

DRAFTING OF JOINT
DEVELOPMENT AGREEMENTS
FROM TAX PERSPECTIVE

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CONTENTS

- Preamble of a JDA
- Parties to the JDA
- Title tracing
- Declarations/Representations
- Consideration
- Obligations
- Taxation and other commercials
- Indemnities
- Force majeure

PARTIES TO THE JDA

- Ensure that all the parties who have certain rights in relation to the land join the JDA;
- If it is a Hindu undivided family, ensure that the same is reflected clearly;
- Other family members – Preferable to make them parties;
- Partnership Firm- All the partners to join the JDA.
- Company – Authorised by a Board Resolution

TRACING OF TITLE TO THE PROPERTY

- Tracing of title is very important
- If certain agreements had been entered into by the land owners with third parties which are subsequently cancelled (registered or unregistered)- it should be brought on record;
- If the land owners had executed any POA, the same is required to be cancelled.
- A registered agreement can be cancelled through another registered agreement only;
- History of family settlement
- Whether HUF property or individual property
- Public Notice will form part of due-diligence.

PREAMBLE TO THE JDA

- Trace the transaction history- MOU between the same parties, if any;
- Modification of earlier terms through any supplementary arrangements
- Existence of any building- should be brought out;
- Earlier activities in the land – factory and its closure and settlement of the affairs of the factory;
- Settlement of any claims: Condition precedent to the transaction- justification for claiming certain expenditure u/s 48?
- Settlement of any disputes with the Government.

PREAMBLE TO THE JDA

- If the intention of the Developer is to develop and hold the building for renting, even his intention to hold it as a capital asset may be declared in the document.
- In such a scenario, the developer should record his work in progress as CWIP and not as part of the inventory. Otherwise, when the work is completed and it has to be capitalised, section 28 (via) of ITA may trigger upon completion and capitalisation.

VARIOUS DATES IN THE JDA

- Date of JDA
- Timeline for conversions, change of land use;
- Timeline for applying for plan sanction;
- Timeline for obtaining the plan sanction;
- Timeline for commencement of work;
- Timeline for obtaining commencement certificate;
- Timeline for completion of the construction and getting the OC- pre condition under RERA;
- Defect liability period- Five years under RERA
- Fix timelines for each of the activities;

CORE UNDERSTANDING OF THE JDA

- Granting the Development rights;
- Entire cost by the Developer;
- Quality and timelines;
- Authority to develop;
- Sharing of Marketing cost- GST will trigger;
- Sharing- area sharing or revenue sharing- please specify;
- Combination of area sharing and revenue sharing?

53A OF TRANSFER OF PROPERTY ACT

- Whether it is required to indicate that the handing over of the possession under the JDA shall not be considered as a possession as contemplated u/s 53A of the TOP Act?
- GST Act- If we have to claim exemption, we have to argue that this is an immovable property transaction. If we provide that the possession is not as contemplated u/s 53A, then, it is not a 'transfer' as contemplated under the TOP Act. This clause could be used under the GST Act against us. Conflict in the argument between 53A clause and a transaction of immovable property?
- This should be sparingly used- required only if the asset is held as an inventory.

DECLARATION BY THE LAND OWNER REGARDING TITLE

- Declaration regarding ownership, encumbrances, charges, litigations, payment of taxes.
- Declaration regarding usage restrictions- Raja kaluve, nalas, roadways, pathways; burial grounds;
- Declaration regarding antecedents- no prior agreements; FSI consumption in another land;
- Declaration that the provisions of Benami Transaction Prohibition Act is not applicable.

COVENANTS OF THE OWNER

- Stock in trade or capital assets- should declare the current status of holding for future references;
- If it is a capital asset, NOC u/s 281? Declaration that there are no arrears of income tax and pending proceedings.

