

EY Tax Alert

HC holds transfer of development rights by landowner to developer under JDA is exigible to GST

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Executive summary

This Tax Alert summarizes a recent judgement of the Telangana High Court (HC)¹ on whether transfer of development rights pursuant to joint development agreement (JDA) can be treated as outright sale of land and hence, outside the purview of Goods and Services Tax (GST).

Taxpayer is engaged in construction of properties and entered into JDA for development of land in exchange of undivided share of land in the developed property. It filed a writ petition before the HC challenging the levy of GST on transfer of development rights by landowners to developer.

Key observations of the HC are:

- ▶ Mere execution of JDA for development of land by itself would not mean that the right, title and ownership of the property or a portion of that property stands transferred in the name of the developer.
- ▶ The title of the property stands vested with the landowners and it is only by way of a separate conveyance deed, that too, after the completion of development activity, the undivided share of land to the extent the developer is entitled could be transferred.
- ▶ Thus, the contention that JDA eventually results in sale of land is incorrect and misleading.
- ▶ Further, Notification No. 4/2018 - Central tax (Rate) merely deals with time of supply of transfer of development rights which always was taxable since the introduction of GST. Taking Article 246A of the Constitution and extraordinary powers of the GST Council into consideration, the challenge to the Notification can safely held to be devoid of merits.

Basis above, HC held that transfer of development rights is not akin to sale of land and hence, exigible to GST.

¹ TS-60-HC(TEL)-2024

Background

- ▶ Assessee is engaged in business of construction activities and entered into Joint Development Agreement (JDA) with landowners for development of land in exchange of undivided share of land in the developed property.
- ▶ It filed a writ petition before the Telangana HC challenging the levy of Goods and Services Tax (GST) on transfer of development rights in land *vide* JDA.

Taxpayer's contentions

- ▶ Transfer of development rights in a JDA should be treated as sale of land and hence, covered under Entry 5 of Schedule III to the Central Goods and Services Tax Act, 2017 (CGST Act).
- ▶ The net result of execution of JDA is sale of land belonging to landowners to developer after retaining part of the area which will be developed by the developer.
- ▶ Further, Notification No. 4/2018 - Central Tax (Rate) imposing GST on transfer of development rights is *ultravires* of Article 14, 246A and 265 of the Constitution of India.
- ▶ There is no specific mechanism or machinery which determines the quantum of tax liability upon the transfer of development rights and there is no specific provision under the GST law which determines the rate at which tax has to be levied in such cases.

Notification being a delegated legislation, cannot travel beyond the scope of substantive law².

- ▶ Moreover, the Notification has been issued invoking powers under Section 148 of the CGST Act. The said provision does not confer the Revenue authorities with the power to levy GST.

Revenue's contentions

- ▶ Reading the clauses of JDA gives a clear indication that there is no outright sale of property in the name of the developer.
- ▶ Rather, it is a case where the conditions would clearly indicate that the ownership is retained by the landowners and the only role of the developer has is developing the land belonging to the landowner.
- ▶ Thus, the transfer of development rights is a service exigible to GST.

HC ruling

- ▶ On perusal of the clauses of the JDA, it gives a clear picture of the fact that mere execution of JDA by itself would not mean that the right, title and ownership of the property or a portion of that property stands transferred in the name of the developer.
- ▶ There are certain conditions/ milestones which have to be crossed before which the taxpayer would be entitled to have a certain element of right over the completed constructed area.
- ▶ As per the terms of the JDA, in case of certain default on the part of the taxpayer, there is a condition of cancelling the contract and under such situation, the entire rights over the said property would continue to remain with the landowners.

This again would show that the right and title of the property even as on date stands vested with the landowners and not with the taxpayer.

- ▶ It is only by way of a separate conveyance deed, that too, after the completion of the development activity, the undivided share of land to the extent the taxpayer is entitled could be transferred.
- ▶ Thus, the contention that JDA eventually results in sale of land is incorrect and misleading.
- ▶ The Notification merely deals with time of supply of transfer of development rights which always was taxable since the introduction of GST.
- ▶ Taking Article 246A of the Constitution and extraordinary powers conferred upon the GST Council into consideration, the challenge to the impugned Notification issued by the Government can be safely held to be devoid of merits.
- ▶ In view of the above, HC dismissed the writ petition.

² Rajasthan State Industrial Development and Investment Corporation v. Subhash Sindhi Co-operative Housing Society, Jaipur, and others [2013 (5) SCC 427]

Comments

- a. Since the issue of taxability of development rights is pending before other HCs also, the matter may not be said to be settled with this ruling. Further, the same could be challenged from the perspective of constitutional power.
- b. It is relevant to note that the definition of 'land' under other statutes like Land Acquisition Act, 1894 and Andhra Pradesh Land Grabbing (Prohibition) Act, 1982 was not referred. In the case of *Safiya Bee v. Mohd. Vajahath Hussain*, Supreme Court observed that 'land' includes benefits to arise out of the land considering definition of land as per section 2(c) of Andhra Pradesh Land Grabbing (Prohibition) Act, 1982.
- c. Considering the provisions of the erstwhile service tax law, Chandigarh CESTAT had held that service tax was not payable on transfer of development rights [2019-TIOL-1514-CESTAT-CHD].
- d. It is pertinent to note that w.e.f. 1 April 2019, exemption has been provided to supply of development rights by landowner to developer for construction of residential apartments subject to certain conditions.

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