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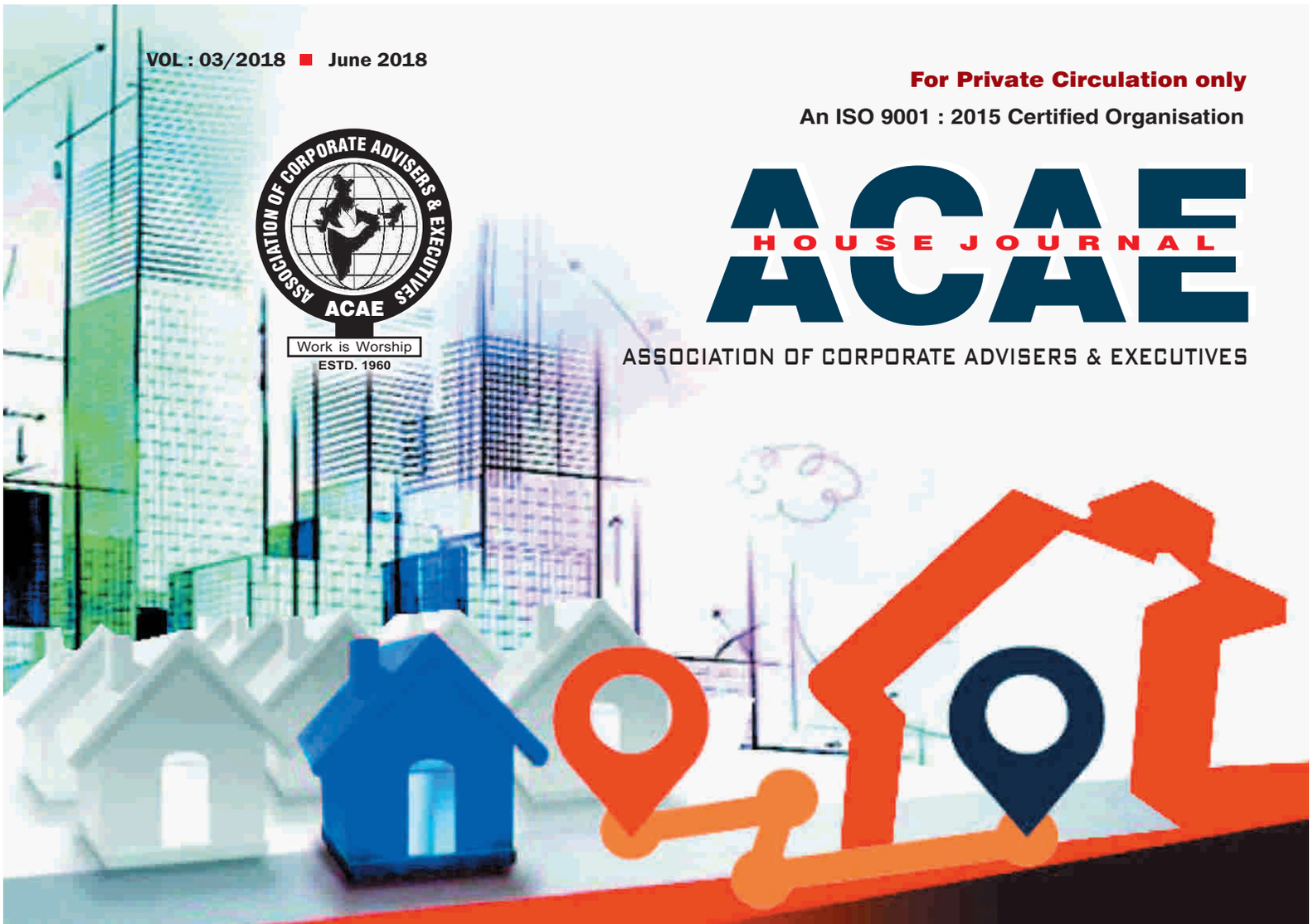
ACAE HOUSE JOURNAL

ASSOCIATION OF CORPORATE ADVISERS & EXECUTIVES



SPECIAL ISSUE ON

REAL ESTATE CONCLAVE

Challenges in Changing Times!

Highlights

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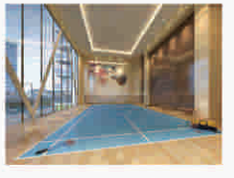

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Editorial

Dear Members,

To begin with, we would like to quote a famous American financer and politician, Russell Sage, "Real estate is an imperishable asset, ever increasing in value. It is the most solid security that human ingenuity has devised. It is the basis of all security and about the only indestructible security."

Under the shadow of the above saying, we are organizing a Real Estate Conclave, Challenges in Changing Times, with eminent speakers being part of the discussion on burning issues in the Real Estate Sector and the impact of the major reforms. The Conclave is scheduled on 9th June, 2018, at The Park, Kolkata.

This Issue of the Journal consists of eloquent articles by acclaimed writers from all over India. The Journal mainly deals with various areas related to the Real Estate Sector, which comprises of Accounting Issues, GST Impact, The Insolvency and Bankruptcy Code, Anti Profiteering in Real Estate Sector, Real Estate Investment Trust, Special Purpose Vehicle and others.

We hope the discussion and the analysis on the subject matter proves to be useful to the Readers and the Delegates attending the Real Estate Conclave, 2018.

We would request all the Members to share their observations and feedback on this Issue which will help us to improve the construction and contents of the Journal and will also serve as a tool for continued learning.

We wish to encourage more contributions / suggestion / feedback from the Members to ensure continued success of the Journal.

We are also sincerely thankful to our President and Chairman - Conclave Committee for giving us this responsibility and keeping faith on us.

Thank you. We hope you will find this Issue informative.

From
Editorial Board

ACAE HOUSE JOURNAL
VOL : 03/2018 June 2018

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President Speaks

Welcome ACAE Members/Delegates,

The 2018 Real Estate Conclave, "Challenges in Changing Times" is taking place on 9th June, 2018 at contemporary luxury hotel, The Park, Kolkata.

In technical partnership with CREDAI BENGAL, Association of Corporate Advisers & Executives (ACAE) is organizing a full day conclave, focusing pre-dominantly on real estate issues encountered by the mass today. It shall involve a healthy deliberation and active discussion among the attendants.

ACAE was formed as a society in 1960 with the main objective of providing a common forum for discussion of contemporary issues related to corporate laws, taxation, audit, accounts, NBFC, capital market, fiscal and monetary policies. It has also proven to be a successful forum for holding symposium on matters relating to international and national tax issues, financial market, corporate laws, banking and many more.

The Real Estate Sector is one of the most globally recognized sectors. In India, real estate is the second largest employer after agriculture and is slated to grow at 30% over the next decade. The growth of this sector is well complemented by the growth of the corporate environment. The Indian Real Estate Sector has witnessed high growth in recent times with the rise in demand for office as well as residential spaces. Emergence of nuclear families and rapid urbanization are likely to remain the key drivers for growth of real estate. From April 2015 to March 2018, the retail segment in Indian realty attracted private equity investments of around Rs. 5,500 crore (US$ 853.4 million). The Government has also raised FDI limits for townships and settlements development projects to 100%. Real estate projects within the Special Economic Zone (SEZ) are also permitted with 100% FDI.

Emboldened by the astounding response, the previous Real Estate Conclaves, held by ACAE, has achieved, we are too inspired on holding Conclave. Shri Firhad Hakim, Hon'ble Minister of Urban Development & Municipal Affairs, Govt. of West Bengal, shall be honored as the Chief Guest of the programme. Technical sessions shall be held by eminent speakers on topics like Integral Accounting Issues, Taxation Issues and Complexities, Legal issues including RERA.

In the light of the famous quote by Winston Churchill, "Difficulties mastered are opportunities won", we shall come together and assimilate the knowledge we gather. Both, the Conclave and this Issue of the Journal shall revolve around the Real Estate Sector and comprise of bountiful discussion on the same.

I deeply believe that this Issue shall add value to the knowledge of the Members and will assist them in all ways by enriching the experience of our Members. The impact of the new policies like GST and RERA, which has revolutionized the real estate sector, is where the cynosure of this Journal is. The major reforms are envisioned to be beneficial both to the builder as well as the buyer in assorted ways.

I would take this opportunity to thank the Editorial Board, Chairman CA Vivek Newatia and Co-Chairman, CA Niraj Harodia, for bringing out this Issue and also to the Conclave Committee Chairman, Mr. Rishi Khator and the Conclave Committee Members for organizing the Conclave on such a scale. We sincerely hope that this Issue shall be appreciated by the Members to ensure a continued success of the Journal.

We desire to learn and improve, which your feedback can assist.

Best Regards
CA Arun Kumar Agarwal
President
05.06.2018

Chairman

Message - Real Estate Conclave Committee

Dear Valued Reader,

Amidst the heat of summer with the sweet expectation of forthcoming rains, putting together my thoughts for this message has coincided with a very positive development – notification (on June 1, 2018) of West Bengal Housing Industry Regulation Act (HIRA). The Act was passed 9 months before by the Assembly. It is expected that in another 3 months, regulator will be appointed, regulations will be framed, appellate tribunals will be setup and a fully functional website (where information on housing projects are uploaded) will be developed. Once HIRA is implemented, projects and developments will become more transparent, promoters will have to disclose the carpet area of apartments instead of quoting the super-built area and a grievance redress system will be in place. Already 21 states have notified RERA Rules and 13 have active online portal.

The notification of HIRA formalizes the confirmation with RERA, a central act ushering in transparency, uniformity and accountability in the Sector. The real estate community is looking forward to an early rollout of HIRA as it believes this will boost customer confidence and revive the industry that has seen sales stagnate since 2012-13. Demonetisation and GST in 2016 and 2017 dealt further blows, leaving the industry tattered.

We can also expect to see a shift in the Real Estate sector on the backdrop of technological advancement. Technology is pushing change in space use, locations and demand levels at an accelerated pace. But it is now the norm to anticipate, strategize, and respond to new technologies before they are in mainstream.

We, at ACAE, have followed a 360 degree approach and will deliberate the Real Estate issues in entirety. Thus we will discuss Accounting, Taxation (Direct and Indirect) and Legal aspects alongwith a separate QnA with Experts. I sincerely believe that the participants from the Industry and the professionals will have a lot of tangible takeaways from the Real estate Conclave – Challenges in Changing Times.

I also want to share with you the delightful experience of working with Credai as Technical Partner. Their valued inputs, specially from the President east, Mr. Nandu Belani, has much contributed to the structuring of this Conclave. Connections with other Organizations with similar visions or to work on common goals is always interesting and often fruitful. Thanks to the chances for our Association to support industry events.

I am thankful to the President CA Arun Agarwal for having given me this opportunity to serve you all as the Chairman of the Conclave. Before I conclude, I wish to place on record the sincere dedication and hard work of our Conclave Committee, which has enabled your Association and its Study Circle to organize the Conclave in this scale and size.

Wishing you rewarding knowledge sessions.

With Regards

CA Rishi Khator

Chairman, Real Estate Conclave

Keshari Nath Tripathi
GOVERNOR OF WEST BENGAL

RAJ BHAVAN
KOLKATA 700 062

1st June, 2018

Message

I am glad to learn that the Association of Corporate Advisers & Executives is organizing a Real Estate Conclave on 9th June, 2018 on the theme "Challenges in Changing Times".

I am sure that the deliberations in the Conclave will be useful in indentifying the challenges to ensure stable growth and development of the economy.

I wish the Conclave all success.

Keshari Nath Tripathi

ICAI President's Message

In a rapidly changing world, Chartered Accountants have evolved as a professional group with new concepts and procedures to meet the varied demand made by society on their skills. In view of this, it is essential for any dynamic and service oriented profession like ours to keep abreast with changing needs and expectations of the society.

A CA's knowledge and skill set allow them to provide wide range of services and guidance to the organization to help them render value in today's highly competitive environment. The ability to adapt to change is arguably one of the most important attributes that our members would need in this fast paced changing regulatory environment. ICAI always strives to maximize the full potential of its members so as to remain relevant in all situations. I am confident that our CAs would make their mark in the ever changing situations.

I am pleased to note that the ACAE Chartered Accountants' Study Circle - EIRC is organising a *Conclave on Real Estate*on the theme "Challenges in Changing Times!" on 9th June, 2018 at Kolkata. In the conclave varied topics of professional relevance relating to Real Estate Sector such as Integral Accounting issues including Ind AS, Direct Taxes Issues, Complexities in GST, RERA, Benami etc. will be discussed by the experienced and eminent speakers.

My compliments to all the organisers and I am sure participants will use the opportunity for their knowledge enrichment and updation to effectively utilise the opportunities in the Sector.

I wish the Conclave a grand success.

CA Naveen N.D. Gupta
President

ICAI Vice President's Message

Dear Members,

India is emerging as among the fastest growing economy globally, our infrastructure development must keep pace with our economic growth. The real estate market in India has unlimited scope, is the second largest employer in India and key catalyst for next level of growth. With the entry of new players, business models, legal frameworks and compliances, it is essential that the Chartered Accountants assist the sector in the strategic and financial management for growth of the sector.

I am glad that the ACAE CA Study Circle of EIRC of the Institute of Chartered Accountants of India is organizing a Real Estate Conclave on the theme 'Challenges in Changing Times!' on 9th June, 2018 in Kolkata. The Conclave will apprise the profession and industry, to emerging trends in the sector, regulatory changes and expectations of the sector from the profession.

The conclave will discuss and deliberate on emerging laws and regulations impacting real estate sector, taxation etcand will enable the members to understand the trends of the real estate sector, to be ready to serve the real estate industry. Our role as Chartered Accountant will become critically significant in guiding the sector to meet compliances and carry out due diligence, emerging out of new rules and regulations applicable to Real estate sector.

I commend the Study Circle for its commitment to provide such an informative platform to the Members, to further their knowledge, skill sets & assisting them in their career growth.

I wish all the delegates a fruitful, professionally enriching and a truly value-added experience from this workshop.

CA Prafulla Chhajed
Vice President

PROGRAMME

6 CPE HOURS

Registration	:	9.15 am to 9.45 am
Inaugural Session	:	9.45 am to 10.30 am
Chief Guest & Keynote Speaker	:	**Shri Firhad Hakim** *Hon'ble Minister of Urban Development & Municipal Affairs, Govt. of WB*
Guest of Honour	:	**Shri Debashis Sen, IAS** *Hon'ble Additional Chief Secretary, Govt. of WB & Chairman-cum-Managing Director, WBHIDCO Ltd.*
		Shri Nandu Belani *President, CREDAI Bengal*

FIRST TECHNICAL SESSION – 10.30 AM to 1.15 PM

Topics	Speakers
1. Integral Accounting Issues including Ind AS	**CA Dolphy D'Souza** *Partner, Ernst & Young Mumbai*
2. Direct Tax Issues	**CA Ashok Raghavan** Partner, NCS Raghavan & Co. Bengaluru

LUNCH BREAK : 1.15 pm to 2.00 pm

SECOND TECHNICAL SESSION – 2.00 PM to 5.15 PM

Topics	Speakers
1. Indirect Tax - Complexities in GST	**Shri J K Mittal** *Senior Advocate, Supreme Court Delhi*
2. Legal – RERA (HIRA - WB), Benami	**CA Vishnu Agrawal** *Senior Partner, S V Agrawal &. Associates, Indore*
3. Question & Answer Session with Experts	
Direct Tax	**CA S S Gupta** *Proprietor, S Swarup & Co., Kolkata*
Indirect Tax – GST	**CA Sushil Kr Goyal** *Central Council Member, Vice Chairman - Indirect Taxes Committee, ICAI*

Mr. Nandu Belani

Mr. Nandu Belani is a real estate icon heading the Belani Group who are the pioneers in real estate development in Kolkata. Today, his is a driving force behind the group, synonymous with the finest homes, commercial complexes and shopping malls. The Group has completed various landmark buildings like Belmont, IDBI, Woodburn Central, Convent Corner, Palacio just to name a few. He is also a founder member of the Hiland Group which has completed many successful ventures namely Hiland Park, Hiland Woods, Hiland Willows and is presently completing a 260 acre township namely Calcutta Riverside, the largest township project in eastern India.

Presently, Mr. Nandu Belani is the President of Credai Bengal and has been the Honorary Consul of Seychelles in Kolkata since 2009. Apart from carving a niche in real estate he has recently tied up for a collaboration with Terram U. K. and floated a company in India for setting up a Greenfield project in Gujarat, for manufacturing of Geosynthetic products.

CA Dolphy D'Souza

CA Dolphy D'Souza is a Chartered Accountant, Cost Accountant, Company Secretary from the relevant Indian Institutes and is also a Management Accountant from the London Institute. CA D'Souza is a leading figure in the Accounting and the Audit profession.

CA D'Souza is a Prolific Author and Speaker and he has authored a book "Ind AS- Interpretation, Issues and Practical Applications". He writes the well-known series for BCA titled "GAPs in GAAP". He is a member of various regulatory, corporate governance and accounting standard committees.

CA Ashok Raghavan

CA Ashok Raghavan has been practising as a Chartered Accountant since 1993. He is a Partner of M/s. N.C.S.Raghavan & Co., as well as of M/s. Raghavan, Chaudhuri and Narayanan, Bangalore. CA. Raghavan specializes in Income-tax, Company Law, Foreign Exchange Management Act, Property Laws, Documentation of various Agreements including Foreign Collaboration Agreements. He authored a Book on Tax Audit published by the SIRC of the Institute of Chartered Accountants of India (ICAI). He participated in various Seminars, workshops and conferences organized by various professional bodies including the ICAI throughout India.

CA Raghavan was the Chairman of Bangalore Branch of the SIRC of the ICAI during 2001-02. He was a Member of the Professional Development Committee of the ICAI during 2006-07 and he was also a Member of the Accounting Standard Board for Local Bodies of the ICAI for the year 2009-10. CA. Raghavan is currently a Member of the Managing Committee of the Karnataka State Cricket Association. He is a Trustee of Sri Balabyraweshwara Educational & Charitable Trust which has been carrying out Yeoman services of educating under-privileged children in Mandya District, Karnataka.

Mr. Jai Kumar Mittal

Mr. Jai Kumar Mittal is a Chartered Accountant turned Advocate. Mr. Mittal had started his Career as a Chartered Accountant in 1992, but later on joined the Law Profession in 2005. Besides being a Fellow Member of the Institute of Chartered Accountants of India he is also a Fellow Member of the Institute of Companies Secretaries of India.

