

**DELHI AUTHORITY FOR ADVANCE RULING
GOODS AND SERVICES TAX
DEPARTMENT OF STATE TAXES
7TH FLOOR, VYAPAR BHAWAN, IP ESTATE, NEW DELHI -110002**

ADVANCE RULING NO. 03/DAAR/2018 dated 28.03.2018

(In Application No: 03/DAAR/2017 dated 29.12.2017)

Name and Address of the Applicant	: Shri Sanjeev Sharma H-77, Wazirpur Colony, Ashok Vihar, Delhi-110052
GSTIN of the Applicant	: Un-registered
Date of Application	: 29.12.2017
Clause(s) of Section 97(2) of CGST/DGST Act, 2017, under which the question raised	: (a) Classification of any goods or services or both (c) Determination of time and value of supply of goods or services or both (g) Whether any particular thing done by the applicant with respect to any goods or services or both amounts to or results in a supply of goods or services or both, within the meaning of that term
Date of hearing(s) for admission	: 19.01.2018
Date of Final Hearing(s)	: 23.02.2018, 16.03.2018
Date of receipt of written submissions from applicant	: 23.03.2018
Date of receipt of comments from (Centre)	: Not received
Date of receipt of comments from (State)	: Not received
Present for the Applicant	: Shri Puneet Agrawal, Advocate
Present for the Revenue (Centre)	: Ms. Tanvi Gupta Assistant Commissioner Shri Ajay Dev Pun, Superintendent CGST (West), EIL Building, Bhikaji Cama Place, New Delhi - 110066
Present for the Revenue (State)	: Shri Mahabir, GSTO (W-05) Vyapar Bhawan, New Delhi 110002

Order No:- 190/DAAR/2018-28.03.2018



Statement of Facts as per the Applicant:

The applicant plans to engage itself in the development and sale of residential houses, generally floors/ flats in India.

Acquisition of Land

2. The proposed modus operandi shall be that the applicant shall either purchase land or it shall enter into collaboration agreements with various land owners whereby the applicant shall acquire the right to develop the property and further sell the units developed thereon.

- a. In case of purchased land: the applicant shall be entitled to sell all the units developed thereon,
- b. In cases of development and sale rights: the applicant shall be entitled to sell the flats/ unit falling to the applicant's share, in terms of the collaboration agreement.

Development and construction of Project

3 Post purchase of land/ acquisition of land rights:

- a. The applicant shall apply for the requisite approvals.
- b. The applicant plans to get the construction work done by contractors as well as on its own.

4 Following agreements would be entered into by the Applicant:

- a. One for sale of undivided and immeasurable share in land; and
- b. Another agreement for sale of superstructure.

Details of Question on which Advance Ruling is requested:

5. In case where there are two transactions each represented by a separate Agreements i.e.

- i. One for sale of undivided and immeasurable share in land @ say Rs. 100, and
- ii. Another agreement for sale of superstructure @ say Rs. 15

6. Following are the questions on which the applicant is seeking advance ruling:



- a) Whether GST will be applicable on the sale of undivided and impartible share of land represented by Agreement to sell the land?
- b) Whether GST shall be applicable on sale of superstructure (which is under construction)?
- c) If yes:-
 - i. What will be the value on which tax is payable?
 - ii. What would be the applicable rate for charging GST?

Views of The Applicant:

7. Sale of land is out of the scope of the definition of Supply under GST, as the same has been prescribed under Entry 5 of Schedule III of the CGST Act, 2017. Consequently, transfer of undivided and impartible share in land would not be leviable to GST.

8. For the purpose of analysing the above transaction, it is of importance to have a perusal of the relevant portion of the provisions providing for the scope of 'Supply', which reads as under:

"7. (1) For the purposes of this Act, the expression "supply" includes-

...

...

(2) Notwithstanding anything contained in sub-section (1) -

- (a) activities or transactions specified in Schedule III; or
- (b) ...

shall be treated neither as a supply of goods nor a supply of services."

9. A perusal of the above extracted provision shows that all transactions provided under Schedule III of the CGST Act are out of the purview of GST and no GST is leviable on the said activities/ transactions.

10. The relevant Entry under the said Schedule, for the purpose of instant application, reads as under

"SCHEDULE III

ACTIVITIES OR TRANSACTIONS WHICH SHALL BE TREATED NEITHER AS A SUPPLY OF GOODS NOR A SUPPLY OF SERVICES.

1. ...
2. ...
3. ...
4. *Sale of land and, subject to clause (b) of paragraph 5 of Schedule II, sale of building.*
5. ...
6. ...

