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C.V.O.CA'S NEWS & VIEWS

FOR MEMBERS / SUBSCRIBERS / VOL. 26 - NO. 2 AUGUST 2022

From President's Desk...

Dear Professional Colleagues and Readers,

As an Indian, I felt it to be a proud moment for all of us, when I read **Geetanjali Shree's** novel “Ret Samadhi”, which became the first ever Hindi novel to win the esteemed **International Booker Prize award.** The win is significant because this is the first time ever, a Hindi language book (translated in English) of fiction has received the honour.

As far as I know, Geetanjali took around 8 years to write the book. The book is about an 80-year-old woman who travels to Pakistan, to fight her trauma of her early life partition and to revisit her life as a mother, daughter, and as a woman. The novel portrays the woman's determination to fly in the face of convention. It is a story about a woman who is breaking free and starting a new journey.

What is more remarkable is, her book beat five other finalists including a Polish Nobel literature laureate Olga Tokarczuk, Claudia Piñeiro of Argentina and South Korean author Bora Chung.

Booker prize was first created, for novels written by Commonwealth nations, Irish, and South African citizens which over the year has been changed to any English-language novel only. Over this history of more than 50 years of history of the booker prize, only 3 other Indian writer shave won this award. Among them, one is very renowned writer Arundhati Roy for her novel “The God of Small Things”.

I would like to take this as an opportunity to announce our upcoming events:

We have already announced a 2-day RRC on GST at Karjat on 5th – 6th August. Committee has ensured apt topics, affecting everyone day to day. We have very few slots left, and in case you have missed the opportunity, please ensure you enroll at the earliest.

Events in retrospect:

On 22nd July' under our 50 year celebration committee, we had our first public awareness seminar on “Equity Investment – Rights and Responsibilities”. The abled speaker from BSE IPF and CDSL IPF answered all the issues being faced by the investors present.

I would like to conclude by congratulating all newly passed CAs. Many students failed to clear the exams. For those who could not clear I would just like to state a small message:

“Failure is not the opposite of success.... its part of success”

Wish all our members a festive upcoming season....

Thank you all..... Always in Gratitude

CA Amit Chheda

August 1, 2022

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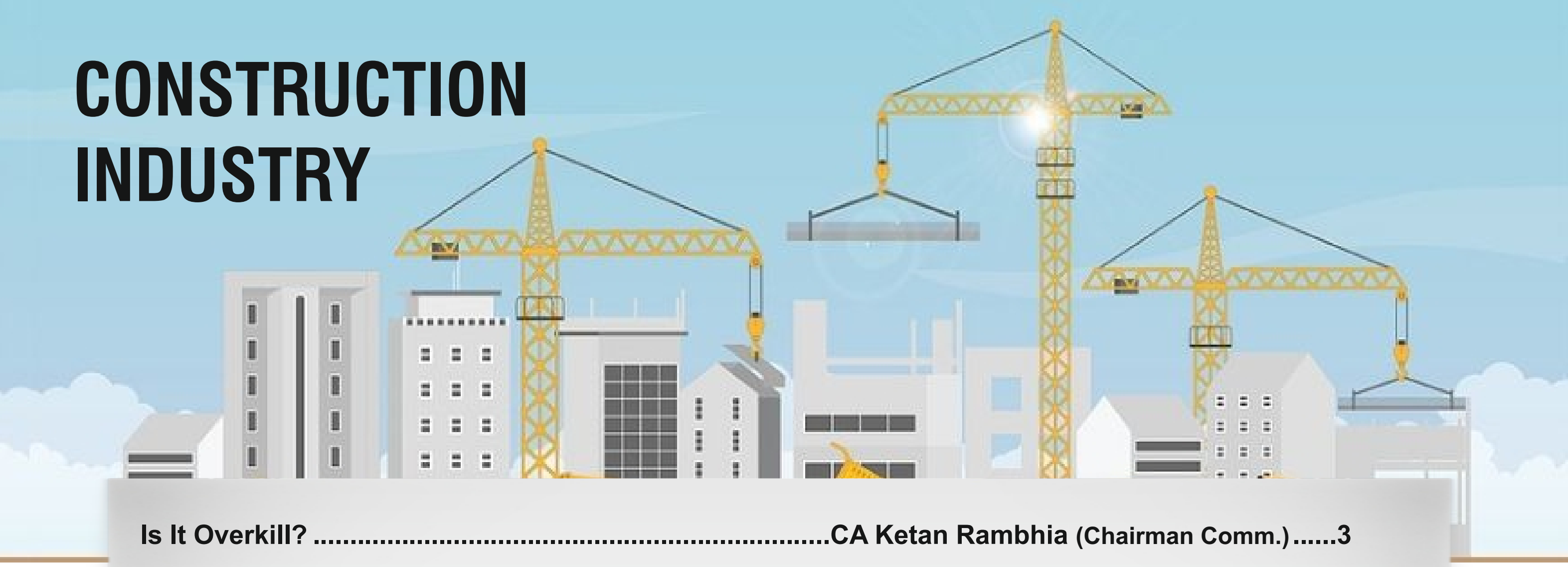
CONSTRUCTION INDUSTRY



IS IT OVERKILL?

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FROM THE DESK OF CHAIRMAN

In India, over the years since independence, corruption and black money generation has been so deep rooted that importance of any effort to curb the menace can never be over emphasized. The efforts to curb black money and leakages in tax revenues were made by means of various legal and other measures and the laws have been made to curb the menace. Generation of black money has various social, economic, even national security implications. In last 5-7 years, the government has been aggressive in taking various steps and also enacting / amending various laws in this respect. The same may be necessary but as every medicine has its side effects, the new and amended laws have its side effects too, mainly in form of complex web of compliances, uncertainties in compliances and undesirable litigations which may follow.

If we talk of revenue laws, amendments introduced, especially in income tax law, will help government to identify and curb revenue leakages, however, the taxpayers are required to comply with various procedures which definitely adds to their burden.

Certain provisions introduced are really harsh on business community and go against the motto of "ease of doing business", e.g. TDS / TCS on Purchase / sale of goods etc above Rs. 50 lakhs. These provisions are pretty burdensome and seem to be unnecessary. Further, TDS on amounts paid by banks etc in cash (cash withdrawals) above Rs. 1 crore in a year (or Rs. 20 lakhs in case of non-filers) are also unwarranted. The fact is cash withdrawals are not incomes of persons receiving cash. Further, post-GST era, it is practically not possible for business community to have unaccounted cash transactions and go scot-free. Recent introduction of provisions related to TDS on benefit or perquisites in respect of business or profession has further added to complications of tax paying community. Tax introduced on partnership firms at the time of reconstitution of firms on assets received by partners is one more instance of amendment seeking to plug revenue leakage but in doing so has created so much complexity and even probability of double taxation. These are only few instances and there are various other amendments to bring more revenues or plug the leakages but are very harsh on taxpayers, many times unnecessary and mostly bringing with them potential future litigations and so on.

It is said that revenue collection by government shall be like honey-bee extracting honey from flowers, it shall be painless to the tax payer. Whereas in reality, the complex web of laws makes it very difficult for any businessman to run business with required ease, especially persons in SME sector feel the heat much harder way. Even small compliance mistake will end up creating large tax demands, long stretched litigations and penalties which will have further financial burden.

On the other hand, the government keeps on boasting about quick payments of tax refunds claimed by taxpayers. However, the whole need to claim refunds by taxpayers comes mainly out of wrongfully collected taxes in advance by way of TDS/TCS etc. This whole exercise has its own cost on the exchequer and taxpayer community, has the effect of depriving taxpayers of their financial liquidity, and use of taxpayer money by the government at no cost i.e. loss to taxpayers.

Another measure used by the government to curb the menace is making most procedures technology driven. This really is effective in many ways and helpful to taxpayers if implemented effectively. Yet the experience is that various faceless procedural aspects are in mess today. The enthusiasm of the government to take advantage of technology for betterment of people at large is understandable but somehow it is not giving desirable results, not at least to the taxpayers. The talk of simple tax laws shall not be just lip service but there has to be a proactive approach towards attaining that goal by understanding problems of taxpayers and resolving the same. The burden on the judiciary can only be reduced by simple tax laws and simple procedures. If the government really wants to introduce ease of doing business, reduce burden on judiciary, improve voluntary tax collections etc., the only way forward is believing in taxpayers and simplifying tax laws for real. Making laws based on handful wrong doing people is not sign of mature tax regime.

So naturally question comes to mind that why the government, so proud of our ancient culture, when it comes to tax levying and collection, completely ignore the writings of Chanakya who advocated about taxation that it should be easy to calculate, convenient to pay, inexpensive to administer and equitable in its burden? Whether such complex tax laws are really needed, or is it just overkill by Government?

Thank you all..... Always in Gratitude

CA Ketan Rambhia

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KEY INCOME TAX ISSUES IN REAL ESTATE INDUSTRY (FROM BUILDERS PERSPECTIVE)

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Real Estate developers earlier were booking revenue based on percentage of completion method because income tax department were favouring percentage of completion method and listed companies were preferring percentage completion method because they can book revenue earlier before project is completed so that they can show good quarterly profits and accordingly their share price will increase. Real Estate Developers were following Guidance Note on Accounting for Real Estate Transactions or Guidance Note on Accounting for Real Estate Transactions (for entities to whom Ind As is applicable).

As per Guidance Note on Accounting for Real Estate Transactions (Revised 2012), Accounting for Real Estate Transactions:

Real estate activities and transactions take diverse forms. While some are for sale of land (developed or undeveloped), others are for construction, development or sale of units that are not complete at the time of entering into agreements for construction, development or sale.

The typical features of most construction/development of commercial and residential units have all features of a construction contract – land development, structural engineering, architectural design and construction are all present. The natures of these activities are such that often the date when the activity is commenced and the date when the activity is completed usually fall into different accounting periods. It is not unusual for such activities to spread over two or more accounting periods.

For recognition of revenue in case of real estate sales, it is necessary that all the conditions specified in paragraphs 10 and 11 of Accounting Standard (AS) 9, Revenue Recognition, are satisfied.

Recognition of revenue requires that revenue is measurable and that at the time of sale or the rendering of the service it would not be unreasonable to expect ultimate collection.

When recognition of revenue is postponed due to the effect of uncertainties, it is considered as revenue of the period in which it is properly recognised.

