

Treading the GST Path – XXVIII

Joint Development Agreements and GST Implications

(G. Natarajan, Advocate, Swamy Associates)

1.0 In a Joint Development Agreement (JDA) the Landowner and a Builder would agree to develop the land owned by the landowner, into a complex and an agreed number of flats would be handed over to the landowner and the remaining flats would be sold to various buyers by the builder. The builder would sell his share of flats, along with proportionate undivided share of land (UDS) and retain the sale proceeds. Strictly speaking the benefit for the builder for constructing and handing over agreed number of flats to the landowner, is only the sale proceeds realised from sale of UDS land pertaining to builder's share of flats. The applicability of erstwhile service tax on the services provided by the builder to the landowners was mired in lot of confusions as to the time when service tax was payable, what is the value to be adopted, etc. under the erstwhile service tax regime. These aspects were clarified in different manner in various CBEC Circulars / Education Guide. Let us try to understand the implications under the GST regime afresh, without any reference to any such circulars / clarifications.

2.0 First let us try to find out what value should be adopted by the builder for payment of GST in respect of the services provided by him to the landowner, by way of construction of flats for him, under the JDA. It may be noted that the landowner would not make any payment of money to the builder and in turn would only grant a right to the builder, whereby the builder can develop the land into a constructed complex, and sell his (builder's) share of flats along with proportionate UDS. Let us first refer to Section 15 of the CGST Act, 2017, dealing with valuation (relevant portion).

15. Value of taxable supply. – (1) *The value of a supply of goods or services or both shall be the **transaction value, which is the price actually paid or payable for the said supply of goods or services or both where the supplier and the recipient of the supply are not related and the price is the sole consideration for the supply.***

(2) *The value of supply shall include –*

(a) *any taxes, duties, cesses, fees and charges levied under any law for the time being in force other than this Act, the State Goods and Services Tax Act, the Union Territory Goods and Services Tax Act and the Goods and Services Tax (Compensation to States) Act, if charged separately by the supplier;*

(b) *any amount that the supplier is liable to pay in relation to such supply but which has been incurred by the recipient of the supply and not included in the price actually paid or payable for the goods or services or both;*

(c) *incidental expenses, including commission and packing, charged by the supplier to the recipient of a supply and any amount charged for anything done by the supplier in respect of the supply of goods or services or both at the time of, or before delivery of goods or supply of services;*

(d) *interest or late fee or penalty for delayed payment of any consideration for any supply; and*

(e) *subsidies directly linked to the price excluding subsidies provided by the Central Government and State Governments.*

Explanation. — For the purposes of this sub-section, the amount of subsidy shall be included in the value of supply of the supplier who receives the subsidy.

(3) *The value of the supply shall not include any discount which is given —*

(a) *before or at the time of the supply if such discount has been duly recorded in the invoice issued in respect of such supply; and*

(b) *after the supply has been effected, if —*

(i) *such discount is established in terms of an agreement entered into at or before the time of such supply and specifically linked to relevant invoices; and*

(ii) *input tax credit as is attributable to the discount on the basis of document issued by the supplier has been reversed by the recipient of the supply.*

(4) *Where the value of the supply of goods or services or both cannot be determined under sub-section (1), the same shall be determined in such manner as may be prescribed.*

(5) *Notwithstanding anything contained in sub-section (1) or sub-section (4), the value of such supplies as may be notified by the Government on the recommendations of the Council shall be determined in such manner as may be prescribed.*

2.1 As already mentioned, no direct monetary consideration would be identified in the JDA towards the flats being constructed and handed over by the builder to the landowner. The builder would be given the right to develop the complex, sell his share of flats along with proportionate UDS land and retain the sale proceeds, though the entire land is owned by the landowner. It may also be noted that there would be no transfer of such UDS land in favour of builder, in the absence of any registration of such land in builder's favour (which is a must under the Transfer of Property Act), but the landowner would only agree to transfer the UDS land, to the buyers, who buys the builder's share of flats.

