

# **REAL ESTATE & GST**

## **KEY OBSERVATIONS BY HC AND SC!**

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[11<sup>th</sup> May 2024]

**CA Pritam Mahure and Associates!**

## Click on the Topics

**JDA**

**TDR**

**Free Units**

**Value**

**Land  
Deduction**

**Time of  
Supply**

**ITC**

**Sale by  
Landowner**

**Works  
Contract**

**Renting /  
Leasing**

# JDA!

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# In JDA – Developer is providing service of construction!

**N Bala Baskar**

[2016 (43) STR 161  
(Mad.)]

Para 22/23

\* Service Tax

- ...At the outset, we have to point out that the **agreement for development** entered into ...in whatever manner worded, is an agreement for the construction of about 15,600 sq.ft of super built up area in the land that belongs to the petitioner and his siblings. It may be true that after construction, the parties may exchange the constructed area for the undivided share of the land. But, the agreement can also be looked at from another angle. ... It is also possible for the Department to contend that a person, who is the **owner of the land**, had **engaged a contractor to put up a construction for themselves** upto a particular limit. Since the cost of construction could not be paid by the owner in the form of cash, they agreed to **exchange** the undivided share of the land with the contractor. ..., **what the developer had done is actually the service of construction**. Therefore, it is not an easy proposition that it was a transfer of immovable property by way of sale or exchange.”

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# Share of revenue of JV - Not a service!

## Mormugao Port Trust

[2017 (48) STR 69  
(Tri. Mum.)]

Para 2

- Service Tax
- Affirmed in 2018 (19) GSTL J118 (SC)

- *Having gone through the impugned judgment passed by the Customs, Excise and Service Tax Appellate Tribunal (CESTAT) and the reasoning given, no interference of this Court is called for.*
- [Tribunal - “23. We are accordingly of the view that there is **no service** that has been rendered by the Appellant, much less the taxable service of renting of immovable property. The **money flow** to the Assessee from SWPL, under the nomenclature of Royalty, is **not a consideration** for rendition of any services but infact represents the Appellant’s **share of revenue** arising out **of the Joint Venture** being carried on by the Assessee and SWPL”].

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# TDR!

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# TDR – Not equivalent of ‘sale of land’!

**Prahita  
Construction Pvt  
Ltd**

[2024 (83) GSTL  
129 (Telangana)]

Para 29/ 39

\* GST

- *what is apparently visible is that, there was **no outright sale of land** being effectuated and the JDA per se cannot be considered merely as a medium adopted by the landowner selling his land and the **JDA does not lead to sale of land** by itself.*
- *In the **absence of any cogent and substantial material** to establish right, title and ownership being created in favour of the petitioner/developer, the **transfer of development rights** as it stands is amenable to GST and **cannot be brought within the purview of Entry 5** of Schedule-III of the GST Act*

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# Sadoday Builders, B.C. Srinivasa Shetty - Distinguished!

**Prahita  
Construction Pvt  
Ltd**

[2024 (83) GSTL  
129 (Telangana)]

Para 38

\* GST

- *As far as the various judgments cited by the learned Senior Counsel for the petitioner which are reflected in paragraph No.14, if we look into the facts of each of those judgments, it will be evidently clear that **all those judgments were rendered under an entirely different factual backdrop unconnected and unrelated** to the issue involved in the present case.*

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# TDR – Is Immovable property!

## DLF COMMERCIAL PROJECTS

[2019 (27) GSTL  
712 (Tri. - Chan.)

Para 16

- Service Tax

- *As the Hon'ble High Court observed in the case of **Sadoday Builders** Private Ltd. and Ors. (supra) that **transferrable development right is immovable property**, therefore, the transfer of development rights in the case in hand is termed as immovable property in terms of Section 3(26) of General Clauses Act, 1897 and no service tax is payable as per the exclusion in terms of Section 65B(44) of the Finance Act, 1994*

# TDR – Is an immovable property!

**Chheda Housing  
Development  
Corporation**

[2007 (2) Bom. CR  
587]

Para 16

- GCA, 1897

- *FSI/**TDR** being a benefit arising from the land, consequently must be held to be **immovable property**.*

# TDR – Is an immovable property!

**Sadoday Builders**  
Private Ltd

[MANU/MH/079/2  
011 ]

Para 5

- GCA, 1897

• *The principal issue which arose before the learned Joint Charity Commissioner as to whether the **TDR** could be termed as a movable property, **is concluded** and is **no more res integra** in view of the judgment of the Division Bench of this court reported in 2007(3) Mh.L.J. 402 in the matter of Chheda Housing Development... If, therefore, any **benefit arises out of the land, then it is immovable property.***

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# Benefit arising out of land - Is an immovable property!

