

MAHARASHTRA AUTHORITY FOR ADVANCE RULING

GST Bhavan, 1st floor, B-Wing, Mazgaon, Mumbai – 400010.

(Constituted under Section 96 of the Maharashtra Goods and Services Tax Act, 2017)

BEFORE THE BENCH OF

- (1) Smt. P. Vinitha Sekhar, Addl. Commissioner of Central Tax, (Member)**
(2) Shri A. A. Chahure, Joint Commissioner of State Tax, (Member)

GSTIN Number, if any/ User-id	27AAVPG7805Q1ZS
Legal Name of Applicant	Vilas Chandanmal Gandhi
Registered Address/Address provided while obtaining user id	Sigma One, Near MIT College, Kothrud, Pune - 411038
Details of application	GST-ARA, Application No. 40 Dated 21.08.2019
Concerned officer	
Nature of activity(s) (proposed / present) in respect of which advance ruling sought	
A Category	Service Provision
B Description (in brief)	Transfer of Development Rights
Issue/s on which advance ruling required	(i) classification of goods and/or services or both (v) determination of the liability to pay tax on any goods or services or both (vii) whether any particular thing done by the applicant with respect to any goods and/or services or both amounts to or results in a supply of goods and/or services or both, within the meaning of that term
Question(s) on which advance ruling is required	As reproduced in para 01 of the Proceedings below.

PROCEEDINGS

(Under Section 98 of the Central Goods and Services Tax Act, 2017 and the Maharashtra Goods and Services Tax Act, 2017)

The present application has been filed under Section 97 of the Central Goods and Services Tax Act, 2017 and the Maharashtra Goods and Services Tax Act, 2017 [hereinafter referred to as “the CGST Act and MGST Act”] by Vilas Chandanmal Gandhi, the applicant, seeking an advance ruling in respect of the following questions.

- Whether GST is leviable on sale of Transferable Development Rights (‘TDR’)/ Floor Space Index (‘FSI’) received as consideration for surrendering the joint rights in land in terms of Development Control Regulations and granted in light of the article of agreement dated 18 December 2017 entered between the Applicant and Pune Municipal Corporation (‘PMC’) read with Development Control Regulations?**
- If yes, what will be classification under GST and what will be applicable rate of GST?**



At the outset, we would like to make it clear that the provisions of both the CGST Act and the MGST Act are the same except for certain provisions. Therefore, unless a mention is specifically made to any dissimilar provisions, a reference to the CGST Act would also mean a reference to the same provision under the MGST Act. Further to the earlier, henceforth for the purposes of this Advance Ruling, a reference to “GST Act” would mean CGST Act and MGST Act.

2. FACTS AND CONTENTION – AS PER THE APPLICANT

The submissions made by the applicant is as under:-

2.1 The Applicant, Mr. Vilas Chandanmal Gandhi, was an owner of the land situated within the limits of PMC and wanted to develop the land jointly in collaboration with M/s. Amar Builders and Developers (**Developer**) and share the profits through distribution of sale proceeds after development of the land by way of construction of residential/ commercial project.

2.2 In terms of the said agreement entered into, between the applicant and the developer:

- Applicant assigned/ transferred the development rights in land to the Developer,
- The said assignment/ transfer of rights in land was for the purpose of construction of residential/ commercial project on the land,
- The Developer agreed to pay consideration in the form of 45% of the sale proceeds of the developed project,
- Further, the developer had given Rs. 3,60,00,000/- (Rs. Three Crores Sixty Lakhs only) to the Applicant as security deposit to be refunded within a month after completion of the project on the underlying land,

2.3 In view of the above agreement, Applicant and the developer were enjoying jointly, the rights in the land on which there was reservation, in light of Draft Development Plan for Pune City sanctioned by the Municipal Corporation of Pune City (PMC).

2.4 Since the applicant and the developer realized that vacating/ removing reservation may not be possible, they decided to surrender their rights in the said land. PMC gave them TDR's/ Additional FSI, as consideration for surrendering the joint rights in land to PMC in terms of Development Control Regulations (DCR).

2.5 Applicant and the Developer entered into a supplementary agreement which included the following clauses:

- The TDR/ Additional FSI to be obtained would be shared between the Applicant and the Developer in the ratio of 73:27;
- The proportionate TDR/ Additional FSI would be transferred by the Applicant in favour of the Developer or the Applicant would transfer the proportionate sale proceeds (out of the sale of TDR/ Additional FSI) to the Developer.



