



TAX ALERT

Clearing the Air around Real Estate Sector

May 23rd, 2019

The Central Board of Indirect Taxes and Customs (“**CBIC**”) has issued two compilations of Frequently Asked Questions (“**FAQs**”)¹ clarifying various issues arising out of the notifications implementing the suggestions of the 33rd meeting of the GST Council with respect to the real-estate sector. The FAQs centre around the scope of ongoing projects, requirement of mandatory procurements, supply of development rights (“**TDR**”), Floor Space Index (“**FSI**”) and Long Term Lease transactions (“**LT Lease**”) (collectively referred as “**Land Rights**”), valuations, etc. Some of the significant clarifications of interest are discussed below:

A. Ongoing Projects

1. The FAQs clarify that developers/promoters would have an option to discharge Goods and Services Tax (“**GST**”) on the rates notified prior to April 01, 2019 for supplies of construction services for apartments in ongoing projects, subject to submission of the prescribed form. Where the form is not submitted by the due date, the developer/promoter would be deemed

to have exercised the option of payment of GST at concessional rates without availability of Input Tax Credit (“**ITC**”). The option has to be exercised by developers/promoters and not by the buyers.

2. An ‘ongoing project’ must fulfil the following criteria:

- (a) The commencement certificate, wherever required, must have been issued by a competent authority. A registered architect / certified engineer / licensed surveyor must have certified that the construction of such project had started on or before March 31, 2019 [i.e. the earthwork or excavation for foundation for the project had been completed on or before March 31, 2019].
- (b) The completion certificate or first occupation of the project has not taken place on or before March 31, 2019. For the definition of first occupation of the project,

the relevant laws, rules or regulations enacted in this regard may be referred to. Projects where only part occupation certificate or part completion certificate was issued on or before March 31, 2019, would be considered as ongoing projects.

- (c) Apartments of the projects had been wholly or partly booked on or before March 31, 2019.
3. In area sharing arrangements between the landowners and developers/promoters, both parties should exercise the identical option for a project to ensure legal and operational harmony.
 4. The option of payment of GST is required to be selected individually for each ongoing project. Since, the Real Estate (Regulation and Development) Act, 2016 (“**RERA**”) allows separate registration for each of the ongoing projects, a developer/promoter may exercise different options for different ongoing projects. Modification / amendment of the option is not allowed post the submissions of the requisite form.
 5. GST liability at concessional rates would have to be discharged in cash, and not through adjustment of ITC.
 6. In a case, where invoices have been issued by a developer/promoter at the rates other than what such developer/promoter ultimately opted for on or before May 20, 2019, debit or credit notes may be issued for adjustment of such differential tax. Where a credit note is issued in case of cancellation of apartment on or after April 01, 2019, the developer/promoter shall be entitled to take adjustment of the tax amount against its

output tax liability, subject to refund of such amount to the buyer. However, where an apartment booked in an ongoing project is cancelled and rebooked at concessional rates or post the issuance of completion certificate, the developer/promoter would be required to reverse the credit attributable to corresponding supply of services till March 31, 2019.

B. Procurements from Registered Suppliers

1. The computation of the value of mandatory procurement requirement of 80% of inputs and input services from registered suppliers would exclude the value of the following supplies:
 - (a) exempted goods / services;
 - (b) Land Rights;
 - (c) high speed diesel, natural gas, electricity, etc.;
 - (d) salaries and wages paid by developer/promoter to its employees, etc.
2. In case of a shortfall in mandatory procurement requirement of 80%, the promoter/developer is required to pay GST at an effective rate of 18% under Reverse Charge Mechanism (“**RCM**”) on inputs and input services procured from unregistered dealers, except on cement on which GST would have to be discharged at an effective rate of 28%.
3. Where a project comprises both residential and commercial apartments, the promoter/developer is required to apportion and account for 80% mandatory procurements of its inputs and input services for the residential apartment in the proportion of the carpet area of the residential apartments to that of the commercial ones.

C. GST on Land Rights

1. Exemption on supply of Land Rights for residential apartments booked before issuance of certificate of completion or first occupation is available only on supplies made on or after April 01, 2019.
2. Supply of Land Rights which is proportionate to construction of un-booked residential apartments as on the date of issuance of completion certificate or first occupation, would attract GST at the rate of 18%. However, the amount of such tax shall be limited to 1% or 5% of value of the residential apartment, as the case may be.
3. No exemption would be available on supply of Land Rights in relation to construction of commercial apartments, and the same would attract GST at the rate of 18%.
4. Any annual/monthly rent or license fee payable for LT Lease for any apartment would attract GST at the rate of 18%.
5. The developer/promoter shall be liable to pay GST on TDR transferred by any person, whether registered or not, on RCM basis.
6. The liability to pay GST on Supply of FSI/LT Lease relating to a commercial apartment where consideration is paid in money, would arise immediately at the time of payment of consideration in money on the developer/promoter under RCM.
7. In a case where the supply of TDR was undertaken prior to April 01, 2019, but allotment of corresponding constructed area is made after such date, the developer/promoter would be required to discharge tax at the time when he transfers the possession or the right in the constructed apartment.

D. Redevelopment and Slum Rehabilitation Projects

1. GST shall be applicable even when apartments are to be supplied free of cost to the slum dwellers. The value of TDR shall be equal to the amount charged by the developer/promoter for similar apartments from the independent buyers booked on the date that is nearest to the date on which such TDR is transferred by the land owner to the developer/promoter.
2. A redevelopment or slum rehabilitation project where the TDR was transferred on or before March 31, 2019, the requirement of receipt of at least one instalment as a consideration for unit is not mandatory, in case of both registered or unregistered supplier.

E. Valuation

1. The threshold of gross amount of INR 45 lakh for affordable residential apartments shall include all the charges or amounts charged by developers/promoters from buyers of the apartments except stamp duty and maintenance charges / deposits for maintenance of apartment or common infrastructure.
2. A developer/promoter can take an abatement of only 1/3 of the value (deemed value) of a unit towards the value of land, and not the actual value of land involved in the sale of a unit.
3. In relation to composite supply of works contract services for affordable residential apartments, the contractor may charge tax on the works contract service provided by him to a developer/promoter at the concessional rate of 12% on the basis of a declaration by the developer/promoter to the contractor that the project meets the conditions prescribed for concessional rate of GST on works contract service.

Our View

The pro-active effort of CBIC in bringing clarity on taxation for the real-estate sector is definitely commendable. While the FAQs do clear substantial ambiguities on various fronts, certain issues/doubts continue to persist. For instance, there is a lack of clarity on whether value of imported goods (where the supplier is not registered in India) would form a part of the value of mandatory procurement requirement of 80% inputs and input services from registered supplier. There is also an ambiguity on requirement of reversal of ITC on procurements made by the developers/promoters on or before March 31, 2019, which are partly used on or after April 01, 2019, and such developers/promoter decides to opt for concessional rate of GST.

Further, while the concessional rates of GST for real estate sector were introduced to provide relief to developers/promoters and buyers, it seems that such rate revision has been rushed into without providing ample time for the industry to adopt the same. For developers/promoters opting for concessional rates, it is not just a rate change but a change in the structure of their business. The decision of opting for concessional rate would impact various aspects of their business which *inter-alia* include non-availment of ITC, procurement from input/input services, contracts with customers, etc. Additionally, with a complex computation mechanism for revised pricing of flats post the rate reduction and pressure of compliance with the anti-profiteering provisions under the GST legislations, the landscape does appear to be primed for controversy.

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