2.2 It may be noted that the term "price" used in Section 15 has not been defined in the Act and as per the general meaning of the term, it refers to the consideration payable for sale of goods or for provision of services. As per Black Law Dictionary, "*price means the amount of money or other consideration asked for or given in exchange for something else; the cost at which something is bought or sold*". The term has also been interpreted in many decisions to the effect that the term is very wide to cover all forms of consideration. It is also relevant to

refer to the definition of the term "consideration" as per Section 2 (31) of the CGST Act.

"consideration" in relation to the supply of goods or services or both includes –

(a) any payment made or to be made, whether in money or otherwise, in respect of, in response to, or for the inducement of, the supply of goods or services or both, whether by the recipient or by any other person but shall not include any subsidy given by the Central Government or a State Government;

(b) the monetary value of any act or forbearance, in respect of, in response to, or for the inducement of, the supply of goods or services or both, whether by the recipient or by any other person but shall not include any subsidy given by the Central Government or a State Government :

Provided that a deposit given in respect of the supply of goods or services or both shall not be considered as payment made for such supply unless the supplier applies such deposit as consideration for the said supply;

2.3 In the instant case, when the UDS land proportionate to the builder's share of flats is sold by the builder and such sale proceeds is retained by the builder, the same is the monetary value of the act of the landowner, permitting the builder to sell proportionate UDS land pertaining to builder's share of flats and retain such sale proceeds and thus the consideration and hence the same is the "price" being payable by the landowner to the builder.

2.4 Let us assume a situation that a landowner has two pieces of land and in one piece he constructs a house for him by engaging a builder and in consideration thereof, divests his other piece of land in favour of the builder, there would be no difficulty in concluding that the value of the service of construction provided by the builder is nothing but the value of the land, divested in favour of the builder. The JDA is only a varied and complex version of such simple barter.

2.5 Hence, it can be reasonably concluded that the value of service provided by the builder to the landowner is the value of UDS land pertaining to the builder's share of flats, realised at the time of sale of builder's share of flats to various buyers. However, we have to be conscious of the fact that this view was not accepted in the Service Tax regime, by the Hon'ble Tribunal in the case of LCS Citymakers Pvt. Ltd. Vs CST – 2012-TIOL-618-CESTAT-Chennai. But, with due respect it is submitted that the entire issue of valuation of service provided to landowners has not been properly considered in the decision and it requires a review in an appropriate case.

3.0 Once we decide that the value of service provided by the builder to the landowner is the sale proceeds of UDS land pertaining to builder's share of flats, next question is to determine the time of supply of service, at which the liability to pay GST arises, for which reference has to be made to Section 13 of the CGST Act.

13. *Time of supply of services.* — (1) *The liability to pay tax on services shall arise at the time of supply, as determined in accordance with the provisions of this section.*

(2) *The time of supply of services shall be the earliest of the following dates, namely :—*

(a) *the date of issue of invoice by the supplier, if the invoice is issued within the period prescribed under sub-section (2) of section 31 or the date of receipt of payment, whichever is earlier; or*

(b) *the date of provision of service, if the invoice is not issued within the period prescribed under sub-section (2) of section 31 or the date of receipt of payment, whichever is earlier; or*

(c) *the date on which the recipient shows the receipt of services in his books of account, in a case where the provisions of clause (a) or clause (b) do not apply :*

Provided that where the supplier of taxable service receives an amount up to one thousand rupees in excess of the amount indicated in the tax invoice, the time of supply to the extent of such excess amount shall, at the option of the said supplier, be the date of issue of invoice relating to such excess amount.

Explanation. — *For the purposes of clauses (a) and (b) —*

(i) *the supply shall be deemed to have been made to the extent it is covered by the invoice or, as the case may be, the payment;*

(ii) *“the date of receipt of payment” shall be the date on which the payment is entered in the books of account of the supplier or the date on which the payment is credited to his bank account, whichever is earlier.*

3.1 It is also relevant to refer to the following definition of “continuous supply of service” under Section 2 (33) of the Act and Section 31 (5) dealing with issue of invoices.