11. From a conjoint reading of Section 7 and Entry 5 of Schedule III of CGST Act, any activity/ transaction which is in the nature of 'sale of land' is not covered within the purview of GST. Consequently, no GST is payable on the transactions resulting in the sale of land.

12. Construction of superstructure would attract tax on Rs 1.5. Further, even in respect of superstructure, GST should be imposed only on the value of construction on or after the agreement with the buyer i.e. after deducting the value of construction already completed till the date of agreement.

13. Relevant Notification No. 11/2017- Central Tax (Rate) dated 28.06.2017:

S. No.	Chapter, Section or Heading	Description of Service	Rate (per cent)	Condition
(1)	(2)	(3)	(4)	(5)
1	Chapter 99	All Services		
2	Section 5	Construction services		
3	Heading 9954 (construction services)	(i) Construction of a complex, building, civil structure or a part thereof, including a complex or building intended for sale to a buyer, wholly or partly, except where the entire consideration has been received after issuance of completion certificate, where required, by the competent authority or after its first occupation, whichever is earlier (Provisions of paragraph 2 of this)	9	



	notification shall apply for valuation of this service)	
	(iii) composite supply of works contract as defined in clause 119 of section 2 of Central Goods and Services Tax Act, 2017.	9
	(iii) construction services other than (i) and (ii) above.	9

Paragraph 2: In case of supply of service specified in column (3) of the entry at item (i) against serial no. 3 of the Table above, involving transfer of property in land or undivided share of land, as the case may be, the value of supply of service and goods portion in such supply shall be equivalent to the total amount charged for such supply less the value of land or undivided share of land, as the case may be, and the value of land or undivided share of land, as the case may be, in such supply shall be deemed to be one third of the total amount charged for such supply.

Explanation :- For the purposes of paragraph 2, "total amount" means the sum total of,-

- (a) consideration charged for aforesaid service; and
- (b) amount charged for transfer of land or undivided share of land, as the case may be.

Discussion:

14. The issue for decision in this case is regarding value and rate of tax for payment of GST on the service of construction of a complex, building, civil structure or a part thereof, including a complex or building intended for sale to a buyer, wholly or partly, except where the entire consideration has been received after issuance of completion certificate, where required, by the competent authority or after its first occupation, whichever is earlier.

15. It is observed that as per Section 7(2)(a) of the CGST Act, 2017, activities or transactions specified in Schedule III of the said Act shall be treated neither as a supply of goods nor a supply of services. Further, Paragraph 5 of the said Schedule III specifically covers sale of land. Hence, sale of land is not covered under the scope of supply under GST and hence on the sale of land, no GST is payable. Similarly, sale of undivided portion of land is also outright sale of immovable property and hence outside the scope of GST.

However, the Section 7(1)(d) of the CGST Act, 2017 read with Paragraph 5(b) of Schedule II of the said Act specifically provides that supply of goods or supply of services include "construction of a complex, building, civil structure or a part thereof, including a complex or building intended for sale to a buyer, wholly or partly, except where the entire



consideration has been received after issuance of completion certificate, where required, by the competent authority or after its first occupation, whichever is earlier". Hence, if construction activity is done on behalf of the buyer i.e. as a supply of goods or services to the buyer, GST is payable.

17. It is also observed that during the construction of a complex, building etc., the land and its superstructure becomes inseparable and hence, separate sale of land and its superstructure does not appear to be permissible. During the hearings, the applicant was asked to submit a sample copy of 'Registered Sale Agreement' in Delhi where sale of land and sale of its superstructure have been separately registered. However, they could not produce any such registered agreements.

18. The applicant has submitted that laws in India recognises "land" and "super-structure" as separate and independent immovable properties. The applicant has referred to provision of General Clauses Act, Indian Contract Act, 1872, Specific Relief Act, Transfer of Property Act, The Indian Evidence Act, Registration Act, Stamp Act, Income Tax Act etc. to claim that land and building are two different assets or immovable property and that land and superstructure can be independently sold and purchased. However, under GST, the valuation of supply of goods and services has to be done in accordance with Section 15 of the CGST Act, 2017.

19. Further, even if separate values would be available for land and goods & services, the paragraph 2 of the Notification No. 11/2017 – Central Tax (Rate) dated 28.06.2017 would be applicable for ascertaining value of goods and services for levy of GST, as discussed below.