Mr. Mittal is the CEO of M/s. J.K. Mittal & Co., Advocates and Legal Consultants, New Delhi. His Firm is specialized in Indirect Taxes matters. Mr. Mittal is regularly appearing in Tribunals, High Courts and also at the Supreme Court. Mr. Mittal is a Co-Chairman of the National Council on Indirect Taxes, ASSOCHEM. Mr. Mittal authored "Law, Practice & Procedure of Service Tax". He also authored – "Introduction to GST" and "Handbook on Equalisation Levy". Mr. Mittal addressed numerous Conferences, Seminars and Workshops organized by various professional bodies, Chambers of Commerce, Trade Association and other Organizations engaged for social causes, at several places in India.

CA Vishnu Agrawal

CA Vishnu Agrawal is a practising Chartered Accountant having wide professional experience of over 19 years. His core area of practice is RERA, Project Financing and Audit. Presently he is a Partner of M/s. S. V. Agrawal & Associates, Indore. Since the enactment of the Real Estate Regulation and Development Act, 2016 CA Agrawal has been very active in understanding the developments evolving in the sector. He delivered lectures on RERA and allied laws across various cities including Noida, Ghaziabad, Gwalior, Jhansi, Indore, Bhopal, Bhubaneshwar, Behrampur, Raipur, Bilaspur, etc. Mr. Agrawal was elected as an Executive Member of Indore Branch of the CIRC of the ICAI in 2013.

Apart from his profession, CA Agrawal is also associated with many organisations for the purpose of welfare of the society. He is the Treasurer of "The Indore Society for Organ Donation" whose main object is to create awareness among the society for organ donation, make available the platform for interested persons for organ and body donation.

CA S. S. Gupta

CA S. S. Gupta acquired C.A. Qualification in 1973 at an early age of 19, securing 1st Rank in Eastern Region in C.A. Final Examination. He worked as the Vice President (Finance) with the A.V. Birla Group. He established S. Swarup & Co., Chartered Accountants, in 1984 and over the years, has gained immense experience and expertise in Income-tax.

Owing to his expertise and experience, CA S. S. Gupta is a regular speaker in various Seminars and Symposiums organised by various Industry bodies, Chambers of Commerce and the ICAI. He has addressed Symposiums in Singapore, Thailand, Nepal etc. on Double Taxation Avoidance Agreement and other allied topics. CA S. S. Gupta is associated with a number of professional associations.

CA Sushil Kr. Goyal

CA Sushil Kumar Goyal is a Fellow Member of the Institute of Chartered Accountants of India (ICAI). He is presently an elected member of the Central Council of the ICAI for the term 2016 to 2019. Earlier he served as a member of the Eastern Regional Council of the ICAI for the period from 2007 to 2013. CA Goyal has been regularly providing services in the field of Indirect Taxes specially Service Tax since 1997. He has been a visiting faculty in NACEN, an institute for training Central Excise, Customs and Service Tax officers.

CA Goyal has spoken on the subject Service Tax/GST in more than 400 seminars, conferences, workshops and training programs. Apart from that he addressed a GST programme through webcast, which was watched online by almost 10000 CA students across the country. CA. Goyal authored a book on Service Tax titled "Service Tax Guide"(10th Edition). He is the Editor of monthly Service Tax bulletin "Tax Talk". He has also been sending Service Tax/GST daily tips through e-mail/Facebook/Whatsapp for more than a year, widely appreciated by all receivers as a small learning tool.

Challenges In Changing Times
– Mr. Nandu Belani

RERA (HIRA-WB) – Challenges in Changing Times
– CA Vishnu Agrawal

Good News for Home Buyers
– CA Sumit Binani

Real Estate Investment Trusts
– Ms. Shreya Routh

Use of Debentures for financing Real Estate SPVs
– Ms. Smriti Wadehra

Ind AS 115 - Revenue from Contracts with Customers : Implications for Real Estate
– CA Dolphy D'Souza

Real Estate IND AS 115 impact- Executive Summary
– Saubhik Sarkar & Rishabh Sureka

Renting of Immovable Property
– CA Sushil Kr Goyal

Impact of GST on Joint Development Agreement
– CA Pulak Saha

GST on under construction property – Completion Certificate Vs.First Occupation - Are the provisions clear?
– CA Tarun Kumar Gupta

GST on Joint Development Agreement
– CA Ankit Kanodia
Assisted by Ms. Bhavana Khemka

Anti profiteering in the Real Estate sector
– CA Shubham Khaitan

Challenges In Changing Times

Mr. Nandu Belani

It's been an action-packed year for the real estate sector. The year 2017, started on a slow note, with the sector still reeling under the shock of demonetisation-a policy measure announced by the government in November, 2016. Since then the country has witnessed a lot of ups and downs and so has the Indian real estate sector.With too many things happening in 2018, we sincerely look forward to a much fruitful and productive year. There have been some very important policy announcements in 2017 which had its positive-negative effects on the country's economy. Some of the important ones are:

- "Housing for All by 2022" which came with a number of benefits like availability of prime land parcels, access to funds and fast approval of incentivizing for the affordable housing projects.
- Announcement of RERA to bring complete transparency between buyers and sellers. This act primarily is consumer friendly and thus has raised the interests of home buyers and confidence among the consumers and amongst foreign investors. Important features of this Act are Mandatory registration, strong penalties, complete transparency and the restriction of withdrawal of the consumers money which is to be deposited in an escrow account.
- Introduction of GST in July 2017 aimed to dismantle multiple tax system.

In 2018, both buyers and developers expect an improvement in the real estate sector post introduction of the new government policies. The ultimate aim would be to keep the industry organized and to boost the housing segment. Introduction of Real Estate Investment Trust (REIT) and inflow of Private Equity (PE) funds will definitely have its positive effect on the real estate industry. In the context of the above the real estate sector will definitely face challenges and opportunities throughout the year some of which I have tried to concisely collate below.

- **Facing the Regulatory Pressure:**

Regulatory rules by the government have impacted the industry both positively and negatively.Developers will face the impact of RERA, restricting new construction and focusing more on completing the projects. RERA is expected to take care of all future buyer grievances. The implementation of two historic policies, the **Real Estate (Regulation & Development) Act,2016 and Goods and Service Tax(GST)** has had its effect on the industry. Businesses had to be realigned to comply with the stringent rules of RERA and GST. New project launches have slowed down and home prices seem to be under pressure. RERA has made developers put more focus on compliances. Demand of Luxury Homes has taken a back seat while Affordable homes are now the focus of the homebuyers.

It is difficult to quantify the exact impact of GST on property prices. 12% GST on real estate has been the biggest challenge. Consumers tend to hold on to their buying decisions in under construction stage and preferring to wait till the finish of the project, which will hugely affect the cash flow of the developers.While developers will be able to avail input credit on goods and services bought and used during the construction process, it is to be see how the benefit is passed

to the home buyers. GST is nevertheless expected to benefit affordable housing. The new tax regime is expected to keep real estate costs low for the affordable housing segment, thereby making it cheaper.

- **Single Window Clearance:**

The major obstacle a real estate developer faces is obtaining 15 numbers pre sanction clearances and No Objection Certificate (NOC) from various departments which usually takeanytime between 18 to 36 months. Single Window Clearance is the biggest challenge faced by the real estate developers. So implementing this method will not only bring down the project delivery deadline delay but also the cost of the project implementation. Thus single window clearance will definitely be a boost to the industry.

In 2018, the primary focus of the developers will be mainly on selling and completing the existing projects within the stipulated deadline. Hence, the year will witness major sales and delivery in the residential market, thanks to the guidelines laid down by RERA.

In the residential segment, we are likely to see fewer project launches, at least until developers are familiar with the new regulatory framework of RERA. Organised real estate developers, with access to institutional funding will find it easier to comply with RERA. We are already seeing new business models emerge, wherein developers are doing joint development of projects with land owners. RERA is expected to do a lot to improve confidence of home buyers in the real estate sector. It will usher in transparency, reduce delays and defaults in projects, introduce professionalism in the sector, improve accountability of developers towards home buyers, protect the interest of buyers and bring in standardisation in the sector.

To conclude, 2018 will continue to pose some challenges for the residential segment as far as home sales and prices are concerned. Developers will become more familiar with GST and RERA which would help them plan their businesses better. Office segment will continue to do well with strong office rentals. Home buyers will emerge as the ultimate winners with RERA acting as a catalyst and taking care of their worries.

Overall, we are very upbeat about 2018 being a year of changes amongst challenges…changes for the good, changes for the betterment of the country.

RERA (HIRA-WB) – Challenges in Changing Times

CA Vishnu Agrawal

Whenever a new law comes, it ushers in a multitude of opportunities and challenges. Since the inception and implementation of the Act across various states of the nation, there have been numerous ups and downs in its application. Utmost efforts have been made by state governments to ensure hassle free implementation of the same. However, it is the 'challenge' that makes the wheel of life rolling. While overcoming new challenges boosts confidence on one hand, it does also offer strength to overcome upcoming challenges. It is an indispensable part of life. Many more challenges are yet to come. HIRA has resulted in a structured, regulated and a disciplined Real estate Sector. HIRA has brought in exemplary opportunities for professionals like CAs, Engineers, Lawyers, etc.

An advantage which the Housing Industries Regulation Act (HIRA) enjoys is that it is a state law. This confers a privilege upon the Govt. of West Bengal because the provisions of this Act can be amended/modified with sufficient ease and flexibility, unlike the other states which follow the Central Legislation- HIRA. Nevertheless, both the legislations are aimed at improving and developing the real estate sector and are apt for the sector.

BIRD'S EYE VIEW : HIRA

Transparency	Accountability
✓ Details of projects and promoters readily displayed on site. ✓ Status visible through site pictures ✓ Engineer Certificate available on site ✓ Non-registered/suspended projects displayed on site	✓ HIRA Registered Projects directly answerable to HIRA ✓ Promoters accountable for timely completion ✓ Promoters accountable for giving agreed facilities ✓ Allottee is accountable to make timely payment.
Compliance	**Regulation**
✓ Registration of new projects with HIRA ✓ Registration of agents with HIRA ✓ Quarterly uploading of CA and Engineer Certificate ✓ Ensuring adherence to the provisions of the Act and Rules	✓ Fund of project is required to be invested in the respective project only. ✓ Withdrawal from account in proportion of completion of development ✓ Heavy penalties for errant/non-compliant builders ✓ Regulating the sector through dedicated judicial mechanism ✓ Ensuring provision of agreed facilities/amenities ✓ Curbing malpractices such as false advertising, etc.
Equality	**Redressal Mechanism**
✓ Equal rate of interest payable by promoter or allottee in case of default. ✓ Both the party i.e. promoter and allottee can file compliant to HIRA.	✓ Specially dedicated redressal mechanism. ✓ Speedy dispute resolution within 60 days of filing complaint ✓ Formation of HIRA Appellate Tribunal for the same
Development of Real Estate Sector	
✓ Grading/Standardization of project. ✓ Suggestion to govt. to remove difficulty of Sector ✓ Efforts for single window clearance	

EXEMPTION FROM HIRA

As per Sub-Section 2 of Section 3 following projects are exempted from the provision of HIRA Act,

- Where area of land proposed to be developed does not exceed 500 sq. mts. Or

  The No. of apartments proposed to be developed does not exceed 8 inclusive of all phase.

  However The State Government may reduce this limit of 500 Sq. Mts. Or 8 Units if it consider necessary.
- Where promoter has received the Completion Certificate of Real Estate Project prior to the commencement of this Act.
- In case of repair, renovation or re-development which does not involve marketing, advertising, selling or new allotment of any apartment, plot or building as the case may be.

REGISTRATION OF REAL ESTATE PROJECT

In the HIRA there is registration of project and not of the promoter i.e. if a promoter is having more than one project then the promoter is required to apply for the registration of each project separately.

For the purpose of obtaining the registration the promoter is required to provide the several information which includes the following:-

- Application in prescribed form.
- Brief details of enterprises i.e. Name, Registered Address and its status.
- Details of their past project and their current status.
- Authenticate copy of land document of the project.
- Authenticate copy of various permission necessary to begin construction.
- Team details with their name, address, email and past experience.
- Proforma of Allotment Letter, Agreement for sale, Conveyance Deed.
- No., type and carpet area of apartment and area of plot in case of plotted development.
- Name and Address of Real Estate Agent.
- The time period to complete the project.
- Declaration in regard to deposit of 70% amount in Designated account with schedule bank and undertaking to withdraw the amount in proportion of completion of the project on certification of Chartered Accountants, Engineers and Architect.
- If the application is in order The RERA/ HIRA authority shall registered the project and issued the login id and password to the promoter.
- There will be deemed registration of project if the RERA/HIRA authority not issue any notice during the period of 30 days from the date of filling application.

TRANSPARENCY

- Transparency is one of the key elements of HIRA. Post-implementation of HIRA, buyers and potential investors can make intelligent decision of investment in a particular project.
- HIRA ensures transparency in various ways including:-
  - Displaying the information of the past projects of the promoters.
  - Information about the No. of cases pending against the promoter.
  - Making site pictures readily available for everyone on its website.
  - Displaying name and details of non-registered/suspended projects.
  - Various documents of the promoter including land documents and other permissions, etc. enable the buyers to decide whether or not that a particular project is having all necessary permission so that He can make up his mind of his investment.

- Quarterly updation of Actual Status of project by uploading actual photo graphs of project.

REGULATION & COMPLIANCE

RERA & HIRA are having an excellent system of regulation and compliances like;

- Without registration of project under this act, no promoter shall advertise, market, book, sell or offer for sale or invite persons to purchase in any manner any pot, apartment or building , as the case may be in any real estate project, though they can start the construction of project there is no need of registration but before doing any of act mentioned above first registration is required.
- No real estate agent can perform work in any real estate project, without getting registered under this act.
- Promoter are required to specify the carpet area of all the units sold/booked before the application of this act even when they were sold on the basis of any other area like built up area or super built area.
- Quarterly uploading information in regard to pending permission obtained, Stage of completion of project, no. of unit & garage sold, Certificate of Three professional etc.
- Promoter is required to obtain the occupancy certificate and completion certificate from The Competent Authority and thereafter execute the conveyance deed in favour of allottee.
- All the documents as required to be signed by the promoter and allottee like Application for booking of unit, Allotment Letter , Agreement for sale and Conveyance Deed are required to be submitted to the RERA/HIRA authority.
- If the promoter make default in complying the provision of this Act, Rule & Regulation or violate term of sanction given by the competent authority or default in complying its commitment to the allottee , The HIRA Authority may revoke its registration.
- Amendment in the sanction plan, layout plan etc can be made by the promoter only after obtaining the consent of not less than 2/3rd of allottee.

EQUALITY

The provisions of RERA/HIRA act are just and equitable, they are not making any discrimination between the promoter, allottee and real estate agent.

Entire RERA/HIRA act are guided on only one principal as mentioned below

SAY WHAT YOU WILL DO
DO WHAT YOU SAY

- The promoter is required to commit only those thing which he is intended to provide in term of quality of material and services in regard to the project as mentioned in the agreement, brochure or any other material.
- The Allottee is duty bound to make the payment as agreed in the agreement to sale/allotment letter, participate in the execution of conveyance deed and take the possession when the unit is completed.
- Similarly the Real Estate Agent is require to make fair disclosure while facilitating the execution of transaction between the promoter and allottee and refrain himself from making any false statement about the quality of material and services in the project.
- In case of default made by the any of the party the aggrieved party can approach the RERA/HIRA Authority by filling complaint.
- The rate of interest payable in case of default of either party whether promoter or allottee shall remain the same and which shall not be more than the SBI Base rate plus 2 %.
- In case of default made by the promoter in complying his part the allottee is having two option if he want to withdraw from project then he can claim the refund of entire amount plus interest on agreed rate from the date of payment and

amount of compensation but if he want to remain in project then he can claim interest for delay in getting possession from the date as agreed on the amount which has already been paid by him.

- If allottee make continuous default in making payment the promoter may cancel the agreement and can forfeit the booking amount as per the terms of the agreement.

PENAL PROVISION

Penal provisions under the RERA/HIRA are very stringent:-

- Penalty in case of default made by the Promoter

Sr	Nature of Default	Sec. of HIRA	Penalty % of Estimated Cost of Project
1	Default in getting registration i.e. default in complying the provision of sec. 3 of HIRA	59(1)	May extend up to 10%
2	Default in complying order, direction or decision issued u/s 59(1)	59(2)	Imprisonment may extend up to 3 years or further fine which may extend to further 10 % or by both
3	Default in complying the provision of sec. 4 or submitting false information at the time of registration	60	Penalty may extend up to 5%
4	General penalty on contravention of other provision of this Act i.e. other than sec. 3 & 4	61	Penalty May extend up to 5%
5	Default in complying the order of Authority	63	Penalty for every day of default which May extend up to 5%
6	Default in complying order of HIRA Tribunal	64	Imprisonment may extend up to 3 years or fine for each day of default which may extend to 10 % or by both

- Penalty in case of default made by the Real Estate Agent

Sr	Nature of Default	Sec. of HIRA	Penalty % of Cost of Unit
1	Default in complying sec. 10 & 11 A] Default in getting registration B] Submission of false information at the time of registration . C] Default in discharging his function/duty	62	Penalty of Rs. 10,000/- per day which may cumulatively extended up to 10 % of unit which he facilitated for sale.
2	Default in complying the order of Authority	65	Penalty for every day of default which May extend up to 5% of unit which he facilitated for sale.
3	Default in complying order of HIRA Tribunal	66	Imprisonment may extend up to 1 years or fine for each day of default which may extend to 10 % or by both

- Penalty in case of default made by the Allottee

Sr	Nature of Default	Sec. of HIRA	Penalty % of Cost of Unit
1	Default in complying the order of Authority	67	Penalty which May extend up to 5% of unit.
2	Default in complying order of HIRA Tribunal	68	Imprisonment may extend up to 1 years or fine for each day of default which may extend up to 10 % or by both.

DISPUTE REDRESSAL MECHANISM

The RERA/HIRA act is having an excellent dispute redressal mechanism, which not only ensure the quick and cheaper dispute resolution but also going to reduce long pendency of cases before the Consumer Forums and Various Court.

