

TAXABILITY OF PLOTS UNDER GST

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As per Section 9 of CGST Act, GST shall be payable on supply of goods or supply or both. Section 2(52) defines goods to mean as “every kind of moveable property”. Section 2(102) define “service” mean anything other than “goods”. Therefore, it is necessary to understand the meaning of words “moveable property”. The moveable property has been defined in Section 2(11) of Sales of Goods Act, 1930.

2: The term immovable property has not been defined under CGST Act, 2017. Hence, we have to fall back upon the definition as given in various enactments namely - Section 3(26) of General Clauses Act define “immovable property”:-

(26) "immovable property" shall include land, benefits to arise out of land, and things attached to the earth, or permanently fastened to anything attached to the earth;

3: Section 2(z) of Real Estate (Regulation & Development) Act, 2016 (hereinafter called RERA) define

“immovable property” includes land, buildings, rights of ways, lights or any other benefits arising out of land and things attached to the earth or permanently fastened to anything, which is attached to the earth, but not standing timber, standing crops or grass”

4: Section 2(6) of Registration Act also define “immoveable property”

“immovable property” includes land, buildilngs, hereditary allowances, rights to ways, lights, ferries, fisheries or any other benefits to arise out of land, and things attached to the earth, or permanently fastened to anything which is attached to the earth, but not standing timber, growing crops nor grass.

5: The Hon’ble Supreme court in C.I.T. Andhra Pradesh v. Taj Mahal Hotel, MANU/SC/0239/1971 has observed that “considering the scope of meaning of the word 'plant', held, **"where a word is not defined in a statute, it must be construed in its popular sense.** Therefore, the word “land” as appearing in Clause 5 of Schedule III has to be understood in popular sense – and interpretational solace could be drawn from Land Acquisition Act as well.

6: The Clause 5 of Schedule III attached to CGST Act reads as under:-

5.Sale of land and, subject to Clause (b) of paragraph 5 of Schedule II, sale of building.

7: In view of the fact that in Clause 5 of Schedule III, the word appearing is “Land” and not “immoveable property” and, therefore, we have to understand the meaning and scope of the word “Land”. Unfortunately, the land has not been defined in CGST Act and consequently we have to look to (i) either popular meaning as has been held in CIT Vs. Taj Mahal Hotel

(Supra) or as defined under other laws viz (i) Land Acquisition Act, 1894 (ii) Bombay Land Revenue Act, 1879.

8: Section 3(a) of Land Acquisition Act, 1894, the expression “land” include benefits that arise out of land and things attached to earth or permanently fastened to anything which is attached to the earth. Likewise, Section 3(4) of Bombay Land Revenue Code, 1879 define “land” includes benefits to arise out of land and things attached to the earth or permanently fastened to anything attached to the earth.

9: The Supreme Court, while interpreting the word “land” as appearing in Land Acquisition Act, in Municipal Corporation of Greater Bombay vs. The Indian Oil Corporation Ltd: MANU/SC/0171/1991 has held as under:-

The question then is whether it is a land? Indisputably the definition of 'land' also is of an inclusive definition. Its accompaniments are land which is being built upon or is built upon or covered with water; benefits to arise out of land; things attached to the earth or permanently fastened to anything attached to the earth and rights created by legislative enactment over any street.

10: The Hon'ble Supreme Court in the case of State of Maharashtra Vs. Reliance Industries Ltd.: MANU/SC/1186/2017, has noted the following definitions of land given in various legal dictionaries.

The Dictionary of English Law [1959 edn., Vol. 2, p. 1053 by Earl Jowitt] LAND, in its restrained sense, means soil, but in its legal acceptation it is a generic term,

comprehending every species of ground, soil or earth, whatsoever, as meadows, pastures, woods, moors, waters, marshes, furze, and heath; it includes also houses, mills, castles, and other buildings; for with the conveyance of the land, the structures upon it pass also. And besides an indefinite extent upwards, it extends downwards to the globe's centre, hence the maxim, Cujus est solum ejus est usque ad caelum et ad inferos; or, more curtly expressed, Cujus est solum ejus est altum (Co. Litt. 4-a).

