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By Adv. Pawan Arora

(Partner at Athena Law Associates)



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SESSION - 7

LONG TERM LEASE, ANTI PROFITEERING,
CANCELLATION OF FLAT

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Long term lease

Levy of GST on Lease of Land & Building

Levy

- GST is leviable on Supply of goods or service.
- **Land:** Any Lease, Tenancy, Easement, License to Occupy Land is a supply of service
- **Building:** Any Lease or letting of Building including a commercial, industrial or residential complex for business or commerce, either wholly or partly is supply of service.

Exemption

- Services by way of renting of residential dwelling for use as residence.

Case Laws on Long Term Lease

- **Bombay High Court in Khatizabai Dharsi Somji Dossa** held that, “the term of the lease may be 5 years, 50 years, 99 years or even 999 years. Nevertheless, the transaction is only a lease and there is always a reversion which continues to vest in the owner for the entire term of the lease...”
- **Privy council in Subramanya Chettiar v Subramanaya Mudaliyar** held that the length of the lease would not be indicative of even permanency of the lease much less of transfer of ownership
- **Allahabad High Court in Greater Noida Industrial Development Authority** held that the term period of lease makes no difference to the meaning of the expression “renting of immovable property.”

1/3rd Deduction in value of land

- **Vide Notification No. 1/2018-CT(R) dt. 25.01.2018**

Sl. No .	Chapter, Section or Heading	Description of Service	Rate (%)	Condition
16	Heading 9972	(i) Services by the Central Government, State Government, Union territory or local authority to governmental authority or government entity, by way of lease of land.	Nil	-
		(ii) Supply of land or undivided share of land by way of lease or sub lease where such supply is a part of composite supply of construction of flats, etc. specified in the entry in column (3), against serial number 3, at item (i); <u>24</u> [(i) (ia), (ib), (ic), (id), (ie) and (if)] <u>24</u> . Provided that nothing contained in this entry shall apply to an amount charged for such lease and sub-lease in excess of one third of the total amount charged for the said composite supply. Total amount shall have the same meaning for the purpose of this proviso as given in paragraph 2 of this notification.	Nil	-
		(iii) Real estate services other than (i) and (ii) above.	9	-

Exemption on Upfront amount of Long Term Lease Service

N.No. 04/2019 CT(R) has inserted the following services to the list of services exempt from levy of GST under N.No. 12/2017 CT(R) :

- **Long term lease for thirty or more on or after 01.04.2019** (only upfront amount):Upfront amount (called as premium, salami, cost, price, development charges or by any other name) payable in respect of service by way of granting of long term lease of thirty years, or more, on or after 01.04.2019, for construction of **residential apartments** by a promoter in a project, intended for sale to a buyer, wholly or partly, except where the entire consideration has been received after issuance of completion certificate.

1. Supply of service by lease of land on or before 31.03.2019, but construction yet to be started - no exemption is provided.
2. Yearly lease rental/premium is not exempted as only upfront amount is exempted in above said entry.

Contd...

- *Circular No. 101/20/2019-GST dated 30.04.2019*, clarifies that GST exemption on the upfront amount is admissible irrespective of whether such upfront amount is payable or paid in one or more instalments, provided the amount is determined upfront.

RCM on Long term lease u/s 9(3)

- **Promoter is liable to pay Tax under RCM on:**
 - **Transfer of Development Rights or FSI**
 - **Long term lease for period of 30 years or more**

<i>Sl.No.</i>	<i>Category of Supply of Services</i>	<i>Supplier of Service</i>	<i>Recipient of Service</i>
<i>5B</i>	<i>Services supplied by any person by way of transfer of development rights or Floor Space Index (FSI) (including additional FSI) for construction of a project by a promoter.</i>	<i>Any person</i>	<i>Promoter.</i>
<i>5C</i>	<i>Long term lease of land (30 years or more) by any person against consideration in the form of upfront amount (called as premium, salami, cost, price, development charges or by any other name) and/or periodic rent for construction of a project by a promoter.</i>	<i>Any person</i>	<i>Promoter</i>

N.No. 05/2019 CT(R) has amended N.No. 13/2017 CT(R) to insert the above services in the list of services on which GST is payable on RCM basis u/s 9(3)

Time of Supply for Promoter in case of Long Term Lease liable to RCM **Received w.e.f. 01.04.2019**

Vide Notification No. 06/2019 CT(R) dated 29.03.2019

- 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).
- Shall be liable to pay tax on 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
- On the date of issuance of completion certificate or first occupation, whichever is earlier.

Anti Profiteering

Anti profiteering

- There are no rules/ method for computation
- Anti – profiteering authority acting arbitrarily
- All accounting methods for computing profit have been put at bay
- They are comparing the ratio of ITC to turnover pre and post GST – it is a makeshift method and is prone to errors of computation
- Several constitutional issues in anti profiteering mechanism
- Later denial of utilisation of GST (w.e.f. 01.04.2019) – hence if GST ITC taken for computing profiteering, then it is incorrect
- They are not allowing benefit of profit transferred
- Agreeing that the computation is not final, still going on with aggressive calculation
- Imposing penalty

Contd ...

- Way forward
 - Proper representation before the authority
 - Our own figures to be given with proper explanation
 - Their formula to be applied with clear cut statement that we don't agree with the formula but calculating on your insistence
 - Must say that these are provisional figures, and would be finalised upon completion
- Making confidential data – public
- Delhi HC stay on depositing 10% in court

Refund on Cancellation of Service



Refund of cancellation

- This is not a case where Credit note can be issued as contemplated in S. 34 –
 - “...the taxable value or tax charged in that tax invoice is found to exceed the taxable value or tax payable in respect of such supply, or where the goods supplied are returned by the recipient”
- However, vide Circular No 137/07/2020-GST dt. 13.04.2020, CBIC clarified that Credit Note Can be issued. To Quote:

<i>Issue</i>	<i>Clarification</i>
<p><i>An advance is received by a supplier for a Service contract which subsequently got cancelled. The supplier has issued the invoice before supply of service and paid the GST thereon. Whether he can claim refund of tax paid or is he required to adjust his tax liability in his returns ?</i></p>	<p><i>In case GST is paid by the supplier on advances received for a future event which got cancelled subsequently and for which invoice is issued before supply of service the supplier is required to issue a "credit note" in terms of section 34 of the CGST Act. He shall declare the details of such credit notes in the return for the month during which such credit note has been issued. The tax liability shall be adjusted in the return subject to conditions of section 34 of the CGST Act. There is no need to file a separate refund claim. However, in cases where there is no output liability against which a credit note can be adjusted, registered persons may proceed to file a claim under "Excess payment of tax, if any" through FORM GST RFD-01.</i></p>

Contd...

What if time limit to issue Credit Note lapsed i.e. September of Next FY from invoice date

- If service is not rendered, advance tax to be refunded
- Article 265: no tax can be collected save by authority of law
- Section 54(8)(c) of CGST Act – Refund
- It is well settled that no taxes can be levied unless the taxable event is attracted

Time Limit to Claim Refund

- Better to claim refund within 2 Years from the date of Cancellation of Unit.

THANK YOU

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