

The Chamber of Tax Consultants (CTC)

Topic : GST issues in Real Estate industry

Day and Date : Wednesday, 29th June 2022

Chairman : Adv. Harsh Shah

Group Leader : CA Jinesh Shah



Some REAL issues in Real Estate industry

- Over-supply and drop in demand, investors disappearing
- Long-pending infrastructure projects
- Multiple legislative issues, complexities and hassles

Indian Contract Act, Transfer of Property Act, Registration Act, Land Acquisition Act, Indian Evidence Act, RERA, Rent Control Act, Consumer Protection, Income Tax Act, GST Act, Stamp Duty, Property Taxes

- Many real estate projects declared as NPAs and big players are facing insolvency proceedings
- Sharp rise in prices of raw material such as cement, steel, aluminium, diesel etc.
- Slow recovery due to Covid-19 pandemic

GST issues in Real Estate industry

- Taxability of sale of under-construction flats
- Sale of land and developed plots
- Valuation of land determined arbitrarily by law at 1/3rd and that also beyond the prescribed method of valuation
- Taxability of long-gestation projects vis-à-vis indirect tax legislation applicable to Real Estate
- Taxability of development rights / TDR / FSI / long-term lease
- Taxability of area allotted free of cost to landowner / society / tenants / slum-dwellers, etc.
- Taxability of affordable residential apartments / affordable housing project
- ITC reversal on account of unsold area in the project

Case Study 1

Implications of Guj. HC
decision in case of
Munjaal Manishbhai Bhatt

Facts of the case

- Decent developers have undertaken following two projects:
 - Tower 21, Andheri – Development rights acquired from landowner; and
 - Tower 65, Belapur – Leasehold rights acquired from CIDCO
- Smart Advisors LLP has advised company to discharge GST liability on value which is equivalent to sales price less ready reckoner value of land
- Company seeks your second opinion on the subject matter

Relevant provisions

- **Para 5(b) of Sch. II** – Construction of complex, building, civil structure or a part thereof, intended for sale to a buyer, wholly or partly, except where entire consideration has been received after issuance of completion certificate or after its first occupation, whichever is earlier
- **Para 5 of Sch. III** – Sale of land and subject to para 5(b) of Schedule II, sale of building
- **Sec. 9(1)** – CGST shall be levied on all intra-State supplies on value determined u/s 15 and at such rates as may be notified
- **Sec. 15(1)** – Value of supply shall be the transaction value i.e. price actually paid or payable
- **Sec. 15(4)** – Where value cannot be determined u/s 15(1), same shall be determined in such manner as may be prescribed
- **Sec. 15(5)** – Notwithstanding anything contained in Sec. 15(1) or Sec. 15(4), value of such supplies as may be notified by the Government on the recommendations of the Council shall be determined in such manner as may be prescribed.

Relevant provisions

- **NN 11/2017 – CT(R) dt. 28.06.2017** – issued u/s 9(1), 9(3), 9(4), 11(1), 15(5), 16(1) and 148
- **Para 2** – *In case of supply of service specified in column (3), in item [(i), (ia), (ib), (ic), (id), (ie) and (if)] 125 , against serial number 3 of the Table above, involving transfer of land or undivided share of land, as the case may be, the value of such supply shall be equivalent to the total amount charged for such supply less the value of transfer of land or undivided share of land, as the case may be, and the value of such transfer of land or undivided share of land, as the case may be, in such supply shall be deemed to be one third of the total amount charged for such supply*

Munjaal Manishbhai Bhatt vs UOI [2022-TIOL-663-HC-AHM-GST]

Facts:

- Petitioner entered into an agreement for purchase of land and construction of bungalow thereon. The agreement depicted consideration for land and construction services separately.

Writ:

- Entry 3(if) and Para 2 of NN 11/2017 – CT(R) should be:
 - struck down and declared ultra-vires; and
 - held violative of Article 14 and ultra vires to Article 246A of the constitution

Observations / Discussion by HC:

- Legislative intent is to impose tax on construction activity undertaken by supplier pursuant to contract with buyers / customers. There is no intention to levy tax on supply of land in any form

Munjaal Manishbhai Bhatt vs UOI [2022-TIOL-663-HC-AHM-GST]

- Sec. 15 provides that valuation of supply would be the price actually paid / payable and where such price is available, GST is to be levied on such actual value. Deeming fiction can be applied only where actual value is unascertainable
- Mandatory application of deeming fiction of 1/3rd value towards land even though the actual value of land is ascertainable is ultra-vires the statutory provision
- Deeming fiction is arbitrary and discriminatory as it is uniformly applied irrespective of the size of the plot of land and construction thereon [no distinction made between flat and bungalow]
- Minutes of 14th GST council meeting – Deduction contemplated only in the context of flats wherein it was difficult to ascertain the value of the undivided share of land
- Arbitrary deeming fiction has led to measure of tax which has no nexus with Charge
- Competence of government cannot be accepted for delegated legislation which ultra-vires GST Act and violative of Article 14 of the Constitution

Munjaal Manishbhai Bhatt vs UOI [2022-TIOL-663-HC-AHM-GST]

Held:

- 1/3rd deduction towards value of land is ultra-vires GST scheme and violative of Article 14
- Such provision should be read down i.e., should not be mandatory and shall apply only where such value is not ascertainable

Points for discussion

- Whether the ratio of Guj. HC decision in case of Munjaal Manishbhai Bhatt be blanketly applied to sale of under-construction flat?
- Whether the ratio of Guj. HC decision apply in cases where sale agreement does not provide bifurcation of value of land and construction services?
 - Whether builder is allowed under RERA / erstwhile MOFA to charge separately for value of land and construction services?
- Going by legislative intent and ratio of Guj. HC decision, value of land should not be taxed under GST. Whether reckoner value can be treated as value of land and balance price be treated as consideration towards construction services?