Words and Phrases Judicially Defined (By Roland Burrows-Vol. III, 1944 edn., p. 206)

The word "land" would be variously understood by different persons. To a farmer the word "land" would not mean his farm buildings; to a lawyer the word would include everything that was upon the land fixed immovable upon it. Smith v. Richmond per Lord Halsbury, L.C., at p. 448.

The Law Lexicon

The word "land" is a comprehensive term, including standing trees, buildings, fences, stones, and waters, as well as the earth we stand on. Standing trees must be regarded as part and parcel of the land in which they are rooted and from which they draw their support.

11: It would also be beneficial to understand the meaning and scope of “immoveable property” as interpreted in various judgments of Hon’ble Supreme Court.

12: While interpreting the word “immoveable property” in *Ananda Behra Vs. State of Orissa*: MANU/SC/0018/1955, the Supreme Court has held that a “profit a prendre” is a benefit arising out of land and that in view of Clause (26) of Section 3 of the General Clauses Act, it is immovable property within the meaning of the Transfer of Property Act. Now the question arises what is the meaning of the words “profit a prendre”.

13 The Supreme Court in *State of Orissa Vs. Titaghur Paper Mills Company Limited* : MANU/SC/0325/1985, while, relying upon Halsbury’s Law of England, defined “profit a prendre” in the following words:-

115. The meaning and nature of a “profit a prendre” have been thus described in Halsbury's Laws of England, Fourth Edition, Volume 14, paragraphs 240 to 242 at pages 115 to 117:

240. Meaning of 'profit a prendre'

A profit a prendre is a right to take something off another person's land. It may be more fully defined as a right to enter another's land to take some profit of the soil, or a portion of the soil itself, for the use of the owner of the right. The term 'profit a prendre' is used in contradistinction to the term 'profit a prendre', which signified a benefit which had to be rendered by the possessor of land after it

had come into his possession. A profit a prendre is a servitude.

241. Profit a prendre as an interest in land.

A profit a prendre is an interest in land and for this reason any disposition of it must be in writing. A profit a prendre which gives a right to participate in a portion only of some specified produce of the land is just as much an interest in the land as a right to take the whole of that produce....

242. What may be taken as a profit a prendre.

The subject matter of a profit a prendre, namely the substance which the owner of the right is by virtue of the right entitled to take, may consist of animals, including fish and fowl, which are on the land, or of vegetable matter growing or deposited on the land by some agency other than that of man, or of any part of the soil itself, including mineral accretions to the soil by natural forces. The right may extend to the taking of the whole of such animal or vegetable matters or merely a part of them. Rights have been established as profits a prendre to take acorns and beech mast, brakes, fern, heather and litter, thorns, turf and peat, boughs and branches of growing trees, rushes, freshwater fish, stone, sand and shingle from the seashore and ice from a canal; also the right of pasture and of shooting pheasants. There is, however, no right to take seacoal from the foreshore. The right to take animals *ferae naturae* while they are upon the soil belongs to the owner of the soil, who may grant to others as a profit a prendre a

right to come and take them by a grant of hunting, shooting, fowling and so forth.

116: A profit a prendre is a servitude for it burdens the land or rather a person's ownership of land by separating from the rest certain portions or fragments of the right of ownership to be enjoyed by persons other than the owner of the thing itself (see Jowitt's Dictionary of English Law, Second Edition, Volume 2, page 1640. under the heading "Servitude"). "Servitude" is a wider term and includes both easements and profits a prendre (see Halsbury's Laws of England, Fourth Edition, Volume 14, paragraph 3, page 4).

14: In view of the above discussions, various activities such as laying down (i) water pipe lines (ii) storm water pipelines (iii) sewer lines (iv) electric poles permanently fastened to the earth (iv) development of parks; (v) play ground (vi) installation of underground pipes for gas, oil and water, in my view, would fall within the realm of “profit a prendre”

15: The Supreme Court in State of Orissa Vs. Titaghar Paper Mills Company Limited MANU/SC/0325/1985, defined “immovable property” as appearing in General Clauses Act:-

Clause (26) of Section 3 of the General Clauses Act, 1897, defines "immovable property" as including inter alia "benefit to arise out of land". The definition of "immovable property" in Clause (f) of Section 2 of the Registration Act 1908, illustrates a benefit to arise out of land.

