ISSUES IN TAXATION OF JOINT DEVELOPMENT AGREEMENT (JDA) TRANSACTIONS

-UNDER GST & INCOME TAX

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In my last write up – **Joint development agreement – Taxation under Income Tax & GST** published in the month of April'2020 I have discussed taxation aspects of Joint Development Agreement (JDA) transactions under Goods & Services Tax Act, 2017(GST) and Income Tax Act,1961 in a detailed manner.

Now, on making a further in-depth study, I found some key issues & debatable points on the subject matter and thus tried to analyze and discuss in this article. The views expressed here-in-below would be my personal views only. The possibility of other views on the subject matter also cannot be ruled out. So the readers are advised to check and refer relevant provisions of statute, latest judicial pronouncements, circulars, and clarifications etc before finally acting on the basis of this write up.

JOINT DEVELOPMENT - ISSUES UNDER GST

1. **Whether transfer of rights in land/TDR really liable to GST?**

   It is a settled legal position that the word 'land' not just includes full title in land but also rights which gives benefits associated with it**. [Sunil Siddharthbhai v. CIT [1985] SC 156 ITR 509/23 Taxman 1]** TDR under JDA is also neither 'lease' not 'license' as mentioned in the scope of supply u/s 7 and Entry sl. 2(a) of Schedule-II. License is a permission

to use the land without the right to exclusive possession. Lease means allowing right to enjoy the immovable property for a specified period. So TDR is not a lease transaction because it is a right to develop a land.

As per general clauses Act, 1897 section 3(26) defines -immovable property -shall include land and benefit arises out of land. So TDR is nothing but rights arising out of land and thus an Immovable property. Under the erstwhile law of Service Tax the same was not also made liable to tax by the various judicial authorities on the ground that TDR is nothing but a benefit arising out of land. **[DLF Commercial Projects 2019 (27) GSTL 712 (Tri. Chan.)]**

The author feels that TDR is an immovable property inasmuch as TDR is connected with land and it is a benefit arising out of land. **[Chheda Housing Development Corporation (Bombay HC)].** But unfortunately the Govt. has considered TDR as a service under GST law and collecting tax on it. [**NN- 04/2018 and AAR ruling in case of Vilas Chandanmal Gandhi and AAR Karnataka in the case of Maarq Spaces Pvt. Ltd.]** However, once this matter will come under judicial scrutiny there would be further clarity on this matter whether it actually a service or an immovable property.

2. **Whether JDA entered under GST regime prior to 25.01.2018 are liable to tax under GST?**

Govt. has notified its intention to tax landowners and developers vide notification no. 04/2018 w.e.f 25.01.2018 only. Prior to that there was no specific mention of such persons and services by them in the CGST Act whereby they were liable to pay tax under JDA. So prior to 25.01.2018 neither the taxable person notified nor the valuation mechanism of the services prescribed. So one may argue that prior to 25.01.2018 there was never the intention of Govt. to tax JDA transactions. So in this scenario can there be a levy at all? At the same time there may be a counter argument that levy was already there, residuary entry was always there in the law and valuation mechanism u/s

15 read with rule 27 to 31 were in force. So tax was always leviable within the four walls of the law.

But the author believes that **if the taxable person and valuation mechanism were already there in the law prior to 25.01.2018 then what necessitated the Govt. to notify it again w.e.f. 25.01.2018?** Further one may be wrong to read a gazette notification issued by the Govt. as clarificatory in nature. So the conclusion we draw is that the taxable person and valuation mechanism was never prescribed in the law earlier. A levy must specify taxable person and measure or value on which the rate will be applied for computing the tax liability. If it is missing or not clearly and definitely ascertainable it is difficult to say that the levy exists. Any uncertainty or vagueness in the legislative scheme of defining measure or value will lead the levy fatal to its validity. [**Govind Saran Ganga Saran v. CST (1985) 155 ITR 144 (SC)]**

So the author is of the opinion this is a litigation prone area and who knows Govt. may introduce retrospective legislation to cover up the gap. So before taking final call one should first obtain a legal opinion and then assess the case in terms of cost-benefit –analysis.