As stated above, real estate sales take place in a variety of ways and may be subject to different terms and conditions as specified in the agreement for sale. Accordingly, the point of time at which all significant risks and rewards of ownership can be considered as transferred, is required to be determined on the basis of the terms and conditions of the agreement for sale. In case of real estate sales, the seller usually enters into an agreement for sale with the buyer at initial stages of construction. This agreement for sale is also considered to have the effect of transferring all significant risks and rewards of ownership to the buyer provided the agreement is legally enforceable and subject to the satisfaction of conditions which signify transferring of significant risks and rewards even though the legal title is not transferred or the possession of the real estate is not given to the buyer. Once the seller has transferred all the significant risks and rewards to the buyer, any acts on the real estate performed by the seller are, in substance, performed on behalf of the buyer in the manner similar to a contractor. Accordingly, revenue in such cases is recognised by applying the percentage of completion method on the basis of the methodology explained in AS 7, Construction Contracts.

Application of Percentage Completion Method

The percentage completion method should be applied in the accounting of all real estate transactions/activities in the situations described above, i.e., where the economic substance is similar to construction contracts. Some further indicators of such transactions/activities are:

(a) The duration of such projects is beyond 12 months and the project commencement date and project completion date fall into different accounting periods.

(b) Most features of the project are common to construction contracts, viz., land development, structural engineering, architectural design, construction, etc.

(c) While individual units of the project are contracted to be delivered to different buyers these are interdependent upon or interrelated to completion of a number of common activities and/or provision of common amenities.

(d) The construction or development activities form a significant proportion of the project activity. This method is applied when the outcome of a real estate project can be estimated reliably and when all the following conditions are satisfied:

  (a) total project revenues can be estimated reliably;

  (b) it is probable that the economic benefits associated with the project will flow to the enterprise;

  (c) the project costs to complete the project and the stage of project completion at the reporting date can be measured reliably; and

  (d) the project costs attributable to the project can be clearly identified and measured reliably so that actual project costs incurred can be compared with prior estimates.

Further to the conditions mentioned above there is a rebuttable presumption that the outcome of a real estate project can be estimated reliably and that revenue should be recognised under the percentage completion method only when the events in (a) to (d) below are completed.

(a) All critical approvals necessary for commencement of the project have been obtained. These include, wherever applicable: (i) Environmental and other clearances. (ii) Approval of plans, designs, etc. (iii) Title to land or other rights to development/construction. (iv) Change in land use

(b) When the stage of completion of the project reaches a reasonable level of development. A reasonable level of development is not achieved if the expenditure incurred on construction and development costs is less than 25 % of the construction and development costs

(c) Atleast 25% of the saleable project area is secured by contracts or agreements with buyers

(d) Atleast 10 % of the total revenue as per the agreements of sale or any other legally enforceable documents are realised at the reporting date in respect of each of the contracts and it is reasonable to expect that the parties to such contracts will comply with the payment terms as defined in the contracts. To illustrate - If there are 10 Agreements of sale and 10 % of gross amount is realised in case of 8 agreements, revenue can be recognised with respect to these 8 agreements.

For applying the percentage of completion method in respect of a project, the provisions of ICDS III on Construction Contract shall apply mutatis mutandis.

In ICDS III on Construction Contract rest 3 conditions mentioned in (b) , (c) & (d) are same except condition (a) is dispensed with. The same may be because now all new projects are registered under RERA and as per Section 4 (2) (c) The promoter shall enclose with application for registration of real estate projects an authenticated copy of the approvals and commencement certificate from the competent authority obtained in accordance with the laws as may be applicable for the real estate project mentioned in the application, and where the project is proposed to be developed in phases, an authenticated copy of the approvals and commencement certificate from the competent authority for each of such phases.

But after introduction of Ind AS 115 Revenue from contracts with customer's, view came that the completion contract method is to be applicable instead of percentage completion method in case of under construction projects.

My article on Ind AS 115- Revenue from Contracts with Customers – Impacts on Real Estate Industry is already published in CVO CA's News and Views and the same is also uploaded in www.taxguru.in website.

As per this standard below mentioned 5 steps are to be followed for Revenue Recognition

1 Identify the contract(s) with the customer

2 Identify the separate performance obligations

3 Determine the transaction price

4 Allocate the transaction price to the performance obligations

5 Revenue Recognition when performance obligations are satisfied

Sale of Completed Property

It is possible that a Real Estate Developer will sell Real Estate flats/commercial units after the construction of property is completed. Nowadays if a Real Estate Developer will sell property after it is completed then the same can be outside the ambit of RERA & also at the same time the same will be outside the ambit of GST. But mainly for funding purpose Developer tries to sell under construction property so that with internal accruals they can complete the construction to save interest burden on Loan/Debt. In case of sale of completed property as per Ind AS 115 Real Estate Developer will be required to recognize revenue when control is transferred to the customer i.e. at a point in time

Sale of Under Construction Property

Majority of the transactions entered by the Real Estate Developers are sale of under construction property. With the introduction of Ind AS 115 now Real Estate Developer has to account for Revenue by following the above stated 5 steps approach wherein as per step 5 revenue is to be recognized when entity satisfy each performance obligation. So now the question is whether the performance obligation is satisfied when the real estate unit is handed over to customer on delivery or it can be proved that performance obligation is satisfied over a period of time. However, to prove performance obligation is satisfied over a period of time one of the criteria to be met out of three which are

a) The customer simultaneously receives and consumes the benefits provided by the entity's performance as the entity performs

My Comments: if a certain slab is completed then the customer neither receives nor consumes any benefit.

b) The entity's performance creates or enhances an asset (for example work in progress) that the customer controls as the asset is created or enhanced or

My Comments: Again going by the same example if certain slab is completed then customer cannot control that asset.

c) The entity's performance does not create an asset with an alternative use to the entity and the entity has an enforceable right to payment for performance completed to date.

My Comments: Here again if certain slab is completed then the Real Estate Developer does not have any alternative use of that part construction as the same is done only for the customer to whom completed units will be given. Similarly, an entity does not have an enforceable right to payment for performance completed to date. As nowadays majority of the schemes are 20 (advance): 80 (on possession) / 10: 90 / 30: 70 etc where in advance is taken from the customer on registration of agreement & balance amount will be taken only when possession of completed property is given. Based on the above findings one can conclude that Real Estate Developers have to recognize Revenue on Completed contract method as against percentage of completion method (POCM).

The same is against Guidance note on Real Estate Transactions & Draft Income Computation & Disclosure Standard (ICDS) on Real Estate transactions as both are advocating on booking of revenue as per percentage of completion method.

As Ind AS 115 is now applicable instead of guidance note & also as the principles mentioned in Ind AS 115 & Guidance note on real estate transactions to whom Ind AS is applicable were different so on 01-06-2018 ICAI had withdrawn the said Guidance Note on Accounting for Real Estate Transactions (for entities to whom Ind AS is applicable).

Institute of Chartered Accountants of India has released press release on **Implementation of Ind AS 115, Revenue from Contracts with Customers in context of Real Estate Sector**

“It has come to ICAI's attention that there have been misleading and confusing media reports that Ind AS 115, Revenue from Contracts with Customers, (issued by MCA vide notification dated March 28, 2018) permits only Completed Contract Method of accounting for real estate companies. We have come across statements like, *“revenue in case of real estate transactions can be booked only after the project is completed and the customer has taken possession of the unit (house/flat)”*. These kind of reports may lead to misinterpretation of the principles laid down in the Standard.

In view of the above, the ICAI would like to clarify that the Ind AS 115 does allow recognition of revenue using Percentage of Completion Method (POCM) and has explicit and specific requirements to recognise revenue, where performance obligation is satisfied over a period of time etc”

However, based on the above discussion in case of an under construction project also now it is almost impossible to apply percentage of completion method and therefore many listed companies and even private limited companies having high net worth to whom Ind AS is applicable have started applying completed contract method of Revenue Recognition.

Only disadvantage is when projects are under construction no revenue will be booked so there will be adent in the profitability as a result of which pressure may be seen in the prices of shares during those periods in case of listed companies. But once a project is completed i.e. when Occupancy certificate is received Developer will apply completed contract method so profit will be shoot up in that quarter/year so again share price will go up. Normally Developers prefer one project in one SPV but now they may plan more projects/phases in one SPV in such a fashion that almost every year one project will get Occupancy certificate or at least one phase registered with RERA will get Occupancy certificate so that they can book profits every year and there will be no dent in the profitability and therefore there will not be any pressure in share price of that listed companies and private companies having high net worth can get sufficient construction finance.

Occupancy certificate is an important legal document certifying that the construction of the building complies with the approved plans. In Maharashtra, occupancy certificate is issued by the Department of Urban Development only if the constructed building is in the appropriate condition for occupancy.

The same is advisable because real estate developers in case of completed contract method, offer 100% income when project is completed so they are in a better position to book 100% expenses against 100% revenue booked i.e. they also estimate further expenses to be incurred like finishing expenses of buildings and flats because Occupancy certificate can be issued to developer even if finishing activities is pending. Further now as per RERA section 14(3) "In case any structural defect or any other defect in workmanship, quality or provision of services or any other obligations of the promoter as per the agreement for sale relating to such development is brought to the notice of the promoter within a period of five years by the allottee from the date of handing over possession, it shall be the duty of the promoter to rectify such defects without further charge, within thirty days, and in the event of promoter's failure to rectify such defects within such time, the aggrieved allottees shall be entitled to receive appropriate compensation in the manner as provided under this Act."

Therefore, the developer has to also provide for such expenses that may or may not be incurred within 5 years from the date of possession is given to the allottees.

Here to avoid litigation with income tax department regarding allowability of provision for expenses they have to provide all expenses scientifically i.e. all relevant proof of provision of expenses should be kept properly so that the same can be submitted to auditors as well as income tax department in case of assessments or in case of audit queries after assessment or to appellate authorities.

Drawback of percentage of completion was Developers were booking revenue periodically by following percentage of completion method but certain expenses if not provided they were not getting allowance of the same because normally real estate developers are opening one company per project so after 100% revenue is booked if certain expenses were not provided and developer has to incur as mentioned above then they were incurring loss in those years which they were not able to get set off because that project is over. Such kind of problems they will not be facing if they follow a completed contract method in line with Ind AS 115 Revenue from contracts with customers.

CIT vs. Bilahari Investments (P) Ltd. (2008) 299 ITR 1(SC)

It is held that Recognition/identification of income under the Act, is attainable by several methods of accounting. It may be noted that the same result could be attained by any one of the accounting methods.

Completed contract is one such method. Similarly, percentage of completion is another such method.

Under the completed contract method, the revenue is not recognised until the contract is complete. Under the said method, costs are accumulated during the course of the contract. The profit and loss is established in the last accounting period and transferred to a P & L account. The said method determines results only when the contract is completed. This method leads to objective assessment of the results of the contract.