16: Further, in Titaghar Papers Mills Ltd (supra), the court has held that what constitutes benefits arising out of land have been

summarized in Mulla on "The Transfer of Property Act, 1882", and it would be pertinent to reproduce the whole of passage. The passage (at pages 16-17 of the Fifth Edition) is as follows:

A 'benefit to arise out of land' is an interest in land and therefore immovable property. The Registration Act, however, expressly includes as immovable property benefits to arise out of land, here diary allowances, rights of way lights, ferries and fisheries'. The definition of immovable property in the General Clauses Act applies to this Act. The following have been held to be immovable property: varashasan or annual allowance charged on land; a right to collect dues at a fair held on a plot of land; a hat or market; a right to possession and management of a saranjam; a malikana; a right to collect rent or jana: a life interest in the income of immovable property; a right of way; a ferry; and a fishery; a lease of land.

17: The Constitution Bench of Hon'ble Supreme Court in Ananda Behera and Ors. vs. The State of Orissa: MANU/SC/0018/1955 has defined "immoveable property" in the following words:-

Section 3(26) of the General Clauses Act defines "immovable property" as including benefits that arise out of the land. The Transfer of Property Act does not define the term except to say that immovable property does not include standing timber, growing crops or grass. As fish do not come under that category the definition in the General Clauses Act applies and as a profit a prendre is regarded as a benefit arising out of land it follows that it is Immovable

property within the meaning of the Transfer of Property Act.

18: The Supreme Court in *State of Orissa and Ors. vs. Titaghur Paper Mills Company Limited*: MANU/SC/0325/1985, has observed as under:-

Thus, while trees rooted in the earth are immovable property as being things attached to the earth by reason of the definition of the term "immovable property" given in the General Clauses Act, the Orissa General Clauses Act and the Registration Act, read with the definition of the expression "attached to the earth" given in the Transfer of Property Act.

19: The Supreme Court in *Sunil Siddharth vs. CIT* MANU/SC/0164/1985, while considering the expression "Transfer of Property", has observed as follows:

"In its general sense, the expression "Transfer of Property" connotes the passing of rights in the property from one person to another. **In one case there may be a passing of the entire bundle of rights from the transferor to the transferee. (emphasis supplied).**

20: We may also see as to whether grant of development right would fall in Clause 2(a) of Schedule II of CGST Act or not? Schedule II deems certain specified transaction as supply of goods or services. Entry No.2(a) deems any lease, tenancy, easement, license to occupy land as supply of services.

21: Clause 2(a) of Schedule-II speaks of mere permission to occupy land and enjoy the same as supply of services – without

ownership rights. However, when there is complete and full transfer, alienation or divesting of all ownership rights, title and interest in the immoveable property by way of execution of Registered Sale Deed or Registered Conveyance Deed or Title Deeds, this transaction, in my firm view, shall not fall under Entry No.2(a) of Schedule II, as there would a permanent transfer, alienation and/or disposal of immoveable property.

22: The Hon'ble Supreme Court in a landmark judgment in the case of Suraj Lamp and Industries Pvt. Ltd. vs. State of Haryana MANU/SC/1222/2011 has held that the land, building or civil structure and other immoveable property could be transferred by way of execution of Registered Sale Deed/Conveyance Deed. The following observations were made.

12: Any contract of sale (agreement to sell) which is not a registered deed of conveyance (deed of sale) would fall short of the requirements of Sections 54 and 55 of Transfer of Property Act and will not confer any title nor transfer any interest in an immovable property (except to the limited right granted under Section 53A of Transfer of Property Act). Section 54 of Transfer of Property Act enacts that sale of immoveable property can be made only by a registered instrument and an agreement of sale does not create any interest or charge on its subject matter.

16: We therefore reiterate that immovable property can be legally and lawfully transferred/conveyed only by a registered deed of conveyance. Transactions of the nature of 'GPA sales' or 'SA/GPA/WILL transfers' do not convey title and do not amount to transfer, nor can they be

recognized or valid mode of transfer of immoveable property.

23: The Hon'ble Bombay High Court in *Sadoday Builders Private Ltd. and Ors. vs. The Jt. Charity Comm.*: MANU/MH/0791/2011, has observed as under:-

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."

