

Certificate GST Course for Real Estate Sector

LEARN INSIDES WITH EASY APPROACH

Experience of Advisory and Litigation of GST, VAT,
& Service Tax to more than 25 Reputed Real Estate
& Infrastructure Construction Companies.

By Adv. Pawan Arora

(Partner at Athena Law Associates)



9+ Hours in 8 Sessions | Starting from 13th Feb 2021 - 5 PM (every saturday)





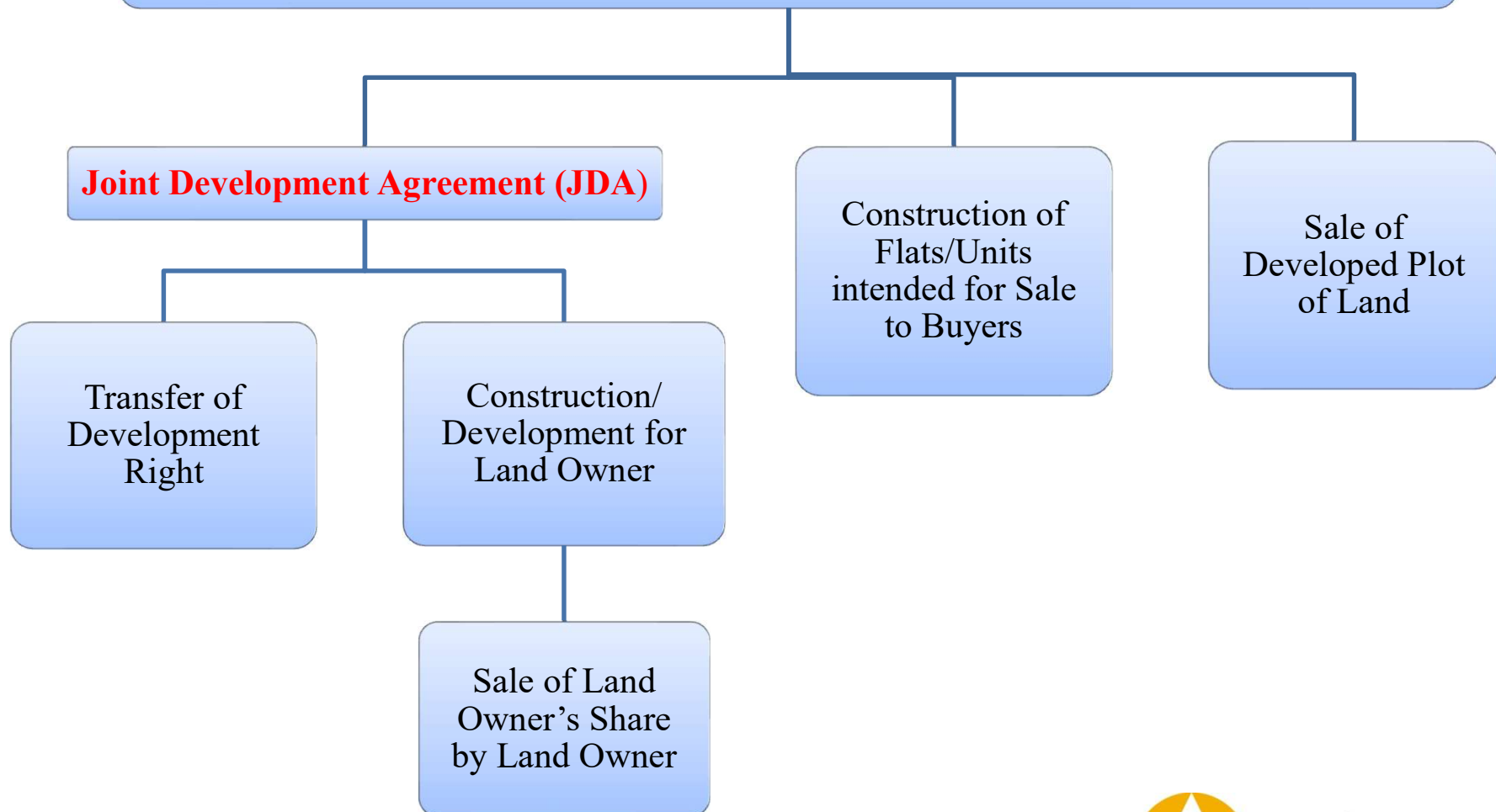
SESSION - 3

JOINT DEVELOPMENT AGREEMENT *PART -1*

*By: Adv. (CA) Pawan Arora
Partner, Athena Law Associates*



Real Estate Transaction



Coverage

1. Taxability on transfer of Development Rights
 - Exemption on TDR/FSI for Residential Apartment
 - Liability to Pay Tax on Exempted TDR/FSI on Un-booked Residential Apartment on the date of CC
 - Time of Supply for Promoter in case of JDA
 - RCM on TDR/FSI
2. Taxability on Construction service for Landowner