Case Study 2

Procurement from
registered persons vis-à-
vis unregistered persons

Facts of the case

- Bindaas Builders Private Limited has commenced construction of residential project in May 2021
- During, FY 2021-22, company has incurred following expenses:

Development rights	Rent allowance, shifting allowance, etc. paid to society members
Incentive / Premium FSI (MCGM)	Electricity Charges
Water Charges	Salary / Wages
Statutory payments to MCGM	Interest on loans
Legal Fees	Cement from unregistered person

- NN 3/2019 – CGST (rate) dated 29.03.2019 provides that 80% of procurements should be received from registered suppliers only.
- Company seeks your expert opinion on applicability of RCM on above payments

Relevant provisions

- **Sec. 9(3)** – Government may, on the recommendations of the Council, by notification, specify categories of supply, the tax on which shall be paid on reverse charge basis by the recipient
- **Sec. 9(4)** – Government may, on the recommendations of the Council, by notification, specify a class of registered persons who shall, in respect of supply of specified categories of goods or services or both received from an unregistered supplier, pay the tax on reverse charge basis as the recipient
- **NN 11/2017 – CT(R) dt. 28.06.2017** – issued u/s 9(1), 9(3), 9(4), 11(1), 15(5), 16(1) and 148

Relevant provisions

- **Conditions under NN 3/2019 – CT (R) dt. 29.03.2019**

- Provided also that 80% of input and input services, *[other than services by way of grant of development rights or FSI (including additional FSI), electricity, high speed diesel, motor spirit, natural gas]*, used in supplying service shall be received from registered supplier
- Provided also that inputs and input services on which tax is paid on reverse charge basis shall be deemed to have been purchased from registered person
- Provided also that where value of input and input services received from registered suppliers during the financial year falls short of the said threshold of 80%, tax shall be paid by the promoter on such shortfall at the rate of 18% on reverse charge basis
- Notwithstanding.. where cement is received from an unregistered person, the promoter shall pay tax on supply of such cement at the applicable rates on reverse charge basis

Relevant provisions

- **Conditions under NN 3/2019 – CT (R) dt. 29.03.2019 (contd..)**
 - Project wise account of inward supplies from registered and unregistered supplier to be maintained
 - Tax payments on the shortfall to be calculated at the end of FY and to be submit in prescribed form electronically on the common portal by end of the quarter following the FY
 - Tax liability on the shortfall of inward supplies from unregistered person to be added to output tax liability in the month not later than month of June following the end of FY

[All the above conditions are mandatory – Q. 10 of CBIC FAQs dt. 7th May 2019]

Relevant provisions

- **RCM under NN 7/2019 – CT (R) dt. 29.03.2019** [issued u/s 9(4)]

Category of supply of goods or services	Recipient of goods or services
Supply of such goods and services or both [other than development rights, long term lease of land or FSI] which constitute the shortfall from the minimum value of goods or services required to be purchased by promoter for construction of project	Promoter
Cement	Promoter
Capital Goods	Promoter

Analysis

Nature of Expenses	Remarks
Development rights	Not to be considered – Specifically excluded from NN 3/2019 – CT(R)
Rent allowance, shifting allowance, etc. paid to society members	Whether it constitutes a supply? If yes – to be considered; or If no – not to be considered
Incentive / Premium FSI	Not to be considered – Specifically excluded from NN 3/2019 – CT(R)
Electricity Charges	Not to be considered – Specifically excluded from NN 3/2019 – CT(R)
Water Charges	Supply exempt under Entry 99 of NN 2/2017 – CT(R)
Salary / Wages	Not to be considered – Neither a supply of goods nor supply of services

Analysis

Nature of Expenses	Remarks
Statutory payments to MCGM	Not to be considered - Neither a supply of goods nor a supply of services <i>[Services provided by Local Authority in relation to function entrusted to Municipality under Article 243W of Constitution - NN 14/2017 - CT(R) r.w. NN 16/2018 - CT(R)]</i>
Interest on loans	Supply exempt under Entry 27 of NN 12/2017 - CT(R)
Legal Fees	GST payable under RCM - Supply deemed to have been received from registered person as per NN 3/2019 - CT(R)
Cement from unregistered person	GST payable under RCM - Supply deemed to have been received from registered person as per NN 3/2019 - CT(R)

Overview

Particulars			
Total Procurements in FY	(A)		xxx
Less: Procurements specifically excluded by notification	(B)		(xxx)
Net Procurements in FY	[C=A-B]		xxx
Less: Procurements not amounting to supply	(D)		(xxx)
Procurements to be considered for 80:20 RCM	[E=C-D]		xxx
20% of (E) above	(F)	xxx	
Supplies procured from URD (-) Supplies on which GST is paid under RCM	(G)	(xxx)	
Shortfall of procurement from RD	[H=G-F]	xxx	
Less: Exempt supplies procured from URD	(I)	(xxx)	
Net Shortfall of procurement from RD	[J=H-I]		xxx
GST Payable at 18% on (J) above	K		xxx

