

GST Impact and Way Forward Housing and Construction Industry

*By:- Puneet Agrawal
B. Com (H), CA, LLB
Partner
Athena Law Associates*

CONTENTS

This presentation covers-

- ✓ *Taxes under the current regime*
- ✓ *Tax Liability under GST*
- ✓ *Issues*
- ✓ *Way Forward*

TAXES UNDER THE CURRENT REGIME

Output Taxes

- **Stamp Duty:** On execution of sale deed, Stamp duty is paid on the full consideration for the sale of flat.
- **Service Tax/VAT:** In order to charge tax on the portion relating to construction of superstructure, certain deeming fictions were introduced. By virtue of these deeming fictions, taxes are being broadly charged as follows by the respective legislatures:
 - goods / movable property which are used in construction: charged to VAT by the State Legislatures,
 - various activities/services which are undertaken by the builder for construction of the unit: charged to Service tax by the Union Parliament
- **No service tax/VAT on element of land:** In either of the above taxes namely Service tax/VAT, element of land value is not covered.

Input Tax Credit

Goods & Service Purchased by Developer

- VAT paid on goods acquired by Developer is eligible for Input Tax Credit under State VAT Law.
- Though, the same is not being paid by developers under West Bengal VAT Act, thus, no ITC as well.
- Service Tax paid on Input Services availed by Developers are admissible as Cenvat Credit.

Input Tax Credit

Works Contract – Sub-Contracted

- VAT/WCT paid to sub-contractor is eligible as Input Tax Credit.
- Service tax paid to sub-contractor is eligible as cenvat credit.

“(l) input service means any service,-

(i) used by a provider of output service for providing an output service; or

.....;

but excludes,-

(A) service portion in the execution of a works contract and construction services including service listed under clause(b) of section 66E of the Finance Act (hereinafter referred to as specified services) in so far as they are used for-

(a) construction or execution of works contract of a building or a civil structure or a part thereof; or

(b) laying of foundation or making of structures for support of capital goods.

Except for the provision of one or more of the specified services; or..”

TAX LIABILITY UNDER GST

Provisions of Model GST Law relating to taxability

❑ Levy of tax under the Model GST Law

- Section 7 is the charging section for imposition of GST on intrastate supplies of goods and services. The said section provides that:
- GST shall be levied on all intra-state **supplies**
- of **goods and services**
- at the rate specified in schedule to the act
- such tax shall be collected in such manner as may be prescribed.
- Thus, GST would be a tax applicable to all *supplies* of *goods* and *services*.

Contd...

- Section 3 of the Model GST law defines Supply. The definition begins by saying –
“3. *Supply includes –*
(a) all forms of supply of goods and / or services such as sale, transfer, barter, exchange, license, rental, lease or disposal made or agreed to be made for a consideration by a person in the course or furtherance of business.
.... ”
- Supply being defined by way of an inclusive definition, hence whatever is enumerated therein is not exhaustive. Furthermore, the expression “all forms” employed by clause (a) makes the term “Supply” even wider.

Contd...

- Salient features of Supply are as follows:
 - it may be supply of goods or services
 - made or agreed to be made
 - for a consideration
 - by a person
 - in the course of furtherance of business.
- Proposed GST regime seeks to impose GST on supply of *all forms* of **goods** and **services**.

Contd...

Definition of **goods** and **services** as per Model GST Law.

- “2(48) **goods** means every kind of movable property other than actionable claim and money but includes securities, growing crops, grass and things attached to or forming part of the land which are agreed to be severed before supply or under the contract of supply;

Explanation: For the purpose of this clause, the term ‘movable property’ shall not include any intangible property

*2(88) **services** means anything other than goods;*

Explanation: Service include intangible property and actionable claim but does not include money”

- It can be seen that Services have been defined by a negative definition – to include **everything except goods**.

Schedule II of Model CGST Act

- Schedule II clause (5) enumerates the **matters to be treated as “supply of service”** under Model GST Law. The relevant supply of service are extracted below:

(a) Renting of immovable property;

(b) Construction of a complex, building, civil structure or a part thereof, including a complex or building intended for sale to a buyer, wholly or partly, except where the entire consideration has been received after issuance of completion certificate, where required, by the competent authority or before its first occupation, whichever is earlier;

(c) Works contract including transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract.

ISSUES

1. Exclusion of Land

Definition of Service

- Immovable property, which is not goods, would apparently get covered within the definition of services under the Model GST Law.

Transaction Value

- GST would be charged on the transaction value as per section 15.
- Transaction value has been defined as the price actually paid or payable for the supply of service by the supplier. This provision further casts a doubt that supply of immovable property would get subjected to tax on the whole value thereof.
- Assuming a flat is sold for Rs. 30 Lakhs including value of land, the whole of Rs. 30 Lakh would be chargeable to GST.