3. **Whether 1/3rd deemed deduction on account of value of land as envisaged in rate notification 03/2019-CT (R) is enough? Is it Compulsory to follow the same?**

The Govt. has made it clear in the rate notification itself that the value of land would be considered equivalent to 1/3rd of the total value only. Therefore the original rates of 18%/12% prior to 01.04.2019 and new rates w.e.f. 01.04.2019 1.5%/7.5% reduced to the effective rate of 12%/8% and 1%/5% respectively i.e after allowing 1/3rd deduction towards land. This standard deduction is applicable to all the cities across the Country irrespective of the actual price of land prevailing in each locality. But in real life the position is totally different. The value of land is not same across the Country. It varies from place to place. In big cities like Mumbai, Delhi, Kolkata etc. where land is scarce the

prices of land are rocket high. So in such a situation the value of land would be quite high and it is illogical to allow only 1/3rd value for land. So by no means it is enough rather it should be in inverse ratio only.

Any deeming fiction cannot prescribe a value which is higher than actual value or value as determined under section 15 of the CGST Act. It is a settled legal position that rule or notification cannot override the provisions of Act. **[UOI v. Jalyan Udyog - Para 34 - 1993 (68) ELT 9 (SC)]** The instant notification is going beyond the provision of section 15 which is legally not permissible. The same is already under challenge in different High Courts of the Country.

4. **Whether valuation of flats/area given by the developer to the landowner against TDR on the basis of value of similar flats is correct?**

In JDA, the landowner transfers development rights to the developer and developers in turns undertake to construct and give specified agreed constructed area on free of cost basis to landowner. Though the para 2 & 2A of the notification 11/2017 CT(R) (as amended by NN 03/2019) prescribes that the amount charged for value of similar apartment to the independent buyer to be the value of construction service rendered by the developer to the landlord. But such value appears to be excessive and unreasonable. This is because open market value of similar flats includes value of land also. Further the land on which construction activity done by the developer and transferred to the landowner is already owned by landlord only. So the value of construction services in such cases will not resemble the value of construction of flats given 'free'. It is also pertinent to mention here that developer generally recovers the value of land from the actual buyer who pays him. The value of land is apportioned to the saleable flats /area only not to flats/area given free to landowner. Also, the developer incurs huge marketing and other expenses which are recovered from buyers of flat/area only. So naturally the price charged to the buyer will be much higher than the actual cost of construction service rendered to the landowner. So the deduction of only 1/3rd on account of value of land in

such a scenario leads to exorbitant value of such services. The author feels rather valuation in such cases should either be after deducting actual value of land or on the basis of cost of construction plus 10% thereon as prescribed in rule 30 of the CGST Rules, 2017.

5. **Is it correct to first include value of land while making valuation and then allow only 1/3rd deemed deduction from total value on account of land?**

In many parts of the Country there is a practice to have separate registry for land and separate for Constructed flat. So in such cases often a problem of valuation arises. In case of **Kara Property Ventures LLP the AAR Tamilnadu [2019] 103 taxmann.com 279** the assessee entered into two separate agreements –one for sale of proportionate share of undivided land and other for construction of complex service to the buyer whereby two separate consideration was charged from the buyer. So a question was raised regarding the measure of tax. The AAR held that both the agreements are co-existent and co-terminus and shall run concurrently; each agreement cannot be terminated without terminating the other., it is a single supply which is squarely covered under Entry No. 5(b) of Schedule II of the Central Goods and Services Tax Act making this transaction a supply of service as 'Construction of a Complex' and thus held that the GST is leviable on 2/3rd of the total value of both the agreements.

Similar views were expressed in case of **Sanjeev Sharma [2018] 93 taxmann.com 494 (AAR - New Delhi)** wherein the authority hold that GST would be payable on two-third of the total amount consisting of amount charged for transfer of land or undivided share of land, as the case may be, and whole of the consideration charged for the supply of goods and services.