Case Study 3

RCM on DR / TDR / FSI

Facts of the case

- Skyscrapers Private Limited commenced construction of a multi-storied skyscraper building in March 2019 containing:
 - 100 residential flats (admeasuring 75,000 sq. ft.); and
 - 50 commercial units (admeasuring 25,000 sq. ft)
- Building contains the following:
 - Common plinth;
 - Common gymnasium and club house on ground floor
 - Basement for parking (commercial units)
 - 1st to 3rd floor for parking (residential flats)
- Commercial units constructed from 4th to 10th floor whereas residential flats constructed from 11th to 30th floor

Facts of the case

- Company has procured the following for construction of building:
 - Basic development rights procured from landowner – Rs. 30 crores
 - Incentive / Premium FSI procured from MCGM in April 2019 – Rs. 5 crores
 - TDR released by SRA in May 2019 (for earlier project) (approx. value - Rs. 5 crores)
 - TDR procured from unregistered vendors in June 2019 – Rs. 10 crores
- Relevant facts on completion of project:
 - 30 residential flats unsold (admeasuring 25,000 sq. ft.)
 - 10 commercial units unsold (admeasuring 5,000 sq. ft.)
 - Selling price of Residential flat – Rs. 15,000 per sq. ft.
 - Selling price of Commercial units – Rs. 25,000 per sq. ft.
- Company wishes to understand whether any RCM liabilities trigger on completion of project.

Points for discussion

Nature of Rights	Remarks
Basic development rights procured from landowner	At what point in time are DR transferred? Whether TOS arises on date of DA? Whether exemption benefit be available? Who would be liable to pay GST?
Incentive FSI from MCGM in April'19	Services in relation to function entrusted to Municipality under Article 243W of Constitution? Neither a supply of goods nor a supply of services?
TDR released by SRA	Whether SRA is a governmental authority? Whether such services are liable to GST?
TDR procured from URD vendor in June'19	TDR procured on or after 01.04.2019 – Whether covered under RCM? Whether exemption available? If yes, then to what extent? Whether TDR is bought for commercial construction or for residential construction? How to calculate GST payable under RCM?

Relevant provisions

- **Sec. 13(2)(b)** – TOS shall be earlier of date of provision of service or date of receipt of payment
- **NN 4/2019 – CT(R) dt. 29.03.2019 r.w. NN 5/2019 – CT(R) dt 29.03.2019**
 - Exemption for DR / FSI transferred on or after 01.04.2019 for construction of residential apartments, except where entire consideration received after completion certificate
*[GST payable on DR / FSI * carpet area of residential apartments / total carpet area]*
 - Promoter liable to pay GST under RCM on value of DR / FSI attributable to residential apartments remaining un-booked on date of issuance of completion certificate
*[GST payable on DR used for construction of residential apartments * carpet area of un-booked residential apartments / total carpet area of residential apartments]*
 - Tax payable shall not exceed 1% / 5% of value of such un-booked residential apartments

Relevant provisions

- Value of un-booked residential apartment shall be deemed to be equal to value of similar apartment charged by promoter nearest to date of completion certificate
- **NN 14/2017 – CT (R) dt. 28.06.2017 r.w. NN 16/2018 – CT(R) dt. 26.07.2018** - Services provided by Local Authority in relation to function entrusted to Municipality under Article 243W of Constitution shall neither be treated as supply of goods nor supply of services Article 243W r.w. 12th Sch. of Constitution
 - Urban planning including town planning
 - Regulation of land use and construction of buildings
 - Planning for economic and social development
- **Entry 4 of NN 12/2017 – CT(R) dt. 28.06.2017** – Exemption for services provided by governmental authority in relation to function entrusted to Municipality under Article 243W

Points for discussion

GST payable under FCM by landowner:

- On DR transferred to developer:

$$18\% * 30 \text{ crores} = 5.4 \text{ crores}$$

GST payable under RCM by developer:

- On DR / TDR / FSI attributable to commercial units:

$$18\% * 10 \text{ crores} * 25,000 \text{ sq. ft.} / 1,00,000 \text{ sq. ft.} = 45 \text{ lakhs}$$

- On DR / TDR / FSI attributable to residential flats:

Lower of:

$$18\% * 10 \text{ crores} * 25,000 \text{ sq. ft.} / 1,00,000 \text{ sq. ft.} = 45 \text{ lakhs; or}$$

$$5\% * (25,000 \text{ sq. ft.} * 15,000) = 1.875 \text{ crores}$$

i.e. Rs 45 lakhs

Case Study 4

Transfer of leasehold land
and factory building

Facts of the case

- In year 1995, MIDC granted industrial plot on long term lease of 99 years to Hindustan Manufacturers Private Limited for constructing manufacturing unit
- Company intends to transfer land along with manufacturing unit (admeasuring about 50,000 sq. ft.) to Bharat Manufacturers Private Limited for lumpsum consideration of Rs. 50 crores
- Bharat Manufacturers will modernise the machinery and carry-on manufacturing business
- Hindustan Manufacturers expressed a view that Bharat Manufacturers is liable to pay GST under RCM on transfer of lease rights along with building standing thereon
- Bharat Manufactures expressed a view that transaction is not exigible to GST as it involves transfer of land and building
- Common consultant suggested that Hindustan Manufacturers should charge GST and Bharat Manufacturers can claim ITC thereof. However, tax manager is sceptical about claiming ITC

Facts of the case

- Confused as to taxability of above referred transaction, both the company has approached you for GST implications
- Would the answer change if Bharat Manufacturers intends to demolish existing manufacturing unit and construct new building solely for letting out?