On the other hand, the percentage of completion method tries to attain periodic recognition of income in order to reflect current performance. The amount of revenue recognised under this method is determined by reference to the stage of completion of the contract. The stage of completion can be looked at under this method by taking into consideration the proportion that costs incurred to date bears to the estimated total costs of the contract.

Now based on the above sift of revenue recognition from percentage of completion method to completed contract method department may not like the same so the change in method of accounting will be subject to dispute by the income tax department. In that scenario below decisions will come to rescue.

Disclosure of changes in an accounting policy used for revenue recognition should be made in the financial statements giving the effect of the change and its amount.

Commissioner of Income Tax II Vs Mapin Publishing Pvt Ltd. (Gujarat High Court at Ahmedabad): Tax Appeal No. 902 of 2013

Issue: - It was noticed by the assessing officer that the assessee Company has changed its accounting policy during the year under consideration and it was found that the Company has assessed loss of Rs.6,29,200/-. During the year under consideration as compared to last year profit of Rs.1,27,860/- and therefore, the assessing officer was of the opinion that the impact of change in system has resulted in reduction of revenue during the year. Assessing officer passed an assessment order making addition of Rs.45,78,354/- into total income of the assessee by observing that the assessee has deviated from the accounting system and has shown less profit of Rs. 45,78,354/-.

Held: - Court agreed with the arguments made by the Appellant that during the year under consideration the change in method of accounting was bona fide and with the compliance of the Accounting Standard – AS 9 – Revenue Recognition issued by the Institute of Chartered Accountants of India and provisions of S.5 of Income Tax Act. As per the provisions of the Act, the income is required to be accounted for or offered for taxation in the year in which it is accrued to the assessee and during the year under consideration, the Appellant has changed method of accounting to account for the income in the year in which the project is completed i.e. on the basis of accrual of income. This method of accounting is more accurate, scientific and as per the various statutory requirements and therefore in my opinion, the change in such method of accounting is bona fide and the same cannot be rejected on the ground that it has resulted into claiming more expenditure during the year under consideration. Therefore, I hold that the action of the assessing officer in rejecting change in the method of accounting is incorrect and not sustainable and accordingly the addition made by the assessing officer is hereby deleted.

Satish H. Patel [93 TTJ 458 (Pune)]

It is held that the assessee having changed his method of accounting from work-in- progress in original return to project completion method in revised return, assessment had to be made as per revised return.

Case Laws on Issues relating to Provision of Expenses

Calcutta Co. Ltd. vs CIT (37 ITR 1) (SC)

Section 28(i), read with section 145 of the Income-tax Act, 1961 [Corresponding to section 10(1), read with section 13 of the Indian Income-tax Act, 1922] - Business deductions - Allowable as - Assessment year 1948-49 - Assessee dealt in land and property and carried on land developing business - It maintained its accounts in mercantile method - In relevant accounting period it sold certain plots and even though assessee received only a portion of sale price, it entered in credit side of its account books whole of sale price of plots - Under terms of sale deeds assessee undertook to carryout developments within six months from date of sale - Accordingly, it estimated a sum as expenditure for developments to be carried out in respect of plots sold out during relevant year and debited said sum in its books of account as accrued liability - Department did not take any exception to said estimated expenditure in regard to quantum but disallowed assessee's claim for deduction of that sum by relying upon provisions of section 10(2) of 1922 Act - Whether estimated expenditure which had to be incurred by assessee in discharging a liability which it had already undertaken under terms of sale-deeds of lands in question was an accrued liability which according to mercantile system of accounting assessee was entitled to debit in its books of account for accounting year as against receipts which represented sale proceeds of said lands - Held, yes

Thyssenkrupp Industrial Solutions (India) Private Limited [TS-192-ITAT- 2019(Mum)]

Mumbai ITAT allows provisions made by assessee (ThyssenKrupp) for future expenses relating Lumpsum Turnkey Projects during AY 2006-07, holds thatsubsequent reversal of provision not bar; The assessee carried out Lumpsum Turnkey Projects [LSTK] and the revenue was recognized upon commissioning of the plant, till the final acceptance of the plant by the customer, certain expenses for trialruns and salaries were to be incurred by the company, for which the provision wasmade by the assessee and which was denied by the AO; ITAT notes that since therevenue from the project is recognized after commissioning of the plantwhereas some expenditure is certainly required to be incurred by the assesseebetween the stage of commissioning of the plant and final acceptance of the plant bythe customer, the estimation of expenditure was required to be made; Statesthat these estimations are mere projections which may or may not crystallizedin the subsequent years and may require suitable adjustment by way of furtherdebit or reversal to profit & loss account in subsequent years; Therefore, holdsthat reversal of expenditure in future could not deprive the assessee to claimlegitimate business expenditure under mercantile system of accounting following matching concept of income, especially when the reversals weretaxed in subsequent years, also notes that the estimations were made on thescientific basis.

HUGHES NETWORK SYSTEMS INDIA LTD Vs DCIT(A) NEW DELHI (2008-TIOL-315-ITAT-DEL)

If a business liability has definitely arisen in the accountingyear, the deduction should be allowed although the liability may have to bequantified and discharged at a future date. What should be certain is the incurringof the liability. It should also be capable of being estimated with reasonable certainty though the actual quantification may not be possible. If these requirements are satisfied the liability is not a contingent one. The liability is in present though it will be discharged at a future date. It does not make any difference if the future date on which the liability shall have to be discharged is not certain.

Interest on Borrowing Costs

As per clause 2(1)(b)(iii) of ICDS IX inventories that require a period of twelve months or more to bring them to a saleable condition are Qualifying assets.

Recognition

Borrowing costs that are directly attributable to the acquisition, construction or production of a qualifying asset shall be capitalised as part of the cost of that asset.

As the real estate project takes more than 12 months so Interest to be added to the cost of inventories and will be allowed when income from the project will be offered for income tax.

As per Ind AS 23 Borrowing Costs

Borrowing costs that are directly attributable to the acquisition, construction or production of a qualifying asset form part of the cost of that asset. Other borrowing costs are recognised as an expense. Borrowing costs are interest and other costs that an entity incurs in connection with the borrowing of funds.

A qualifying asset is an asset that necessarily takes a substantial period of time to get ready for its intended use or sale.

An entity shall cease capitalising borrowing costs when substantially all the activities necessary to prepare the qualifying asset for its intended use or sale are complete.

As per Clause (2)(1)(c)(A)(ii) of Draft ICDS on real estate transaction

Borrowing costs – Costs which are incurred directly in relation to a project or which are apportioned to a project in accordance with Income Computation and Disclosure Standard IX relating to Borrowing Costs.

36 (1) (iii)

The deductions provided for in the following clauses shall be allowed in respect of the matters dealt with therein, in computing the income referred to in section 28—

(*iii*) the amount of the interest paid in respect of capital borrowed for the purposes of the business or profession:

> **Provided** that any amount of the interest paid, in respect of capital borrowed for acquisition of an asset (whether capitalised in the books of account or not); for any period beginning from the date on which the capital was borrowed for acquisition of the asset till the date on which such asset was first put to use, shall not be allowed as deduction.

In above section it appears that there is a conflict between treatment of borrowing cost suggested in ICDS IX and Ind AS 23 Borrowing cost because the said section 36 (1) (iii) is only telling that if interest paid in respect of capital borrowed for the purpose of the business or profession then the same should be allowed in the year in which interest is incurred. Only exception is given to Fixed Assets, till the time asset is not first put to use the same should be added to the cost of the said Fixed Assets. Real Estate projects like under construction of Real Estate Projects are stock in trade (Inventories) and not fixed assets so Developers will follow Accounting Standards/Ind AS which is telling that interest to be capitalised to Inventories till substantially all the activities necessary to prepare the qualifying asset for its intended use or sale are complete.

Therefore Developers will claim such Interest cost when income from the project will be offered for income tax.

However, if Developer is developing a Mall and will generate rental income from subletting commercial units then they will show Mall not under stock in trade/inventories but under Fixed Assets so in that case there is no conflict between ICDS IX and Ind AS 23 Borrowing cost & 36 (1) (iii) of the Income Tax Act.

Lokhandwala Construction Inds. Ltd. 260 ITR 579 (Bombay HC)

The assessee-company was engaged in the business of construction of buildings. The assessee followed the Mercantile System of accounting. The assessee had secured development rights from Bombay Gaw Rakshak Mandal under Agreement dated 13th December 1984 in respect of a plot of land situate at Kandivali admeasuring 788000 sq. metres for total consideration of Rs 11 crores or Rs 50/- per sq. ft of FSI that may be sanctioned by BMC. During the Assessment Year in question, no activities were carried out and, therefore, work-in-progress came to be carried forward. The assessee had taken loans amounting to Rs. 1.15 crores, out of which an amount of Rs 1.10 crores came to be utilised during the Assessment Year in question for payment to the Mandal. The assessee claimed deduction of Rs. 14,09,942/- paid as interest on moneys borrowed under Section 36 (1) (iii) of the Income-tax Act.

On the above facts, the following question of law arises

"Whether on the facts and in the circumstances of the case, the Tribunal was correct in law in holding that the interest claimed as revenue expenditure amounting to Rs. 14,09,942/- cannot be treated as capital expenditure and added to work-in-progress in spite of the fact that other expenses on project were being capitalised by the assessee itself and holding that the Commissioner of Income Tax was wrong in directing the Assessing Officer to disallow the said interest and treat the same as capital expenditure as a part of work-in-progress, thereby quashing the order under Section 263 of the Act of the Commissioner of Income Tax?"

Findings

In the case of India Cements Ltd. V. CIT, Madras reported in 60 ITR Page 52, it was held by the Supreme Court that in cases where the act of borrowing was incidental to carrying on of business. That, for the purposes of deciding the claim of deduction under Section 10(2)(iii) of the Income-tax Act 1922 [section 36(1) (iii) of the present Income-tax Act], it was irrelevant to consider the purpose for which the loan was obtained. In the present case, the assessee was a builder and the assessee had undertaken the Project of construction of flats under the Kandivali Project. Therefore, the loan was for obtaining stock-in-trade. That, the Kandivali Project constituted the stock-in-trade of the assessee. That, the Project did not constitute a fixed asset of the assessee. In this case, we are concerned with deduction under Section 36(1)(iii). Since the assessee had received a loan for obtaining stock-in-trade (Kandivali Project), the assessee was entitled to deduction under Section 36(1)(iii) of the Act. That, while adjudicating the claim for deduction under Section 36(1)(iii) of the Act, the nature of the expense - whether the expense was on capital account or revenue account -was irrelevant as the Section itself says that interest paid by the assessee on the capital borrowed by the assessee was an item of deduction. That, the utilization of the capital was irrelevant for the purposes of adjudicating the claim for deduction under Section 36(1)(iii) of the Act (See judgment of the Bombay High Court in the case of Calico Dyeing and Printing Works v. CIT, Bombay City-II, reported in 34 ITR 265). In that judgment, it has been laid down that where an assessee claims deduction of interest paid on capital borrowed, all that the assessee had to show was that the capital which was borrowed was used for business purpose in the relevant year of account and it did not matter whether the capital was borrowed in order to acquire a revenue asset or a capital asset. The said judgment of the Bombay High Court applies to the facts of this case and decision came in favour of the assessee.

