

CONFERENCE ON FINANCE BILL & FISCAL LAW'S ORGANISED BY NAGPUR ICAI

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BY S. S. GUPTA

CHARTERED ACCOUNTANT

❖ The presentation is made on following topics –

A. Real Estate Transactions

B. Reverse Charge Mechanism – Practical Aspects

C. E-Way Bills – Penalties & Case Laws

A. REAL ESTATE TRANSACTIONS

1. The service tax on construction of residential/commercial complex was levied under the category of construction service with effect from 01/07/2010. The explanation was added in the definition of taxable service from 01/07/2010. The definition of “residential complex” specifically excluded the construction activity undertaken for residing by the service recipient himself or providing on rent. The credit was not available to the service provider for input, input service and capital goods for the period 01/07/2010 to 30/06/2012.

There was no category of service which provides for levy of service tax on granting of development right.

2. Service is defined under Section 65B(44) with effect from 01/07/2012. The declared service under Section 66E included the construction of complex (residential or commercial) for sale when sale has taken place prior to receipt of completion certificate. The credit of service tax paid on input service was available to service provider.

The definition of service given in Section 65B(44) excluded transfer of title in immovable property by way of sale, gift or in any other manner. The development right is one of the right arising from land which is also immovable property. Hence service tax is not payable on granting of development right.

❖ The relevant portion of the definition is as follows:

65(44) “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

(ii)”

3. The GST is levied with effect from 01/07/2017. The definition of supply given in Section 7 of GST Act is very wide. An any activity undertaken for other person is considered as supply. The schedule-III of the GST Act which narrates the transaction which are not treated as supply only excludes sale of land and not benefit arising out of land. Therefor, the GST is leviabale on development right granted after 01/07/2017. The law has further undergone change on 01/04/2019.

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5. The various notifications listed below have changed the rates of GST and other provision with effect from 01/04/2019. The notification number are –

Sr. No.	Noti. No.	Description
1	3/2019-CT (R)	To notify rates for real estate sector
2	4/2019-CT (R)	To exempt Development Right/Long Term Lease for Real Estate Sector
3	5/2019-CT (R)	To specify services under RCM
4	6/2019-CT (R)	Special provisions for deferment on payment of tax
5	7/2019-CT (R)	To specify payment under RCM when goods/services are procured from un-registered person.
6	8/2019-CT (R)	To notify rates for goods procured from unregistered
7	16/2019-CT	Special ITC reversal rules

6. One of the burning issue in the real estate sector is the payment of tax on premise provided in lieu of development rights to the owner of land/society/ residence of slum. The time of supply for redevelopment can be discussed under the following heads –

- i. Free flats provided under slum rehabilitation scheme.
- ii. Free flats provided to landowners
- iii. Free flats provided to society members

Further, the above issues get more complicated as the law has undergone change from 01/07/2010, 01/07/2012, 01/07/2017 and 01/04/2019. Therefore, the levy of tax on free flats shall be discussed under following scenario –

- i. Development right granted prior 01/07/2010
- ii. Development right granted after 01/07/2010 but before 31/06/2012
- iii. Development right granted after 01/07/2012 to 30/06/2017
- iv. Development right granted after 01/07/2017 to 31/03/2019
- v. Development right granted after 01/04/2019

7. The following issues in respect of each of the period is required to be discussed –

i. Point of Taxation / Time of Supply

ii. Valuation

iii. Availability of Credit

8. Point of Taxation or Time of Supply

The point of taxation is raising of invoice or receipt of payment whichever is earlier. The consideration for receipt of premises free of cost either by landowners or society members or SRA Authorities is the grant of development right. The development right is irrevocably granted to developer on the date when agreement is entered into. Therefore, the developer receives consideration on the date of entering into agreement. This date should be considered as point of taxation.

- However, the department has taken the different position in different case. The various position taken by the department are summarised below:
 - i. The date of agreement by which the development rights are granted.
 - ii. In the council meeting of Chief Commissioners, it was decided that development right is vested in the developer on receipt of commencement certificate which is the authority for commencement of construction activity.

