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FAQS ON GST LIABILITY BY RWA ON MEMBER'S MONTHLY SUBSCRIPTION

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The decision of the Hon'ble Madras High Court in the case of Greenwood Owners Association and others is one of the much talked about judgement in recent times.

The issue involved was interpretation of the following exemption entry S.No. 77 under Notification 12/2017 Central Tax (Rate) Dt. 28.06.2017, as amended, which reads as

*Service by an unincorporated body or a non-profit entity registered under any law for the time being in force, to its own members by way of reimbursement of charges or share of contribution **up to** an amount of five thousand rupees[1] per month per member for sourcing of goods or services from a third person for the common use of its members in a housing society or a residential complex.*

The issue before the High Court was that if a Residential Welfare Association (RWA) collects more than Rs.7,500 per month per member, whether GST is payable on the whole amount or, after claiming exemption up to Rs.7,500, GST is payable only on the amount in excess of Rs.7,500.

The High Court has upheld the later view and set aside an AAR Ruling and CBIC circular to the contrary effect and also observed that the Flyer issued by the CBIC, immediately after introduction of GST has correctly clarified the issue.

This judgement has generated lot of questions among all concerned, which are addressed as a FAQ below.

Q 1. So far, our RWA was collecting GST on the whole amount, wherever the contribution was in excess of Rs.7,500. Can the RWA claim refund?

A1. Since the RWA has already collected such GST from the members, the RWA would not be eligible to claim refund as per the doctrine of “unjust enrichment”. The individual members who have borne the incidence of higher GST can claim refund, but since the quantum of tax paid in excess may not be substantial in the hands of individual members, filing several claims is a cumbersome process. It is better to claim the benefit of the judgement prospectively

Q2. Is this judgement of the Madras High Court final?

A2. An intra-court appeal before the Division Bench of the same High Court is possible and it is not known whether the department is going to file an appeal or not. But unless this judgement is stayed, it is binding on all concerned.

Q3. Is this judgement applicable only in Tamil Nadu or throughout the country?

A3. Since the provisions of exemption notification has been interpreted and a CBIC’s circular is quashed, it will have great persuasive value in all other States. In the absence of any contrary judgements by any other High Courts, this should generally apply.

Q4. Will the Government make any retrospective amendment to overcome the effect of this judgement?

A4. Considering the facts and circumstances of the case, in the opinion of the author, it is highly unlikely that the Government would bring in any retrospective amendment in this case. Having clarified the issue in favour of RWAs immediately after introduction of GST, a contrary view has been taken after two years of introduction of GST by way of issue of a circular.

Q5. Can the Government amend the Notification prospectively to deny the benefit of the judgement?

A5. If the Government wants to amend to the Notification prospectively so as to make the entire contribution liable to GST if it exceeds Rs.7,500 per month, they can very well do so, after discussion in the GST Council. But, until such amendment is made, this decision of the High Court would be applicable.

Q6. Can the RWAs start following the judgement and charge GST only on the amount in excess of Rs.7,500?

A6. Certainly.

Q7. What will be the effect on ITC availment by RWAs.

A7. Let us take the below example

No. of flats in a complex : 500

Monthly contribution : Rs.10,000 per member.

Earlier they might have been paying GST on the entire amount of Rs.10,000 per month collected from their members and also avail ITC of GST charged on them on various goods and services procured by them. Let us assume, in a month they are availing ITC of Rs.5,00,000.

Now, as per the judgement Rs.7,500 per month per member would be exempted from GST and GST would be paid only on Rs.2,500 per month per member. So the value of exempt supply would be 37,50,000 (500 x Rs.7,500) and the value of taxable supply would be Rs.12,50,000 (500 x Rs.2,500) in a month.

So ITC would be entitled on proportionate basis, as per Rule 42 of the CGST Rules, i.e.

Rs.12,50,000

Rs.5,00,000 x ----- = Eligible ITC Rs.1,25,000.

Rs.50,00,000

Q8. What will be the effect of loss of ITC due to claiming of the benefit of the judgement.

A8. It is a basic principle that if the activity is not liable to GST, then the benefit of ITC would not be admissible. So, the GST paid on various inputs and input services procured by RWAs, could be availed as ITC, only to the extent they are liable to pay GST on their collections and to the extent

exemption is claimed, the ITC would be restricted, as explained in the previous question. This will increase the basic cost of the services. But not all inputs and input services procured by RWAs may be liable to GST. For example the major expenses are on account of procurement of water and electricity for common area, both of which does not attract any GST.

Q9. Recently there is an Advance Ruling from Maharashtra that RWAs are liable to pay GST. Can you explain?

A9. In this case, it was argued that on the basis of the doctrine of mutuality (the association and its members are not different and they are one and the same and hence no services are supplied by the RWA to its members), by relying on the Hon'ble Supreme Court judgement in Calcutta Club case. In this case, the Hon'ble Supreme Court has upheld the doctrine of mutuality and held that under Service Tax law and VAT law, there were not enough provisions to overcome the same. Subsequently, in order to overcome the effect of this judgement under GST, Section 7 of the CGST Act has been amended, by specifically overcoming this doctrine. Though this amendment has now become part of the Act now, it has not come into effect till now. In the case of Emerald Court Co-operative Housing Society Ltd, the Maharashtra Advance Ruling Authority has relied on this amendment and held that doctrine of mutuality is not applicable in view of this amendment and hence RWAs are liable to pay GST. The ruling is wrong to the extent that it has relied on a statutory provision, which is not in force. The issue of interpretation of the exemption under S. No. 77 of Notification 12/2017 was not at all an issue before the AAR.

So, the issue before the Maharashtra AAR was totally different, i.e. whether RWAs are liable to pay any GST at all or not whereas the issue before the Madras High Court was different. The levy was not under challenge before the Madras High Court on the basis of mutuality of interest. The question is only about the quantum of exemption available. This does not preclude any RWAs from challenging the levy itself on any legal ground.

Q10. What is the interplay between the threshold exemption up to Rs.20 lakhs and the present decision of the Madras High Court?

A10. The following examples can be seen.

Example 1.

No. of flats in a complex : 50

Monthly contribution : Rs.2,500 per member.

Total Collections per year : Rs.15,00,000.

Since the aggregate turnover is less than Rs. 20 lakhs, the RWA is not required to obtain GST registration and not liable to pay any GST.

Example 2.

No. of flats in a complex : 20

Monthly contribution : Rs.6,000 per member for 10 flats

Rs.8,000 per member for 10 flats.

Total Collections per year : Rs.16,80,000.

Since the aggregate turnover is less than Rs. 20 lakhs, the RWA is not required to obtain GST registration and not liable to pay any GST. Even in cases where the contribution is in excess of Rs.7,500, no GST is payable, since the aggregate turnover of the RWA is below Rs.20 lakhs.

Example 3.

No. of flats in a complex : 50

Monthly contribution : Rs.6,000 per member for 20 flats

Rs.8,000 per member for 30 flats.

Total Collections per year : Rs.43,20,000.

Since the aggregate turnover is more than Rs. 20 lakhs, the RWA is not entitled for any exemption up to Rs. 20 lakhs. They have to charge GST on Rs.500 per month per member from 30 members.