Year of Taxability is immaterial when tax rates are same

CIT vs. EXCEL INDUSTRIES LTD. (2013) 358 ITR 295 (SC)

Held that

The real question concerning us, is the year in which the assessee is required to pay tax. There is no dispute that in the subsequent accounting year, the assessee did make imports and did derive benefits under the advance licence and the duty entitlement pass book and paid tax thereon. Therefore, it is not as if the Revenue has been deprived of any tax. We are told that the rate of tax remained the same in the present assessment year as well as in the subsequent assessment year. Therefore, the dispute raised by the Revenue is entirely academic or at best may have a minor tax effect. There was, therefore, no need for the Revenue to continue with this litigation when it was quite clear that not only was it fruitless (on merits) but also that it may not have added anything much to the public coffers.

For the aforesaid reasons, we dismiss the civil appeals with no order as to costs, but with the hope that the Revenue implements its litigation policy a little more practically and a little more seriously.

In above decision court has not only dismissed the appeal filed by CIT but given advise that Revenue should implements its litigation policy more seriously i.e. should file appeal only in genuine cases and cases when there is a tax leakage and not when tax is already paid but revenue feels that tax is postponed because overall there is no difference in overall tax collection.

Slump Sale

Slump sale is purely a tax concept governed by Section 50B and Section 2(42C) of the Income Tax Act, 1961.

Section 2(42C) of the Act defines slump-sale as follows: “transfer of one or more undertakings as a result of the sale for a lump-sum consideration without values being assigned to the individual assets and liabilities”. The prerequisites to a business transfer being in the nature of slump sale will be – a) transfer of a business undertaking, b) by way of sale, c) for a lump sum consideration and c) without values being assigned to the individual assets and liabilities.

So to consider slump-sale following are conditions

1) Transfer of one or more undertaking or one or more business segment

2) Both assets and liabilities have to be transferred i.e. if only assets are transferred then will not qualify under slump sale but then will be considered as sale of individual assets only.

3) Transfer to be done by way of sale

4) For a Lump sum consideration without assigning any values to the individual assets or liabilities

As mentioned above if assets are transferred individually without transferring liability then the same is not considered as slump sale.

The said view is supported by below decision

The Income-tax Appellate Tribunal, Mumbai Bench "J", in the case of Mahindra Sintered Products Ltd v. Deputy CIT [2004] 279 ITR (AT) 1; [2005] 95 ITD 380 has held that where the price had been fixed beforehandin respect of identifiable assets of undertaking and no liability was transferred to the buyer, the transfer of undertaking would not constitute a slump sale.

If all the assets and liabilities of an undertaking is not transferred then the same is not considered as a slump sale.

The said view is supported by below decision

The Income-tax Appellate Tribunal, Kolkata Bench "D", in the case of Deputy CIT v. ICI (India) Ltd. [2008] 23 SOT 58 has held the same view that Hindustan Engg. & Ind. Ltd., AY 2009-10 cannot be a case of slump sale, if all the assets and liabilities of an undertaking have not been transferred to the vendee. The assessee has sold the chemical unit not as a going concern but itemized sale was made vide agreement and hence, the sale cannot be treated as slump sale.

Similarly, the Income-tax Appellate Tribunal, Mumbai Bench "J", in the case of Mahindra Sintered Products Ltd v. Deputy CIT [2004] 279 ITR (AT) 1; [2005] 95 ITD 380 has held that where the price had been fixed beforehand in respect of identifiable assets of undertaking and no liability was transferred to the buyer, the transfer of undertaking would not constitute a slump sale.

Section 50 B is reproduced below

50B. (1) Any profits or gains arising from the slump sale effected in the previous year shall be chargeable to income-tax as capital gains arising from the transfer of long-term capital assets and shall be deemed to be the income of the previous year in which the transfer took place

Provided that any profits or gains arising from the transfer under the slump sale of any capital asset being one or more undertakings owned and held by an assessee for not more than thirty-six months immediately preceding the date of its transfer shall be deemed to be the capital gains arising from the transfer of short-term capital assets.

47**[(2) In relation to capital assets being an undertaking or division transferred by way of such slump sale,—**

(*i*) the "net worth" of the undertaking or the division, as the case may be, shall be deemed to be the cost of acquisition and the cost of improvement for the purposes of sections 48 and 49 and no regard shall be given to the provisions contained in the second proviso to section 48;

(*ii*) fair market value of the capital assets as on the date of transfer, calculated in the prescribed manner, shall be deemed to be the full value of the consideration received or accruing as a result of the transfer of such capital asset.]

(3) Every assessee, in the case of slump sale, shall furnish in the prescribed form, a report of an accountant as defined in the *Explanation* below sub-section (2) of section 288 before the specified date referred to in section 44AB] indicating the computation of the net worth of the undertaking or division, as the case may be, and certifying that the net worth of the undertaking or division, as the case may be, has been correctly arrived at in accordance with the provisions of this section.

Explanation **1. For the purposes of this section, "net worth" shall be the aggregate value of total assets of the undertaking or division as reduced by the value of liabilities of such undertaking or division as appearing in its books of account:**

Provided that any change in the value of assets on account of revaluation of assets shall be ignored for the purposes of computing the net worth.

Explanation **2. For computing the net worth, the aggregate value of total assets shall be,—**

(*a*) in the case of depreciable assets, the written down value of the block of assets determined in accordance with the provisions contained in sub-item (*C*) of item (*i*) of sub-clause (*c*) of clause (*6*) of section 43;

[(*aa*) in the case of capital asset being goodwill of a business or profession, which has not been acquired by the assessee by purchase from a previous owner, *nil;*]

(*b*) in the case of capital assets in respect of which the whole of the expenditure has been allowed or is allowable as a deduction under section 35AD, *nil;* and

(*c*) in the case of other assets, the book value of such assets.

If you are selling any undertaking or division whose major assets are under fixed assets more than 3 years then also if you will sell, income of that assets will be taxed under short term capital gain under section 50 if depreciation is claimed/allowed.

But if all assets and liabilities are transferred and if conditions mentioned above in Section 50B and Section 2(42C) of the Income Tax Act, 1961 are fulfilled and if classified as slump sale and if held for more than 36 months then income will be classified under long term capital gain (20% Plus surcharge (if applicable)& cess). If not classified under slump sale then rate of short term capital gain will be normal tax i.e. 25.17% to 34.944% etc based on type of assessee and which section assessee is following in case of companies. So to save 2% to 10% plus and on that difference of 2% to 10% surcharge and cess will be also saved if assessee sale under slump sale as discussed above.

How to calculate income under slump sale is specified under section 50B as mentioned above i.e.

Sales Consideration

Less expenses on transfer

= Net consideration

Less Cost of acquisition i.e, Net worth to be calculated as per section 50B as mentioned above

= Capital Gain/Loss

If Net worth is negative, then cost of acquisition to be taken as NIL as per below decisions:

In the case of Zuari Industries Ltd. [(2007) 105 ITD 569 (Mumbai)] and

Paper Base Co. Ltd. [(2008) 19 SOT 163 (Delhi)]: it was held that if the net worth of the undertaking is negative, the same should be considered as zero and should be disregarded for the purposes of computing capital gains under Section 50B of the Act.

If Net worth is negative then negative networth to be added to the sales consideration to arrive at capital gains tax:

However, if net worth is negative then as per Mumbai special bench in case of Summit Securities Ltd. [2012] 19 taxmann.com 102 (Mum.) (SB) dissented from the above decisions and held that negative networth to be added to the sales consideration to arrive at capital gains which is the killer i.e. very purpose of transaction to be classified under slump sale to save tax will be defeated.

The Hon'ble Special Bench opined that the negative net worth of an undertaking cannot be equated to zero and the same should be added to the sale consideration to arrive at capital gains. In the case before Special Bench, sale consideration of the business was Rs. 143 crore and there was negative 'net worth' of Rs. 157 crore as per section 50B. It was held that, negative figure of net worth of Rs. 157 crore could not be ignored and, thus, capital gain chargeable to tax in case of slump sale would be Rs. 300 crore (i.e., Rs. 143 crore plus Rs. 157 core) and not Rs. 143 crore only as declared by assessee.

In case of negative net worth selling individual assets will be more beneficial even if classified as short term capital gain under section 50 if depreciation is claimed, then if sold under slump sale as in slump sale if negative net worth is there, then the same will be added to sales consideration then even if long term capital gain is to be paid as per section 50B but that tax payable amount as per section 50B will be higher than section 50 amount.

Is Slump sale being liable to GST?

Schedule II of CGST Act deals with ACTIVITIES TO BE TREATED AS SUPPLY OF GOODS OR SUPPLY OF SERVICES

4. Transfer of business assets (a) where goods forming part of the assets of a business are transferred or disposed of by or under the directions of the person carrying on the business so as no longer to form part of those assets, whether or not for a consideration, such transfer or disposal is a supply of goods by the person;

As per entry 4 (a) of Schedule II of CGST Act if assets of a business are transferred or disposed of then the same are considered as supply of Goods.

4. Transfer of business assets (c) where any person ceases to be a taxable person, any goods forming part of the assets of any business carried on by him shall be deemed to be supplied by him in the course or furtherance of his business immediately before he ceases to be a taxable person, unless— (i) the business is transferred as a going concern to another person; or (ii) the business is carried on by a personal representative who is deemed to be a taxable person.

As per clause 4 (c) if the entire business is transferred as a going concern then the same is not considered as a Supply of Goods under GST.

As per Notification No. 12/2017- Central Tax (Rate) (SI No 2) Services by way of transfer of a going concern, as a whole or an independent part thereof is exempt from GST.

As per the said Notification Services by way of transfer of going concern as a whole or part thereof is exempt from GST.

Therefore, in case of slump sale not only income will be classified under long term capital gain so less tax but the same is also exempt under GST. So huge tax saving is possible.