1. TAXABILITY ON TRANSFER OF DEVELOPMENT RIGHTS

Development rights are Immovable Property

Law relating to immovable property

- Finance Act as well as GST Act do **not provide for the definition of immovable property.**
- Transfer of Property Act covers the law w.r.t immovable property but misses out on definition.
- General Clauses Act defines the immovable property u/s. 3(26) as:
*Immovable property shall include land, **benefits arising out of land**, and things attached to the earth, or permanently fastened to anything attached to the earth”*
- Development Rights are benefits which arises from the land and therefore to be considered as immovable property.
- In various judicial pronouncements it has been held that Developments Rights are immovable property.

Case Laws

- In the case of ***Chheda Housing Development Corporation, 2007 (3) MhLJ 402***. The Hon'ble Bombay High Court has observed that the benefit arising from land is an immovable property and FSI/TDR being benefit arising out of land must be held to be immovable property. Relevant Para of the Judgment is extracted below:

15..... From these judgments what appears is that a benefit arising from the land is immovable property. FSI/TDR being a benefit arising from the land, consequently must be held to be immovable property and an Agreement for use of TDR consequently can be specifically enforced, unless it is established that compensation in money would be an adequate relief

- The Hon'ble Bombay High Court in the matter of ***Sadoday Builders Pvt. Ltd. (2011)6 Bom CR 42*** has relied on the Judgement given in Chheda Housing Development Corporation and held that transfer of development rights are benefits arising out of land and therefore must be considered as immovable property.

Case Laws

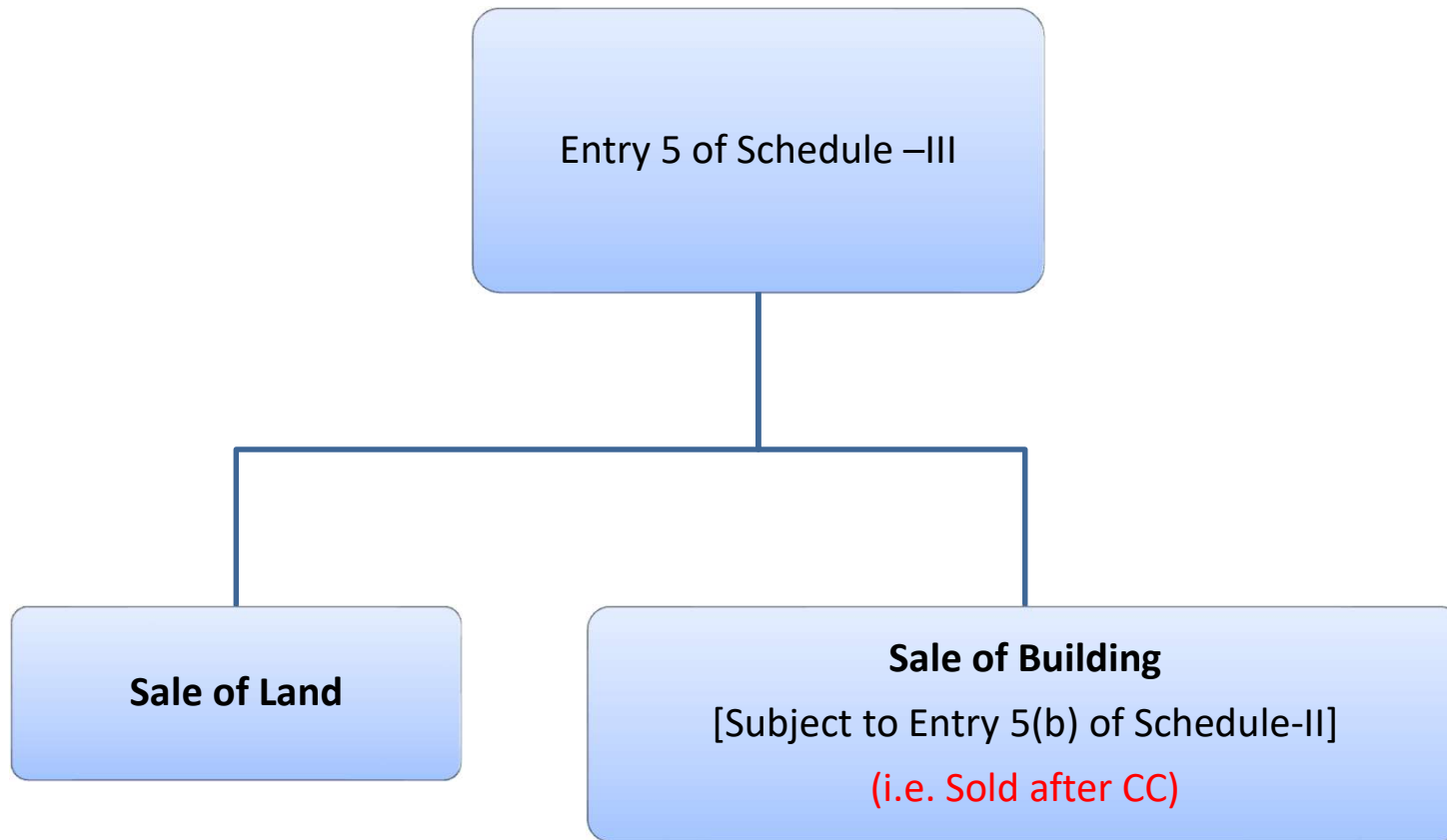
- In the case of *DLF Commercial Projects Corporations Vs. Commissioner of Service Tax, Gurugram Appeal No. ST/60476/2018*, the Hon'ble CESTAT (Chandigarh) has held that transfer of development rights is an immovable property and no service tax is payable on the same. Relevant para of the Judgment is extracted herein:

16.

As the Hon'ble High Court observed in the case of Sadoday Builders Private Ltd. and Ors. (supra) that transferrable development right is immovable property, therefore, the transfer of development rights in the case in hand is termed as immovable property in terms of Section 3 (26) of General Clauses Act, 1897 and no service tax is payable as per the exclusion in terms of Section 65B(44) of the Finance Act, 1994.

Constitution of India – Power to Levy GST

- Article 246A levies GST on Supply of Goods and Services – Starts with *“Notwithstanding anything contained in Article 246...”*
 - Article 366(12) “goods” includes all materials, commodities, and articles.
 - Article 366 (26A) “Services” means anything other than goods
- Wide definition of services & include transactions in immovable property
- Thus, both GST & Stamp Duty as on date.



Levy of GST on Transfer of Development Rights

- Scope of Supply defined under Section 7 of CGST Act provides for those activities which shall neither be treated as a supply of goods nor as a supply of services covered under Schedule-III which includes sale of land vide Para.5.
- But the definition of Service under GST is very wide and it only excludes goods as well as the prescribed exclusion given in the definition itself.
- Therefore, GST only excludes the transaction of sale of land not immovable property, hence GST is applicable on transfer of development rights.

Taxability on transfer of Development Rights

➤ **Tax Rate – 18%**

- While granting exemption, Government has classified under SAC 9972. Prima facie it does not fall under SAC 9972, but same rate of tax @ 18% under residual entry under SAC 9997

➤ **Exemption**

- **Transfer** W.e.f. 01.04.2019 exempt for Construction of **Residential Apartments**
 - Exemption shall be withdrawn to the extent unsold inventory on issuance of CC or First Occupation
 - Development Rights Transferred prior to 01.04.2019 – No Exemption
- No exemption for transfer pre 01.4.2019: contrary to the policy
- No Exemption for Commercial Units in both REP and RREP
- No Exemption for Residential Plots

Contd...