20. The supply in this case is a composite supply consisting of three components, namely (i) land on which the complex or building is constructed, (ii) goods which are used in construction activities and (iii) services undertaken by the applicant directly or through other contractors.

21. While admitting that GST cannot be levied on the value of land or value of undivided share of land, the question which needs to be answered is how the value of the said land needs to be ascertained.

22. In this case, the measure of tax should be the value of goods and services supplied by excluding the value of land. However, since land cannot be separately sold, a deemed value of land need to be ascertained on which GST would not be payable.



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23. The applicant wants the value of land to be ascertained by him on the basis of Rule 30 of CGST Rules, 2017, as the said Rules, do not provide any other specific provision to ascertain the value of land for exclusion.

24. It is also observed that a similar issue under Service Tax was decided by Hon'ble High Court of Delhi under W.P. (Civil) No. 2235/2011 in the case of Shri Suresh Kumar Bansal v/s Union of India. The Hon'ble High Court held in its judgement dated 03.06.2016 that in the case of sale of complex, which is a composite contract, the levy of service tax would be restricted to the service element of the contract, after excluding the value of goods as well as the value of land from such contracts. It was also held that statutory framework must provide for machinery provisions to ascertain the value of such service element which are charged to Service Tax. In Service Tax, the Section 67 of the Finance Act, 1994 and by virtue of Section 67(1)(ii) of the said Act, Rule 2A of the Service Tax (Determination of value) Rules, 2006 provided mechanism to ascertain the value of services and goods in a composite works contract. However, the said Rule did not cater to determination of value of services in case of a composite contract which also involves sale of land. Further, circulars or other instructions could not provide the machinery provisions for levy of tax, which must be provided in the statute or the Rules framed under the statute. In Service Tax, the provision to exclude the value of land was sought to be provided by exemption Notification No. 26/2012 – ST dated 20.06.2012 which had been issued under Section 93 (1) of Finance Act, 1994. The scope of the said Section 93 of the said Act, was limited to grant of exemption provided the service tax was leviable under Section 66/66B of the Finance Act, 1994. It was held that the abatement to the extent of 75% or 70% by a notification or a circular cannot substitute the lack of statutory machinery provisions to ascertain the value of services involved in a composite contract.

25. However, under GST Notification No. 11/2017 - Central Tax (Rate) dated 28.06.2017 - S. No. 3 r/w Paragraph 2, the deemed value of land or undivided share of land has been fixed at one-third of the total amount charged. Hence, in GST, the machinery provisions to ascertain the value of land is available in the notification which has been issued under Sub-Section (5) of Section 15 of the CGST Act, 2017 regarding value of taxable supply. The said sub-section (5) of Section 15 of CGST Act, 2017 reads as under:

"Notwithstanding anything contained in sub-section (1) or sub-section (4), the value of such supplies as may be notified by the Government on the recommendations of the Council shall be determined in such manner as may be prescribed."

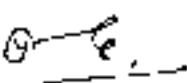
26. The said Notification has been issued under Section 15(5) of the CGST Act, 2017 by the Government on the recommendation of the GST Council and hence, no separate Rule was required to be issued. Hence, Paragraph 2 of the Notification No. 11/2017 - Central Tax (Rate) dated 28.06.2017 is fully authorised by Section 15(5) of the CGST Act, 2017 to provide



machinery provisions to ascertain the value of land for exclusion and to measures the value of supply of goods and services for levy of GST. The said machinery provisions cannot be equated with exemption Notification issued under Section 93(1) of the Finance Act, 1994 which were held to be insufficient by the Hon'ble High Court, as mentioned above.

Ruling

27. In the case of supply of services by way of construction of a complex, building, civil structure or a part thereof, including a complex or building intended for sale to a buyer, wholly or partly, except where the entire consideration has been received after issuance of completion certificate, where required, by the competent authority or after its first occupation, whichever is earlier, the GST would be payable on two-third of the total amount consisting of amount charged for transfer of land or undivided share of land, as the case may be, and whole of the consideration charged for the supply of goods and service. Hence, the value of land, or the undivided share of land, as the case may be, would be deemed to be one-third of the total amount, which is excluded from the value for the purposes of payment of GST. Even if agreement between the applicant and the buyer is entered after part of the construction is already completed, whole of the consideration would be added for payment of GST. The applicable rate of GST on the said two-third of total amount is 9% (CGST) and 9% SGST under S. No. 3(i) of Notification No. 11/2017-Central Tax (Rate) dated 28.06.2017 and parallel SGST notification.


Pankaj Jain
Member (Centre)


Vinay Kumar
Member (State)

