TRANSFER OF DEVELOPMENT RIGHTS – TAXABILITY –WHEN & AT WHAT RATE?

By
Pradeep K Mittal*
BCom,LLB,FCS

In this Article, an attempt has been made to explain the position of taxability of "Development Rights". Before I venture to do this, it would be prudent to explain what, in fact, are "Development Rights". On may occasions, the land-owners may be owning a plot or land but he may not be having either the requisite money, resources or expertise, infrastructure to develop either the Residential Complex, Commercial Complex or combination thereof over it. Therefore, the land-owner may enter into an Agreement with the Developer for the purpose of development and hence, in the process, there is a transfer of "Development Right" in favour of "Developer" to develop the said land or plot. The obvious question, therefore, arises as to whether in a transaction of this nature, the "Land-Owner" or "Developer" or combination of both is required to pay GST ?

Advocate – Past Central Council Member, the ICSI
Pkmittal171@gmail.com

2: In this regard, reference is made to the latest landmark and illuminating judgment of the Hon'ble Tribunal in the case of DLF Commercial Project vs. Comm. of Service Tax, 2019-TIOL-1514- Cestat, Chandigarh, wherein it has been held that

the “Development Right is benefit arising out of land and, therefore, the same is not chargeable to service tax. The relevant paragraphs of the decision are extracted as under:-

> "14. Now, we deal with the legal aspect of the case. Section 65B(44) of the Finance Act, 1994 defines the services and excluded certain activities which are as under:-
>
> any activity which constitutes merely-
>
> (i) a transfer of title in goods or immovable property, by way of sale, gift or in any other manner; or
>
> (ii) such transfer, delivery or supply of any goods which is deemed to be a sale within the meaning of clause (29A) of Article 366 of the Constitution, or
>
> (iii) a Transaction in money or actionable claim;"

3: As per the said provisions, the transfer of title in goods or immovable property, by way of sale, gift or in any other manner is not a service and no service tax is payable thereon.

4: The immovable property has not been defined in the Finance Act, 1994, therefore, as per Section 3 (26) of the General Clauses Act, 1897, the immovable property means as under:-

> (26) "Immovable property" shall include land, benefits to arise out of land, and things attached to the earth, or permanently fastened to anything attached to the earth;

5: On going through the said definition, the immovable property includes land benefit arising out of land can be equated to transfer of development rights of the land, therefore, it is to be

seen in the legal aspect whether the benefit arising out of land can be equated with transfer of development rights of land or not?

6: The said issue has been examined by the Hon'ble Allahabad High Court in the case of Bahudur and Others vs. Sikandar & others MANU/UP/0016/1905 and Other wherein it was observed as under:-

> "Therefore, the principal question we have to consider is whether the right to collect dues upon a given piece of land, the property of the alleged lessor, is a benefit to arise out of land within the purview of Section 3 of the Registration Act. In our opinion, the right to collect dues upon a given spot is such a benefit, and therefore, we are constrained to find that the document in question purported to convey that which falls within the definition of immovable property. The so-called lease being an unregistered instrument, it could not effect the transfer and could not be admissible in evidence. We are therefore of opinion that the Court of first instance was right. We set aside the order of the lower appellate Court and restore the decree of the Court of first instance with costs in all courts."

7: Further, in the case of Chheda Housing Development Corporation vs. Bibijan Shaikh Farid, MANU/MH/0070/2007 the Hon'ble High of Bombay observed as under:-

> 15. The question is whether on account of the term in the clause which permits acquisition of slum TDR the appellants in so far as the additional FSI is concerned, are

not entitled for an injunction to that extent. An immovable property under the General Clauses Act, 1897 under Section 3(26) has been defined as under:-

> (26) "immovable property' shall include land, benefits to arise out of land, and things attached to the earth, or permanently fastened to anything attached to the earth." If, therefore, any benefit arises out of the land, then it is immovable property. Considering Section 10 of the Specific Relief Act, such a benefit can be specifically enforced unless the respondents establish the compensation in money would be an adequate relief.

