

# **P.R. GUPTA & CO.**

## **CHARTERED ACCOUNTANTS**

August 8, 2020

### **GST IMPLICATIONS ON ASSOCIATION OF APARTMENT OWNERS**

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#### **I. Preamble :**

These days the concept of 'Association of Apartment Owners' is gaining lot of importance to facilitate the upkeep of the residential project which a Builder has developed as a Group Housing Complex. These housing complexes in the state of Uttar Pradesh are governed by the provisions of 'Uttar Pradesh Apartment (Promotion of Construction, Ownership and Maintenance) Act, 2010' as amended by 'Uttar Pradesh Apartment (Promotion of Construction, Ownership and Maintenance) (Amendment) Act, 2016'. In short it is more popularly called 'U.P. Apartment Act'. This association of apartment owners is formed under the provisions of this act.

In fact this association may also be called as Apartments Owner Association (AOA) which term is more popular than 'Association of Apartment Owners' and is used inter-changeably. Before discussing the implications of provisions of "Goods & Service Tax Act" (GST) on an AOA, it will be important to understand as to how a project is executed by a builder, flat is sold to apartment owner, what are common areas and how AOA is formed and various functions performed it and the laws governing these AOA.

## **II. Sale of Apartment by Builder :**

When a ‘Housing Society Project’ is developed by a Builder/Promoter, first of all he forms a separate company and acquires land on lease hold/ freehold basis from Local Authority. He then builds the flats and also develop the common area infrastructure. All these assets are held as stock-in-trade in the books of builder/promoter unless he chooses to convert whole or part thereof as ‘Capital Assets’.

He then sells these flats to individuals and a sub-lease is registered in the name of flat owner. This sub-lease or ‘apartment deed’ is a tripartite agreement between the Noida Authority who has provided the land, builder and flat owner and is registered after paying the stamp duty under Registration Act 1908. Through this apartment deed, the ownership rights of flat and proportionate land area and proportionate common area infrastructure are transferred to individual flat owners and thereafter he becomes entitled to possession of the apartment.

Builder recovers the cost of flat and the infrastructure facility along with his margin from the flat owners. During construction period, Service tax/GST is charged by the builder. With the change of rules in GST, refund of input credit has also been made by the builder to flat owners in some cases. No GST is chargeable on sale of flat made after the completion/occupation certificate is issued.



### **III. Impact of RERA:**

It may be noted that the Real Estate (Regulation & Development) Act, 2016, (RERA) is a central act. It has been notified in all the states from different dates and rules have been framed state wise. The purpose of the Act is to protect the interest of consumers in real estate sector and provision of speedy adjudication mechanism. In certain circumstances RERA provisions are also applicable on projects which had started before the coming into effect of RERA.

It may be noted that in the 'RERA', it is provided that provisions of this act will be over-riding if any provision is in contradiction with other acts. It will be interesting to note that similar provision of having over-riding effect is also contained in 'UP Apartment Act'. Therefore it will become difficult to ascertain, which Act will over-ride in case of conflict of provisions. The various terms like 'project', 'apartment', 'promoter', 'common areas' and many other terms have been defined differently in both Acts. It may also be noted that there is no such concept of 'Independent Area' in RERA. Therefore lot of care shall have to be taken while complying with the provisions of both Acts.



#### **IV. Common Areas and Facilities of the Project :**

**‘Common Area and facilities’** is defined as per the ‘Uttar Pradesh Apartment (Promotion of Construction, Ownership and Maintenance) Act, 2010’ and means:

- i) The land on which the building is located and all easements, rights and appurtenances belonging the land and building;;
- ii) The foundations, columns. Girders, beams, supports, main walls, roofs/terraces, halls for common use, corridors, lobbies, stairs, stairways, fire-escapes and entrance and exit of the building;
- iii) The basements (areas of common use only), cellars, yards, parks, garden, community centres and common parking areas;
- iv) The premises for the lodging of janitors or persons employed for the management of property;
- v) Installations of central services, such as power light, gas, hot and cold water, heating , refrigeration, air conditioning, incinerating and sewerage;
- vi) The elevators, tanks, pumps, motors, fans, cable pipe line, (TV, gas, electricity etc.), rain water harvesting system, compressors, ducts and in general all apparatus and installation existing for common use;