“continuous supply of services” means a supply of services which is provided, or agreed to be provided, continuously or on recurrent basis, under a contract, for a period exceeding three months with periodic payment obligations and includes supply of such services as the Government may, subject to such conditions, as it may, by notification, specify;

31(5) Subject to the provisions of clause (d) of sub-section (3), in case of continuous supply of services, —

(a) *where the due date of payment is ascertainable from the contract, the invoice shall be issued on or before the due date of payment;*

(b) where the due date of payment is not ascertainable from the contract, the invoice shall be issued before or at the time when the supplier of service receives the payment;

(c) where the payment is linked to the completion of an event, the invoice shall be issued on or before the date of completion of that event.

3.2 It may be observed that the builder would not be raising any invoice and would not claim any payment from the landowner. The service being provided by the builder is a continuous supply of service. Since it has already been decided that the value of service being provided by the builder to the landowner is the sale proceeds from the sale of proportionate UDS land pertaining to builder's share of flat, as and when such sale proceeds towards UDS land is due from the buyers of the builder's share of flat, such due date is the time of supply. To further amplify, as and when the value towards UDS land is due from the buyers of builder share of flat, such value of UDS would be considered as the value of service being provided by the builder to landowner and appropriate GST is payable at that time.

Let us take an example to understand the above better.

Total No. of flats in the project	:	50
Flats for Builder	:	25
Flats for Landowner	:	25
Builder is selling his flats for	:	Rs.50 lakhs each.
Out of the above, value of UDS land	:	Rs.10 lakhs.

For paying GST for the services provided by the builder to his buyers, he has the following options:

(i) 18 % on 2/3 of Rs.50 lakhs per flat = Rs.6,00,000 (S.NO. 3 (i) of Notification 11/2017)

(ii) 18 % on Rs. 40 lakhs (excluding UDS value) = Rs.7,20,000 (S.NO.3(ii) of Notification 11/2017).

For paying GST for the services provided by the builder to the landowner, irrespective of whatever method he followed for payment of GST for buyers,

As and when he receives the UDS value from each of his buyers, such UDS value would be treated as value of service supplied to the landowner and GST would be payable on such UDS value @ 18 %. The total GST liability in respect of landowner would thus be 25 flats X Rs. 10 lakhs X 18 % = Rs.45,00,000.

3.3 As already observed, the above view is capable of being disputed. The department has been maintaining under Service Tax regime that the value of comparable flats have to be adopted. The decision in LCS Citymakers case also supports such view. However, the author is the opinion that still the above method of valuation is perfectly in tune with the legal provisions. However, without prejudice to the above, if a conservative view has to be taken on the subject, let us see what other alternatives could be thought of.

4.0 Let us assume that in the absence of any direct “price” for the service being provided by the builder to the landowner, recourse has to be made to the provisions under the CGST Rules, 2017 relating to valuation. The following rules may be referred to.

RULE 27. Value of supply of goods or services where the consideration is not wholly in money. — Where the supply of goods or services is for a consideration not wholly in money, the value of the supply shall, -

(a) be the open market value of such supply;

(b) if the open market value is not available under clause (a), be the sum total of consideration in money and any such further amount in money as is equivalent to the consideration not in money, if such amount is known at the time of supply;

(c) if the value of supply is not determinable under clause (a) or clause (b), be the value of supply of goods or services or both of like kind and quality;

(d) if the value is not determinable under clause (a) or clause (b) or clause (c), be the sum total of consideration in money and such further amount in money that is equivalent to consideration not in money as determined by the application of rule 30 or rule 31 in that order.

Illustration :

(1) Where a new phone is supplied for twenty thousand rupees along with the exchange of an old phone and if the price of the new phone without exchange is twenty four thousand rupees, the open market value of the new phone is twenty four thousand rupees.

(2) Where a laptop is supplied for forty thousand rupees along with the barter of a printer that is manufactured by the recipient and the value of the printer known at the time of supply is four thousand rupees but the open market value of the laptop is not known, the value of the supply of the laptop is forty four thousand rupees.

RULE 30. Value of supply of goods or services or both based on cost. — Where the value of a supply of goods or services or both is not determinable by any of the preceding rules of this Chapter, the value shall be one hundred and ten percent of the cost of production or manufacture or the cost of acquisition of such goods or the cost of provision of such services.

