

**WHETHER SERVICE TAX PAYABLE ON CONSTRUCTED
AREA FALLING TO THE SHARE OF LAND-OWNER
UNDER JOINT DEVELOPMENT AGREEMENT ?.**

By

Pradeep K Mittal*, BCom, LLB, FCS

It is very common in the Real Estate Industry, the land-owner does not have the wherewithal for construction and development of (a) Group Housing Complex (b) Commercial Complex (c) Residential-cum- commercial complex and, therefore, the land-owner approaches the reputed and renowned Builder/Developer for the development of their land which the landowner owns. For that purpose, a Joint Development Agreement (hereinafter called JDA) or Joint Collaboration Agreement (hereinafter called JCA) is signed between the Land-Owner and Developer. Under the Agreement, out of the total area constructed, certain portion may be 10% 20% or 30%, depending upon the value of the land, cost of construction and other related factors, it is agreed between the Land-owner and the Builder/Developer to share the constructed portion between the land-owner and developer.

Advocate- Past Central Council Member, the ICSI
pkmittal171@gmail.com.

2: However, I have seen tone and texture of various JDA/JCA, which are generally executed between the parties, the land-owner transfer the “Development Rights” in favour of Developer/Builders and the Builder/Developer carry out construction as per sanctioned plan and as a consequence of which, there is a emergence of “Constructed Complex”. It is, however, seen that JDA/JCA, is generally “futuristic” in nature and certain constructed area is allocated in favour of land-owner without, in any manner, vesting or conferment of any right, title and interest in the constructed portion in favour of land-owner. Later on, after the construction is complete and Completion Certificate or Occupancy Certificate is obtained, either Conveyance Deed or Sale Deed is executed in favour of land-owner by the Developer obviously on payment of requisite Stamp Duty and its registration before Sub-Registrar having jurisdiction over immovable property.

3: A question then arise as to liability of payment of Service Tax on the area allocated to the land-owner – more particularly the point of taxation - First of all, a question arises as to whether transfer of development right by land-owner in favour of Developer, for the purpose of enabling the Developer to carry out

construction on the land (owned by the land-owner) is a “service” within the meaning of Section 65B(44) of Finance Act, 1994 ?. The Section 65B(44) is reproduced below for ready reference.

4: The Section 65B(44) of the Finance Act, 1994 defines the services and excluded certain activities which are as under:-

any activity which constitutes merely-

(i) a transfer of title in goods or immovable property, by way of sale, gift or in any other manner; or

(ii).....

(iii)

5: As per the said provisions, the transfer of title in goods or immovable property, by way of sale, gift or in any other manner is not a “Service” and no service tax is payable thereon.

6: The word “immovable property” has not been defined in the Finance Act, 1994, therefore, one has to fall back upon the definition in other laws. As per Section 3 (26) of the General Clauses Act, 1897, the immovable property means as under:-

(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;

7: On going through the said definition, the immovable property includes land or benefits arising out of land. It is to be examined as to whether the benefit arising out of land can be equated with transfer of development rights of land or not?

8: In the case of Chheda Housing Development Corporation vs. Bibijan Shaikh Farid, MANU/MH/0070/2007 the Hon'ble High of Bombay observed as under:-

15. The question is whether on account of the term in the clause which permits acquisition of slum TDR the appellants in so far as the additional FSI is concerned, are not entitled for an injunction to that extent. An immovable property under the General Clauses Act, 1897 under Section 3(26) has been defined as under:-

(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." If, therefore, any benefit arises out

of the land, then it is immovable property. Considering Section 10 of the Specific Relief Act, such a benefit can be specifically enforced unless the respondents establish the compensation in money would be an adequate relief.

9: A question as to whether FSI/TDR be said to be a benefit arising from the land. Before answering this issue, I may refer some judgments. In Sikandar and Ors. Vs. Bahadur and Ors. 27 ILR 462 a Division Bench of Hon'ble Allahabad High Court held that right to collect market dues upon a given piece of land is a benefit arising out of land within the meaning of Section 3 of the India Registration Act, 1877. A lease, therefore, of such right for a period of more than one year must be made by registered instrument.

10: The Hon'ble Division Bench of the Oudh High Court in Ram Jiawan and Anr. V. Hanuman Prasad and Ors. MANU/OU/0077/: AIR 1940 Oud 409 also held, that bazaar dues, constitute a benefit arising out of land and therefore a lease of bazaar dues is a lease of immovable property. The Allahabad High Court in Smt. Dropadi Devi v. Ram Das and Ors. MANU/UP/0120/1974: AIR 1974 All 473 on a consideration of Section 3 (26) of General Clauses Act, is also to the above effect.

11: Further, the issue was examined by the Hon'ble High Court of Bombay again in the case of Shadoday Builders Private Ltd. And Ors. Vs. Jt. Charity Commissioner MANU/MH/6791/2011 wherein the issue was in respect of sale of transferrable development right is immovable property or not? The Hon'ble High Court observed as under:-

"5. The principal issue which arose before the learned Joint Charity Commissioner as to whether the TDR could be termed as a movable property, is concluded and is not more res integra in view of the judgment of the Division Bench of this court reported in MANU/MH/0070/ 2007(3) Mh.L.J. 402 in the matter of Chheda Housing Development Corporation..vs.. Bibijan Shaikh Farid. Para no. 15 of the said judgment is material and is reproduced hereunder.