80IBA - JOINT RESPONSIBILITIES

- Whether land owner is carrying on the business of developing and eligible for deduction u/s 80IBA? If the land is held as an investment, there may be a need to convert into stock in trade.
- This will depend upon the facts and JDA clauses- whether the land owner also participates in the development? Karnataka HC- in the case of CIT Vs Shravani Constructions (2012 22 Taxmann.com 250 Kar) has held that the deduction u/s 80IB (10) is not restricted to the building of the housing project, but it includes developing and building housing project.
- Please provide a clear clause providing that the land owner will participate in the following with veto power to the developer:
 - Finalisation of plans and designs;
 - Levelling of land ready for development?
 - Selection of contractor;
 - Finalisation of land scaping;
 - Supervision during the construction and right to highlight defects noted;
- Whether the word- 'Joint' Development is required to be used in this case?

JDA BY FDI COMPANIES

- Companies in real estate business cannot sell land as such without development.
- Whether they can enter into a JDA with revenue sharing arrangement or area sharing arrangement?
- In a revenue sharing arrangement, can it be construed that they are selling the UDI?
- Safeguard clauses regarding joint responsibilities, developer cannot assign or sell without development; TDS on the land owner by the customer

OBLIGATIONS OF THE LAND OWNER

- Should not agree for demolition of the building- otherwise, cost of the building may not be available u/s 48 of ITA.
- Exclude clearly from RERA obligations, labour law regulations;
- Re-clarify about the joint participation in the planning, design, but at the cost of the developer and also structure responsibility of the developer.

OBLIGATIONS OF THE DEVELOPER

- To get the customer agreement cleared by the land owner- to ensure that the customer declarations are in line with the JDA terms;
- Approvals of land owners regarding designs; specifications; release of Civic amenities area and selection thereof;
- To meet the entire cost of completion, getting the OC; insurance as per section 16 of RERA (title and construction);
- To clear the defect as per the defect liability period under RERA.

DECLARATION UNDER RERA AS A PROMOTER

- Whether land owner need to declare himself as one of the promoters?
- Registration of the “real estate project” is contemplated under RERA.
- Whether there is a need to register a JD project meant for renting by both the parties and not meant for sale?

GST LIABILITY IN A RESIDENTIAL BUILDING

- Effective 1st April, 2019, GST in a residential building where the developer would be paying GST
 - landowner is likely to be exempted from the payment of GST in respect of Transfer of Development Rights;
- Yet the Developer would be liable for GST in respect of the construction of the building to the land owners. Whether composition tax is applicable on this? If yes, whether the land owner would be liable for GST once again when he sells before OC?
- Charging of GST by the Developer to the land owner?
- Whether input credit can be availed by the developer?
- Whether the developer should pass the input credit to the customer? In other words, whether the land owner can demand the developer to charge the GST net of input tax credit?
- Timing of liability of the developer?

TIMING OF GST LIABILITY ON THE LAND OWNER AND DEVELOPER 4/2018

(a) registered persons who supply development rights to a developer, builder, construction company or any other registered person against consideration, wholly or partly, in the form of construction service of complex, building or civil structure; and

(b) registered persons who supply construction service of complex, building or civil structure to supplier of development rights against consideration, wholly or partly, in the form of transfer of development rights,

as the registered persons in whose case the liability to pay central tax on supply of the said services, on the consideration received in the form of construction service referred to in clause (a) above and in the form of development rights referred to in clause (b) above, shall arise at the time when the said developer, builder, construction company or any other registered person, as the case may be, **transfers possession** or the **right in the constructed complex**, building or civil structure, to the person supplying the development rights by entering into a conveyance deed or similar instrument (for example allotment letter).

GST LIABILITY IN RESPECT OF COMMERCIAL BUILDING

- Land owner is liable for GST in respect of transfer of development rights;
- Timing of liability? Section 13 (2) – Time of supply- date of issue of invoice or date on which the supplier receives the payment with respect to the supply or the date of provision of service. As per explanation 2, date of receipt of payment- entry in the books or credit to the bank account.
- Date of provision of service is not defined. Notification No. 4/2018- can be resorted. If no unit is sold, cost plus 10%- applying rule 30 may be possible.

