The Malad Chamber of Tax Consultants

44th YEAR

MCTC Bulletin

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President's Communiqué

My Dear Professional Colleagues,

The Election Commission of India has announced the **Lok Sabha Election 2024.** India will hold the world's largest general elections in 7 stages starting April this year with nearly a billion voters set to exercise their franchise. As the largest Democracy of the World selects its leader for the next 5 years, I request all of you to cast your valuable vote.

The Chamber successfully hosted a **Women's day Special Webinar on "Women in Tax Practice" on 9th March, 2024 jointly with GSTPAM.** The Panel comprised of Stalwarts like **Adv. Nikita Bhadeka, CA Sujata Rangnekar, CA Jayanti Kulkarni** and Youngling **Adv. Priyanshi Desai** sharing their experiences candidly under the able moderation of **Adv. Sejal Shah.** It was an inspiring and engaging session for all the participants.

The Chamber also Conducted an **Online Conference on "Income Tax Litigation"** jointly with AIFTP (WZ), MTPA, NMTPA, AGFTC, TPA-Thane & LRS-Kolkata on **21st, 22nd, 24th, 28th, & 29th March, 2024.** Great Care was taken in curating the Learned Speakers and Relevant Topics. The Participating Members had the opportunity to enhance their knowledge on Controversial Income Tax Issues directly from the Expert Gurus of the Profession.

The Chamber oraganized **Turf Cricket Triangular League 2024** between MCTC, CTC & GSTPAM on **Saturday, 23rd March, 2024** after a gap of 4 years. We had an overwhelming response which lead us to close the registrations within 2 hours of the announcement. MCTC were the **Defending Champions of 2019** and also the **Winners for 2024** too. All of us enjoyed the great sportmanship spirit of all the participating teams. It was a proud moment for MCTC to lift the cup. Congratulations to the winning captain Adv. Rinav Khakhar and his team MCTC Challengers for bringing the trophy back.

As we came to an end of the Financial Year 2023-24 and brace ourselves for 2024-25, we have a lot of Festivities to look forward to. I wish everyone Happy **Holi,** Happy **Easter,** Happy **Gudi Padwa,** Happy **Ramzan Eid,** Happy **Vaishakhi**, Happy **Ambedkar Jayanti,** Happy **Ram Navami** and Happy **Mahavir Jayanti.**

CA Khyati B. Vasani
President

Request members please send your Mobile No. & Email ID to update list of life membePlease send message on 7039006655 or email to maladchamber@gmail.com

For Queries & Submission of Forms for Membership/Seminar please contact any of the following Office Bearers:

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The Malad Chamber of Tax Consultants
Announces a Study circle on "Issues in 44AD & 44ADA"

Day & Date	Saturday, 20th April, 2024
Time	11 a.m. to 1 p.m.
Speaker	CA Viral shah
Venue	B D VASANI & Co., Level 5 Vini Elegance, L T Road, Borivali (West), Mumbai-400 092.

DIRECT TAXES CIRCULARS AND NOTIFICATIONS ISSUED BY CBDT/MINISTRY OF FINANCE

Compiled by CA Nitin Bhuta

Part I – Circulars

A. Circular No. 2/2024 dated 05-03-2024 (Beneficial Circular to rectify the mistake of filing Form 10B/Form 10BB pertaining to Assessment Year 2023/24)

The above beneficial circular issued u/s. 119 of the Income Tax Act, 1961 to provide as follows:

- As you may know, New Form 10B/10BB was notified via notification No. 07/2023 dated 21-02-2023, effective 01-04-2023.
- One of the conditions required to be fulfilled by the trust or institution to be eligible to claim an exemption under the first regime is laid down in clause (b) of the tenth proviso to clause (23C) of section 10 of the Act; this states that in case the total income of the trust or institution, as computed under the Act without giving effect to the provisions of exemption under the first regime, exceeds the maximum amount which is not chargeable to income-tax in any previous year, the trust or institution is required to get its accounts audited and furnish the audit report in the prescribed Form before the specified date.
- Further, Rules 16CC and 17B of the Income-tax Rules, 1962 (hereinafter referred to as the Rules) prescribe the form of the audit report for trust or institution under the first and second regimes, respectively. They provide that the report of audit of the accounts of a trust or institution shall be furnished in -

  (a) Form No. 10B where,

  (i) the total income of trust or institution exceeds rupees five crores during the previous year; or

  (ii) such trust or institution has received any foreign contribution during the previous year or

(iii) such trust or institution has applied any part of its income outside India during the previous year;

(b) Form No. 10BB in other cases.

- A reader may be aware that several trusts/institutions had furnished audit report/s on or before 31st October, 2023 in Form No. 10B, where Form No. 10BB was applicable and vice-versa, to comply with the stipulation of furnishing audit report/s under clause (b) of the tenth proviso to clause (23C) of section 10 and sub-clause (ii) of clause (b) of sub-section (1) of section 12A of the Income-tax Act, 1961 due to complexity involved in the compilation of such forms;
- To provide relief to them, vide the above circular, CBDT has provided relief to such trusts/institutions to file the correct Form No. 10B / 10BB for the year ending 31 March 2023 relevant to the assessment year 2023-24 only on or before 31 March 2024.
- Readers are requested to take advantage of the above circular by filing the correct applicable form. Suppose any disputes arise in the regular assessments. In that case, the above circular can be referred to for recording in the statement of facts, grounds of appeals, and/or prayers claimed in the appeal as per the provisions of the Act.