**Titaghur Paper Mills**

[1985 AIR 1293]

- Orissa Sales Tax, 1897

*• In addition to the right to enter upon the land for the above purpose, there are other important rights flowing from the bamboo contract which we have already summarized earlier and which make it clear that what the bamboo contract granted was **a benefit to arise out of land** which is an interest in **immovable property**. The attempt on the part of the State Government and the officers its Sales Tax Department to bring to tax the amounts payable under the bamboo contract was, therefore, not only unconstitutional but ultra vires the Orissa Act."*

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# Surface right – Not main service!

RAJASTHAN STATE  
MINES &  
MINERALS LTD.

[2020 (35) G.S.T.L.  
561 (Tri. - Del.)]

Para 18

- Service Tax

- *The provisions of Mines and Minerals Act, clearly state that the element of **surface right is not the main activity** in the mining operation, but it is only incidental to that. In such a situation, the **incidental activity cannot be treated as a main** activity, which is mining and benefit arising out of law, to be an independent service under the category of renting of immovable property service.*

# FREE UNITS!

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# Levying tax on landowner's units will lead to double tax!

## Vasantha Green Projects

[2019 (20) GSTL 568 (Tri. - Hyd.)]

Para 41

- Service Tax
- Appeal Pending before SC [2022 (60) GSTL J53 (SC)]

• ...Accordingly the Developer is discharging the Service Tax on the Gross Revenue amounting to Rs. 346.12 Crores, against sale of Villas belongs to the Developer, from and out of which the **construction cost** of Built-Up areas supposed to be shared to the Land Owners, shall be borne by the Developer, against the **Land on Barter System**... This leads to conclusion that it is evident that appellant has complied with the service tax liability on the construction undertaken on joint development basis on the value of construction which is mandated in Section 67 of Finance Act, 1994, read with rules made thereunder. In our view, **if once the service tax liability has been discharged** on the gross amount, demand of service tax on the same amount again **would amount to double taxation**.

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# No tax on free units to society members!

Ethics Infra Dev.  
Pvt Ltd

[ST Appeal 85459  
of 2020 (Tri. -  
Mum.)]

Para 4.8

- Service Tax

• In the present case the respondent has **discharged the complete** service tax **liability** on the **gross amount received** by him for providing the taxable services. Once he have discharged the tax liability on the gross consideration received by him by the sale of flats to new buyers, the **demand** of service tax **for the flats handed over to the existing members** of the societies **without any consideration** cannot be sustained.

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# Developer does not appear to be works contractor for Society!

## Sujal Developers

[2013 (31) STR 523  
(Guj.)]

Para 13

- Service Tax

• ...from the development agreement, **it does not appear** that the respondent-developer is a contractor who is **executing the construction work on behalf of the society**. Here, the developer is using its own finances and developing the land in question and selling the property constructed thereon to the members of the society. ...Thus, in the light of the clarification issued by the Board, viz., when it is only after the completion of the construction and full payment of the agreed sum that a sale deed is executed and only then, the ownership of the property gets transferred to the ultimate owner, in such a case, any service provided by such seller in connection with the construction of residential complex till the execution of such sale deed, would be in the nature of **“self-service”** and consequently, would not attract service tax.

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# VALUE!

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# ‘Gross amount charged’– For service only!

Larsen & Toubro  
Ltd

[2015 (39) STR 913  
(SC)]

Para 41

\* Service Tax

- *Further, the finding that Section 67 of the Finance Act, which speaks of “gross amount charged”, only speaks of the **“gross amount charged” for service** provided and **not the gross amount of the works contract as a whole from which various deductions have to be made** to arrive at the service element in the said contract.*

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# LAND DEDUCTION!

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# Land sale – Not subject to tax!

## DLF COMMERCIAL PROJECTS

[2019 (27) GSTL  
712 (Tri. - Chan.)

Para 18/ 19

- Service Tax

- *We also take a note of the fact that the land owning company have not transferred any development right in favour of the appellant from the facts before us. Therefore, it cannot be said that the appellant has transferred any development right of land to M/s. DLF Ltd.*
- *In view of above discussions, we hold that the activity in question which is only **acquisition of land**, therefore, **no service tax is payable** by the appellant in terms of Section 65B(44) of the Finance Act*

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# Land – Levying a tax on land not permissible!

Suresh Kumar  
Bansal

[2016 (43) STR 3  
(Del.)]

Para 37

- *Levying a tax on the constituent goods or the **land** would **clearly intrude** into the legislative field reserved for the States under List-II of the Seventh Schedule to the Constitution of India...*

\* Service Tax

# Abatement – Cannot substitute lack of statutory machinery!

Suresh Kumar  
Bansal

[2016 (43) STR 3  
(Del.)]

