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INDIRECT TAX UPDATE

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One third deduction towards value of land held to be optional under Goods and Services Tax (GST) Law

Munjaal Manishbhai Bhatt v. Union of India, [R/Special Civil Appeal No. 1350 of 2021 (Gujarat High Court), decided on May 6, 2022]

Facts of the Case:

- (a) The petitioner entered into an agreement with the developer for i) Sale of land and ii) construction of bungalow on such land. Separate and distinct consideration was agreed upon for each of the activities.
- (b) For the construction activity, the developer raised an invoice charging 9% Central GST and 9% State GST on the entire consideration payable for land and construction of bungalow after deducting 1/3rd of the total amount towards land. Such mechanism was adopted in accordance with entry no. 3(if) of the Notification No. 11/2017-Central Tax (Rate) dated June 28, 2017 ("**Notification**") read with para 2 thereof.
- (c) Being aggrieved by the valuation mechanism prescribing deduction of 1/3rd of the total amount of consideration towards land instead of its actual value, which was separately identifiable, a petition was filed challenging the Notification to such extent.
- (d) The petitioner contended, *inter-alia*, that by virtue of Section 7(2) of the Central GST Act, 2017 ("**CGST Act**"¹) read with Schedule III thereto, sale of land is neither supply of goods nor services. Hence, imposition of tax on consideration received towards sale of land by virtue of the delegated legislation via the Notification is *ultra-vires* the provisions of the CGST Act.
- (e) The respondents argued, *inter-alia*, that the exclusion clause on account of sale of land would not be applicable since the transaction is for sale of a developed piece of land and not a plain land *per se* and is subject to various terms and conditions under the agreement. The respondents also argued that the value of land cannot be determined basis the booking agreement, which is decided *inter-se* between the parties, and the parties may artificially fix a higher value for land so as to reduce the tax liability under the GST Acts.

Observations:

The Court while allowing the petition, made the following observations:

- i. In view of the history of imposition of indirect tax on construction service, the legislative intent is to impose tax on construction activity undertaken by a supplier at the behest of or pursuant to contract with the recipient. There is no intention to impose tax on supply of land in any form even under the GST Laws.
- ii. In terms of the minutes of the meeting of the 14th GST Council, which led to the insertion of the Notification, the deduction was contemplated only in the context of flats wherein it was difficult to ascertain the value of the undivided share of land. However, in the actual Notification, a standard rate of deduction was provided

¹ Reference made to CGST Act is similar to the provisions under the respective State GST Act, unless specified otherwise.

irrespective of the nature of the transaction. Therefore, such mechanism is arbitrary in nature and violative of Article 14 of the Constitution.

- iii. The department's contention that the deduction is not available for a developed piece of land is untenable since no such restriction has been stipulated by the Notification. Thus, Schedule III to the CGST Act covers sale of developed land as well.
- iv. When Section 15 of the CGST Act requires valuation as per actual price for the service and where such price is available, tax has to be imposed on such actual value and the deeming fiction cannot be applied mandatorily. Hence, para 2 of the impugned Notification deeming such value is arbitrary and *ultra-vires* the provisions and scheme of the GST laws.
- v. Further, with respect to the contention of the respondents qua determination of value of the land as per the agreement between the parties, it was observed that the possibility of obtaining indirect consideration cannot be ruled out for any supply transaction. However, if it is found that the value declared by the supplier is incorrect, recourse could be adopted under Section 15(4) of the CGST Act and rules framed thereunder. Therefore, determining the value basis the deeming fiction was unsustainable.
- vi. Even under the erstwhile service tax law, the valuation rules provided for a deduction of land basis a fixed percentage only where the actual value was not ascertainable and not otherwise.

Judgment:

Accordingly, the petition was allowed by the Gujarat High Court and impugned para 2 of the Notification was read down to the effect that the deeming fiction of 1/3rd of the total amount will not be mandatory in nature. ***It was held that the deeming fiction will only be available at the option of the taxable person in cases where the actual value of land or undivided share in land is not ascertainable.***

The Court further directed the GST authorities to refund the excess tax collected along with interest at the rate of 6% per annum.

Argus Comments:

Using the aforesaid judgment, the recipients of construction services may explore possibilities of claiming refund of excess GST paid where the value of land is separately identifiable, and burden of tax has not been passed on to another person.

Contributed by the Indirect Tax team

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