GST On TDRs for Commercial Projects – Also under Reverse Charge?

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We are aware that the taxability of Transferable Development Rights (for brevity 'TDR') has undergone a significant change with effective from 01st April 2019. The liability was shifted on the developer subject to certain conditions. The reasoning of such a shift to developer only if has unsold flats as on the date of completion certificate appears to be inspired from the Honourable Hyderabad Tribunal in the matter of Vasantha Green Projects[1].

With the shift of burden of the taxability of TDRs on the developers, has provided a great relief to the land owners. Unless the land owner intends to sell his share prior to completion certificate, there is no requirement for him to obtain the registration under GST laws. As discussed in our previous articles, the land owner is only obliged to pay tax on two transactions. One, being the transfer of development rights to the developer and two, being the sale of flats falling his share to the customer prior to the completion certificate. Since, the taxation on transfer of development rights has been shifted to the developer, he is relieved from the burden of registration qua such transaction. The other transaction which compels his to obtain registration is sale of flats falling to his share prior to completion certificate. If the land owner retains or sells them post completion certificate, then there is no obligation to register under GST laws.

With the taxation of TDRs shifted to developer, everyone was of the belief that the problems surrounding the taxation of TDRs have come to end. However, that being possible only in Utopia, a new problem has surfaced.

The troubling question is, whether the shifting of taxation of TDRs on the developer is only pertaining to the residential projects or it applies to the commercial projects also? The main contribution to this issue, is the inadequate language used in the Entry 5B in Notification No 13/2017 – CT (R).The said entry states that services supplied by any person by way of transfer of development rights for construction of a project by a promoter. The supplier of service is mentioned as 'any person'. The recipient of service is mentioned as 'promoter'.

If one sees the Entry 5B in isolation, it is possible to argue that the burden of taxation on TDRs is shifted to promoter (developer) even in cases where a commercial project is involved. This is primarily for the reason that there was no mention about whether Entry 5B applies only to residential project. Now, let us proceed to examine, whether Entry 5B applies only to residential or applies both to residential and commercial. In our view, the Entry 5B is applicable only for residential projects and not to commercial projects. The reason for the conclusion is explained as under.

Normally, the land owner is obliged to pay the tax on the TDRs supplied. However, on an isolated reading of Entry 5B of Notification No 13/2017 – CT (R), it appears that for all supplies of TDRs, the developer is responsible for payment of tax under reverse charge. This is for the reason that the said

[1] 2018 (5) TMI 889 – CESTAT Hyderabad

entry nowhere uses the expression which would mean, that it covers only TDRs which are supplied for construction of residential apartments, making it possible for every TDRs supply to be taxable under reverse charge.

However, on a close reading of the situations and circumstances which led to the birth of Entry 5B of Notification No 13/2017, – CT (R) a different view may emerge. It is important to note that the reverse charge on TDRs supplied for the purposes of construction of residential apartments is exempted in the hands of land owner by virtue of Entry 41A of Notification No 12/2017 – CT (R) subject to a condition that the developer is obliged to pay tax under reverse charge on such supply to the extent of his unsold apartments.

In order to provide legal support for such proposal of payment of tax under reverse charge by developer which is mentioned in Entry 41A of Notification No 12/2017 – CT (R), the Entry 5B is inserted to Notification No 13/2017 – CT(R). This is also for the reason that the Notification No 12/2017 – CT (R) has not been issued in exercise of powers under Section 9(3) of CT Act. Hence, there may be a challenge to the stipulation of payment of tax under reverse charge by developer if it is mentioned only in Notification No 12/2017 – CT (R). In order to overcome this, the Government has inserted entry in Notification No 13/2017 – CT (R), which is the notification exercised using powers under Section 9(3).

Hence, on a combined reading of Entry 41A of Notification No 12/2017 – CT (R) and Entry 5B of Notification No 13/2017 – CT (R), it should be interpreted that the reverse charge obligation is only on the developer who has received TDRs for construction of residential apartments only if he has unsold flats as on the date of issuance of completion certificate. Hence, it appears that the reading of Entry 5B of Notification No 13/2017 – CT(R) in isolation to mean that developer, who has received TDRs for construction of commercial apartments is not in accordance with the law.

Further, assuming that the said interpretation is in accordance with the law, then there should be an entry which should provide exemption for supply of TDRs in the hands of land owner in similar terms to Entry 41A of Notification No 12/2017 – CT (R). Since there is no specific entry exempting the supply of TDRs in the hands of land owner which are given for construction of commercial apartments, the interpretation that the developer is liable to pay tax under reverse charge in light of Entry 5B of Notification No 13/2017 – CT (R) is not in accordance with the law.

Further, assuming that the said interpretation is in accordance with the law, what would be the tax that is liable to be paid by the developer if he has unsold flats as on the date of completion certificate. For the residential projects, a detailed modus operandi is provided, where a maximum cap of tax liability is also stipulated. However, for commercial, nothing is prescribed. Does that mean, there is no requirement for stipulation, since, the developer is obliged to pay tax on the unsold flats at the rate that is applicable to the TDRs. It is also important to note that the TDRs are taxed at the rate of 18%, whereas the commercial apartment is taxed at the rate of 12% (after availing the 1/3rd deduction towards land). In such a situation, it cannot be left for an obvious or a fallout interpretation. The same has to be specified in clear text. In absence of such a text, it is highly illogical to shift the burden on the developer.

In commercial projects, it is obvious the land owner and developer wants to retain the apartments, so that they can generate rent, which is unlikely in the residential project. Hence, in every commercial project, there is high chance that the developer has unsold inventory. In all such cases, asking him to pay tax, especially, when credit is also not available, is antithesis to the business interest.

Despite of the above, what will be the position of the land owner if the developer insists that the levy of tax on TDRs is under reverse charge and not forward charge? Will the land owner be immune from the tax authorities, if they claim that the taxation on TDRs is under forward charge and not reverse charge? Will the payment by developer under reverse charge provide immunity to the land owner? Not an easy task on the land owner. He has to fight till the tribunals to get that sort of relief. Hence, it is important for the Council to provide more clarity on this transaction before it becomes another contentious issue.