RULE 31. Residual method for determination of value of supply of goods or services or both. — Where the value of supply of goods

or services or both cannot be determined under rules 27 to 30, the same shall be determined using reasonable means consistent with the principles and the general provisions of section 15 and the provisions of this Chapter :

Provided *that in the case of supply of services, the supplier may opt for this rule, ignoring rule 30*

Explanation. — *For the purposes of the provisions of this Chapter, the expressions -*

(a) "open market value" of a supply of goods or services or both means the full value in money, excluding the integrated tax, central tax, State tax, Union territory tax and the cess payable by a person in a transaction, where the supplier and the recipient of the supply are not related and the price is the sole consideration, to obtain such supply at the same time when the supply being valued is made;

(b) "supply of goods or services or both of like kind and quality" means any other supply of goods or services or both made under similar circumstances that, in respect of the characteristics, quality, quantity, functional components, materials, and the reputation of the goods or services or both first mentioned, is the same as, or closely or substantially resembles, that supply of goods or services or both.

4.1 It may be noted that Rule 27 would apply "where the consideration is not wholly in money". As per the view taken in para 2.0 to 2.5 above, in the instant case, the consideration is only in money, which is not flowing from the landowner to the builder, but flowing from the buyers to builder (value of UDS land). Since we are looking for alternative method of valuation, let us assume that the consideration in this case is not wholly in money. It may be further noted that the term "not wholly in money" would cover a situation where (i) the entire consideration is not in the form of money; and (ii) where part of the consideration is not in money. In the instant case, assuming that the consideration from the landowner to builder is in the form of right granted by the landowner to the builder, to sell proportionate share of UDS land pertaining to builder's share of flats and retain the same, and the same is not in money, let us apply Rule 27.

4.2 As per clause (a) of Rule 27, the value shall be "open market value" which term is also defined. From the definition of the said term it may be observed that the same refer to the comparable value, **at the same time** when service is provided to landowner, i.e. at the time of supply (which also needs to be decided). It may be observed that the builder's share of flats are sold over a period of time and at the time of supply of service to the landowner, no such open market value may be available.

4.3 As per clause (b) of Rule 27, the value shall be the sum total of consideration in money and any such further amount in money as is equivalent to the consideration not in money, if such amount is known at the time of supply. In the instant case, since no consideration in money is flowing from the landowner to builder. If the right granted by the landowner to the builder, to sell proportionate UDS land pertaining to builder's share of flat is considered as the non-monetary consideration, the value of the same at the time of supply, shall be the value under Rule 27 (b). Now let us deal with the question as to how the "time of supply" has to be determined in this case, for which purpose reference may once again be made to section 13 of the GST Act, 2017.

4.4 It may be observed that clauses (a) and (b) of sub-section (2) of section 13 are not applicable in this case, as neither any invoice is raised by the builder on landowner, nor any payment received. As per clause (c) *ibid*, the time at which the landowner shows the receipt of service in his books of accounts would be the time of supply. If the landowner is retaining such flats for his own use, he would recognise the same as his capital assets and if the landowner is going to again sell such flats, he would recognise the same as his stock in trade. So, the builder would be liable to pay GST at the time, when the landowner recognises the receipt of flats from the builder.

4.5 Practically, after entering into JDA, various approvals are sought by the builder and after obtaining the requisite approvals, the flats meant for landowner and builder are identified and a Supplementary Agreement is entered into for this purpose. It can be said that upon entering into such Supplementary Agreement the landowner recognises the receipt of services in his books of accounts. Or sometimes, the landowner may recognise the receipt of services (flats) only at the time of handing over of flats to him. But from builder's point of view it would be very difficult to conclude when the landowner recognises receipt of service. In this connection, we may refer to the CBEC Instruction F.No.354/311/2015 Dt. 20.01.2016, wherein in the context of point of taxation under service tax it has been clarified as,

"Service tax is liable to be paid by the builder/developer on the 'construction service' involved in the flats to be given to the land owner, at the time when the possession or right in the property of the said flats are transferred to the land owner by entering into a conveyance deed or similar instrument (e.g. allotment letter)".

4.6 Toing the same line, for the time being we can conclude that the builder is liable to pay GST in respect of the services supplied to landowner, at the time of when the flats are identified for the landowner and communicated, which is in tune with Section 13 (2) (c).

