

LEGALITY OF GST APPLICABILITY ON USAGE OF BRAND NAME



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Legality of GST Applicability on usage of Brand Name by subsidiary companies/associate companies of holding company.

Earlier several banks had started receiving goods and services tax (GST) notices for using their brand name by their branches and subsidiaries. According to GST rules, banks and non-banking financial companies (NBFCs) are eligible to claim only 50 per cent ITC against services and capital goods. If the use of the brand name is subject to GST, a bank can only claim half the GST as input credit.

Because Banks and NBFCs are getting only 50 percent ITC and therefore department has issued GST notices.

On similar lines GST department has started inquiring many developers and asked them to pay GST on brand name used by subsidiary companies/associate companies of holding company. Normally Brand of Holding company is registered as a trade mark. So department is telling that if holding company is charging royalty of use of trademark/brand name from subsidiary companies/associate companies then GST @ 18% is to be payable by holding company on such royalty charges. Further if Holding company is not charging royalty for use of brand name, logo, trade mark by subsidiary companies /associate companies then also they are telling them to value Brand value usage & telling them to pay GST at the rate of 18% on the said estimated brand value usage. Real Estate developers developing residences are not getting any set off of input credit. GST @ 5% is payable by developers on under construction flats sold subject to complying certain conditions and one of the condition is no input credit set off is allowed. Further in case of affordable housing GST rate is 1% subject to complying certain conditions and one of the condition is no input credit set off is allowed. As developers developing residences are not getting any input credit set off and therefore department started inquiries and in few cases it is heard that Show cause notice is issued to them asking them to explain why Department cannot ask holding company to pay GST on Brand value on usage of brand name-logo-trademarks by the subsidiary company/associate company.

Normally in a real estate industry one special purpose vehicle is floated by holding company i.e. one company one project. Normally the said special purpose vehicles are wholly owned subsidiaries of holding company. As people normally know holding company so holding company use their trade mark, brand name, logo etc. while doing marketing activities of subsidiary companies/associate companies. So because of above if sales are happening in subsidiary companies then finally holding company will be benefited because once net worth of subsidiary companies will increase so Investment in shares of subsidiary companies will also increase. Therefore, finally they are benefited.

In case of developer of commercial properties, they are going to get input credit set off so even if GST on Brand value on use of brand name, trade name, logo by subsidiary company's / associate companies will be charged by the holding company then they will not lose anything.

We will try to examine now what GST law is telling at present on above controversy.

For GST to be levied it should fall under Supply.

Definition of Supply as per CGST Act is as under

LEVY AND COLLECTION OF TAX Section 7 – Scope of supply

CGST ACT 2017

- (1) For the purposes of this Act, the expression “supply” includes--
- (a) all forms of supply of goods or services or both such as sale, transfer, barter, exchange, licence, rental, lease or disposal made or agreed to be made for a consideration by a person in the course or furtherance of business;

¹[(aa) the activities or transactions, by a person, other than an individual, to its members or constituents or vice-versa, for cash, deferred payment or other valuable consideration.

Explanation.--For the purposes of this clause, it is hereby clarified that, notwithstanding anything contained in any other law for the time being in force or any judgment, decree or order of any Court, tribunal or authority, the person and its members or constituents shall be deemed to be two separate persons and the supply of activities or transactions inter se shall be deemed to take place from one such person to another;]

- (b) import of services for a consideration whether or not in the course or furtherance of business;²[and]
- (c) the activities specified in Schedule I, made or agreed to be made without a consideration;

Relevant abstract of SCHEDULE I is as under

Activities to be treated as Supply even if made without consideration

- 2) Supply of goods or services or both between related persons or between distinct persons as specified in section 25, when made in the course or furtherance of business:

– For the purposes of this Act,--

- (a) persons shall be deemed to be —related persons if--
- (iv) any person directly or indirectly owns, controls or holds twenty-five per cent. or more of the outstanding voting stock or shares of both of them;
- (v) one of them directly or indirectly controls the other

Based on above definition of related person Holding and Subsidiary company and Holding and Associate Company are related person.

Therefore, as per schedule 1 of CGST act even if no consideration is charged by the holding company for its use of trade name/brand name/logo by subsidiary company's/ associate companies, it is considered as supply as the same is used by subsidiary company / associate company in the course or furtherance of business and therefore GST is apparently payable. But there is a need to challenge the said new levy by developers as GST if payable by developers of residences then as no input credit set off is allowed so it will result into additional cost, further in rising input cost scenario this will add to further additional cost so finally it can result into passing of such cost by developers to customers to maintain their profitability so as a result of the same inflation cost will increase.

Many developers have thought of fighting the same whereas some developers have thought of valuing the said services in such a fashion so that impact of the same can be minimised. So some developers thought of valuing the said services at 0.5% to 1% of booking of revenue and on that they are thinking to pay 18% on such value.

However, if you as developers are thinking to pay GST on above only after receipt of Show cause notice and if you failed to convince department in the reply of Show cause notice then it is better to pay GST under protest and then challenge the same so that Developers can claim refund if decision comes in their favour.

Further, here I wanted to explain one GST tax saving idea on above valuation of Brand value. There are various methods to value Brand value and one of the method is Income approach.

The income approach of brand valuation measures the value of a brand based on the present economic benefits that it provides over the rest of the brand's useful life. Among the methods to measure the brand value based on the income approach is to multiply the price differential of the branded products concerning the generic products by the amount of income generated by the branded products.

It means that actual benefit of using Brand name by subsidiary companies / associate companies of holding company is only getting sales value over and above ready reckoner value for payment of stamp duty and not entire sales consideration. Therefore, if at all Developers decided to pay GST on brand value then developer has to find out sales value over and above ready reckoner value of stamp duty and on that apply 0.1 percent to 1 percent and on that pay GST @ 18% under protest so within the four corners of law, developers can minimise the impact of GST payment if at all it can come on them.

Conclusions:

- 1) Developers has to challenge the new levy proposed by department on usage of brand value/trade mark/logo etc by subsidiary companies / associate companies of holding company.
- 2) If developers are getting show cause notices and they have decided to pay GST on the said Brand value usage by subsidiary companies / associate companies , then it is better to pay under protest and then challenge the same so that Developers can claim refund if decision comes in their favour.
- 3) To reduce the GST impact on brand value usage if it will come to developers then apply income approach. And value brand value only on difference of sales consideration over and above stamp duty ready reckoner value by the subsidiary company / associate company because it is that value only which is extra amount received by the subsidiary company / associate company on usage of brand value of holding company. And on that additional amount, apply 0.1% to 1% and only pay 18% GST on the said value. Don't forget to pay GST under protest because the concept is debatable.
- 4) Developers associations can challenge the said levy in court. Many developers have approached Finance Ministry to intervene in their favour else additional levy can result into increase of inflation also.
- 5) Developers developing commercial properties are indifferent because they are going to get set off of Input credit even if such GST levy will come.

