

Part-I-GST on flats allotted to Landowner-Promoter & on development rights in case of Joint Development Agreement is illegal

Where a landlord sells the land to a developer, there is no role for him in a real estate project. GST on the sale of land is not payable by virtue of Para 5 of Schedule III appended to Central and State GST Act, which provides that a transaction of sale of land shall be treated neither as a supply of goods nor a supply of services.

The case is different, where the landlord does not want to sale land but want to develop the said land, jointly with a developer by entering into Joint Development Agreement (JDA) on revenue sharing basis or area sharing basis or something in cash plus mixture of revenue & area sharing. **JDA** can be for:

- (i) construction on vacant land;
- (ii) development of land into plots or apartment.
- (iii) demolition of existing building and constructing new building on the same land, or
- (iv) converting existing building or a part thereof into apartments,

JDA is required to be drafted carefully, by taking into account, not only the liability to pay GST but, Capital Gain Tax, Stamp Duty, documents required for registration of the project under RERA and most important is, transfer of title of apartment or plot, to Buyers/Society.

JDA is nothing but a partnership by whatever name it is called or treated under the Income Tax Act, GST Act, etc. The Land and Development rights is a capital used by the landlord to carry out the business of development, jointly with a developer. The capital of a developer is his experience, skill, labour, goods and money he invests, for the said project. **I am of the view that, in JDA, development rights by the landlord and construction services by the developer cannot be treated as supplied to each other and to and by JDA, as a third entity/party and the levy of GST on the said development rights and construction services invested in JDA as capital, is illegal.**

Under the GST Act, tax is being levied erroneously on the development rights in land and on goods/services respectively contributed as a capital by the co-venturer landlord and developer. For the purpose of levying tax on their capital contribution for JDA, with effect from April 2019, following amendments have been carried out to Entry 3 of the Notification No.11/2017-CT vide Notification No.3/2019-Central Tax (Rate) dated 29/03/2019.

- (a) It is defined that **Developer-promoter** is a promoter who constructs or converts a building into apartments or develops a plot for sale. [Refer Entry 3(i) to 3(id), clause (i) of the Explanation to 4th Proviso in condition column]
- (b) It is defined that **Landowner-promoter** is a promoter who transfers the land or development rights or FSI to a developer-promoter, for construction of apartments and receives constructed apartments against such transferred rights and sells such apartments to his buyers independently. [Refer Entry 3(i) to 3(id), clause (ii) of the Explanation to 4th Proviso in condition column]

- (c) It is provided that the **developer-promoter shall pay tax on supply of construction of apartments to the landowner-promoter**. [Refer Entry 3(i) to 3(id), clause (i) of 4th Proviso, in condition column]
- (d) Where a registered 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 total amount charged for similar apartments in the project from the independent buyers, other than the person transferring the developing right or FSI (including additional FSI), nearest to the date on which 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. [Refer Para 2A of Notification No.11/2017-CT, as amended by Notification No.3/2019-Central Tax (Rate) dated 29/03/2019]

While making the aforesaid provisions, the provisions under RERA are not taken into account. As the JDA is a joint venture, under RERA, the responsibility on the landlord and developer is joint. Section 2(zk) of RERA defines the term 'promoter'. It does not define or explain, the term 'developer-promoter' or 'landowner-promoter'. The sum and substance of the definition of a promoter is that a promoter means a person who constructs or causes to be constructed an apartment for the purpose of selling and therefore the persons covered by clause (v) of the aforesaid Section are also promoter, if they acts as a builder, colonizer, contractor, developer, estate developer, or by any other name or claims to be acting as the holder of power of attorney from the owner of the land on which the building or apartment is constructed or plot is developed for sale. As per explanation to Section 2(zk) of RERA, **where a person who constructs/develops apartment or plot etc. for sale and the person who sells the same are different persons, both of them shall be deemed to be the promoters and shall be jointly liable as such for the functions and responsibilities specified under this Act or the rules and regulations made thereunder**.