VALUATION OF SUPPLY BY LAND OWNER

- Value on which GST is payable?
 - 100% of the guideline value ?
 - Guideline value of the proportionate right of land being transferred to the developer?
 - Construction cost? This is more futuristic.
- Whether collectible from the Developer?
- Section 15 of the CGSTA provides that the value of supply shall be the transaction value, which is the price actually paid or payable for the supply of services. When it cannot be determined, one has to resort to valuation rules.

VALUATION OF SUPPLY BY LAND OWNER

- Rule 27 provides for the valuation of supply of services where the consideration is not wholly in money. Since in the case of area sharing, consideration is not wholly in money, this rule will apply, where market value of such supply itself can be the value of service. Hence, one can go for value of UDS agreed to be transferred to the developer in an area sharing.
- In the case of revenue sharing arrangements, as per entry No.5 of schedule III, one can take a view that this is a sale of land to the customer along with the developer as developer is not obliged to give any consideration and it is a case of joint sale of land and building to the customer.

VALUATION OF SUPPLY BY THE DEVELOPER

- Valuation rules has to be referred to as section 15 is not clarifying the value.
- Rule 27- where the supply of service is for a consideration not wholly in money, open market value of such supply- whether this can be applied? Open market value- whether based on the first sale or the sale at the time of completion? Whether one can argue that the contract with the customer is no comparable because, in the case of construction for the owner, there is no land component being transferred.
- Rule 30- cost plus 10% permissible when all other rules are not applicable.
- Definition of ‘continuous supply of service’ may not be applicable as in terms of section 2 (33), a continuous payment obligation is also required to be established which is missing.

Indication of consideration in cash and settlement in kind?

- Whether it is important to assign a value to the transfer of development rights?
- Whether for capital gains tax, such indication of value in the JDA can help?
Insertion of Section 50D- indicating the value in the JDA may no longer required.
- Valuation of services under the GST regulations- in the case of construction of commercial building meant for leasing- this may be quite useful to minimise the GST.
- Land owner will be clear of the amount payable to the developer also towards the GST as the consideration is fixed upfront.

EXISTING BUILDING AND ITS DEMOLITION

- Whether the existing building should be demolished by the land owner or the developer?
- Cost of acquisition/ improvement of the building- can be claimed as a deduction u/s 48 only if it is transferred;

PAYMENT OF MUNICIPAL TAX DURING THE JDA

- Before entering into JDA, Municipal Taxes including betterment charges, has to be cleared by the Landowner.
- Whether any issue if the same is paid by the Developer?

CHARGING OTHER COSTS BY THE DEVELOPER?

- Most contentious clause in the JDA and ends up with bad relationship?
- Fees payable to obtain various infrastructure facilities to the project;
- Deposits payable to obtain the above
- Costs to be incurred to create the infrastructure?
- GST on the same?

REVENUE SHARING CLAUSE

- Definition of Revenue?
- Exclusions from the Revenue? Revenue attributable to additional FSI/ TDR bought by the Developer?
- Timing of payments? Whether proportionate out of the collection from the customer or proportionate out of free money as per RERA regulations?
- Method of payment- daily swipe or periodical payment?
- GST on the land owner in a revenue sharing agreement? If we draft the clause properly, there is no transfer of development rights to the developer, but, both should agree to sell to the customers and agree to share the revenue.

REVENUE SHARING CLAUSE FROM GST PERSPECTIVE

- Implications of composition scheme- input credit is no longer available and it will form part of the price and land owner will get a share out of the same?
- Revenue sharing post completion- price includes the GST input credit reversal?

REVENUE SHARING

- Whether we should authorise the developer to collect the entire sale consideration and share with the land owner?
- Whether we should indicate that when the developer sells the units, he has to disclose the land owner portion with the customer or he can show that it is on his own account?
- Price parity clause
- GST implications in case we show separate consideration to the land owner? Whether valuation rules or composition rules can apply when the consideration is split between the land owner and the developer?