- vii) Such other common areas and community ~~and commercial~~ facilities as may be specified in the bye laws ( *words 'and commercial' deleted by amendment act 2016*) and
- viii) All other parts of the property necessary or convenient to its existence, maintenance and safety or normally in common use

**Independent area** as per clause (p) of section 3 of the Act means the areas which have been declared but not included as common areas for joint use of apartments and may be sold by the promoter without the interference of other apartment owners. It may be noted that declaration has to be made to the Competent Authority which is 'Noida Authority' for the state of Uttar Pradesh.

**V. Transfer of Common Area & facilities from Builder to AOA:**

Normally builder/promoter forms a different company for providing common area maintenance services to apartment owners. After the formation of AOA, promoter is duty bound to transfer the affairs of the 'common areas and facilities' to AOA. In Section 4(6) of the Act, it is provided that promoter should handover the common area and facilities and original plans and documents etc. to AOA after one year of completion certificate.

The 'Interest Free Maintenance Security' (IFMS) collected by the builder/Promoter from the flat owners is also transferred to the AOA. Since Builder/promoter is the owner of unsold flats, he also becomes the member



and liable to contribute towards common area maintenance and IFMS in respect of unsold flats.

The maintenance company would not be owning any 'infrastructure assets' as these are all recorded in the books of builder and in turn already sold to flat owners. Upon the handover, neither the AOA nor the appointed agency will have ownership rights on these assets. Further if any assets have been acquired of which maintenance company is owner and cost has not been borne by the apartment owners, then AOA can also purchase these assets from Maintenance Company to prevent any disruption in services. In this case, the maintenance company will issue a 'Tax Invoice' to the AOA after charging GST.

## **VI. Formation of an AOA :**

In the state of Uttar Pradesh, the formation of 'Association of Apartment Owners' (AOA) is provided in the 'Uttar Pradesh Apartment (Promotion of Construction, Ownership and Maintenance) Act, 2010'.

Builder/promoter is duty bound to form 'Association of apartment owners' in a time bound manner. AOA is to be formed mandatorily after hand over is given to 60% flats. In fact AOA can be formed one year after the completion certificate is issued to the Project. If builder does not co-operate, then apartment owners can go ahead of their own after giving notice to



builder and Noida authority. No specific approval of any authority is required. The apartment owners then approach the Registrar of Societies and get the association formally registered. Registrar accords the registration after considering all the documents, objections if any raised and ensuring that AOA has incorporated the Model Bye Laws as specified in UP Apartment Act.

All the apartment owners automatically becomes the members of AOA and bound to contribute Rs.1,000 as initial membership fees as per Model Bye Laws. The AOA gives notice of this to every flat owner and they are bound to follow the rules of AOA and contribute towards common area and facilities.

**‘Association of Apartment Owners’** means all the owners of apartment therein, acting as a group in accordance with the bye laws under the Act.

Section 14 of the ‘Uttar Pradesh Apartment (Promotion of Construction, Ownership and Maintenance) Act, 2010’ provides as follows:

(1) There shall be an Association of Apartment Owners for the administration of affairs in relation to the apartments and property appertaining thereto and the management of common areas and facilities.

Provided that in case of ‘Independent area’ or an ‘independent commercial area’, a separate association can be made.



- (2) It is the joint responsibility of Promoter and apartment owners to form an association
- (3) It is obligatory on the part of apartment owner to become member of the association
- (4) On the formation of 'AOA', the management of common areas are deemed to be transferred from Promoter to association
- (5) The Government will notify in the gazette, the model bye laws for the formation and management of 'AOA' and these bye laws will be adopted by the AOA.