While amending the Entry 3, the existence of Joint Venture in the form of JDA is also not taken into account. In case of JDA, the Landlord, by a separate irrevocable Power of Attorney, allows the developer, to use the development rights, for carrying out the said project. As such there is no transfer of development rights by the landlord to a developer. Had it been so transferred, there was no need of power of attorney, for authorizing the developer to use the development rights. **The land and all the rights attached thereto, remains with the landlord, till conveyance deed is executed in favor of buyer/society**. As the said rights are not being transferred to a developer, the landlord (not the developer) executes 'Conveyance Deed' in favor of buyer of apartment or plot or society. The developer merely signs the conveyance deed on behalf of the landlord as well as in his capacity as a developer, as a confirming party.

When it is clear that in JDA, neither the land nor development rights are transferred to a developer, it is a legal error on the part of author of Notification No.3/2019-Central Tax (Rate) dated 29/03/2019 to insert Para 2A to Notification No.11/2017-CT providing that the value of construction service provided to landlord shall be equal to total amount charged, less

the value of transfer of land as prescribed in para 2. Under the circumstance, following questions are important.

Whether allowing to use the development rights in a joint venture vide JDA is a sale, transfer, barter, exchange, licence, rental, lease or disposal made or agreed to be made, by a landlord? In other words, whether allowing the use of development rights is a 'supply' within the meaning of Section 7 of the Central and State GST Act?

In my view, allowing the use of development rights is different than permanent transfer or transfer for some period. For all kinds of supply covered by Section 7, transfer of goods or services to other person, permanently or for some period, is obligatory. As there is no transfer of developments rights to a developer, it is not a 'supply' within the meaning of Section 7.

Similarly, another question is, whether, a developer is liable to pay output tax in case of allotment of flats/apartments or plots to landlord, of his share in JDA?

In my view, when the Real Estate Project is carried out by JDA, the allotment of under construction apartments or under developed plots by the developer to the landlord, as landlord's share, cannot be treated as supply by the developer or by JDA within the meaning of Section 7 of the Central and State GST Act and hence no GST thereon can be levied. **In other words, in case of JDA, there cannot be two sales of under construction apartment or plot; first one by developer to landlord and second one from landlord to outside buyer. There can be only one sale by JDA to outside party. When a developer sells, landlord shall be a confirming party and when landlord sells, developer shall be a confirming party.**

GST Registration: According to me, ultimate purpose behind JDA is to sale, all or some of the apartments or plots to outsiders. The liability to pay GST on the sale of under construction apartments or plots to outside buyers is joint. Hence the landlord and developer should obtain single GST registration on the basis of Joint Development Agreement, as AOP i.e. as 'Association' or 'Body of Individuals' whether incorporated or not. If the landlord wishes to take separate registration, he may obtain the same and file the returns and pay the output tax pertaining to sale of under construction flats/plots of his share. In the alternative i.e. where the landlord do not wish to take separate registration, the output tax on such sale, shall be paid by a developer, and a sale proceeds thereof, if received by the developer, shall be paid to the landlord by deducting the GST payable thereon or the landlord shall collect the sale proceeds from the buyer. Though such sale is shown by the developer in his returns, it should not be shown as sale in his Profit & Loss Account. The sale proceeds received from the buyers and paid to landlord should be respectively credited and debited to separate ledger account, which at the end will show zero balance.

The opinion expressed in this article gets support from the order in case of **Mormugao Port Trust v/s Commissioner of Customs, Central Excise & Service Tax, Goa dated 07/10/2016**. [2016 SCC online CESTAT 5095, 2017 ELT TRI BOM 4869, 2017 ELT TRI BOM 04869] The facts involved in the aforesaid case, the concept of joint venture and the observations and decision of CESTAT will be described in detail in the next part.

Summing up: The opinion expressed by me in this article may be pressed or relied upon by the landlord or a developer only where the tax on transactions between the two is not paid and the show cause notice is received for the said levy. Otherwise, the Association of Builders should represent before the GST Council to amend the Entry 3, to do away the levy of GST on the so-called supply between the landlord and developer in case of JDA.

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