14: Similar view has been expressed by Hon'ble Customs Excise & Service Tax Appellate Tribunal in the case of Mormugao Port Trust vs. Comm. MANU/CM/0883/2016:2017 (48) STR 69.

15: Further, Hon'ble Tribunal in the case of Rajasthan State Mines and Minerals Limited vs. Commissioner of Central Excise and Service Tax (21.08.2019 - CESTAT - Delhi) : MANU/CE/0269/2019 has held as under: -

In the circumstances, we find that there is no element of service involved in the transaction, undertaken by the appellant while acquiring the land and transferring the same to the JV company, for setting up of the power plant.

16: The Hon'ble Tribunal in the case of DLF Commercial Projects Corporation Vs. CCE MANU/CJ/0032/2019 dt.22.5.2019 (covering the period 1.7.2012 to 31.3.2016) holding that no Service Tax is payable on transfer of "Development Rights". The Department filed an appeal before Supreme Court challenging the above judgment but Counsel for the Department did not pray for stay at the time of hearing on 26th Nov 2019 before Supreme Court and hence no stay. Similarly, the Final Order in Rajasthan State Mines & Minerals Limited (no stay) has also been challenged before Supreme Court and both these matters have been tagged together.

17: As far as the demand of levy of Service Tax upon the party transferring development rights is concerned, in view of the above submission, there is no manner of doubt that no "Service Tax" is payable.

However, a question remains to be seen about the liability of Service Tax on constructed area earmarked in favour of land-owner. The JDA or JCA does not, in any manner, confer, transfer, alienate any right, title or interest in constructed area, in favour of land-owner. If the language of various clauses of JDA or JCA is seen, these are futuristic in nature and speaks of execution of either "Conveyance Deed" or "Sale Deed" upon payment of Stamp Duty and its subsequent registration before the Sub-Registrar under Section 17 Indian Registration Act. The issue may be still to be seen as to point of time when Service Tax would be payable ?.

18: Attention is invited to the Board Circular No.151/2/2012 dt.10.2.2012, as is relevant for our purpose, is reproduced below:-

Service Tax is liable to be paid by the builder/developer on the construction service involved in the flats to be given to the land owner, at the time when the possession or right in the property of the said flats are transferred to the land-owner by entering into a conveyance deed or similar instrument (i.e. allotment letter).

19: In my view, in view of above circular, Service Tax is liable to be paid by the builder/developer on the constructed area/flats to be given to the land-owner, at the time when either the possession or right in the property of the said flats are transferred upon execution of "Conveyance Deed" or Similar Instrument i.e. Sale Deed. In my humble submission, the Agreement to Sell does not create any right, title or interest in favour of buyer/vendee – though the Circular speaks of "Allotment Letter" in view of the following judgments.

20: The Hon'ble Supreme Court in *Kaushaliya vs. Jodha Ram and Ors.* (25.11.2019 - SC) : MANU/SC/1618/2019, clearly holds that Agreement to Sell does not confer right, title or interest in the immoveable property.

As per the settled preposition of law, Agreement to Sell does not confer any right, title or interest in the property.

21: The Three Member Bench of Hon'ble Supreme Court in the case of *Suraj Lamp and Industries Pvt. Ltd. vs. State of Haryana* : MANU/SC/1222/2011, has observed as under:-

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.

22: The Full Bench of J & K High Court in the case of *Shiv Kumar and Ors. vs. Ajodhia Nath and Ors.* (18.01.1972 - JKHC) : MANU/JK/0047/1972, has observed as under:-

It is, therefore, clear that even after the agreement to sell, title clearly resides in the vendor and even though he may have parted with possession, the possession of the proposed vendee is under the agreement and not being a transfer of interest, it is at the utmost, that of a licensee and is therefore clearly permissive.

23: The Gujarat High Court in the case of *Manoramyia Resorts and Hotels Pvt. Ltd. vs. Tinaben Behram Mehta* (17.12.2019 - GUJHC) : MANU/GJ/3156/2019, has observed as under:-

Thus, an agreement to sell does not in itself create any interest in or charge on the property concerned. Till a registered sale deed is executed in favour of a transferee, the transferor remains a full owner of the property. In absence of a sale deed no right, title or interest in any immovable property can be transferred.

24: The Board Circular itself says that the Service Tax shall be payable only when either possession of flats has been given – admittedly when the construction has not yet been completed, there is no question of giving possession to the land-owner, or right in the property has been transferred to the land-owner upon execution by Developer, “Conveyance Deed” or “Sale Deed” in favour of Land-

Owner. The provision of service is complete only when either possession has been given or right, title or interest in the earmarked “constructed area” has been transferred upon execution of registered “Conveyance Deed or registered “Sale Deed”.

25: Therefore, the Service Tax shall be payable only (in respect of constructed area earmarked for land-owner) when either the possession has been given or Conveyance Deed or Sale Deed has been executed upon payment of stamp duty and duly registered before Sub-Registrar under Section 17 Indian Registration and not at the time of execution of JDA/JCA.
