Valuation for services relating to JDA - commercial projects

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The scheme of tax under GST for the real estate sector saw a sea change from 1st Apr '19. The changes though, were more for the residential projects. However, there were changes brought about in some of the provisions relating to the commercial projects as well and in this article we are specifically looking into the valuation provisions that have changed for the commercial projects.

Without getting into the provisions that existed prior to 1st Apr '19, we would have a look at the valuation provisions from such date for the following, w.r.t. the commercial projects:

a. Development services provided by the Developer
b. Transfer of development rights by the Landowner

For the purpose of this article we are assuming that the above are liable to GST.

Development services provided to the Landowner

Under the JDA there is a barter i.e. the Landowner parts with a share of his land and development rights in return for the built-up area from the developer. Hence, there is a non-monetary consideration accruing to both whereby a condition under section 15(1) of the CGST Act, 2017 (hereinafter referred to as the Act) is not satisfied. Thereby in terms of section 15(4) of the Act reference has to be made to the CGST Rules, 2017 (hereinafter referred to as the Rules) to identify the valuation applicable for the said transfer of development rights.

Before referring to the Rules, reference is made to section 15(5) of the Act, which begins with a non-obstante clause "***Notwithstanding*** *anything contained in sub-section* ***(1)*** *or sub-section* ***(4)****…*" and goes on to state that the value for certain notified supplies **SHALL** be as prescribed. The non-obstante clause in such provision makes it clear that the provisions of section 15(1) and 15(4) discussed above would not be applicable in case there is a specific prescription u/s 15(5) *ibid*.

Further, on reference to notification No. 8/2017-IGST (R), the existence of reference to section 15(5) of the Act in its preamble can be noted including the para 2A of such notification which reads as under

"2A. *Where a* ***person transfers development right*** *or FSI (including additional FSI) to a* ***promoter*** *against consideration, wholly or partly, in the form of* ***construction of apartments****, the* ***value of construction service*** *in respect of such apartments shall be* ***deemed*** *to be equal to the Total Amount charged for* ***similar apartments in the project*** *from the independent buyers,* ***other than the person transferring the development right*** *or FSI (including additional FSI), nearest to the date on which such development right or FSI (including additional FSI) is transferred to the promoter,* ***less the value of transfer of land****, if any, as prescribed in paragraph 2 above"*

The following important aspects to be noted from above:

a. Person – Landowner
b. Promoter – Developer
c. Valuation prescribed for construction of apartments – As per explanation (xiv) to the said notification would include both commercial as well as residential units.
d. Value deemed to be of similar apartment in the project – Value of apartment in any other similar project cannot be considered as the reference to value is only for apartment in the project. The reference is 'THE' project and not 'A' project.
e. The first sale value is of the project and not specifically of the developer. Hence the first sale value can be even of the landowner, if he does one before the developer.
f. Exclusion to the person transferring the development right – The value in respect of any sale made to the Landowner by the Developer cannot be adopted.
g. Express deduction given for the land value included in such first sale value.

From the discussion till now it can fairly be concluded that for a commercial project, the value for the development/construction services provided by the developer on the area belonging to the Landowner, would be as per the above referred valuation in notification 8/2017 *ibid* only and reference to rules cannot be made as such valuation is prescribed in terms of section 15(5) *ibid* which begins with a non-obstante clause.

In this backdrop, let us identify the value for service in respect of a commercial project, where the developer and landowner are intending to only **lease** and not sell even a single apartment. It can be noted that in such a scenario no valuation mechanism exists in the law as:

- Sale value of any other project belonging to the developer/landowner cannot be adopted as the reference in para 2A *ibid* is that of the project under consideration and not similar project.

However, if the landowner sells even one unit then such value can be adopted. Though the question that arises is whether in every case, such value would be available at the time of completion of the project (which is the due date for payment of tax for this service as per notification 6/2019-CT (R)).