- Bar of Jurisdiction:- Sec. 75 of HIRA specify that no civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which the Authority or the Appellate Tribunal is empowered by or under this act to determine.
- So now entire matter in regard to dispute of Real Estate Shall be entertain by The RERA/HIRA Authority and later on to RERA/HIRA Tribunal.
- Complaint before The Authority :- Section 31 empowered an aggrieved person to file complaint to the RERA/HIRA Authority, the procedure of filling complaint shall be specified by regulation, in general in other state the filling fees is of Rs. 1000/ - only and the authority is required to disposed off the matter with in 60 days from the date of filling complaint.
- Appeal before the RERA/HIRA Tribunal:- Section 44 empowered The State Government, The Competent Authority or any person aggrieved by an order direction or decision of authority may file an appeal before the Appellate Tribunal. The Tribunal is required to disposed of the appeal within 60 days from the date of receipt of appeal else the Appellate Tribunal is required to record the reason in writing of non-disposal of appeal.

PROMOTION AND DEVELOPMENT OF REAL STATE SECTOR

As we all know that Real Estate Sector is Second largest employment generating sector and making significant contribution to the GDP of our country, but this very important sector in which people are making the investment of their whole life saving and further by borrowing from financial institution, but this sector was not properly regulated and were not having any specific authority to regulate it, Now the RERA/ HIRA Authority is here not only for regulation of this sector but also for promotion this sector, section 32 specified various steps which the RERA authority may take for promotion of Real Estate Sector.

- Protect Interest of Promoter, Allottee and Real Estate Agent.
- Recommend The State Govt. & The Competent Authority to introduce the single window clearance system for project approval and issue of completion Certificate.
- Create Transparency and develop good grievance redressal mechanism.
- Standardization or grading of project on various parameters which will improve overall quality of real estate in the country.
- Measure to encourage investment in real estate sector.
- Measure to facilitate digitization of land records.

KNOWLEDGE OF OTHER ALLIED LAWS

I use to tell people in my lectures and seminars across the nation and even during interactions with learned brothers of my fraternity that knowing this Act *(HIRA)* it self is not enough , unless backed up by knowledge of local laws of the concerned state. It is pertinent to mention that ***Section 83*** of HIRA Act says it very succinctly:

"The provisions of this Act shall be in addition to, and not in derogation of, the provisions of any other law for the time being in force".

Thus, section 83 makes it abundantly clear that the provisions of this act are in addition to the provisions contained in prevalent local laws. Hence, for proper understanding of this act, knowledge of local laws such as Municipalities Act, Land Revenue Code, etc. is a prerequisite.

Thus it is very clear from the above that HIRA has successfully added into the transparency, accountability, equality, compliance, etc. in the sector. We often find people complaining about every new legislation, be it HIRA or Money Laundering or anything else. We must understand that what we've got to do is ensure compliance and stop complaining. It has been rightly said by William Frederick Halsey: *"There are no great people in this world, only great challenges which ordinary people rise to meet"*. Thus, the only way out is to keep moving forward, overcoming every new confronting challenge and chalking the success path. There is a long way to go.

Good News for Home Buyers

Treatment of Home Buyers under the Insolvency and Bankruptcy Code, 2016: Extracts from the Insolvency Law Committee Report, March, 2018

CA Sumit Binani

The World Bank Doing Business' Index 2018 recognized the sustained efforts and commitment of the Government of India as this year India became one of the top 10 'improvers' in the rankings released by the World Bank. However, improving on the Doing Business rankings is not an easy task, especially for an economy that is as large and complex as India's. Drafting a new piece of legislation is only the start. The more significant challenge is ensuring that the law is implemented in its true spirit. This can be achieved by periodically evaluating the law, especially when it is in its initial stages and practical challenges in implementation emerge. Towards this end, the Insolvency Law Committee was constituted by the Ministry of Corporate Affairs to conduct a detailed review of the Insolvency and Bankruptcy Code, 2016 in consultation with key stakeholders.

This Report by the Insolvency Law Committee is a sincere attempt to encourage sustainable growth of the credit market in India, while safeguarding interests of various stakeholders. One of the key recommendations is that home buyers should be treated as financial creditors owing to the unique nature of financing in real estate projects and the treatment of home buyers by the Hon'ble Supreme Court in ongoing cases. Notably, classification as financial creditors would enable home buyers to participate equitably in the insolvency resolution process under the Code

Let us look at the discussions of the Committee while dealing with the aforesaid recommendation:

1. Section 5(8) of the Code defines 'financial debt' to mean a debt along with interest, if any, which is disbursed against the consideration for the time value of money and *inter alia* includes money borrowed against payment of interest, etc. The Committee's attention was drawn to the significant confusion regarding the status of buyers of under-construction apartments ("**home buyers**") as creditors under the Code. Multiple judgments have categorised them as neither fitting within the definition of 'financial' nor 'operational' creditors. In one particular case, they have been classified as 'financial creditors' due to the assured return scheme in the contract, in which there was an arrangement wherein it was agreed that the seller of the apartments would pay 'assured returns' to the home buyers till possession of property was given. It was held that such a transaction was in the nature of a loan and constituted a 'financial debt' within the Code. A similar judgment was given in *Anil Mahindroo & Anr* v. *Earth Organics Infrastructure*. But it must be noted that these judgments were given considering the terms of the contracts between the home buyers and the seller and are fact specific. Further, the IBBI issued a claim form for "creditors other than financial or operational creditors", which gave an indication that home buyers are neither financial nor operational creditors.
2. Non-inclusion of home buyers within either the definition of 'financial' or 'operational' creditors may be a cause for worry since it deprives them of, first, the right to initiate the corporate insolvency resolution process ("**CIRP**"),

second, the right to be on the committee of creditors ("**CoC**") and third, the guarantee of receiving at least the liquidation value under the resolution plan. Recent cases like *Chitra Sharma* v. *Union of India* and *Bikram Chatterji* v. *Union of India* have evidenced the stance of the Hon'ble Supreme Court in safeguarding the rights of home buyers under the Code due to their current disadvantageous position.

3. To completely understand the issue, it is imperative that the peculiarity of the Indian real estate sector is highlighted. Delay in completion of under-construction apartments has become a common phenomenon and the records indicate that out of 782 construction projects in India monitored by the Ministry of Statistics and Programme Implementation, Government of India, a total of 215 projects are delayed with the time overrun ranging from 1 to 261 months. Another study released by the Associated Chambers of Commerce and Industry of India, revealed that 826 housing projects are running behind schedule across 14 states as of December 2016. Further, the Committee agreed that it is well understood that amounts raised under home buyer contracts is a significant amount, which contributes to the financing of construction of an asset in the future.

4. The current definition of 'financial debt' under section 5(8) of the Code uses the words *"includes"*, thus the kinds of financial debts illustrated are not exhaustive. The phrase *"disbursed against the consideration for the time value of money"* has been the subject of interpretation only in a handful of cases under the Code. The words "time value" have been interpreted to mean compensation or the price paid for the length of time for which the money has been disbursed. This may be in the form of interest paid on the money, or factoring of a discount in the payment.

5. On a review of various financial terms of agreements between home buyers and builders and the manner of utilisation of the disbursements made by home buyers to the builders, it is evident that the agreement is for disbursement of money by the home buyer for the delivery of a building to be constructed in the future. The disbursement of money is made in relation to a future asset, and the contracts usually span a period of 4-5 years or more. The Committee deliberated that the amounts so raised are used as a means of financing the real estate project, and are thus in effect a tool for raising finance, and on failure of the project, money is repaid based on time value of money. On a plain reading of section 5(8)(f), it is clear that it is a residuary entry to cover debt transactions not covered under any other entry, and the essence of the entry is that "amount should have been raised under a transaction having the commercial effect of a borrowing." An example has been mentioned in the entry itself i.e. forward sale or purchase agreement. The interpretation to be accorded to a forward sale or purchase agreement to have the texture of a financial contract may be drawn from an observation made in the case of *Nikhil Mehta and Sons (HUF)* v. *AMR Infrastructure Ltd*.

6. *"A forward contract to sell product at the end of a specified period is not a financial contract. It is essentially a contract for sale of specified goods. It is true that some time financial transactions seemingly restructured as sale and repurchase. Any repurchase and reverse repo transaction are sometimes used as devices for raising money. In a transaction of this nature an entity may require liquidity against an asset and the financer in return sell it back by way of a forward contract. The difference between the two prices would imply the rate of return to the financer."* (emphasis supplied).

7. Thus, not all forward sale or purchase are financial transactions, but if they are

structured as a tool or means for raising finance, there is no doubt that the amount raised may be classified as financial debt under section 5(8)(f). Drawing an analogy, in the case of home buyers, the amounts raised under the contracts of home buyers are in effect for the purposes of raising finance, and are a means of raising finance. Thus, the Committee deemed it prudent to clarify that such amounts raised under a real estate project from a home buyer fall within entry (f) of section 5(8).

8. Further, it may be noted that the amount of money given by home buyers as advances for their purchase is usually very high, and frequent delays in delivery of possession may thus, have a huge impact. For example, in *Chitra Sharma* v. *Union of India* the amount of debts owed to home buyers, which was paid by them as advances, was claimed to be INR Fifteen Thousand Crore, more than what was due to banks. Despite this, banks are in a more favourable position under the Code since they are financial creditors. Moreover, the general practice is that these contracts are structured unilaterally by construction companies with little or no say of the home buyers. A denial of the right of a class of creditors based on technicalities within a contract that such creditor may not have had the power to negotiate, may not be aligned with the spirit of the Code.

9. The Committee also discussed that section 30(2)(e) of the Code provides that all proposed resolution plans must not contravene any provisions of law in force, and thus, the provisions of Real Estate (Regulation and Development) Act, 2016 ("**RERA**") will need to be complied with and resolution plans under the Code should be compliant with the said law.

10. Finally, the Committee concluded that the current definition of 'financial debt' is sufficient to include the amounts raised from home buyers/allottees under a real estate project, and hence, they are to be treated as financial creditors under the Code. However, given the confusion and multiple interpretations being taken, at this stage, it may be prudent to explicitly clarify that such creditors fall within the definition of financial creditor, by inserting an explanation to section 5(8)(f) of the Code. Accordingly, in CIRP, they will be a part of the CoC and will be represented as aforesaid and in the event of liquidation, they will fall within the relevant entry in the liquidation waterfall under section 53. The Committee also agreed that resolution plans under the Code must be compliant with applicable laws, like RERA, which may be interpreted through section 30(2)(e) of the Code.

If the Cabinet approves the above recommendation, it would bring a lot of respite to the home buyers. The impact of this amendment is likely to have a very positive impact on the real estate industry as a whole.

Real Estate Investment Trusts :

The concept and its potential to be an alternative investment vehicle for the Real Estate Companies

Ms. Shreya Routh

Investment in the real estate sector possesses various drawbacks in the areas of availability, large ticket size and complicated management issues. In lieu of such hitches and downsides, the concept of Real Estate Investment Trusts ("REITs") had come into existence. REITs allow investor to participate in real estate investment without actually having to hold huge sum of money. The entire process of investing in REITs is regulated by SEBI under the SEBI (Real Estate Investments Trusts) Regulations, 2014 ("REIT Regulations")[1].

Apart from the benefits offered to the shareholders, REITs also act as an alternative investment vehicle for real estate companies. By investing in varied sources of finance of a real estate company, REITs indirectly contribute towards the development of the real estate sector in India.

In this write-up we shall be discussing on how REITs operate and how can it act as an alternative investment vehicle for real estate companies.

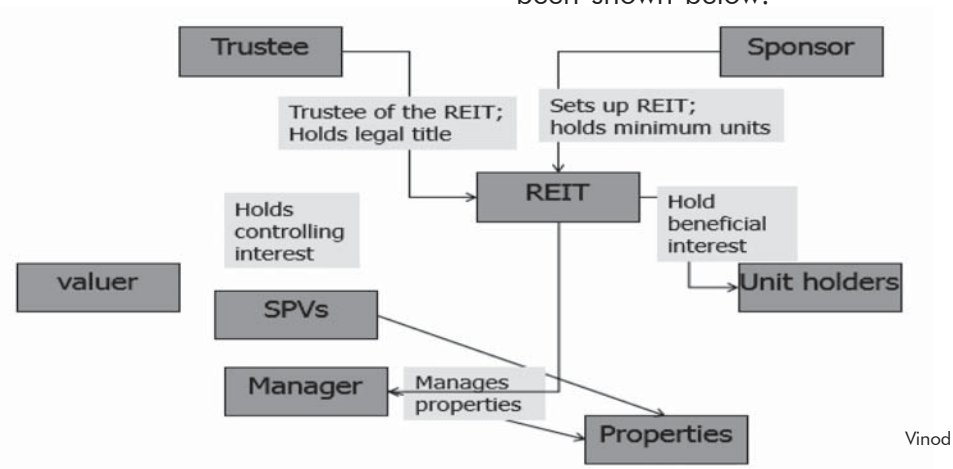
What is REIT?

REIT is a form of alternative investment vehicle. The working mechanism of a REIT involves purchase of commercial properties and then providing them on rent to tenants or for the purpose of holding them for capital gain. The funding is done through issuance of units to public which are tradable on stock exchanges. The main advantage of a REIT structure is grounded on the tax exemptions that it receives. Further, Regulation 2(zm) of the REIT Regulation, state that "REIT" or "Real Estate Investment Trust" *shall mean a trust registered as such under this regulations*.

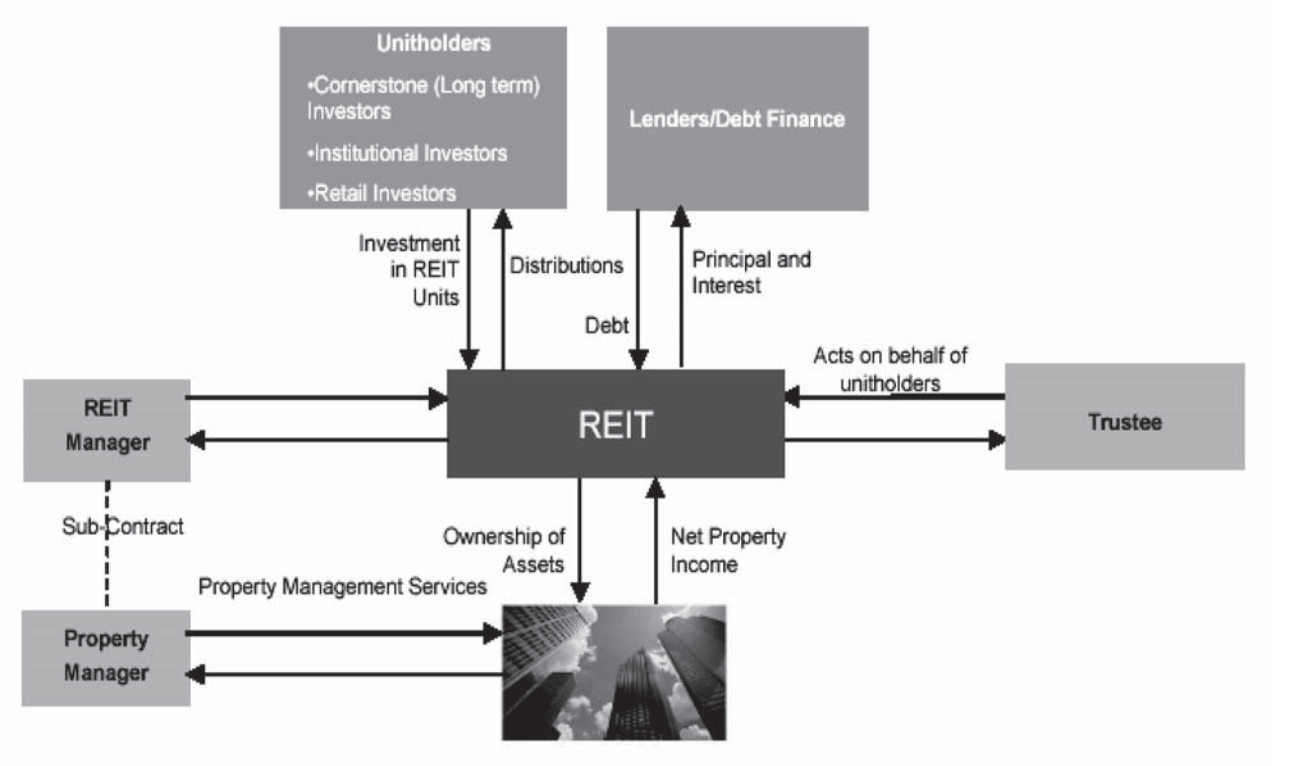
As per the REIT Regulation, the following are the parties to a REIT:

i. Sponsor- Sponsor is the entity that puts up the entire show and holds at least 25% of the unit at inception, and 15% throughout
ii. Trustee- who is registered as a Debenture Trustee.
iii. Manager- While trustee is the title holder of trust properties, Manager is the operating functionary of a REIT
iv. Valuer- deals with valuation of the asset

Graphical illustration of parties to a REIT has been shown below:



A typical structure of a REIT has been diagrammatically represented herein below:



Benefits of investing in REITs

Investing in REITs can be construed as a diversified investment in bricks. The most significant advantage offered by REITs is in the area of taxation. As per the provisions, REITs are required to distribute atleast 90% of their income as dividend- hence, the name 'income oriented'. The dividend is exempted from taxability. Other relaxations offered are as follows:

1. Investment in Debt of SPV- Interest Exempt u/s 10(23FC)
2. Sale of shares of SPV- Taxable as LTCG/ STCG
3. Sale of Properties by Trust- Taxable as LTCG/ STCG
4. Rentals derived from the properties- Taxable @ MMR (i.e. 30%)
5. Any other income of the Trust - Taxable @ MMR (i.e. 30%)

Earlier, REITs were only allowed to issue equity as a means of raising finance. However, SEBI on its Board Meeting dated 18th September, 2017[2] have allowed REITs to issue debt as well. Earlier, REIT could raise external funds only through borrowings from banks and other financial institutions. However, it is pertinent to note that since banks can provide credit only upto a certain limit and are subject to deposit constraints, complete fulfilment of fund adequacy was not being attained with such limited borrowing sources. Hence, with a view to provide wider sources of borrowing, SEBI in its recent amendment has allowed REITs to raise debt capital by issuing debt securities. With this opportunity, substantial pool of investment avenues can now be tapped by a REIT.