REVENUE SHARING IN A LLP ARRANGEMENT?

- Sharing of percentage of turnover itself as a share of profit for one of the parties?
- Separate share of profit and separate share of loss percentage for the partners?

CONSUMPTION OF FULL FLOOR SPACE INDEX

- Obligation of the developer to consume full FSI?
- Penalty for under consumption?
- Who has to bear the cost of TDR to be loaded and get the benefit of such additional FSI?
- Who has to bear the cost of premium FSI?

Transfer of Common Area

- As per Section 17 of RERA, the promoter shall execute a registered conveyance deed in favour of the allottee along with the undivided proportionate title in the common areas to the association of the allottees or the competent authority, as the case may be, and hand over the physical possession of the plot, apartment of building, as the case may be, to the allottees and the common areas to the association of the allottees or the competent authority, as the case may be, in a real estate project, and the other title documents pertaining thereto within specified period as per sanctioned plans as provided under the local laws.
- Common Area and carpet area does not include exclusive open terrace area and "exclusive balcony or verandah area. Neither transferred to allottee and Association.

Transfer of Common Area

- Applicability of 56(x) in association hands as the Consideration paid by allottees?
- In the draft agreement issued by RERA authority, land owner is not included.
- In further, draft agreement states the UDS shall be transferred to allottee contradicting to section 17 of RERA Act.

TDS U/S 194IA OR 194IC OR NO OR BY THE CUSTOMER DIRECTLY?

- TDS by the transferee to a resident transferor;
- If the land owner is a non resident, section 195 would apply;
- Cash consideration is covered under this section;
- In a revenue sharing arrangement, whether developer is paying the consideration to the land owner when he shares the revenue? Is he giving as an agent or on own account?

194IC- TDS 10%

- *Notwithstanding anything contained in section 194IA, any person responsible for paying to a resident any sum by way of consideration, not being consideration in kind, under the agreement referred to in sub section (5A) of section 45, shall be at the time of credit of such sum to the account of the payee or at the time of payment thereof in cash or by issue of a cheque or draft, whichever is earlier, deduct an amount equal to 10% of such sum.*
- *‘Specified agreement’ means a registered agreement in which a person owning land or building or both agrees to allow another person to develop a RE project on such land or building or both, in consideration of a share, being land or building or both in such project, whether with or without payment of part of the consideration in cash.*
- Term used is ANY PERSON, while, in section 45 (5A), only individual or HUF? Whether this has enlarged the scope? If the owner is a firm or a LLP or company, whether this section is applicable?
- Only area sharing agreement is covered in the definition of ‘specified agreement’ u/s 45 (5A). Hence, whether revenue sharing agreement without any area sharing is not a specified agreement?

TDS BY THE CUSTOMER DIRECTLY

- Can the TDS be done by the ultimate customer directly in the name of land owner and developer proportionately?
- This would avoid multiple queries on turnover of the developer from the project; no payment of consideration by the developer to the land owner;
- Project account- should there be separate account for the land owner?
- If it is a joint escrow account (100%), whether this can be complied with?

SHARING OF MARKETING COST AND GST IMPLICATIONS

In a revenue sharing arrangement, if the landowner is required to share part of the marketing cost, then, there will be a GST chargeable by the developer to the land owner and land owner will not get any input credit. Hence, may be avoided.

MAINTENANCE COST- ITS COMMENCEMENT AND TIMELINE OF PAYMENT

- Clarity regarding the commencement of maintenance charges by the land owner;
- Quantum- normally, developer collects 12 months or 24 months advance amount from their customers. However, land owner can retain a right to pay on a periodical basis in case he retains the units.
- In the case of units, the land owner should enable the developer to collect from his customers directly.
- To pay periodically and not in lump sum

CORPUS FUND, PAYMENT AND TIMELINES?

- Corpus fund collected by the developer for the project which is subsequently required to be transferred to the Association- GST liability when it is collected by the Developer?
- This may be liable as it is not refundable to the customer, but to be transferred to the Association. Hence, it is advisable for the Association to collect and not the developer. This clarity may be provided in the JDA itself.