Hence, it could be said that, since no valuation mechanism exists in such a scenario the developer would not be liable to GST as levy fails, as was held in the case of Govind Saran Ganga Saran v. CST: (1985) 155 ITR 144 (SC) and Commissioner Of Income Tax, ... vs B. C. Srinivasa Setty, 1981 AIR 972, 1981 SCR (2) 938.

However, in such a case if the developer wishes to take a conservative stand he could consider adopting the value as prescribed in the Rules in this regard and make a suitable intimation to the department in this regard wherein the option of paying under protest can also be explored.

Transfer of development rights

Similar to the discussion above, for the development rights given by the landowner also it can be seen that there is a prescription u/s 15(5) of the Act as contained in the preamble to the **exemption notification** No. 9/2017-IGST (R). Further, para 1A in such notification reads as below:

*"1A. Value of supply of service by way of **transfer of development rights** or FSI by a **person** to the **promoter** against consideration in the form of residential or **commercial apartments** shall be **deemed** to be equal to the value of **similar apartments** charged **by the promoter** from the independent buyers nearest to the date on which such development rights or FSI is transferred to the promoter."*

The following important aspect to be noted from above:

a. Person – Landowner
b. Promoter – Developer
c. Valuation prescribed for commercial apartment also.
d. Value deemed to be of similar apartment ~~in the project~~ charged by the promoter – No reference to '*in the project*' as existed in the case of valuation for the development services discussed above. Thereby, sale value of similar apartments in any other project can also be considered.
e. First sale value should be that of the developer only as there is reference to value of similar apartments **charged by the promoter**.

f. No exclusion to any sale made to the Landowner by the Developer, as existed in entry 2A *ibid*. Thereby, if any share of units of the developer is sold to the landowner the same can also be adopted if they are independent parties.
g. No express deduction given for the land value included in such first sale value. Though could be argued that what cannot be taxed (land) directly cannot be taxed indirectly as held in the case of Commissioner of Central Excise, Pondicherry Versus Acer India ltd 2004 (172) E.L.T. 289 (S.C)), which could require a challenge to the notification itself.

The first question that arises is whether the above valuation can be adopted for a commercial project in respect of which no exemption is available? Though it can be argued that it may not be applicable as exemption is only w.r.t. to the residential projects and thereby there is no need to refer to this notification for valuation for commercial projects, it could still be said that reference to section 15(5) in the exemption notification requires adoption of this valuation against the valuation prescribed in the rules in terms of section 15(4) of the Act. Further, para 4.1.1 of the booklet GST on real estate issued by Ranga Reddy GST Commissionerate has also clarified applicability of the above valuation for commercial projects.

Another aspect to be noted in this regard is that in the exemption notification, only for para 2 – '*Definitions',* it has been mentioned as: ***For the purposes of this notification****…..,* which could indicate that the absence of such phrase for para 1A *ibid* could mean that the intention is to make this valuation applicable for the commercial projects as well. Further, this is the valuation that the department has always tried to adopt even during the service tax regime vide notification 151/2012-ST.

Having understood the above now let us identify the value for the development rights transferred by the landowner, where the developer is intending to only **lease** and not sell even a single apartment. It can be noted that in such a scenario it could be argued that no valuation mechanism exists in the law as:

- Sale value of landowner in the project, if any, cannot be adopted as sale value of developer only mentioned.
- No 2 projects are similar, as each project would have differences which are significant being its location, size, amenities, etc.
- Even if it exists it is a rarity that sale in such project will be closer to the date of JDA of the project under question.

Hence, as concluded for valuation of the development service, it could be said that since no valuation mechanism exists in the scenario discussed, the developer would not be liable to GST as levy fails. However, in such a case if the developer (as he is liable under RCM) wishes to take a conservative stand he could consider adopting the value as prescribed in the Rules in this regard and make a suitable intimation to the department, wherein the option of paying under protest can also be explored.

One aspect that rings from the above discussion is that for real estate transactions, whether you first examine the taxability aspect or assume taxability and look at other aspects, the conclusion that emanates in many instances is that levy fails. This reminds me of the proverb '*All roads lead to Rome.'*

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