Investment options available to REITs

REITs are under an obligation to fulfil two main criteria

a. Income criteria
b. Asset criteria

The income criteria envisages the fact that atleast 75% income of REITs must be sourced from rentals. Further, as stated above, REITs in India are also required to ensure minimum distribution requirement. Minimum 90% of the net distributable cash flows will be distributed to unitholders on a half yearly basis as per Regulation 16(c) of the REIT Regulation.

The asset criteria stipulates the fact that atleast 80% of the investments of REITs must be in rent generating properties. Now, the term "rent generating property" itself indicates a completed

and not an under-construction property. Regulation 18(4) of the REIT Regulation, throw light on the investment boundaries of a REIT. The relevant text of the provision has been reproduced herewith:

> *18(4) "Not less than eighty per cent of value of the REIT assets shall be invested in completed and rent [and/or income] generating properties subject to the following:*
>
> *(a) if the investment has been made through a [holdco and/or] SPV, whether by way of equity or debt or equity linked instruments or partnership interest, only the portion of direct investments in properties by such [holdco and/or] SPVs shall be considered under this sub-regulation and the remaining portion shall be included under sub-regulation (5)*
>
> *(b) if any project is implemented in stages, the part of the project which is completed and [rent and/or income generating] shall be considered under this sub-regulation and the remaining portion including any contiguous land as specified under proviso to sub-regulation (2) shall be included under clause (a) of sub-regulation (5)"*

Further, for the purpose of the remaining 20%, a REIT may invest in under-constructed property provided that such property is held by REITs for atleast 3 years. Apart from such under-constructed properties, a REIT may invest its remaining 20% in the following sources additionally:

i. listed or unlisted debt of companies or body corporate in real estate sector
ii. mortgage backed securities
iii. equity shares of companies listed on a recognized stock exchange in India which derive not less than seventy five per cent. of their operating income from real estate activity as per the audited accounts of the previous financial year
iv. government securities, etc

Alternative Investment Vehicle for Real Estate Companies

Considering the investment framework involved in a REIT, it can be well assumed that apart from simply investing in properties, a REIT may also act as a finance choice for real estate companies. Real estate companies primarily being into construction, run very capital intensive activities, and therefore, raise finance from varied sources. Amongst all such varied means of finance, REIT also comes as a tapping source.

In lieu of the fact that REITs can invest its remaining 20% in other than rent generating properties, comes the opportunity for real estate companies to approach REITs to contribute in its source of funding, as corpus involved in a REIT structure runs into hundreds of crores.

However, if a real estate company intends to raise funding from REITs, the debt instrument must be structured properly, as the Companies Act, 2013 do not provide an exemption to any amount raised by a company from any REIT, from being called as deposit. Only the following classes of debentures or debt instruments are exempted from the definition of deposits:

a. Debentures secured by first charge on assets of the issuer or by a charge ranking pari-passu with first charge on the asset;
b. Unsecured debentures which are compulsorily convertible into equity within a period of ten years from the date of issuance;
c. Unsecured debentures which are listed with recognised stock exchanges;
d. Unsecured debentures which are redeemable within a period of 1 year from the date of issuance, issued in accordance with the RBI directions on Money Market Instruments.

Conclusion

Though always considered as a boon and angel in disguise from an investor's point of view, another side of REIT can now be acknowledged as an alternative investment vehicle for real estate companies. By all means, the REIT mechanism is a complete win-win situation from every aspect, be it for retail investors or real estate companies, you name they have it! However, unfortunately, until now the concept has not gained popularity that it deserves.

(Footnotes)

[1] https://www.sebi.gov.in/legal/regulations/dec-2017/sebi-real-estate-investment-trusts-regulations-2014-last-amended-on-december-15-2017-_38449.html

[2] https://www.sebi.gov.in/media/press-releases/sep-2017/sebi-board-meeting_35969.html

Use of Debentures for financing Real Estate SPVs

Ms. Smriti Wadehra

Introduction

During the course of day-to-day operations, each and every organisation needs money over and above their capital to meet the financial needs as a result of which they are bound to depend on external sources for funding. The business of real estate is no different and is very capital intensive and therefore, it is quite evident that most of the real estate developers have to rely heavily on borrowed funds. The primary source of borrowing funds happens to be banks, but banks too have single borrower exposure limits, therefore, the real estate companies can rely on bank finance only upto a certain extent. Here arises a need for alternative mode of funding for these entities and the debentures can turn out to be a very convenient mode of funding.

In this article we will discuss about the different types of debentures, how to issue them and what should be considered while structuring them.

Definition

Before delving into detailed discussion, let us first understand what constitutes to be a debenture. The term "debenture" has been defined in the section 2(30) of the Companies Act, 2013 (Act, 2013):

> *'debenture' includes debenture stock, debentures and any other instrument evidencing a debt, whether constituting a charge on the assets of the company or not".*

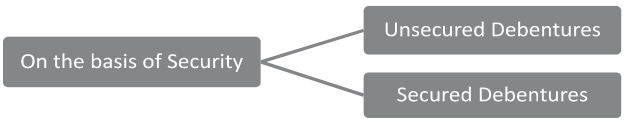
Debenture is creation or acknowledgment of debt instrument whether or not it constitutes charge over the assets of the company. The intent was to include any such evidencing debt, i.e. debentures even if by nomenclature it may be any different. Therefore, debenture denotes an instrument issued by the Company, normally but not necessarily, called on the face of it a debenture and providing for the payment of, or acknowledging the indebtedness in a specified sum at a fixed rate, with interest thereon. Literally, it means an indenture, that is, a legal instrument. Further, looking at the variety of purposes for which the word 'debenture' is used, it appears that it denotes a variety of investments and the term is extremely elastic in character.

Historically, debentures were devised as acknowledgement of floating charge. However, as the practice has evolved over time, debentures are taken to be marketable debt instruments.

Further, a debenture need not necessarily be a security. The definition of debentures and securities under the Act, 2013 are independent and not inter-connected. In order to be considered as a security, a debenture has to be marketable in nature. If a debt instrument is structured in a manner that it fails the test of the marketability, then it may be treated as a debenture for the purpose of the Act, 2013, but not securities.

Types of Debentures

A. On the basis of Security:

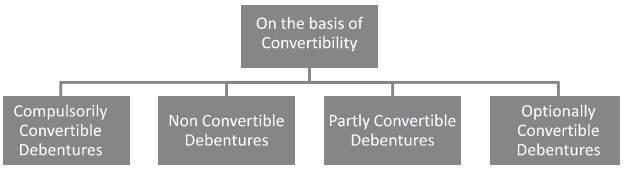


i. **Unsecured Debentures**: These debentures does not create any charge on the assets of the company. The holders of such debentures do not have the right to attach particular property by way of security as to repayment of principal and interest. Unsecured debentures are treated as public deposits under the Companies (Acceptance of Deposit) Rules, 2014. Hence, it is impractical for NBNFCs to issue unsecured debentures while NBFCs are allowed to issue unsecured debentures with a minimum

subscription of one Crore and above vide notification dated February 20, 2015.

ii. **Secured Debentures:** Debentures that are secured by a mortgage of the whole or part of the assets of the company are called secured debentures. As per Section 71 of the Act, 2013 every Company has to issue debentures secured by a first charge or a charge ranking pari passu with the first charge on any assets specified in Schedule III of the Act excluding intangible assets.

B. On the basis of Convertibility:



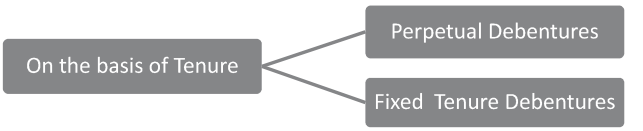
i) **Compulsorily Convertible Debentures**-Compulsorily convertible debentures are mandatorily converted into equity shares of the company as per the terms specified in the issue on the expiry of specified period. Hence, in view of mandatory conversion feature, compulsorily convertible debentures are treated as deferred equity instrument. As per Section 73 read with Rule 2(c) of Companies (Acceptance of deposit) Rules, 2014 if the debentures are convertible into equity shares within a period of 5 years, deposit rules will not attract.

ii) **Non Convertible Debentures** -These debentures do not carry the option of conversion into equity shares and are therefore redeemed on the expiry of certain specified period. Such debentures shall be secured as per Section 71 read with Rule 18 of the Companies (Share Capital and Debentures) Rules, 2014.

iii) **Partly Convertible Debentures**-These debentures may consist of two types namely -convertible and non-convertible debentures. The convertible portion is to be converted into equity shares at the expiry of specified period. However, the non convertible portion is redeemed on the expiry of the stipulated period

iv) **Optionally Convertible Debentures**-Optionally convertible debentures are debt instruments in which debenture holder has an option to convert into shares at the pre-determined price and time. Globally, these debentures are well accepted and prevalent as an interesting hybrid between equity and debt, but in India such debentures are ruled out by regulators due to massive misuse of this instrument by Sahara.

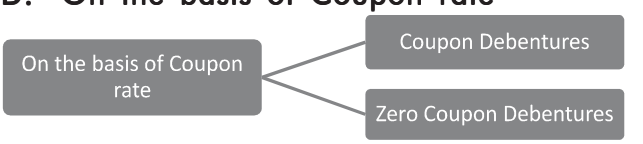
C. On the basis of tenure:



i) **Perpetual Debentures**-If the debentures are issued subject to redemption on the happening of specified events which may not happen for an indefinite period e.g. winding up, they are called perpetual debentures. These debentures are basically issued by financial sector entities for the purpose of giving permanent support to the capital requirement. Since the debt is not having redemption period, these debentures form part of Tier I capital up to 15 per cent of the Tier I capital and amount in excess of amount admissible as Tier I shall qualify as Tier II capital.

ii) **Fixed Tenure Debentures**-The debentures which are issued for a fixed period of term and are redeemable at the end of term are said to be fixed tenure debentures. These debentures may be of long term and short term. Long term debentures are issued for a term of more than 12 months, whereas short term debentures are issued for a term up to 12 months

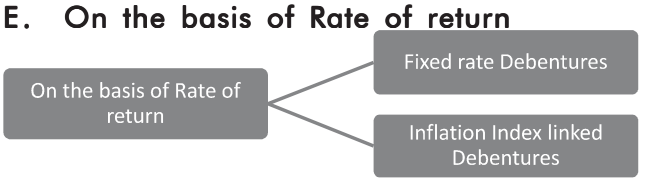
D. On the basis of Coupon rate



i) **Coupon Debentures Coupon** - typically pay interest periodically at the pre-specified rate of interest. The annual rate at which the interest is paid is known as the coupon rate.

ii) **Zero Coupon Debentures -** Zero coupon debentures are issued at a discount to its face value, fetches no periodic interest and are redeemed at the face value at maturity.

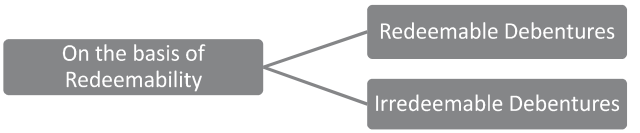
E. On the basis of Rate of return



i) **Fixed Rate debentures-** Fixed rate debentures are issued with a fixed coupon (interest) rate, as opposed to a floating rate note. These debentures have a pre-determined interest rate, which is paid over a period of time.

ii) **Inflation Index linked debentures**- A debenture is considered indexed for inflation if the payments on the instrument are indexed by reference to the change in the value of a general price or wage index over the term of the instrument.

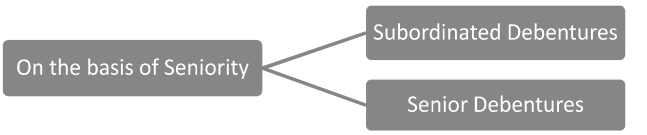
F. On the Basis of Redeemability



i) **Redeemable Debentures**-Debentures that are redeemable on expiry or before the maturity date are called redeemable debentures. Such debentures are issued in accordance with Section 71(8) of the Act, 2013. As per Rule 18(1) (a) of the Companies (Share Capital and Debentures) Rules, 2014 secured debentures are to be redeemed within 10 years from date of issue. However, Companies engaged in setting up infrastructure projects may issue for a term exceeding 10 years but not exceeding 30 years.

ii) **Irredeemable Debentures-** The debentures which lack a call feature or right of redemption are called irredeemable debentures. Such debentures are also called as perpetual debentures or non-callable debentures.

G. On the basis of Seniority



i) **Subordinated Debentures** - Subordinated debentures, as evident from the meaning, are subordinated to other debt of the Company. Subordinated debt has been defined under Systemically Important Non-Banking Financial (Non-Deposit Accepting or Holding) Companies Prudential Norms (Reserve Bank) Directions, 2015 means "an instrument, which is fully paid up, is unsecured and is subordinated to the claims of other creditors and is free from restrictive clauses and is not redeemable at the instance of the holder or without the consent of the supervisory authority of the non-banking financial company. These debentures are issued for a minimum term of 5 years. Subordinated debentures are primarily included in Tier II capital and provide support to capital and are utilized by Companies for paying senior debt.

ii) **Senior Debentures**- Senior debentures as the name suggests senior to other debt holders. The holder of these instruments gets a higher priority claim than another debenture's to the same class of assets in case of default or bankruptcy.

Issuance of Debt Securities

A glimpse of compliances required to be made by companies for issuance of debentures are:

- **Issuance of debentures:** Where a company issues debentures, it is governed by the provisions of Section 71, Section 77, and Section 180 of Companies Act, 2013 and with Companies (Share Capital and Debentures) Rules, 2014.

  As per Rule 18 of Companies (Share Capital and debenture) Rules, 2014 where a company issues secured debentures it must be secured by creation of a charge on the properties or assets of the company, having a value which is sufficient for due

repayment of amount of debentures and interest thereon. Further, the security has to be by way of "specific" assets. The word specific asset implies the creation of a fixed charge on debentures to be secured by way of a charge or mortgage created in favour of the debenture trustee on:

i) any 'specific' movable property of the company; or

ii) any 'specific' immovable property wherever situate, or any interest therein

Unsecured debentures attract public deposit rules under Section 73 as the definition of deposit, provided under Companies (Acceptance of Deposits) Rules, 2014, excludes only those debentures which are secured by first charge or a charge ranking pari passu with the first charge on any assets referred to in Schedule III of the Act, 2013 excluding intangible assets of the company or debentures compulsorily convertible into shares of the company within ten years. However, unsecured debentures which are listed on recognised stock exchanges in accordance with applicable laws issued by the SEBI are exempted from the definition of public deposits.

Further, the Deposit Rules also exclude money market instruments issued in accordance with the provisions of the RBI directions on Money Market Instruments. RBI directions on Money Market Instruments also allow companies in India to issue unsecured non-convertible debentures with less than 1 year maturity.

Therefore, to summarise, unsecured debentures -

a. Which are compulsorily convertible into equity within a period of 10 years from the issuance of the instrument – Can be issued, not treated as deposit

b. Which are unlisted – Cannot be issued, treated as deposit

c. Which are listed on recognised stock exchange - Can be issued, not treated as deposit

d. Which have maturity upto 1 year, issued in accordance with RBI Directions on Money Market Instruments - Can be issued, not treated as deposit

Here it is to be noted that the aforesaid discussion holds good where the funds are raised from individuals or entities, which are not companies. If the subscriber to the instrument is a company, then the same shall be exempted from the definition of deposits as the same excludes any amount received by a company from another company.

- **Debenture redemption reserve:** Section 71(4) requires every company issuing debentures to create a debenture redemption reserve ("DRR") account out of the profits of the company available for payment of dividend and the amount credited to such account shall be utilized only for the purpose of redemption of such debentures.

  For this, an adequate amount of profit is required to be transferred till the debentures are redeemed and/or cancelled. The DRR is to be created only out of the profits of the company which are available for payment of dividend. The Company which is required to maintain DRR shall park, on or before the 30th day of April each year, a sum of at least 15% of the amount of its debentures, maturing during the year ending on the 31st day of March next following year, in any one or more of the following:

  a) in deposits with any scheduled bank, free from charge or lien;

  b) in unencumbered securities of the Central Government or of any State Government;

  c) in unencumbered securities mentioned in clauses (a) to (d) & (ee) of Section 20 of the Indian Trusts Act, 1882;

  d) in unencumbered bonds issued by any other company which is notified under clause (f) of Section 20 of the Indian Trusts Act, 1882;

  The money so parked can be utilized only

for the purpose of repayment of debentures maturing during the year. The amount remaining deposited /invested shall not at any time fall below 15% of the amount of debentures maturing during that year ending 31st March. Further, the adequacy of DRR will be 25% of the value of outstanding debentures issued through public issue as per present SEBI (Issue and Listing of Debt Securities), Regulations 2008 and also 25% DRR is required in the case of privately placed debentures by listed companies. Also, for unlisted companies issuing debentures on private placement basis, the DRR will be 25% of the value of outstanding debentures.

- **Prior approval of shareholders:** As issue of debenture is a borrowing for Companies therefore they should comply with Section 180 of the Act, 2013 whereby it requires to take the prior approval of Shareholder in Shareholders meeting (Companies can also take blanket approval for borrowing whole year), whenever ***the borrowing limit exceed aggregate value of paid up share capital and free reserves.***

  There is one more instance of debenture issuance which warrants approval of the shareholders, that is, where the debentures carry an option to convert the instrument into equity at future date. In such case, approval of shareholders have to be obtained under section 62(3) of the Act, 2013.

- **Private placement of debt securities:** Section 42 of the Act, 2013 requires Companies to issue private placement offer letter for the private placement of debentures and the approval of Shareholders should be taken. Rule 14 (2)(b) of Companies (Prospectus and Allotment of Securities) Rules, 2014 provides that in case of offer or invitation for non-convertible debentures, it shall be sufficient if the company passes a previous special resolution only once in a year for all the offers or invitation for such debentures during the year.

- **Debenture trustee:** As per Section 71(5) of the Act, 2013, Company making offer or invitation debentures to the public or to its members exceeding five hundred for the subscription of its debentures shall before such offer needs to appoint Debenture Trustee. Further, as per SEBI (Issue and Listing of debentures) Regulations, 2008 requires issuer to appoint one or more debenture Trustee in accordance with Companies Act and SEBI (Debenture Trustee) Regulation, 1993.

