

GST on Transfer of development rights or long term lease

- sitapatirao@yahoo.co.in
- | Goods and Services Tax - Articles
- 09 Jan 2020
- 10,521 Views (As on 16.6.2020)

GST on Transfer of development rights or long term lease by landowner to promoter

Dear colleagues, before going to subject we have to refer an important definitions of the following words as per GST Law,2017 for more clarity.

1. Meaning of Development Right:

The term development right has not been defined in the GST Law or the notification issued in this regard. It's a general practice for the landowner to transfer development rights in the land to the promoter. In lieu of such rights, along with the proportionate share in the land . The developer provides money or a fixed quantity of flats to the land owner or share in the revenue from sale of the flats or combination of three. For the construction services provided by the developer to the to the landowner. The landowner would not make any monetary payment to the developer , but only grant development rights concomitant to the land coupled with the agreement to transfer the proportionate land. The promoter would then be entitled to develop a complex or an agreed number of flats on such land and be entitled to sell his proportionate undivided share of land, remaining the proceeds from such sale.

Development Right (DR) refer to the rights that permit promoters to modify or improve their property within the limitations of the law. These rights add value to a property as they represent the development potential of the property. Such rights are conferred on the landowners by the local authority that is responsible for regulating and use in the jurisdiction.

The definition of "Development Right" defined in section 2(9A) of the Maharashtra Regional and Town Planning Act,1966," Development right" means right to carry out development or to develop the land or building or both and shall include the transferable development right in the form of right to utilize the "Floor Space Index" of land utilizable either on the remainder of the land partially reserved for a public purpose or elsewhere, as the final Development Control Regulations in this behalf provide.

In certain circumstances, the development potential of a plot of land may be separated from land itself and may be made available to/by the owner of land in the form of development rights. Nevertheless, inspite of notification regarding taxability of **Transferable development rights (TDR)** in GST, ambiguity remains regarding taxability of inseparable TDR as to whether the same are liable to GST in the hands of the landowner.

To define the development rights with respect to joint development agreement , it is necessary to discuss the concept of floor area ration (FAR) of floor space index (FSI). FAR may be used by the authorities to limit the urban density. While it directly limits building density , indirectly it also limits the number of people that a building can hold, without controlling a building's external shape.

Ex: if plot of 1000 sq.mt.is required to adhere to a 2.5 FAR, then the total area of all floors in all buildings on the lot should not be more than 2500 sq.mt. A promoter may plan either a double story building consuming the entire allowable area in two floors , or a multi – story building that arises higher above the plan of the land.

In case of joint development agreement , the landowner transfers proportionate land coupled with Development Right (DR) for construction. Generally, these two rights cannot be separated and intention of the landowner is to transfer proportionate FAR for a consideration in the form of constructed flats/units.

2. There are 3 types of Joint Development agreements:

Type-1: Share of profits from the project: Under this type, the promoter and landowner share the profit from the development of project. Such cases might be treated as an unincorporated Joint Venture (JV) which is subject to independent taxation.

Type-2: Fixed sum percentage on the consideration charged to the buyers of Unit: Under this type, the promoter collects and remits a fixed percentage of consideration charged from the buyers of the units to the landowner towards the land. The consideration received from the sale proceeds before completion certificate shall be subject to GST in the hands of promoter, however, units sold after completion certificate shall be out of purview of GST.

Type-3: Allotting free units out of constructed space to landowner: Under this system, free units are allowed to the landowner in lieu of land consideration. This is a barter transaction between the landowner and the promoter where the landowner transfers the land and the promoter transfers the part of constructed property to the land owner. However, the definition of supply under section 7 (1) includes all forms of supply such as sale, transfer, barter, exchange etc.. Thus, such supplies shall be taxed under GST Scenario.

3. These following steps to be undertaken with respect of transfer of Development Right(DR):

(1) Promoter is given permission to enter the land for the purpose of carrying out the development activity. However, ownership in land continues with the landowner.

(2) The promoter enters into an agreement with a landowner, wherein the right to develop the land is permanently and irrevocable transferred by the landowner to the promoter. As a consideration for sale of share in undivided land coupled with development right, a fixed consideration and / or a share in sale proceeds and /or ownership of certain developed area is given to the owner by the promoter.

(3) Accordingly, the promoter acquires rights for development and subsequently transfers (by way of sale, lease, license, etc., to end customers) the entire or certain percentage of the developed area (i.e. apartment, units, plots etc.,) partially to the landowner and partially to the third parties.

4. Is development rights are taxable under GST Scenario?

Yes, Under GST Scenario, as per Entry No.5 of Schedule III of the Act, sale of land shall neither be considered as supply of services nor supply of goods. There is no mention in the said Schedule about the rights arising out of land. And now with a very wide definition of service which includes anything other than goods, the Government has taken a stand that even rights arising out of land, like "Transferable Development Right (TDR) /Floor Space Index (FSI) would be taxable under GST Scenario.