Now the **General Anti Avoidance Rule (GAAR)** is applicable, so all companies are advised to keep provisions of GAAR in mind before entering any arrangement where tax benefit is there to avoid further litigation and to avoid additional tax, interest and penalty.

As per Rule-10U, Income-tax Rules (1) (a)

Chapter X-A not to apply in certain cases. —(1) The provisions of Chapter X-A shall not apply to—

(a) an arrangement where the tax benefit in the relevant assessment year arising, in aggregate, to all the parties to the arrangement does not exceed a sum of rupees three crore;

Therefore, if any arrangement is entered where tax benefit is up to Rs 3 crores to all the parties to the arrangement then GAAR provisions are not applicable. So in such cases there is less worry.

Determination of consequences of impermissible avoidance arrangement.

10UA . For the purposes of sub-section (1) of section 98, where a part of an arrangement is declared to be an impermissible avoidance arrangement, the consequences in relation to tax shall be determined with reference to such part only.

96. Impermissible avoidance arrangement. —(1) An impermissible avoidance arrangement means an arrangement, the main purpose or one of the main purposes of which is to obtain a tax benefit and it—

(a) creates rights, or obligations, which are not ordinarily created between persons dealing at arm's length;

(b) results, directly or indirectly, in the misuse, or abuse, of the provisions of this Act;

(c) lacks commercial substance or is deemed to lack commercial substance under section 97, in whole or in part; or

(d) is entered into, or carried out, by means, or in a manner, which are not ordinarily employed for bona fide purposes.

(2) An arrangement shall be presumed to have been entered into, or carried out, for the main purpose of obtaining a tax benefit, if the main purpose of a step in, or a part of, the arrangement is to obtain a tax benefit, notwithstanding the fact that the main purpose of the whole arrangement is not to obtain a tax benefit.

So based on the above it appears that if an arrangement, main purpose or one of the main purpose is to obtain a tax benefit then the entire arrangement or part of the arrangement is called impermissible avoidance arrangement. If an arrangement creates rights or obligations not at arm's - length, results directly or indirectly in the misuse or abuse of the provisions of Income tax act and lacks commercial substance (open ended so scope is wide) or is deemed to lack commercial substance under section 97 or is entered into or carried out in a manner which are not ordinarily employed for bona fide purpose.

GAAR empowers the tax authorities, to not only target sham transactions and colourable devices, but also to counteract the abusive elements of arrangements that are otherwise legally valid.

A self serving evaluation, which is not bona fide, leading to claim of reduced tax burden for the Assessee will be a colourable device within the meaning of the landmark decision of **Hon'ble Supreme Court in the case of McDowell and Co. Ltd. Vs. Commercial Tax Officer 154 ITR 148 (SC)**. **A colourable device to evade tax has to be rejected.**

In above decision below was also quoted:

W.T. Ramsay v. Inland Revenue Commissioners, [1982] AC

300; Inland Revenue Commissioners v. Burmah Oil Company Ltd. 1982 STC 30; Furniss v. Dawson, [1984] I All E.R. 530 quoted with approval.

HELD: (Per Ranganath Misra, J.)

Tax planning may be legitimate provided it is within the framework of law, Colourable devices cannot be part of tax planning and it is wrong to encourage or entertain the belief that it is honourable to avoid the payment of tax by resorting to dubious methods. It is the obligation of every citizen to pay the taxes honestly without resorting to subterfuges.

[823 H, 824 A]

Taxability of Unsold Flats

Section 23 (5) Where the property consisting of any building or land appurtenant there to is held as stock-in-trade and the property or any part of the property is not let during the whole or any part of the previous year, the annual value of such property or part of the property, for the period up to two years from the end of the financial year in which the certificate of completion of construction of the property is obtained from the competent authority, shall be taken to be nil.

Normally Developers develops the flat or commercial premises to sell and not to sublet so if flats are unsold then up to 2 years from the end of the financial year in which the certificate of completion of construction of property is obtained from the competent authority then annual value of such property or part of the property should be considered as Nil. Afterwards the same will be taxable as Income from House Property even if the Developer has developed flats or commercial premises for sale and not for subletting. The purpose of introduction of the said section appears two fold, one reason is to get more tax and another reason is to penalise developer if they are not able to sale flats which are completed so they may reduce the price and sell the same so people will get flats at some discount and developer will be able to repay loan taken on construction of the project.

Here word certificate of completion of construction of property is mentioned i.e. taxability will start after 2 years from the end of the financial year in which Building Completion Certificate (BCC) is obtained and not Occupancy Certificate (O.C.). Developers receive BCC after receipt of OC so Developers will rightly get some more time of exemption from taxation of Unsold flats.

Annual Information Return (AIR) of 'high value financial transactions' (statement of financial transaction (SFT)) is required to be furnished under section 285BA of the Income-tax Act, 1961 by 'specified persons' in respect of 'specified transactions' registered or recorded by them during the financial year.

Serial No	Class of persons Nature and value of transaction (3)	Nature and value of transactions
6	Registrar or Sub-Registrar appointed under section 6 of the Registration Act, 1908.	Purchase or sale by any person of immovable property valued at thirty lakh rupees or more.

Registrar or Sub-Registrar appointed under section 6 of the Registration Act, 1908.

Based on above details received by Income tax department (SFT) & 26 AS, software of Income tax department will try to compare data received with income tax return of developer so if some mismatch is found then many notices are issued by income tax department to many Builders for escapement of income. Developers follow a percentage of completion method or completed contract method of revenue recognition so it is possible that income is offered for tax but may be in a different year/s but still they get income tax escapement notices. Lot of time, energy and money goes in replying to such notices.

GST ASPECTS FOR THE REAL ESTATE INDUSTRY

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For decades, we have been hearing that *"Roti, Kapda, and Makaan"*– Food, clothing, and shelter, are the 3 essential needs of our compatriots. While food and clothing are fairly taken care of for most classes of the populace, "Makaan" – housing remains an aspiration for most, especially the youth of our country.

The government is also actively pursuing policies to ensure housing for all with various housing schemes like PM Awaas Yojana (PMAY) and schemes launched by State Governments. In doing so, GST remains an important cost consideration for the developers, as well as the buyers.

While prima facie it might look like a fairly simple task to determine the GST rate on construction services – 1% for affordable and 5% for non-affordable houses, the reality is far from simple. Let us understand some of the finer nuances under GST for real estate developers.

Applicability of GST on Real Estate:

GST is an indirect tax i.e.; it is levied on the consumption of goods and services. However, immovable properties have been kept outside the scope of indirect taxes and GST is no exception to that. Sale of land and building has been kept outside the purview of GST law by way of Schedule III of CGST Act. While "immovable property" has not been defined in GST law, however, General Clauses Act, 1897 defines "immovable property" as land, benefits arising out of the land, and things permanently attached to the earth.

In the context of the above definition, it is only logical that GST does not apply to the sale of land and has been placed in Schedule III of the CGST Act which covers activities that are not to be considered as supply of goods or services. Hence, the sale of land is outside the purview of GST.

Similarly, any property for which an occupation certificate/completion certificate from the relevant authority has been received has been considered to be immovable property, and when such a property is sold, it will also be treated at par with the sale of land and shall be outside the purview of GST.

In contrast, when a property is sold while it is under construction, it is not considered to be land. It is deemed to be a composite supply of construction services that involves the supply of material and labour i.e., goods and services. Schedule II of the CGST Act classifies this composite supply as a "service" since it is in the nature of a "works contract service" and it is eligible to GST.

New Regime:

W.e.f. 1st April 2019, new tax rates for the real estate sector were ushered in by the Government. These changes brought in some radical changes not only in the taxability of the services provided by the real estate sector but also on various inward supplies like TDR.

Some of these major changes include the following:

- Introduction of the concept of Residential Real Estate Project (RREP) and Real Estate Project (REP);
- Effective rate of GST for construction services was reduced to 1% for affordable housing projects and 5% for non-affordable housing projects;
- Commercial shops in RREP to be treated at par with residential houses;
- No ITC for residential projects opting under the new regime;
- Tax payable on Transferable Development Rights (TDR) by the developer under reverse charge, in proportion to the unsold area as on the date of occupation certificate;
- If URD purchases are more than 20% of the total cost (with certain exceptions) then tax payable under reverse charge on such excess purchases
- Reversal under Rule 42 shall be done at the end of the project instead of at the end of each financial year.

Further, after the 47th meeting of the GST Council, various GST rates on various goods and services have been changed. Amongst the said changes, the most notable changes pertain increase in the rate of GST of all works contract services from 12% to 18%.

Earlier, works contract services provided by contractors to promoter-developers who are selling affordable residential flats under the new regime were taxable at 12%. Similarly, works contract services provided in relation to various projects of the PMAY, Affordable housing scheme, projects meant for low-income groups, etc shall also be taxable at 18%.

The impact of this is that, while the contractor will charge a higher rate of GST to the developers, the developers will not be able to take the input tax credit for these services and therefore, they will have to ultimately pass on the burden of this additional cost to the home buyers which will, in turn, increase the cost of purchasing a house.

The Valuation conundrum

As mentioned earlier, the sale of immovable property has been kept out of the purview of GST. However, any price for purchasing a real estate property invariably involves two components – the cost of land and cost of development and it is nearly impossible to separate one from the other.

To ensure that GST is not levied on the value of the land of any such agreement, the Government allowed for 1/3rd abatement in the total contract value as being towards the cost of land and GST was payable on the balance of 2/3rd of the contract value.

For example, the developer entered into a contract for the sale of a flat for Rs. 1.50 crores. In that case, 1/3rd of the contract value i.e., Rs. 50 Lakhs will be deemed towards the value of land and a balance of Rs. 1 crore will be deemed to be towards construction service and GST will be payable on the same at the applicable rate.

Hon'ble Gujarat High Court in the case of **M/s Munjal Manishbhai Bhatt - 2022-TIOL-663** has held the deeming fiction of 1/3rd value towards land as ultra-vires the GST law and allowed the option to the assessee to consider the value of land as per the information available and if the value of land is not ascertainable, only then it will be deemed to be 1/3rd of the contract value.

It is very much likely that the Government will approach the Supreme Court and challenge this judgement. However, what are the developers supposed to do in the meantime? While the judgement of the Hon'ble Gujarat High Court is applicable to the entire country until there is any contradictory judgement from any other High Court, it is highly possible that GST Departments of other States may not be as willing to follow the judgement in the right spirit and the developers valuing land at more than 1/3rd of the contract value will face an uphill challenge till the final verdict from Supreme Court is received.