  However, for the sake convenience, for every issuance of secured debentures, where there are more than one subscribers, appointment of debenture trustee would prove to be logistically beneficial. This will save the debenture holders from the pain of the altering the charge documents whenever there is a transfer of debentures by one debenture holder to a third party.

Conclusion

On worldwide scenario, bond financing is rather more popular than bank financing, but the picture in India has been totally reverse. While bank finance offers a low interest rate, it fails to offer the flexibility that a debenture offers in terms of structure.

The terms of debentures can be structured in a manner that suits the requirements of both the issuer and the investors, but in case of bank finance, the terms of the funding arrangement are mostly drawn in a manner that favours the interest of the lender and that of the borrower are bypassed altogether.

Therefore, between bank finance and financing through debt instruments, the only advantage that bank finance offers is the low rate of interest. However, if a debenture is structured properly with adequate layers of credit support to the investors, a rate as low as bank rate of interest can be achieved.

Therefore, the real estate entities can not only use debentures as an additional source of funding but also an alternative to bank funding, if the same is structured properly.

Ind AS 115 - Revenue from Contracts with Customers : Implications for Real Estate

CA Dolphy D'Souza

Background

IAS 18 (equivalent of Ind AS 18) was issued in December 1982, has outlived its utility and failed to address complicated revenue transactions and current revenue models including something as fundamental as a multiple element transaction. Noting several concerns with existing revenue requirements for both IFRS and US GAAP, the two Boards decided to develop a joint revenue standard (IFRS 15) that is intended to:

- Remove inconsistencies and weaknesses in current revenue requirements
- Provide a more robust and comprehensive framework for addressing revenue issues
- Improve comparability of revenue recognition practices across companies, industries, jurisdictions and capital markets
- Simplify the preparation of financial statements by reducing the number of requirements to which an entity must refer
- Provide more useful information to users of financial statements through improved disclosure requirements

On 28 March 2018, the Ministry of Corporate Affairs (MCA) notified the new revenue recognition standard, viz., Ind AS 115 *Revenue from Contracts with Customers*. Ind AS 115 is applicable for the financial years beginning on or after 1 April 2018 for all Ind AS companies. It replaces virtually all the existing revenue recognition requirements under Ind AS, including Ind AS 11 *Construction Contracts*, Ind AS 18 *Revenue* and the *Guidance Note on Accounting for Real Estate Transactions*.

Revenue is one of the most important financial statement metric for both preparers and users of financial statements. It is used to measure and assess aspects of an entity's past financial performance, future prospects and financial health. Revenue recognition is therefore one of the accounting topics most scrutinised by investors and regulators. The Standard prescribes a five-step model to help entities decide the timing and amount of revenue recognition from contracts with customers. The core principle of this Standard is that an entity shall recognise revenue to depict the transfer of promised goods or services to customers in an amount that reflects the consideration to which the entity expects to be entitled in exchange for those goods or services. Ind AS 115 prescribes the 'control approach' for revenue recognition as against the 'risk and reward' model under Ind AS 18.

Ind AS 115 contains fundamental changes to the revenue recognition approach vis-a-vis the current Ind AS. It focuses on revenue recognition from the customer's point of view, i.e., whether the customer has received a stand-alone benefit from the goods or services transferred.

Key business impact

The implementation of the new standard should not be seen as a mere accounting change. It will have significant business consequences. For example, consumer product companies may need to change their sales arrangement with distributors, to provide them control at the point of shipment, if revenue is to be recognised on

shipment. Consider a real estate company has to change its accounting from POCM to completed contract. This may create significant challenges in performance reporting and taxes payable for real estate companies. A real estate company may wish to change its contract with customers so that it meets the criteria for revenue recognition over time. Given that the impact will be felt on business operations, business heads will need to be involved in the implementation of Ind AS 115.

If revenue is significantly impacted, the profits may also be significantly impacted. The consequential impact will be felt in the computation of performance bonuses and the income tax computation. Though GST will be determined on the basis of the invoices raised, the indirect tax authorities may probe on the difference between the invoices raised and the revenue recognized. For example, if product sale is recognized as two separate performance obligations (for example, product sale and warranty service); it may lead to challenges on the indirect taxes.

Most entities will need to plan for the significantly expanded disclosure requirements which are highly onerous. In case the standard has major impact, such as, in the case of real estate entities, investor analysts and shareholders will have to be taken into confidence to avoid any later shock to the share price. The new requirements and the expanded disclosures will require the entity to modify the IT systems, management information systems and standard operating procedures. Adequate controls will need to be designed and implemented; else, auditors may qualify their report with respect to controls. For example, a construction company may have ignored variable consideration and the corresponding cost, in the case of an unpriced scope change by the customer, in accordance with Ind AS 18. Under Ind AS 115, variable consideration and additional cost due to scope change will have to be estimated and taken into consideration. Whilst the entity will have to apply a degree of conservatism in determining the variable consideration; full cost will be included in the determination of percentage of completion and margins. Such a change, in addition to accounting and business consequences, will entail, changes in the systems and implementation of new controls to ensure the reliability of the calculations.

It is important that entities apply a comprehensive methodology for implementing Ind AS 115. Doing so will help entities adopt the standard in an organised and efficient manner that reduces risk and the possibility of costly errors and delays.

Real Estate Contracts

Real estate companies have to apply Ind AS 115, and the earlier *Guidance Note on Accounting for Real Estate Transactions* has been withdrawn from the application date of Ind AS 115. Under Ind AS 115, for real estate entities involved in the construction of multi-unit building for several customers the POCM recognition criteria is met only if the entity's performance does not create an asset with an alternative use to the entity and the entity has an enforceable right to payment for performance completed to date.The enforceable right to payment for performance completed to date is extremely difficult to fulfil. The right to payments for performance completed to date, may not be available in the contract with the customer or prohibited by the statutes. Therefore, real estate companies may find it extremely difficult to qualify for applying the POCM method.

The other criterion in which control of a good or service is transferred over time to the customer is again rarely fulfilled by real estate companies. In some jurisdictions, it may be possible to pledge, sell or exchange the unfinished apartment. Careful consideration will be required of the specific facts and circumstances. The September 2017 IFIRC Update discusses this issue in detail and concludes that this criterion is not fulfilled in most developments of a multi-unit complex. Consequently, PCOM cannot be applied in such cases. Particularly, the IFRIC emphasised the following:

1) In applying this criterion, it is important to

apply the requirements for control to the asset that the entity's performance creates or enhances. In a contract for the sale of a real estate unit that the entity constructs, the asset created is the real estate unit itself. It is not, for example, the right to obtain the real estate unit in the future. The right to sell or pledge this right is not evidence of control of the real estate unit itself.

2) The entity's performance creates the real estate unit under construction. Accordingly, the entity assesses whether, as the unit is being constructed, the customer has the ability to direct the use of, and obtain substantially all of the remaining benefits from, the part-constructed real estate unit. The IFRIC observed the following:

   (a) Although the customer can resell or pledge its contractual right to the real estate unit under construction, it is unable to sell the real estate unit itself without holding legal title to it.

   (b) The customer has no ability to direct the construction or structural design of the real estate unit as the unit is constructed, nor can it use the part-constructed real estate unit in any other way.

   (c) The customer's legal title (together with other customers) to replace the real estate entity, only in the event of the entity's failure to perform as promised, is protective in nature and is not indicative of control.

   (d) The customer's exposure to changes in the market value of the real estate unit may indicate that the customer has the ability to obtain substantially all of the remaining benefits from the real estate unit. However, it does not give the customer the ability to direct use of the unit as it is constructed.

Thus, the customer does not control the part-constructed unit.

Conclusion

Real estate companies have made a representation to the Ministry of Corporate Affairs to provide them an exemption from applying Ind AS 115. The jury is still out on this. Apart from not being permitted to apply POCM, there are numerous other challenges facing real estate companies consequential to implementation of Ind AS 115.

Real Estate IND AS 115 impact- Executive Summary

CA Saubhik Sarkar & CA Rishabh Sureka

The Context

On 28 March 2018, the MCA has notified that Ind AS 115 will be effective for accounting periods starting on or after 1 April 2018. The **risks and rewards** guidance currently in Ind AS 18 will be replaced by an approach based on transfer of "**control**". Revenue is a crucial financial performance indicator and due to the new concepts and extensive guidance. Major industries impacted by this standard include telecommunication, real estate, pharmaceuticals, retail and engineering & construction. Ind AS 115 is expected to have significant impact on recognition, measurement and disclosure of revenue.

The new standard is divided into 5 steps discussed below:

The 5 Step Model

1. Assess whether the contract is within the scope of Ind AS 115. "Customer" is now a defined term.
2. Determine whether the goods and services in the contract are distinct
3. Determine fixed and variable consideration.
4. Allocate based on a relative stand-alone selling price basis using acceptable method.
5. Recognize revenue at a point in time or over a period of time based on performance obligations.

Significant Impact Areas

Identification of Performance Obligations

The new standard requires an entity to assess the services promised in a contract with a customer and identify those services that are distinct as performance obligations. Presently, contractors account a 'macro promise' in the contract (For Example-to build a residential Complex). Real estate developers will need to evaluate the accounting for those contracts where other amenities like common areas and parking will be provided (to be owned by either homeowners association or the local municipality) and whether they constitute a separate performance obligation from a customer perspective.

Example: Developer B enters into a contract to build a commercial complex for a customer on land owned by Developer B. Ownership of the complex and land are transferred to the customer when construction is completed. The developer is responsible for the overall management of the project and identifies various goods and services to be provided, including design work, procurement of materials, site preparation and foundation pouring, framing and plastering, mechanical and electrical work, installation of fixtures (e.g., windows, doors, cabinetry and finishing work.

Q) How do Developer B identify different performance obligations?

Developer B first evaluates whether the customer can benefit from each of the various goods and services, either on their own or together with other readily available resources. Developer B determines that these goods and services are regularly sold separately to other customers by other contractors.

Therefore, the customer could generate economic benefit from each of the goods and services (either on their own or together with the

other goods and services that are readily available to the customer), although they would have to be provided in the context of a different property. Consequently, Developer B determines that the goods and services are capable of being distinct.

Developer B then evaluates whether the goods and services are distinct within the context of the contract. Developer B determines that the contract provides a significant service of integrating the various goods and services (the inputs) into the new complex (the combined output). Therefore, Developer B's promise to transfer the various individual goods and services in the contract are not separately identifiable from other promises in the contract.

That is, the various goods and services are all transferred to the customer as a completed commercial complex.

Because both criteria for identifying a distinct good or service are not met, Developer B determines the goods and services are not distinct and accounts for all of the goods and services in the contract as a single performance obligation.

Contract Modification

Real estate entities will need to carefully evaluate promised goods or services at the date of modification to determine whether the remaining goods & services to be transferred are distinct and priced commensurate with their stand-alone selling prices. Based on the evaluation entities will determine whether contract modification has to be treated as new contract or modification to the existing contract.

Example : A developer S enters into a contract with customer B to develop a commercial complex for Rs. 1,000 lakhs. Developer S determines that revenue for the contract should be recognized over time using the cost-to-cost method. Developer S estimates that the total cost of the commercial complex will be Rs. 800 lakhs and incurs Rs. 600 lakhs in the first two years of the contract.

At the end of Year 2, Customer B asks developer S to make a complex change in the commercial complex design. Developer S agrees and begins the work immediately. However, the corresponding change in transaction price will be determined subsequently. Developer S estimates that the costs for the development will increase by Rs. 200 lakhs and the consideration will increase by Rs. 300 lakhs.

Q) How to account such changes in the contract?

A change order is a contract modification, so the contractor will first need to confirm that the change order is approved under the contract modifications guidance. Once approved, the contractor will need to determine whether the change order should be accounted for as a separate contract or as part of the existing contract.

An unpriced change order is not usually accounted for as a separate contract based on the following:

- Change orders often don't provide distinct goods or services because they are not distinct within the context of the contract, but rather are part of the contractor's service of integrating goods and services into a combined item for the customer.
- The pricing of a change order often does not represent the standalone selling price of the additional goods or services.

Assuming that the unpriced change order cannot be accounted for as a separate contract, the contractor would need to consider the guidance on variable consideration. Revenue are accounted for under the guidance in relation to variable consideration recognized to date is updated on a 'cumulative catch-up' basis.

At the end of Year 2	Before Modification	After Modification
Cumulative Revenue	750*[1]	780*[2]
Adjustment to Revenue	-	30*[3]

Notes :

1. Rs. {1000 lakhs * 600 lakhs/800 lakhs}
2. Rs. {(1000 lakhs + 300 lakhs)* 600 lakhs}/ (800 lakhs + 200 lakhs)

3. Rs. 780 lakhs – Rs. 750 lakhs

Developer S increases the cumulative amount of revenue recognized at the end of Year 2 by Rs.30 lakhs to Rs.780 lakhs.

Arrangements with Variable Considerations may come in the form of claims, awards and incentive payments, discounts, rebates, refunds, price concessions, performance bonuses, penalties.

Developers who defer recognizing consideration under current guidance until such time as the variability is resolved will be affected under new standard. Regardless of the form of variability or its complexity, once variable consideration is identified, an entity is required under Ind AS 115 to estimate the amount of variable consideration to determine the transaction price .The estimate is to be made by using either the "expected value" method or the "most likely amount" method, depending on which method the entity expects to better predict the amount of consideration to which it will be entitled. Sufficient judgments should be used to differentiate between price concessions and credit risk where the latter is impacted by the intent and ability of payment by the customer. However, the price concessions could be a business decision to promote sale in a particular segment of customers.

Recognition of Revenue over Time or Point in Time

Currently Real Estate revenue recognition for projects under development is done based on percentage completion method (POCM). Real estate developers will need to carefully evaluate the control transfer model and conditions for recognition of revenue over time to record revenue for projects under development. The POCM method of revenue recognition will be challenged significantly under the principles of IndAS 115 as there needs to be established control of the asset by the customer during the period of construction together with enforceability of payment. Also the perspectives of the regulatory regime, RERA should be considered with variations across different states to evaluate the merits of POCM recognition. Specific Guidance Note on accounting for real estate transaction by ICAI which imposed a POCM recognition of real estate transactions will no longer available and revenue for real estate contracts have to recognized under the principles of IndAS 115.

Control refers to customer's ability to direct the use of, obtain substantially all of the remaining benefits from, an asset. It also includes the ability to prevent other entities from directing the use of, and obtaining the benefits from, an asset. Potential cash flows that are obtained either directly or indirectly-e.g. from the use, consumption, sale, or exchange of an asset-are benefits of an asset.

An entity can recognize revenue over time when any of these three conditions are satisfied:

a) The Seller's performance creates or enhances an asset controlled by the customer.

b) The customer simultaneously receives and consumes the benefit of the seller's performance as the seller performs.

c) The Seller does not create an asset that has an alternative use to the seller and the seller has the right to be paid for performance to date.

Example: Developer D is developing a multi-unit residential complex. Customer Y enters into a binding sales contract with Developer D for unit X, which is under construction. Each unit has a similar floor plan and is a similar size. The following facts are relevant.

- Customer Y pays a nonrefundable deposit on entering into the contract and will make progress payments intended to cover costs to date plus the margin percentage in the contract during construction of Unit X.
- The contract has substantive terms that preclude developer D from being able to direct Unit X to another customer.
- If customer Y defaults on its obligation by failing to make the promised progress payments when they are due, then Developer

D has a right to all of the consideration promised in the contract if it completes the construction of the unit.

- The courts have previously upheld similar rights that entitle developers to require the customer to perform, subject to the entity meeting its obligations under the contract.

At contract inception, Developer D determines that because it is contractually prevented from transferring Unit X to another customer, Unit X does not have an alternative use. In addition, if customer Y were to default on its obligations, then Developer D would have an enforceable right to all of the consideration promised under the contract. Thus, criteria C for recognizing revenue over time has been met in this case.

Contract Costs

Under the new standard specific guidance has been given in relation to cost of obtaining the contract and costs of fulfilling the contract. Incremental costs (i.e. costs that would not have been incurred if the contract had not been obtained) that are expected to be recovered should be capitalized and will be amortized on a systematic basis that is consistent with the transfer to the customer of the goods or services to which the asset relates. For Instance-Sales Commission paid to real estate agents are directly related the sale contacts obtained and would qualify for capitalization unlike the present practice where they are expensed.

Conclusion

Since Listed companies will need to implement IND AS 115 for their Q1 reporting by 30th June 2018 so mindful adoption of transition options has to be made by the entities. Two options are available for companies will transiting to IND AS 115, one is Retrospective Approach where comparative period number will also have to be restated and other is Modified Retrospective approach where comparative numbers will not be under IND AS 115 but additional disclosure in the form impact of IND AS 115 on each balance sheet line item has to be given. Comprehensive Disclosures with respect to contract with customers, contract balances, performance obligations and disclosures about significant judgement and estimates have to be made.

Real estate entities will have to evaluate how it will affect their specific revenue recognition policies and will need to make changes to their accounting systems and internal control over financial reporting.

Renting of Immovable Property

CA Sushil Kr Goyal

This article discusses in details the taxability of renting of immovable property under GST. Under GST, "renting of immovable property" is included in schedule II of CGST Act which defines it as the supply of services on which the GST rate is 18%.

However, entry no. 12 of Exemption Notification no. 12/2017 dated 28.06.2017 exempts the services by way of renting of residential dwelling for use as a residence, meaning thereby that if the residential dwelling is leased out for commercial purposes then no exemption will apply and the rental from such residential property being leased out for commercial activity shall be taxable to GST. So, *"Services by way of renting of residential dwelling for use as residence" is exempted from the tax net*. However, it does not exempt renting of immovable property for commercial use. Accordingly, the same is taxable at 18% GST.

Pre-GST?

Under Pre-GST regime, obtaining a service tax registration was necessary for the landlord if total taxable service (including the rental income from all properties) exceeded Rs. 10 lakh per year. As long as the rental income (from all the properties that have been rented-out) does not exceed Rs 10 lakh per year, service tax would not be attracted.

