

**Impact of GST on Immoveable
Property and Construction Sector
PART-II**

By
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Real Estate sector in India has been identified by the Government as one of the dominant sectors economy. As a part of their manifesto, BJP, who is dominant player in the NDA Government, has set ambitious targets under the low cost housing segment and has left no stone unturned to incentivize the developers in multiple ways. At the same time, the consumers have been empowered by the implementation of Real Estate Regulation Act, 2016.

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2: In this part of Article, an attempt has been made to explain as to how various taxes has impacted the residential sector during Pre-GST regime and how the GST would impact this Sector post GST regime.

	Real Estate Transaction VAT Rates			
	Bengaluru	Mumbai	Chennai	Gurugram
VAT	4.0%	1.0%	2.0%	4.0%
Service Tax	4.5%	4.5%	4.5%	4.5%
Stamp Duty	5.7%	5.0%	7.0%	6.0%
Registration Charges	1.0%	1.0%	1.0%	0.5%
Total Taxation	15.2%	11.5%	14.5%	15.0%

3: **GST on under-construction flats and properties** will be taxed at 12% which includes 6% SGST plus 6% CGST in case the value of land has been included. The government has also allowed deduction of land value equivalent to one-third of the total amount charged by a developer, thus, making the effective tax rate as 18%. In other words, it could be said that the effective rate of GST for under construction property would be 12% where the value of land is included and 18% where the value of land is not included.

GST Impact on Construction Materials Tax Rates

Materials	VAT	GST
Cement	20-24%	28.00%
Iron rods and pillars	20%	18.00%
Paint, wall fittings, plaster, wallpaper and ceramic tiles	20-25%	28.00%
Sand lime bricks and fly ash bricks	6.00%	5.00%

4: The study carried out is an effort to assess the impact of GST on various issues connected with the real estate sector. The following issues have been taken up for this impact study:

1. Basic overview of the new tax regime under GST
 - a. The past
 - b. Scheme of taxation under GST
 - c. Valuation

5: In the present Article, I will cover (i) Basic Overview (ii) Scheme of Taxation in GST and (iii) Valuation - whether materials such Steel, Cement, Marble/Tiles supplied by Principal to be included in the "Transaction Value" or not?

BASIC OVERVIEW OF NEW TAX REGIME UNDER GST

6: The Hon' Karnataka High Court in the case of K. Raheja Corporation Vs. State of Karnataka, which treated a Developer as a "Works Contractor", to tax the

transfer of property in goods while constructing the real estate property. The law laid down by the Hon'ble Supreme Court in K. Rahejas' case (141) STC 298) was a subject matter of challenge before the Hon'ble Supreme Court in the case of Larsen and Toubro Limited & Another vs. State of Karnataka & Another. However the same was upheld in the year 2013 which paved the way for all the states in the country to start recovering indirect taxes in the form of VAT from the builders. The Hon'ble Supreme Court, while delivering the judgment made a very critical remark that in such cases, the position of works contract would only arise from the date the agreement is being entered into with the prospective customer.

7: As far as service tax is concerned, in the Finance Act, 2010, an explanation was added w.e.f. 1-7-2010, which meant that any construction of a complex by a builder during or after construction shall be deemed to be service taxable under the Act. This came with an exception that if no sum is received from the prospective buyer before the grant of completion certificate by the authority, then it would not be service taxable under the act.

SCHEME OF TAXATION UNDER GST:

8: The "Works Contract" as well as sale of under construction property have been classified as a 'service' under Clause (b) of Schedule II attached to the CGST Act. This is the most positive sign for the construction and real estate sector as this would take care of major valuation related issues dealing with splitting the total agreement into value towards material and labour.

9: As far as construction of complex is concerned, a significant change that is now visible is that apart from the requirement of completion certificate from the competent authority, there is also a reference of "first occupation" as an alternative option. This would suggest that the moment first occupation (though may not be as per law) is proved by anyone, any subsequent bookings would not be subject to GST. Invariably, it is seen that, on all many occasions, the Regulatory Authorities are extremely reluctant to issue "Completion Certificates". However the said term "first occupation" has not been defined and, therefore, leaving a scope for little ambiguity - the possession could be actual possession or symbolic possession and hence calls for "clarification" from the Government.

10: Now, in the GST regime, the following rates have been prescribed. Two relevant entries are as below:-

Sr. No.	Description of Services	GST Rate
1	Construction of a complex, building, civil structure or a part thereof, intended for sale to a buyer, wholly or partly. [The value of land is included in the amount charged from the service recipient.	12% With Full ITC but no refund of overflow of ITC
2	Composite supply of Works Contract as defined in Clause (119) of Section 2 CGST Act read with Clause 5(b) of Schedule-II attached to CGST Act.	18% With Full ITC

10.1: One can safely conclude that effectively, a 33% abatement has been considered for the purpose of land.