But with due respect to the AAR, the author begs to differ here. Land being an immovable property and a State specific matter has already been kept out of constitutional framework as well as GST law. So there is no GST on the Land. So once the valuation is done including the

value of land and thereafter only 1/3rd (which is much less than the actual value of land) of such value is deducted implies that a lion's share on account of value of land is still included in the valuation and tax is being collected on such value. So indirectly Govt. is charging GST on supply of land also. It is a settled position that what is not permissible directly the Govt. cannot do it indirectly also. [**Acer India Ltd. 2004 (172) E.L.T. 289 (S.C.) Approved in 2018 (360) ELT 769 (Supreme Court)]. Also, article 265 of** the Constitution of India provides that no tax can be collected without the authority of the law. So *prima-facie* it appears wrong to collect tax indirectly on the value of land as well.

If the fair value of land is ascertainable and easily available from revenue /circle offices or the Stamp Duty Value is determinable or the value thereof is also recorded in the books of the assessee then such value should only be allowed as deduction. If the same is not available then only the standard deduction should be made applicable. It is worthwhile to refer that the Apex Court in case of **Gannon Dunkerley & Co. and Ors. v. State of Rajasthan and Ors. (1983) 1 SCC 364: (1993) 88 STC 204** prescribed similar mechanism to ascertain the value of deemed sales of goods liable to tax under a works contract. The deductions for labour and other services are to be made from total contract value for determining value of goods sold for levy of tax. So accordingly the Hon'ble Apex Court has laid down certain deductions and if the same are maintained and ascertainable from the records of the assessee then the same has to be deducted to derive the taxable value. Therefore deriving force from the above judgment of Apex Court the author is of the opinion that under GST also 1/3rd deduction for land should be optional and applicable to only those cases where actual value thereof is not ascertainable.

6. **What will be the nature of services rendered by the developer to the landowner under JDA and how it would be valued?**

In case of JDA arrangement the developer is basically rendering construction service only without transfer of land. So in such case it should be purely a 'Works Contract' service. But the notification issued

by the Govt. recognizes such service as 'Construction of Complex Service' only which in the opinion of the author is not justifiable inasmuch as the developer is doing only works contract of the nature of composite supply of goods and services only. Further the landowner is already owner of the land on which such construction is undertaken by the developer. Hence it should only be a 'works contract' service. So once it is considered as works contract service then again its valuation should not be done in the manner laid down in para 2A of the notification 03/2019. Rather appropriate valuation in such cases should be as per rule 30 of CGST rules i.e cost plus 10% only.

7. **Whether valuation mechanism as introduced by the rate notification (NN-11/2017 -28.06.2017 as amended by NN-04/2019 - 29.03.2019) is legally valid?**

As we know that section 15 of the CGST is the governing section for valuations under GST. So in order to answer this question it becomes important to first understand the provision of section 15(5) of the CGST Act, 2017 which reads as:

> *(5) Notwithstanding anything contained in sub-section (1) or sub-section (4), the value of such supplies as may be notified by the Government on the recommendations of the Council shall be determined in such manner as may be* ***prescribed****.*

Now, if we read the opening para of said notification it is revealed that the notification was issued in exercise of powers conferred under various sections which, *inter-alia,* includes sub-section 5 of section 15 of the CGST Act also. So apparently it seems that the said notification is issued under the authority of the law. The same was also discussed in case of **Sanjeev Sharma [2018] 93 taxmann.com 494 (AAR - New Delhi)** wherein in para-26 the Ld. Authority concluded that the said notification has been issued under Section 15(5) of the CGST Act, 2017 by the Government on the recommendation of the GST Council and hence, no separate Rule was required to be issued. Hence, Paragraph 2 of the Notification No. 11/2017- Central Tax (Rate) dated 28-06-2017 is

fully authorized by Section 15(5) of the CGST Act, 2017 to provide machinery provisions to ascertain the value of land for exclusion and to measures the value of supply of goods and services for levy of GST.