- iii. As per Circular No. 151/2/2012-ST dated 10-02-2012, Service tax is liable to be paid by the builder/developer on the 'construction service' provided to the landowner, at the time when the possession or right in the property of the said flats are transferred to the landowner by entering into a conveyance deed or similar instrument (e.g. allotment letter).
- iv. The notification No. 4/2018-CT (Rate) also provides that the liability to pay tax shall arise at the time when the developer transfers possession or the right in the constructed premises to the person supplying the right by entering into conveyance deed or similar instrument.

It will thus be observed that determination of point of taxation or time of supply is highly confusing due to various circulars issued by the authority. However, the correct view appears to be date of invoice or consideration whichever is earlier for the supply of development right made prior to 25-01-2018 i.e. the date of issuing notification No. 4/2018-CT (Rate). Thereafter, the time of supply is the date of granting possession or right in constructed premises.

9. Value of Services

The section 67 provides that the value shall be the gross amount charged by the service provider for services provided where the amount is paid in money but in a case where the provision of service is for a consideration not wholly or partly consisting of money, be such amount in money as, with the addition of service charged, is equivalent to the consideration;

Since, in this case the amount is received in kind, the value of such premises will have to be determined.

Further, rule 3 of the Service Tax (Determination of Valuation) Rule 2006 reads as follows:

3. Manner of determination of value.— Subject to the provisions of section 67, the value of taxable service,¹ where such value is not ascertainable, shall be determined by the service provider in the following manner:—

- a) the value of such taxable service shall be equivalent to the gross amount charged by the service provider to provide similar service to any other person in the ordinary course of trade and the gross amount charged is the sole consideration;*
- b) where the value cannot be determined in accordance with clause (a), the service provider shall determine the equivalent money value of such consideration which shall, in no case be less than the cost of provision of such taxable service.*

As per this rule, the value of similar service to any other person in the ordinary course of trade and the gross amount charged for such similar service shall be the value. In case of SRA the value of similar service may not be available. Similarly, in case of premises constructed for society members, the value similar premise may not be available. Therefore, the clause (b) of Rule 3 provides that the value shall be equivalent money value which shall not be less than the cost of provisions of services. Therefore, it appears that the cost of construction shall be proper value. Alternatively, the value can also be determined based on ready reckoner rate.

However, in GST the value is required to be determined under rule 27 of GST Rules which reads as follows:

27. Value of supply of goods or services where the consideration is not wholly in money. - Where the supply of goods or services is for a consideration not wholly in money, the value of the supply shall,-

- a) be the open market value of such supply;*
- b) if the open market value is not available under clause (a), be the sum total of consideration in money and any such further amount in money as is equivalent to the consideration not in money, if such amount is known at the time of supply;*
- c) if the value of supply is not determinable under clause (a) or clause (b), be the value of supply of goods or services or both of like kind and quality;*
- d) if the value is not determinable under clause (a) or clause (b) or clause (c), be the sum total of consideration in money and such further amount in money that is equivalent to consideration not in money as determined by the application of rule 30 or rule 31 in that order.*

Illustration:

- 1) Where a new phone is supplied for twenty thousand rupees along with the exchange of an old phone and if the price of the new phone without exchange is twenty-four thousand rupees, the open market value of the new phone is twenty four thousand rupees.*
- 2) Where a laptop is supplied for forty thousand rupees along with the barter of a printer that is manufactured by the recipient and the value of the printer known at the time of supply is four thousand rupees but the open market value of the laptop is not known, the value of the supply of the laptop is forty four thousand rupees.*

It also appears that the value shall be the cost of construction plus 10% in GST.

10. Input Tax Credit

The Input Tax Credit was not available for the services provided during the period 01-07-2010 till 30-06-2012. Subsequently, from 01-07-2012 to 30-06-2017 the credit was available only for input services used in providing output services. However, after 01-07-2017 the rate of tax has also been increased and the credit is permitted on all the items including the capital goods subject to provisions of section 17. This law undergone further change with effect from 01-04-2019.