Intention

- Intention was never to include land within the purview of GST.
- In fact the discussion relating to inclusion of immovable property by subsuming stamp duty is also within the purview of GST, was never agreed to between the States and the Centre.

Contd...

- In proposed constitutional amendment bill also land was never intended to be included within the scope of GST.
- Schedule II of Model GST Law also suggests that there is no intention to tax immovable property/land.

2. Land and Building

(1) Any lease, tenancy, easement, license to occupy land is a supply of services.

(2) Any lease or letting out of the building including a commercial, industrial or residential complex for business or commerce, either wholly or partly, is a supply of services.

2. Input Tax Credit

- Under Section 17(4)(d) of the revised Model GST law, Input Tax Credit is restricted on goods/service acquired by a taxable person for construction of an immovable property even when used in course or furtherance of business. The relevant extract reads as follows:

17. Apportionment of credit and blocked credits

(4) Notwithstanding anything contained in sub-section (1) of section 16 and sub-(3) section (1), (2), (3) and (4) of section 18, input tax credit shall not be available in respect of the following:

...

(c) works contract services when supplied for construction of immovable property, other than plant and machinery, except where it is an input service for further supply of works contract service;

(d) Goods or services received by a taxable person for construction of an immovable property on his own account, other than plant and machinery, even when used in course or furtherance of business;

Contd..

- No credit shall be allowed to Developers/Builders on goods or service received for construction of an immovable property under clause (d) of section 17(4). Credit is allowed under clause (c) of section 17(4) only where builders/developers, being a provider of works contract service, will receive works contract services from sub-contractor.
- Thus, when builders will award **pure labour contracts** or **procure building materials** for construction of a building on its own account, builders would not be eligible to claim Input Tax Credit charged by the supplier.

Comparison of tax liability

Current regime vs. Model GST Law

- Let's say, per sq. ft selling price to be Rs. 7,500, wherein various components are as follows:
 - Land value – Rs. 4,500
 - Materials – Rs. 1,800
 - Service portion – Rs. 1,200

Output Tax Liability of Developer

Under current regime (when value of service is known)	Model GST Law (Assuming GST Rate @ 18% for supply of goods as well as services)
Service Tax = Rs. 1200 x 15% = Rs. 180	On supply of service: Rs. 1200 x 18% = Rs. 216
VAT = (Rs. 1,800 + Rs. 180) x 10% = 198	On supply of material: Rs. 1800 x 18% = Rs. 324
TOTAL LIABILITY = Rs. 378	TOTAL LIABILITY = Rs. 540
Credit of VAT and Service Tax so paid to the service provider and seller can be availed by the developer.	As credit is denied to a developer/ builder, GST so paid shall be a cost for the developers.

Anomaly due to above stated ITC provisions

- In contrast to the current law, ITC is not being made available in case of self procurement of goods/ receipt of pure supplies. Even if such procurement/ receipt of services is practically undesirable, such agreements shall be required to be entered upon for availing the credit.
- Such shall cause rise in costs and thus inflating of prices in the entire industry.

3. Leasehold properties

- In case where freehold properties are not available for certain reasons, long term leases are entered upon. Flats/houses constructed on such land cannot be sold and can only be leased out for a maximum period equal to the lease term.
- Thus, the Builders/Developers transfer the flats by subleasing. In such cases, credit shall not be allowed to the lessor in terms of clause (c) of section 17(4). ITC is available of works contracts, only to builders/developers, being a provider of works contract service. To quote:

(c) works contract services when supplied for construction of immovable property, other than plant and machinery, except where it is an input service for further supply of works contract service

Anomaly due to above stated ITC provisions

- As such long term leases are on equal footing to sale of flats, it would result into disparity of tax treatment i.e.,
 - where builders construct flats to sell out rightly with all rights, and
 - where builders construct for parting with all rights attached to the flats/units but technically enter into lease because of the land laws/ land being on lease
- Further, renting of immovable property is not possible without first constructing the units. Further, renting of immovable property is leviable to GST. Moreover, the ITC is also not available. This shall only effect into double taxation. It will further result in increase in cost of leasing, and inflation in housing, retail and various other sector.

WAY FORWARD

Our suggestions

Representations

Real estate must rigorously follow up with the Government, which shall include, by making suitable representations to the following:

- i. GST Council/ Empowered Committee
- ii. GST Cell, CBEC
- iii. Ministry of Finance
- iv. Ministry of Housing and Urban Poverty Alleviation

THANK YOU

Contact us:

Puneet Agrawal
Partner

Athena Law Associates

puneet@athenawallawassociates.com

+91-9891-898911

Website: athena.org.in

Blog: gstlawindia.com