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DECODING IMPACT OF NEW GST PROVISIONS ON REAL ESTATE SECTOR



Adv Bharat Bhushan Gupta (B. Com, L.L.B. P. G. Dip. Tax Laws,
Dip. I.P.R.)

Adv Nidhi Gupta (B.PSc(Hons) LL.B (Constitutional Law Hons),
Diploma in IPR)

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ABSTRACT

With effect from 1st April, 2019, the Government has completely changed the rates and mechanism for levy and collection of GST in real estate sector. This is an attempt to understand the said new provisions and their implication.

REVISED GST RATES EFFECTIVE FROM 1ST APRIL, 2019¹

Category	Effective GST Rate after 1/3 abatement for Land
Affordable Residential Apartments	1%
Other Residential Apartments	5%
Commercial Apartments in Residential Real Estate Project	5%

[Residential Real Estate projects (RREP) are those residential projects wherein carpet area of commercial apartments is not more than 15%]

- The above rates are compulsory for projects starting on or after 1st April, 2019. However, in Case of “[Ongoing Projects](#)”, the Promoter may opt to pay Tax at erstwhile Rates with input tax credit facility.

¹ New Rates as introduced by Notification No. 03/2019-Central Tax (Rate), dated 29th March 2019 by amending Entry at Sr. No. 3 of Table contained in Notification No. 11/2017-Central Tax Rate.

It appears that GST rate on residential apartments and commercial apartments in RREP is same. But the exact tax implication in commercial apartments in RREP is much higher. In case of commercial apartment, the promoter is liable to pay GST on reverse charge basis for the development rights received from land owner and the tax will form part of its cost because input tax credit is not available in new tax scheme. In case of residential apartments there is an exemption from GST on development rights received.

AFFORDABLE RESIDENTIAL APARTMENTS²

<p>In Metropolitan Cities Bengaluru, Chennai, Delhi NCR (limited to Delhi, Noida, Greater Noida, Ghaziabad, Gurgaon, Faridabad), Hyderabad, Kolkata and Mumbai (whole of MMR)</p>	<p>Value Not Exceeding Rs. 45 Lakhs. Carpet Area Not Exceeding 60 sq. Mts.</p>
<p>In Other Places</p>	<p>Value Not Exceeding Rs. 45 Lakhs. Carpet Area Not Exceeding 90 sq. Mts.</p>
<p>Value includes Amount charged for the transfer of land or undivided share of land and any other amount charged by the promoter from the buyer of the apartment including preferential location charges, development charges, parking charges, common facility charges etc</p>	

² The Term ‘affordable residential apartment’, for the aforesaid rate purpose, have been defined in newly inserted clause (xvi) in para 4 of Notification No. 11/2017 -Central Tax – Rate. As per the said definition, houses being constructed under various schemes like Jawaharlal Nehru National Urban Renewal Mission or Rajiv Awaas Yojana; Housing for All (Urban) Mission/Pradhan Mantri Awas Yojana (Urban).

CONDITITONS

The above-mentioned new tax rates come with following riders:³

- Tax shall be paid in cash and Credit cannot be utilised
- Credit of Input tax will not be available.
- Eighty percent of Input and Input Services will be received from registered supplier only.
- Tax on capital goods received from unregistered supplier have to be paid under Reverse Charge.
- This scheme is not an option except in case of an ongoing project.

Note: the basis of GST remains same and GST will be charged only on sale of those flats whose booking is done before the receipt of completion certificate or first occupancy whichever is earlier. If entire consideration is received after completion certificate then neither GST was charged nor GST charged as same would be sale of building which is an exemption and not a supply under GST.

CONDITION OF 80% PROCUREMENT FROM REGISTERED SUPPLIER

The following supplies will not be taken into account to compute 80% supply received from registered suppliers.