11. Rate of Tax

- ❖ The new rate of tax with effect from 01/04/2019 can be summarised as follows –

Sr. No.	Description	Effective GST Rate
1	Construction of affordable residential apartments in RREP	1%
2	Construction of residential apartments (other than affordable) in RREP	5%
3	Construction of Commercial apartments (shops, offices, godowns etc.) in RREP	5%
4	Construction of Commercial Apartment in REP (Real Estate Project)	12%
5	Wholly Commercial Project	12%

- ❖ As per Sr. No. 5B and 5C of Notification No. 13/2017 Central Tax (Rate), tax is payable by promotor for supply of development right or FSI or long terms lease of land for construction of a project. This provision is applicable to commercial and residential projects.

❖ COMPLIANCE TO CONDITIONS FOR NEW RATE

- I. Tax shall be paid in Cash. Closing balance of ITC should not be used.
- II. The annexure 1 and 2 of the Notification No. 3/2019 – Central Tax (Rate) provides the formula for determining reversal of credit for the ongoing projects who intends to avail the benefit of rate of tax of 1% or 5%. Broadly the formula provides for availment of credit for the constructed premises to the extent on which tax has been paid.
- III. Where registered person (landowner-promotor) transfers development rights or FSI (incl. Addl. FSI) to a promotor (developer-promotor) against consideration, wholly or partly, in the form of construction of apartment then,
 - a) Developer will have to pay tax on supply of construction of apartments on date of Completion Certificate. Value shall be nearest sale price.
 - b) Landowner will be eligible for ITC provided landowner further supplies such apartment & pays tax more than charged by the promotor.

IV. 80% of value of input and input services, [other than services by way of grant of development rights, long term lease of land (against upfront payment in the form of premium, salami, development charges etc.) or FSI (including additional FSI), electricity, high speed diesel, motor spirit, natural gas], used in supplying the service shall be received from registered supplier only. The manner of computation is as follows,

a) Where value of input and input services received from registered suppliers falls short of the said threshold of 80%, tax shall be paid by the promotor on value of input and input services comprising such shortfall at the rate of 18% on reverse charge basis.

b) Values of inward supplies received should be calculated during the financial year (or part of the financial year till the date of issuance of completion certificate or first occupation of the project, whichever is earlier).

c) The said tax payments on the shortfall shall be submitted in the prescribed form electronically on the common portal by end of the quarter following the financial year. The said tax liability be added to the output tax liability in the month not later than June following the end of the financial year.

d) Where cement is received from an unregistered person, the promoter shall pay tax at the applicable rates of cement under RCM. [benefit of 80% is not available]. Tax shall be paid in the month in which cement is received.

V. Inputs and input services on which tax is paid on reverse charge basis shall be deemed to have been purchased from registered person;

VI. ITC not availed shall be reported every month by reporting the same as “Ineligible Credit” in Row No. 4(D)(2) in GSTR-3B.

- d. The Rule 42 and 43 of GST Rules has been amended to provide that the reversal of credit on date of obtaining occupation certificate will be based on the area remaining unsold. Prior to this, the value of the premises sold after obtaining occupation certificate was considered as exempted supply. Accordingly, the input tax credit was required to be reversed.
- e. The separate class of person under section 148
- The notification 6/2019-CT (Rate) specifies the following class of registered person as the separate class of person for the purpose of payment of tax.:
 - (i) *a promoter who receives development rights or Floor Space Index (FSI) (including additional FSI) on or after 1st April, 2019 for construction of a project against consideration payable or paid by him, wholly or partly, in the form of construction service of commercial or residential apartments in the project or in any other form including in cash;*
 - (ii) *a promoter, who receives long term lease of land on or after 1st April, 2019 for construction of residential apartments in a project against consideration payable or paid by him, in the form of upfront amount (called as premium, salami, cost, price, development charges or by any other name),*

as the registered persons in whose case the liability to pay central tax on, -

- a) the consideration paid by him in the form of construction service of commercial or residential apartments in the project, for supply of development rights or FSI (including additional FSI);*
- b) the monetary consideration paid by him, for supply of development rights or FSI (including additional FSI) relatable to construction of residential apartments in project;*
- c) the upfront amount (called as premium, salami, cost, price, development charges or by any other name) paid by him for long term lease of land relatable to construction of residential apartments in the project; and*
- d) the supply of construction service by him against consideration in the form of development rights or FSI (including additional FSI), -*

shall arise on the date of issuance of completion certificate for the project, where required, by the competent authority or on its first occupation, whichever is earlier.