➤ Time of Supply

- Upto 24.01.2018 – Section 13 of the CGST / SGST Act
 - **Continuous Supply of Development Rights ?**
- From 25.01.2018 to 31.03.2019
 - Monetary Consideration or Revenue Share – Section 13
 - Consideration in the form of Construction Service [Area Share]
 - N.No. 4/2018-dt. 25.01.2018 – When Transfers the possession or the rights in constructed complex by entering into conveyance deed or similar document (e.g. Allotment Letter)
- DR **Transfer W.e.f.** 01.04.2019
 - TDR for residential Apartments - Consideration both in monetary form and in the form of Construction Service – N.No. 6/2019-dt. 29.03.2019 – on issuance of CC or First Occupation, whichever is earlier
 - TDR for Commercial Apartment
 - Monetary or Revenue Share – Section 13
 - In the form of Construction Service [Area Share]– issuance of OC or First Occupation
- **ITC to Developer after Completion of Project - Accumulation of ITC**

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

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

- Liability to pay tax in case of following classes of registered persons:
 - a. A promoter who receives TDR/FSI **on or after 01.04.2019** 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;
 - b. 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).

Contd...

- Liability to pay tax (time of supply) shall arise on the date of issuance of completion certificate or first occupation, whichever is earlier, for following liability:

For Tax payable as recipient of service

- 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) relating 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 relating to construction of residential apartments in the project; and

For Tax payable as supplier of service on construction service provided to landowner

- (d) the supply of construction service by him against consideration in the form of development rights or FSI (including additional FSI)

Contd...

➤ **Person Liable to Pay GST**

- Upto 31.03.2019 – Supplier of Service i.e. Landowner
- W.e.f. 01.04.2019 – Developer being recipient of Service [**irrespective of date of transfer of DR**]

RCM on TDR/FSI & 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**

Sl.No.	Category of Supply of Services	Supplier of Service	Recipient of Service
5B	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.	Any person	Promoter.
5C	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.	Any person	Promoter

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)

Exemption on TDR/FSI & 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) :

- **Transfer of TDR/FSI on or after 01.04.2019**: Service by way of transfer of development rights (herein refer TDR) or Floor Space Index (FSI) (including additional FSI) on or after 1st April, 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.
- **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 transfer of development rights (TDR) or transfer of FSI or 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.

Calculation of Amount of Exemption

- Calculation of Amount of Exemption

$$\begin{array}{c} \text{Amount of} \\ \text{exemption} \end{array} = \begin{array}{c} \text{Amount of GST} \\ \text{payable on} \\ \text{TDR/FSI/Long} \\ \text{Term Lease} \end{array} \times \frac{\begin{array}{c} \text{Total Carpet Area of} \\ \text{Residential} \\ \text{Apartments in the} \\ \text{project} \end{array}}{\begin{array}{c} \text{Total Carpet Area} \\ \text{(Commercial +} \\ \text{Residential) of the} \\ \text{Project} \end{array}}$$

It is to be noted that as per above formula provided in exemption notification, the amount of exemption is restricted to the proportionate area of the residential apartments without any distinction of project in REP/RREP. Thus, TDR/FSI/Long term lease proportionate to commercial area in RREP are not subjected to exemption.

Liability to Pay Tax on Exempted TDR/FSI & Long Term Lease On Un-booked Apartment on the Date of CC

- Where any residential apartments remain un-booked on the date of issuance of completion certificate, or first occupation of the project, Promoter shall be liable to pay tax on RCM basis, on such proportion of value of development rights, or FSI (including additional FSI), 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, or as is attributable to such residential apartments.
- GST payable under RCM in such cases shall be calculated in the following manner:

$$\text{Amount of Tax} = \text{Amount of exemption} \times \frac{\text{Total Carpet Area of Residential Apartments in the project remain un-booked on Issuance of CC}}{\text{Total Carpet Area of Residential Apartment in the Project}}$$

- Time of supply in such cases shall be the earlier of, date of completion or first occupation of the project.

Upper Limit of Tax Liability

- However, tax payable under RCM in such cases shall not exceed :
 - 1% of the value in case of affordable residential apartments and
 - 5% of the value in case of residential apartments other than affordable residential apartments

remaining un- booked on the date of issuance of completion certificate or first occupation

1. TAXABILITY ON CONSTRUCTION SERVICE FOR LAND OWNER

Taxability on Construction service for Landowner

- Leviable to GST
- Person Liable to Pay GST – Developer

Contd...