But if we read section 15(5) again as reproduced above we find the word **'prescribed'** is used therein. Further the law has got a very specific meaning of word 'prescribed' under section 2(87) which read as:-

> *(87) "prescribed" means prescribed by rules made under this Act on the recommendations of the Council"*

So it is clear that any valuation mechanism under sub-section 5 of section 15 has to be prescribed through rules only. A rate notification will not substitute rules under the law. It is a settled legal position that where a statute requires doing certain thing in a certain way, the thing must be done in that way or not at all. Other methods or mode of performance are impliedly and necessarily forbidden. When the law provides that something is to be prescribed in the Rules then that thing must be prescribed in the Rules to make the provisions workable and constitutionally valid. **[Voltas Ltd 2007 (7) STR 106 (SC)]**

Similar matter was also questioned in Service Tax regime to the Hon'ble **Delhi High Court** in case of **Suresh Kumar Bansal, W.P.(C) 2235/2011 dated: 03.06.2016** wherein the Hon'ble Court held that the abatement to the extent of 75% by a notification or a circular cannot substitute the lack of statutory machinery provisions to ascertain the value of services involved in a composite contract. In order to sustain the levy of service tax on services, it is essential that the machinery provisions provide for a mechanism for ascertaining the measure of tax, that is, the value of services which are charged to service tax.

Interestingly, the AAR in case of **Sanjeev Sharma** as discussed above has distinguished the judgment of **Suresh Kumar Bansal** on the ground that in GST, the machinery provisions to ascertain the value of land is available in the notification which has been issued under sub-section (5) of section 15 regarding value of taxable supply. The said Notification has been issued under section 15(5) by the Government on the

recommendation of the GST Council and hence, no separate Rule was required to be issued. Hence, paragraph 2 of the Notification No. 11/2017- Central Tax (Rate), dated 28-6-2017 is fully authorized by section 15(5) to provide machinery provisions to ascertain the value of land for exclusion and to measures the value of supply of goods and services for levy of GST. The AAR also held that the said machinery provisions cannot be equated with exemption Notification issued under section 93(1) of the Finance Act, 1994 which were held to be insufficient by the Hon'ble High Court.

But the Ld. AAR has neither discussed nor pressed upon the meaning of the word ***'Prescribed'*** anywhere in the ruling. So without discussing this provision the logic explained by the AAR seems to be perverse. *Had it been examined then there it would have been certainly an interesting scenario.*

8. Is it compulsory to follow the new taxing structure i.e. without claiming ITC for the new projects commenced on or after 01.04.2019?

The author is of the opinion that whenever a statue prescribes rate of tax on an item with certain conditions then in such cases the same should be optional only. In other words those who are willing to fulfill those conditions are subject to such rate of tax. Otherwise there is always a residuary entry and tax can be paid under such entry and input is also not denied once conditions u/s 16 is fulfilled. The Govt. in 23rd GST Council meeting on 10th November, 2017 has decided to cut rate of tax on restaurants and accordingly changed the tax rate for all stand alone restaurants whereby a uniform rate of 5% is kept without input tax credit. This matter was challenged in Gujrat High Court and recently the Hon'ble Court has issued notice to the Centre seeking to know why the option of input tax credit under goods and services tax (GST) regime is not available for restaurants, unlike others. W.e.f.01.04.2019 the real estate sector is also feeling the heat of new tax rates without ITC in residential projects. So a question arises what happens if one fails to fulfill conditions of new rate notification? There may be an argument

that the provision whereby the right of the petitioner is restricted is introduced by virtue of a notification and is not prescribed by the rules is not correct. So why not one pay tax under residuary entry and avail ITC? The author finds some force in this argument. But again it should not be followed blindly rather based on cost-benefit analysis with proper legal opinion.

9. What will be the taxability of TDR on the new projects on or after 01.04.2019 which are not intended for sale?

The notification number 04/2019 CT-(R), 05/2019 CT-(R) & 06/2019 CT(R) are applicable in case of projects meant for sale only. So it means that these notifications are not going to be applicable for a project which is not intended for sale. Also, such projects would be out of the purview of RERA and builder in such case would not be termed as 'Promoter'. So what will be the position for taxability of TDR? Whether it will be under Forward Charge Mechanism or Reverse Charge Mechanism (RCM)? The author opines that since RCM is applicable only on the projects meant for sale whereby developer-promoter is liable to pay. Thus in case of a project which are not meant for sale the liability of landowner under Forward Charge Mechanism will continue to operate is similar manner as existed prior to 01.04.2019.

