TDR's involve permanent and irrevocable transfer of land, it cannot be regarded as grant of license.

It can be argued that TDRs are benefits arising out of land and transfer of TDR gives the recipient an irrevocable and permanent development rights on such land. Therefore, transfer of development rights would get covered under the expression 'sale of land' appearing in Entry No. 5 of schedule III of the CGST Act, and hence, shall neither be treated as neither supply of goods nor as supply of services.

- iv. TDR is nothing but a 'document showing title' wherein the holder of TDR can construct the additional built up area in lieu of the area relinquished or surrendered by the owner of

the land. It is comparable to a 'Share Certificate' which shows only a title of a share holder who holds the equity in a Company. Further, the expression "immovable property" is defined under the General Clauses Act, to "include land, benefits to arise out of land and things attached to the earth or permanently fastened to anything attached to the earth". On a careful reading of the definition of 'immovable property', it is possible for one to argue and contend that TDR is nothing but a benefit which has arisen out of a portion of land that has been relinquished and therefore, the same can be construed as a right relating to an immovable property. This view can also be supported by the fact that if one needs to buy TDR, then the same must be registered with the sub-registrar as applicable to an immovable property.

- v. It therefore becomes clear that a right arising from an immovable property cannot be equated to 'movable property' or 'goods'. Assuming but not admitting that it were goods, the question of requirement of registration of the said TDR with the sub-registrar for the purpose of payment of stamp duty would not arise. It must also be borne in mind that the said TDR is also commonly understood by the trade and industry as one relating to an immovable property. So construed, it becomes clear that the said TDR is a 'document showing title' with respect to an immovable property. Therefore, TDR cannot be viewed as 'goods' for the purpose of GST laws. However, as a matter of abundant caution it is stated that there are no settled precedents on this issue. In the event of a possible litigation it is widely believed that one has a strong case on merits to argue that TDR is right relating to an immovable property and as such cannot be considered as goods.

Conclusion:

Thus, from the above discussion, it can be understood that consideration received towards trading of TDRs received in the form of Development Rights Certificate shall not be liable to GST. However, it is important to note that there are no direct and favorable judicial precedents available under the GST law till now and, therefore, considering the fact of the judgment rendered by the Advance Ruling Authority, New Delhi it may involve another round of litigation.