12. Other Issues –

- i. Cancellation of Flat – Sometimes the buyer of the premises after making part payments cancel the booking Section 34 of the GST Act provide for issuing of credit note for return of goods, not for return of service. However, in view of the observation of Supreme Court in the case of M/s All India Federation of Tax Practitioners reported in 2007 (7) S.T.R. 625 (S.C.) that goods or service are to be considered as equal. Accordingly, it is possible to argue that cancellation of flat result in return of service. Therefore, the credit note can be issued as per the provision of Section 34 of GST Act.

- ii. Other Charges – The Authority for Advance Ruling (AAR) has held that advance maintenance charges will attract GST rate of 18% but other charges namely, Club House Development charges, Water, Electricity, Drainage, Sewerage, and other charges will attract GST at the rate at which construction already

iii. National Anti-Profiteering Authority (NAA) – As per Section 171 the benefit of input tax credit shall be passed on to the recipient by way of commensurate reduction in prices. The NAA has been determining the profit by comparing ratios of credit to turnover in Pre-GST period and Post-GST period. In case the ratio in Post-GST rate is higher than Pre-GST period the order is passed to pay the amount to purchaser. This method of determine the profit appears to be incorrect.

B. REVERSE CHARGE MECHANISM

1. The Section 9(3) empowers the Government to specify categories of supply of goods or services, the tax on which shall be paid on reverse charge basis by the recipient of service and all the provision of GST Act shall apply to such recipient as if he is person liable to pay tax.

The Section 9(4) empowers the Government to specify class of registered person who shall in respect of specified categories of goods or service procured from unregistered person shall pay tax on reverse charge basis as recipient.

2. In exercise of above powers, the Government has issued the Notification No. 4/2017 – Central Tax (Rate) dated 28/06/2017, 13/2017 – Central Tax (Rate), 17/2017 – Central Tax (Rate), 10/2017 – Integrated Tax (Rate), 14/2017 - Integrated Tax (Rate) specifying the supply of goods or services on which tax is payable by recipient.

3. The major difference between the tax payable on reverse charge and under service tax and under GST can be summarized as follows –
- a) The tax on reverse charge is payable on goods also
 - b) The credit of tax paid on the reverse charge is available in the same month.
 - c) Major categories on which tax is not payable in the reverse charge under GST are manpower supply and works contract service.

4. Some of the important points are as follows –

- a) The tax is required to be paid in cash. The credit cannot be utilized for payment of tax.
- b) In case of import of service, the place of supply is required to be determined. If the place of supply is outside India like in case of staying in hotel, conveyance etc. GST is not payable.
- c) There is no time limit for availment of credit for tax paid under reverse charge. Thus, the GST paid under reverse charge for supply made in 2017-18 can be availed as credit.
- d) It is advisable to pay GST in the state in which the services are consumed to avoid problem of co-relating.

5. The nature of service on which tax is payable under reverse charge are –

	Services		Services
a)	GTA Services	l)	Transportation of Passenger
b)	Legal Services	m)	Accommodation in Hotel, Inn, etc.
c)	Arbitral Tribunal	n)	Supply of online information and database services by person in non-taxable territory
d)	Sponsorship services	o)	Transportation of goods by vessel
e)	Services by Government/Union Territory/Local Authority by of renting immovable property	p)	Housekeeping Services
f)	Transfer of development rights or Floor Space Index (FSI)	q)	Services by Overseeing Committee to RBI
g)	Long term lease of land	r)	Services by direct selling agents
h)	Services by Director	s)	Services by Business Facilitator to Banking Company
i)	Insurance Agents	t)	Services by Agents of Business Correspondent to Business Correspondent
j)	Recovery Agents	u)	Security services
k)	Author, Music Composer, Photographer, Artist, etc	w)	Renting of motor vehicle

6 a) The levy of GST on ocean freight is most controversial. The payment of GST on rent-a-cab and GTA services are also difficult to monitor as both these category of supply attracts GST at 5% or 12% depending upon the fact of availment of credit by supplier of service.

b) The 'Intermediary' is defined in Section 2(13) of IGST Act,2017 as follows –

“intermediary” means a broker, an agent or any other person, by whatever name called, who arranges or facilitates the supply of goods or services or both, or securities, between tow or may persons, but does not include a person who supplies such goods or services or both or securities on his own account.