B. Circular No 3/2024 dated 06/03/2024 (Income from Property Held for Charitable or Religious Purposes Donation by Trust/Institutions to Another Trust/Institutions Shall Be Deemed to Be Application of Income for Charitable or Religious Purposes)

One more welcome circular issued u/s. 119 of the Income Tax Act, 1961, which explains in detail as under (reproduced as it is):

1. Income of any fund or institution or trust or any university or other educational institution or any hospital or other medical institution referred to in sub-clause (iv) or sub-clause (v) or sub-clause (vi) or sub-clause (via) of clause (23C) of section 10 of the Income-tax Act, 1961 (the Act) (hereinafter referred to as the first regime) or any trust or institution registered u/s. 12AA or 12AB of the Act (hereinafter referred to as the second regime) is exempt, subject to the fulfilment of certain conditions provided for the two regimes in the Act. These conditions inter-alia include the following for the entities (hereinafter referred to as trust/institution in the two regimes): -

   a. at least 85% of the income of the trust/institution should be applied during the year for charitable or religious purposes;

   b. Trusts or institutions are allowed to apply mandatory 85% of their income either themselves or by making donations to the trusts with similar objectives; and

   c. If donated to other trust/institution, the donation should not be towards corpus to ensure that the donations are applied by the donee trust/institution for charitable or religious purposes.

2. In order to ensure intended application towards charitable or religious purposes, the Finance Act of 2023 has provided that eligible donations made by a trust/institution shall be treated as applications for charitable or religious purposes only to the extent of 85% of such donations. Accordingly, Finance Act 2023 has made the following amendments: -

   a. inserted clause (iii) in Explanation 2 to third proviso of clause (23C) of section 10 of the Act;

   b. inserted clause (iii) in Explanation 4 to sub-section (1) of section 11 of the Act.

These amendments read as under: -

a. clause (iii) in Explanation 2 to third proviso of clause (23C) of section 10

"any amount credited or paid out of the income of any fund or trust or institution or any university or other educational institution or any hospital or other medical institution referred to in sub-clause (iv) or sub-clause (v) or sub-clause (vi) or sub-clause (via), other than the amount referred to in the twelfth proviso, to any other fund or trust or institution or any university or other educational institution or any hospital or other medical institution referred to in sub-clause (iv) or sub-clause (v) or sub-clause (vi) or sub-clause (via), or trust or institution registered under section 12AB, as the case may be, shall be treated as application for charitable or religious purposes only to the extent of eighty-five per cent of such amount credited or paid. "

b. clause (iii) in Explanation 4 to sub-section (1) of section 11

Any amount credited or paid, other than the amount referred to in Explanation 2, to any fund or trust or institution or any university or other educational institution or any hospital or other medical institution referred to in sub-clause (iv) or sub-clause (v) or sub-clause (vi) or sub-clause (via) of clause (23C) of section 10, as the case may be, or other trust or institution registered under section 12AB, as the case may be, shall be treated as application for charitable or religious purposes only to the extent of eighty-five per cent of such amount credited or paid.

3. Representations have been received raising concerns about whether the remaining 15% of the donation to another trust/institution would be taxable or eligible for 15% accumulation since the funds would not be available having been already disbursed.

4. The matter has been examined with reference to the issues raised in paragraph 3. It is reiterated that eligible donations made by a trust/institution to another trust/ institution under any of the two regimes referred to in para 2 shall be treated as application for charitable or religious purposes only to the extent of 85% of such donations. It means that when a trust/institution in either regime donates ₹ 100 to another trust/institution in either regime, it will be considered to have applied 85% (₹ 85) for the purpose of charitable or religious activity. It is clarified that 15% (₹ 15) of such donations by the donor trust/institution shall not be required to be invested in specified modes under section 11(5) of the Act as the entire amount of ₹ 100 has been donated to the other trust/institution and is accordingly eligible for exemption under the first or second regime.

This is illustrated by the following example where Trust 1, Trust 2 and Trust 3 are trusts or institutions under any of the two regimes. Further, Trust 1 is making eligible donations to Trust 2, and Trust 2 is further making eligible donations to Trust 3.

