**BY E-MAIL / COURIER**

**File No.115/2023-Opinion**

16.06.2023

Confederation of Real Estate Developers Association of India,

Century Plaza, 8th Floor, 8E,

No.526, Anna Salai,

Chennai – 600 018.

Attn.: Mr. P. Kruthivas, Secretary <secretary@credaichennai.in>

**Mobile:**  **98847 24111**

C.C.: <prasad@harmonyhomes.in>

Sir,

**Sub.: Payment of GST in respect of cases coming under Joint Venture Development.**

1. In connection with the above, find attached the following.

(a) Opinion.

(b) Our Bill towards professional charges.

2. Should you need any further clarification in this regard, please feel free to contact me. Kindly arrange for payment of the attached bill.

Yours faithfully,

**S. MURUGAPPAN**

Attached: as above.

sm/ss

**OPINION**

**1. QUERIST:**

Confederation of Real Estate Developers Association of India,

Century Plaza, 8th Floor, 8E,

No.526, Anna Salai,

Chennai – 600 018.

**2. FACTS:**

2.1 In respect of construction of residential units in the form of apartment complexes, the querist has referred to the category of Joint Venture Development or Re-development projects. Typically, when the land owners are aged and do not have means to develop the property by themselves or the apartment complex built already has become aged and needs to be demolished and in its place a new complex is to be built then, in such cases, the owners concerned and the builders enter into joint venture agreements for joint development of the property.

2.2 In such a case a standard Joint Development Agreement is executed where a clear demarcation of the total constructible apartments along with the UDS that is being realigned are mentioned clearly for both the Land owners and the Developer. The Developer then is enabled to sell his portion of the constructible area i.e. apartments along with the UDS that is allocated to him. The Developer in lieu of getting a portion of the UDS (Undivided Share of Land) is in turn bringing in capital and constructing the entire project. In this scenario the Developer is rendering service to the Land owner.

2.3 It is stated by the querist that with regard to a redevelopment or a joint venture where the land owner wants to retain his portion of the apartments, the GST department is currently emphasising the land owner to pay an equivalent sum that a new buyer pays for his or her apartment.

They are going by Rule 27 of CGST Rules 2017 which reads as follows.

**27.** Value of supply of goods or service where the consideration is not wholly in money. Where the supply of goods or service is for a consideration not wholly in money, the value of the supply shall, --

**(a)** Be the open market value of such supply.

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The Department is quoting the above Rule and is taking the view that the open market value in this instance is the equivalent amount that the new buyer of the apartment pays.

2.4 For example if an assumption is made that as per the JDA the land owner gets 5 apartments that are of 1000 Sq. ft. each and the Developer gets 5 apartments of the same 1000 Sq. ft. each to sell to the open market. Hence, currently the department gives a 1/3 fixed rebate for land value and the balance 2/3 is considered as construction cost and 7.5% is taxed to the buyer for the 2/3rd portion. Also, it is pointed out at this juncture that the Department is adding EB, Metro Water, Sewer, Reserved Carpark costs to the cost of the apartment while computing the total value of the apartments.

2.5 In any inner city location (for instance, Adyar, Mylapore, T.Nagar or Alwarpet) where the price of the apartment is, say, hovering between 16,000 to 20,000 Rupees per sq. ft., the logic of deducting 1/3 for land and having 2/3 for construction cost will be absurd. For that matter in any location across the country today the construction cost would and could only vary between 2000 to 3500 Rupees per sq. ft.

The Developer’s entire receivables from his share of the apartments also includes the cost for the construction for the entire project including the land owner’s portion. According to the querist when these entire proceeds and income (which includes the developer’s profit margin) is already suffering GST, the question of again trying to value a service rendered to the Land owner and taxing him again is not logical. No doubt the landowner has been rendered a service. But the entire proceeds for that project has already suffered tax. According to the querist in essence, the Land owner’s share or the service rendered to the land owner has also been taxed by way of collection from the new buyer.

