

GST IMPACT ANALYSIS ON SPECIFIC INDUSTRIES/SECTORS



REAL ESTATE

Introduction:

Currently, a Builder is subjected to numerous taxes such as VAT, service tax, entry tax, Octroi, LBT, CVD, SAD, etc. which come under the indirect tax net. With the introduction of GST, major levies shall be subsumed into a single tax 'GST'; thereby putting to rest to old controversies. In this article, a few important concepts pertaining to real estate sector and related issues have been dealt.

Levy of Tax:

While 'post Occupancy Certificate Sale' by itself is not covered under the ambit of GST, sale of under construction flat shall attract GST. Attention is drawn to Section 7(1) (d) read with Item 5(b) of Schedule II to the CGST Act, 2017/SGST Act, 2017 which deals with taxability of under construction flats. The above-mentioned item of Schedule II is a reproduction of declared service as present under current Service Tax regime except for the words 'after its first occupation, whichever is earlier'. The said reading of the amended item of Schedule II may lead to a conclusion that even if the completion certificate has not been received by the builder, if first occupancy in the premises has been taken place, builders may not be required to charge GST if entire consideration is received after first occupation. This would come as a blessing for the builders who due to certain reasons are unable to get the completion certificate from the local authority. However, the expression 'first occupation' is not defined in the Act and therefore, will be a subject matter of interpretation and litigation in absence of any clarification by the Government.

Rate of Tax:

As per the GST council, rate of construction service is recommended to be **12%** and that of works contract is **18%**.

Input Tax Credit:

Currently, under VAT & Service Tax regime numerous restrictions have been imposed on a Builder in order to claim the input credit resulting in significant loss of ITC. Under the GST Regime, a Builder shall be entitled to take ITC on inputs, input services & capital goods used in furtherance of business. Section 17(5)(c) of the CGST Act/SGST Act provides for restriction of input tax credit on 'works contract services when supplied for construction of an immovable property (other than plant and machinery) **except where it is an input service for further supply of works contract service**'.

A builder discharging 12% GST on construction service may not be in a position to take a stand that input services under the description of "works contract services" are used for further supply of works contract service. If that is the case, builder ought to pay GST at the applicable rate of works contract i.e. 18%. Therefore, in absence of any clarification, a builder discharging GST under construction service may not be entitled to ITC on input services under the description of "works contract service ("such as civil works, tiling work, grilling work, lobby works, etc.)

Transitional Provisions:

One of the crucial aspects of transition is the excise duty, CVD, SAD suffered by the builder on its major components such as steel, cement, etc. A builder directly purchasing from a manufacturer or importer may be in possession of required documents and therefore may be in a position to avail the credit of excise, CVD, etc. A builder purchasing material from wholesaler, retailer may not be in a position to reproduce required documents and therefore such builders may not be in a position to claim the whole credit.

Further, proviso to Section 140(3) envisages a situation for availing of credit of excise duty/ CVD, etc. where registered person is not in possession of duty paying document. However, the proviso restricts manufacturer and supplier of service from its ambit. Builder being a service provider would not fall under the said proviso and therefore in absence of required documents, he may not be able to carry forward the credit.

Ongoing Contracts:

In case of ongoing contracts, a situation may occur wherein full VAT is discharged but only part service tax is paid on the same flat. Accordingly, issue may arise as to proportion of payment of GST on such flats. It has been provided that proportionate credit of full tax paid earlier may be available. However, it is advisable to check the applicable SGST Act for similar provisions in order to get the benefit of respective state VAT paid.

Floor Space Index(FSI)/Transfer of Development Rights(TDR):

FSIs/ TDRs used by the Builders are effectively rights in land and not land by itself. As per Schedule III of the CGST Act/SGST Act not all immovable properties are excluded from ambit of GST but just sale of land. Accordingly, there are chances that such transaction of sale of FSI/ TDR may attract tax under GST. However, according to another school of thought FSI/ TDRs may still be counted as 'part of Land' and therefore stands excluded from GST net.

Barter Transactions:

Many barter transactions are witnessed in Real Estate industry. For Example, giving away of free flats in lieu of 'development rights'. Many experts have been taking a stand under several state VAT laws that such barter transactions are not subjected to VAT on the basis of the term 'valuable consideration'. However, GST shall be payable even in barter transactions. The value of supply shall be determined in accordance with GST (Determination of Value of Supply) Rules.