Sl. No.	Particulars	Trust I		Trust 2		Trust 3	
1.	Income (A)	300		100		100	
2.	Income which is required to be applied (B = 85% of A)		255		85		85
3.	Application of income						

4.	Donation to other trusts under the first or second regime (C)	100		100			Nil
5.	Amount to be considered as application of income against the donations at row no. 3 [as per clause (iii) of the Explanation 2 to third proviso to clause (23C) of section 10 or clause (iii) of the Explanation 4 to sub-section (1) of section 11 of the Act]. (D = 85% of C)		85		85		
6.	Balance income for application (E = A-Q	200		Nil		100	
7.	Application other than SI. No. 4 (F = 85%ofE)		170		Nil		85
8.	Remaining income which may be accumulated without Form No. 10 / 9A (G = 15% of E)		30		Nil		15
9.	Funds required to be invested in section 11 (5) modes (H = G)		30		Nil		15
10.	Exemption of income (I = C + F + G)	300		100		100	

C. Circular No 4/2024 dated 07/03/2024 (Due date of Filing Form 26QE is extended to 30.05.2023 in respect of the period commencing from 01.07.2022 to 28.02.2023)

One more beneficial circular issued u/s. 119(2)(d) hereby extends the due date of filing of Form 26QE to 30.05.2023 by way of ex-posto extension in respect of TDS deducted u/s. 194S @ 1% of such sum as income tax thereon resulting on account of transfer of a virtual digital asset as per Rule 31A.

Consequently, it provides for the interest waiver u/s. 201(1A) and the late fee waiver u/s. 234E of the Income Tax Act, 1961.

Further, it has been clarified that it is only a one-time extension issued in connection with such governing provisions.

Part II – Notifications

A. Series of Notification to notify several organizations/associations

Sr No	Notification No and date	Name of the Organisation/Associations
1	18/2024 dated 30.01.2024	'M/s. Prayoga, Bengaluru (PAN: AACTP9202D) as 'Other Institution' under the category of 'University, College or Other Institution' for 'Scientific Research' for the purposes of clause (ii) of sub-section (1) of section 35 of the Income-tax Act, 1961 read with rules 5C and 5E of the Income-tax Rules, 1962 from AY 2024/25 to AY 2028/29.

Sr No	Notification No and date	Name of the Organisation/Associations
2	23/2024 dated 26.02.2024	'Panjab University, Chandigarh (PAN: AAAJP0325R) under the category of 'University, college or other institution' for 'Scientific Research' for the purposes of clause (ii) of sub-section (1) of section 35 of the Income-tax Act, 1961 read with rules 5C and 5E of the Income-tax Rules, 1962 from AY 2024/25 to AY 2028/29.
3	25/2024 dated 01.03.2024	'Uttar Pradesh Real Estate Regulatory Authority' (PAN AAAGU0671E) is an Authority constituted by the State Government of Uttar Pradesh from AY 20/21 to AY 22/23 with specific stipulations as notified.
4	26/2024 dated 01.03.2024	'Karnataka Urban Water Supply and Drainage Board' (PAN: AAATK5837F) is a Board constituted under the Karnataka Urban Water Supply and Drainage Board Act, 1973 (Karnataka Act No. 25 of 1974), AY 20/21 to AY 22/23 with specific stipulations as notified.

B. Notification No 21/2024 dated 07/02/2023 [DTAA notified Between India and Samoa]

Vide the above notification, DTAA has been notified between The Govt of the Republic of India and the Govt of Samoa by notifying Article 1 to Article 13 for the term of 5 years.

C. Notification No 22/2024 dated 07/02/2023 [certain changes in ITR Forms viz. ITR 2, ITR 3 & ITR 5]

Vide notification corrigendum dated 07.02.2023, certain amendments called Income Tax (Amendments) Rules 2024 to provide changes in ITR 2 and ITR 3 for claiming deduction u/s. 80DD (Details of deduction in respect of maintenance including medical treatment of a dependent who is a person with disability) by mentioning relationships with the value reported in Amount (Rs.).

Further, reporting changes are introduced in ITR 3 for the deduction claim u/s. 80U, with the value reported in Amount (Rs.).

Further, an additional section was introduced in ITR 5 on page 271 by adding section 54D (which provides an exemption in respect of capital gain that arises during the compulsory acquisition of land or building forming part of an industrial undertaking) to the CG schedule.

Further, the section has been deleted in ITR 5 on page 275 by deleting Section 54GB (which allows taxpayers to claim exemption from capital gains tax if the net consideration from the transfer of residential property is invested in the equity shares of an eligible start-up company) to the CG schedule.

D. Notification No 24/2024 dated 01/03/2024 (Notification of ITR 7 for AY 2024-25)

Vide the above notification, Govt. has notified ITR 7 applicable w.e.f April 1, 2024.

Such IT Returns are filed by the assessee companies required to furnish returns under sections 139(4A) or 139(4B) or, 139(4C) or 139(4D) only for assessment year (AY) 2024-25.

Companies filing ITR in ITR-7 to include the following additional information on cursory review:

- the Legal Entity Identifier (LEI) if applicable (only certain classes of assesses as of now) .....(A21) (h)
- UDIN Reporting in ITR 7, where audit reports in Form 10B/10BB are required to be filed as per the provisions of the Act.

DIRECT TAX CASE LAWS

Compiled by CA Rupal Shah
(Partner at RHDB & Co LLP)

Smt Bhavnaben K. Punjani (Appellant) v/s PCIT (Respondent).

Citation: IT Appeal No.138 (Rajkot) of 2017

Whether legal heir of the deceased person is under legal obligation to inform Tax department about the demise of the assessee.