4.7 By application of Rule 27 (b), the value of UDS land, proportionate to the builder's share of flats, as on the date of time of supply as determined as above (date of conveyance / allotment letter), as per the Government Guideline value would be the value of service provided to the landowner. To amplify, the value of total area of UDS land, proportionate to the builder's share of flats would be the value of service and on such total value, the builder would be liable to pay GST @ 18 %. It may be noted, even if the application of Section 15 is ruled out

and recourse is made to Rule 27, the value of UDS land pertaining to builder's share of flat could be justified as the value of service provided to landowners.

5.0 Some of the practitioners and industry representatives are of the view that either comparable price of similar flats or cost of construction of the flats meant for landowners would be the value relevant for payment of GST. Let us examine these claims.

5.1 It may be observed that "comparable value", i.e. open market value is contemplated in Rule 27 (a). The said rule would apply, only if the value could not be determined under section 15 of the Act. If it is agreed that the value of UDS land proportionate to builder's share of flat is the only consideration for the builder, such value becomes the value of service provided by the builder to the landowner, as per Section 15 of the Act and there is no need to take recourse to Rule 27 of the GST Rules, 2017 at all. The said value can be disregarded, only if it is held that the same is not the "price payable" by the landowner to the builder and it is felt that the same cannot be thus disregarded.

5.2 Assuming for a moment that Section 15 value is not available in this case and recourse has to be made to Rule 27 (a), according to which, the value shall be "open market value" i.e. comparable price is available at the same time, at the time of supply of service to the landowner. As the stress is on "at the same time" such open market value at the same time, may not be available. Application or Rule 27 (b) also justifies considering the value of UDS land proportionate to builder's share of flats as the value of service provided to the landowner. Rule 27(c) talks about value of service of like kind and quality, which is also very difficult to ascertain, considering the uniqueness of each construction, in terms of area / locality, quality, builder's reputation, etc. Recourse to cost plus 10 % as per Rule 30 read with Rule 27 (d) would not at all be practical as cost can be ascertained only after completion of construction and if the time of supply occurs before completion of construction, the cost cannot be measured. What is relevant for Rule 30 is actual cost and not estimated cost.

5.3 Despite all the above odds, if one has to pay GST on the basis of comparable price, i.e. open market value of similar flats sold by the builder, the computation of GST liability would be as under, by way of example.

Total No. of flats in the project	:	50
Flats for Builder	:	25
Flats for Landowner	:	25
Builder is selling his flats for	:	Rs.50 lakhs each.
Out of the above, value of UDS land	:	Rs.10 lakhs.

For paying GST for the services provided by the builder to his buyers, he has the following options:

(i) 18 % on 2/3 of Rs.50 lakhs per flat = Rs.6,00,000 (S.NO. 3 (i) of Notification 11/2017)

(ii) 18 % on Rs. 40 lakhs (excluding UDS value) = Rs.7,20,000 (S.NO.3(ii) of Notification 11/2017).

GST liability for the services provided by the builder to the landowner, would be,

(i) 18 % on 2/3 of Rs.50 lakhs per flat = Rs.6,00,000 (S.NO. 3 (i) of Notification 11/2017); A total of Rs.1.5 Crores.

(ii) 18 % on Rs. 40 lakhs (excluding UDS value) = Rs.7,20,000 (S.NO.3(ii) of Notification 11/2017): A total of Rs.1.8 Crores.

It may be noted that for determining the "open market value", i.e. comparable value the same options available for payment of GST for services provided to buyers would also be available for determining the GST liability for services provided to landowners.

To sum up,

- (i) The value of service provided to landowners by builders, in terms of JDA would be the value of total UDS land, pertaining to builder's share of flats, on the date when the flats meant for landowner are identified / conveyed / allotted.
- (ii) If there is any apprehension in adopting the above value, comparable value of flats sold in the same complex, at a time nearest to the date on which the flats meant for landowner are identified / conveyed / allotted and GST may be paid on such value.
- (iii) If no comparable value is available at the time when flats meant for landowner are identified / conveyed / allotted, if the cost of construction of such flats is available at that time, the value can be considered as 110 % of such cost of construction.

(Published in www.taxindiaonline.com on 08.08.2017)