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Affordable Housing – GST & Income Tax Perspective

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'Housing for All' is one of the biggest agendas of the current government. To achieve this agenda, the government has been granting various tax sops have been extended from time to time to builders/developers and other stakeholders. In this article, we explore the some of the sops pertaining to taxation of affordable housing from the perspective of goods and services tax laws (GST laws) and income tax laws.

Incentives under Income Tax Laws:

For Seller:

Section 80 IBA of Income Tax Act, 1961 (for brevity 'Income Tax Act') deals with deductions in respect of profits and gains from certain housing projects. Vide such section, where the gross total income of an assessee includes any profits and gains derived from business of developing and building housing projects, subject to certain conditions, 100% of such profits and gains are allowed as deduction.

Such deduction is allowed to the assessee only if he satisfies all the conditions mentioned vide Section 80 IBA. Earlier the said deduction was extended vide Section 80 IB(10). Now, the deduction is provided to assessee vide Section 80 IBA. The conditions attached to the said section have undergone certain amendments vide Finance (No.2) Bill, 2019, which is dealt at appropriate place.

The conditions that the assessee has to satisfy to be eligible for deduction of profits and gains are as under:

Projects approved - 1st June 16 to 30th Aug 19	**Projects approved - 1st Sept 19 to 31st March 20**	**Remarks**
The project is approved by the competent authority after 1st June 2016 but on or before 31st March 2020	The project is approved by the competent authority ***after 1st September 19*** but on or before 31st March 2020	-
The project is completed within a period of 5 years from the date of approval by the competent authority	The project is completed within a period of 5 years from the date of approval by the competent authority	-
The carpet area of the shops and other commercial establishments included in the housing project does not exceed 3% of the aggregate carpet area	The carpet area of the shops and other commercial establishments included in the housing project does not exceed 3% of the aggregate carpet area	-
The project is on a plot of land measuring not less than 2000 Square meters, in case where the land is located other than cities of chennai, delhi, kolkata or mumbai. In case of cities of chennai, delhi, kolkata or mumbai, the project is on a plot of land measuring not less than 1000 Square meters	The project is on a plot of land measuring not less than 2000 Square meters, in case where the land is located other than cities of chennai or delhi or kolkata or mumbai or hyderabad or bangalore. In case of cities of chennai, delhi, kolkata or mumbai, hyderabad or bangalore, the project is on a plot of land measuring not less than 1000 Square meters	Hyderabad and Bangalore are added to list of metros
The project is the only housing project in the plot of land mentioned above	The project is the only housing project in the plot of land mentioned above	-
The carpet area of residential unit comprised in the project should not exceed 60 square meters, where the project is located other than cities of chennai,	The carpet area of residential unit comprised in the project should not exceed 90 square meters, where the project is located other than cities of chennai,	Maximum carpet area has been increased

delhi, kolkata or mumbai. In case of residential unit in cities of chennai, delhi, kolkata or mumbai, the carpet area should not exceed 30 square meters.	delhi, kolkata or mumbai. In case of residential unit in cities of chennai, delhi, kolkata or mumbai, the carpet area should not exceed 60 square meters.	to align with GST laws.
The residential unit in housing project is allotted to an individual, no other residential unit in housing project shall be allotted to the individual or spouse or minor children of such individual	The residential unit in housing project is allotted to an individual, no other residential unit in housing project shall be allotted to the individual or spouse or minor children of such individual	-
The project utilises not less than 80% of such floor area ratio where such project is located in any place other than cities of chennai, delhi, kolkata or mumbai. In other cities, not less than 90%.	The project utilises not less than 80% of such floor area ratio where such project is located in any place other than cities of chennai, delhi, kolkata or mumbai or hyderabad or bangalore. In other cities, not less than 90%.	Hyderabad and Bangalore are added to list of metros
The assessee maintains separate books of account in respect of the housing project	The assessee maintains separate books of account in respect of the housing project	-
-	The stamp duty value of a residential unit in the housing project does not exceed Rs 45 lakhs	New Condition
The assessee should not execute such housing project as a works contract awarded by any person (including central government or state government)	The assessee should not execute such housing project as a works contract awarded by any person (including central government or state government)	-

Only on satisfaction of all the conditions, the assessee shall be eligible for deduction of 100% of profits or gains arising from developing such residential projects. If the housing project is not completed within 5 years period, the total amount of deduction so claimed and allowed in one or more previous years, shall be deemed to be the income of previous year under head profits or gains from business or profession (for brevity PGBP) of the previous year in which the period of completion expires.

Certain Issues:

Issue: Deduction for Builder and Landowner under JDA model:

One of the contentious issues for allowing deductions under Section 80 IBA [erstwhile Section 80 IB(10)] is, whether the builder who undertakes the project on joint development model is eligible for deduction under this section. The builders were claiming deductions and tax authorities state that the builders are not eligible for deduction as one of the conditions is that the assessee should not execute such project as a works contract and claim of tax authorities was that builder being a works contractor and executing the same on behalf of the land owner, he is not eligible for deduction as he failed to satisfy one of the conditions attached to Section 80 IBA or erstwhile Section 80 IB (10).