Points for discussion

- Whether transfer of leasehold rights along with building thereon is liable to GST?
 - Whether it amounts to sale of land and building covered under Sch. III?
 - Whether it is a bundled services wherein pre-dominant element is either transfer of leasehold rights **or** transfer of building?
 - Whether it can be treated as a composite supply or mixed supply and taxed accordingly?
- Lumpsum consideration is charged for transfer of leasehold rights and building. Whether entire consideration is to be taxed or value of leasehold rights and building be artificially vivisected?
- Whether GST is payable under RCM on transfer of leasehold rights along with building thereon?
- In case where Hindustan Manufacturer charges GST on transfer of leasehold rights along with building, whether Bharat Manufacturers would be entitled to claim ITC thereof? Would it be blocked u/s 17(5)(d)?

Relevant provisions

- **Sec. 7(1)(a)** – Supply includes all form of supply of goods or services such as sale, transfer, barter, exchange, license, rental, lease or disposal made for a consideration by a person in course or furtherance of business
- **Para 2(a) of Sch. II** – Any lease, tenancy, easement, license to occupy land is a supply of services
- **Para 5(e) of Sch. II** – Agreeing to the obligation to refrain from an act or to tolerate an act or a situation, or to do an act is a supply of services
- **NN 4/2019 – CT(R) dt. 29.03.2019** – Exemption for upfront amount (premium / salami, etc.) payable in respect of service by way of granting of long-term lease of 30 years or more, on or after 01.04.2019, for construction of residential apartments except where entire consideration received after completion certificate

Relevant provisions

- **NN 5/2019 – CT(R) dt. 29.03.2019** – Promoter shall be liable to pay GST under RCM on long term lease of land (30 years or more) by any person against consideration payable in form of upfront amount (premium / salami / cost price, etc.)
- **Para 5 of Sch. III** – Sale of land and subject to para 5(b) of Schedule II, sale of building
- **Sec. 2(30)** – Composite supply means a supply made by a taxable person consisting of two or more taxable supplies of goods or services or both, which are naturally bundled and supplied in conjunction with each other in the ordinary course of business, one of which is principal supply
- **Sec. 2(108)** – Taxable supply means a supply which is leviable to tax under this Act
- **Sec 2(74)** – Mixed supply means two or more individual supplies of goods or services, made in conjunction with each other by a taxable person for a single price where such supply does not constitute a composite supply

Relevant provisions

- **Sec. 8** – Taxability of composite and mixed supply
 - Composite supply – treated as supply of principal supply; and
 - Mixed supply – treated as supply of that particular supply which attracts highest rate of tax
- **Sec. 17(5)(c)** – Blocks ITC in respect of WCT services when supplied for construction of an immovable property (other than plant and machinery) except where it is an input service for further supply of WCT service
- **Sec. 17(5)(d)** – Blocks ITC in respect of goods or services received by a taxable person for construction of an immovable property (other than plant or machinery) on his own account
- **Explanation** – Construction includes re-construction, renovation, additions or alterations or repairs, to the extent of capitalization, to the said immovable property

Relevant provisions

- **Explanation** – Plant and machinery means apparatus, equipment, and machinery fixed to earth by foundation or structural support that are used for making outward supply of goods or services or both and includes such foundation and structural supports but excludes:
 - Land, building or any other civil structures

Relevant case laws / rulings

- **Builders Association of Navi Mumbai – Bombay HC [2018-TIOL-2767-HC-MUM-GST]**

It is settled law that such provisions in a taxing statute would have to be read together and harmoniously in order to understand the nature of the levy, the object and purpose of its imposition. No activity of the nature mentioned in the inclusive provision can thus be left out of the net of the tax. Once this law, in terms of the substantive provisions and the Schedule, treats the activity as supply of goods or supply of services, particularly in relation to land and building and includes a lease, then, the consideration therefor as a premium/one-time premium is a measure on which the tax is levied, assessed and recovered.

- **Enfield Apparels Limited – West Bengal AAR [2020-TIOL-214-AAR-GST]**

The activity of assignment is in the nature of agreeing to transfer one's leasehold rights - It does not amount to further sub-leasing, as the applicant's rights as per the Deed of sub-lease stands extinguished after assignment - Neither does it create fresh benefit from the land - It is in the nature of compensation for agreeing to do the transfer of the applicant's rights in favour of the assignee - It is a service classifiable under 'Other miscellaneous service' (SAC 999792) and taxable @ 18%.

Relevant case laws / rulings

- **Inox Air Products Private Limited – Tamil Nadu AAR [2021-TIOL-199-AAR-GST]**

Activity of agreeing to part with the leasehold interests held by the applicant in favour of M/s. INOX Air Products Private Limited is 'Supply' as defined under Section 7 of the Goods and Services Act, 2017 and GST is liable to be paid on the consideration of Rs. 15 Crores received by them

- **Jinmagal Corporation – Gujarat AAR [2020-TIOL-282-AAR-GST]**

One-time long term lease premium payable/paid by the Jinmagal Corporation to Ahmedabad Urban Development Authority (AUDA) is supply and thus liable to pay tax as per Section 7 - Jinmagal Corporation is required to discharge/pay tax under Reverse Charge Mechanism in accordance with notification No. 13/2017 as amended by 05/2019 - Annual lease premium payable/paid by the applicant is supply and tax is payable on the same under reverse charge mechanism

Relevant case laws / rulings

- **J M Chemicals – Gujarat AAR [2021-TIOL-276-AAR-GST]**

The word used in the said Parliamentary Act in said clause (d) is 'for' and not 'used'. The word 'for' indicates a purpose, an intended goal. Here, 'for' is to be construed to indicate the purpose to construct factory shed/ administrative block, et al, on the said land, so that JM may pursue its business goals.