The interpretation of this clause is matter of heavy disputes

C. E-WAY BILLS – PENALTIES & CASE LAWS

- i. As per rule 138, every registered person who causes movement of goods of consignment value of Rs.50,000/- and above in relation to supply or for reason other than supply or due to inward supply to unregistered person shall prepare E-Way Bill. E-Way Bill consists of Part A and Part B. Part A inter-alia consists of name of supplier, invoice No., name and address of consignee and Part B consist of vehicle No., GRN No., RR No. This can be prepared by supplier or purchaser or by the transporter. The purpose of preparing E-Way Bill is to inform the Government about movement of goods. The authorities have right to verify E-Way Bill with the consignment while goods are in transit. In case of discrepancy, provisions of section 129 and 130 are applicable.

ii. As per section 129(1) authorities have power to detain the goods or seize the goods and conveyance. This shall be released –

(a) on payment of the applicable tax and penalty equal to one hundred per cent. of the tax payable on such goods and, in case of exempted goods, on payment of an amount equal to two per cent. of the value of goods or twenty-five thousand rupees, whichever is less, where the owner of the goods comes forward for payment of such tax and penalty;

(b) on payment of the applicable tax and penalty equal to the fifty per cent. of the value of the goods reduced by the tax amount paid thereon and, in case of exempted goods, on payment of an amount equal to five per cent. of the value of goods or twenty-five thousand rupees, whichever is less, where the owner of the goods does not come forward for payment of such tax and penalty;

(c) upon furnishing a security equivalent to the amount payable under clause (a) or clause (b) in such form and manner as may be prescribed :

iii. The authorities are required to issue the order for detention in Form MOV-6. As per section 129(3) the proper officer shall serve show cause notice in form MOV-7, release order in form MOV-5, order for demand and penalty in MOV-9. The person can file appeal against the order in MOV-9. The thrust of preparing E-Way Bill is to plug evasion of taxes.

iv) However, there have been certain cases which may be relevant to contest levy of penalty.

a) Expiry of E-Way Bill. Since extension is possible, no need to detain the vehicle. *Ram Charitra Ram Harihar Prasad Versus The State of Bihar 2019 (9) TMI 158 (Patna H.C).*

b) Issue of classification cannot be decided by officer on verification. *M/S. Jeyyam Global Foods (P) Ltd., Versus Union of India [2019 \(2\) TMI 124 - MADRAS HIGH COURT](#)*

- c) Minor discrepancies penalty of Rs.500/- shall be ordered. K. B. Enterprises 2019 (12) TMI 1089 – Appellate Authority, GST, Himachal Pradesh. Circular No. 64/38/2018 dated 14-8-2018.
- d) Kerala High Court has released the goods under simple bond when minor discrepancies are noticed. Umiya Enterprise 2020 (2) TMI 171 (Kerala HC)
- v) Section 129 provides for levy of duty and penalty; whereas section 130 empowers the Government to confiscate the goods or conveyances and levy of penalty. As per section 130(2) wherever confiscation of any goods or conveyance is authorised by this Act, the officer shall give to the owner of goods an option to pay in lieu of confiscation such fine as it may deem fit provided that the fine payable shall not exceed the market value of the goods confiscated less the tax charged thereof. Further, the aggregate of such fine and penalty leviable shall not be less than the amount of penalty leviable under section 129(1).

THANK YOU

BALANCED VIEW

PRESENTED BY

S.S.GUPTA

Chartered Accountant

**1009-1015, Topiwala Centre,
Topiwala Theatre Compound,
Near Goregaon Railway Station,
Goregaon (W), Mumbai 400 104**

TEL: 28754127 /28760161

E-MAIL : ssg@ssgupta.in