



## Dimensions – 40<sup>th</sup> Edition

### Ruling / judgment under GST era:

#### 1. M/s MAARQ Spaces Pvt. Ltd. - Karnataka<sup>1</sup>

##### Issues for Consideration

- Whether the activity of development and sale of land attracts GST?
- If yes, whether the value of land and supply of service can be determined as per rule 31 (i.e. residual method) of the CGST Rules?

##### Discussion & Ruling

##### Discussion:

- The Applicant is engaged in the business of property development. It has entered into a Joint Development Agreement (JDA) with landowners for development of a land into residential plot along with amenities.
- The revenue sharing ratio between the Applicant and landowners is 25% and 75%. The cost of development will be borne by the Applicant. Pursuant to the JDA, the Applicant has entered into agreement with the customers for sale of residential property to be constructed.
- The Applicant contended as follows:

##### Levy of GST

- On a combined reading of the definition of 'supply' and Entry No.5 of Schedule III of the CGST Act, the sale of land is excluded from the scope of supply;
- Applying jointly the principle of *Composite Supply* and *Principal Supply*, as defined under the GST law, to the facts of the present case, the predominant supply is land and the development activity is incidental to sale of land. The development activity is naturally bundled with sale of land and therefore, sale of **developed plot** is nothing

<sup>1</sup> Order no. KAR ADRG/ 199/2019 dated September 30, 2019



but sale of land, which falls under Entry 5 of Schedule III of CGST Act and does not attract GST;

- In terms of section 32 of the Karnataka Urban Development Authorities Act, 1987, the Applicant is required to transfer the ownership on the developmental works such as roads, drains, water supply mains, etc. to the developmental authority for which the Applicant has entered into separate agreements. Therefore, there cannot be an agreement for supply of service but only for sale of land;

#### **Value of supply**

- Irrespective of the transaction being divisible or not, the value of land should be excluded from the levy of GST in terms of entry 5 of Schedule III of CGST Act;
- Rule 27 to 30 of the CGST Rules, do not apply to the transaction and accordingly, value should be determined as per rule 31 applying reasonable means. Accordingly, the market value of the land should be excluded from total consideration or tax should be levied on development charges based on market value or on cost plus basis including reasonable profit.

- The Authority after going through the various clauses of the agreement observed as follows:

#### **Levy of GST**

- The Applicant has represented himself as a person having experience and expertise as a **Land Developer**. This shows that the core competency of the Applicant lies in conversion of raw piece of land into a residential layout and not in the sale of land. The activities undertaken include survey of land, preparing layout, carrying out construction, etc.;
- The activity of sale of plots is incidental to the main activity of development of land;
- There are various provisions in the agreement which indicate that the Applicant has no right over the land and consequently the Applicant cannot be engaged in the sale of land as per entry 5 of Schedule III of the CGST Act. The activities being undertaken amount to supply of service to the landowners;

#### **Valuation**

- As per the agreement, the Applicant gets 25% of the amount at which the plots are sold. Applicant does not get physical possession of the 25% of the plots as understood by him. This consideration is received in the form of money and not land;
- Rule 27 to 30 of the CGST Rules is not applicable in the present case and accordingly, rule 31 needs to be applied;
- The amount received from the plot buyers to the extent of 25% represents the consideration for the services rendered to the landowners;
- Consideration is the total value received in the deal and not what the service provider expends for providing the service. Accordingly, the value of land cannot be excluded;



	<p><b>Ruling:</b></p> <ul style="list-style-type: none"><li>• The activities as envisaged in the agreement amount to supply of services and is liable to GST;</li><li>• Rule 31 applies in the instant case and the value of supply is equal to the total amount received by the applicant, which is equal to 25% of the market value of each plot.</li></ul>
<p><b>Dhruva Comments / Observations</b></p>	<ul style="list-style-type: none"><li>• The ruling does not consider the fact that as per the GST law when there is a supply of construction service and a transfer of land then sale of value of land is deemed to be one third of the total consideration, which is to be excluded from the total consideration received.</li><li>• Further, in a similar ruling in the case of <i>NFORCE Infrastructure India Pvt. Ltd.</i><sup>2</sup> the Authority held that the Applicant was supplying construction service to the supplier of development right against consideration in the form of transfer of development right.</li><li>• Whilst the structure is a Joint Venture, it needs to be deliberated whether the current structure amount to Association of Persons and assess its implications under GST? Further, interestingly, the ruling states that the services are rendered by the developer to the landowner and not the plot buyers.</li></ul>