Para 39/ 53

\* Service Tax

- *In order to sustain the levy of service tax on services, it is essential that the machinery provisions **provide for a mechanism for ascertaining** the measure of tax, that is, the **value of services** which are charged to service tax.*
- *The **abatement** to the extent of 75% by a notification or a circular **cannot substitute the lack of statutory machinery** provisions to ascertain the value of services involved in a composite contract.*

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# 1/3<sup>rd</sup> Deduction – Contrary to GST Act!

**Munjaal  
Manishbhai Bhatt**

[RSCA No. 1350 of  
2021]

Para 118/119

\* GST Act

- Thus, it has been clarified by the Parliament that **Schedule II** to the GST Acts is **not meant to define or expand the scope of supply** but only to clarify whether a transaction will be supply of goods or service if such transaction qualifies as supply. Such clarification is required since there are different tax rates for goods and services.
- ...whether deduction towards land value can be stipulated by way of **uniform rate of 1/3rd**. Detailed reasons have been given to show how such deeming fiction is not only **contrary to the scheme of the GST Acts** but also it is grossly arbitrary and violating Article 14 of the Constitution.

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# TIME OF SUPPLY!

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# TDR - Always taxable, Not. No. 4/2018 only provides for time!

**Prahita  
Construction Pvt  
Ltd**

[2024 (83) GSTL  
129 (Telangana)]

Para 36

\* GST

- ... The **Notification No. 4 of 2018** dated 25.01.2018 ... it is not with which there is a charge created on the transfer of development rights, **but in fact only provide for the time** ... In other words, the aforesaid notification deals with the time of supply of services of **transfer of development rights** which **was** otherwise **always taxable**, since introduction of GST, has now been postponed to a time **when the petitioner transfers the possession** of the constructed/developed area to the landowner.

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# When does developer receive right to sell is a critical fact!

**Prahita  
Construction Pvt  
Ltd**

[2024 (83) GSTL  
129 (Telangana)]

Para 39

\* GST

- ... until the completion of the project takes place, the petitioner does not get any right on the said property and it is **only after the completion of the project**, issuance of completion certificate, **the petitioner derives the right to sell the area** of property which stood allotted to him for the realization of amount of money invested by him in the course of execution of the JDA

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# ITC!

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# Reversal – Not required on obtaining of completion certificate!

**Alembic Ltd**

[2019 (29) GSTL  
625 (Guj.)]

Para 16/17

\* Service Tax

- As at the time of taking credit, there was no existence of any exempted service, therefore, there is no application of Rule 6. That part of the service **was exempted only after obtaining completion** certificate and thereafter, the respondent was not required to avail the Cenvat credit on the input service, if any, received after obtaining the completion certificate.
- From the above sub-rule (4), it is clear that even if an output service provider avails the credit and output service becomes exempted in such case the credit only in respect of inputs lying in stock or is contained in taxable service is required to be paid whereas there is **no provision for payment of Cenvat credit equivalent to the input services** used in respect of exempted service. Therefore, Cenvat credit availed in respect of input service is not required to be paid back under any circumstances

# SALE BY LANDOWNER!



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# Landowner – Flat sold before completion will attract tax!

Subhash Chand  
Surana

[2019 (21) G.S.T.L.  
533 (Tri. - Del.)]

\* Service Tax

- Thus, it becomes clear that the **flats sold by the land owner before the completion** certificate was obtained i.e. before 20th March, 2012 **will invite the liability of Service Tax upon the land owner**. However, the flats sold after the said date of receiving completion certificate, since no more construction services were rendered after the said date, the land owner will not invite any liability to the Service Tax.

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# WORKS CONTRACT!

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# Sale of flat 'before' construction is 'works contract'!

**K. RAHEJA  
DEVELOPMENT  
CORPORATION**

[2006 (3) STR 337  
(SC)]

Para 18

\* Karnataka Sales Tax Act

- Thus the Appellants are undertaking to build as developers for the **prospective purchaser**. Such construction/development is to be on payment of a price in various instalments set out in the Agreement. As the **Appellants are not the owners they claim a "lien"** on the property. Of course, under clause 7 they have **right to terminate** the Agreement and to dispose off the unit if a breach is committed by the purchaser. However, **merely having such a clause** does not mean that the agreement ceases to be a works contract within the meaning of the term in the said Act. All that this means is that **if there is a termination** and that particular unit is not resold but retained by the Appellants, there would be no works contract to that extent. But so long as there is no termination the construction is for and on behalf of purchaser. Therefore, it **remains a works contract** within the meaning of the term as defined under the said Act.

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# Sale of flat 'after' construction is not a 'works contract'!