Facts:

An order u/s. 144 r.w.s. 147 of Income Tax Act (I.T Act) was passed by the Assessing officer (AO) on 16.02.2015 by making an addition of ₹ 12,25,000/- under Long term capital gain (LTCG) in the hands of the assessee (being difference in agreement value and Stamp duty value). Since assessee had not filed the return of income and valuation of the property was on the higher side, there was escapement of income and AO reopened the assessment. Assessee did not file the return of income in response to the notice issued u/s. 148 of I.T. Act nor attended any assessment proceeding initiated under the act.

Therefore, best judgment assessment was passed by the AO on 23.02.2015 u/s. 143(3) r.w.s 147 of the I.T Act determining total income of ₹ 12,25,000/- on account of LTCG. In Order passed AO adopted stamp duty valuation as full value of consideration by invoking provision of Sec 50C of the I.T Act.

PCIT while framing the assessment order observed that Ld. AO did not ascertain the cost and year of acquisition of the capital assets. Thus, assessment was made without prior inquiry and investigation. Therefore, according to the PCIT assessment order was not only erroneous but also prejudicial to the interest of the revenue as envisaged under section 263 of the I.T Act. Accordingly, PCIT set aside the assessment order and directed the AO to make fresh assessment after considering the cost and year of acquisition of the capital asset.

Being aggrieved by the order of the PCIT assessee file an appeal before us on the ground that the original assessment order was passed in the name of the deceased person. It is well established in the law when the order passed in the name of the deceased person same is bad in law and hence

void ab initio. Since the original order itself is void ab initio, assessment order is not subject matter of revision u/s. 263 of I.T Act. In response DR submitted that the legal heir did not inform the department about demise of assessee.

Held

Question before ITAT was whether legal heir of the deceased person is under legal obligation to inform Tax department about the demise of the assessee and in absence of intimation whether assessment order passed in the name of deceased person is valid in eyes of law? In the case of Savita Kapila v. ACIT, the High Court held that in absence of a statutory provision, a duty cannot be cast upon legal representatives to intimate factum of death of assessee to Department and, thus, where Assessing Officer issued a notice to assessee under Section 148 after his death and, in such a case, it could not have been validly served upon assessee, said notice being invalid, was to be quashed.

In the case of Pravin Chandra A Shah, the Gujarat High Court held that reopening notice under section 148 issued upon deceased assessee was a nullity, therefore, consequential proceedings and orders passed thereon were to be quashed and set aside.

Conclude that with respect to the above judgment and in absence of specific requirement under Income Tax Act which require legal heir to intimate the demise of the assessee to the department we are of the considered view that the order passed under section 263 of the Act is not valid in the eyes of law, since the original assessment order having been framed is in the name of a deceased person and the same is not valid in the eyes of law.

Cases relied upon

1. Savita Kapila v. ACIT 118 taxmann.com 46 (Delhi HC),
2. Pravin Chandra A Shah 154 taxmann.com 616 (Gujarat HC)

Income Tax Officer (Appellant) v/s Mahavir Enterprises (Respondent).

Citation: IT APPEAL NO. 1304 (MUM.) OF 2023

Consideration paid as a highest bidder under e tender will be treated as FMV for the purpose of stamp duty

Facts

Assessee is a partnership firm. During the year under consideration the assessee purchased a property in the auction from Jai Hind Co-operative bank ltd for ₹ 3,53,70,000/- whereas the Fair Market Value (FMV) as per record was ₹ 5,84,99,000/-. During assessment proceeding the assessee was asked to show cause as to why the amount of ₹ 2,31,29,000/- being difference in FMV and consideration not be considered under income from other source u/s. 56(2)(x) of the Act. In response assessee submitted that the property was purchased from the aforesaid bank after duly participating in the E-tender, as the aforesaid bank went into liquidation. Assessee further submitted that the bidding and auction was administered by the Hon'ble Commissioner of Co-operation and Registrar, Maharashtra State, Pune.

Therefore, FMV of the property was only ₹ 3,53,70,000/- and stamp duty value is high, as same has not consider the actual condition and various factor affecting the property.

AO did not agree with the submission of the assessee and passed the order u/s. 143(3) by making addition of ₹ 2,31,29,000/- u/s. 56(2)(x) of the act being difference between FMV and consideration.

Being aggrieved by the order of the AO assessee file an appeal before CIT(A) who passed the order in the favour of the assessee by relying on the judgment of the Hon'ble Supreme Court in the case of Registrar of Assurances Versus ASL Vyapar Private Ltd. Wherein it was held that the value determined

by the stamp valuation authority will be untenable and value of the property fetched in the open public auction will be considered. CIT(A) also relied on the circular dated 30/06/2005 issued by the Government of Maharashtra wherein it has been provided that the while registering the document in respect of sale conducted by government/non-government organisation by public auction, the highest price as certified in the sale certificate or other order issued by such authority should be considered as the fair market value for the purposes of stamp duty and price as per ready reckoner should not be considered. Being aggrieved by the order of the CIT(A), revenue filed an appeal before ITAT.