8: A question as to whether FSI/TDR be said to be a benefit arising from the land. Before answering this issue, I may refer some judgments. In Sikandar and Ors. Vs. Bahadur and Ors. 27 ILR 462 a Division Bench of Hon'ble Allahabad High Court held that right to collect market dues upon a given piece of land is a benefit arising out of land within the meaning of Section 3 of the India Registration Act, 1877. A lease, therefore, of such right for a period of more than one year must be made by registered instrument.

9: The Hon'ble Division Bench of the Oudh High Court in Ram Jiawan and Anr. V. Hanuman Prasad and Ors. MANU/OU/0077/: AIR 1940 Oud 409 also held, that bazaar dues, constitute a benefit arising out of land and therefore a lease of bazaar dues is a lease of immovable property. The Allahabad High Court in Smt. Dropadi Devi v. Ram Das and Ors. MANU/UP/0120/1974: AIR 1974 All 473 on a consideration of

Section 3 (26) of General Clauses Act, is also to the above effect.

10: Further, the issue was examined by the Hon'ble High Court of Bombay again in the case of Shadoday Builders Private Ltd. And Ors. Vs. Jt. Charity Commissioner MANU/MH/6791/2011 wherein the issue was in respect of sale of transferrable development right is immovable property or not? The Hon'ble High Court observed as under:-

> "5. The principal issue which arose before the learned Joint Charity Commissioner as to whether the TDR could be termed as a movable property, is concluded and is not more res integra in view of the judgment of the Division Bench of this court reported in MANU/MH/0070/ 2007(3) Mh.L.J. 402 in the matter of Chheda Housing Development Corporation..vs.. Bibijan Shaikh Farid. Para no. 15 of the said judgment is material and is reproduced hereunder.
>
> > 15. The question is whether on account of the term in the clause which permits acquisition of slum TDR the appellants insofar as the additional F.S.I. is concerned, are not entitled for an injunction to that extent. An immovable property under the General Clauses Act, 1897 under section 3(26) has been defined.

11: Another question arises as to whether - Can FSI/TDR be said to be a benefit arising from the land. Before answering that issue, I may refer to some judgments for that purpose. In Sikandar & others..vs. Bahadur & others., XXVII Indian Law Reporter, 462, a Division Bench of the Allahabad High Court

held that right to collect market dues upon a given piece of land is a benefit arising out of land within the meaning of Section 3 of the Indian Registration Act, 1877. A lease, therefore, of such right for a period of more than one year must be made by registered instrument. A Division Bench of the Oudh High Court in Ram Jiawan and anr.. Vs. Hanuman Prasad and ors., MANU/OU/0077/1940: AIR 1940 Oudh 409 also held, that bazaar dues, constitute a benefit arising out of the land and therefore a lease of bazaar dues is a lease of immovable property. A similar view has been taken by another Division Bench of the Allahabad High Court in Smt. Dropadi Devi vs. Ram Das, AIR 1974 Allahabad 473 on a consideration of Section 3(26) of General Clauses Act (which define "immoveable property").

12: As the Hon'ble Bombay High Court observed in the case of Sadoday Builders Private Ltd. And Ors. (supra) that transferrable development right is immovable property, therefore, the transfer of development rights in the case in hand is termed as immovable property in terms of Section 3(26) of General Clauses Act, 1897 and consequently, no service tax is payable as per the exclusion in terms of Section 65B(44) of the Finance Act, 1994".

13: Similar view has been expressed by Hon'ble Customs Excise & Service Tax Appellate Tribunal in the case of Mormugao Port Trust vs. Comm. MANU/CM/0883/2016:2017 (48) STR 69.

14: Further, Hon'ble Tribunal in the case of Rajasthan State Mines and Minerals Limited vs. Commissioner of Central

Excise and Service Tax (21.08.2019 - CESTAT - Delhi) : MANU/CE/0269/2019 has held as under: -

> In the circumstances, we find that there is no element of service involved in the transaction, undertaken by the appellant while acquiring the land and transferring the same to the JV company, for setting up of the power plant.

14.1: The GST is leviable either on supply of goods or on service by virtue of Section 7 & 9 of CGST. The question then arise as to whether the "Development Right" is Goods or Service? The "Goods" has been defined U/s 2 (52) which reads as under:-

> "goods" means every kind of movable property other than money and securities but includes actionable claim, growing crops, grass and things attached or forming part of the land which are agreed to be severed before supply or under a contract of supply;

14.2: The definition U/s 2(52) of CGST talks of "movable property". In simple words, the goods means movable property and certainly not immovable property.

