

GST Department Audit-Issues in Real Estate Sector

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Background

The real estate sector has faced department audit under section 65 of GST Act over the course of past 5-6 years in GST regime. The paperwriter has examined the recent major issues being raised at time of audit by department for real estate and the validity of the same under the law.

Common issues and its implications

1. GST on plotted development done by developer:

- GST is being demanded on the value of the sale of plots done by the developer. This is alleged to be the value of the infrastructure services supplies done by developer. The GST levy is attracted on the **supply** of goods/**services** for a **consideration**.
- The substance of the transaction is to convey the developed sites[land with amenities]. The development activities carried out on land are also a part of land , i.e., sale of land along with the benefits forming part of it.
- There is no intention to tax the land/immovable property under GST[Entry 5 Schedule III GST law, sets out sale of land is not supply of goods nor supply of services]. This is supported by decisions such as Magus Construction Pvt Ltd [2008 (11) STR 225 (Gau.)], wherein agreement indicated that impugned transaction is one of sale and purchase of premises and not for carrying out construction activity on behalf of prospective buyer.
- Circular no.177/9/2022 has clarified that GST is not leviable on sale of developed plots by developer. This is in line with Schedule III of GST law Entry 5.
- There is no specific valuation mechanism in GST Act/Rules to value the plotted development works done by developer for Landowner share of plots. It can be said that in the absence of valuation mechanism GST levy fails. Similarly held in CIT Vs B.C. Srinivasa Shetty 1981 (2) SCC 460 – SC.

2. GST on Development rights/DR:

- a. Under Joint Development Agreement[JDA], when Irrevocable rights to enter into and do development of project is given to developer by land owner. In exchange for the DR, the developer would do construction and hand over the constructed area in residential/commercial project to Landowner. Demand of GST could be

done by GST department on **DR from developer under reverse charge** as recipient vide notification 13/2017-CT@ as amended.

- b. Development rights can be said to be “**benefits arising from land**”, covered under “Immovable property” as defined in General Clauses Act. A view can be taken that such rights, are excluded from GST levy, by virtue of Schedule III Entry 5 “Sale of land” neither a supply of goods nor supply of services. It can also argue that it is a state subject and as liable for stamp duty, the GST levy may be challenged.
- c. **In M/s. Prahitha Constructions Private Limited v. Union of India and Ors. [Writ Petition No. 5493 of 2020 dated February 09, 2024]** dismissed the writ petition wherein DR transferred under JDA dated during December 2017 and held that transfer of development rights would be considered as service and is, therefore, subject to levy of GST. SC issues The Supreme Court issued notices to the Union of India, Revenue Department, and CBIC on the SLP filed against the Telangana HC ruling in SLP (C) No. 11079/2024]. The final clarity on tax levy on DR from Apex Court is awaited as on date.
- d. Assuming that DR are taxable to GST, **RCM is not applicable on developer when such rights were transferred vide JDA dated prior to 1.4.2019.**
- e. **It is significant that if the development rights were transferred under JDA dated prior to 1.7.2017**, GST demand would fail. This is vide “Service“ definition in Section 65B(44) wherein it excluded the below.

*“Service” means any activity carried out by a person for another for consideration, and includes a declared service, but **shall not include-***

(a) an activity which constitutes merely,—

*(i) a transfer of **title** in goods or **immovable property**, by way of sale, gift or in any other manner; or “*

- f. The Development rights transferred under JDA maybe said to be transfer of rights [akin to title], to benefit arising from land, being immovable property, in any other manner[under JDA]. Thus excluded from ST levy at the time when such rights were irrevocably provided prior to 1.7.2017.

- g. In the case of DLF Commercial Projects Corporations [2019 (27) GSTL 712 (Tri. Chan.), it was held that transferrable development rights is immovable property in terms of Section 3(26) of General Clauses Act, 1897 and hence, no Service Tax is payable as per exclusion in terms of Section 65B(44) of Finance Act, 1994. [Appealed to Supreme Court - Appeal Admitted in 2020 \(32\) GSTL J116 \(Supreme Court\)](#)
- h. CESTAT New Delhi in case of **Omaxe Limited Vs Commissioner of Central Goods And Service Tax and Central Excise, Delhi East [Service Tax Appeal No. 50348 Of 2019]** quashes Rs. 448 Crore Service Tax Demand on Real Estate Developer holding that the transfer of land development rights constitutes a transfer of immovable property and does not amount to a taxable service under the Finance Act, 1994.
- i. Once levy fails in ST period, **tax cannot be demanded under GST, citing construction work and completion done in post GST period.** This is also supported by Section 142(10) read with Section 142(11)(b).

