Explaining Development Right under JDA and it's GST Implications

Background of the Issue:
In joint development agreement (JDA), the landlord enters into arrangement whereby developer is allowed to enter into the land or the possession is handed over, and developer given an irrevocable right to do development works of construction of complex/building[nomenclated here as “development rights”] Land ownership continues with the owner of the land. In consideration of the development rights given by landlord, a portion of built up area is constructed by the developer and delivered over to landlord.

It would do well to remember that in GST law, tax is levied on supply of goods[moveables] or services[anything other than goods]. In the Third Schedule to GST Act sets out the activities which are treated neither as supply of goods nor as supply of services. There is an entry at sl no.5 as follows-5. Sale of land and, subject to clause (b) of paragraph 5 of Schedule II, sale of building.

At this juncture maybe noted the sale of land and sale of building is excluded from GST levy. GST is leviable on the construction and sale of complex/building/structures to end buyer, except when the entire consideration is received after completion certificate/first occupancy, whichever is earlier.

In recent times, after the notification 4/2018-CT(rate) dated 25.1.2018, there has been controversy about the GST applicability on the landlords on the development rights given to developer under JDA. The notification 4/2018-CT(rate) seems to indicate that tax is payable on development rights parted by landlords.
It sets out the tax liability on development rights arises to be paid at time when the developer transfers possession or the right in the constructed complex/building to landlord by entering into a conveyance deed or allotment letter to the person transferring development rights. Tax liability arises on the consideration received in the form of construction service.

In this backdrop, the paper writer in this article has examined as to whether the “development rights” can be said to be sale of land covered in Third Schedule entry 5 and implications in this regard.

What is “sale”, “land” and immovable property”?

The word “sale” and “land” has not defined under the GST law. In the absence of the definition in the Act, we could look under other enactments and into Dictionary meaning [similarly held in Star Paper Mills case[1989 (43) ELT 178 (SC)]. by Apex Court

Sale: In the Transfer of Property Act, 1882 Section 54. “Sale” is defined. “Sale” is a transfer of ownership in exchange for a price paid or promised or part-paid and part-promised.

Definition of land: Black’s Law Dictionary (Seventh Edition) defines that 'land' means an immovable and indestructible three-dimensional area consisting of a portion of the earth's surface, the space above and below the surface, and everything growing on or permanently affixed to it

P. Ramanatha Aiyar's Law Lexicon (Second Edition) observes that the word 'land' is a comprehensive term, including standing trees, buildings, fences, stones, and waters, as well as the earth we stand on. Standing trees must be regarded as part and parcel of the land in which they are rooted and from which they draw their support. The word 'land', in the ordinary legal sense, comprehends everything of a fixed and permanent nature and therefore embraces growing trees.

In Land Acquisition Act, 1894, 3. (a) the expression “land” includes benefits to arise out of land, and things attached to the earth or permanently fastened to anything attached to the earth;

Definition of ‘immovable property: In General Clauses Act. as given in clause (26) of the General Clauses Act, 1897 has to be taken as per which “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.

“Benefit to arise from land/profit a pendre-few examples”

a. A contract relating to bamboo constitutes a grant of a profits a prendre and is a benefit to arise out of land and as such creates an interest in immovable property. It was held in state of Orissa vs. Titaghar Paper Mills Co. Ltd[AIR 1975 Ori 90].
b. In Bhola Nath Nundi vs. Midnapore Zamindari Co Ltd (1904)8 Cal WN 425) the Calcutta High Court held that, ‘a
Profit a prendre’ is an incorporeal right clothing the possessor of it with an interest in the land. It is a right to enter
on the land of another and take therefrom a profit of the soil. It is so called because the claimant is entitled to take
the profit for himself.

c. Trees are immovable property (except standing timber) are immovable property” it is proved in the Shantabhai vs
State of Bombay (AIR 1958 SC 532(536) that trees are considered as immovable property.

From the above definitions and decisions, clear as follows:

a. Sale could be said to cover transfer of ownership.
b. Land is defined to include trees, buildings.
c. Immoveable property is defined to include land, benefits to arise from land.
d. In some enactments, land includes benefits arising from land

**Comparison of land vs benefit to arise from land:**

A fine distinction maybe possible to be done between land and benefit from land.

a. Immoveable property is inclusive to cover land and benefit arising from land- such as development rights.
b. Land could be said to be sub-category of immoveable property.
c. ‘Benefit to arise out of land’ is also sub-set of immoveable property – A benefit to arise out of land is an interest in
land, therefore immovable property. Not only the land, but benefit arising out of it is also regarded as immovable
property because benefits arising out of land is an incident of it and cannot be severed from it.

**Whether parting with development rights by landlord is covered as sale of land?**

In a JDA, landlord is giving away irrevocable right permanently to developer to enter into the land and to do
development works on land. Such right to do construction on land maybe said to be benefit arising from land.
Consequently development rights which is benefit arising from land is also an “immoveable property”.