Held

Based on the material available on record there is no doubt that the property under consideration was kept on auction due to liquidation and e tender was published for said property. As evident from the copy of the advertisement bid price of the said property is kept at ₹ 3,51,00,000/- based on the valuation report of the said property. Valuer consider the value after considering the distressed value of the property since it was about 111 years old. Assessee being the highest bidder purchase the property at a value higher than the bid price set for the said property. However, AO considered the FMV and passed the order.

We find the judgement of the coordinate bench of the Tribunal in Krishi Utpanna Bazar Samittee v. Dy. CIT wherein it was held that the after considering the circular dated 30/06/2005 issued by the Government of Maharashtra which state the consideration stated in the sale deed pursuant to the public auction is to be accepted as the fair market value for the purpose of the stamp duty.

Concluded that in view of the above judgement and circular as stated above the Hon'ble Bench believed the consideration paid by the assessee, being the highest/successful bidder of the e tender, is the fair market value of the property and we find no infirmity in the order passed by the Ld CIT(A) as a result grounds raised by the revenue are dismissed.

Cases relied upon

1. Registrar of Assurances Versus ASL Vyapar Private Ltd, Civil Appeal 8281 of 2022, Supreme Court
2. Krishi Utpanna Bazar Samittee v. Dy. CIT ITA/PN/2043

ANALYSIS OF RECENT TELANGANA HIGH COURT DECISION IN PRAHITHA CONSTRUCTION PVT. LTD. VS. UOI & ORS DATED 09.02.2024 - (2024) 159 TAXMANN.COM 437 (TELANGANA)

Compiled by CA Bhavin Mehta

FACTS OF THE CASE

1. Writ petition was filed by the Developer, Prahitha Construction Pvt. Ltd., for direction by the Court declaring that the transfer of development rights of land by the landowners to the Developer by way of Joint Development Agreement (JDA) should be treated as sale of land by the landowners and hence on execution of said agreement should not be subject to levy of GST. The Notification No. 4 of 2018-CTR dated 30.09.2019 imposing GST on transfer of development rights of land by the landowners under a JDA is ultra vires the Constitution of India.
2. The Developer had entered into JDA with landowners, namely, M/s. Jitvan Land Limited and M/s. Janina Marine Properties Pvt. Ltd., who are landowners. The issues decided by the Hon'ble Court are as under:
   (i) Whether the transfer of development rights is in nature of transferof immovable property or the nature of services would fall within the scope of GST?

(ii) Whether the transfer of development rights can be safely brought within the purview of an outright sale of land?

SUBMISSION BY PETITIONER (DEVELOPER)

1. The transaction entered into between the developer and the landowners can be safely brought within the purview of sale of land and pursuant to the JDA, the original landowners in fact transferred the development rights of the subject property to the Developer.
2. Notification is ultra vires of Article 14, 246A and 265 of the Constitution of India, particularly, for the reason that the said notification does not prescribe any methodology or offer of development rights. Thus, it becomes arbitrary and also unconstitutional. The net result of execution of JDA is the sale of land belonging to the landowners to the developer after retaining part area which shall be developed by the developer.
3. It is the implication and the effect of execution of the JDA which has to be considered as whole, rather than taking note of only certain particular clauses. The JDAs are normally entered enabling the landowners to sell the land and procure residential or commercial apartments corresponding to the value of the property sold to the developers and the JDAs are to be viewed as conveyance as is expected in other laws.
4. By virtue of the execution of JDA itself there is substantive transfer of development rights of property in favour of the Developer which results in sale of land proportionate to the amount of investment made by the developer and hence, there is a statutory embargo on the levy of tax as execution of JDA gives rise to an element of sale of land.
5. The said notification no. No. 4 of 2018-CTR dated 30.09.2019 is not tenable in the eye of law for the reason that levy of tax would not be made permissible by way of issuance of a notification and the same would also be unconstitutional.
6. The said notification cannot be brought within the purview of a delegated legislation and if at all it is a delegated legislation, it has to be one which has been issued within the four corners of the statute which in the instant case of silent. The revenue has travelled beyond the four corners of the GST law. Thus, have exceeded its jurisdiction with issuance of the said notification no. No. 4 of 2018-CTR dated 30.09.2019. The delegated legislation cannot travel beyond the scope of substantive law. The petitioner relied upon number of decisions including of Supreme Court decision in the case of Rajasthan State Industrial Development and Investment Corporation vs. Subhash Sindhi Co-operative housing Society and Ors.
7. The taxing areas under the GST law cannot be expanded by way of issuance of a notification. Section 148 of GST Act does not confer upon revenue the power to levy GST.
8. 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 on a JDA pertaining to transfer of development rights.