Further, We rest on the dictum, 'first things first', that is to say, the land will be used for construction of the immovable property/ factory shed/ administrative block/ civil structures first.

- **GGL Hotel and Resort Company Ltd – West Bengal AAR [2020-TIOL-282-AAR-GST]**

Applicant's argument about absence of any nexus - direct or indirect - between the lease rental and construction of the buildings for hotel etc. is incorrect - nexus between them is, therefore, direct and the two are inseparable - Construction of the hotel etc. is impossible unless the Applicant enjoys uninterrupted right to use the land - It is clear from the Agreement that the Applicant cannot enjoy that right if he fails to pay the lease rental - Construction of the immovable property is, therefore, critically dependent on the supply of the leasing service

Case Study 5

Construction of low-cost
houses for Municipal
Corporation

Facts of the case

- Uptown Developers Private Limited owns a land in Mumbai Suburbs
- Company has received in principal approval from BMC for developing and handing over 500 PAP units to BMC
- The size of each such unit is around 27.88 sq. mt (i.e. 300 sq. ft.)
- BMC will compensate the company as under:
 - Release of Commercial Credit notes worth Rs. 195 crores as under:
 - On acceptance of BMC's LOI – 10% i.e. Rs. 19.50 crores
 - On completion of plinth – 50% i.e. Rs. 97.50 crores
 - On handover / completion of PAP units– Balance 40% i.e. Rs. 78 crores

[Company can either use these credit notes to offset premium payable in future or transfer it to a third party. The realisable value would depend on market rate prevalent]

Facts of the case

- Land TDR and Construction TDR

[Company can either load TDR in any of the project or transfer it to a third party. The realisable value would depend on market rate prevalent]

- Company is confused with respect to GST implications of the following:
 - Whether any GST liability triggers on PAP units handed over to BMC?
 - How should one determine value of units handed over to BMC?
 - At what rate GST liability is to be discharged?
 - At what rate should sub-contractors charge to Company?
 - Whether further sale of commercial credit notes and / or TDR is exigible to GST?

Points for discussion

- Whether constructing and handing over of PAP units to BMC amounts to a supply liable to GST?
 - If yes, at what point in time is the tax payable?
- How should one determine value of units handed over to BMC?
 - Value is assigned to Credit notes;
 - At what rate Land / construction TDR should be valued? Whether at market value or at ready reckoner value?
 - If value per unit is ascertained below Rs. 45 lakhs, can it be treated as 'affordable residential apartment' especially when definition uses the words 'gross amount charged'?
- At what rate GST liability is to be discharged?
 - Whether 1% or 5% or 12% or 18%?
 - Entry 3(i) to 3(if) uses the words 'project' and 'promoter' – Will concessional rate apply?

Points for discussion

- At what rate should sub-contractors charge to Company?
 - Whether 12% or 18%?
- Whether further sale of commercial credit notes and / or TDR is exigible to GST?
 - Whether it can be treated as transfer of actionable claim?
 - Whether it can be treated as transaction in money?
 - Is it akin to duty credit scrip and therefore exempt?

Relevant provisions

- **Sec. 7(1)(a)** – Supply includes all form of supply of goods or services such as sale, transfer, barter, exchange, license, rental, lease or disposal made for a consideration by a person
- **Sec. 2(119)** – Works contract means a contract for building, construction, fabrication of any immovable property wherein transfer of property in goods (whether as goods or in some other form) is involved in the execution of such contract
- **Para 5(b) of Sch. II** – Construction of complex, building, civil structure or a part thereof, intended for sale to a buyer, wholly or partly, except where entire consideration has been received after issuance of completion certificate or after its first occupation, whichever is earlier
- **Sec. 15(1)** – Value of supply shall be the transaction value i.e. price actually paid or payable
- **Sec. 15(4)** – Where value cannot be determined u/s 15(1), same shall be determined in such manner as may be prescribed

Relevant provisions

- **Rule 27** – Value of supply where consideration is not wholly in money
 - a) Open Market Value;
 - b) Sum of consideration in money and any such further amount in money as is equivalent to the consideration not in money;
 - c) Value of supply of goods or services or both of like kind and quality;
 - d) Rule 30 (110% of cost or provision of services) or Rule 31 (reasonable means)
- **Para 4(xvi) of NN 11/2017 – CT(R) dt. 28.06.2017** – Affordable residential apartment shall mean a residential apartment having carpet area not exceeding 60 sq. mt. / 90 sq. mt, as the case may be, and for which gross amount charged is not more than Rs. 45 lakhs

Relevant provisions

Entry of NN 11/2017-CT(R)	Remarks	Effective Rate
3(i)	Construction of affordable residential apartment <u>by a promoter in a RREP,, intended for sale to buyer</u>	1%
3(ia)	Construction of residential apartments (other than affordable) <u>by a promoter in a RREP,, intended for sale to buyer</u>	5%
3(ib)	Construction of commercial apartments <u>by a promoter in a RREP,, intended for sale to buyer</u>	5%
3(ic)	Construction of affordable residential apartment <u>by a promoter in a REP,, intended for sale to buyer</u>	1%
3(id)	Construction of residential apartments (other than affordable) <u>by a promoter in a REP,, intended for sale to buyer</u>	