- 2.6 Thus Applicant surrendered the rights in the said land in favour of the PMC against which PMC awarded TDR's/ Additional FSI as compensation vide issue of Development Right Certificates (**DRC's**).
- 2.7 Both the parties later decided to sell a part of the TDRs/ Additional FSI to Vamona Developers Pvt. Ltd. (VDPL) and share the sale proceeds in agreed ratio. Consequently, Applicant entered into agreement/ deed of assignment with VDPL.
- 2.8 Initially at the time of the said agreement, applicant did not charge GST and later on Applicant raised GST invoice on VDPL and requested them to pay the GST on the said transaction along with interest. However, VDPL informed applicant that that GST is not leviable on the transaction of sale of TDR/ Additional FSI.
- 2.9 In view of above, Applicant has applied for advance ruling and submitted before us that Sale of TDR/ Additional FSI does not amount to taxable supply under GST being in nature of transaction of sale of land/ immovable property and covered under Clause 5 of Schedule III of CGST Act.
- 2.9.1 Applicant has reproduced the definition of the term "goods" as defined in the CGST Act, 2017 and has submitted that the said definition includes the word 'moveable property' which has not been defined in the CGST Act. To understand the definition of the term 'movable property', Applicant has cited Section 3 (36) of the General Clauses Act, 1897, Section 2 (9) of the Registration Act, 1908 and Section 22 of Indian Penal Code, 1860 and sub-section 102 of section 2 of CGST Act and has arrived at the conclusion that movable properties are covered in the definition of goods, and other than goods are covered within the ambit of services.
- 2.9.2 The applicant has further referred to various other legislations to explain the term 'immovable property', like, Section 3(4) of Bombay Land Revenue Code, 1879, Section 2(z) of the Real Estate (Regulation and Development) Act, 2016, etc. and has arrived at the conclusion that immovable property includes land and land includes the benefits arising out of land. Referring to various case laws in support of their arguments, applicant submitted that TDR/ Additional FSI in the present case are land being benefits arising out of land. Hence according to the Applicant, the present transaction can be said to be a transaction of sale of land and covered under Schedule III of the CGST Act and can neither be treated as supply of goods nor supply of services to be taxable under GST.
3. The applicant has also made alternate submissions stating that their supply may be taxable under GST, as below;
- 3.1 The scope of the supply is very wide and it encompasses most of the commercial transaction undertaken during the course of business and involving consideration such as sale, barter, transfer etc.



- 3.2 The term service is wide enough and covers everything other than goods, money and securities. Hence, a view can be formed that supply of TDR/ Additional FSI will be considered as supply of service.
- 3.3 Notification No. 4/2018 Central Tax (Rate) dated 25 January 2018 provides for the incidence of taxable event under CGST, in respect of transfer of development rights for construction and although the said notification has been issued in the context of joint development agreement, it appears that the Government intended to tax the transaction of transfer of TDR/ Additional FSI because even in the joint development agreement, there is transfer of development rights. Hence it appears that Government intended to tax all the transactions of TDR's/ Additional FSI under GST.
- 3.4 Notification no 4/2019-Central Tax (Rate) dated 29 March 2019, has made an amendment in Notification No. 12/2017-Central Tax (Rate) whereby, Service by way of transfer of development rights/ Additional FSI were made exempt subject to condition that promoter shall be liable to pay tax at the applicable rate, on reverse charge basis, on such proportion of value of development rights, as is attributable to the residential apartments, which remain un-booked on the date of issuance of completion certificate.
- 3.5 Further, reference is made to Notification no 5/2019-C.T.(Rate) dated 29.03.2019 wherein by way of amendment in Notification No. 13/2017-C.T.(Rate), Service by way of transfer of development rights/ Additional FSI by any person to promoter were made taxable under reverse charge. Also, reference has been made to Notification no 6/2019-C.T. (Rate) dated 29.03.2019 prescribes that in case of a promoter who receives development rights against consideration in the form of construction service or against monetary consideration, GST liability shall arise on date of issuance of completion certificate.
- 3.6 In view of the above, applicant feels that the transactions of transfer of development rights are taxable under GST and to determine the rate of tax, the rate notification is required to be referred.
- 3.7 The GST rates for services have been prescribed in the Notification No. 11/2017- Central Tax (Rate), dated 28-6-2017 wherein there is no specific reference to the services of transfer of TDR/ Additional FSI.
- 3.8 In Notification 4/2019-CT(Rate) dated 29 March 2019 i.e. notification providing that the service by way of transfer of development rights/ Additional FSI would be exempt subject to certain conditions, the heading of 9972 has been mentioned for the against the services by way of transfer of development rights. Hence the GST rate as applicable to heading 9972 would be applicable in the present case. Alternatively, the supply of service by way of transfer of TDR/ Additional FSI would be covered under entry 35 (being other miscellaneous services not elsewhere specified) to the said Notification.