➤ Time of Supply

- Upto 24.01.2018 – Section 13 of the CGST / SGST Act
- From 25.01.2018 to 31.03.2019
 - Monetary Consideration – Section 13
 - Consideration in the form of Development Rights – N.No. 4/2018-dt. 25.01.2018 – When Transfers the possession or the rights in constructed complex by entering into conveyance deed or similar document (e.g. Allotment Letter)
- W.e.f. 01.04.2019
 - Monetary Consideration – Section 13
 - Consideration in the form of Development Rights – N.No. 6/2019-dt. 29.03.2019 – on issuance of CC or First Occupation, whichever is earlier
- It may result into accumulation of ITC in the hands of Landowner

CASE STUDY- 1

JDA PRIOR TO 01.04.2019



Facts of the case

ABC Ltd (hereinafter referred to as “**Developer**”) is a company engaged in construction of **residential** properties.

XYZ & Co (hereinafter referred to as “**Landowner**”) is a partnership firm engaged in the business of Real Estate. They are owners of a piece of land measuring about 30,000 square feet in Gurgaon.

By entering into a Property Development Agreement on **21st February, 2018**, the landowner and the developer are desirous of entering into the following arrangement for the purpose of constructing apartments on the said land-

1. Transfer of Development Right

The Landowner shall transfer the right to develop the land to the developer, wherein the Power of Attorney shall be granted to the developer enabling them to obtain requisite permissions and undertake necessary operations.

Contd...

2. Construction Activity

The developer shall undertake construction activity on the aforementioned piece of land and the total constructed area is estimated to be around 8,00,000 sq. feet.

3. Non-Refundable Deposit

Prior to undertaking construction, the developer shall be liable to pay an amount of Rs. 10 crore as non-refundable deposit to the landowners in lieu of the development rights.

4. Division of Constructed Property

After construction, the constructed area shall be divided between developer and landowner in 40-60 ratio.

Query

1. Determine the liability under GST in the hands of the (a) Owner and (b) Developer.
2. What would be the time of supply under GST in respect to construction services provided by the developer to the Owner?

GST Liability

Levy of GST on transfer of development rights by XYZ & Co. (land owner)

- Transfer of development rights are leviable to GST
- Thus, land owner company is liable to pay GST on the transfer of development rights to the developer.
- Applicable tax rate is 18%.

Levy of GST on construction service (works contract) supplied by ABC Ltd. (Developer)

- In this case, developer is providing works contract service to the land owner
- Thus, developer is liable to pay GST on works contract service provided to XYZ & Co.
- Applicable tax rate is 18%.

Contd...

➤ **Time of Supply**

- Monetary Consideration (Rs. 10 crore) received by Landowner for Development Rights – 21.02.2018 [*Section 13*]
- Consideration in the form of Construction Service received by Land owner – N.No. 4/2018-dt. 25.01.2018 – When Transfers the possession or the rights in constructed complex by entering into conveyance deed or similar document (e.g. Allotment Letter)
- Consideration in the form of Development Rights received by Developer – N.No. 4/2018-dt. 25.01.2018 – When Transfers the possession or the rights in constructed complex by entering into conveyance deed or similar document (e.g. Allotment Letter)

CASE STUDY- 2

JDA ON PERSONAL LAND FOR OWN USE



Facts of the Case

Mr. A (“Owner”) owns a residential plot of land bearing No. 999, measuring 325 Sq. Yds., situated at Defense Colony, New Delhi (hereinafter referred to as the “said property”) which he had inherited as legal heir on death of Mr. Ram Mohan (father of the Owner and first and erstwhile owner of the said property). The said property was purchased by Mr. Ram Mohan as a plot of land at his own cost and out of his personal earnings in the year 1962.

The Owner is desirous to re-construct the said property by demolishing the existing structure on the said property and construct a new super structure comprising of 4 floors including the ground floor/level (“**new structure**”). Owner has entered into a Property Development Agreement (“**Agreement**”) with a developer. Agreement has been entered on 09.09.2017. Developmental Rights are transferred by the Land Owner to the Developer on the date of execution of the Agreement

Under the Agreement, in lieu of consideration for development and construction of the new structure, the Owner would allot and grant exclusive ownership and usage rights in the share of the said property to the developer as follows:

- i. Entire Second floor.
- ii. Use of common areas, facilities and services.
- iii. 45% undivided, indivisible and impartible ownership rights in the plot of land

Query

1. Determine the liability under GST in the hands of the Owner?
2. What if the owner has intent to sell his share to the prospective customer ?