10. Whether development of Plots from land and sale of such plots is taxable under GST?

Activity of purchase of land and selling such land by converting in to integrated residential sub plots of varying sizes under name of "Bliss Homes" with basic facilities is liable to GST.**[020 (4) TMI 633- Authority For Advance Ruling Gujarat- In Re: M/S. Satyaja Infratech]**

In case of **MAARQ Spaces (P.) Ltd., [2019] 111 taxmann.com 368 (AAR – KARNATAKA)** applicant has entered into a joint development agreement with landowners for development of land into residential layout and cost of development shall be borne by applicant. The revenue

accruing from sale of plots is shared in ratio of 75 per cent for landowners and 25 per cent for applicant. It was held that activities undertaken by applicant amount to supply of service to landowners and taxable value of supply in terms of rule 31 (residuary rules using reasonable means consistent with the principles and the general provisions of section 15) is equal to total amount received by applicant.

If we look at the definition of **Real Estate Project** (under section 2(zn) of RERA Act) the activity of development of land into plots is included therein. Further GST law also recognizes this definition under RERA for the purpose of taxing Real Estate Projects. So this definition perhaps might be attracting the attention of the authorities in taxing sale of under construction plots.

The Hon'ble Apex Court in case of **A. V Fernandez Vs. State Of Kerala, AIR 1957 SC 657** while explaining interpretation of taxation provisions, made the observations that tax can be charged only if the activity sought to be taxed falls squarely within the taxing entry. A tax cannot be imposed by presumption, but must be imposed only as per the specific language of the taxing entry.

The development of land into Plots and thereafter sales of such Plot should not be liable to tax inasmuch as when land *per se* is out of the purview of GST (under SCH-III neither supply of goods nor services) so how can there be a question of taxing plots? When plots are sold, they very much possess all the characteristics of land. Merely development of land into plot will not change the character of the land. The same will remain immovable property always and known as plot of land only in common parlance. So it would be out of the purview of GST. The only taxable transaction in such cases will be the value of construction services/works contract service. So the sale of plot should not be subject to tax.

11. Can developer pre-pone his liability on construction services rendered to landowner under JDA to enable landowner to claim ITC?

Under the new scheme of taxation of real estate w.e.f. 01.04.2019 the landowner is entitled to claim ITC on the construction services rendered by developer to him. However, the same is subject to fulfillment of some conditions. Further the time of supply of such services by developer to the landowner will be on the issuance of completion certificate or first occupation whichever is earlier. But by that time the landowner might have sold his share of flats/constructed area and discharged his liability by paying in cash to the Govt. account. So the input tax as mentioned in the bill of the developer is not going to help him and would be useless rather become cost only. Further refund of ITC is also not eligible u/s 54 in such cases. So this creates a big problem for the landowner and thus a question comes can developer pre-pone his liability on the construction services rendered to the landowner? In view of the author in such cases the legal and operational harmony necessitates that both the parties can mutually decide to pre-pone developer's liability by intimating to their jurisdictional officer. So by this way the landowner can adjust the input tax charged by the developer with his output tax liability on the sale of under construction flats. There is no bar in the CGST Act, 2017 for harmonizing the provision of time of supply in such cases. So instead of literal interpretation one can resort to purposive and functional interpretation to remove absurdity.

12. Is TDR taxable when landowner gets construction on its individual /ancestral land for its own use (without any business) under JDA?