5. Exemption in the GST on transfer of TDR, FSI or Long Term Lease: As per **Notification No.04/2019-CT(Rate) 29.3.2019** w.e.f.01.04.2019 vide Entry No.41A and 41B, services by way of transfer of development rights or Floor Space Index (including additional FSI) and Upfront amount (called 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 30 years or more on or after 01st April, 2019 for construction of residential apartments by a promoter in a project, intended for sale to a buyer, wholly or partly is **exempt**, except where entire consideration has been received after issuance of CC or OC. **It may be noted that exemption is not available for construction of commercial apartments.**

Note on purpose of exemption: If we carefully note, we would find that exemption is available only if the development rights (DR) or the long term lease (LTL) are used by the promoter for making taxable supply. There is no exemption where consideration is received after completion of construction by the promoter, which is not supply.

Had there been no exemption and thus, the Promoter would be liable to pay tax, then he would have claimed **input tax credit** against the output liability of construction service.

6. Procedure to be followed to calculation of exemption on TDR towards residential units in a mixed project:

GST payable on transfer of DR or FSI or LTL for construction of the project X Carpet area of the residential apartment in the project /Total carpet area of the residential and commercial apartments in the project.

7. Transfer of "Development Rights" to a builder for construction is "not for sale":

Definition of the term 'Promoter' includes a person who constructs or causes to be constructed an independent any building or a building consisting of apartments or converts an existing building or a part thereof into apartments for the purpose of selling all or some of the apartments to others.

As per **Notification No. 04/2019-CTR**, Entry No.41A and 41B includes phrases——— for construction of residential apartments by a promoter in a project, intended for sale to a buyer wholly or partly——— Thus, exemption under Entry No.41A and 41B is available when the residential units are constructed with the intention for sale——,

Similarly, **Notification No.06/2019-CTR** postpones the liability to pay GST on transfer of Development Rights (DR) to the date of Completion Certificate/ Occupancy Certificate only in case of promoter, who constructs the residential /commercial units for sale, wholly or partly. Similarly reverse charges provisions vide **Notification No.05/2019-CTR** is applicable only where recipient of service is Promoter.

Further, if the construction is “NOT FOR SALE” ,then it is out of scope of RERA Act and out of scope of this new rate regime too However, if some /many units could not be sold due to any reason that does not mean the project was not intendant for sale.

Where person constructs the units without any intention of sale (for the purpose of renting, office building etc.,) then neither **Notification No.04/2019-CTR** nor **Notification No . 06/2019 –CTR** is applicable nor such person would be termed as “promoter” . The question arises, “whether the and owner is liable to pay GST or the builder , and at which time and at what time?

Where the project is not for sale , wholly ,taxability of transfer of “Development Rights” (DR) will be as under:-

(i) **Notification No.4/2018-CTR dated, 25th Jan,2018** will be applicable, which postpones the time of supply to date of CC/OC,

(ii) Development Rights supplied is taxable on forward charge basis in the hands of landowner,

(iii) To avail the benefit under **4/2018-CTR**, landowner must be a registered persons,

(iv) On the date of Occupancy Certificate/ Completion Certificate , landowner shall pay tax in cash on supply of Development Rights,

(v) Valuation of Development Rights will be the “cost of Construction”. It may be noted that deemed value(in Para 2 of **Notification No.11/2017-CTR** and Para-2A as amended by **Notification No.03/2019-(CTR)** is not applicable if the project is NOT FOR SALE, and

(vi) Since the project is not for sale, Input Tax Credit will not be available to the builder. Like RCM liability on shortfall-tax liability on inward supplies from unregistered persons will not be applicable.

> Whether the units allotted to the landowner in terms of joint development agreement shall be treated as units booked before Completion Certificate/ Occupancy Certificate. The units allotted to or retained by the landowner are the consideration of transfer of Development Rights . Here the promoter is providing the construction service to the landowner against value of development tights transferred by the landowner.

> The value of construction service in respect of such apartments shall be deemed to be equal to the total amount charged for similar apartments in the project from the independent buyer nearest to the date on which such Development Rights or Floor Space Index is transferred to the promoter, less the value of transfer of land at the specified percentage.

> GST on transfer of Development Rights/ Long Term Lease is payable in respect of unbooked units , which belongs to the Promoter. For Example: out of 1000 units 40 are given to landowner as a consideration for transfer of Development Rights and the landowner could ne sell 5 units of his share during construction, through builder has sold 60 units before Completion Certificate/Occupancy Certificate , in that case, builder-promoter is not required to pay any GST on transfer of Development Rights.