- 3.9 The applicant has finally concluded that, if the underlying transactions are taxable under GST then GST is payable at 18% (CGST 9% and SGST 9%).

03. CONTENTION – AS PER THE JURISDICTIONAL OFFICER

The submissions made by the jurisdictional office is as follows:-

- 3.1 The jurisdictional officer has reproduced the definitions of “goods”, ‘services’ and has submitted that the scope of supply of services is very wide. The transaction of TDRs could be treated as “service.”
- 3.2 As per Notification No. 05/2019 C.T. (Rate) dated 29.03.2019, which amends Notification No. 13/2017 C.T. (Rate) dated 28.06.2017, supply of TDRs is made taxable under reverse charge.
- 3.3 As per Notification no. 04/2018 C.T. (Rate) dated 25.01.2018, amended by Notification No. 23/2019 dated 30.09.2019 GST is leviable on supply of Development Rights & liability to pay Central Tax shall arise at the time of transfer of the constructed structure to the person supplying Development Rights.
- 3.4 As per Notification No. 04/2019 C.T. (Rate) dated 29.03.2019 which amends Notification No. 12/2017 C.T. (Rate) dated 28.06.2017, it can be said that sale of TDRs or Additional FSI is a supply of service which is taxable on reverse charge basis.

04. HEARING

Preliminary hearing in the matter was held on 20.11.2019. Sh. Nitin Shah, Advocate, appeared and requested for admission of their application. Jurisdictional Officer Sh. Sachin Gaikwad, State Tax Officer (C-311) Pune-2, also appeared and submitted written submissions.

The application was admitted and called for final hearing on 12.12.2019. Sh. Nitin Shah, Advocate, appeared, made oral and written submissions. Jurisdictional Officer Sh. Sachin Gaikwad, State Tax Officer (C-311) Pune-2 along with the Sh. B.C. Khandale, Asstt. Commissioner of S.T. Pune -2, appeared and made oral submissions.

05. OBSERVATIONS

- 5.1 We have gone through the facts of the case, documents on record and submissions made by both, the applicant as well as the jurisdictional officer. The basic issue before us is, whether GST is leviable on sale of TDR/ FSI received as consideration for surrendering the joint rights in land in terms of Development Control Regulations.
- 5.2 We find that vide F. No. 354/32/2019-TRU dated the 14th May, 2019, the Government of India, Ministry of Finance, Department of Revenue (Tax Research Unit), New Delhi has issued FAQs (Part II) on real estate. Sr.No. 7 of the same is reproduced below:-

Sr.No.	Question	Answer
7	<p>In the formula prescribed under first proviso to Entry 41A of the Notification 12/2017- CT (R), as amended by Notification 4/2019 CT (R), what rate shall be taken to determine the value to be ascribed to the "GST Payable on TDR or FSI or both for construction of the residential apartments in the project but for exemption contained therein" as no specific rate has been prescribed in Notification 11/2017 CT-Rate or any other notification?</p> <p>What is the rate applicable to output supply of TDR or FSI?</p> <p>Whether the quantum of TDR or FSI (including additional FSI) or both shall be taken only in respect of un-booked apartments as on the date of issuance of Completion Certificate or first occupation of the project for the purpose of formula?</p>	<p>The GST on transfer of development rights or FSI (including additional FSI) is payable at the rate of 18% (9% + 9%) with ITC under Sl. No. 16, item (iii) of Notification No. 11/2017 - Central Tax (Rate) dated 28-06-2017 (heading 9972).</p> <p>There is no exemption on TDR or FSI (Addl. FSI) for construction of commercial apartments. Therefore, GST shall be payable on TDR or FSI (including additional FSI) or both used in respect of (i) carpet area of commercial apartment and (ii) un-booked residential apartments as on the date of issuance of Completion Certificate or first occupation of the project for the purpose of formula.</p>

From the above table it is very clear that GST is payable at the rate of 18% (9% + 9%) on transfer of development rights or FSI (including additional FSI), under Sl. No. 16, item (iii) of Notification No. 11/2017 - Central Tax (Rate) dated 28-06-2017 (Heading 9972).