Sometimes landowner may get construction done for his own use for the purpose of his residence and agrees to share a potion of constructed area with the developer also under a JDA model. In such case there is never an intention on the part of the landowner to sale his share of the constructed area. So in such a situation whether TDR is taxable? The author believes that TDR in such cases should not be taxable because the same was never with an intention to do business or in the course of furtherance of any business by the landlord. So the conditions of section 7 are not wholly satisfied and thus there should not be supply. Also there

will never be a **business** or **profit motive** in such transactions. But one may also argue that the definition of 'Business' under section 2(17) is very wide and it includes any trade, commerce, manufacture, profession, vacation, adventure, or any other similar activity whether or not it is for a pecuniary benefit irrespective of the volume, frequency, continuity or regularity of such activity or transaction. Therefore, the activity of transfer of development rights by a land owner, whether an individual or not, to a promoter is a supply of service subject to GST.

But again, the author has different argument that when the Govt. has already clarified in the year 2017 itself that sale of old jewellery and private used vehicles will not be considered as supply because the same are not in furtherance of business. So why not the same principle is applicable for exchange of TDR services with construction services? Does it mean that there will be separate principles applicable to goods and separate to services? The author apprehends taxability in such cases. However, disputes in such cases can still be mitigated by way of drafting the JDA agreement very carefully so that unnecessarily the same is not interpreted as in furtherance of business or supply.

13. Whether exempted inward supply would be included in the value of supply from unregistered person while calculating 80% threshold?

If we see the answer to question no.18 of the FAQs released by the Govt. on 14.05.2019 it has been clarified that value of such exempted supplies needs to be included in the value of supply of goods or services received from unregistered person for the purpose of calculating 80% threshold. It implies that the developer needs to pay tax on such exempted goods or services @18% under RCM if there is shortfall. Further no input of such payment made under RCM is entitled to the developer. So here a question arises that can Govt. charge tax on exempted goods or services under RCM? There may be an argument that section 9(4) prior to its amendment was referring **'….supply of taxable goods or services or both**…..' but after amendment w.e.f. 01.02.2019 the new wordings are '…..**in respect of supply of specified categories of goods or services or both**…..'. So there is no such

stipulation in the amended section 9(4) to tax only taxable supplies of goods or services or both. But the author believes that when a supply *per se* is exempted then how the same can be taxed even under RCM? We all know that the Govt. can exempt goods or services or both in the public interest etc. by exercising powers conferred u/s 11 of the CGST Act. Further section 11 has got overriding effect over section 9. So when a particular class of goods or services is exempted u/s 11 why it would at all taxable u/s 9(4)? It would be absolutely without the authority of law and violation of article 265 to demand tax even under RCM on exempted goods or services or both. So the answer given in the FAQs is also beyond one's understanding.

14. When would a project be considered as 'Completed' or 'First Occupied'?

The explanation to entry 5(b) of Schedule –II has prescribed the meaning of 'Competent authority' who can issue ***Completion certificate*** or ***Occupation certificate***. It provides that in cases where completion certificate is not issued by any Governmental Authority, the certificate issued by an architect or a chartered engineer or a licensed surveyor shall be regarded as the completion certificate and hence the date of issuance of such certificate is to be considered. It is thus a State/ Municipal Board/ Local Authority specific matter and each State/UT has got its own law for issuance of such certificate. But in real life situation it takes years to get completion certificate from Governmental authority even where actual completion of the project completed long back. By that time the apartments are occupied by owners and inhabited by them. So in such a situation in absence of Government certificate it really becomes difficult to determine the exact date when the project was completed or first occupied. The developer issues possession letters usually only after receiving 'completion certificate' from the Architect/Engineer. Hence date of 'first occupation' will be only after the date of issuance of 'completion certificate'. Thus it will be the date of issuance of the "completion certificate" which will be the relevant date to determine the taxability of the units. If it is available or issued by Govt. authority (wherever applicable) then there is no dispute. But the

difficulty arises in determining actual first occupancy. One should also not misunderstand date of handing over possession as date of first occupancy. The Hon'ble Delhi High Court in case of **K. Industries v. Mohan Investments and Properties Private Limited (Suit No. 507 of 1984)** held that where 'first occupation' takes place before the issuance of 'completion certificate' especially when such certificate is required to be issued by the Governmental Authority. In such cases the date of first occupation will be the relevant date even if the occupation is granted in violation of other laws.