GST Liability for Owner

- It is pertinent to note that only those activities/ transactions are treated as supply only if the said activities/ transactions are made by a person in the course or furtherance of business and would be subject to levy of GST respectively.
- In the present scenario, the said property is a residential property of the Owner for personal usage and enjoyment. The Owner of the said property is entering into an Agreement with the Developer for the purpose of development and construction of the new structure for his own residence.
- Thus owner is not liable to pay GST on transfer of development rights.
- If the land owner has got the super structure constructed for sale to the prospective customer, then the transfer of development right would also be considered as supply in course or furtherance of business, and therefore transfer of development right become leviable to GST.

CASE STUDY- 3

JDA DURING SERVICE TAX REGIME



Facts of the case

- M/s “X” (“Company/Developer”) has entered into a Development Agreement on 22.07.2014 (“Agreement”) with M/s “P” Private Limited (“Land Owner”) for the purpose of development of the Group Housing Project on the Project Land situated at Noida, Uttar Pradesh;
- The Development Agreement is dated 22.07.2014. As per the terms of the agreement, all rights covered within the scope of development rights has been transferred on execution of agreement
- Construction has been started on the said project on 5th August, 2018.

Query

What is the GST implication on the Owner on transfer of Developmental Rights by the Land Owner to the Developer?

Effective date of Transfer of Development Rights

- Agreement for transfer of Development Rights was executed on 22.07.2014.
- **Transfer through registered instrument**
- Land Owner has granted and the Developer has accepted the Developmental Rights on the date of Agreement. Therefore, the said Developmental Rights are transferred by the Land Owner to the Developer on the date of execution of the Agreement i.e. in July, 2014 itself.
- During the service tax regime, transfer of title in immovable property is excluded from the definition of service.
- Thus, the transfer of development right being an immovable property shall not be considered as provision of service and therefore not leviable to service tax under Finance Act, 1994. Hence, no service tax is payable by the Owner in this transaction.
- Since the rights are supplied in the service tax regime itself (that is so called service have already been supplied prior to 1.07.2017), no GST is leviable on such transaction in light with charging section 9 of CGST Act read with transitional provision i.e. section 142(11).

CASE STUDY- 4

JDA WITH REVENUE SHARING ARRANGEMENT



Facts of the Case

1. XY Housing Pvt. Ltd. (Owner) entered into a Collaboration agreement on 15.02.2018 with BE Pvt. Ltd. (Developer) for the purpose of development of the Group Housing Land (GH Land) situated at Hauz Khas, New Delhi;
2. Vide the said agreement, the owner has granted irrevocably and unconditionally the development rights along with such ancillary and incidental rights on the GH Land as set forth in the Agreement.
3. It has been further agreed that the Owner shall handover the vacant and peaceful possession of the GH Land to developer on the Execution Date i.e. 15.02.2018, and possession was in fact granted on that date.
4. Both the parties have agreed to share the receipts of the project in an agreed percentage of 37.5% : 62.5% to be computed in the manner provided in the agreement.

Query

1. Is there any service provided by developer to owner ?

GST Liability

Levy of GST on transfer of development rights by land owner

- Transfer of development rights are leviable to GST in the present Case.

Supply of service by Developer to land owner

- The present case is revenue sharing model
- Thus, in this case, developer is not providing any supply of service to the land owner

Co-venture arrangement - ???

- Where the parties enter into a model where they both would pool their respective resources – landowner will pool land, Developer will contribute construction over land which he shall own, and they will respectively sell their portions, and share the sale consideration
- This arrangement would be a development agreement rather than an agreement for transfer of Development Rights to Developer and Construction Service to Landowner.

CASE STUDY- 5

JDA AFTER 01.04.2019

NO EXEMPTION OF TDR FOR COMMERCIAL APARTMENT



No Exemption of TDR for Commercial Apartment

- DR transferred on 25.07.2019
- Total Project Carpet Area – 5,00,000 sq ft.
- Commercial Carpet Area – 50,000 sq. Ft.
- Residential Carpet Area – 4,50,000 sq. ft.
- Value of Development Rights (as per Valuation Rules) – 10 Cr.
- Tax on DR – 1.8 CR.
- Exemption on Development Rights = $1.8 \text{ Cr.} * 4,50,000/5,00,000 = 1.62 \text{ Cr.}$

THANK YOU

Adv. (CA) Pawan Arora
Partner

Athena Law Associates

pawan@athenawassociates.com

+91-88000-91636