The issue was answered in favour of builder by various courts, wherein it was stated that the builder cannot be equated with a works contractor as mentioned in the conditions attached to the said sections. A works contract would not be taking any risk and works for agreed amounts, whereas the builder in a joint development model carries huge risk of sale of inventory and other issues. Hence, the courts on various occasions have held that the builder executing such projects under joint development model can also claim the deduction under Section 80 IB(10) or Section 80 IBA, since he cannot be called as works contractor for the purposes of said sections.

The above view is expressed by Honourable Income Tax Appellate Tribunal of Ahmadabad in the matter of Madhav Builders[1]. Even though the judgment is in the context of interpretation of Section 80 IB(10), the rationale would help in the interpretation of Section 80 IBA, since both the sections have

[1] 2016 (3) TMI 408 – ITAT Ahmedabad

similar conditions. The Honourable Tribunal after making a thread bare analysis of various judgments have concluded vide Para 25 as under:

25. By going through the various clauses of the development agreement dated 28.8.2003 between the assessee ***and the land owner Shree Madhav Co-op. Housing Society, it can be construed that the assessee is having much wider authority –rights and powers for accomplishing the plan of the housing project and certainly such type of powers and rights which are exercised along with collection of revenue from each unit of the housing project and successful completion of each part of the housing project very well justify to large extent that assessee was working as developer and not works contractor.*** *Further we have also examined the financial statement of the assessee and find that in the audited balance sheet as on 31.3.2006 assessee has shown sundry debtor of ₹ 1,99,21,445/- , the list of which includes 42 parties including Shri Madhav Co-op. Housing Society Ltd. being a sundry debtor of ₹ 8,87,166/- and the remaining amount of debtor i.e. ₹ 1,90,34,279/- are being debit balance in the names of various flat owners from whom the assessee had yet to receive the amount which it has spent for the housing project.* ***This shows that assessee was not working only as a work contractor on behalf of Shree Madhav Co-op. Housing Society Ltd. else the assessee would have been showing the complete outstanding balance in the name of Shree Madhav Co-op. Housing Society Ltd. This fact has not been controverted by the revenue at any stage below and, therefore, looking to the terms and conditions of the development agreement and audited financial statement of the assessee, we are of the view that assessee comes under the category of developer and not of works contractor and, therefore, comes within the definition of developer as referred in the provisions of section 80IB(10) of the Act.***

Hence, as of now, we can conclude that the above issue is squarely in favour of the assessee and the builders can very well claim the deduction under Section 80 IBA if he satisfies all other conditions.

Another question would arise, whether the landowner, who is the other party in the joint development model is eligible for claiming deductions under Section 80 IBA or erstwhile Section 80 IB(10). The landowner certainly is not struck with the condition of works contract, because, he does not engage in any sort of construction activity. The only issue arises for claiming the deduction under the said sections is whether landowner can be said to be engaged in carrying of business or profession by entering a joint development agreement with the builder.

It is natural that the landowners would be offering tax under the head capital gains as far as the transfer of development rights are concerned in a typical joint development agreement model. If the landowner offers income under the head capital gains, it would be tough for him to claim deduction under Section 80 IBA or Section 80 IB(10), since such deductions are applicable only for the assessee who are engaged in generating income classifiable under PGBP.

The Honourable Madras High Court in the matter of Commissioner of Income Tax v Anjali Foundations[2] in interpretation of benefit of deduction under Section 80 IB(10) held as under:

Having hearing the learned counsel for the Revenue, we are satisfied that there is nothing in Section 80IB(10) of the Act to deny the benefit of Deduction to the land owner also, who is equally a partner in the "development" of Industrial Undertaking other than the Infrastructure Development Undertaking. Without the land, obviously, the construction of building cannot be undertaken and therefore, the landowner is an integral part of the development of the Buildings. It is considered to be an Industrial Undertaking other than Infrastructure Development in view of the said provision. Merely because the landowner does not undertake the construction work himself, the landowner cannot be excluded from the ambit and scope of Section 80IB(10) of the Act.

[2] 2019 (5) TMI 109 – Madras High Court

It is evident that the Honourable High Court has not gone into the aspect as to whether the deduction is eligible despite of the fact that income is offered by landowner is classified as capital gains. However, the said judgment is currently occupying the field and landowners can take a calculated risk of claiming deduction under Section 80 IBA or Section 80 IB(10) for incomes earned from sale of their share of flats in the joint development model.

For Buyer:

The Finance (No.2) Bill, 2019 has also introduced a new section vide Section 80 EEA which allows deduction of interest payable on housing loan to the extent of Rs 1.5 lakhs subject to condition that the stamp duty value of such residential unit does not exceed Rs 45 lakhs and assessee is not claiming deduction under Section 80EE[3] and other specified conditions.