COMPENSATION FOR DELAYS?

- Compensation for intermediary delays for change of land use; plan sanctions, commencement certificate and completion?
- Compensation will attract GST;
- Whether compensation is an income or a capital receipt?
- If compensation is waived subsequently in lieu of certain give and take? GST may be still leviable and income tax also may be leviable?
- As per section 15 (2) (d), interest or late fee or penalty for delayed payment of any consideration for any supply shall be included in the value of supply. As per section 13 (6), it is taxable only when received.

SPECIFICATIONS OF THE PROJECT

- Clear elaborated specifications;
- Developer giving extra amenities to his customers and not to the land owner units?
- Specifications in a commercial building- developer may or may not go for a flooring of his area;
- Specifications for common amenities in the commercial building?
- Electricity capacity in land owner portion?
- Height of each floor in a commercial building- crucial from renting perspective.

PAYMENT OF SUM BY THE DEVELOPER

- Refundable amount and time of repayment?
- Interest on delayed repayment- whether GST will apply?
- Non refundable amount? TDS?
- Non refundable amount and computation of consideration in the hands of the land owner? Whether it is subsumed within the valuation of section 50D or it has to be added further?
- Subsequent conversion of refundable amount to non refundable amount?

MORTGAGE CLAUSE

- Developer's right to mortgage;
- Utilisation of loan funds;
- Repayment?
- Utilisation of sale proceeds- whether restriction to use in the project only should be insisted?
- Deposit of title deeds;
- Land owner's right to mortgage;
- Appointment of a trustee or escrow agent?
- Mortgage clauses versus inventory meant for sale argument?

FORCE MAJEURE CLAUSE

- Definition;
- Inclusion and exclusions- shortage of materials, lorry strikes; labour shortage?
Government delays?
- Delays due to the title issues during the project?
- Notification of such events between the parties on a periodical basis?
- Whether reduction of GDP below 2% can be a force majeure?

TITLE INSURANCE AND INDEMNITIES

- Under section 16 of the RERA, taking a title insurance for the land and construction is mandatory;
- Determine whether this will be arranged by the developer or the land owner and provide for the same;
- Indemnities from the claims of customers under RERA regarding quality and delay in completion;
- Even though registered as a promoter, clear clarity under the JDA regarding all the obligations of completion of the project and indemnity against any such claims;
- Indemnity from the claims arising out of construction and development works.

STAMP DUTY CLAUSE

- Clear clarity about the liability;
- Stamp duty on the JDA
- Stamp duty on owners area;
- Stamp duty on developer's area;
- Stamp duty on any subsequent documents to be executed consequent to the JDA-say- sharing agreement?
- Whether sharing agreement has to be registered?

STRUCTURING FOR THE LAND OWNER?

50D VERSUS 45 (5A)?

- Conversion into stock in trade?
- Contribution to a Firm or LLP?
- Gifting within the family members and creating multiple rights- GAAR?
- Revenue sharing versus area sharing?
- Initially to go for revenue sharing and conversion thereof into an area sharing upon completion of a commercial building by having a partition of the property?

JDA- SALE OF UNITS BY THE LAND OWNER- WHETHER LTCG OR STCG?

- When an apartment is sold- the land owner would be selling the UDS and the unit;
- UDS RETAINED- computation of indexed cost based on the date of purchase;
- Building- whether short term or long term asset? What is the date of acquisition- whether on the date of JDA or date of sharing agreement or date of completion and receipt of possession?
- Gulshan Malik vs CIT (43 Taxmann.com 200), Delhi High Court has held that a right on the apartment crystallises on the date of entering into an agreement to purchase.
- Clause in the sharing agreement- allocation and declaration of right of both the parties- that they have absolute right to dispose off.
- Land owner should assign his right on the building and period of holding can be reckoned from the date of sharing agreement.

ANY QUESTIONS

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THANK YOU

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