**'Apartment Owner'** means the person or persons owning an apartment or the promoter or his nominee in case of unsold apartments and an undivided interest in the common areas and facilities appurtenant to such apartment in the percentage specified in the Deed of Apartment and includes the lessee of land on which the building containing such apartment has been constructed, where the lease of such land is for a period of thirty years or more

## **VII. Functions of AOA :**

The functions of such AOA may be summarized as under:

1. To maintain the common areas and facilities more elaborately defined in UP Apartment Act as elaborated in section IV above.
2. To pay for electricity bills for common areas & water charges
3. To provide Generator facility as a power back up for common areas





4. To provide Generator facility as a power back to flat owners as per individual need
5. To maintain club & Restaurant and provide food and club facilities to members
6. To maintain Banquet halls, mini theatres and similar facilities to the members.
7. To pay for any Govt. dues on the project relating to individual members
8. Services of Plumber, Electrician etc. to individual flat owners.
9. Insurance of common area infrastructure due to fire, theft, natural calamities etc. at reinstatement value.
10. To perform administrative functions of maintaining the Association office and all related work with the functioning of society.
11. Any other objective of common interest to members/flat owners

#### **VIII. Management of AOA :**

To execute these functions, AOA's General Body elects a 'Board', who would manage these functions on behalf of the owners of flats. The AOA also needs to appoint a 'Manager'. The AOA will be providing services to all flat owners who may or may not be the members of AOA. It is obligatory on the part of an apartment owner to become members of the association.



**IX. Appointment of Maintenance Agency by AOA:**

Performing these functions of common area maintenance is a humungous project by itself and normally AOA engage a specialized External Agency for this purpose. The physical possession of ‘common infrastructure assets’ is taken by this agency for the purpose of its up-keep and proper and regular maintenance as per specification given by AOA and also responsible of complying with all the applicable statutory rules and regulations from time to time with due-diligence.

The external maintenance agency will charge the AOA the ‘common area maintenance charges’ (CAM) and in turn AOA will issue bills to its members. This way society will be paying GST to the external agency and then claiming this as input credit in the output liability on collection from members.

**X. Receipt and Expenses of AOA:**

**These may be the broad area of revenue/receipts by the AOA:**

- i. Interest on IFMS and other surplus funds of AOA
- ii. Collection from members towards the membership fees
- iii. Collection from flat owners towards Electricity for common area



- iv. Collection from flat owners towards water charges, property tax or other dues payable to Govt. Authorities
- v. Collection from members towards sinking fund ( for future use)
- vi. Collection from Flat Owners ( who may or may not be members) towards the CAM charges including Generator charges
- vii. Collection from flat owners towards letting out of Banquet hall & other facility like food etc. to flat owners alone and not to outsiders.

**These may be the expenses whether revenue or on capital account**

- i) Administrative expenses of AOA
- ii) CAM charges to be paid to external Agency
- iii) Payment of Electricity
- iv) Payment of Govt. dues
- v) Purchase /replace of any infrastructure asset in future like lift etc.

**XI. GST Registration by AOA:**

Now we come to the crucial question whether to obtain GST registration by AOA and at what point of time? To understand first of all let us understand a few requirements under GST Laws



### **When a GST registration is required?**

- a) GST registration is required when the value of supplies covered by applicability of GST whether exempt or not (Excluding Supplies outside the purview of GST) exceed Rs 20 Lacs in a year. If once the limit exceed, and GST registration is taken, GST registration will continue even if value of supplies fall below 20 Lacs.
- b) There is another case where GST registration becomes compulsory i.e when a society needs to pay GST under reverse charge (RCM) .Normally it would be applicable when advocate fees is being paid by AOA. Once a GST registration is taken, then it will also have to charge GST on Taxable supplies irrespective of turnover.
- c) Further to avail benefit of 'Input credit' of GST, it becomes advisable to register under GST even if not mandatorily required to do so.