Any developer wishing to take such a route must ensure that the rate of land considered must be derived using proper mechanisms and with ample evidence. This bifurcation must be specified in the agreement as well. Further, if this route is followed and the same is challenged by Department, it may be possible that any other High Court may take a contrasting view. Therefore, any developer opting to take such a route of valuing the land portion at more than 1/3rd value shall do so only after weighing in all the risks and shall bear in mind that this fight will have to be fought till the very end, as the stakes are very high in such cases.

Taxability of Development Rights

Developing a building by purchasing Transferable Development Rights (TDR) is one of the popular mechanisms followed by a majority of builders. The basic tenet here is that the builder purchases rights for developing a particular plot from the owner and in exchange give a portion of the developed land to the owner. Such an arrangement may include some cash portion or % of revenue as well. Whatever may be the nuances of the agreement, these types of agreements by and large fall under the category of barter transactions.

The idea here is that in exchange for the construction activities, the developer is receiving development rights as consideration whereas the owner of the plot is giving away the rights and receiving construction service as consideration therefore, GST shall be payable as it is a supply by way of a barter transaction.

It can very well be argued that TDR is a benefit arising out of land and therefore it is an "Immovable Property" (ref. definition of Immovable Property as per General Clauses Act) and therefore outside the purview of GST law.

In the case of M/s Vasantha Green Projects - 2018-TIOL-1611, the Division Bench of Hon'ble CESTAT has held that cost incurred by the developers towards the TDR (construction of area allotted to land owner) is already included in the price charged to the customer and service tax is paid on such price. Therefore, since service tax is already paid on the rights received from the land owner, asking the developer to pay the tax again on the same service would lead to double taxation.

Department has already filed an appeal with the Hon'ble Supreme Court in the said matter and the final verdict of the Supreme Court is awaited, which will have an impact not only on service tax but also on the GST regime.

Under the GST regime, the Government has continued to maintain its stand that GST shall be payable on the TDR received from the land owner. However, w.e.f. 1st April 2019, in the case of residential apartments, GST applies on TDR only to the extent of the area remaining unsold on the date of OC / CC. Whereas GST will be payable on the entire TDR value in the case of commercial shops.

GST on TDR is payable by the developer (recipient of TDR) under the reverse charge mechanism at the time of receipt of OC / CC. The mechanism for calculation of GST liability for TDR pertaining to residential apartments has been prescribed as follows:

*Tax payable under RCM = GST Payable on TDR * Residential area unsold on date of OC ÷ Total residential area in the entire project.*

Tax payable under RCM should not exceed the actual tax which would have been payable on the unsold area, if the area was sold before OC (at the price closest to OC)

*GST Payable on TDR = Value of the area allotted to land owner * 18%*

Value of area allotted to land owner = Price at which apartment sold to a third person nearest to the date of transfer of development rights.

Let us understand the above by way of an illustration:

Mr. Akash (land owner) has entered into an agreement with GRC Developers to transfer his TDR to them and in exchange, GRC will give him 40% of the area they develop on the said land. GST liability calculation is to be done as per the following table:

Total Area to be developed	1,00,000 sq. ft.
Area to be allotted to land owner Mr. Akash	40,000 sq. ft.
Area to be sold by Developer directly	60,000 sq. ft.
TDR Transferred on	15th May 2022
Flat booking was done on 17th May 2022 (nearest from date of transfer)	Rs. 10,000 per sq. ft.
Area booked up to the date of OC / CC	75,000 sq. ft.
Area not booked up to the date of OC / CC	25,000 sq. ft.
Flat booking done just before OC	Rs. 45,000 per sq. ft.
Value of TDR = Area allotted to Mr. Akash at the nearest price value	40,000 sq. ft. * 10,000 per sq. ft. = Rs. 40 Crores
GST Payable on TDR = Value of TDR * 18%	Rs. 40 Crores * 18% = Rs. 7.2 crores
GST payable under RCM on residential apartments = GST Payable on TDR * Area unsold ÷ total area in the project	Rs. 7.2 Crores * 25,000 ÷ 1,00,000 = Rs. 1.8 Crores
GST Payable on unsold area (at the rate closes to OC) (assuming it is an affordable property)	25,000 sq. ft * Rs. 45,000 per sq. ft. * 1% = 1.12 crores

Accordingly, the developer shall pay GST of Rs. 1.12 crores under RCM when the OC / CC is received. It must be noted that for ease of understanding, the example is only for a 100% residential project. In the case of a project with residential apartments and commercial shops, the calculation will be modified to the extent of GST payable on the TDR of the commercial area for which no exemption is available and GST will be payable on the entire value.

Taxability of Preferential location charges, floor rise, etc.

It is a common practice for builders to charge additional value for allotting a flat on a higher floor or facing a particular direction under various nomenclatures like "Preferential Location Charges", "Floor Rise", etc.

These concepts are not new to the construction industry and are commonly followed by all developers across the country. Hence, these charges are incidental to the main supply of service and therefore, the entire package should be treated as a composite supply under Section 2(30) of CGST Act and GST as applicable to construction services shall apply to these types of charges as well.

However, in a lot of cases, Department has been taking the stand that PLC, Floor rise, and such charges have no nexus with the construction services provided by the Developers and therefore, they must be treated separately from the construction service and GST shall be payable at the rate of 18%.

In the press release issued after the 47^{th} GST Council meeting, the council has clarified that PLC collected in case of a long-term lease are a part of the consideration of long-term lease and therefore shall get the same treatment in GST. Applying the same logic for construction services, PLC, Floor rise charges, etc. shall also be considered to be a part of the consideration for the construction charges as well.

Due to a lack of clarification from the Council and Department in this aspect, there could probably be some difficulty in obtaining relief in such cases at the preliminary stages, but in the long term, it is expected that this matter will mostly be ruled in the favour of the developers only.

Conclusion

From the above discussion, it can be safely assumed that a lot of grey areas have cropped up under the GST law as far as the real estate sector is concerned. The more Government has tried to simplify the entire tax regime for construction activities, it has somehow become more complicated.

Taxability for construction is vastly different from how the law operates for all other sectors and that has made uncertainty the only constant in this sector.

FEMA FOR REAL ESTATE DEVELOPERS


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Background:

The philosophy with respect to Foreign Direct Investment (FDI)/Inbound investment under FEMA has been to permit and promote investment in sectors which lead to employment creation, greater innovation, technology transfers and development of strategic sectors with the objective of enhancing long term sustainable capital in the economy.

Being a capital deficit and developing economy, India has embarked on a liberal path of inviting FDI by opening up majority of the sectors, except for Railways, atomic energy and few others. Also 'Trading sector' has been opened up in a calibrated manner. Retail sector has been opened up off late but with a set of conditions which again has the intention of generating domestic manufacturing or local procurement by foreign retailers.

In this backdrop, we now analyse provisions related to Real Estate Developers under FEMA with respect to FDI.

FDI Provisions under FEMA for Real Estate Developers:

The provisions relating to FDI are governed by Non Debt Instrument Rules, 2019 (NDI Rules). Prior to 2019, the FDI provisions were regulated through Notification 20(R) of 2017 which replaced its prior version Notification No.20.

Real estate development as a sector for FDI has undergone many changes however, the prime objective has always remained underchanged, that is- only construction and development activities are permitted and 'trading in real estate (real estate business) has always remained prohibited.

The term 'real estate business' has been defined in NDI Rules [Note 6 to Para 10.2 of Table to Schedule I of NDI Rules] as under-

Real Estate business means dealing in land and immovable property with a view to earning profit there from and does not include development of townships construction of residential / commercial premises, roads or bridges, educational institutions, recreational facilities, city and regional level infrastructure, townships, construction of residential/commercial premises, roads or bridges, educational institutions, recreational facilities, city and regional level infrastructure townships.

Explanation:

(a) *Investment in units of Real estate Investment Trust (REITs) registered and regulated under the Securities and Exchange Board of India (REITs) Regulations, 2014 shall also be excluded from the definition of " real estate business"*

(b) *Earning of rent income on lease of the property , not amounting to transfer , shall not amount to real estate business* *(c)* Transfer in relation to real estate includes,

(i) the sale, exchange or relinquishment of the asset ; or

(ii) the extinguishment of any rights therein ; or

(iii) the compulsory acquisition here of under any law ; or

(iv) any transaction involving the allowing of the possession of any immovable property to be taken or retained in part performance of a contract of the nature referred to in section 53A of the Transfer of Property Act ,1882 (4 of 1882); or

(v) any transaction, by acquiring capital instruments in a company or by way of any arrangement or in any other manner whatsoever, which has the effect of transferring, or enabling the enjoyment of, any immovable property.

--Real estate broking services shall be excluded from the definition of "real estate business" and 100% foreign investments is allowed in real estate broking services under automatic route

Note: It is interesting to observe that renting is excluded from the definition of real estate business [explanation (b) above]. It can therefore be interpreted that Renting income from lease of property is a separate activity and should fall in the eligible category for FDI as there are no other specific restrictions.

Thus, it can be inferred that intention is to promote investment for construction- development and denying foreign investor from indulging in mere buying and selling of immovable properties. Unlike portfolio Investment where Foreign Portfolio Investors (FPI) are allowed to have all modes of transaction in shares and securities viz., Investment, trading and even forward contracts, the Real Estate sector has always remained shielded from such trading or speculative environment.

Another vital restriction has been to prohibit foreign investment in an entity which is engaged in construction of farm houses and trading in TDRs.

While intention is to permit foreign investment in construction-development activities, as an exception, foreign investment is permitted in completed projects for operating and managing townships, malls/shopping complexes and business centres.

Conditions on Construction-development sector:

To further achieve true intent of development of real estate and to discourage trading, the sector has been fastened up with following conditions:

- The investor shall be permitted to exit on (1) completion of the project or (2) after development of trunk infrastructure i.e. roads, water supply, street lighting, drainage and sewerage or (3) after completion of lock-in-period of three years from each tranche of foreign investment. Completion of the project shall be determined as per the local bye-laws/rules and other regulations of State Government.

  Exceptions-

  1. The condition of lock-in-period however, doesn't apply to Hotels and Tourist resorts, Hospitals, SEZs, Educational Institutions, Old Age Homes and investment by NRIs and OCIs.

  2. Foreign investor, however can sell his stake to another foreign investor without any restriction of lock-in-period.

- The project should conform to the norms and standards, including land use requirements and provisions of community amenities and common facilities, as stipulated by Municipal or local body. Indian investee company should obtain necessary approvals from Municipal or local body.
- The Indian investee company is permitted to sell only developed plots. For this purpose, developed plot means – where trunk infrastructure i.e. roads, water supply, street lighting, drainage and sewerage, have been made available.