REVENUE CONTENTIONS

1. The department counsel argued that in order to reach to the conclusion whether the JDA would amount to an outright sale of land or it is only a transfer of development rights alone, it would be necessary to take into consideration certain clauses of JDA itself.
2. Clause D of the agreement provides that the landowners have approached the Developer with a view to engage its services for developing the IT/ITES and/or commercial office project. Clause 2.2 of the agreement provides that the Landowners irrevocably permit, grant and authorise the Developer the exclusive right to enter upon the Schedule Property on and from the effective date for the purpose of developing the Schedule Property.
3. Clause 2.3 of agreement provides that the Landowners have put the Developer in permissive possession and authority of the Schedule Property to develop which is coupled with interest. Clause 2.4 provides that permissive possession of property shall not be construed as delivery of possession in part performance of any agreement to sell under section 53-A of the Transfer of Property Act, 1882 and/or Section 2(47) of the Income Tax Act, 1961.

4. Consideration to developer is provided in Para 6.1 of the agreement, wherein it states the consideration of developer agreeing to construct, develop, and deliver to the landowners the landowners share, the developer is entitled to construct, develop and absolutely own the developer share and receive conveyance of the developer undivided share in the property. Further, para 6.7 of the agreement confirms that on handing over the landowners share on delivery date, the developer shall be entitled to seek a conveyance from the landowners of the developer undivided share in the project.

5. On reading certain clauses of JDA, revenue strongly contended that there is no outright sale of property in the name of developer. Rather, it is a case where the conditions would clearly indicate that the ownership, the title rights are all retained by the landowner himself and the only role which the developer has is execution of JDA so fas as developing of land belonging to the landowner is concerned. There is no specific sale of land belonging to the owner. The impugned notification No. 4 of 2018-CTR dated 30.09.2019 issued by GST Council conferred enormous powers as evident from Article 279A of the Constitution of India.

OBSERVATION AND CONCLUSION BY HON'BLE COURT

1. As per clause 6.7 of agreement, upon handover of landowners share including handing over of possession of the landowners undivided share on delivery date, the Developer shall be entitled to conveyance from landowners of the Developer undivided share in proportion to the completed Tower and Annex Building in the project which is attributable to the Developer Share. In the event of completion of all the 3 Towers in the project, at the same time, the developer shall be entitled to receive conveyance (in the form of sale) of the entire Developer undivided share.

2. ***Mere execution of JDA by itself would not mean that the right, title and ownership of the property or portion of the property stands transferred in the name of Developer.*** There are certain conditions/ milestones/stages which have to be crossed before which the Developer is entitled to have certain element of right over the completed constructed area which has been left at the disposal of Developer.

3. Reading the clauses of JDA would reflect that ***the landowners have bundle of rights attached to his immovable property. One of the rights is that of getting the property developed by engaging an agency of his choice,*** on his terms and in the manner he deems fit.

4. By virtue of JDA, Developer would have permission/license to enter into the subject property of the landowners for the purpose of undertaking and execution of the development activities of the property. Upon Developer developing the entire property, the landowners would be granting a share in the land proportionate to the built-up area for which the Developer is entitled towards consideration for the development.

5. ***There is also a condition of cancelling the contract agreement 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 Developer.

6. It is evident that the ***Developer is offering construction services to the landowners in exchange for the landowners transferring the development rights to the Developer. Only on account of the development rights thus the developer gets the right to enter into the land to undertake construction over the said property.***

7. The execution of JDA between the two parties by itself would not result in transfer of ownership. ***The transfer of development rights is hence service under GST law which the landowner is offering to the Developer and that too for a consideration. Thus, the transfer of development rights is a service and not an outright sale of an immovable property.***

8. The transfer of developed/constructed property including undivided share of land in favour of the purchaser of the constructed property will happen only after transfer of undivided share of land by the landowner by way of sale deed.

9. ***The transfer of ownership from the landowner goes directly to the purchaser of the constructed property and not in favour of the Developer*** unless and until the land stands transferred in the name of the Developer. Transferring of the development rights does not result in transfer of ownership rights.

10. The reliance of circular no. 151/2/2012-ST is not of any relevance as the same was issued under service tax regime under which service tax was levied only on those services which figured in the specified list of services and where sale of land by the landowner was held to be non-taxable.

11. It is as per the GST Council recommendation that the liability to pay GST on supply of TDR shall be shifted to the developer-promoter under RCM and was notified vide notification no. 5/2019-CTR dated 29.03.2019. The eventual burden to bear the tax remains with the service recipient in this case the developer-promoter.

12. ***From the plain reading of the JDA, there are two sets of transactions to be met in its entirety. One is agreement between the landowner and the Developer and another is the supply of construction services by the Developer to the landowners and only thereafter sale of constructed area to third party buyers. Both these transactions qualify as supplies made and would attract GST.*** Under no circumstances can the aforesaid two supplies can be termed as sale of land under Entry 5 of Schedule III.

13. A reading of the JDA in the present case would show that the owner continues to be the owner throughout the agreement, and has at no stage purported to transfer rights akin to ownership, and that too for a specific possession alone is given under the agreement, and that too for a specific purpose--the purpose being to develop the property, as envisaged by all the parties. We are, therefore, of the view that this clause will also not rope in the present transaction.