### **Whether AOA will at all be covered by provisions of GST Act?**

Though AOA (Society) is a non-profit motive organization but the GST provisions will be applicable because of following considerations.

- a) That tax is on "Supply" of goods or services (Section 9 of CGST Act, 2017)



- b) “Supply” includes all forms of supply of goods or services or both such as sale, transfer, barter, exchange, licence, rental, lease or disposal made or agreed to be made for a consideration by a person in the course of furtherance of a business and import of services for a consideration whether or not in the course or furtherance of business;. ( Section 7(1))
- c) “Business” includes: Provision by a club, association, society, or any such body (for a subscription or any other consideration) of facilities or benefits to its members. (Section 2(17) of the CGST Act).

## **XII. GST Exemption/ Relaxations to AOA:**

Entry 77 in Exemption Notification No – No.12/2017 Central Tax (Rate) read with Notification 2/2018 Central Tax(Rate) exempts services by an unincorporated body or a non- profit entity registered under any law for the time being in force, to its own members by way of reimbursement of charges or share of contribution up to an amount of Seven thousand and five hundred rupees per month per member for sourcing of goods or services from a third person for the common use of its members in a housing society or for the provision of carrying out any activity which is exempt from the levy of Goods and service Tax;



**Therefore the following may be noted for availing above exemption:**

- i) Services are given by an unincorporated body or a or a non- profit entity registered under any law for the time being in force,
- ii) Services are provided for the common use to members.
- iii) Charge should be by way of reimbursement of charges or share of contribution
- iv) It should be in relation to for sourcing of goods or services from a third person

**Clarifications by GST Authorities:**

**Circular No. 109/28/2019-GST dated 22/07/2019 issued by Tax Research Unit of Department of Revenue, Ministry of Finance, Govt. of India has clarified as under:**

- a) The exemption from GST on maintenance charges by RWA from residents is available only if such charges do not exceed Rs. 7,500 per month. In case charges exceed Rs. 7,500 per month, per member, the entire amount is taxable.



- b) RWA are entitled to take credit of 'Input Tax Credit' (ITC) on capital goods (generator, water pumps, lawn furniture etc., goods (taps, pipes, other similar hardware fittings etc.) and input services

**FAQ dated 05/09/2017 in respect of levy of GST on supply of services to the Co-operative Societies etc. has clarified as under:**

- a) Property Tax, Water Tax, if collected by the RWA/ Co-operative Society on behalf of the MCGM from individual flat owners, then GST is not leviable.
- b) GST is not levied on Electricity Charges etc, which are collected under other statutes from individual flat owners. However, if these charges are collected by the Society for generation of electricity by Society's generator or to provide drinking water facility or any other service, then such charges collected by the society are liable to GST.
- c) Sinking fund, repairs & maintenance fund, car parking charges, Non-occupancy charges or simple interest for late payment, attract GST, as these charges are collected by the RWA/ Co-operative Society for supply of services meant for its members such as repair and maintenance services.



**XIII. GST Applicability to Individual Source of Revenue of AOA:**

The undisputable position will be as follows:

**A. Exempt/Non-Taxable:**

- i. Interest on IFMS and other surplus funds of AOA
- ii. Collection from flat owners towards Electricity for common area
- iii. Collection from flat owners towards water charges, property tax or other dues payable to Govt. Authorities
- iv. Common Area Maintenance charges if below Rs. 7,500 per month as explained above.

**B. Taxable:**

- i. Collection from members towards the membership fees
- ii. Collection from members towards sinking fund ( for future use)
- iii. Collection from Flat Owners ( who may or may not be members) towards the CAM charges including Generator charges above Rs, 7,500
- iv. Letting out of Banquet hall & other facility like food etc.
- v. Club charges etc.
- vi. Collection of interest on late payment by members.