8. Reverse Charge Mechanism: As per **Notification No.05/2019 – CT(Rate) dated.29.3.2019** w.e.f.01.04.2019 , Reverse Charge Mechanism is liable to pay on Transfer of Development Rights/ Long Term Lease under GST Scenario as per below table:

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 (TDR) 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 construction 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

When Reverse Charge is Payable on Development Rights/ Floor Space Index as per Notification No.04/2019-CTR(Rate) dated.29.03.2019 and Notification No.06/2019 CTR(Rate) dated.29.03.2019 (Special Provisions w.e.f.01.04.2019). Here with I am providing When Reverse Charge is Payable in the below table form for better understanding:

S. No.	Transfer of	Nature of Construction.	Mode of payment of consideration for transfer	Time of supply
1.	DR/FSI	Residential	Money or construction service wholly or partly	At the time of issuance of CC/OC
2.	DR/FSI	Commercial	Construction Service, Wholly or Partly	At the time of issuance of CC/OC
3.	DR/FSI	Commercial	Money	At the time of transfer of DR/FSI
4.	LTL	Residential	Money or construction service wholly or partly	At the time of issuance of CC/OC

5.	LTL	Commercial	Money or construction service wholly or partly	At the time of transfer of LTL
----	-----	------------	--	--------------------------------

9. Value of supply of Transfer of Development Rights:

(i) We have to refer the **Notification No.04/2019-CT(Rate) dated. 29.03.2019** vide Para No.1A & 1B for calculation of value of supply of Transfer of Development Right under GST Scenario. Value of supply of service by way of transfer of Transfer of Development Rights (TDR) or Floor Space Index (FSI) by a person i.e. landowner to the promoter against consideration in the form of residential or commercial apartments shall be equal to the value of similar apartments charged by the promoter from the independent buyers nearest to the date on which such TDR or FSI is transferred to the promoter.

(ii) Value of portion of residential or commercial apartments remaining un-booked on the date of issuance of Completion certificate /Occupancy Certificate.

10. Tax Rate applicable on transfer of Development Right or Long Tern Lease or Floor Space Index under GST Scenario:

(i) **Residential Apartments:** @18% Tax payable shall not exceed 1% of the value of TDR, FSI and LTL as the case may be , in case of affordable residential apartment and 5% of the value in case of residential apartments other than affordable residential apartment remaining un-booked on the date of issuance of Completion Certificate/ Occupation Certificate vide **notification no. 04/2019-CT (R) dated.29.03.2019** (II proviso to the Conditions specified in entries 41A and 41B.

(ii) **Commercial Apartments:** @18% on value of portion of residential apartments remaining un-booked on the date of issuance of Completion Certificate/ Occupation Certificate shall be deemed to be equal to the value of similar apartments charged by the promoter nearest to the date of issuance of Certificate/ Occupation Certificate.

11. Tax liability of transfer of Development Right/ Floor Space Index before 01.04.2019: Before 1st April,2019, transfer of Transfer of Development Rights was taxable on forwarded charge basis in the hands of landowner. However, as per **Notification No.04/2018-CT(Rate) dated,25th Jan,2018** the Government has postponed the time of supply on transfer of TDR to the date of Certificate/ Occupation Certificate. The said notification read as:-

“ The Central Government hereby notifies the following classes of registered persons, namely:

(a) Registered person who supply development rights to a developer, builder, construction company or any other registered person against consideration, wholly or partly, in the form of construction service of complex, building or civil structure ; and

(b) Registered persons who supply construction service of complex , building or civil structure to supplier of development rights against consideration , wholly or partly in the form of transfer of development rights.

As the registered person in whose case the liability to pay central tax on supply of the said services, on the consideration received in the form of development rights referred to in clause(a) above and in the form of construction service referred to in clause (b) above,

Shall arise at the time when the said developer , builder, construction company or any other registered person, as the case may be, transfers possession or the right in the constructed complex, building or civil structure , to the person supplying the development rights by entering into a conveyance deed or similar instrument like allotment letter.

Thus , in short, taxability of (i) transfer of Development Rights by the landowner and (ii) construction service provided by the promoter to the land owner, shall arise at the time when the promoter transfers possession or the right in the constructed unit to the landowner. The said notification applies to the residential as well as commercial units.

> It is important to note that the Notification No 4/2018=CT-(rate) is effective from 25th January,2018. For the period from 1st July,2017 to 24th January,2018 the taxability of transfer of TDR qua landowner and construction service qua promoter arose at the time of transfer of TDR.

> It may also be noted that this notification requires that the landowner must also be registered under GST Act(Builders/Developers would always be registered). Since the transfer of development right is taxable in the GST, if the value of TDR exceeds the threshold limit , then the landowner would require mandatory for taking GST registration, in that case, benefit of said notification could be availed. So, colleagues registration is mandatory for landowner and Promoter for taking registration to get the benefit of notification.