- services by way of grant of development rights, long term lease of land (against upfront payment in the form of premium, salami, development charges etc.) or FSI (including additional FSI),
- electricity,
- high speed diesel, motor spirit, natural gas

³ These conditions are contained in newly inserted clause (i) to (id) of Entry at Serial No.3 in table contained in Notification No. 11/2017 Central Tax – Rate.

The Promoter shall Maintain Project wise account of Inward supplies from Registered and Unregistered suppliers.

- Where value of Input and Input Services received from Registered Suppliers during a Financial Year falls short of 80%, promoter shall pay tax on value of such shortfall @18% on reverse charge basis.
- On payment of tax under reverse charge basis, the supplies shall be deemed to be received from registered suppliers.

Cement:

- Promoter shall pay tax, under reverse charge, @28% on value of Cement received from unregistered supplier.
- Tax will be paid in the same month in which supply of Cement is received.

Commercial Apartments in residential real estate projects (RREP) will be taxed @5% and therefore, condition regarding receipt of 80% inputs/input services from registered dealer is applicable on entire project. However, in a project where area of commercial apartments is more than 15%, the rate of tax on such commercial apartments would be 12% with input tax credit. Therefore, the said condition of procurement of 80% inputs and input services is applicable for residential apartments, but not on the commercial apartments in the said project. It is not notified, as to how, the computation will be done in such a situation. It will lead to host of litigations in future.

EXAMPLE

There is an ongoing RREP project, for which the promoter has not opted to pay tax at the rates prescribed under Sr. No. (1e) or (1f) of the Notification No. 11/2017 Central Tax (Rate). In the project total receipt of inputs and input services, during the year 2019-20 is of Rs. 100 Crores, out of which supply from registered dealers is Rs. 60 Crores. Out of rest Rs. 40 Crores, Cement worth Rs. 10 Crores was supplied by unregistered suppliers during the month of September 2019.

- As the promoter have not opted to pay tax at the rates prescribed under Sr. No. (1e) / (1f), hence GST would be applicable @ 1% / 5% and condition regarding procurement of 80 % inputs / input services would be applicable.
- GST amounting to Rs. 2.8 Crore (28% Of 10 Crore) is payable, as Tax on Cement received from unregistered suppliers.
- The said Rs. 2.8 Crore is payable in September 2019 itself.
- On Payment of Rs. 2.8 Crore, the Cement is deemed to be supplied by registered supplier.
- Thus, during the year 2019-20, supply from registered suppliers is Rs. 70 Crore (60 Crore + 10 Crore) and from unregistered supplier is Rs. 30 Crores.
- The supply from registered suppliers is still short by Rs. 10 Crores from 80% of total supply of Inputs and input Services (Rs. 100 Crores).
- Therefore Tax @ 18% of Rs. 10 Crores which comes to Rs 1.8 Crore will become payable along with the tax liability for the month of June, 2020.

ONGOING PROJECTS⁴

It may be noted that the option of continuing to pay GST at old rates is given to ongoing projects.

GST @ 8% [12% and 1/3rd abatement for Land] –Affordable Residential Apartments.⁵

GST @ 12% [18% and 1/3rd abatement for Land] - Residential Apartment Other Than Affordable Residential Apartment

⁴ Is defined in clause (xx) of paragraph 4 of Notification No. 11/2017 Central Tax – Rate.

⁵ • Affordable Residential Apartment, as per Central / State Govt. Schemes specified in sub-item (b), sub-item (c), subitem (d), sub-item (da) and sub-item (db) of item (iv); sub-item (b), sub-item (c), sub-item (d) and sub-item (da) of item (v); and sub-item (c) of item (vi), against serial number 3 of the Table,

All the following Conditions must be fulfilled on or before 31st March, 2019 to avail be qualified as ‘ongoing project’:

- Commencement Certificate issued by Competent Authority.
- Certified by an Architect, a Chartered Engineer or a licensed Surveyor that Construction has started.
 - Construction of a project shall be considered to have started on or before the 31st March, 2019, if the earthwork for site preparation for the project has been completed and excavation for foundation has started on or before the 31st March, 2019.
- Completion Certificate has not been issued.
- Apartments have been partly or wholly booked.
 - An apartment booked on or before the 31st March, 2019 shall mean an apartment which meets all the following three conditions:
 - a) part of supply of construction of which has time of supply on or before the 31st March, 2019 and
 - b) at least one instalment has been credited to the bank account of the registered person on or before the 31st March, 2019 and
 - c) an allotment letter or sale agreement or any other similar document evidencing booking of the apartment has been issued on or before the 31st March, 2019;

Ongoing Projects

- One Time Option to be Exercised to Pay Tax @ 8 % / 12%
- Option to be Exercised by 10th May, 2019.
- If option not Exercised, GST @1% / 5% payable.
- Invoices for Supply of Service can be issued before Exercising Option.
- But Invoices shall be in accordance with Option to be Exercised.

COMMERCIAL APARTMENTS

- Commercial Apartments, in Residential Real Estate Project will be taxed at the same rate applicable to Residential Apartments i.e. @ 5% with same conditions.
- In ongoing RREP, wherein promoter has opted to pay tax @ 8% /12%, the commercial apartments will be taxed @12%.
- All other Commercial Apartments will be taxed @ 12%.

INPUT TAX CREDIT

Prior to 1st April, 2019, input tax credit was available to promoters. However, under new taxation scheme no such credit is available for construction of residential apartments and commercial apartments in residential real estate projects (RREP).

Construction of complex is an ongoing process and a continuous supply of service. There may be a situation wherein a promoter has started work in a project and have received inputs and input services. But have no booking prior to 1st April 2019. In this scenario, the promoter has availed input tax credit in the old tax regime but the entire tax on the project will be paid in new tax regime wherein availing input tax credit is not allowed. Therefore, such a promoter is required to reverse the input tax credit already availed.

There may also be a situation wherein the promoter has received bookings prior to 31st March, 2019 and have also paid tax @old rates but construction has not commenced upto 1st April, 2019 and no credit of input or input services has been availed by that date. The promoter will receive input and input services in new tax regime wherein credit is not allowed. But, as the promoter has already paid tax in old tax regime, therefore, proportionate input tax credit has been allowed to him.

Detailed provisions have been incorporated in Notification No. 3/2019 Central Tax Rate, dated 29th March, 2019 as annexure 1 & 2 to the said notification containing detailed calculations to allow additional credit which is not otherwise available and seeking reversal of input tax credit availed in excess. The liability to pay back input tax credit required to be reversed as per the said calculations may be huge, therefore, explicit provisions have been incorporated authorising jurisdictional Commissioners to allow payment in instalments on the request of the party.

JOINT DEVELOPMENT AGREEMENT -TAXABILITY OF DEVELOPMENT RIGHTS

Suppose a landowner and a developer enters into an agreement to construct residential apartments having total carpet area 10 lakh square feet and commercial apartments in 5 lakh square feet on a plot of 10 acres owned by the landowner. It is agreed upon that landowner will get 40% of the carpet area both in residential as well commercial apartments with proportionate land share and remaining 60% will go to the developer. In addition, the developer will also pay Rs. 50 lakhs to the landowner at the time of signing the joint development agreement. What would be the GST implications in this case?

The developer is certainly providing construction services to the landowner. But the moot question here is that whether the landowner is also providing some service to the developer or just paying consideration in form of land for the construction services provided by the developer.