The transaction of transfer of development rights by landlord could be said to be transfer of immoveable property **and not be treated as sale of land. This view may not be correct.**

In paper writer opinion, under GST, based on the above definitions of “sale” and “land” as defined under Land
Acquisition Act, 1894(similar definition of land is given under several Municipality Acts], as given above, it may be said
that “ land” covers benefit to arise out of land. Consequently, the transfer of development rights could be treated as
covered in “sale of land” covered in Schedule III entry 5, and treated neither as supply of goods nor as a supply of
service, and excluded from levy under GST.
However, the intention to cover benefit to arising from lands such as development rights in Schedule III-entry 5 is not clear/forthcoming in the said entry. The Apex court in many decisions has held that exemption need to be read strictly and intention cannot be read into the law. The view that development rights are covered in sale of land could be legally tenable, but disputed by dept. Revenue could dispute that there is no explicit exclusion for transfer of development rights/immoveable property from tax net and demand GST.

**Issues**

**Whether Service tax/GST is applicable on development rights transferred under joint development agreement entered by landlord and developer in 2013?**

Under erstwhile service tax law, negative list taxation[from 1.7.2012 to 30.6.2017], service tax was not leviable on the exclusions from definition of “service” as set out in section 65B(44). The service definition excluded the transfer of title to immovable property, by way of sale, gift or any other manner.

The definition of “immovable property” as defined in the General Clauses Act[given above] is inclusive definition where immovable property includes the following:

a. Land  
b. Benefits arising out of the land

**Transfer of title by way of sale gift or in any other manner:** Transfer of title means change in ownership. The scope of transactions relating to transfer of title in immovable property could cover transfer of title in immovable property in any other manner other than by way of sale or gift.

In respect of the land, landlord is able to transfer absolute rights associated with the said land. A view is possible this could be done because landlord is the owner of the land and whatever rights are being transferred has accrued/arisen on account of the ownership.

When landlord is transferring the possession of interests/rights or benefit arising out of land it could be said to be transfer of title to immovable property, in any other manner, and excluded from service tax levy. Similarly as development rights does not involve transfer of title to goods ie moveable property by landlord, no VAT on transfer of development rights either.

**Whether the builder can avail credit of GST paid on development rights to landlord?**

Yes when the landlord raises tax invoice, charge and collect GST from developer on development rights, the developer can avail such credit to extent related to the construction done by him, which would be supplied as taxable supply of
Conclusion

In view of the paper writer in pre-GST period, the rights arising from land-such as development rights were excluded from tax levy. However this intention seems to have got missed out in GST, leading to confusion for many. This issue would be raked up in light of the notification 4/2018-CT(rate). The persons who may suffer the most are the small landowners who have entered into JDA and who are not engaged in any other activity of taxable supplies of goods/services. Such persons may be forced to examine their transaction, register and pay taxes, file returns, when the value of their supplies exceeds Rs 20 Lakh pa in GST regime, unless any specific relief by way of exemption was to be given in this regard.

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Recommended Read

- Impact of constitutional amendment in Article 370 on Income Tax & GST in Kashmir
- How To Choose The Right Mutual Fund

The replies are given below based on the understanding that the JDA was entered and construction done post 1/7/2017.

1. We are collecting amount from Customer as advance. Example - Rs.100/- has been collected from Mr A (Customer) against our Demand/intimation letter & against Rs.100/- (including Tax) we are paying GST @12% or 18%(as per applicability). But as a Developer we are not getting 100% of that amount, certain percentage of that amount are transferred to the Land Owner through Escrow account. So, should we pay GST on Rs.100/- or else, Please advise???

2. If it is triparty agreement[landlord+ developer+ end purchaser/customer] where your co enters agreement for sale of flat in course of construction with all end buyers of flats[both of developer and landlord share of construction area], then your co can collect and pay GST on such agreement of sale of flats entered with end buyers in course of construction.

3. What will be the Tax Liability (on GST point of view) of Land Owner against receiving of certain percentage amount from Customer?? This would depend on agreement of developer with landlord. If it is revenue share arrangement where clearly specified that amount collected from customer a percentage is paid to landowner for...
value of sale of land or transfer of title to land, then such amount maybe excluded from GST levy at Schedule III entry 5.

Whether any Invoice will be raised by Land Owner in favour of Developer?? A view is possible that the transfer of development rights done post 1.7.2017 is also covered in Schedule III entry 5 which covers sale of land and not liable to GST Dept may dispute in such scenario, landlord may take call to register under GST and collect and pay GST on value of development rights. In such scenario, GST could be collected and paid by landlord at the time of handover of units of Landlord share vide notification 4/2018-CT(rate) and invoice to be raised at such point of time by land owner.

Respected Madam, please advise.

Respected M'am, Presently I'm working in a Real Estate Company (Developer) for last 5 months & this company has been incorporated in 2017 & this is their 1st project. I have some doubt in GST & the details are as follows: - 1. We are collecting amount from Customer as advance. Example - Rs.100/- has been collected from Mr A (Customer) against our Demand/intimation letter & against Rs.100/- (including Tax) we are paying GST @12% or 18%(as per applicability). But as a Developer we are not getting 100% of that amount, certain percentage of that amount are transferred to the Land Owner through Escrow account. So, should we pay GST on Rs.100/- or else, Please advise???? 2. When hand over to be made to the Customer, who will be generate Tax Invoice through Sale Proceed?? Developer or Land Lord??? 3. What will be the Tax Liability (on GST point of view) of Land Owner against receiving of certain percentage amount from Customer?? 4. Whether any Invoice will be raised by Land Owner in favour of Developer?? Please advise me briefly on the above issues & GST impact on Real Estate sector. Please advise M'am at the earliest.

Already replied sir.

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