So here again a question arises -when will one assume '**first occupation'**?

The author is of the opinion that occupancy generally takes place in an apartment which has provision for civic infrastructure such as water, sanitation and electricity. So once such amenities are stared operating in a building and the owner actually occupies the apartment it can safely be presumed that it is occupied. The documents available with builder like Lift License, Fire NOC etc. along with other documents like Sale deed, Electric Bill, Telephone Bill and Water bill etc with owners may be relevant to determine date of first occupation in such cases.

JOINT DEVELOPMENT- ISSUES IN SECTION 45(5A) OF I.T.ACT, 1961

1. **Why the Govt. has not extended the benefit of this section to the assessees other than the Individual and HUF?**

   This perhaps was an intentional move to not to extend the benefit of this section to assesses other than Individual & HUF. Generally JDA model is preferred by the Individuals & HUFs who apart from ownership of land do not possess any funds or expertise to construct. So they join hands with developer to get construction done. So that's why the Govt. perhaps visualized the situation and that's why extended benefit only to such petty assesses. Now, a question comes can't it be considered as

discrimination with other assesses like Partnership, AOP, LLP, Companies etc? If we see the entire Income Tax law there are various benefits extended by the Govt. only to a particular class of assesses. So it is absolutely the choice and policy of the Govt. to extend benefit to the desired class of assessees only. So this should not be considered as discrimination with other assessees.

2. **Whether the indexation will be given up to the date of Joint Development Agreement or to the date of completion certificate or to the date of registration of constructed flats?**

   According to the provision of section 45(5A), actual date of transfer of asset is not relevant for the purpose of computing capital gain. In such a situation, in the opinion of the author the period of holding should also be computed with reference to the date on which capital gain is chargeable to tax. So indexation should be considered upto the date of completion certificate accordingly.

3. **When will be the time limit to make investment u/s. 54 and 54F will be reckoned- From date of Joint Development Agreement or from the date of completion certificate?**

   The logical interpretation would be the date of transfer for claiming exemption and making investment as required under section 54/54F/54EC etc. should be taken to be the date on which capital gains is chargeable to tax as provided under section 45(5A). Taking such interpretation would avoid undue hardship in claiming exemptions under those sections. So the same should be reckoned from date of completion only.

4. **Whether reference to the valuation officer u/s 50C is permissible in case the SDV is higher than FMV?**

   Section 50C of Income Tax Act provides that in case stamp duty value is higher than fair market value of the asset, assessee may challenge and refer to valuation officer and in case fair market value assessed by valuation officer is less than the stamp duty value, the value assessed by

valuation officer being fair market value shall be deemed to be the full value of consideration for computing capital gain. But if we read section 45(5A), no such stipulation is provided therein. So does it mean that reference to section 50C is not possible?

Since Section 50C is a legal fiction and its area and scope are confined to what is stated in the provision. Therefore, this provision can be invoked only when there is a transfer of land or building or both. Its operation cannot be extended to the other assessees or to other properties or to other circumstances than what is stated therein. It has also been held that Section 50C can be invoked if development rights are transferred along with the transfer of the land. What is to be seen is that there is a registered transfer deed. The additional rights given would not make any difference. So long as condition laid down under section 50C. i.e. instrument of transfer is registered in respect of the immovable property other events or additional transfer or rights or liabilities would be in consequential **[Arif Akhatar Hussain v. ITO [2011] 45 SOT 257/(Mum]**

5. **Whether capital gain on entire land shall be attracted in the year in which certificate of completion for even part of the project is issued or in such a situation capital gains on land should be attracted on proportionate basis in the ratio of the land utilized for the part of the project for which certificate of completion has been issued?**

   As per the provision of section 45(5A), capital gain is chargeable to tax even when certificate of completion is issued for part of the project. But in the above stated scenario, the logical and reasonable interpretation would suggest that the capital gain should be attracted on proportionate basis in the ratio of the land utilized for the part of the project for which certificate of completion has been issued.