Sale of land is included at Serial No. 5 of Schedule III to the Central Goods and Service Tax Act, 2017. Hence, as per Schedule III, sale of land and building is not a taxable supply under GST. Similarly, after introduction of negative list regime w.e.f 1st July, 2012 transfer of title in immovable property was specifically excluded from the definition of the service as contained in Section 65B (44) of the Finance Act, 1994. A similar question was answered in Educational Guide issued by the Government at the time of negative list regime in service tax which reads as under:

Taxation of Services: An Education Guide [page 81]

- 6.2.1 What would be the liability to pay service tax on flats/houses agreed to be given by builder/developer to the land owner towards the land /development rights and to other buyers. If payable, how would the services be valued?
- Here two important transactions are identifiable: (a) sale of land by the landowner which is not a taxable service; and (b) construction service provided by the builder/developer. The builder/developer receives consideration for the construction service provided by him, from two categories of service receivers: (a) from landowner: in the form of land/development rights; and (b) from other buyers: normally in cash.
- Construction service provided by the builder/developer is taxable in case any part of the payment/development rights of the land was received by the builder/ developer before the issuance of completion certificate and the service tax would be required to be paid by builder/ developers even for the flats given to the land owner.

From the above, it is clear that the landowner is not providing any service but just paying consideration in kind by transferring land to the developer for construction services provided. There is no different legal position in GST regime. However, the government manifested its interpretation by issuance of Notification No.4/2018 Central Tax Rate, dated 25th January, 2018 wherein transfer of development rights by a landowner in lieu of construction services was considered as an independent service. Writ petitions have been filed in various High Courts challenging the aforesaid notification, which are still pending. As per the interpretation of authors, landowner is not providing any service. However, in the new tax regime effective from 1st April, 2019 the government has notified detailed provisions regarding taxability of this so-called supply of development rights by landowner. Therefore, till the time the said provisions are not struck down by an appropriate court, assessee is bound by the same and is liable to pay the GST. Thus, let us decode the provisions in this regard to see its implications on the landowners and developers.

PERSON LIABLE TO PAY TAX

The promoter -developer have been made liable to pay GST on services of development rights received by it.

EXEMPTION

Grant of development rights, in lieu of constructed apartments in respect of residential apartments have been exempted. However, the said exemption is not available to those residential apartments which are not booked prior to issuance of completion certificate. In simple terms, if GST is being paid on Construction of residential complex, then tax on development rights is not payable. Similarly, exemption is granted to GST payable on Upfront amount paid at the time of long term lease in respect of residential apartments. Again, the condition is that the said exemption will not be available for those apartments which are not booked till the date of issuance of completion certificate.

EXAMPLE

A Landowner enters into an agreement with a Developer for development of Ten acres of his land. As per the agreement the land owner and developer will have 50 – 50 shares in developed area. The joint development agreement is signed on 1st May 2019 and plan is sanctioned on 30th June, 2019. As per the sanctioned plan, total carpet area of the project is 50,000 sq. mts., which is divided as under.

- a. Commercial apartments - 5000 sq. mts.
- b. 100 Residential Apartments, each having 50 sq. mts. carpet area - 5000 sq. mts.
- c. 200 Residential Apartments, each having 200 sq. mts. carpet area – 40,000 sq. mts.

The developer started booking on 1st July, 2019 and on that day a shop having carpet area of 10 sq. mts. was booked @ Rs. 25,000/- per sq. mts., one residential apartment having 50 sq. mts. carpet area @ Rs. 8,000/- per sq. mts. and two residential apartments having carpet area 200 sq. mts. @ Rs. 13,000/- sq. mts.

The completion certificate to the project is issued on 30th June, 2022. On date of completion, the following apartments were un-booked.

- a. Commercial Apartments – Land Owner's Share 1000 Sq. Mts. + Developer's Share 500 Sq. Mts.
- b. Residential Apartments 50 sq. Mts. – Land Owner's Share 40 units + Developer's Share 10 units
- c. Residential Apartments 200 sq. Mts. – Land Owner's Share 50 units – Developer's Share 40 units.

Just prior to issuance of completion certificate. The promoter had booked a commercial apartment @ Rs. 30,000/- per sq. mts., a 50 sq. mts. residential apartment @ Rs. 8,000/- per sq. mts. and a 200 sq. mts. residential apartment @ Rs. 15,000/- per sq. mts.