3. Construction done for Landowners share under area share JDA:

- The constructed area of Landowners share, delivered as immovable property, by developer to Landowner, maybe said to be exchange of immovable property for the land/rights to land. If this stand is taken then not liable to tax. There is no final decision from High Courts/SC on this matter in GST law favouring assessee as on date.
- This would be certainly a litigatable position to take since dept may contend that the GST is leviable since the constructed area is being done under JDA against the non money consideration of development rights by developer and demand tax u/s 7(1)(a) r/w Section 9.

4. Credit availed post completion of construction which is pertaining to units sold prior to completion: Such input tax credit related to project cannot be denied when it is related to the constructed units sold prior to OC/CC to buyer provided output GST was paid at 12% effective tax rate[with 1/3rd land value deduction].

5. Input tax credit reversal demanded to be done by Landowners who are registered under GST:

ITC could be sought to be denied to the Landowners who discharges GST at 5% [effective tax rate under notification 11/2017-CT® with 1/3rd land value deduction] on the constructed units sold prior to completion, by them out of their share in residential real estate project. **Such credit of GST charged by developer can be availed by Landowners** provided the output GST paid towards sale of such units during construction by Landowner is more than input tax credit availed on the developers invoice by Landowner.

6. **ITC related to leased commercial premises of share of developer of commercial project** : When the developer leases out the commercial premises such as mall, warehouse instead of sale to end customer in course of construction, can credit be availed on goods/services related to the commercial premise?

- ITC is blocked on civil works of nature of works contract [material plus labour works for building construction, unless used for providing taxable outward works contract service by taxpayer [vide section 17(5)(c).
- Credit on **moveable goods-Eligible** such as fitouts, which can be removed installed to other location without damage, Eg: prefabricated structures/building which are based on nut bolt technology, detachable and installed elsewhere are eligible.
- ITC on plant and machinery-**Eligible** such as elevators, escalators is eligible **even if it is immovable** and cannot be removed without damage/cannibalization.
- Credit on goods/services used for construction, renovation, addition, repairs of immovable property of building, capitalized to immovable property block of assets, **is restricted** unless used on other than own account [Vide section 17(5)(d).
- There is no decision from Apex Court upholding credit on works contract/goods services used for the construction of building [being immovable property], being leased/rented out as of current date in GST period.
- Note: Immovable property is that item attached to earth, which cannot be removed/moved from civil foundations to elsewhere without damage/destruction.

7. **Other common issues:**

I. **Reconciliation matters:**

- a. **Turnover mismatches: Turnover in 3B vs GSTR 1, unreconciled turnover in GSTR 9C, GSTR 3B vs sales register, Differences between GSTR-3B, GSTR-1, and Audited Financial Statements (P&L).** In all cases, reasons for difference to be provided along with reconciliation statement to establish correctness of taxes paid.

- b. The department also cross-references business turnover in the income tax return from the Income Tax portal with GST returns. This could be sale of constructed units by developer to customers entered into post completion of construction[not liable to GST as sale of completed constructed unit].
- c. **ITC can be availed when output GST is paid at 18%/12% rate on outward taxable supplies of construction services by developer. Input tax credit availed in GSTR 3B vs in 2A/2B:** Maintain reconciliations for the credit availed in GSTR 3B vs the 2A/2B. It is given in section 16(2)(aa) of GST Act that the credit availed in GSTR 3B to be reflected in 2B January 2022 onwards.
 - a) Credit reversal workings also to be maintained to extent of ITC attributed to units sold post completion of project. **Note: Credit is restricted to developer when output GST paid at 1%/5% effective tax rate for residential project vide condition attached to notification 11/2017-CT(R).**
- d. **Reconciliation of GST paid under reverse charge and credit availed:** Reasons for difference to be provided along with reconciliation statement of RCM taxes paid and credit of such taxes being availed.

Conclusion

In this article the paper writer has given major practical issues in the real estate sector and the legal position which if properly drafted replies, could certainly help to avoid/reduce frivolous objections and relief by way of dropping of demands at the stage of audit itself[prior to SCN].

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