11: It may be appreciated that 12% rate allows full Input Tax Credit (hereafter called “ITC”) without any refund of overflow. This would suggest that the Government foresees a situation where the developer would be paying Input Taxes at 18% and 28% which may lead to excess Input Tax credit balances in comparison to output tax at the rate of 18%. Such out-flow of taxes would only be available for set off against the future projects.

VALUATION

12: Though valuation is very exhaustive and comprehensive topic and presently, I would be covering a limited issue as to whether the costs of (a) Steel, and (b) Cement, is liable to be included in the “transaction value” for the purpose of calculation of GST payable thereon. Other critical issues of “Valuation” would be covered in the subsequent issues/parts as would be appearing in future.

12.1: The Section 15 of CGST Act, inter-alia, deals with the valuation of supplies of either Goods or Services, for the purpose of levy of Tax and the same are reproduced below:-

Section 15: (1) The value of a supply of goods or services or both shall be the “Transaction Value”, which is the price actually paid or payable for the said supply of goods or services or both where the supplier and the recipient are not related and the price is the sole consideration for supply.

(2): The value of supply shall include:-

(a): any taxes, duties, cesses, fees, and charges levied any law for the time being in force other than this Act, the State Goods and Services Tax Act, the Union Territory Goods and Services Act and the Goods and the Service Tax (Compensation to States) Act, if charged separately by the supplier:

(b): any amount that the supplier is liable to pay in relation to such supply but which has been incurred by the recipient of the supply and not included in the price actually paid or payable for the goods or services or both.

13: Since “Transaction Value”, as appearing in Section 15, has not been interpreted by any judicial fora, therefore, we may seek the help of judicial pronouncements under Section 4 of Central Excise Act, 1944, which is in para-materia, with Section 15(1)(2)(a)(b) and (c) of CGST Act. The Supreme Court in the case of **Purolator India Limited Vs. CCE MANU/SC/0988/2015**, while defining the words “actually paid or payable” has observed as under:-

“The expression 'actually paid or payable for the goods, when sold' only means that whatever is agreed to as the price for the goods forms the basis of value, whether such price has been paid, has been paid in part, or has not been paid at all. The basis of 'transaction value' is, therefore, the agreed contractual price ”.

COST OF FREE SUPPLIES:

14: A question arises as to whether value of “free of supplies” by the Principal/Developer, made to the “Contractor” would be liable to be included in the “transaction value” for the purpose of levy of GST ? Free supplies may, however, inter-alia, include:-

- a) Cement (b) Steel (c) Sand (d) Construction materials
- e): Imported Marbles/Tiles (f) Articles to be used/applied in the project

15: Section 15(2)(b): it provides that the transaction value will include the amount which the supplier is so liable to pay but it has been paid by the recipient of supply - which could be in the form of (i) durable and returnable packing (ii) advertisement expenses and (iii) sales promotion expenses etc.etc. Thus, in a

contract, the obligation undertaken by the supplier for making the supply of goods needs to be determined. In case, any amount has been incurred by the recipient of supply in connection with the supply, the same would be included in the “transaction value”. However, the issue of free supply made by the principal do not fall within the four corner of Section 15(2)(b) as he is not incurring any amount, which under the contract, the contractor (i.e. service provider) is liable to incur.

16: The Supreme Court in the case of **Steel Authority of India Limited Vs. CCE - MANU/SC/1401/2015** has observed as under:-

“It is undeniable that under Section 4 of the Act, the excise duty is to be paid on the 'transaction value' and such a transaction value has to be seen at the time of clearance of the goods. When the goods were cleared, the excise duty was paid taking into consideration the price that was actually charged and was reflected in the invoices raised for the said purpose. The Department cannot plead that as on that date, this was not the price charged. No doubt, when the differential payment is made at a later date, further amount towards excise duty becomes payable as a result of said differential in price.”

17: Upon the conjoint reading of the above two judgments i.e. Purolator India Limited (supra) and Steel Authority of India Limited (supra), it makes manifestly clear that the “transaction value” is a contract price or agreed price, becomes value for the purpose of payment of Excise Duty now GST. It requires no elaboration that in the Tender Documents” or “Letter of Intent”, price is well defined and would clearly specify the items and, therefore, sum total of those items would be “Transaction Value”. If we analyze the ratio laid down in Steel Authority of India Limited (supra), it is manifestly clear that the Supreme Court has viewed that the “price actually charged and/or as shown in the Invoice, shall be “transaction value” over which the Excise Duty shall be calculated and payable. However, the situation may differ in case the Principal/Government, while supplying the material is raising issuing invoice/debit note to the Contractor in respect of materials supplied.