We have to calculate GST liability of developer on development services received.

SOLUTION

Valuation of Development Service

Land Owner Share in Constructed Apartments	Rate (Rs. Per sq. Mts.)	Value
Commercial Apartment 2500 sq. mts.	25,000/-	Rs. 6,25,00,000/-
Affordable Residential Apartments 2500 sq. mts.	8,000/-	Rs. 2,00,00,000/-
Other Residential Apartments 20000 sq. mts.	13,000/-	Rs. 26,00,00,000/-
Total		Rs. 34,25,00,000/-

Note : As per the Notification, the valuation have to be done at the rates charged by promoter from independent buyer nearest to the date on which such development rights were transferred.

Applicable rate of GST on development rights is not specified in Notification No. 11/2017-Central Tax (Rate). Therefore, the service would be classifiable under Residuary entry at Sr. No 35 of the said Notification attracting GST @ 18%.

Total GST on Development Rights will Come to Rs. 6,16,50,000/- (18% of Rs. 34,25,00,000/-)

AMOUNT OF EXEMPTION (TAX ATTRIBUTABLE TO RESIDENTIAL APARTMENTS)

= TOTAL GST PAYABLE

× (CARPET AREAT OF RESIDENTIAL APARTMENTS ÷ TOTAL CARPET AREA OF THE PROJECT)

Rs. 6,16,50,000/- × (45000 sq. mts.. ÷ 50,000 sq. mts.) = Rs. 5,54,85,000/-

GST Attributable to Commercial Apartments payable by the promoter on reverse charge basis.

Rs. 6,16,50,000/- Minus Rs. 5,54,85,000/- = Rs. 61,65,000/-

<p>GST Payable on Residential Apartments remaining un-booked on the date of issuance of completion certificate (<i>GST is payable on all residential apartment remaining un-booked, whether in promoter's share or land owner's Share</i>) is equal to =</p>	<p>GST attributable to Residential Apartments × (Carpet Area of Residential Apartments un-booked ÷ Total Carpet Area of Residential Apartments)</p>
	<p>= Rs. 5,62,95,000/- × (20500 ÷ 45000)</p>
	<p>= Rs. 2,56,45,500/-</p>

However, the aforesaid tax liability shall not exceed 1% of value in case of Affordable Residential Apartments and 5% of value in case of other residential Apartments. Here the value shall be deemed to be equal to the value of similar apartments charged by the promoter nearest to the date of issuance of completion certificate.

Calculation of Tax Liability on the basis of Value and applicable GST rates.

Type of Apartment	No. of Un-booked	Total Carpet Area (In sq. Mts.)	Rate (Rs. Per sq. Mts.)	Value (in Rs.)	GST Rate	Tax (in Rs.)
Affordable Apartments	50	2500	8000/-	2,00,00,000	1%	2,00,000
Other Residential Apartments	90	18000	15000/-	27,00,00,000	5%	1,35,00,000
TOTAL						1,37,00,000/-

Thus, the amount of Rs. 1,37,00,000/- is payable by the promoter in respect of residential apartments remaining un-booked on the date of issuance of completion certificate, in addition to Rs. 2,56,45,500/- in respect of Commercial Apartments.

TIME OF SUPPLY

As per Notification No. 04/2018-Central Tax (Rate) the liability to pay Tax on development rights in respect of Commercial Apartments shall arise on the date when the developer transfers possession or the right in constructed apartments to the land owner. However, as per Notification No. 04/20`9- Central Tax (Rate) the liability to pay tax in respect of residential apartments which remain un-booked, will arise on the date of issuance of completion certificate.

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Lower Ground Floor, Vikaspuri,

Near Multi-Gym Park,

New Delhi -110018, India

[+91.11.45087900, 9810854786](tel:+911145087900)