Relevant provisions

- **Para 4(xvii) of NN 11/2017 – CT(R) dt. 28.06.2017** – Promoter shall have same meaning as assigned to it u/s 2(zk) of RERA, 2016

(zk) "promoter" means,—

(i) a person who constructs or causes to be constructed an independent building or a building consisting of apartments, or converts an existing building or a part thereof into apartments, for the purpose of selling all or some of the apartments to other persons and includes his assignees; or

(ii) a person who develops land into a project, whether or not the person also constructs structures on any of the plots, for the purpose of selling to other persons all or some of the plots in the said project, whether with or without structures thereon;

.....

Relevant provisions

- **Para 4(xviii) of NN 11/2017 – CT(R) dt. 28.06.2017** – REP shall have same meaning as assigned to it u/s 2(zn) of RERA, 2016
(zn) "real estate project" means the development of a building or a building consisting of apartments, or converting an existing building or a part thereof into apartments, or the development of land into plots or apartment, as the case may be, for the purpose of selling all or some of the said apartments or plots or building, as the case may be, and includes the common areas, the development works, all improvements and structures thereon, and all easement, rights and appurtenances belonging thereto
- **Para 4(xix) of NN 11/2017 – CT(R) dt. 28.06.2017** – RREP shall mean a REP in which carpet area of commercial apartment is not more than 15% of total carpet area

Relevant provisions

Entry of NN 11/2017-CT(R)	Remarks	Effective Rate
3(xii)	Construction services other than (i), (ia), (ib), (ic), (id), (ie), (if), (iii), (iv), (v), (va), (vi), (vii), (viii), (ix), (x) and (xi) above	18%
3(va)	<p>Composite supply of works contract, other than that covered by items (i), (ia), (ib), (ic), (id), (ie) and (if) above, <u>supplied by way of construction</u>, erection, commissioning, installation, completion, of <u>affordable residential apartments</u> covered by sub-clause (a) of clause (xvi) of paragraph 4 below, in a project which commences on or after 1 st April, 2019</p> <p><i>- Provided carpet area of affordable residential apartments is not less than 50% of total carpet area of all apartments in the project</i></p>	12%

Relevant provisions

Entry of NN 11/2017-CT(R)	Remarks	Effective Rate
3(v)(da)	<p>Composite supply of works contract, other than that covered by items (i), (ia), (ib), (ic), (id), (ie) and (if) above, supplied by way of construction, erection, commissioning, or installation of original works pertaining to:</p> <p>(da) low-cost houses up to a carpet area of 60 square metres per house in <u>an affordable housing project</u> which has been given <u>infrastructure status vide notification</u> of Government of India, in Ministry of Finance, Department of Economic Affairs <u>vide F. No. 13/6/2009-INF, dated the 30th March, 2017</u></p>	12%

Relevant provisions

- **Notification F. No. 13/6/2009-INF dt. 30.03.2017** – Harmonized Master List of Infrastructure Sub-sectors

Sr. No. 5 – Category: Social and Commercial Infrastructure; **Sub-sector:** Affordable Housing
Affordable Housing” is defined as a housing project using at least 50% of the Floor Area Ratio (FAR) /Floor Space Index (FSI) for dwelling units with carpet area of not more than 60 square meters

- **Sec. 2(1)** – Actionable claim shall have same meaning assigned to it u/s 3 of TOPA, 1882
Actionable claim means a claim to any debt, other than a debt secured by mortgage of immoveable property or by hypothecation or pledge of moveable property, or to any beneficial interest in moveable property not in the possession, either actual or constructive, of the claimant, which the Civil Courts recognize as affording grounds for relief, whether such debt or beneficial interest be existent, accruing, conditional or contingent

Relevant provisions

- **Entry 6 of Sch. III** – Actionable claims (other than lottery, betting and gambling) shall neither be treated as supply of goods nor supply of services
- **GST rates on following:**

Heading	Remarks	GST Rate
4907	Unused postage, revenue or similar stamps of current or new issue in the country in which they have, or will have, a recognized face value; stamp-impressed paper; banknotes; cheque forms; stock, share or bond certificates and similar documents of title (other than Duty Credit Scrips).	18%
4907	Duty Credit Scrips	Nil Rated

Relevant case laws / rulings

- **Puranik Construction Private Limited – Maharashtra AAR [2019-TIOL-138-AAR-GST]**

Entry Clause (da) of Item (v) of notification 01/2018-CTR nowhere restricts the benefit to a 'Developer' only - Notification entry is qua the supply of service and not qua the person and, therefore, once the project qualifies as Affordable Housing Project (AHP), the benefit of concessional rate of tax would be available in respect of Works Contract Services pertaining to Low Cost Houses, irrespective of it being supplied by the Developer or Contractor - since, in the present case, the project qualifies as AHP, the benefit of concessional rate of tax of 12% would be available to the applicant

- **Prajapati Developers – Maharashtra AAR [2018-TIOL-121-AAR-GST]**

Since the project undertaken by the applicant falls under the definition of 'Affordable Housing', they are entitled to the benefit of reduced rate of 6% CGST in the cases of supply effected after 25.01.2018 and in respect of only those flats which are of carpet area up to 60 sq. mtrs. – in respect of other flats having carpet area of more than 60 sq. mtrs., applicant would be required to pay GST at normal applicable rate