**C.** If at all logic does not prevail and if there has to be a tax component again that is going to be levied on the land owner then it has to be the open market value of what it would cost to construct a 1000 sq. ft. flat. If the land owner went to a contractor and built 5 apartments for himself then that value of pure construction cost is the only amount that can be taxed. This determination of open market value for pure construction cost can always be ascertained through a registered cost accountant’s valuation.

Thus, in the opinion of the querist Rule 27 is being wrongly used to tax the Home buyers and the Land owners in a very inappropriate way.

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2.6 Apart from the above issue the querist is referring to the fact that when GST was first introduced, Developers were under the 18% GST tariff with input credit being allowed. Subsequently, Developers’ associations from across the country represented to the Central Government stating that Housing forms an essential part of the common man of this country and the Government has to rethink of taxing the Home Buyer at such a high tariff.  In turn, the Government came up with 5% GST but prohibited availment of any Input credit. Developers across the country never expected the Government to take away the option of availing Input credit.

2.7 The core principle of GST is to take credit and pass credit. It is the very foundation of GST. Here, the developer pays GST on every material he procures and sometimes as high as 28% for Cement and 18% for Steel and Bricks and is being denied the option of availing Input credit. This issue has been time and again addressed by various Associations and Developers from across the country to the Central Government but without any success.

**3. QUERY:**

3.1 In the above background the querist would like to know the correctness or otherwise of the method adopted by the GST authorities for collecting tax in respect of flats given to the land owners.

3.2 With regard to denial of input credit, the querist would like to know whether there is scope to approach High Courts for appropriate relief.

**4. OPINION:**

4.1 As already indicated by the querist it is clear that as of now, generally, the GST authorities are levying and collecting tax in respect of flats given to the land owners on the basis of ‘deemed’ valuation. Secondly, such valuation is based on the price at which such flats are sold to other third-party buyers by the builder in the **same project** after adjustment of land cost.

4.2 For adopting such value, it is seen that GST authorities rely upon Rule 27 of CGST Rules 2017. Rule 27 reads as follows:

*“****Rule 27. Value of supply of goods or services where the consideration is not wholly in money.*** *–– Where the supply of goods or services is for a consideration not wholly in money, the value of the supply shall, -*

*(a) be the open market value of such supply;*

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*(b) if the open market value is not available under clause (a), be the sum total of consideration in money and any such further amount in money as is equivalent to the consideration not in money, if such amount is known at the time of supply;*

*(c) if the value of supply is not determinable under clause (a) or clause (b), be the value of supply of goods or services or both of like kind and quality;*

*(d) if the value is not determinable under clause (a) or clause (b) or clause (c), be the sum total of consideration in money and such further amount in money that is equivalent to consideration not in money as determined by the application of rule 30 or rule 31 in that order.”*

4.3 In respect of joint development projects as mentioned by the querist, the land owners (LO) agree to transfer / sell a specific portion of their land-holding to third parties through the builder. As indicated, such transfer is done by the builder acting as power of attorney holder and this is a direct transfer between the LO and the third-party buyer. For ceding with such land-holding, in turn, the LO expects the builder to offer them constructed flats in the same land. This is achieved by retention of the remaining portion of the land by the LO. Such construction of flats to be given to the LO can be without any extra consideration by way of money payment either from the builder to the LO or from the LO to the builder depending upon the location and cost of the project.

4.4 In this context, it is to be noted that though the entire construction cost is recovered from the third-party buyers, it cannot be argued that the LO who get the flats constructed are not receiving any service from the builder. For ceding a part of their land-holding, in return, the LO get flats constructed by the builder for them. Thus, there is a service element involved and the consideration for such service cannot be taken as free as it may look, apparently at the first glance. But the actual consideration is in the form of giving away a portion of their land. Thus, the consideration is in kind and not in cash alone or depending upon each case, it can be a combination in kind and cash.

4.5 In such cases, it becomes necessary to arrive at the value for the purpose of collecting GST in respect of services provided to the LO by construction of flats for the LO. Rule 27 of CGST Rules 2017 mentioned above provides a method for valuation in respect of such situations. Rule 27(a) states, in such a case the value shall be the open market value of such supply. If such open market value is not available then recourse is to be taken to Rule 27(b); then Rule 27(c) and finally, Rule 27(d). While applying Rule 27(d), the provisions contained in Rule 30 should be applied first and then Rule 31 is to be applied.