6. **In case agricultural land, not covered within the definition of capital asset u/s 2(14) is contributed for joint development – Whether capital gain liability shall be attracted?**

The nature of agricultural land in such a case is to be seen as on the date of transfer of land by landowner to the developer. In case land transferred by land owner to the developer was rural agricultural land in terms of section 2(14) of the Act at the time of transfer of land, it is not a capital asset. In the case of transfer of rural agricultural land, there is no transfer of capital asset by land owner. Provision of section 45(5A) is applicable when there is transfer of capital asset. Therefore, in such a case there should not arise any capital gain tax liability in the hands of the land owner.

7. **Whether section 45(5A) can be applied retrospectively?**

This section was made applicable from A.Y.2018-19 onwards only which leave no room of doubt that it would be applicable prospectively only from the said assessment year.But if one looks at the **object** of this section as explained in Finance Bill 2017 *it seeks to minimize the genuine hardship which the owner of land may face in paying capital gains tax in the year of transfer*. So it is basically a beneficial or curative provision which seeks to eliminate hardship faced. So one can interpret that such a provision should be applied retrospectively only. Reliance can be placed on the decision of Hon'ble Supreme Court in the case of **Allied Motors (P.) Ltd. v. CIT [1997] 224 ITR 677/91 Taxman 205 (SC) and CIT v. Alom Extrusions Ltd. [2009] 319 ITR 306/185 Taxman 416 (SC).**

However, the Hon’ble ITAT Hyderabad Bench ‘B’ in case of **Adhinarayana Reddy Kummeta v. Assistant Commissioner of Income Tax, Circle -11(1), Hyderabad [2018] 91 taxmann.com 360 (Hyderabad-Trib.)** held that section 45(5A) being substantive provision cannot be applied to the development agreement entered into earlier, in which section 2(47)(v) would certainly get attracted.

8. When will the liability arise in case where the ***‘Completion certificate’*** is not issued by competent authority?

In we read the language employed in section 45(5A) it makes clear that capital gains shall be chargeable as income of the previous year in which the *certificate of completion* for the whole or part of the project is issued by the competent authority. Now, there may be a situation where certificate of completion of the project is issued much after actual completion and occupation of the project. So in such cases does it mean that capital gain will not be chargeable to tax till such time? Can dept. wait taxing such transactions till the certificate of completion is issued after a considerable delay or not issued in some cases?

If we go by the literal interpretation it is clear that the point at which liability will be triggered is the year in which certificate of completion issued. But in some parts of the Country it takes considerable time or years to take for issuance of such certificate or not issued even after 10-15 years of the actual completion of the project. So the literal interpretation in such cases may lead to absurdity. Thus the author believes that in such cases we have to follow purposive or functional interpretation to remove such absurdity and to give effect to the provisions. The occupancy certificate or the first occupation as discussed in this article will be considered as point of liability for such purposes.

Conclusion:

The above discussion reveals that both the laws are quite similar inasmuch as having various contentious issues. Each law has got its own inherent limitations. Under the Income Tax law, the retrospective amendments was a unique feature in past. Now, GST law seems to have adopted the same path. GST law has its peculiar problem of governing everything through notifications only. Further the contrary AARs under GST are also making life more difficult. Whereas on the other hand Income Tax law has also left certain questions unanswered in the newly inserted section 45(5A). In such a situation the assessees and professionals are in a big dilemma as what to suggest and whom to follow. The author feels that where a notification issued by the Govt. is patently in violation of the settled legal principles or in contradiction of the provisions of the Act then one may safely follow the provision of Act only.

But the difficulty arises in a situation where it is not practical to follow such impugned notifications. This will lead to litigations. The author firmly believes that strong judicial system of our country will certainly take care of such *vires* & challenges.

***<u>Disclaimer</u>**: The above expressed views are purely the personal views of the author. The possibility of other views on the subject matter cannot be ruled out. So the readers are requested to check and refer relevant provisions of statute, latest judicial pronouncements, circulars, clarifications etc before acting on the basis of the above write up. The author is not responsible in anyway.*

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