18: The Board in its circular Letter F. No. 354/81/2000-TRU dated 30.06.2000 has clarified the position as under: -

6...It may also be noted that where the Assessee charges an amount as price for his goods, the amount so charged and paid or payable for the goods will form the assessable value. If, however, in addition to the amount charged as

price from the buyer, the Assessee also recovers any other amount by reason of sale or in connection with sale, then such amount shall also form part of the transaction value for valuation and assessment purposes. Thus if Assessee splits up his pricing system and charges a price for the goods and separately charges for packaging, the packaging charges will also form part of assessable value as it is a charge in connection with production and sale of the goods recovered from the buyer ...

7. It would be seen from the definition of 'transaction value' that any amount which is paid or payable by the buyer to or on behalf of the Assessee, on account of the factum of sale of goods, then such amount cannot be claimed to be not part of the transaction value. In other words, if, for example, an Assessee recovers advertising charges or publicity charges from his buyers, either at the time of sale of goods or even subsequently, the Assessee cannot claim that such charges are not includable in the transaction value. The law recognizes such payment to be part of the transaction value that is assessable value for those particular transactions.

20: The Three Member Bench of the Hon'ble Custom Excise Service Tax Tribunal in the case of M/s. Bhayana Builders (P) Ltd. and Ors. etc. etc. vs. CST, Delhi and Ors. MANU/CE/0343/2013, has laid down the following ratio.

14: We are compelled to conclude that goods and materials, supplied/provided/used by the service provider for incorporation in the construction, which belong to the provider and for which the service recipient is charged towards the value of such supply/provision/use and the corresponding value whereof was received by the service provider, to accrue to his benefit, whether independently specified as attributable to the specific material/goods incorporated or otherwise, would alone constitute the gross amount charged., This is not to say that an exemption Notification cannot enjoin a condition that the value of free supplies must also go into the gross amount charged for valuation of the taxable service. If such intention is to be effectuated the phraseology must be specific and denuded of ambiguity.

15. In conclusion we answer the reference as follows:

(a) The value of goods and materials supplied free of cost by a service recipient to the provider of the taxable construction service, being neither monetary or non-monetary consideration paid by or flowing from the service recipient, accruing to the benefit of service provider,

would be outside the taxable value or the gross amount charged, within the meaning of the later expression in Section 67 of the Finance Act, 1994; and

(b) Value of free supplies by service recipient do not comprise the gross amount charged under Notification No. 15/2004-ST : MANU/DSTX/0036/2004, including the Explanation thereto as introduced by Notification No. 4/2005-ST.

21: Following Larger Bench judgment of Bhayana Builders (P) Ltd, the Hon'ble Tribunal in the case of CCE, Vs. Sonali India (03.01.2014 - CESTAT - Delhi) : MANU/CE/0094/2014, has held as follows:-

The short question required to be decided is as to whether allowing the claim of abatement of 67% in terms of said notification, the value of tanks and pumps supplied free by M/s. IOCL (Indian Oil Corporation Limited) have to be included or not. It was held that value is not required to be included.

Stamp Duty & Registration Charges:

22: As far as "Valuation" is concerned, the provisions of Section 15(2)(a) of the CGST Act talks about inclusion of any taxes, duties, cesses, fees and charges levied under any other law (other than GST) in the "assessable value" while discharging the GST liability. Now, a question arises as to whether "stamp duty" and/or "registration charges" collected from the buyer would also be subjected to GST or not? From the language of Section 15(1)(a), it is manifestly clear that such charges are bound to be taxed under GST. These charges shall be required to be included.

23: At the same time, we may have to take note of the judgment of the Supreme Court in the case of M/s. Burn Standard Company Ltd. and another vs. UOI MANU/SC/0403/1991 and this judgment is prior to 2000 when the concept of "Transaction Value" (as in Section 15 of CGST Act) has been introduced for the first time under Section 4 Central Excise Act, 1944 and hence not required to be considered:-

The "free supply items" like wheel-sets etc. in the process of manufacturing become part of the complete wagon and lose their identity. It hardly matters how and in what manner the components of the wagon are procured by the

manufacturer, so long as the appellant is manufacturing and producing "wagons", it is liable to pay duty of excise on the normal value of the wagon.

24: The procedural formalities required to be followed would be that the Principal/Government shall be buying the materials either from the manufacturer or trader who would be raising invoice in the name of the Principal/Government (as a buyer) and the "consignee" would be "Contractor" who would be working at the site of works. The materials so supplied by the Principal/Government would be used by the Contractor and the "Contractor" as a Service Provider would be, from time to time, raising Running Account Bills/Invoices of the "Transaction Value" (Section 15 CGST Act) i.e. sum total of materials/services used in the "works contract", as certified by the Engineer of the Principal/Government. However, reiterating at the cost of repetition, the value of materials (i.e. cement, steel, marbles, tiles etc.etc.) shall not form part of the "Transaction Value".

25: However, the law is evolving and by and large there is consensus on the above view except singular view that Section 15(2) (b) of CGST Act, would include the value of cement, steel and other materials supplied by Principal/Government.

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