As can be seen conditions have been placed on construction development activities with an objective to channelize foreign funds for productive purposes rather than luring foreign investor to engage in mere buying-selling. Since inception of FEMA, real estate sector has been kept open only for construction development and that is the reason that real estate sector has never witnessed volatility of the magnitude which one observes in stock market. Even during 2007-08 (U.S sub-prime crisis) global crises, where other economy such as UAE witnessed large exodus of funds and real estate bubble burst, Indian real estate sector never witnessed such situation, thanks to the policy of not permitting foreign investment in real estate business.

LLP and Foreign Investment for construction-development sector-

LLP as an entity is not eligible to receive foreign investment for construction-development activity. In terms of Schedule VI to NDI Rules, foreign investment in LLP is permitted in the sectors where foreign investment up to 100 percent is permitted under automatic route and there are no FDI linked performance conditions.

Since construction-development sector has FDI linked performance conditions, LLP is not eligible entity to receive foreign investment.

Construction-development sector and borrowings in foreign currency- External Commercial Borrowings (ECB)-

A. ECB provisions

In terms of Master Direction on ECB, borrowing is not permitted for Real Estate Activities. The definition of Real Estate Activities is different from that of Real estate business as given in NDI Rules. The definition of Real Estate Activities as per ECB Master Direction is as under-

Any real estate activity involving own or leased property, for buying, selling and renting of commercial and residential properties or land and also includes activities either on a fee or contract basis assigning real estate agents for intermediating in buying, selling, letting or managing real estate.

However, this would not include, (i) construction/development of industrial parks/integrated townships/SEZ (ii) purchase/long term leasing of industrial land as part of new project/modernisation of expansion of existing units and (iii) any activity under 'infrastructure sector' definition.

The analysis of definition suggests that similar to FDI not being permissible for trading in real estate, even ECB is not permissible for buying-selling or renting of commercial and residential properties or land.

Interestingly, exceptions are carved out in the definition of Real Estate Activities for construction of industrial parks, long term leasing of industrial land and activity under 'infrastructure sector'. The issue is therefore, whether construction of commercial or residential premises shall be an eligible activity or not? Can it be said that other than buying selling or renting other construction activities are eligible and exceptions given are further to normal construction activity of residential or commercial premises. The view however emerges is that only exceptions mentioned in the definition are eligible activities for availing ECB. Within infrastructure sector, falls, Affordable Housing and hence if the construction project is for affordable housing same would be eligible for raising of ECB in addition to townships, industrial parks etc. It is further to be noted that ECB can be raised only by companies and not by LLPs.

B. Non Debt- Hybrid Instruments for foreign investment

NDI Rules permit investment in convertible / hybrid instruments such as Convertible Preference shares or Convertible Debentures. Both these instruments have to be compulsorily convertible i.e. CCPS or CCDs, it cannot be optionally convertible.

CCDs can serve the purpose of debt till the time it gets converted into equity. It is worth noting that there is no cap on rate of interest for CCDs as is there in case of ECB.

Investment by NRIs/OCIs on non repatriable basis:

A. Investment in Company or LLP

NRIs and OCIs have one more option of investing i.e. on Non Repatriation basis. Non Repatriation basis would mean that upon disinvestment the sale proceeds would compulsorily be parked in Non Resident Ordinary (NRO) Account. It cannot be credited to NRE Account or buyer cannot remit sale proceeds to overseas bank account of NRI/OCI.

Non Repatriable investment finds its reference in NDI Rules, Schedule IV. Even under Non Repatriable investment, trading in TDRs, construction of farm houses and Real Estate business are prohibited activities.

B. Investment in partnership firm or proprietary concern

NRIs/OCIs have one more option of investing i.e. investment in partnership firm (other than LLP) or proprietary concern. LLP requires one resident designated partner and company requires one resident director. Whereas partnership firm doesn't require any partner to be resident of India. Therefore, though with unlimited contractual liability but at times Partnership firm finds its relevance when NRI group doesn't want any resident designated partner.

The restriction of Real Estate business will continue even for this segment of investment.

Conclusion:

Indian companies engaged in construction-development sector is eligible to receive FDI under automatic route subject to compliance of pricing guidelines and other compliances under FEMA.

LLP engaged in construction- development sector is not eligible to receive Foreign Investment as sector has FDI linked performance conditions.

OVERVIEW OF RERA - CA'S PERSPECTIVE

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What is RERA & it's Objective

The Real Estate (Regulation & Development) Act 2016 (hereinafter referred to as "RERA") is Act of Parliament, enacted to regulate and promote the real estate sector in an efficient and transparent manner. Rule making powers are vested with the respective State Government and Regulations are made by Authority setup under the Rules of respective State Governments. For Union Territories, powers are allocated as per Section 2(g) of the Act.

Real estate has remained a sector with significance, not only for the employment generation and role in the economy but also because of the fact that even small projects have investments, returns and transactions in millions and crores. We have experienced the approach of revenue during the Sales Tax & Service Tax regime. Stamp Duties generated from real estate deals have also remained a key source of revenue for the State. Hence it has always remained favorite for all. However, lack of effective Regulation has encouraged a number of malpractices and fraudulent activities resulting in losses to homebuyers. In order to protect the interest of homebuyers and put a cap on malpractices, the law was enactedin March 2016 and fully operational from May 2017.

Section 1 & 2	Enactment & Definition
Section 3 to 19	Operational aspects - Registration, Duties/ Responsibilities of Promoter/ allottee, etc
Section 20 to 40	Regulatory aspects - Establishment, Formation, Combination, Functions, Powers, etc of Authority
Section 41 to 42	Formation and Function of Central Advisory Council
Section 43 to 58	Real Estate Tribunal - Establishment, Formation, Combination, Functions, Powers, etc
Section 59 to 72	Offences, Penalties & Adjudication
Section 73 to 92	Administrative & Miscellaneous Provisions

Key aspects of the Law

Certain key aspects of the law enacted for the effectiveness are as follows

1. **Establishment of Regulator**

   One of the important features of this law is establishment of Regulator (i.e. Authority) by the respective State Governments. States also have powers to make Rules and General Administration of Law. Authority shall have power to make recommendation to State Governments, Entertain Complaints, call for information and conduct investigation (on Complaint or suo moto), issue interim orders, issue direction to promoters/allottee/agents, impose interest/penalty, Perform Functions listed u/s. 34 of the Act, etc. In a way Authority is an executor of the various aspects of the law. It is a Driving force of the law. MahaRERA has till date issued a number of circulars, orders, clarifications, etc. It has also taken a lot of initiatives for the strict compliance, development of the sector, complaint handling, blacklisting promoters, declaring lapsed projects, providing solutions to the practical issues of promoters, etc. Though there is a flip side too, but advantages are certainly blessings for many

2. **Registration of Projects, Agents**

   Real Estate Developers/Builders (hereinafter referred to as "Promoter") are required to take a lot of approvals from various authorities before/during project development. Most of the approvals are from planned development and resources availability perspective, given by various local authorities. RERA also requires promoters to register their Project with the Authority. Registration under this Act is an additional approval which is required to be taken before advertising/ marketing/selling/booking. This move is more towards providing project information on plate before the customer makes his buying decision. Law has prescribed certain eligibility criteria for mandatory registration of projects (Section 3). Law has also broadly prescribed information to be forwarded while making application for Registration of Project. Information includes Details of Promoters& Past projects, Actual Approvals related to Projects, Title Certificate, Encumbrances, Litigations, Project Features Certified by Project Professionals, Project Cost Certified by CA, Proforma of Sale Agreement/Allotment Letter (Including deviation from model agreement/allotment letters), etc. Promoter is also required to commit the date of completion of Project in an Affidavit. Every application for Registration is scrutinised before approval within a reasonable period of time.

   The registration of the project does not give assurity as to correctness and completeness of the information. However, it is a ready source of information for Customers bringing some responsibility amongst promoters. MahaRERA has of late brought a reasonable amount of strictness in issuing Registration Certificates. The kind of Scrutiny of applications and documents sought have improved to a good extent. This certainly helps keeping check on Projects right from the date of application of registration. As per information available in public domain, there are 36,869 projects in the state of Maharashtra. Agents are also required to get themselves registered with the information.

3. **Duties & Responsibilities of Promoter**

   Law has imposed certain Responsibility on Promoters. Some of those are

   a. Restriction on Advertisement, Sale, Booking, etc before RERA registration

   b. RERA Registration and Providing Project information online

c. Update RERA with Project progress in the form of Bookings, Cost Incurred, Completion Stage, Approvals, on side development, etc

d. Maintain Separate Bank Account for collection from Customers and maintain financial discipline to have control over withdrawal from the said Bank Account. (70% of amount realised to be withdrawn to cover project land and construction cost)

e. Obtain Annual Audit Reports

f. Provide timely possessions & fulfilling commitments of agreement to sale

g. Formation of Society

h. Execute Conveyance

i. Responsibility for false or incorrect statement/advertisement, etc

j. Not to accept more than 10% of agreement amount before registration of agreement

k. Take Consent to allottee before change in Sanctioned Plans/Layout Plans, etc

l. Restriction on transfer or assign project

m. Obtain Title and Construction insurance

n. Right to file complaint, appeal, etc

Rules & Regulations under the Act further adds certain specific requirements to be complied with by Promoters.

4. Duties & Responsibilities of buyer (allottee)

a. Allottee under the Act has right to be informed about fundamental documents and progress of the project

b. Allottee is entitled to claim possession of the Unit as per the terms of agreement. In case of delay, he is entitled to interest/refund of the amount paid

c. Allottee has right to file complaint, appeal, adjudicate for compensation, etc

d. Allottee is duty bound to make timely payment, compensate promoter with interest in case of delay, take possession within 2 months of occupation, participate in formation of society/obtaining conveyance

5. Litigation (Complaint, Adjudication, Appeal, etc)

a. Separate Grievance redressal is a unique feature and much more required function of this law.

b. MahaRERA has, apart from handling Complaint and Adjudication proceedings, encouraged Conciliation proceedings wherein more than 45 benches are set up for amicable settlement of the disputes. Entire functioning of the said benches is undertaken within the framework of the policies designed by MahaRERA

c. Certainly, Complaint and Conciliation proceedings at MahaRERA has resulted into speedy mode of dispute resolution because of the online mode of hearing, limited paper documents and following its own procedures

As per the information available in public domain, out of 18,232 Complaints received to MahaRERA 12,317 (68%) of Complaints are disposed off by MahaRERA till 5th July 2022

In the previous paragraphs I have tried to highlight important aspects of the law in a concise manner. However, in order to get a hold of the subject matter, it is important to get deep into it. It's just a 5 years old baby, hence it's not 100% perfect and matured. It's still evolving and there are many questions to be answered, either by regulators or legislators or courts.