14.3: There is no doubt that the "Development Rights" are not goods by any means. The question then arise as to whether they are "Service" or not?. However, the definition, as given U/s 2 (102) of the CGST Act, defines "Service".

> "Service" means anything other than goods, money and securities but includes activities relating to the use of money or its conversion by cash or by any other mode,

from one form, currency or denomination, to another form, currency or denomination for which a separate consideration is charged;

[Explanation: For the removal of doubts, it is hereby clarified that the expression 'services' includes facilitating or arranging transactions in securities;]

14.4: By going by the definition of " Service" in my view, "Development Rights" are neither service as well. The question then arise as to whether 'Development Rights" are immovable property.The immovable property has been defined in Section 3(26) of the General Clauses Act and in the preceding paras, there is a exhaustive discussion about the meaning and scope of "immoveable property" (which is definitely immovable property) and also benefits arising out of the land. At this stage, it would be kept in mind that under Schedule-I attached to CGST Act, there is no deeming fiction to hold that "Development Rights" are either "Goods" or " Service.

14.5: In my view, development rights are certainly not a immovable property but certainly is the 'benefits arising out of land' and not liabe to payment of GST regime. There is a Board Circular issued by CIBC whereby it is sought to be explained under various situation, as to when the GST would be payable. But Board Circular cannot fasten tax or duty. There is no gain saying in the fact that immovable property is the subject matter of tax by the State Government under the Stamp Act when there is transfer of immovable property.

POINT OF TIME WHEN GST IS PAYABLE IN CASE FLATS ALLOTTED TO LAND OWNER.

15: In many cases, the promoter receives development right from the landowner for the purpose of developing the property. The promoter pays the landowner by allotting certain apartments to the landowner. The landowner may either sell the apartments or retain partially or fully the apartments for his own use.

16.1: The proviso in Column No.5 of the notification provides that the promoter shall pay the tax on supply of constructed apartments allotted to the landowner. The tax will be paid by the developer-promoter on the date when the right in allotted apartments is provided to the landowner-promoter. The granting of right will be in the form of allotment letter or by creating any other documents by which the rights are provided to the landowner-promoter. The value of the apartment should be the sale price of the similar apartments nearest to the date on which the landowner-promoter is allotted the apartments.

AVAILABILITY OF ITC

17: The GST paid by the developer-promoter on the apartments allotted to the landowner-promoter will be available as a credit to the landowner-promoter. The landowner-promoter will sell the apartments and pay the tax on the sale of the apartments, provided the apartments are sold while under construction. It has been clarified that vide Circular F.No.354/32/2019-TRU

dated 14.05.2019 that the landowner-promoter will not be entitled to any other credit, except the credit of tax paid by the developer-promoter. The Sr. No.2 of the Circular is reproduced below:-

S.No.	Question	Answer
2.	In case of an area sharing arrangement between landowner-promoter and a Developer-Promoter, where the Project qualifies to be considered an "Ongoing Project", whether an option of 1% or 5% (without ITC_ vis-à-vis 8% or 12% (with ITC as prescribed in Notification No.3/2019 can be exercised by the Developer-Promoter and Landowner-Promoter independently?	The legal and operational harmony necessitates that both the Landowner-Promoter and the Developer-Promoter exercise identical option for a project

17.1: Further, the land-owner-promoter is not required to make any physical payment for the value of the flat to the developer-promoter. The payment is already made by him in the form of granting the development right to the developer-promoter.

18: The CBIC vide F.No.354/32/2019-TRU dated 14.05.2019 in Sr. No.24 has clarified that the landowner need not pay

amount within 180 days as he has already paid the amount. The clarification is reproduced below:

S.No.	Question	Answer
24.	Whether the condition to make payment within 180 days by Landowner-Promoter to Developer-Promoter as provided in second proviso to section 16(2), shall be applicable for reversal of input tax credit.	The apartments given to the Landowner-Promoter are given by the Developer-Promoter against consideration received by him in the form of TDR from the Landowner-Promoter. Therefore, the payment of Landowner-Promoter for service of construction of apartments received from the Developer-Promoter is made even before the service is provided.. Therefore, Landowner-Promoter shall not be required to reverse input tax credit of tax charged from him by the Developer-Promoter on the ground that he has not made payment for the service received from the Developer-Promoter.