Under Service Tax regime, commercial properties alone that are let-out would attract service tax. This applies even if a residential property is used for commercial purposes. Service tax was 15% of the rent for commercial properties. To add, rental income from residential properties used for residential dwelling did not attract service tax.

Taxability under GST

Under the GST Act, renting out of an immovable property would be treated as a supply of services. GST will be applicable only to certain types of rent:

1. When a property is given out on lease, rent, easement, or licensed to occupy
2. When any property is leased out (or let out) including a commercial, industrial, or residential property for business (either partly or wholly)

This type of renting is considered as a supply of services and thus would attract tax.

REGISTRATION- WHEN THE PROPERTY IS RENTED TO BUSINESSES?

Every supplier shall be liable to be registered under this Act in the State or Union territory, other than special category States, **from where he makes a taxable supply of goods or services or both,** if his aggregate turnover in a financial year exceeds twenty lakh rupees or in special states if his aggregate turnover in a financial year exceeds ten lakh rupees.

ITC PROVISIONS:

The person paying GST on rent can usually take credit for the tax paid, to pay his other tax dues. In other words, if all the provisions to claim Input tax credit are fulfilled, ITC on GST paid on rent can be claimed.

HOW IS GST CALCULATED WHEN YOU RENT OUT A PROPERTY FOR COMMERCIAL PURPOSES?

- For all commercial spaces that are on rent, GST will be applicable at 18% on the taxable value and rent would be

treated as a taxable supply of service.

- If a registered charitable trust or a religious trust owns and manages a religious place meant for the public, it is exempt from GST. This can happen only if :
    - The rent of these rooms is less than Rs. 1000 per day
    - The rent of shops and other spaces for business is Rs 10,000 or less per month
    - The rent of community halls or any open area is Rs 10,000 or less per day.

WHETHER SUPPLY OF RENTING OF IMMOVABLE PROPERTY SERVICE IS INTER-STATE OR INTRA-STATE?

PLACE of supply plays a vital role in the scenario of GST. The place of supply has been notified for various activities under the IGST ACT. With regard to renting of immovable property the place of supply is the place where the immovable property is situated. For determining place of supply, we need to evaluate 2 co-ordinates i.e. 'Place of Supply of Services' and second is the location of supplier of services'

If these two co-ordinates fall in two different States, then it is an inter-state supply, and

if both of these two co-ordinates fall in the same state then it is an intra-state (local) supply.

Now going by the above parameters let us evaluate what will happen to a case of rental of immovable property?

Suppose, a landowner who is located in Kolkata and owns an immovable commercial property in Bangalore which he has rented out there at Rs. 1,00,000/-.

The question is whether the land owner will have to take GST registration in the State of Karnataka which is undisputedly the place of supply? Or, instead

Whether the land owner can take GST registration in the State of West Bengal which is his usual place of residence and treat it as inter-state supply and accordingly charge IGST?

For that, let us examine the above two co-ordinates.

A. Place of Supply

As per section 12(3) of IGST Act, the place of supply of service in relation to an immovable property shall be the location at which the immovable property is located.

Therefore, in this case, the place of supply is undisputedly Bangalore because the property is located thereat.

B. Location of supplier

For this the reference is invited to section 2(15) of IGST Act.

Section 2(15) contains four clauses (a),(b),(c),(d) to determine the location of the supplier of service.

Clause (a) says that location of a supplier means a place of business wherefrom the supply is made.

To fulfill this test, it is important to check whether the land owner is having any place of business in Bangalore just by having an immovable property thereat.

For the meaning of 'place of business' reference is invited to section 2(85) of CGST Act, which defines a 'place of business' wherefrom a business is ordinarily carried on and/or where a warehouse or godown or any other place for storage of goods is located and/or books of accounts are maintained and/or the business through agent is carried on.

Just having an immovable property doesn't qualify this test as per section 2(85) of CGST Act, so in our example there is no 'place of business' of the landlord in Bangalore.

Now let us examine clause (b) of Sec 2(15) of IGST Act, whether the land lord is having fixed establishment in Bangalore and for that reference is directed to section 2(50) of CGST Act, wherein a fixed establishment is a place which is characterized by a sufficient degree of permanence and suitable structure in terms of human and technical resources.

This test of having human and technical resources is also not qualified by just having immovable property at Bangalore.

So Clause (b) has no application in our case.

Now let us examine Clause (c) of Sec 2(15) of IGST Act. It pertains to a supply of service from more than one establishment and thus has no application in our case.

Now comes the final test i.e. **residual clause (d)** which says that:

in the absence of clause (a),(b),(c) being applicable, the location of usual place of residence shall be the location of the supplier of services within the meaning of clause (d) of sec 2(15) of IGST Act.

Conclusion

Therefore in our example

1. the location of the landlord will be Kolkata, while
2. the place of supply will be Bangalore ,and
3. hence as per section 7 of IGST Act this will be an inter-state supply subject to IGST, and
4. So**, there is no need for the landlord to take** GST registration **in the State of Karnataka.**

REVERSE CHARGE MECHANISM

Services supplied by the Central Government, State Government, Union territory or local authority by way of renting of immovable property to a registered person under CGST Act, 2017 to be taxed under Reverse Charge Mechanism (RCM) vide Notification No. 13/ 2017- Central Tax (Rate), dated the 28th June, 2017 as amended vide Notification No. 3/ 2018- Central Tax (Rate) dated 25th January, 2018.

Impact of GST on Joint Development Agreement

CA Pulak Saha

Introduction

In real estate sector it is a common practice that the land owner and builder join hands in developing a property. The modus operandi in almost all the cases are that the developer approaches the land owner with a proposal for developing the property owned by the land owner. After both the parties agree in principle about each one's share, rights and obligations, then one Agreement is executed wherein the agreed terms and conditions are recorded in writing. The most important aspect of this agreement is how the land owner's share is to be discharged by the developer. Generally land owner's share is discharged in two ways. One, partly in cash and partly in the form of agreed constructed area and the other is fully in the form of agreed constructed area. It is pertinent to mention that simultaneously a registered Power of Attorney is also executed by the land owner in favour of the developer and through this Power of Attorney, the developer obtains the physical possession of the land and other necessary powers to develop the property. In every such Joint Development, there are two interlinked transactions. One is that the land owner gives right to the developer for development of the entire property as per the sanctioned plan and permits the developer to sell his share of constructed area to the prospective buyers alongwith proportionate share of land attached to such constructed area which the land owner agrees to convey in favour of such prospective buyers. The other is that the developer in exchange of such right agrees to compensate the land owner either partly by cash and partly by agreed constructed area or fully by agreed constructed area. Now in this article the author has tried to give his view about the taxability of these two transactions under GST.

Taxability of transactions arising out of Joint Development Agreement

Firstly it is to be examined whether, granting of development rights concomitant to the land coupled with agreement to transfer the proportionate land would be taxable under GST. Under the GST, as per Entry 5 of the Schedule III to the CGST Act, 2017, sale of land shall neither be considered as supply of services nor supply of goods. There has been no specific mention in the said Schedule about the right arising out of the said land. Considering the fact that with a very wide definition of services which includes anything other than goods, the Department might take a position and dispute that transfer of right to develop land would be considered as supply of service hence liable to GST. However, it is view of the author that in case of a Joint Development Agreement, transfer of development rights, *per se*, cannot be taxable in the hands of the land owner, since these rights are in conjunction with the proportionate right in the land which the land owner will convey in due course along with the constructed area. But in a situation, if through the joint development agreement the land owner grants only the right to develop and sell the constructed area without conveying the proportionate share of land, then it would, without any doubt, be treated as supply of service as right to use the land and hence would be leviable to GST. Therefore, any consideration whether by cash or agreed constructed area or both are received by the land owner from the developer under a Joint Development Agreement would be considered as sale of land by virtue of Entry 5 of the Schedule III to the CGST Act, 2017, such consideration shall not be leviable to GST.

Secondly, it is to be seen whether the developer is at all providing any service to the land owner while agreeing to allot some constructed area in exchange of giving him the right to develop the land and sell his share of constructed area alongwith the proportionate share of land attached to such constructed area. In a Joint Development Agreement, the land owner agrees to allot some agreed unit free of cost in lieu of land consideration. This is a pure barter transaction between the land owner and the developer where the land owner transfers the land and the developer transfers the part of constructed area in the said land to the land owner. In GST, the definition of "supply" includes all forms of supply such as sale, transfer, barter, exchange, etc. [*Section 7(1)(a) of the CGST Act*]. Therefore, such transfer of constructed area to the land owner would come within the ambit of "supply" and therefore, such supply would be taxed under GST.It is pertinent to mention here that under the erstwhile regime, service tax and VAT were levied on such free units deeming it as providing of construction services and works contract activity respectively by the developer to the land owner.

Value of Supply

As per section 15(1) of the CGST Act, the value of a supply of goods or services or both shall be the transaction value, which is the price actually paid or payable for the said supply of goods or services or both where the supplier and the recipient of the supply are not related and the price is the sole consideration for the supply.

As per section 15(4) of the CGST Act, where the value of a supply of goods or services or both cannot be determined under sub-section (1), the same shall be determined in terms of Rule 27 to Rule 30 of the CGST Rules.

As per Rule 27 of the CGST Rules, where the supply of goods or services is for a consideration not wholly in money, the value of supply shall, -

(a) be the open market value of such supply;

(b) if the open market value is not available under clause (a), be the sum total of consideration in money as is equivalent to the consideration not is money, if such amount is known at the time of supply;

(c) if the value of supply is not determinable under clause (a) or clause (b), be the value of supply of goods or services or both of like kind and quality;

(d) if the value is not determinable under clause (a) or clause (b) or clause (c), be the sum total of consideration not in money as determined by the application of rule 30 or rule 31 in that order.

The expressions,"open market value" and "supply of goods or services or both of like kind and quality" are given under Explanation to Rule 35 of the CGST Rules which reads as follows :

"Open market value" of a supply of goods or services or both means the full value in money terms, excluding the Integrated tax, Central tax, State tax, Union territory tax and cess payable by a person in a transaction, where the supplier and the recipient of the supply are not related and price is the sole consideration to obtain such supply at the same time when the supply being valued is made. [*Explanation (a) to Rule 35 of the CGST Rules*].

"Supply of goods or services or both of like kind and quality" means any other supply of goods or services or both made under similar circumstances that, in respect of the characteristics, quality, quantity, functional components, materials, and the reputation of the goods or services or both first mentioned, is the same as, or closely or substantially resembles, that supply of goods or services or both. [*Explanation (b) to Rule 35 of the CGST Rules*].

Now the real challenge is whether the value of similar units/constructed area given to others by the developer is comparable with units/ constructed area given free to the land owner, i.e. whether that value closely or substantially resembles the value of construction of the units given free.

It is very clear that GST would be payable on the value of supply of construction services provided by the developer to the land owner. This value by no stretch of imagination can include the value of land as the land is still belonging to the land owner, while open market value of similar units includes value of land also.

It is without doubt that the proportionate value of land attributable to the concerned unit is recovered from the third party buyers by the developer as the price for the unit being charged is always inclusive of the proportionate share of land which is being conveyed in favour of the third party buyers.

Even if we look at the definitions "open market value" and "supply of goods or services or both of like kind and quality", it is more than sufficient to establish that the value of similar units/ constructed area sold to third party cannot be considered as "open market value" of units/ constructed area given free to the land owner as the first includes the value of land while the second does not include value of land.

A further question arises,even if we consider the gross value of the units given free to the land owner based on the open market value of the said unit, whether canwe claim the 33% abatement from that value towards the deemed value of land? As per para 2 of the Notification No. 11/2007-CT (Rate) and Notification No. 8/ 2007-IT (Rate) both dated 28.06.2017, the land value included in the value of the flat/unit will be deemed to be one third (33.33%) of the total amount and GST is payable on the balance amount. Therefore, the effective GST rate would be 12% (6% CGST and 6% SGST). For the benefit of the reader, it is stated that this is a deeming provision for hassle free valuation of the land included in the constructed unit. However, in the opinion of the author, such deeming provision cannot apply in a situation where the actual value of the land included in the total value of the constructed unit is more than 33.33%. Now the issue arises whether the deemed value of service can exceed the value as calculated in terms of Section 15 of the CGST Act? In a case where value of land exceeds 33.33% of the value of the unit, the effective value of construction services will be less than 66.67% whereas, the GST would still be payable on 66.67% value as the deemed value of service. In the opinion of the author, this obviously not permissible, as any deeming provision cannot prescribe a value of service which is higher than the value as determined under Section 15 of the CGST Act.

Hence, it is a clear case of conflict between the Act and Rules/Notifications. It is well settled that Rules or Notifications cannot override the provisions of the Act.

In *LaghuUdyog Bharti vs. UOI [(2006) 4 STT 322 (S.C.)]* the Hon'ble Supreme Court held that Rules are made to carry out the purpose of the Act. The Rules cannot be so framed which do not carry out the purpose of the Act and cannot be in conflict with the same.

In *KunjBehari Lal vs. State of HP [AIR 2000 SC 1069 (SC 3 member bench)]* Hon'ble Supreme Court held that Rules cannot be framed so as to bring into existence substantive rights or obligations or disabilities not contemplated by the provisions of the Act itself. The aforesaid decision was quoted with approval and also followed in *Wipro Ltd. Vs. ACC [(2005) 58 taxmann.com 123].*

Rules and Notifications cannot override the provisions of the Act and cannot be derogatory to the object of the Act. *UOI vs. JalyanUdyog [1993 (68) ELT 9 (SC)].*

In *CCE vs. Ashok Arc [2005 taxmann.com 555 (SC 3 member bench)]* Hon'ble Supreme Court held that a rule cannot override or be contrary to a section.

From the above settled principles of law, it is now clear that the value of free units supplied to the landowner cannot be determined in terms of Rule 27(a), (b) or (c) as the price of similar units or open market value is not comparable as that price includes the value of land, which may be more than 33.33% of the total amount charged for such unit and the value of supply calculated on that basis will exceed the value as is permissible under Section 15 of the CGST Act. Therefore, the valuation on the basis of Rule 27(a), (b) or (c) would always be incorrect and not in accordance with the set principle.

Since the value of the units given to the landowner free, cannot be determined in terms of the Rule 27 of the CGST Rules, we are now left with two more rules, namely Rule 30 and Rule 31 of the CGST Rules.

As per Rule 30 of the CGST Rules, where the value of supply of goods or services or both is not determinable by any of the preceding rules of this Chapter, the value shall be one hundred and ten percent of the cost of production or manufacture or cost of acquisition of such goods or the cost of provisions of such services.

As per Rule 30 of the CGST Rules, where the value of supply of goods or services or both cannot be determined under Rules 27 to 30, the same shall be determined using reasonable means consistent with principles and the general provisions of Section 15 and provisions of this Chapter.

In the case of supply of services, the supplier may opt for this rule, ignoring Rule 30.[*Proviso to Rule 31 of the CGST Rules*]

Therefore, for valuation of constructed units given to the land owner free, the builder can adopt the Rule 31 of the CGST Rules. Hence, the developer can have the following choices:

1. value on the basis of deeming provision considering the value of land as 33.33%, if the actual land value is less than equal to 33.33%; this may be considered as determination of value of service by 'using reasonable means' consistent with Acts and Rules as provided under rule 31;
2. value on the basis of cost plus 10% as provided under rule 30;
3. value on the basis of price of similar units after deducting value of proportionate land, if the value of comparable land is available as provided under rule 31.

If the developer adopts the deemed value, then there could be a challenge as the Chief Commissioner Central Tax, Central Excise & Customs, Thiruvananthapuram Zone vide instruction C. *No. IV/16/122017-CCO (TVM) dated 19th September, 2017*clarified that the deemed deduction is not available for units transferred to the land owner by the developer under Joint Development Agreement. Citing this clarificatory instruction the department may dispute this valuation for discharging the GST. Therefore, it is advisable not to adopt deemed valuation model while discharging the GST on transfer of units to the land owner under Joint Development Agreement till the GST Council comes with contrary clarificatory Circular.

Time of Supply

Free transfer of units to the land owner would be liable to GST and how the value of such service would be determined has also been discussed in the foregoing paragraphs. Now the last leg of challenge is at what point of time the liability would arise in such transfer.

As per Section 13 of the CGST Act, the time of supply shall be the earliest of the date of issue of invoice, date of payment or provision of service if the invoice is not issued within 30 days from the date of supply of such service.

In the case of Joint Development Agreement, since the payment to the developer is under barter transaction i.e. payment for the construction is received by the developer simultaneously with the execution of the Joint Development Agreement and the Power of Attorney through which the land owner transfers the right to develop the property, therefore, the time of supply shall be the date on which such agreement is entered into between the land owner and the developer.

However, in a situation where the land owner is registered under GST, then in terms of Notification No. 4/2008-CT (Rate) dated 25th January, 2018, the time of supply has been deferred and shall arise at the time when the said developer transfers possession of the unit to the land owner by entering into a conveyance deed or similar instrument (for example, allotment letter). Benefit of this Notification would not be available if the land owner is not registered under GST.

Conclusion

Under service tax regime, confusion in regard to the value of service and the time of supply in case of transfer of units to the land owner by the developer under Joint Development Agreement was clarified by the CBEC vide Circular No. 151/2/2012-ST dated 1oth February, 2012. Again the confusion started during Negative List of Service regime when the conflicting clarification provided by the CBEC in its 150 pages booklet titled "Taxation of Services: An Education Guide" released on 20th June, 2012. This conflict however, was removed by the CBEC vide its instruction No. 354/311/2015-TRU dated 20th January, 2016 on the basis of the opinion of the High Level Committee set up by the Ministry of Finance to resolve the conflict created between the views expressed in the Circular dated 10th February, 2012 and the Education Guide released on 20th June, 2012. But under GST, in the view of the author, more surprise is awaited unless the GST Council issues the appropriate clarification about the value and time of supply in regard to the transfer of units to the land owner by the developer under Joint Development Agreement.

GST on under construction property– Completion Certificate Vs. First Occupation - Are the provisions clear?

