

# Whether transfer of development rights is “Sale of Land”



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## Introduction

As per Paragraph 5 of Schedule III 'sale of land and, subject to clause (b) of paragraph 5 of Schedule II, sale of building' shall be treated as neither supply of goods nor supply of services.

**Development rights** are as such not defined in gst law, nor they were defined under the service tax law or vat law. In simple terms Development rights can be meant to convey right to carryout development or to develop land or building or both. Landowner transfers development rights to the developer who undertakes development/construction of the project. Landowner may sell development rights to the land owner in three ways:

- a) Landowner transfers development rights **for cash**. In such cases normally there is sale of both land as well as development rights and developer constructs the apartments on his own accounts.
- b) Landowner transfer development rights in lieu of development/construction undertaken by the developer. The constructed flats are sold and proceeds are shared between land owner and developer. These are called **revenue sharing arrangements**.

- c) Landowner transfer development rights in lieu of development/construction undertaken by the developer. Developer retains some flats with himself and hands over possession of remaining constructed flats to the landowner. Both of them separately sell the flats in their respective possession. These are called **land sharing arrangements**

#### Brief of GST law on development rights

GST law reintroduced the discussion of development rights by bringing Notification 4/2018 dated 25-01-2018, which pronounced that time of supply of development rights by the landowner to the developer shall be at the time when developer transfers possession or the right in constructed complex, building or civil structure **by entering into a conveyance deed or similar instrument (for example allotment letter)**

However Notification 23/2019 dated 30-09-2019, put the NN 4/2018 to rest w.e.f. 01-10-2019, because of spate of notification introduced w.e.f. 01-04-2019 by virtue of following notifications:

- a) Notification 3/2019- Concessional Tax rates for construction of residential and commercial apartments without availing ITC
- b) Notification 4/2019- Exemption for Transfer of Development Rights for construction of Residential Apartments subject to payment of tax on RCM on date of completion on unbooked flats by promoter
- c) Notification 5/2019- RCM liability of Developer-Promoter for Transfer of Development rights/Long Term Lease by Owner
- d) Notification 6/2019- Time of Supply of RCM liability of developer-promoter of residential and commercial apartments shifted to the date of issuance of completion certificate
- e) N/N 7/2019 dated 29-3-2019-RCM u/s 9(4) applicable on purchases from unregistered person by promoter on shortfall from 80%
- f) Notification 8/2019 dated 29-03-2019]-Tax Rate on Goods (other than Cement and capital Goods) [New Entry 452 Q Introduced]

However the perennial question as to whether development rights are taxable has not been touched by neither of notifications/circulars/order under new or existing laws. In other words whether the development rights can be brought

under the words “**sale of land**” under Para 5 of Schedule III of CGST Act and hence not exigible to GST.

First analysing whether development rights are same as land i.e. immovable property

The term immovable property has not been defined under the GST law. **The General Clauses Act, 1987** defines "immovable property" as to include land, **benefits to arise out of land**, and things attached to the earth, or permanently fastened to anything attached to the earth.

Held by Bombay High Court in **Chheda Housing Development ... vs Bibijan Shaikh Farid And Ors. on 15 February, 2007**

“.....FSI/TDR being a benefit arising from the land, consequently must be held to be immovable property.....”

Hence the development rights are same as land and can be covered by Schedule III to that extent.

Next let us analyse whether transfer of TDRs is covered by “Sale”

Again “Sale” is not defined. In GST law. The definition of Sale is available both in “Sale of Goods Act” as well as “Transfer of Property Act”. Since TDRs are same as "Immovable property", hence it shall not be appropriate to adopt the definition of sale from Sale of goods Act which specifically excludes immovable property and one must resort to Transfer of Property Act

Section 54 of Transfer of Property Act, 1882,

'sale' is a transfer of ownership in exchange for a price paid or promised or part- paid and part-promised.

*Sale how made – Such transfer, in the case of tangible immovable property of the value of one hundred rupees and upwards, or in the case of a reversion or other intangible thing, can be made only by a registered instrument.*

*In the case of tangible immovable property of a value less than one hundred rupees, such transfer may be made either by a registered instrument or by delivery of the property.*

*Delivery of tangible immoveable property takes place when the seller places the buyer, or such person as he directs, in possession of the property.*

**Contract for sale.** – *A contract for the sale of immovable property is a contract that a sale of such property shall take place on terms settled between the parties.*

It does not, of itself, create any interest in or charge on such property.

1. Section 54 deals with transfer of immovable property which includes benefits arising from immovable property. Hence what is contemplated u/s 54 is land **and benefits**. Exclusive transfer of benefits shall not be covered by definition of "Sale" under transfer of property act
2. Further section 54 provides the modes of Sale for “tangible” immovable property only. Hence benefits which are tangible in nature shall also be covered by the definition of sale u/s 54 of transfer of property act but since TDRs are intangibles, hence the definition of "Sale" u/s 54 shall not include the TDRs. **Mumbai Tribunal in Ishver Lal Mohan Dass Kanakia 12-02-2012 (itatonline.org)** has also held that "TDRs" are intangible property.
3. Still Further section 54 of the Transfer of Property Act covers transfer of ownership of immovable property in exchange for "price".

**Madras High Court in Madam Pillai vs Badrakali Amal (1922) 42 MLJ 410**

has said that price u/s 54 of Transfer of property act must be money only. If it is some thing else , not being money, in exchange for land, then it shall be covered by definition of exchange u/s 118 of transfer of property Act. In case of TDRs, land owner generally transfers development rights in exchange for construction rights, hence it fails to satisfy the meet the definition of "price". As per section 2(10) of the Sale of Goods Act also, “price” means the money consideration for a sale of goods. The cases of cash sale where land is sold along with development rights are cases of outright sale of land and no separate sale of development rights is normally undertaken.

Hence the transfer of TDRs can not fall in the section 54 of the transfer of property act.

## Conclusion

From the discussion above it is clear above that sale u/s 54 does not cover the transfer of development rights and hence it can be concluded that though TDRs form part of land, can not be brought under ambit of "Sale of Land" under Schedule III.

Hence the transfer of development rights can not be said to be outside the purview of GST.