18.1: The Developer-Promoter and the landowner-promoter has been defined in the explanation as follows:-

i. "developer-promoter" is a promoter who constructs or converts a building into apartments or develops a plot for sale;
ii. "landowner-promoter" is a promoter who transfers the land or development rights or FSI to a developer-promoter for construction of apartments and receives constructed apartments against such transferred rights and sells such apartments to his buyers independently.

19: It will be evident from the above that the landowner-promoter is a person who intends to sell such an apartment. The society does not sell the apartment but allots the same to their members. Therefore, the society cannot be considered as a landowner-promoter.

20: The CBIC vide F.No. 354/32/2019-TRU dated 14.05.2019 in Sr. No. 1 has clarified that both the landowner-promoter and developer-promoter shall exercise identical option. Thus, either both should pay 8% or 12% tax or should pay 1% or 5% tax. The said clarification is reproduced below:

S.No.	Question	Answer
1.	In case of an area sharing arrangement between Landowner-Promoter and a Developer-Promoter, where the Project qualifies to be considered an "Ongoing	The legal and operational harmony necessitates that both the Landowner-

	Project", whether an option of 1% or 5% (without ITC) vis-à-vis 8% or 12% (with ITC) as prescribed in Notification No.3/2019 can be exercised by the Developer-Promoter and Landowner-Promoter independently?	Promoter and the Developer-Promoter exercise identical option for a project.

PURCHASE OF 80% OF INPUTS AND INPUT SERVICES FROM REGISTERED DEALER:

21: It may kindly be seen that 80% of value of input and input services, [other than 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], used in supplying the service shall be received from registered supplier only. The manner of computation is as follows:-

(a) Where cement is received from an unregistered person, the promoter shall pay tax at the applicable rates of cement under RCM on monthly basis.[benefit of 80% is not available]. Tax shall be paid in the month in which cement is received. Once tax is paid, it will be considered as purchased from registered dealer.

(b) Where value of input and input services received from registered suppliers falls short of the said threshold of

80%, tax shall be paid by the promoter on value of input and input services comprising such shortfall at the rate of 18% on reverse charge basis as provided under Sr.No.452Q of Schedule-III of Notification No.1/2017-CT (Rate) dated 28.06.2017.

(c) Values of inward supplies received should be calculated during the financial year (or part of the financial year till the date of issuance of completion certificate or first occupation of the project, whichever is earlier).

(d) The said tax payments on the shortfall shall be submitted in the prescribed form electronically on the common portal by end of the quarter following the financial year. The said tax liability be added to the output tax liability in the month not later than June following the end of the financial year.

APPORTIONMENT BETWEEN COMMERCIAL AND RESIDENTIAL APARTMENTS –

22: The REP projects will be both commercial and residential apartments. The cost of purchase of input and input services are required to be bifurcated between commercial and residential on the basis of carpet area. The CBIC vide F.No.354/32/2019-TRU dated 14.05.2019 in Sr. No. 5 clarified as follows:-

S.No.	Question	Answer
5.	In case of a Real Estate Project, comprising of Residential as well as Commercial portion (more than 15%), how is the minimum procurement limit of 80% to be tested, evaluated and complied with where the Project has single RERA Registration and a single GST Registration and it is not practically feasible to get separate registrations due to peculiar nature of building(s)?	The promoter shall apportion and account for the procurements for residential and commercial portion on the basis of the ratio of the carpet area of residential and commercial apartments in the project.