24: The Hon'ble Tribunal in *DLF Commercial Projects Corporations vs. Commissioner of Service Tax, Gurugram* (22.05.2019 - CESTAT - Chandigarh) : MANU/CJ/0032/2019, has observed as under:-

As the Hon'ble High Court observed in the case of *Sadoday Builders Private Ltd. and Ors. (supra)* that transferable 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.

25: In view of the above discussions, the various activities partake the character of "development rights" in view of the judgment of Hon'ble Bombay High Court and Hon'ble

Tribunal, held to be benefits arising out of land. It would be noticed that even the definition of land, as given in Section 3(a) of Land Acquisition Act, inter-alia, says that the land would include the benefits arising out of land. The various activities such as laying down (i) pipe lines (ii) storm water pipelines (iii) sewer lines (iv) electric poles permanently fastened to the earth (iv) development of parks; (v) play ground (vi) installation of underground pipes for gas, oil and water would fall in the realm of land. Hence, all developmental activities are, in my humble view, benefits arising out of land and consequently fall in Clause 5 of Schedule III and hence NO supply and resultantly not taxable. On the lighter side, girl with or without jewellery would still be bride at the time of marriage – land be it raw land or developed land, would still be land only and its character would not change.

26 In my view, sale of plot is akin to sale of land and activities like road laying, drainage works, electricity supply facilities are incidental to development and does not change character of land. The utilities, road and parks are not supplied to the purchaser of plot but surrendered to the Public Authority/Municipal Corporation and rights therein are vested in the public authority.

27: By virtue of aforesaid judgments, all other facilities which had been installed, erected and commissioned over the open un-developed land, so as to make it “developed plot” and title to those facilities would also be conveyed to the plot-holder, a registered deed of documents would be necessary and hence, the value addition is required to form part of total consideration

shown in the Sale Deed or Conveyance Deed or Title Deed which is registered under Section 17 of Indian Registration Act.

28: Can we perceive a situation whether Clause 5 Schedule III would cover or encompass only raw land and not developed plot of land ?.

29: The AAA of Karnataka, Gujarat, Madhya Pradesh have held that development of land and selling it as plots is essentially a supply of service and hence these transactions are taxable.

a) M/s Satyaja Infratech (AAA Guj. 20.9.2019)

b) M/s Maarq Spaces (P) Ltd (AAA Kar 30.9.2019)

c) M/s Vidit Builders (AAA MP 6.1.2020)

d) Sh Dipesh Anil Kumar Naik(AAR Guj 19.5.2020)

30: How, Ld AAA decided the cases in totally biased and prejudiced mannter. The classic case is AAA Gujarat in M/s Satyaja Infratech dated 20.9.2019 2020-TIOL-80-AAR GST wherein it has been held that the entire sale consideration i.e. 100% of the plot value would be taxable. Can 100% consideration which is inclusive of value of land would be subject to tax – answer is BIG NO.

31: The Clause 5 of Schedule III to CGST Act “ Sale of land and, subject to Clause (b) of paragraph 5 of Schedule II, sale of building” shall neither be treated as supply of good nor supply of services. The development rights are akin to the benefits

arising out of land and hence outside the purview of taxation by virtue of Schedule-III to CGST Act. In my view, the Clause 5 of Schedule III would cover all activities that are directly and closely connected to the purchase and sale of land including all activities in connection with the development of plots. Therefore, all other connected activities (which are part of developmental activities) which are incidental or ancillary to the main activities connected with the development of land would be outside the purview of supply of either goods and services.

32: Notwithstanding the above, yet as a bundant caution, if it is decided to pay tax, the following route could be followed:-

a):The Developer to carry out all developmental activities himself and develop the plots out of land and sell the developed plots upon execution of registered Sale Deed/Conveyance Deed etc upon receipt of sale consideration. Since, it is self service, no GST would be payable.

b): To appoint either one or more than one contractors to undertake various developmental activities. The contractors would be raising taxable invoices.

c):The Developer can avail ITC of tax so paid on the taxable invoices of contractors.

d):After development, the Developer will have to raise (i) Bill towards sale of developed land/plot (ii) Taxable Invoice for proportionate development charges which were incurred in the whole project and charge GST and pay to

the Government after claiming ITC of tax so paid on the invoices of contractors.

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