**K. RAHEJA  
DEVELOPMENT  
CORPORATION**

[2006 (3) STR 337  
(SC)]

Para 18

\* Karnataka Sales Tax Act

- *It must be clarified that if the agreement is entered into after the flat or unit is **already constructed**, then there would be **no works contract**. But so long as the agreement is entered into **before the construction** is complete it would be a **works contract**.*

# 'Works contract' definition - Is an inclusive and wide!

**K. RAHEJA  
DEVELOPMENT  
CORPORATION**

[2006 (3) STR 337  
(SC)]

Para 15

\* Karnataka Sales Tax Act

- ...the definition of the term 'works contract' in the said Act is an **inclusive** definition. It does not include merely a works contract as normally understood. It is a **wide definition** which includes **"any agreement" for carrying out building or construction activity** for cash, deferred payment or other valuable consideration. ...For the purposes of considering whether an agreement amounts to a works contract or not, the provisions of the **Karnataka Ownership Flats (Regulation of Promotion of Construction, Sales, Management and Transfer) Act, 1974 will have no relevance**

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# Works contract – Centre can tax ‘service’ element and State can tax ‘goods’ element!

Larsen & Toubro  
Ltd

[2015 (39) STR 913  
(SC)]

Para 16

\* Service Tax

- When it comes to **composite indivisible works contracts**, such contracts can be taxed by Parliament as well as State legislatures. **Parliament can only tax the service element** contained in these contracts, and the **States can only tax the transfer of property in goods** element contained in these contracts. Thus, it becomes very **important to segregate the two elements completely** for if some element of transfer of property in goods remains when a service tax is levied, the said levy would be found to be constitutionally infirm.

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# Works contract – A separate species of contract!

Larsen & Toubro  
Ltd

[2015 (39) STR 913  
(SC)]

Para 17

\* Service Tax

- ...**works contract is a separate species of contract** distinct from contracts for services simpliciter recognized by the world of commerce and law as such, and has to be taxed separately as such. In **Gannon Dunkerley**, 1959 SCR 379, this Court **recognized** works contracts as a separate species of contract...

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# Separate contracts - May entail separate tax implications!

**GANNON  
DUNKERLEY &  
COMPANY  
(MADRAS) LTD.**

[1958 AIR 560]

Para 57

\* Entry 48 in List II of Sch. VII to the GoI Act, 1935, "Taxes on the sale of goods"

- To avoid misconception, it must be stated that the above conclusion has reference to **works contracts, which are entire and indivisible**, as the contracts of the respondents have been held by the learned Judges of the Court below to be. The several forms which such kinds of contracts can assume are set out in Hudson on Building contracts, at p. 165. **It is possible** that the **parties might enter into distinct and separate contracts**, one for the transfer of materials for money consideration, and the other for payment of remuneration for services and for work done. **In such case, there are really two agreement, though there is a single instrument** embodying them, and the power of the State to separate the agreement to sell, from the agreement to do work and render service and to impose a tax thereon cannot be questioned, and will stand untouched by the present judgment.

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# RENTING/ LEASING!



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# Lease of 99 years – It's a service and not sale!

**Builders  
Association of  
Navi Mumbai**

[2018 (12) GSTL 3  
(Bom.)]

Para 16

\* GST

- ...in this case as the **transfer** is **of leasehold interest** in immovable property **for 99 years** and **not an outright sale** or transfer of the complete interest of the transferor in the immovable property
- The **CIDCO** is one such authority. It is entirely for the legislature, therefore, to exercise the powers conferred by sub-section (2) of Section 7 of the GST Act and issue the requisite notification. **Absent that notification**, merely going by the status of the CIDCO, we cannot hold that the **lease premium** would not attract or invite the liability to pay tax in terms of the GST Act.



# Legislative competence under Entry 49 – Pending before nine judges bench!

UTV News Ltd  
[2018 (13) GSTL 3  
(SC)]

Para 3

Service Tax

(Whether CG can levy ST on Renting of Immovable Property?)

- ...scope and ambit of **Entry 49 of List II** of the Seventh Schedule to the Constitution of India dealing with “Taxes on lands and buildings”. If the impost/levy is **directly relatable** to the lands/buildings contemplated in Entry 49 of List II of the Seventh Schedule to the Constitution of India we would have had **no hesitation in saying that the Union Parliament would lack legislative competence** to enact the particular provision in the Finance Act, 1994
- Whether such **indirect connection or relation** would be **of any relevance** to decide the issue of legislative competence appears to be **pending before a nine judges Bench** of this Court on a reference made in an order in **Mineral Area Development Authority and Others...**

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Thank you!

**CA Pritam Mahure and Associates**

**Happy to Discuss**

For suggestions: [Pritam.Mahure@Lawgical.in](mailto:Pritam.Mahure@Lawgical.in) / [Sahil.Tharani@Lawgical.in](mailto:Sahil.Tharani@Lawgical.in) / +91 99206 44648 / 90988 90333

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