GST levy on Realty Sector w.e.f 1st April - some major ramifications

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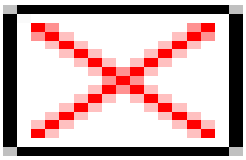

THE Board has come out with the much-awaited notifications dated March 29, 2019 concerning the new GST regime for the Realty Sector that has come into effect from April 1, 2019. This article is an attempt to try and understand some of the major ramifications arising out these notifications.

Vide Notification No. **3/2019-CTR** dated 29-3-2019, the existing SAC No.9954(i) has been completely substituted with new entries, viz. 9954(i) to (if), with effect from 1-4-2019 and SAC No. 9954(ii) dealing with composite works contracts has been omitted with effect from 1-4-2019. The impact of these drastic amendments would be that, Developers and Builders would now be compulsorily required to treat themselves as suppliers who are providing construction services. Prior to this amendment, it was very much possible for Developers and Builders who are engaged in the construction of apartments, etc. in the non-affordable segment, to take a view that, being works contracts, they could claim the actual deduction towards land, in terms of SAC No. 9954(ii). With this amendment, Developers and Builders, operating in the non-affordable segment, who are exercising the option for paying GST @ 18% under SAC No. 9954(if) vis-Ã -vis existing projects would now have to compulsorily claim the deduction towards land, at the rate of one third of the total value, resulting in an effective GST rate of 12% on the total value inclusive of land, in respect of instalments falling due on or after 1-4-2019.

In respect of new residential projects in the non-affordable segment, launched on or after 1-4-2019, Notification No. **3/2019-CTR** makes it clear that Developers and Builders would have no choice but to charge an effective 5% output GST on the total value, without availing ITC. The more draconian amendment is that, under the 5% GST scheme, Developers and Builders cannot utilize the ITC already availed by them. Developers and Builders who opt to shift to the new scheme even in respect of existing projects would also not be allowed to utilize ITC already availed by them, for payment of output GST.

Similar amendments have been introduced in respect of affordable housing also, with the output GST rates before claiming land deduction, being fixed at 1.5%, which after the one-third deduction towards land, would lead to an effective GST rate of 1% on the total value including of land. Here also, neither ITC can be claimed nor can already availed ITC be utilized for payment of the output GST.

As we know, ITC is a substantive benefit conferred by Section 17 of the **CGST Act, 2017** and is it legally justifiable for the Government to force Developers and Builders to go under the new scheme, in term of which, they are forced to pay output GST @ 5% on the total value of supply, without claiming ITC or being allowed to utilize ITC. Moreover, is it legally justifiable for the Government to unilaterally fix the value of land at one-third of the total value, irrespective of the actual value of land? In other words, can a Developer who is constructing a residential project at, let's say, Malabar Hills at Mumbai, where the land value could be about 80 to 85% of the total value be treated at par with a Developer who is constructing a residential project at, let's say, Mysore, where the land value could be about 25% of the total value? How can ITC which has already been availed, be not allowed to be utilized for payment of output GST, under the new scheme? Will this not be against decisions of the Supreme Court rendered in a host of cases during the previous MODVAT/CENVAT credit era?

Surely, since these changes which have been brought about by way of a notification, it is certain that Developers and Builders would file writ petition(s) challenging this obnoxious notification, which, is prima facie, ultra vires Section 16 and the very scheme of the GST law and is, therefore, legally unsustainable. It would have been better if the Government had retained the 12% GST scheme with ITC, for non-affordable housing projects and had introduced the scheme of 5% GST without ITC, as an alternative, in which case, much of the legal challenge to the new changes could have been averted.

Developers and Builders would be better off not opting to pay GST @ 5% for existing projects, for sure and even if any benefit is to be extended to existing customers vis-Ã -vis the new scheme, it would be better to offer these as discounts to the basic price.

This Notification which denies utilization of input tax credit already availed for payment of output GST under the new scheme, is clearly violative of the decisions of the Supreme Court rendered in ***CCE, Pune v Dai Ichi Karkaria Ltd - 2002-TIOL-79-SC-CX-LB*** and ***Eicher Motors Ltd v UOI - 2002-TIOL-149-SC-CX-LB*** and many other decisions. Of course, it would seem that the ITC already availed in respect of the residential projects can be utilized by the Developer for his other activities like renting, etc.

Be that as it may...

In terms of the definitions of Real Estate Project ('REP') and Residential Real Estate Project ('RREP'), it would seem that, when approvals are obtained under RERA for separate towers in a single project, each of these towers would be considered as a separate project, for purposes of the new changes that have come into effect.

Insofar as the construction activity of Developers and Builders, in pursuance of joint development projects is concerned, the applicable GST rate would be 18%, which seems draconian.

Insofar as payment of GST under RCM, by Developers on transfer of development rights by Landowners is concerned, in terms of Notification No. **4/2019-CTR** dated March 29, 2019, the Developer/Builder would be exempt from this levy, provided that such Developer/Builder would be liable to pay GST under RCM, on the value of proportion of the development rights or FSI, as is attributable to the value of residential apartments which remain un-booked on the date of the issuance of the completion certificate or the first occupation of the project, as the case may be. It would seem that, that the Developer or Builder, in these cases, would be better off paying the entire GST under RCM and avail of the ITC thereof, which can be adjusted against his output GST liability on the construction services vis-Ã -vis the completed flats that are transferred to the Land owner.

Shifting the liability to pay GST on transfer of development rights, from the land owner to the Developer/Builder, is obnoxious, to say the least, and the relevant notifications will most probably be challenged by way of writs, in the High Courts. Development rights, being rights arising or accruing out of land, cannot be subjected to the levy of GST, at all, leave alone, being brought under RCM, as levy of GST on development rights is nothing but levy of GST on land itself, which is impermissible.

One clarity that would seem to emerge is that, in respect of ongoing projects, all projects that fall under the Pradhan Mantri Awas Yogana, Credit Linked Subsidy Scheme ('CLSS') etc. which enjoyed concessional rate of tax would continue to be treated as affordable housing projects, while in respect of new projects in the affordable segment, the restrictions related to carpet area not to exceed 60 square metres in non-metro cities and 90 square metres in metro cities and the sale value not to exceed Rs 45 lakhs would be applicable.

Insofar as the new projects to be launched on or after April 1,2019 are concerned, there is nothing in the law for Developers and Builders not to increase their basic prices to compensate them for the loss of ITC, as Section 171 dealing with anti-profiteering is not applicable in this case.

Forcing Developers and Builders to compulsorily switch to the new system of paying GST@ 5% on the total value without ITC, without providing an alternative system of paying GST at a higher rate with ITC, in respect of new projects to be launched on or after 1-4-2019, to reiterate, goes against the GST law, in terms of which, seamless flow of credit is a fundamental concept, especially when these changes have been brought about by way of a Notification. Needless to say, this Notification deserves to be struck down/read down by the Courts.

Under the garb of simplification, the Government seems to have considerably added to the confusion that this Sector has been facing over the years and the new notifications are likely to open fresh gates of litigation for this Sector.

(The views expressed are strictly personal)