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4.6 In cases of joint venture development, it is to be noted that the construction cost is not recovered from the LO and the whole costing for the project is designed in such a way by the builder that the cost is recovered from the third-party buyers. Therefore, while it is necessary to collect tax for the services rendered to the LO on the basis of deemed valuation concept because the consideration for such construction of flat is by way of ceding a portion of land, it will not be correct to adopt the price at which the flats in that project are sold to third parties. This is for the reason the price charged to third-party buyers in joint venture development cannot be termed as ‘open market value’ for construction of a flat in an independent venture where the payment for all the buyers of the units in a project are based on outright sales only. In a joint venture development, when a third-party buyer buys a flat at Rs.15,000/- per sq.ft., it is to be kept in mind that such a price is fixed based on the overall cost of the joint venture project where some of the flats in the very same project are given to the LO in a sort of barter arrangement.

4.7 In the above background, the price at which the flat is sold to a third-party buyer in such projects cannot be taken as the ‘open market value’ for the flats sold.

4.8 One has to take into consideration the price at which a similar flat with the same specifications in the same area will cost.

4.9 In the present method of calculation, not only the adoption of such prices as open market value is wrong but also deduction of 1/3rd towards land cost is an artificial but inappropriate method. In areas where the land commands a very high cost, this method of exclusion of certain amount towards land value will not be proper and fair. But, in any case, since the government has notified this method of calculation for excluding land cost, there will be little option for the service provider to adopt a different method.

4.10 Once it is ruled out that in this case there is no ‘open market value’, then, Rule 27(b) and (c) are to be applied. In case, there is no data available for applying Rule 27(b) or Rule 27(c) then one has to go to Rule 30 as provided for in Rule 27(d).

4.11 Availability of prices for comparable flats with same specification in the same area can be a major challenge and in the normal circumstances, in comparison even between two builders’ projects will not result in accurate computation. Therefore, after ruling out the application of Rule 27(b) and 27(c) one has to fall back to Rule 30 which reads as follows:

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*“****Rule 30. Value of supply of goods or services or both based on cost.*** *–– Where the value of a supply of goods or services or both is not determinable by any of the preceding rules of this Chapter, the value shall be one hundred and ten percent of the cost of production or manufacture or the cost of acquisition of such goods or the cost of provision of such services.”*

4.12 **If one can work out the cost of construction by taking into account the materials and the labour and get that certified by a cost accountant or a qualified civil engineer, then, that should represent the true and correct value that can be adopted for charging tax for the flats given to the LO**. In this calculation, the land cost does not come into picture at all and the data to compute the cost of construction of such flats with the material as well as labour break-up will be readily available. Such a computation will fairly represent the value that can be adopted for charging tax on the flats given to LO.

4.13 **Accordingly, in our view, the querist will have a strong case to dispute the method of valuation adopted by the department by applying Rule 27(a) in respect of joint venture projects.**

4.14 With regard to the denial of input credit, in case, the builders want to avail 5% GST for the construction services provided by them, it comes without any input credit and in this regard, it is to be noted that this will be a policy decision of the government. The availability of input credit can be subject to the conditions to be imposed by the government. When they have powers to extend such benefits they have powers to restrict such benefits subject to conditions, as such. In this regard, when concessional tax is levied subject to the condition of non-availment of credit, it may be difficult to contest that as “without authority of law”. One possible solution will be to make a representation to the government and ask them to change the conditions applicable, as complete denial of input credit for availing a lower rate of tax benefit appears to be not justified and is logically unsound.

**S. MURUGAPPAN**

sm/ss

**Disclaimer:-** The above opinion is provided based on the information and documents made available to us by the querist and further based on the laws and rules prevalent as on date and the understanding of such provisions by the author and is meant for the private use of the person to whom it is provided without assuming any liability for any consequential action taken based on the views expressed here.