Incentives under Goods & Services Tax Laws:

A concessional rate of 1% is applicable for construction services provided by suppliers with respect to the affordable residential apartment under goods and services tax laws. The normal rate of tax applicable for supply of construction services pertaining to residential apartments is 5%. However, if such residential unit falls under the definition of affordable residential apartment, the same is reduced by 4%, making the effective rate of tax at 1%. The said concessional rate comes with conditions which the supplier has to satisfy, which are detailed hereunder.

Entry 3 of Notification No (NN) 11/17 deals with rates of taxes applicable for construction services. Vide Entry 3(i), the rate of tax for construction of affordable residential apartment by a promoter in a ***residential real estate project*** (RREP) which commences after 1st April 19 is notified to be 0.75%[4]. Hence, total rate of tax would be 1.5% (0.75% - CT and 0.75% - ST). Further, a deduction of 1/3rd of total amount charged for supply would be deemed to be the value of undivided share of land and accordingly the effective rate of tax would be 1% (1.5% * 2/3).

Vide Entry 3(ic) of NN 11/17, the rate of tax for construction of affordable residential apartment by promoter in a ***real estate project*** (REP) other than RREP is notified to be 1.5%. However, as stated earlier, the deduction towards value of land has been extended to this entry also, making the effective rate of tax is 1%.

The only difference is the earlier one deals with RREP and later with REP. The expression 'residential real estate project' has been defined vide 4(xix) of NN 11/17 to mean a REP in which the carpet area of the commercial apartments is not more than 15% of the total carpet area of all the apartments in REP.

Hence, if assessee is contemplating the project with commercial space which is not more than 15% of the total carpet area of all the apartments in REP, then such project would be called as RREP and tax rate of 1% is applicable vide Entry 3(i). Further, the rate of tax applicable to such commercial space in

[3] Deduction in respect of interest on loan taken for residential house property

[4] To this, state tax (ST) at 3.75% has to be added, which comes through a separate legislation namely State Goods & Services Tax Act, 2017

a RREP is 5%[5] as notified vide Entry 3(ib). Except for this difference, there is no other difference between RREP and REP. All other conditions equally apply to RREP and REP.

The phrase 'affordable residential apartment' assumes significance in the current context. The said phrase has been defined vide 4(xvi) of NN 11/17 under two limbs. The first limb assumes significance for the projects being started after 1st April 19. Vide such limb, if a residential apartment having carpet area not exceeding 90 square meters in cities or towns other than metropolitan cities and for which the gross amount charged is not more than Rs 45 lakhs.

Hence, in order to fall under the definition of affordable residential apartment under the CT Act and to be eligible for concessional rate of 1% for residential apartments and 5% for commercial apartment in RREP, assesse has to satisfy twin conditions. One, the carpet area of residential apartment should not exceed 90 square meter and two, gross amount charged[6] should not be more than Rs 45 lakhs. On satisfaction of both the conditions, the said residential apartment would fall under the definition of 'affordable residential apartment' and accordingly eligible for concessional rate.

Further the assessee should also satisfy additional conditions that no credit of input tax can be claimed, 80% of the value of input and input services shall be procured from registered supplier (else, tax has to be paid by assessee on shortfall at 18% excluding cement purchased from unregistered supplier).

Snapshot of Conditions under Income Tax and GST laws:

Condition	Income Tax laws for deductions	GST laws for concessional rates
Timelines for Approval	June 2016 to March 2020	No timelines
Time limit for Completion	5 years from the date of approval	No time limit
Commercial Area	Not more than 3% of total carpet area	Not more than 15% of total carpet area
Minimum Land	Not less 2000 (non-metro) /1000 (metro) sq mts	No such condition
Other Projects	Only such project on land, no others	No such condition
Max Carpet Area of Unit	30 (metro) /60 (non-metro) Sq mts (till 30.08.19)	60 (metro) /90 (non-metro) Sq mts
Max Carpet Area of Unit	60 (metro)/90 (non-metro) Sq mts (from 01.09.19)	60 (metro) /90 (non-metro) Sq mts
Max Units an individual can hold	Only one	No such condition
Min Floor Area Usage	80% (metro)/ 90% (non-metro)	No such condition
Separate Books of Accounts	Yes	No such condition
Works Contract	Assessee should not be a works contractor	No such condition
Maximum Value of Unit	No Restriction (till 30.08.19)	INR 45 lakhs
Maximum Value of Unit	INR 45 lakhs (from 01.09.19)	INR 45 lakhs

It is evident from the above that vide amendments made to Finance (No.2) Bill, 2019 an effort was made to bring alignment of conditions mentioned in Income Tax laws with GST laws to make the sops attractive and optimise the benefits available to tax payers.

[5] Rate of tax is notified as 3.75%. Adding ST to that and claiming the deduction towards value of land, the effective rate of tax is 5%.

[6] Gross amount shall be the sum total of consideration charged for construction services provided, amount charged for transfer of undivided share of land and any other amount charged from buyer including preferential location charges, development charges, parking charges, common facility etc