5.3 Notification No. 4/2018 C.T. (Rate) dated 25 January 2018 was issued and it specifies the incidence of tax under CGST for construction in case of transfer of development rights made. The same is reproduced below:-

Notification No. 4/2018-C.T.(Rate), dated 25.01.2018 issued vide [F. No.354/13/2018 -TRU].
G.S.R.....(E).- In exercise of the powers conferred by section 148 of the Central Goods and Services Tax Act, 2017 (12 of 2017), the Central Government, on the recommendations of the Council, hereby notifies the following classes of registered persons, namely :- (a) registered persons who supply development rights to a developer, builder, construction company or any other registered person against consideration, wholly or partly, in the form of construction service of complex, building or civil structure; and (b) registered persons who supply construction service of complex, building or civil structure to supplier of development rights against consideration, wholly or partly, in the form of transfer of development rights, as the registered persons in whose case the liability to pay central tax on supply of the said services, on the consideration received in the form of construction service referred to in clause (a) above and in the form of development rights referred to in clause (b) above, shall arise at the time when the said developer, builder, construction company or any other registered person, as the case may be, transfers possession or the right in the constructed complex, building or civil structure, to the person supplying the development rights by entering into a conveyance deed or similar instrument (for example allotment letter).



5.4 Further, in Notification No. 13/2017-C.T. (Rate) as amended by Notification no 5/2019-C.T. (Rate) dated 29.03.2019, Service by way of transfer of development rights/ Additional FSI by any person to promoter were made taxable under reverse charge mechanism.

A reading of all abovementioned Notifications along with the FAQ, show that transactions of transfer of development rights/Additional FSI are taxable under GST Laws @ 18% (9% CGST+ 9% SGST) under Sl. No. 16, item (iii) of Notification No. 11/2017 – C.T. (Rate) dated 28.06.2017 (Heading 9972).

06. In view of the extensive deliberations as held hereinabove, we pass an order as follows:

ORDER

(Under Section 98 of the Central Goods and Services Tax Act, 2017 and the Maharashtra Goods and Services Tax Act, 2017)

NO.GST-ARA- 40/2019-20/B- 06 Mumbai, dt. 15/01/2020

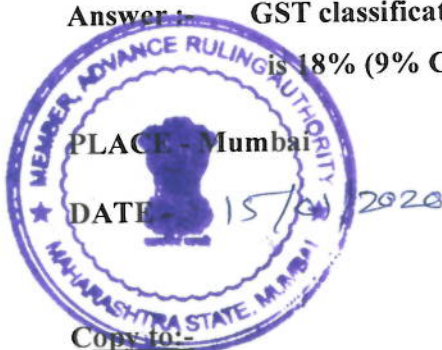
For reasons as discussed in the body of the order, the questions are answered thus –

Question A :- Whether GST is leviable on sale of Transferable Development Rights ('TDR')/ Floor Space Index ('FSI') received as consideration for surrendering the joint rights in land in terms of Development Control Regulations and granted in light of the article of agreement dated 18 December 2017 entered between the Applicant and Pune Municipal Corporation ('PMC') read with Development Control Regulations?

Answer :- Answered in the affirmative.

Question B:- If yes, what will be classification under GST and what will be applicable rate of GST?

Answer :- GST classification will be under Heading 9972 and the applicable rate of GST is 18% (9% CGST+ 9% SGST).



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P. VINITHA SEKHAR
(MEMBER)

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A.A. CHAHURE
(MEMBER)

CERTIFIED TRUE COPY

Copy to:-

1. The applicant
2. The concerned Central / State officer
3. The Commissioner of State Tax, Maharashtra State, Mumbai
4. The Chief Commissioner of Central Tax, Churchgate, Mumbai
5. Joint commissioner of State Tax, Mahavikas for Website.

Note :- An Appeal against this advance ruling order shall be made before The Maharashtra Appellate Authority for Advance Ruling for Goods and Services Tax, 15th floor, Air India building, Nariman Point, Mumbai – 400021.

sd-
MEMBER
ADVANCE RULING AUTHORITY
MAHARASHTRA STATE, MUMBAI