Scope for CAs

Like many other Laws in which CA's are practicing, RERA is also one of the laws with blend of financial cum legal expertise. Hence, it is full of opportunity for the Chartered Accountants. Some of the areas identified by me for the practicing CA's are as follows

1. Planning & Educating : Proper Planning and Educating Promoters about requirements of Law is of utmost importance. Penalties under the law are very stringent and maintaining financial discipline also requires expert's acumen. Basic Skills of a Chartered Accountant blend with specialised knowledge of the Law, enabling identifying problems in advance and bringing solutions at the beginning of the project. This reduces hassles subsequently while executing the project.

2. Registration, Extension & Compliance : Fulfilling basic Compliance requirement of RERA is also matter of great importance. End of the day the majority of the disclosures made are part of the Public domain. Also, the Complexity of the project, involvement of project stakeholders/promoters, etc requires expert assistance not only to provide solutions but also to identify the problems at the first instance.

3. Certifications : This is the pure domain of Chartered Accountants. However, Certification Requirements of MahaRERA are too Complex. One has to understand the various requirements of the Certificate/Law/Rules, etc and undertake assignments within the Framework of Standards and Guidance Notes issued by the ICAI.

4. Litigation : Chartered Accountants are authorised to appear before Authority, Adjudicating Officer and also Tribunal for representing matter. Hence it is one more practicing opportunity for CAs

5. 360 degree view : Stand taken in RERA or disclosures/ Certificates issued under RERA has implication in Presentation of Financials, GST & Income Tax matters. Having a holistic approach is always good for the financial health of the organisation. Chartered Accountant with 360 degree knowledge can alien requirements under all the laws and execute desired operations accordingly

6. Real Estate CFO : Real Estate in itself is Complex subject from Tax, Finance and Legal perspective. It requires specilised knowledge and skills to understand industry specific issues and their implications. Cash flow requirements of the RERA adds to more complexity. It certainly requires professionals to handle the finance function of an organisation. A Chartered Accountant in CFO position gives balance to any project finances. Hence there is a lot in store for Chartered Accountants over here

7. Specialised Project handling: Stalled Projects, Due Diligence, Deal Analysis, etc are certain important aspects which a Chartered Accountant can undertake with its knowledge of RERA and allied laws. Getting a complete package at one stop is very difficult in the market. Hence the specialized knowledge of industry along with different subject matter expertise gives a good stage to handle complex projects.

8. For Homebuyers : It's a Consumer Protection law, awareness amongst homebuyers is still rare. Though project information is in public domain, understanding of various documents and issues surrounding them is lacking. Chartered Accountant can help homebuyers in understanding various aspect of project and help make buying decision

Approach

Any new practicing area requires effort to learn and remain stable in its evolving time. There are many finer things in the subject. In Depth Study of the matter and handling practical cases gives confidence and readiness to deal with any situation. RERA is not an exception to this rule. One needs to stick to the basic and keep on enhancing knowledge in this Domain. Though there is very limited study material available for the reference, the knowledge acquired during the practical experience plays an important role. Making own checklists/notes, analysing orders/judgment of courts, understanding views of different professionals, accessing information available in public domain, getting an idea as to how the regulator thinks/behaves, understanding object and functioning of authority, etc are some of the important points one has to work upon. Merely looking at it (RERA) as a Certification Assignment is a big loss of opportunity. CAs can add value to clients on the core domain of the act too. Though it's Challenging, the result looks satisfactory.

"If it doesn't challenge you, it won't change you"

APPROACH IN RAISING BANK FINANCE FOR CONSTRUCTION INDUSTRY

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Real Estate is one of the major drivers of the economy with their significant contribution to the country's GDP. As such, the construction finance is critical to ensure that real estate development faces no hurdles.

In view of this massive funding requirement of the construction sector, there is a need for a robust financing ecosystem, supported by enabling policy initiatives. The banks provide the largest share of the construction finance followed by HFCs (Housing Finance Companies), NBFCs and by trusteeship (Alternate Investment Funds). Over the past several years, the government has undertaken several reforms and positive policy initiatives to meet the construction finance requirements, but despite this promising support, the road ahead has many challenges to surmount.

Bank credit for construction finance remains a challenge. It is not just restrictive but also costlier for the small and medium real estate companies. However, over the past few years, several policy measures have been taken to improve construction finance, including re-finance schemes for construction finance for affordable housing by the National Housing Bank (NHB).

A spate of reforms including RERA to regulate the real estate sector, making it more organized and transparent, has helped boost sourcing of foreign funding. Today Greater transparency adopted by real estate developers with regard to accounting and management systems to meet due diligence standards of investors, will further boost funding in the coming years.

Reforms have opened up alternate financing routes for the construction sector. Alternate Investment Funds (AIFs) have emerged as another construction financing option.

Construction Industry is a capital-intensive industry, where heavy fund investments are required on daily basis at the initial stage of the construction project and the payment from bookings comes in installments. There will be always cash flow deficit in the project at the initial stages. Banks and other financial institutions funds the deficit of the project and get the loan repaid at the nearing completion of the project.

India is a developing country. Government is encouraging various industries including Real Estate. Government has been giving many concessions to Real Estate i.e. increase in TDR, development of SRA properties, additional FSI, Fungible FSI etc. for last 2 decades. Many banks are positive about sanctioning loan to Real Estate. Therefore, many companies are entering into Real Estate development projects.

Real Estate sector offers an attractive avenue for deployment of funds, especially in the present environment of active marketing of housing finance by commercial banks and other housing finance companies; resulting in an increase in construction activities which results in the requirement of more Project Finance.

Banks and financial institutions consider the following types of funding for Construction Industry:

1) Construction Finance:

- Construction finance is the shortage of Cash Flow funding. In construction projects developers needs more funding at the initial stages for acquiring land or Development rights, paying premiums and buying FSI, paying for TDR and for starting the construction

- Banks and financial institutions gives finance for the construction cost of the project and as per the progress of the work banks disburse the loans to the developers

- The prior permission from Government / Local Government / Other Statutory Authorities for the project should be in place before sanction of the loan.

- The construction finance is not extended to developers :

  i) For acquisition of land.

  ii) For meeting the cost of acquisition of development rights, for paying Premiums and FSI cost.

  ii) For meeting the tenancy settlement cost.

- Developer firm or partners should have completed projects in recent past and having project delivery track record

- Project should be RERA Registered (or RERA Registration process must be initiated)

- All the permissions for construction should have received

- Construction of the project must have started at the time of first disbursement of loan.

- Banks mortgage entire project and in some cases banks may ask for additional collateral securities.

- The total securities including collateral securities shall not be below 150% of the loan amount.

- Bank take personal guarantee of all partners/directors

- The funding can be done covering maximum 60% of the total project cost

- Promoters margin should be 40% of the total project cost. Booking advance received from the customers are treated by the banks as part of the promoter's contribution.

- Developers have to submit Architect Certificates and CA certificates at periodical intervals for ascertaining the progress of the work and funds deployment.

- The payments from the loan are issued directly in the name of suppliers and contractors

- Sales inflows would be charged (hypothecated) with the lender

- depending on the project status principal moratorium would be given

- The loan tenor ranges from 3 to 5 years as per the need of the project. The loan gets disbursed in periodical intervals as per funds required for the project.
- Repayment of the loan will be at the end of the loan period as per the cashflow
- Rate of Interest range for majority of lenders is 10% to 13%

2) For Inventory Finance :

Banks and NBFC gives loans against unsold inventories to developers.

This funds developer can use for the same project or for any other project or for their day to day requirements

- Even first time Developer's proposal can get funding against inventory
- Saleability of the project and latest sales trend in the surrounding market is considered
- Project in which units to be mortgage should have completed more than 90%
- Developer can utilise this money for his any business purpose
- Lender gives funding upto 60% to 65% of the value of the property
- Bank take personal guarantee of all partners/directors
- The loan tenure ranges from 3 years to 7 years
- Loan repayment is in equal monthly installments, so its start from next month of disbursement
- Developer firm and the partners should have justified income for repayment of installments
- Rate of Interest range from 10% to 13%

3) For Structured/Early stage Finance

AIF (Alternate Investment Funds) and some of the NBFCs gives early state funding. They give funding at the early stage of the project.

Developer need more money at the initial state for acquisition of land or Development rights, for paying for FSI, premiums and other charges to authorities for buying TDR, In case of redevelopment projects, developer needs to pay for corpus, mobilisation advance and rent also. Banks don't give finance for all such needs, so in case of early funding needs AIF and some NBFC play a key role and fund the initial stage of requirements. The various terms of the sanction and disbursements are as follows

- The disbursement of the funds is directly of the specific purpose mentioned in the term sheet
- They give funding to the corporate entity i.e.project should be either under private limited or public limited companies

- Interest is paid either monthly or quarterly as per sanction arrangement with the lender.
- The lender mortgage the entire project and create charge on entire project
- Lender issues NCDs (Non Convertible Debentures) for the loan amount
- Shares of the borrower company needs to be in demate form and it needs to be pledged in favour of lender.
- Lender takes personal guarantee of all the directors
- Lender take PDCs cheques as per Repayment schedule and one blank undated cheque for the entire loan amount as security.
- They monitor the cashflow and the progress of the project at periodical intervals
- Other Majority of terms are similar to Construction Finance; however, funding can be done at pre-approval stage (and even for Land Acquisition)
- Rate of Interest range starts from14 to 18% and above
- Other Majority of terms are similar to Construction Finance; however, funding can be done at pre-approval stage (and even for Land Acquisition)

EVENTS IN RETROSPECT

Day & Date	Committee	Program Name	Moderator / Speaker	Attendance / Views
25th, June 2022	Program Committee	Laws relating to Trust and Trustee	CA Arvind Singh CA Nitin Maru	400+

Events In Retrospect

Day & Date	Committee	Program Name	Moderator / Speaker	Attendance / Views
28th, June 2022	Students Committee	Seminar on Intricacies on ITR Filing-Case Studies Format	Speaker : Hetvi shah(GBCA), Tanvi Shetty (Shah and Modi) Mentored : CA Gautam Mota	80

Day & Date	Committee	Program Name	Moderator / Speaker	Attendance / Views
30th, June 2022	Study Circle Committee	Study Circle meeting on Provisions of TDS u/s 194R and related issues	Speaker : CA Bhavin Dedhia	33
8th, July 2022	Study Circle Committee	Study Circle meeting on Amendments in ITR reporting for AY 2022-23	Speaker : CA Hetal Gada	19