Case Study 6

Taxability of SRA project

Facts of the case

- Noble Builders Private Limited has received LOI from Slum Rehabilitation Authority under Slum Rehabilitation Scheme for following projects in FY 2022-23:
 - Noble Park – wherein land belonged to the State Government / SRA; and
 - Noble Millennium – wherein land belonged to Company itself
- Company is required to construct residential tenements as well as commercial tenements (below 15%) lieu of which it is entitled to receive either development rights / FSI (to be consumed in-situ in sale building) or TDR certificate (which can be loaded in other projects)
- Company seeks overall advise on taxability of SRA projects undertaken on public land as well as private land

Slum Rehabilitation Scheme

- Once a particular area is declared as slum area under the Slum Redevelopment Act, it empowers SRA to formulate and implement SRS for the purpose of rehabilitation of slums
- The Slum Redevelopment Act specifically provides that SRA has jurisdiction over land owned by private parties and MHADA
- SRA permits undertaking slum rehabilitation project as per proposal made by a developer with consent of the co-operative society of the slum dwellers
- An agreement between developer and society of slum dwellers is executed only for submitting such proposal to the SRA.
- SRA is empowered to suo motu appoint a developer for undertaking slum rehabilitation work
- If the project is approved by the SRA, an LOI, sanctioning the project, is issued by SRA which lays down the responsibilities of a developer and timelines for execution of project as well as consideration that would be paid by SRA for undertaking such activities (additional FSI / TDR)

Slum Rehabilitation Scheme

- Tenements in the rehab building would be allotted only to slum dwellers who are found eligible by the SRA
- Developer is required to enter into agreement with individual slum dwellers for permanent alternate accommodation
- Developer is required to provide temporary accommodation to slum dwellers, upon demolition of slums for construction
- Developer obtains IOA, CC and carries out construction of buildings as per guidelines of SRA w.r.t. area, quality, amenities thereof, etc.
- As per the LOI issued by the SRA, the tenements in the rehabilitation buildings are required to be handed over to SRA and same will be allotted by SRA to eligible slum dwellers as per guidelines of the SRA. On getting OC of SRA buildings, the developer hand over of the tenement keys to the SRA

Points for discussion

- Whether services provided for construction of rehab tenements is liable to GST?
 - Who is the recipient of services?
 - What is the nature of services provided?
 - At what point in time is the tax payable?
 - What is the value of services provided?
 - What is the applicable tax rate?
 - Whether ITC is available for construction of rehab tenements?
- Whether DR / FSI / TDR released by SRA is liable to GST?
 - Is the company required to pay GST under RCM?
- At what rate should sub-contractor charge to company?

Relevant provisions

- **Sec. 7(1)(a)** – Supply includes all form of supply of goods or services such as sale, transfer, barter, exchange, license, rental, lease or disposal made for a consideration by a person
- **Sec. 2(119)** – Works contract means a contract for building, construction, fabrication of any immovable property wherein transfer of property in goods (whether as goods or in some other form) is involved in the execution of such contract
- **Para 5(b) of Sch. II** – Construction of complex, building, civil structure or a part thereof, intended for sale to a buyer, wholly or partly, except where entire consideration has been received after issuance of completion certificate or after its first occupation, whichever is earlier
- **Sec. 2(93)** – Recipient of supply would mean:
 - Where consideration payable – person liable to pay such consideration
 - Where no consideration is payable – person to whom the service is rendered

Relevant provisions

- **Sec. 13(2)(b)** – TOS shall be earlier of date of issuance of invoice (as per Sec. 31) or provision of service or date of receipt of payment
- **Sec. 31(5)** – In case of continuous supply of services, invoice shall be raised:
 - Where due date of payment is ascertainable – on or before such due date
 - Where due date of payment is not ascertainable – on or before receipt of payment
 - Where payment is linked to completion of event – on or before date of completion of event
- **NN 6/2019 – CT(R) dt. 29.03.2019** – Promoter who receives DR / FSI on or after 01.04.2019 for construction of project where consideration payable by him in form of construction services shall be liable to pay GST on supply of construction services (against consideration in form of DR / FSI) on date of issuance of completion certificate of the project

Relevant provisions

- **Sec. 15(1)** – Value of supply shall be the transaction value i.e. price actually paid or payable
- **Sec. 15(4)** – Where value cannot be determined u/s 15(1), same shall be determined in such manner as may be prescribed
- **Rule 27** – Value of supply where consideration is not wholly in money
 - a) Open Market Value;
 - b) Sum of consideration in money and any such further amount in money as is equivalent to the consideration not in money;
 - c) Value of supply of goods or services or both of like kind and quality;
 - d) Rule 30 (110% of cost or provision of services) or Rule 31 (reasonable means)
- **Para 4(xvi) of NN 11/2017 – CT(R) dt. 28.06.2017** – Affordable residential apartment shall mean a residential apartment having carpet area not exceeding 60 sq. mt. / 90 sq. mt, as the case may be, and for which gross amount charged is not more than Rs. 45 lakhs