23: The CBIC vide F.No.354/32/2019-TRU dated 07.05.2019 in Sr. No.9 has clarified with regard to shortfall in purchase of 80% of the value of Input and input services. The said clarification is reproduced below:

S.No.	Question	Answer
9	If value of purchases as prescribed above from registered supplier is less than 80%, what would be the applicable GST rate on such purchases?	Promoter has to pay GST @ 18% on reverse charge basis on all such inward supplies (to the extent short of 80% of inward supplies from

		registered supplier) except cement on which tax has to be paid (by the promoter on reverse charge basis) at the applicable rate, which at present is 28% (CGST 14%+SGST 14%)

23.1: The inclusion of value of exempted supply/land value in computing 80% of the value has also been clarified vide F.No.354/32/2019-TRU dated 14.05.2019 in Sr. No.18 and Sr.No.19 reproduced below:

S.No.	Question	Answer
18.	Whether the inward supplies of exempted goods/services shall be included in the value of supplies from unregistered persons, while calculating 80% threshold?	Yes. Inward supplies of exempted goods/services shall be included in the value of supplies from unregistered persons while calculating 80%

		threshold.
19.	Whether the purchase of Land from an unregistered person shall be required to be included in the value of Input and Input Services for the purpose of calculation of 80% threshold?	No. As per Schedule III, Entry No.5, of CGST Act, sale of land is not a supply. In addition, as per 5th proviso to entries at Sl.No.(i), (ia), (ib), (ic) and (id) against Serial No.3 in the Notification No.11/2017-CTR dated 28.06.2017 as amended by Notification No.3/2019-CTR dated 30.03.2019, transactions by way of grant of development rights, long term lease, FSI etc. are not required to be included in the value of Input and Input Services for evaluation of criteria of 80% from registered persons.

24: The three examples given in Annexure-III to the Notification No.11/2017-CT (Rate) are reproduced below to explain the above provisions.

Situation 1

S.No.	Name of input goods and services	Percentage of input goods and services received during the financial year	Whether inputs received from registered supplier (Y/N)
1.	Sand	10	Y
2.	Cement	15	N
3.	Steel	20	Y
4.	Bricks	15	Y
5.	Flooring Tiles	10	Y
6.	Paints	5	Y
7.	Architect/designing/CAD drawing, etc.	10	Y
8.	Aluminium windows, ply, commercial wood	15	Y

25: As mentioned above, if cement is purchased from unregistered person, tax on reverse charge will be payable irrespective of the fact that whether 80% of purchase from registered person is achieved. In the above example, tax will be

payable on 15% of the purchase as he has purchased cement from unregistered person.

Situation 2

S.No.	Name of input goods and services	Percentage of input goods and services received during the financial year	Whether inputs received from registered supplier (Y/N)
1.	Sand	10	Y
2.	Cement	15	N
3.	Steel	20	Y
4.	Bricks	15	Y
5.	Flooring Tiles	10	Y
6.	**Paints**	5	Y
7.	Architect/designing/CAD drawing, etc.	10	Y
8.	**Aluminium windows, ply, commercial wood**	15	Y

26: The builder/developer has purchased 80% of goods and input services from registered person. 20% viz. paints, aluminium windows, ply, commercial wood are purchased from unregistered person. Therefore, the person is not required to pay any amount under reverse charge.

Situation 3

S.No.	Name of input goods and services	Percentage of input goods and services received during the financial year	Whether inputs received from registered supplier (Y/N)
1.	**Sand**	10	Y
2.	**Cement**	15	N
3.	Steel	20	Y
4.	Bricks	15	Y
5.	Flooring Tiles	10	Y
6.	Paints	5	Y
7.	Architect/designing/CAD drawing, etc.	10	Y
8.	Aluminium windows, ply, commercial wood	15	Y

27: In this case, only 4 items i.e. sand, cement, aluminium windows, ply, commercial wood are purchased from unregistered person. As mentioned above, he will have to pay GST on cement on monthly basis. After making payment on Cement, still he has purchased 35% of the purchases from unregistered person. Therefore, he will have to pay GST @ 18% on 15% of the purchases.

28: The Revenue has challenged the judgment of Hon'ble Tribunal Chandigarh Bench, in the case of DLF Ltd, wherein it was held that the no Service Tax is leviable on transfer of

Development Rights. The appeal of the Department has come up for hearing, for the first time, in the first week of November, 2019 and the same stood admitted and would be listed for final arguments in due course. In my personal opinion, the rate of 18% requires re-consideration . The reputed companies like DLF, Tata and Godrej & others, who are buying duty paid inputs and input services, are really facing the pain of (i) payment of inputs tax, (ii) non availment of ITC of inputs and input services (iii) and payment GST at the rate of 5% requires serious re-consideration when the Real Estate Industry reeling under severe recession and is in the process slow revival – a little Philip from Government would be invigorating.