CA Tarun Kumar Gupta

Introduction

1. Goods and Services Tax (GST) was implemented w.e.f. July 1, 2017, which introduced a new concept, unheard in Service Tax, that of "first occupation" in under-construction property. The introduction of the concept of "first occupation" has although brought in big-time relief for promoters/ developers, since obtaining a completion certificate was quite a tedious task. It has also created many confusions, in the absence of clarity in law. Infact, w.r.t. the provisions of completion certificate, it is now required only if there is a provision in the local laws for obtaining the same. Let us first see what was the provision under service tax and what is there now under GST:

Provisions of taxability of under construction property under Service Tax:

2. Section 66E - The following shall constitute declared services, namely:—

(*a*) ……..;

(*b*) construction of a complex, building, civil structure or a part thereof, including a complex or building intended for sale to a buyer, wholly or partly, except where the entire consideration is received after issuance of completion certificate by the competent authority.

Explanation.—For the purposes of this clause,—

(*I*) the expression "competent authority" means the Government or any authority authorised to issue completion certificate under any law for the time being in force and in case of non-requirement of such certificate from such authority, from any of the following, namely:—

(*A*) architect registered with the Council of Architecture constituted under the Architects Act, 1972 (20 of 1972); or

(*B*) chartered engineer registered with the Institution of Engineers (India); or

(*C*) licensed surveyor of the respective local body of the city or town or village or development or planning authority;

(*II*) the expression "construction" includes additions, alterations, replacements or remodelling of any existing civil structure.

Provisions of taxability of under construction property under GST:

3. Schedule II of the CGST Act, 2017 (as per Section 7) - Activities to be treated as supply of goods or supply of services –

5. Supply of services:

The following shall be treated as supply of services, namely:—

(a) ……..;

(b) construction of a complex, building, civil structure or a part thereof,including a complex or building intended for sale to a buyer, wholly or partly,except where the entire consideration **has been** received after issuance of completioncertificate, **where required**, by the competent authority **or after its first occupation,whichever is earlier**.

Explanation.—For the purposes of this clause—

(1) the expression "competent authority" means the Government or anyauthority authorised to issue completion certificate under any law for the timebeing in force and in case of non-requirement of such certificate from suchauthority, from any of the following, namely:—

(i) an architect registered with the Council of Architecture constitutedunder the Architects Act, 1972; or

(ii) a chartered engineer registered with the Institution of Engineers(India); or

(iii) a licensed surveyor of the respective local body of the city ortown or village or development or planning authority;

(2) the expression "construction" includes additions, alterations,replacements or remodelling of any existing civil structure.

(changes brought by GST have been highlighted in bold)

4. A fine reading of the provisions under the erstwhile service tax laws and current GST law shows that there are two major changes in the taxability of under construction properties:

1. The insertion of the words "**where required**" w.r.t. completion certificate, and

2. The insertion of the words "**or after its first occupation, whichever is earlier**".

Provisions w.r.t. completion certificate:

5. In the erstwhile provisions of service tax, transactions in under-construction properties were taxable if the same were undertaken before the completion certificate (CC) was issued. The provisions were clear that "issuance of completion certificate by the competent authority" is an important milestone in the life of a property and once a CC is issued, it is "assumed" that the construction is complete and the property does no longer carry the tag of "under-construction". Thus a property in which a CC has been issued moves on to becoming a "constructed" property and service tax was no longer applicable. The Explanation to the provision went on to say that in case of non-requirement of such certificate from an authority, a CC from any of the following, namely architect, chartered engineer or licensed surveyor would suffice. In some states, there is also a requirement to obtain "occupancy certificate" e.g. West Bengal Municipal Areas. However there is no mention of the words "occupancy certificate" in the service tax provisions.

6. As per The West Bengal Municipal (Building) Rules, 2007, provisions w.r.t. issuance of a "completion certificate" and that of an "occupancy certificate" are as follows"

(a) **Completion Certificate** – As per the West Bengal Municipal (Building) Rules, 2007, Rule 16 - Duties and responsibilities of Architect and Licensed Building Surveyor, clause (i) the responsibility to submit the completion certificate and completion plan immediately after the work is completed is cast upon the Architect and Licensed Building Surveyor. The responsibility to submit a certificate that the structure has been constructed as per submitted structural plans and the building is safe for occupation alongwith the application for completion certificate in Form G (as per Rule 33) after the completion of the building is cast upon the Structural Engineer (Rule 17[k]). As per Rule 33, within one month after the completion of the erection of a building or the execution of any work, the owner of the building shall submit a notice of completion in Form 'G' accompanied by a structural safety certificate duly signed by the Architect or Licensed Building Surveyor and/or Empanelled Structural Engineer, as the case may be.*(As per section 2(q) of Real Estate (Regulation and Development) Act, 2016 (RERA), Completion certificate relates to the completion of the entire project certifying that the project has been developed according to the sanctioned plan, layout plan and*

specifications, as approved by the competent authority).

(b) **Occupancy Certificate** –As per Rule 34, if the Authority is satisfied that the building or the work has been completed in accordance with the sanctioned plan, it will issue an occupancy certificate, in Form 'H'. The Rules also mention that no partial occupancy certificate shall be issued unless the Authority is satisfied that the portion for which such partial occupancy is solicited is in a habitable condition. The Rules go on to mention that the Authority shall not permit connections to be made to municipal water mains and municipal drains, if any, for any new building in respect of which occupancy certificate has not been issued.*(As per section*

2(zf) of Real Estate (Regulation and Development) Act, 2016 (RERA), Occupancy certificate relates to the occupation of the apartment/ building, which has provision for civic infrastructure such as water, sanitation and electricity and is habitable).

7. A combined reading of the service tax laws and West Bengal Municipal (Building) Rules, 2007 shows that as per the West Bengal Municipal (Building) Rules, 2007, there is no requirement of the Authority to issue a completion certificate. It is actually issued by the Architect or Licensed Building Surveyor and/or Empanelled Structural Engineer, as the case may be. Only upon submission of the completion certificate by the Architect or Licensed Building Surveyor and/or Empanelled Structural Engineer, as the case may be, the Authority issues an Occupancy Certificate.

8. GST has introduced the words "**where required**" in the requirement for a completion certificate. If we read the provisions for requirement of a completion certificate in service tax and GST together combined with the requirement in West Bengal Municipal (Building) Rules, 2007, we can safely say that the West Bengal Municipal (Building) Rules, 2007 actually requires the issuance of a completion certificate (as per Rule 33), albeit by the Architect or Licensed Building Surveyor and/or Empanelled Structural Engineer, as the case may be.Based on this completion certificate, the Authority shall issue an Occupancy Certificate.

9. The experience of promoters/ developers, however is that obtaining a completion certificate/ occupancy certificate even after the construction is complete, is quite a tedious process, since difficulties exist with all stakeholders. In this event, the consumers, because of such difficulties faced in the issue of completion certificate, paid service tax, even when construction got completed.

10. With the introduction of GST, this difficulty has been rightly addressed, wherein the GST provisions have added the following "**or after its first occupation, whichever is earlier"**. Thus it means that the promoter/ developer can sell under-construction property without charging GST if the same has been occupied, even without the issuance of a completion certificate, since the provisions mention, "whichever is earlier". Let us now analyse what is "first occupation" and whether it is at all possible without the issuance of a completion certificate?

Provisions w.r.t. First Occupation

11. The provisions for taxability under GST have added another option w.r.t. under-construction properties. It goes on to say that "construction of a complex, building, civil structure or a part thereof, including a complex or building intended for sale to a buyer, wholly or partly, except where the entire consideration has been received after issuance of completion certificate, where required, by the competent authority **or after its first occupation, whichever is earlier"**. Let us analyse two questions that comes out from this Para:

a. What is "occupation"? and;

b. Can "first occupation" occur in the absence of a completion certificate?

12. The meaning of occupation or occupy means "reside or have one's place of business in (a building)"[1].

13. As per the UK laws, the meaning of "occupation" has been considered in two notable appeals[2]:

a. The first, Brambletye School Trust Limited (VTD 1768) concerned a preparatory school. In 1999 the school constructed a new sports hall and in May 2000 it granted a lease in the hall to a subsidiary company. The school had previously opted to tax but argued that this should not be disapplied under paragraph 12 of Schedule 10 as it was not their intention that the land would be exempt land as defined in paragraph 15 of Schedule 10.In their view, it was their subsidiary company that was in occupation (for the purpose of making taxable supplies of sports club membership) and not the school. They argued, that because the pupils used the hall as part of the curriculum activities, the school occupied the building, and it therefore had the status of exempt land. At the hearing, the tribunal

took the view that 'occupy' meant 'to be present in' and went on to consider how the use of hall was organised. Key factors in the tribunal's decision were: (i) the pupils were given priority over other users, (ii) they used it for the purposes of their physical education and, crucially, (iii) whenever they used it they were under the supervision of the teachers, who were employed by the school. Consequently, it was the teachers who exercised control over the sports hall. ***The Chairman decided for these reasons that the school was in occupation of the school hall and dismissed the appeal.***

b. In a more recent case, The Principal and Fellows of Newnham College in the University of Cambridge [2008] UKHL 23, the House of Lords took a different view on what was a similar arrangement. The College wished to renovate its library and in order to recover input tax put in place a complex scheme. In short, this consisted of opting to tax and then granting a lease and seconding library staff to a subsidiary company. In a majority decision the House of Lords concluded that the College was not in occupation. In doing so it distinguished the earlier Brambletye decision (Lord Hoffman observed that 'a decision as to whether acts attributable to a body like the school or college amount to occupation of premises is a question of degree, sensitive to the particular constellation of facts'). In the case of Newnham, the fact that library staff was seconded and were no longer under the direct control of the college was seen as crucial. Lord Hoffman took the view that for the purposes of paragraph 15 of Schedule 10 ***'occupation' should be defined as 'the right to occupy property as if that person were the owner and to exclude any other person from enjoyment of such a right'***. The arrangements that Newnham College had adopted meant that the College no longer had possession and control of the library premises.

14. A combined reading of the definition and the case laws of UK. we can take the view that for a person to be in occupation they must have both:

a. a physical presence on the property,and

b. the right to occupy it as if they are the owner.

15. On the second question of can "first occupation" occur in the absence of a completion certificate, we need to answer this is light of the provisions of West Bengal Municipal (Building) Rules, 2007, wherein it is mentioned that the Authority shall not permit connections to be made to municipal water mains and municipal drains, if any, for any new building in respect of which occupancy certificate has not been issued. Since an occupancy certificate cannot be issued in the absence of a completion certificate and one cannot "occupy" or live-in a house without water and sewerage connection, legally "first occupation" is not possible before the issuance of a completion certificate. Assuming the provisions of the issue of completion certificate and occupancy certificate is similar across the country, in places where there is a requirement for the issue of a completion certificate, that should be taken as the milestone for charging/ not charging GST, since legally "first occupation" cannot occur without a completion certificate. Thus "first occupation" is a stricter test compared to "completion certificate".

16. However having said that, practically, one canoccupy a property even without municipal water and drain connection, since many complexes have their own arrangements for the same. Since the two tests as per the UK law do not specify water and sewerage connection as a pre-requisite, practically, one can 'occupy' even without a completion certificate, though it may not be permissible under Building Bye-laws.

17. Thus the matter whether a property is 'occupied' or not is more a matter of fact than of law. The promoter/ developer needs to prove, in a matter of litigation, that as a matter of fact, the property was 'first occupied' and after which GST has not been charged.

18. Let us analyse the following situations, based on the two basic requirements of "first occupation" i.e. (i) a physical presence on the property, and (ii) the right to occupy it as if they are the owner:

Sl. No.	Situation	Opinion
1.	In case of a complex, is "first occupation" to be considered for a standalone building or of the complex as a whole?	As per the provisions of GST, it says "construction of a complex, building, civil structure or a part thereof, including a complex or building intended for sale to a buyer, wholly or partly, except where the entire consideration has been received after issuance of completion certificate, where required, by the competent authority or after its first occupation, whichever is earlier". So, construction of a complex or after "its" first occupation, whichever is earlier. Thus, technically speaking, after the first occupation in a complex, the other properties should not attract GST.
2.	Will giving Letter of Possession qualify as "first occupation"?	It seems that only providing Letter of Possession to an owner and him without moving-in will not qualify as "first possession". As per the conditions set-in by the UK case law, physical presence on the property is a fundamental test.
3.	Will giving out property for completion/ fitting-out/ interior, etc. amount to "first occupation"?	It seems that providing possession for the limited purpose of completion/ fitting-out/ interior, etc. will not qualify as "first possession", since, as mentioned above, physical presence on the property is a fundamental test.
4.	In case of a building/ complex having a mixed use e.g. residential as well as commercial; will giving out a commercial property qualify as "first occupation" even for residential properties and vice-versa?	As per the provisions of GST, there is no differentiation between residential or commercial properties. Thus, if the commercial property passes the two tests of physical presence and right as an owner, benefit under GST can be passed on to residential properties and vice versa.
5.	In case of a building where-in it is already occupied and additional floors are being built. Will the people staying in the building qualify as "first occupation"?	It seems that the part of the building, say additional floors, should be taken as a separate structure for the purposes of GST, as the provision mentions "or a part thereof". The already residing residents will not qualify as "first occupation"; it has to happen in the new construction.
6.	What are the tests/ documents that can be used to prove "first occupation"?	The other tests/ documents that can be used to prove "first occupation" includes electricity bills (with units consumed), water bills (with consumption), payment of property tax, completion status of the building in registration document, payment of common area maintenance charges, of the occupied property. A letter from the rightful owner that he/ she is residing in/ occupying the property may also be taken for record purposes.

Sl. No.	Situation	Opinion
7.	In case, the Developer/ Promoter occupies a property himself, then will it qualify as "first occupation"?	If the Developer/ Promoter passes the test as a rightful owner and moves in physically, it should qualify as "first occupation".
8.	Will registration of the property suffice as "first occupation"?	Registration is undertaken of the document and not of the property. In some states e.g. Maharashtra, the contract for sale is also registered, which can even be before the start of construction. Thus registration of the document may not qualify as a test for "first occupation".
9.	In case where the owner takes possession and gives it out on rent qualify as "first occupation"?	In this case, assuming, the tenant moves in and starts staying in the property, this may not qualify as "first occupation" since the tenant is not a rightful owner (based on the second test in UK case law).
10.	Can "first occupation" occur on partial completion of the property?	In case a property is built partially (e.g. plinth and casting of 4 floors) but only some flats (say 1st and 2nd floors) are complete and ready to move-in, any occupation passing the two tests should qualify as "first occupation".
11.	In case a property has been illegally occupied, will the same qualify as "first occupation"?	As per the tests in the UK law, the second test of being a rightful owner is important. Thus even if the property is occupied, since it is not rightfully owned, it will not qualify as "first occupation" .
12.	Will capitalization of the property and charging depreciation (in case of business assets) qualify as "first occupation"?	Since the basic test of physically moving in the property is not being fulfilled, merely capitalising the property and charging depreciation not qualify as "first occupation".

19. Thus, these are some situations and probable reply to the same. It should be kept in mind that Government has not issued any clarification on this issue and these replies are based on the two basic tests of "first occupation" as mentioned above.

20. The views and expressions in this article should not be construed as professional advice. Readers are encouraged to seek professional advise for any relevant opinion. The Government or the Association (ACAE) does not subscribe to the views of the author.

(Footnotes)

[1] https://www.google.com

[2] https://www.gov.uk/hmrc-internal-manuals/vat-land-and-property/vatlp23800

GST on Joint Development Agreement

CA Ankit Kanodia
Assisted by
Ms. Bhavana Khemka

A joint development agreement is an agreement between a land owner or owners and the builder/ promoter regarding any real estate joint venture project. A joint venture is one where a land owner with a vacant land or land with building enters an agreement with the builder to construct new projects. This way, the capital, construction and legal work will be carried out by the builder whereas the land will be provided by the builder.

Various things should be considered before speaking about the taxability of joint development agreement. The first thing being whether there is any taxable event for levy of GST on such transaction or not. This issue must be seen from the point of view of the developer as well as the land owner. Let us discuss both there as under.

Land owner point of view

What the land owner transfers is the development rights in return for the construction services received from the developer. In the plain language development rights shall mean "unused rights that allow developers to make changes to their property within the limitations imposed by state or local law". It is important to note that such rights which are to be transferred are in relation to Land.

Transfer or sale of land has been covered by the CGST Act, 2017 under Schedule 3, Serial Number 5. Schedule 3, serial number 5 mentions that "Sale of land and sale of building are activities or transactions which shall be treated neither as a supply of goods nor a supply of services". Any transfer of development rights shall also be construed to be sale of land and hence shall neither be covered as a supply of goods nor as a supply of service. The same can be supported on the basis of the judgement of In the case of Safiya Bee v. Mohd. Vajahath Hussain - (2011) 2 SCC 94, Apex Court held that 'land' includes rights in or over land, benefits to arise out of land. Also As per Sec. 3(a) of Land Acquisition Act (1 of 1894) the expression 'land' includes benefits to arise out of land and things attached to earth or permanently fastened to anything attached to the earth.AlsoApex Court in the case of Pradeep Oil Corporation v. Municipal Corporation ofDelhi - (2011) 5 SCC 270 observed that land includes benefits to arise out ofland. One can also refer for similar observation in S.N. Chandrashekar v. Stateof Karnataka - (2006) 3 SCC 208 as well as Dena Bank v. B.B.P. Parekh & Co. -(2000) 5 SCC 694. Hence transfer of development rights by the land owner to the developer shall not be taxable.

However, there is another school of thought which says that transfer of development rights does tantamount to supply n the normal course of business and hence shall be taxable. Such view is based on the issuance of Notification No 4/ 2018 – Central Tax (Rate) dated 25thJanuary, 2018. The said notification was issued to clarify the time of supply in case of Joint Development Agreement. However, the said notification nowhere mentions that the transaction shall be taxable.