Relevant provisions

Entry of NN 11/2017-CT(R)	Remarks	Effective Rate
3(i)	Construction of affordable residential apartment <u>by a promoter in a RREP,, intended for sale to buyer</u>	1%
3(ia)	Construction of residential apartments (other than affordable) <u>by a promoter in a RREP,, intended for sale to buyer</u>	5%
3(ib)	Construction of commercial apartments <u>by a promoter in a RREP,, intended for sale to buyer</u>	5%
3(ic)	Construction of affordable residential apartment <u>by a promoter in a REP,, intended for sale to buyer</u>	1%
3(id)	Construction of residential apartments (other than affordable) <u>by a promoter in a REP,, intended for sale to buyer</u>	

Relevant provisions

- **Para 4(xvii) of NN 11/2017 – CT(R) dt. 28.06.2017** – Promoter shall have same meaning as assigned to it u/s 2(zk) of RERA, 2016

(zk) "promoter" means,—

(i) a person who constructs or causes to be constructed an independent building or a building consisting of apartments, or converts an existing building or a part thereof into apartments, for the purpose of selling all or some of the apartments to other persons and includes his assignees; or

(ii) a person who develops land into a project, whether or not the person also constructs structures on any of the plots, for the purpose of selling to other persons all or some of the plots in the said project, whether with or without structures thereon;

.....

Relevant provisions

- **Para 4(xviii) of NN 11/2017 – CT(R) dt. 28.06.2017** – REP shall have same meaning as assigned to it u/s 2(zn) of RERA, 2016
(zn) "real estate project" means the development of a building or a building consisting of apartments, or converting an existing building or a part thereof into apartments, or the development of land into plots or apartment, as the case may be, for the purpose of selling all or some of the said apartments or plots or building, as the case may be, and includes the common areas, the development works, all improvements and structures thereon, and all easement, rights and appurtenances belonging thereto
- **Para 4(xix) of NN 11/2017 – CT(R) dt. 28.06.2017** – RREP shall mean a REP in which carpet area of commercial apartment is not more than 15% of total carpet area

Relevant provisions

Entry of NN 11/2017-CT(R)	Remarks	Effective Rate
3(xii)	Construction services other than (i), (ia), (ib), (ic), (id), (ie), (if), (iii), (iv), (v), (va), (vi), (vii), (viii), (ix), (x) and (xi) above	18%
3(va)	<p>Composite supply of works contract, other than that covered by items (i), (ia), (ib), (ic), (id), (ie) and (if) above, <u>supplied by way of construction, erection, commissioning, installation, completion,</u> of <u>affordable residential apartments</u> covered by <u>sub-clause (a) of clause (xvi) of paragraph 4 below</u>, in a project which commences on or after 1 st April, 2019</p> <p><i>- Provided carpet area of affordable residential apartments is not less than 50% of total carpet area of all apartments in the project</i></p>	12%

Relevant provisions

Entry of NN 11/2017-CT(R)	Remarks	Effective Rate
3(v)(da)	<p>Composite supply of works contract, other than that covered by items (i), (ia), (ib), (ic), (id), (ie) and (if) above, supplied by way of construction, erection, commissioning, or installation of original works pertaining to:</p> <p>(da) low-cost houses up to a carpet area of 60 square metres per house in <u>an affordable housing project</u> which has been given <u>infrastructure status vide notification</u> of Government of India, in Ministry of Finance, Department of Economic Affairs <u>vide F. No. 13/6/2009-INF, dated the 30th March, 2017</u></p>	12%

Relevant provisions

- **Notification F. No. 13/6/2009-INF dt. 30.03.2017** – Harmonized Master List of Infrastructure Sub-sectors

Sr. No. 5 – Category: Social and Commercial Infrastructure; **Sub-sector:** Affordable Housing
Affordable Housing” is defined as a housing project using at least 50% of the Floor Area Ratio (FAR) /Floor Space Index (FSI) for dwelling units with carpet area of not more than 60 square meters

- **Entry 4 of NN 12/2017 – CT(R) dt. 28.06.2017** – Exemption for services provided by governmental authority in relation to function entrusted to Municipality under Article 243W of Constitution

Article 243W r.w. 12th Sch. of Constitution

- Regulation of land use and construction of buildings
- Slum improvement and upgradation

Relevant provisions

- **Q. 19 of FAQs on Government Services**

Q – *Whether services in the nature of change of land use, commercial building approval, utility services provided by a governmental authority are taxable?*

A – *Regulation of land-use, construction of buildings and other services listed in the Twelfth Schedule to the Constitution which have been entrusted to Municipalities under Article 243W of the Constitution, when provided by governmental authority are exempt from payment of tax.*

Relevant case laws / rulings

- **Puranik Construction Private Limited – Maharashtra AAR [2019-TIOL-138-AAR-GST]**

Entry Clause (da) of Item (v) of notification 01/2018-CTR nowhere restricts the benefit to a 'Developer' only - Notification entry is qua the supply of service and not qua the person and, therefore, once the project qualifies as Affordable Housing Project (AHP), the benefit of concessional rate of tax would be available in respect of Works Contract Services pertaining to Low Cost Houses, irrespective of it being supplied by the Developer or Contractor - since, in the present case, the project qualifies as AHP, the benefit of concessional rate of tax of 12% would be available to the applicant

- **Prajapati Developers – Maharashtra AAR [2018-TIOL-121-AAR-GST]**

Since the project undertaken by the applicant falls under the definition of 'Affordable Housing', they are entitled to the benefit of reduced rate of 6% CGST in the cases of supply effected after 25.01.2018 and in respect of only those flats which are of carpet area up to 60 sq. mtrs. – in respect of other flats having carpet area of more than 60 sq. mtrs., applicant would be required to pay GST at normal applicable rate

Thank You