14. The very purpose of issuance of said notification no. 4/2018-CTR dated 30.09.2018 appears to be ease for the landowners and developers as transfer of development rights happen at the time of execution of JDA. However, handing over of the constructed area to the landowner happen at a later stage only on issuance of the completion certificate of the project. In other words, the aforesaid notification deals with the time of supply of services of transfer of development rights which was otherwise always taxable, since introduction of GST, has now been postponed to a time when the developer transfers the possession of the constructed/developed areas to the landowners.

15. Thus, as has been held earlier, under no circumstances can the execution of the JDA or the mere transfer of development rights nor any of the clauses of the JDA indicate an automatic transfer of ownership or title rights over any portion of land belonging to the landowner in favour of the petitioner/developer. In the absence of any cogent and substantial material to establish right, title and ownership being created in favour of the petitioner/developer, the transfer of development rights as it stands is amenable to GST and cannot be brought within the purview of Entry 5 of Schedule-III of the GST Act.

16. The challenge to the said notification no. 4 of 2018-CTR dated 30.09.2019 is held to be devoid of merits. The writ petition filed by the Developer is dismissed.

MY COMMENTS

1. The Development Agreement states that the landowners will get constructed/developed area share in consideration of granting development rights to the Developer. In this context, what does "transfer of development rights" mean? Section 2(9-A) of the Maharashtra Regional and Town Planning Act, 1966 provides the meaning of "development right" as under:

> "2. (9-A) "development right" means right to carry out development or to develop the land or building or both and shall include the transferable development right in the form of right to utilise the floor space index of land utilisable either on the remainder of the land partially reserved for a public purpose or elsewhere, as the final Development Control Regulations in this behalf provide."

A transferable development right is therefore a voluntary, incentive-based programme allowing landowners to sell development rights from their land to a developer, or to other interested parties, who can then use these rights to increase the density of development at another designated location.

2. The object is to give compensation in a different way, to private landowners who have transferred a portion of their land to the Government as and when the Government has required such private land to build or expand public utilities like grounds, garden, bus stand, road, etc. The alternate mode of compensation, instead of payment of money is transferrable development rights (TDR), which is nothing but development potential, in terms of increased floor space index (FSI) awarded in lieu of the area of land given, conferred in the form of a Development Rights Certificate (DRC), by the Government. Such TDR or DRC

is negotiable and can be transferred for consideration leaving it open for the owner of the acquired land to either use the TDR for himself or to sell it in the open market. Hence, TDR is an instrument issued by the Government authorities which gives the right to a person to build over and above the permissible FSI under the prevalent rules of the respective location.

3. As against the above concept of marketable TDR, the transaction between the landowners and petitioner (developer) is completely different. At the time of agreement between the landowners and the Developer, there is no transfer of any land. The Developer will construct the property and would be entitled to sell its share in the market. Unless and until the Developer completes its responsibility, it will not be entitled to any benefit under the contract. The true nature of the transaction is to be understood from the way the contract is executed and the respective benefits the parties will get on execution of the contract.

4. The developer is not merely a contractor engaged to undertake the construction; the developer is, under the agreement with the owner, promised a part of the constructed premises as owner thereof together with the proportionate area of land. In such sense, a Development Agreement which envisages the party thereto other than the owner being responsible for ensuring the construction of a building on the subject land and having a share therein, there is an inescapable contract to transfer immovable property. In form, a Development Agreement which envisages the Developer to have a share in the building proposed to be constructed in terms of the Agreement, in law, a Development Agreement of the kind described herein entails the transfer of immovable property in the sense that the Developer or an assignee of the Developer, at the instance of the Developer, would be entitled not only to a part of the constructed area but the proportionate share of the land on which the construction is made.

5. In ***Chheda Housing Development Corpn. v. Bibijan Shaikh Farid, 2007 SCC OnLine Bom 130 : (2007) 3 Mah LJ 402,*** a Division Bench of the Bombay High Court while dealing with the question of whether specific performance should be granted of a development agreement held as follows:

"20A. In our opinion, from a conspectus of these judgments, what is relevant would be the facts of each case and the agreement under consideration. Agreements considering what is discussed, amongst others, could be:

(a) An agreement only entrusting construction work to a party for consideration;

(b) An agreement for entrusting the work of development to a party with added rights to sell the constructed portion to flat purchasers, who would be forming a Cooperative Housing Society to which society, the owner of the land, is obliged to convey the constructed portion as also the land beneath construction on account of statutory requirements;

(c) A normal agreement for sale of an immovable property.

21. An agreement of the first type normally is not enforceable as compensation in money is an adequate remedy. An agreement of the third type would normally be specifically enforceable unless the contrary is proved. A mere agreement for development, which creates no interest in the land would not be specifically enforced."

6. In author's view, the agreement between the landowners and the Developer results in transfer of ownership rights from the landowners to Developer. Therefore, the consideration flowing from the Developer in the form of constructed/developed area is against transfer of ownership of land. In ***DLF Commercial Projects Corporations vs. Commr. of S.T., Gurugram, 2019 (27) GSTL 712 (Tri. – Chan.),*** the Hon'ble CESTAT had examined the Department's allegation that tax was payable on transferable development rights. After examining the relationship between the land-owning companies and the developer, M/s. DLF Ltd., it held that the land-owning companies would be receiving money for transfer of land. The so-called transfer of development rights is not a separate transaction from transfer of property in the land.