<b>2. Akhil Krishan Maggu and Anr. v. Directorate General of GST Intelligence (DGGI)<sup>3</sup></b>	
<p><b>Issue for Consideration</b></p>	<p>Whether the power of arrest should be exercised on the grounds of suspicion that the Petitioner connived to obtain refund of IGST?</p>
<p><b>Discussion &amp; Judgment</b></p>	<p><b>Discussion:</b></p> <ul style="list-style-type: none"><li>• Petitioner no. 1, son of Petitioner no. 2, is a practicing lawyer in the field of taxation. The Petitioner filed a Writ Petition on behalf of four exporters before the Hon'ble Delhi High Court against the Respondents.</li><li>• The Respondents alleged that these exporters were dummy owners and had availed huge IGST refunds. Subsequently, the Respondents conducted a search at the residence of Ramesh Wadhera, alleged owner of the dummy export firms. Both the Petitioners came to the residence of the alleged owner where some commotion took place between the Petitioners and the Respondents. At the behest of the Respondents, the police registered FIR and arrested the Petitioners. They were released on bail after a week's incarceration.</li><li>• Thereafter, the Respondents recorded the statements of the dummy exporters, who allegedly also disclosed the name of both the Petitioners being involved in the alleged fraud. Later, a search was conducted at Petitioner's premises in his absence and the younger brother of Petitioner no. 1 was arrested. The Respondents also filed FIR against Petitioner no. 2 alleging obstruction in performance of official duty.</li></ul>

<sup>2</sup> 2019 (20) G.S.T.L. 184 (A.A.R. - GST)

<sup>3</sup> 2019 (11) TMI 942 – The High Court of Punjab and Haryana



- The Respondents issued summons directing the Petitioners to appear before Senior Intelligence Officer (SIO) to submit their statement in connection with the impugned exports. Aggrieved, the Petitioners filed a petition before the Hon'ble High Court.
- The Petitioners contended that there was no evidence connecting them with the alleged fraud committed by the exporters or Ramesh Wadhera and was a case of personal vendetta to tarnish their reputation.
- The Respondents submitted that the Petitioner no. 1 was involved in the fraud and the four exporters were not the owners of the exporting firm. Further, it was the Petitioners who in connivance with Ramesh Wadhera had set-up bogus/ dummy firms to avail the refund of IGST.
- The Hon'ble High Court observed as under:
  - After discussing the ratio and observation in all the recent judicial precedents of the various High Courts and the Hon'ble Supreme Court [*Make My Trip v. Union of India*<sup>4</sup>, *Jayachandran Alloys (P) Ltd. v. Superintendent of GST & C. Ex. Salem*<sup>5</sup> and *Vimal Yashwantgiri Goswami v. State of Gujarat*<sup>6</sup>], it was concluded that the power to arrest should be resorted to only in exceptional circumstances and with full circumspection;
  - No criminal liability can be imposed in the absence of tax evasion. This is further substantiated by the fact that even though the maximum sentence prescribed under the GST law is five years, it is directly linked with the quantum of tax evaded;
  - The judgment of Telangana High Court in the case of *P.V. Ramana Reddy v. Union of India*<sup>7</sup> relied upon by the Respondents was distinguished and it has been held that the opinion expressed by the Telangana High Court cannot be applied to all the cases. The judgment in *P.V. Ramana Reddy* cannot be considered as an authority to conclude that DGGI has the power to arrest in every case without determining the quantum of tax evaded or without producing evidence that the accused has committed an offence under section 132 of the CGST Act;
  - Irrational and indiscriminate arrest results in gross violation of rights of personal liberty, as enshrined under Article 21 of the Constitution of India. Such rights should be curtailed only in exceptional cases where arresting the accused is imperative under circumstances of the case and after proper reasons are recorded for such arrest [*Siddharam Satlingappa Mhetre v. State of Maharashtra*<sup>8</sup>];
  - The power of inspection, search and seizure and power to arrest under the CGST Act borrow provisions from the Code of Criminal Procedure, 1973 (CrPC), which also provide that a person can be arrested if he has committed a cognizable offence and if the officer has reason to believe that the accused has committed the offence and arrest is required to prevent tampering of evidence, to ensure proper

<sup>4</sup> 2016 (44) STR 481 (Del.)

<sup>5</sup> 2019 (25) G.S.T.L 321 (Mad.)