#### **XIV. Contentious issues regarding GST Applicability & Limitation of Exemptions:**

##### **1) Whether Association of Apartment Owners should be outside the scope of GST provisions on the principle of “Mutuality”**

The AOA cannot be held for “Profit Motive”. These are purely association of persons to cater to the needs of members.

In a recent case albeit in Service Tax, it has been held by Hon’ble Supreme Court in Calcutta Club that on the principle of “Mutuality”, no service tax is applicable to services being provided to members alone.

##### **2) Whether membership fees collected from members can be treated as Exempt from GST ?**

Appellate Authority of AAA of Maharashtra in Rotary Club of Mumbai Queens Necklace has ruled in favour of the club that no GST would be applicable on membership fees. The following had been noted:

*“The appellant is not providing any specific facility or service to its members against the subscription fees charged from the members as the entire amount is spent towards administrative expenses and therefore it cannot be held that club is carrying on any business activity within the meaning of section 2(17) of CGST Act.”*

Also it will remain to be ascertained that what will happen if the amount is not actually spent but is to be spent in future?



**3) Whether exemption up to Rs. 7,500 is available to apartment owner, who is not a member of AOA ?**

Strictly construing the provisions of the exemption notification, it is provided that it is available to only members of RWA. Therefore if an apartment owners is not a member of AOA, the exemption may not be available. Though 'Uttar Pradesh Apartment (Promotion of Construction, Ownership and Maintenance) Act, 2010' mandates that it is obligatory on every apartment owner to be a member of AOA and rather he becomes automatically the member of AOA.

**4) Whether exemption should be up to Rs. 7,500 or no exemption if amount exceed Rs. 7,500 per month.**

Department has issued circular stating that exemption will not apply once amount exceed Rs.7,500 per month. It may be noted that the need for clarification itself shows that the provision contained in the exemption notification does not means like this. It should be understood that all these are beneficial provisions and that too in a non-profit entity. It leads to anomaly for members where the amount just gets marginally exceed Rs. 7,500.

Therefore exemption or abatement should be given up to an amount of Rs.7,500 per month per member rather than charging on full amount if the charges exceed Rs. 7,500.



**5) Whether AOA will be able to take full credit of ITC ?**

There will be certain restrictions on availing ITC like provision u/s 17(5) Further Rule 42 & Rule 43 will apply and GST shall be disallowed on Input services which are availed for Exempt services. Therefore AOA will not be able to take full credit of the GST input credit and they will have to expense it out in its Income & Expenditure account.

**6) What happens if Common Area Maintenance charges are subsidised due to interest available to society on the IFMS ?**

Now let us take a case where the actual cost of maintenance may be more but the members are charged less due to the availability of interest available on IFMS. The department can raise a dispute as to value of services since AOA and members can be treated as related party.

**7) Interest charged from members for delay in payment of dues ?**

Whether interest charged from members for the delay in payment of dues will attract GST as clarified by department in FAQ? Yes this will be chargeable to GST as it becomes part of the value of services provided. But it should be exempt where it is in respect of services which are exempt from GST.



**XV. Conclusion:**

- The undisputable position in law would be that AOA will need to register under GST in the circumstances as explained earlier. Therefore an Association whether registered or not will have to pay GST @ 18% on the facilities or benefits provided to its members if the facility or benefit provided constitutes a “supply” of services. The rate shall be 5% in case of food services in restaurant. Also GST is to be paid on RCM basis.
- Further rather than to subsidise the ‘Common Area Maintenance’ charges due to interest available on interest available on IFMS and collecting ‘Sinking Fund’ separately, it will be advisable to charge full CAM and not to collect sinking fund. Sinking Fund should be built from the interest earned on IFMS. This will result in savings on GST.
- If the AOA wants to resolve any of contentious issues, then it should approach the ‘Authority of Advance Rulings’. However if it will be very beneficial if GST authorities pro-actively issue a circular clarifying these issues and GST Council should explore a case to provide the mechanism for AOA to claim refund of input credit which cannot be off-set against the output liability .



**ABOUT AUTHOR:**

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