7. The Hon'ble Court fails to appreciate that tax consequence will arise only when an executory contract is fully performed. In the present case, merely by entering into JDA, the contract does not get executed. Only in an executed contract, if one party has paid the consideration as per the agreement before receiving the reciprocal promise, the amount received would be treated as income accrued. But in an executory contract, incidence of tax has to wait till each party has performed his part of the bargain. There is clear distinction between a completed conveyance and an executory contract, and the events contemplated until

it completes the transaction, resulting in concluded transfer. In the case of ***Charanjit Singh Chadha vs. Sudhir Mehra, reported in (2001) 7 SCC 417,*** the Hon'ble Supreme Court has held that an executory contract confers no right in rem, until the conditions of transfer of property to the buyer have been fulfilled.

8. Further, it may be noted that the development rights acquired by Developer is personal in nature and is not transferrable. The nature of conferment by landowners on the Developer is grant, rather than transfer of any right.

9. In the premises, in the considered opinion of author, no taxable transaction occurs at the time of entering into JDA between landowners and the Developer. In clause 2.3 of the agreement, the it is made clear that the landowner allowing the Developer to enter upon and undertake construction activities shall not be construed as delivery of possession under section 53A of the Transfer of Property Act, 1882, or transfer within the meaning of section 2(47) of the Income Tax Act, 1961. In the event of completion of all the 3 Towers in the project, at the same time, the developer shall be entitled to receive conveyance (in the form of sale) of the entire Developer undivided share. The ownership of land will get transferred to the Developer or the buyers selected by it, when sale deeds are registered.

10. In Notification No. 4/2019-C.T.(Rate), tax rate on transfer of TDR or Floor Space Index (FSI) has been prescribed at Nil, if the promotor, to whom the TDR/FSI is transferred, pays the tax at the applicable rate on reverse charge mechanism under the specified circumstances. Notification No. 6/2019-C.T.(Rate) has prescribed the time for payment of tax, where a promotor, who receives TDR/FSI on or after 01.04.2019 for construction of a project against consideration payable, wholly or partly, in the form of construction service, and where a promotor receives long term lease of land for construction of residential apartment in a project against consideration payable by upfront payment. This notification states that the liability of such person is to pay GST shall be on the date of issuance of completion certificate for the project or of its first occupation, whichever is earlier. However, the present case of the petitioner, does not involve TDR, as explained above at point no. 1 to 3 under "my comments" section.

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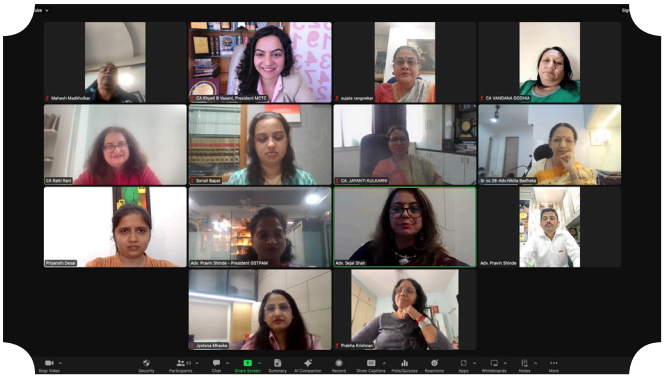
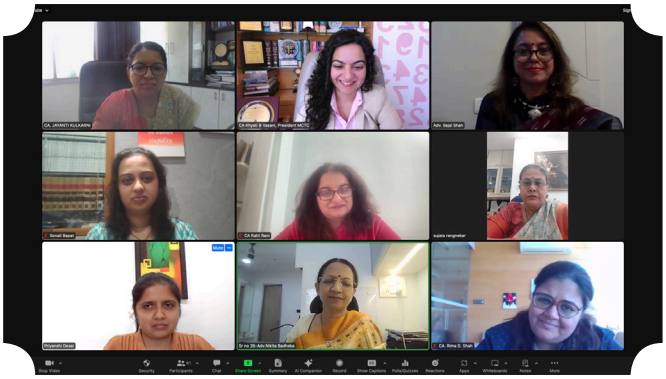
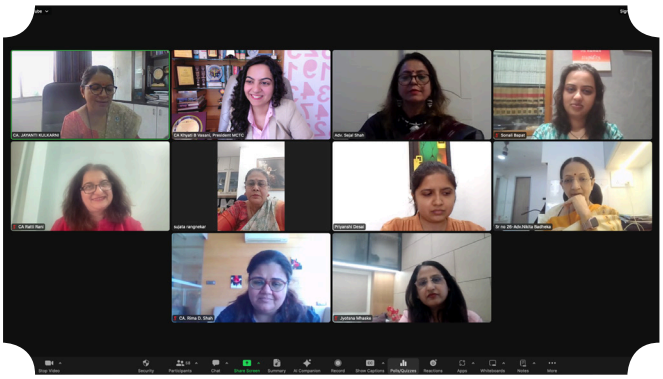


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