<sup>6</sup> 2019-TIOL-1746-HC-AHM-GST

<sup>7</sup> 2019 (25) G.S.T.L. 185 (Telangana)

<sup>8</sup> 2011 (1) SCC 694



	<p>investigation, to prevent the person from committing any further offence etc. The provisions further provide that where a person complies with a Notice issued under Section 41A of the CrPC, no arrest is warranted;</p> <ul style="list-style-type: none"><li>- Powers of arrest cannot be exercised “<i>at the whims and caprices of any officer or for the sake of recovery or terrorising any businessman or create an atmosphere of fear, whereas it should be exercised in exceptional circumstances during investigation.</i>” An illustrative list of such exception circumstances has also been noted by the High Court;</li><li>- Taxpayers/ persons against whom no concrete evidences are available to establish evasion of tax should not be arrested prior to determination of liability and imposition of penalty;</li><li>- Arrest of professionals i.e. CAs/ Advocates should not be carried out in absence of corroborative evidence linking the professional with the alleged offence;</li><li>- The High Court also noted that this case involves some misunderstanding between Petitioners and the DGCI and no evidence has been produced showing direct involvement of the Petitioners in the alleged fraud.</li></ul> <p><b>Judgement:</b></p> <p>The Petition was disposed of by the Hon’ble High Court with direction to the Respondent to not take Petitioner No. 1 into custody without prior approval of the Court.</p>
<b>Dhruva Comments / observations</b>	<p>Power to arrest and the arrest has been a vexed issue under the GST law with Courts adopting contrary view on the arrest and bail cases. This a welcome judgment safeguarding the professionals who are merely assisting the taxpayers in business or filing of returns and not beneficiary to the benefits arising from the fraud committed by such taxpayers.</p>

## Circular under GST:

### Electronic refund process through Form GST RFD-01 and single disbursement<sup>9</sup>

#### Clarification

The Government has issued the present circular on the guidelines to be followed by the assessee’s / department in respect of filing / sanctioning of the refund claim. Further, the present circular supersedes all the circulars issued in the past in relation to the refund matters, except to refund claims which have been filed before September 26, 2019. Key highlights of the circular are as follows:

- **Filing of refund application:**

- The refund application should be filed in FORM GST RFD-01 on the common portal along with the specified documents. The maximum file size of the **each** of the specified documents to be uploaded should not exceed 5MB;
- Refund claim for a tax period should be filed only after all the returns i.e. GSTR-1 and GSTR-3B have been filed on or before the date on which the refund application is filed;

<sup>9</sup> Circular no. 125/44/2019 - GST dated November 18, 2019



- The refund application can be filed for a tax period or by clubbing successive tax periods. The period cannot spread across different financial years.
- **Deficiency memo**
  - Deficiency memo or an acknowledgment should be issued within 15 days of filing of the refund application. Once an acknowledgement is issued, no deficiency memo should be issued on any ground.
- **Disbursal of refund:**
  - Presently, disbursement of refund of CGST / IGST / Compensation cess was sanctioned by Central tax officers and SGST by State tax officers which caused undue hardship. Accordingly, for refund application assigned to a Central tax officer, he should issue both i.e. sanction order and corresponding payment order for all the tax heads. Similarly, State / UT tax officer should do the same.
- **Refund of compensation cess (cess)**
  - Coal on which cess has been paid was used for manufacture of electricity. Further, the said electricity, which is exempt from GST had been used for the manufacture of aluminium. Accordingly, it was questioned whether the refund claim can be rejected since coal was used for generation of electricity which is exempted.  
  
It has been clarified that coal is an input used in the production of aluminium, albeit indirectly through captive generation of electricity, which is directly connected with the business of the person and the credit should be eligible.
- **Zero rated supplies**
  - If a person has made zero-rated supplies and has opted for without payment of tax option before filing the LUT and has applied for the refund of ITC, then the substantive benefit of zero rating should not be denied subject to the exports being made in terms of the relevant provisions. The delay in furnishing of the LUT should be condoned considering facts and circumstances in each case;
  - If there is a difference between the value declared in the GST invoice in case of zero rated supplied made under LUT and the corresponding shipping bill, then the lower of the two values should be considered for calculating the eligible refund amount;
  - In case of export of goods, insistence of proof of realization of export proceeds for processing of the refund claims is not envisaged in the law and should not be insisted upon;
  - Transitional credit pertains to the duties and taxes paid under the Service tax and Excise law and cannot be said to have been availed during the GST regime and accordingly, the same cannot be treated as 'Net ITC' while calculating the refund under Rule 89(4) or (5) of the CGST Rules.
- **Refund on account of inverted tax structure**
  - The refund on account of inverted tax structure would be available only on inputs and not on input service and capital goods;



- The refund cannot be denied of those inputs which are procured at a lower or equal rate of tax than the GST rate on outward supply while calculating the maximum refund amount under Rule 89(5) of the CGST Rules.

