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ARTICLES 2022

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GUJARAT HIGH COURT REJIGS LAND VALUATION FOR LEVY OF GST.

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Ever since the rate of GST applicable for real estate sector was revamped from 1st April 2019, the industry has been struggling to cope up with the new regime which has to forego the input tax credit and fulfil various conditions. One of the contentious issues faced by the sector was exclusion of the value of Land / Undivided Share of Land (UDS land) transferred to a buyer when a house or an apartment is purchased, for the purpose of levy of GST. It may be noted that when a buyer buys a house / apartment is purchased from a builder, the land / UDS land on which the house / apartment is constructed would also be transferred to the buyer and no GST is leviable on sale of land / UDS land. The notification issued by the Government in this regard allows an uniform deduction of one third of the total purchase price towards the value of Land / UDS land and GST is levied on the remaining two third value.

In many situations, such as construction in prime locations or construction of Bungalows in vast stretch of land, etc. the actual value of land, for which stamp duty is paid would be more than one third of the total price. So, GST was being levied on part of the value of the Land also, which is not leviable to GST. The said condition in the Notification was challenged before the Hon'ble Gujarat High Court, which has recently held that such mandatory uniform deduction of one third of the total price is discriminatory and ultra vires and if the actual value of the land is available, the same can be excluded or the value of construction service, which is leviable to GST can be arrived at as per the valuation Rules.

The effect of this judgement could be summarised as below

1. Where the value of the Land / UDS land being transferred in favour of the buyer is separately available, GST will be payable on the total value minus the actual value of land / UDS land, as per the registration documents. This would benefit the buyers of apartments in prime areas, where the actual value of the land / UDS land is more than one third of the total price.
2. When such actual value of the Land / UDS land is less than one third of the total price, only the actual value of the Land / UDS land can be deducted and not one third of the total price. Thus this judgement would be prejudicial to the buyers of apartments in areas, where the actual value of the land / UDS land is less than one third of the total price. Going by the judgement, it would be difficult to claim one third deduction when separate value of land / UDS land is available.

3. When the value of the Land / UDS land is not separately available (the Sale deed is for the total price without any break up in value), the builder has the option of determining the value for levy of GST either after excluding one third of the total price from the total price or by determining the value of construction (ideally cost of construction plus 10 %).

With the stamp duty rates being at variance in different States, a proper tax planning is required to optimise the tax liability, within the legal frame work and the ratio of the Gujarat High Court judgement. Though the judgement is by and large beneficial for the real estate sector, still there is uncertainty as to whether the Government will take it before the Hon'ble Supreme Court or not. If better sense prevails, the Government may well accept the judgement as the relevant condition has only been "read down" by the Hon'ble High Court in appropriate circumstances and not completely quashed.

(Published in Business Line)