A recent ruling of the Hon'ble Hyderabad CESTAT in the case of "**Vasantha Green Projects vs. CCT, RangareddyGST" vide FO No. A/ 30559/2018 dated 11/05/2018** has provided that the activity of the land owner to transfer of the development right cannot be taxed to service tax by stating ***"Consideration***

received from landowners in the form of development rights thereon for construction of 'villas' under Joint Development Agreement (JDA) not liable to service tax separately where cost of acquisition of land included in gross amount charged by assessee-builder; *Observes that assessee discharged service tax on the transaction entered with prospective customers from whom it received consideration in cash for the sale of villas and "It would not be a rocket science to understand that the value….would include the consideration paid or payable for acquisition of land"; Rejecting Revenue's contention that transactions between builder & landowner and builder & prospective buyers have to be understood as two separate transactions.*

The judgement also stated that ***"merely because the consideration received from land owners is invested in construction of villas to other buyers on which service tax is paid, it cannot be concluded that service tax paid on consideration received from land owners has to be evaluated differently";*** *Referring to Chartered Accountant's certificate evidencing discharge of service tax on gross consideration received, as well as CBEC Circular dated February 16, 2006, CESTAT holds that as assessee discharged service tax liability on the construction undertaken on joint development basis, "demand of service tax on the same amount again would amount to double taxation"*

In the light of the above judgement, it can be concluded that the transaction between the land owner and the developer regarding transfer of development rights in exchange for construction services shall not be taxable at the end of the landowner being a right in immovable property.

Developer Point of View

The developer transfers construction service to the land-owner in return of the portion of land or revenue sharing from the land owner. Such transaction shall construe as a supply under the definition of supply as it shall be a transaction between two persons for a consideration. The developer shall charge GST on the value of the construction service from the land owner. Such transfer is not debatable, and the time of supply as clarified under Notification No. 4/2018 Central Tax (Rate) shall stand good for such transaction.

Place of Supply

The services provided by the developer shall be in relation to an immovable property hence section 12(3)(a) shall remain in force according to which "place of supply of services directly in relation to an immovable property, including services provided by architects, interior decorators, surveyors, engineers, and other related experts or estate agents, any service provided by way of grant of right to use immovable property or for carry out of co-ordination of construction work shall be the location at which the immovable property is located or intended to be located."

Time of Supply

The time of supply shall be determined according to the Notification No. 4/2018 – Central Tax (Rate) dated 25thJanuary, 2018 which was issued to clarify the same:

1. 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 **[Landowner]**

2. 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 **[Real Estate Developer]**

   are liable to pay tax on supply of the said services at the time of supply which 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). In simple words, the time of supply is the time when either the possession is transferred or the rightful area is demarcated.

Value of Supply

There is no direct monetary consideration would be identified inthe JDA towards the flats being constructed and handed over by the developerto the landowner.

The developer would be given the right to develop thecomplex, sell his share of flats along with proportionate undivided share in landand retain the sale proceeds, though the entire land is owned by thelandowner.In such a case Rule 27 of valuation rules shall apply. Where the supply of goods orservices is for a consideration not wholly in money, the value of the supplyshall-

(a) be the open market value of such supply;

(b) if the open market value is not available under clause (a), be the sumtotal of consideration in money and any such further amount in money as isequivalent to the consideration not in money, if such amount is known atthe time of supply;

(c) if the value of supply is not determinable under clause (a) or clause (b), be the value of supply of goods or services or both of like kind and quality;

(d) if the value is not determinable under clause (a) or clause (b) or clause

(e), be the sum total of consideration in money and such further amount inmoney that is equivalent to consideration not in money as determined bythe application of rule 30 or rule 31 in that order.

Thus, the value for the barter transaction between the developer and the landowner shall have to be valued as per the above terms and provisions.

Anti profiteering in the Real Estate sector

CA Shubham Khaitan

Much has been spoken about the controversial anti-profiteering measure adopted by the Government during the advent of GST. There have been nationwide disputes whether anti profiteering can be considered as a successful and a just measure by the Government. For this, it is imperative, the meaning and the provisions of the law relating to anti profiteering be examined.

Section 171 of the CGST Act depicts the provisions relating to anti profiteering. As per the said provision, any reduction in rate of tax on any supply of goods or services or the benefit of input tax credit shall be passed on to the benefit by way of commensurate reduction in prices. For this, it empowers the forming of an Authority which can examine whether input tax credits availed by any registered person or the reduction in rates of taxes have actually resulted in commensurate reduction in the price of the goods or services or both.

For the purpose given above, Anti profiteering rules have been prescribed which elucidates the constitution of the authority and committees under the authority, powers and duties of such authority and the detailed process for the conducting the entire proceedings relating to this anti profiteering measure.

The newly established mechanism empowers the affected consumers to apply for relief to the Screening Committee in their state citing that the reduction in rates or increase of input tax credit has not resulted in a commensurate reduction in prices. Upon examination by the State Level Screening Committee, the Screening Committee will forward the application along with its recommendations to the Standing Committee. In case, the incident of profiteering relates to an item of mass impact with 'All India Ramification', the application can directly be made to the Standing Committee. After forming a prima facie view that there is an element of profiteering, the Standing Committee will refer the matter for detailed investigation to the Director General of Safeguards, CBEC which will report the finding to the National Anti Profiteering Authority. If the authority confirms the necessity to apply the anti profiteering measure, it can order the business to reduce its prices or return the undue benefit along with interest to the recipient of goods or services. If the benefit cannot be passed on to the recipient, it can be ordered to be deposited with the Consumer Welfare Fund. In certain extreme cases, a penalty on the defaulting business entity and even an order for cancellation of GST registration may be issued. Its constitution aims to bolster the confidence of consumers to get the benefit of reduction in GST rates.

It may be noted that a detailed procedure of the anti profiteering mechanism has been given in detail by the Government through the rules prescribed by it. However, some important questions remain unanswered. The foremost question is the methodology to be adopted while calculation of amount of profit being earned because of GST.

In the real estate sector, a number of companies were paying under composition scheme in VAT ranging between 1% to 4% and were having a service tax rate of 4.5% after abatement. Under GST, this rate has been increased to 18% along with deduction for the 1/3rd value for the land. The Government intends that this sector should pass on the benefit of additional input tax credit to the consumers by means of anti profiteering.

In the real estate sector, it has been prescribed that the overflow of Input tax credit will not be allowed as a refund. Also, the credit which remains after the flat are unsold needs to be reversed. In that situation, can it be really stated that the additional tax input tax credit is accruing to the real estate company because it gets to utilize this? The unutilized credit may not accrue as a benefit to the real estate company. To complicate matters, there will be reversal of input tax credit which may be due to outward exempt supplies or inward supplies which are for non-business purposes.

In fact, till the project gets completed, the actual benefit arising due to GST may not be determinable at all. However, the Department has been asking real estate companies to reduce their prices even though the project is far from the stage of completion. For sure, it may not be possible for the real estate companies to pass on the benefits without realizing them at first. Also, any increase in prices in the normal course of the project due to increase in the cost of consumables, labour etc. may be subject to questioning. This is because the Department may allege the violation of the principles of anti profiteering. This is against the basic demand supply market price determination principle. A seller who is otherwise freely allowed to fix his own prices may not be allowed to do so without the fear of provisions of anti profiteering getting attracted.

It is quite natural that the booking may open at a lower price for the real estate companies to be able to popularize the project. Also, they try and ensure that some of the properties are sold within it quickly so that they can quickly recoup the cost of the construction. As and when the project advances and with actual cost rising above the budgeted, the flats sold later may have a higher value. Such increase in prices are driven by economies of scale and various market factors. To disrupt such market forces will be grossly against the interest of trade and industry.

To put in the aspect of non profiteering for the purpose of calculation may result in complex calculations which are susceptible to difference of opinion. The original profit margin may not be correctly determinable as the prices were only budgeted in the beginning. Since, this budgeting does not hold any statutory significance, they may be subject to manipulation by the real estate companies. In turn, only the consumers who wish to have the prices reduced may litigate the matter and have their costs rising because of that. The result of these litigations may not be as fruitful as they desire because of the calculations being in the hands of the real estate company and the lack of structured approach in respect of such calculation under the law. It may not be practically feasible to calculate the change in input tax credit and the rate structure. In these kind of situations, the methodology adopted by any company may not be acceptable to the Government. For this reason, a standard mechanism for calculation should be prescribed.

If there is no standard methodology prescribed, then it will result in unnecessary wastage of resources of the Department and Judiciary. It will result in a plethora of cases getting registered with the Committees and Authorities causing hasty disposal of cases. This may result in unnecessary harassment for the taxable persons who may have kept the prices of goods / services fixed as per their calculation.

While the intent of the legislature may be in the right place to prevent inflation due to GST, the execution requires a clear and transparent mechanism. Otherwise a few market players having the dominant position in the market may drive the prices and little may be left in the hands of the other businesses. Also, if a retailer is caught in the fiasco wherein the customer alleges profiteering, the retailer may be left with no alternative. This is because he may simply be part of a much larger chain. This will result in a fresh institution of a case against that person. All and all it may be a lengthy and cumbersome process.

It may easily be argued that the market forces drive the prices of any industry and a lot may not be left in the hands of an individual taxable person. So, penalising any person without realising the ultimate price mover may result in a gross injustice and dismissal of such cases in front of the judiciaries on merit.

Anti profiteering is not a first time made in India concept. It was made applicable in Australia and Malaysia during the introduction of GST there. The proportion of cases wherein anti profiteering was proven was very low compared to the number of complaints received. It did more harm than good from the perspective of promotion of businesses. Taking a cue from that and the fact that India is a federal country with a much larger market and factors driving that market, it may turn out to be disastrous if not handled carefully.

In a competitive market like India, prices get self adjusted. Also, since there are various market players making the market very competitive, it will be very difficult to prove that the price change has been attributable to GST only. Various other factors contributing to the changes in prices need to be taken into account. These factors may have a separate outlook from the perspective of the industry and the customer expecting the price reduction. So, settlement and decision of pricing mechanism in large number of cases may not do a world of good to the trust reposed in the businesses by the Government.

To summarize, it is high time that a measure brought with the intent of the common good should be given shape. Also, confidence should be reposed in the businesses so that they know the correct direction which will save them from unnecessary direction. These actions need to be taken sooner rather than later because at the moment it seems to be a ship without a rudder!!

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Lecture Meeting on
(1) Section 148 : Income Escaping Assessment
(2) Provisions of GAAR and its implications
on 10.04.2018 at ACAE, Emami Conference Hall

On the dais, Guest Speaker CA Ramesh Kr Patodia, Vice President CA Vasudeo Agarwal, Guest Speaker CA Sanjay Bhattacharya and Convenor CA Anup Kr Sanghai.

Lecture Meeting on Recent Regulatory Issues concerning NBFCs on 13.04.2018 at ACAE, Emami Conference Hall

Guest Speaker CA Mohit Bhuteria giving his deliberations.

Lecture Meeting on Voluntary Liquidation and Latest Developments in IBC on 27.04.2018 at ACAE, Emami Conference Hall

Guest Speaker CS Dr. (h.c) Mamta Binani, Past President-ICSI, being felicitated by CA Anup Kr Banka, Executive Committee Member-ACAE.

Guest Speaker CA Sumit Binani, Vice Chairman of EIRC-ICAI, giving his deliberations.

Programme for Articles/Students on Place of Supply under GST on 28.04.2018 at ACAE, Emami Conference Hall

On the dais, Guest Speaker CA Pradeep Modi and CA Pramod Kr Mundra, Chairman - Students & New Members Sub-Committee.

Panel Discussion on Real Estate in GST Regime on 30.04.2018 at Williamson Magor Hall, BCCI

Panelists CA Arvind Baheti, Executive Director-Khaitan & Co., Kolkata, Shri Khalid Aizar Anwar, Sr. Joint Commissioner, States Taxes, Moderator CA Sushil Kr Goyal, Central Council Member, Vice Chairman-Indirect Taxes Committee, ICAI, President CA Arun Kr Agarwal, Panelist CA A Jatin Christopher, Partner-JSSC, Bengaluru and Convenor CA Anup Kr Sanghai

Seminar jointly with Views Exchange Chartered Accountants Study Circle – EIRC on Prohibition of Benami Properties Transaction Act, 1988 on 18.05.2018 at The Park

Group photograph of dignitaries at the Lighting of the Inaugural Lamp.

Opening remarks by Shri Sridhar Bhattacharyya, IRS,Addl.CIT, BPU Kolkata.

Technical Session : Shri Firoz B Andhyarujina, Sr. Advocate, Mumbai, Chairman of the session CA Ranjeet Kr Agarwal, Central Council Member-ICAI, CA Ashwani Taneja, Advocate (Ex-Member ITAT), New Delhi and Covenor CA Anup Kr Sanghai

Panelists CA Ashwani Taneja, Advocate (Ex-Member ITAT),New Delhi, Shri Firoz B Andhyarujina, Sr. Advocate, Mumbai, Moderator CA Jinesh S Vanzara and Advocate (CA) Sanjay Sanghvi, Partner-Khaitan & Co., Mumbai.

Cross-section of the audience.

Seminar on Goods and Services Tax (GST) (1) Reconciliation of Financial Statements and GST Returns (2) Preparing for Scrutiny/Compliance Verification in GST Regime (3) Analysis of Recent Judicial Pronouncements in GST (including some landmark judgements in earlier law) on 24.05.2018 at Williamson Magor Hall, BCCI.

Guest Speaker, CA Gaurav Gupta, New Delhi, giving his deliberations. On the dais, CA Tarun Kr Gupta, Chairman-Indirect Tax Sub-Committee, CA Arun Kr Agarwal, President-ACAE, CA Sushil Kr Goyal, Central Council Member, Vice Chairman-Indirect Taxes Sub-Committee, ICAI

Advocate Vinay Shraff giving his deliberations. On the dais, CA Tarun Kr Gupta, Chairman-Indirect Tax Sub-Committee, CA Anup Kr Sanghai, Convenor and CA Vivek Agarwal, Executive Committee Member.

Cross-section of the participants

Real Estate Conclave - *Challenges in Changing Times* !
Saturday, the 9th June, 2018 at The Park, Kolkata

INAUGURAL SESSION

Lighting of the Inaugural Lamp by Guest of Honour, Shri Nandu Belani, President - CREDAI Bengal.

CA Arun Kr Agarwal, President-ACAE, giving his welcome address. On the dais, CA Rishi Khator, Chairman-Real Estate Conclave, Guest of Honoour, Shri Nandu Belani, President-CREDAI Bengal and CA Anup Kr Sanghai, Convenor-ACAE CA Study Circle.

Guest of Honour Shri Nandu Belani, President-CREDAI Bengal being felicitated by CA Arun Kr Agarwal, President-ACAE.

Guest of Honour Shri Nandu Belani, President-CREDAI Bengal, presenting CREDAI Views.

CA Rishi Khator, Chairman-Real Estate Conclave, giving introduction of the theme of the Conclave - *Challenges in Changing Times* !

Group Photograph

FIRST TECHNICAL SESSION

Executive Committee Member and MOC, CA Vivek Agarwal introducing the Guest Speakers. On the dais, CA (Dr.) Debashis Mitra, Central Council Member, ICAI and Vice President-ACAE, Guest Speaker, CA Dolphy D'Souza,Sr. Partner, Ernst & Young, Mumbai, CA Rishi Khator, Chairman-Real Estate Conclave and Guest Speaker, CA Ashok Raghavan, Partner, NCS Raghavan & Co.,Bengaluru.

Guest Speaker CA Dolphy D'Souza being felicitated by CA Beena Jajodia, Dy. Convenor, ACAE CA Study Circle.

Guest Speaker CA Ashok Raghavan giving his deliberations.

SECOND TECHNICAL SESSION

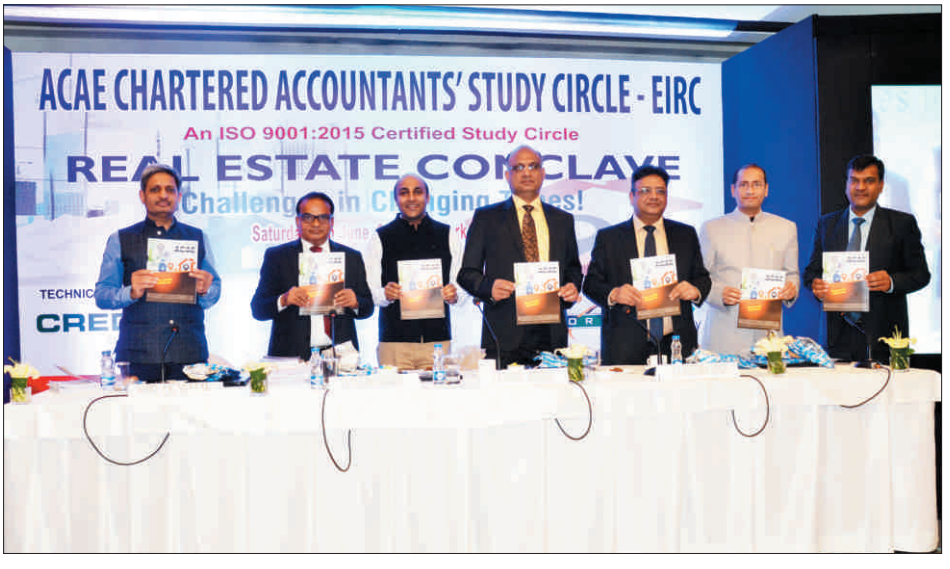
Guest Speaker Shri J K Mittal, Sr. Advocate, Supreme Court, Delhi being felicitated by CA Pramod Kr Mundra, Executive Committee Member.

Guest Speaker, CA Vishnu Agrawal, Sr. Partner, S V Agrawal & Associates, Indore, being felicitated by CA Niraj Harodia, Co-Chairman, House Journal Committee.

Guest Speaker, Sr. Advocate Shri J K Mittal giving his deliberations. On the dais, CA Vasudeo Agarwal, Vice President, Guest Speaker CA Vishnu Agrawal and CA Jitendra Lohia, General Secretary.

Question & Answer Session with experts on Direct and Indirect Taxes in full swing

Panelists Shri J K Mittal,Sr. Advocate, Supreme Court, Delhi, CA Sushil Kr Goyal, Central Council Member, Vice Chairman-Indirect Taxes Committee, ICAI, CA S S Gupta, Proprietor, S Swarup & Co., CA Vishnu Agrawal, Sr. Partner, S V Agrawal & Associates, Indore, with CA Arun Kr Agarwal, President - ACAE.



Release of ACAE House Journal - June, 2018 Special Issues on Real Estate Conclave by Sr. Advocate J K Mittal, CA Vasudeo Agarwal, CA Niraj Harodia, CA Vishnu Agrawal, CA Arun Kr Agarwal, CA Rishi Khator and CA Jitendra Lohia.

Cross-section of the audience

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