- **Refund of TDS / TCS deposited in excess**

- If the tax deposited or collected is deposited in the wrong tax code (e.g. CGST is deposited as IGST) then the deductor / collector should be eligible to claim the refund of such excess balance in the electronic cash ledger;
- Further, if such excess payment is credited to the account of the deductee, then the deductee can adjust the same while discharging his output liability or claim refund under the category of 'refund of excess balance in electronic cash ledger' (ECL).

- **Debits in ECL**

- A merchant exporter who has received the supplies from a supplier who has availed the benefit of concessional rate of tax (i.e. 0.10%) should file the refund claim under the category of 'any other' instead of 'refund of unutilized ITC on account of exports without payment of tax' and accompanied by all supporting documents;
- If the proper officer is satisfied that whole or part of the amount claimed is payable as refund, then he shall request the tax payer to debit the ECL through DRC 03;
- Once the proof of such debit is submitted then the officer shall sanction the refund amount.

- **Other issues**

- It was reported that the tax authorities were rejecting refund for such invoices (for e.g. pertaining to August 2018) which were declared in GSTR-3B in subsequent months (for e.g. September 2018). It is clarified that refund of ITC on such invoices cannot be denied, as the same has been taken within the time limit prescribed under the GST Law.



## ADDRESSES

### Mumbai

11th Floor,  
One IndiaBulls Centre, Tower 2B,  
841, Senapati Bapat Marg,  
Elphinstone Road (West),  
Mumbai 400 013  
Tel: +91 22 6108 1000 / 1900

### Ahmedabad

B3, 3rd Floor, Safal Profitaire,  
Near Auda Garden,  
Prahlanagar, Corporate Road,  
Ahmedabad - 380 015  
Tel: +91-79-6134 3434

### Bengaluru

Prestige Terraces, 2nd Floor  
Union Street, Infantry Road,  
Bengaluru 560 001  
Tel: +91-80-4660 2500

### Delhi / NCR

101 & 102, 1st Floor, Tower 4B  
DLF Corporate Park  
M G Road, Gurgaon  
Haryana - 122 002  
Tel: +91-124-668 7000

### Pune

305, Pride Gateway, Near D-Mart, Baner,  
Pune - 411 045  
Tel: +91-20-6730 1000

### Kolkata

4th Floor, Unit No 403, Camac Square,  
24 Camac Street, Kolkata  
West Bengal – 700016  
Tel: +91-33-66371000

### Singapore

Dhruva Advisors (Singapore) Pte. Ltd.  
20 Collyer Quay, #11-05  
Singapore 049319  
Tel: +65 9105 3645

### Dubai

WTS Dhruva Consultants  
U-Bora Tower 2, 11th Floor, Office 1101  
Business Bay P.O. Box 127165  
Dubai, UAE  
Tel: + 971 56 900 5849

### Bahrain

WTS Dhruva Consultants  
2301, Level 23, P.O. Box No. 60570,  
Harbour Tower (East), Bahrain Financial Harbour,  
Kingdom of Bahrain  
Tel: +973 1663 1921

### New York

Dhruva Advisors USA, Inc.  
340 Madison Avenue, 19th Floor, New York,  
New York 10173 USA  
Tel: +1-212-220-9494

### Silicon Valley, USA

Dhruva Advisors USA, Inc.  
5201 Great America Parkway,  
Santa Clara, California 95054  
Tel: +1 408 930 5063

## KEY CONTACTS

### Dinesh Kanabar (Mumbai)

Chief Executive Officer  
dinesh.kanabar@dhruvaadvisors.com

### Ritesh Kanodia (Mumbai)

ritesh.kanodia@dhruvaadvisors.com

### Niraj Bagri (Mumbai)

niraj.bagri@dhruvaadvisors.com

### Ranjeet Mahtani (Mumbai)

ranjeet.mahtani@dhruvaadvisors.com

### Amit Bhagat (Delhi / NCR)

amit.bhagat@dhruvaadvisors.com



Dhruva Advisors has been named “**India Tax Firm of the Year**” for 2017, 2018 and 2019 by International Tax Review

Dhruva Advisors has been named “**India Disputes and Litigation Firm of the Year 2018**” by International Tax Review

Dhruva Advisors ranked as a **Tier 1 Firm** in India in Tax and Transfer Pricing by International Tax Review.

#### Disclaimer:

This information contained herein is in summary form and is therefore intended for general guidance only. This publication is not intended to address the circumstances of any particular individual or entity. No one should act on such information without appropriate professional advice after a thorough examination of the particular situation. This publication is not a substitute for detailed research and opinion. Before acting on any matters contained herein, reference should be made to subject matter experts and professional judgment needs to be exercised. Dhruva Advisors LLP cannot accept any responsibility for loss occasioned to any person acting or refraining from action as a result of any material in this publication