


GUJARAT AUTHORITY FOR ADVANCE RULING GOODS AND SERVICES TAX D/5, RAJYA KAR BHAVAN, ASHRAM ROAD, AHMEDABAD – 380 009.	
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ADVANCE RULING NO. GUJ/GAAR/R/2023/15
(IN APPLICATION NO. Advance Ruling/SGST&CGST/2022/AR/55)

Date: - 31.03.2023

Name and address of the applicant	: M/s. Kedaram Trade Centre 15, Nest Bungalows, Ground floor, Nr. Narmada Vasahat, Satellite, Ahmedabad 380 015.
GSTIN of the applicant	: 24AAVFK7173P1ZC
Date of application	: 18.11.2022
Clause(s) of Section 97(2) of CGST / GGST Act, 2017, under which the question(s) raised.	: (a) (e)(g)
Date of Personal Hearing	: 09.02.2023 and 28.02.2023
Present for the applicant	: CA Nirav Malkan and CA Akhil Shah.

Brief facts:

M/s. Kedaram Trade Centre, 15, Nest Bungalows, Ground floor, Nr. Narmada Vasahat, Satellite, Ahmedabad 380 015 [for short –‘applicant’] is registered under GST and their GSTIN is 24AAVFK7137P1ZC.

2. The applicant is engaged in the business relating to construction of immovable properties.

3. Government of Gujarat, acting through Gujarat State Road Transport Corporation [for short –‘GSRTC’] decided to develop the area admeasuring 58370 sq. mtrs. of TP scheme no. 2 of Kankaria through private sector participant on commercial build, operate and transfer basis.

4. Vide concession agreement dated 12.5.2011 between GSRTC and Hubtown Bus Terminal (Ahmedabad) P Ltd, [for short ‘Hubtown’], GSRTC granted development rights to Hubtown, in the manner set out in the concession agreement. Out of the development rights for the total area of land, Hubtown executed a deed of assignment dated 3.3.2021 with the applicant, who acquired development rights for development of commercial units on plot of land admeasuring 1670 sq. mtrs. through the said deed of assignment dated 3.3.2021.



5. The applicant has undertaken development of the project as per the approved plans and has developed commercial unit. Upon duly completing the construction and development of the project the Ahmedabad Municipal Corporation has issued the BU permission on 25.5.2022.

6. The applicant wishes to allot developed units to prospective buyers on a long term lease basis for a period of 90 years. The applicant in fact has received booking for the certain units before getting BU permission and he has charged the GST at the applicable rate on the entire amount of the consideration received for the booking done before BU permission.

7. The lease deed shall be executed by and between the following parties viz

Sr. No.	Name	Description to the party of lease deed
1	Gujarat State Road Transport Corporation [GSRTC]	Lessor
2	Prospective buyer	Lessee
3	Hubtown Bus Terminal (Ahmedabad) P Ltd	Confirming party No. 1
4	Kedaram Trade Centre LLP [applicant]	Confirming party No. 2

8. On expiry of the lease period, the lease deed shall come to an end and the lessee/sub-lessee shall without any demur or delay remove all the goods and other belongings and hand over the leased premises to the lessor or its nominee.

9. The lessee shall pay a one-time premium of Rs. 13.00 lacs to the applicant [ie confirming party no. 2] as a consideration for allotment of the commercial unit on long term lease period of **90 years**. Additionally, the lessee shall pay to the lessor *ie* GSRTC, advance annual lease rental of Re 1/- per square metre for the built up area of the leased premises for the first three years and thereafter the same shall be enhanced by 200% for every subsequent block of 10 years or part thereof.

10. The lease deed *inter alia* also provides that the lessee shall be entitled to sublet or transfer/assign holding rights in the leased premises in favour of a third party in the manner set out in clause 8 of the said deed.



11. In view of the foregoing, the applicant has filed this application seeking advance ruling on the below mentioned questions viz

- (i) Whether one time premium received by the applicant on allotment of completed building would be treated as taxable supply or not?
- (ii) In case the supply is treated as taxable supply, what will be the applicable rate of tax.

12. In the additional submissions made during the course of personal hearing, the applicant further stated as follows:

- that sale of office after receipt of BU permission should be considered as non GST supply;
- that the services provided by them may not be considered as rental or leasing services as the applicant is not the lessor;
- that the applicant has not been given any contract for construction of building from GSRTC or Hubtown;
- that the applicant is the developer, who acquired the rights with respect to the development in land;
- in return of transfer of development rights, developer gives the landowner/assigner consideration as specified in the deed of assignment;
- the applicant has constructed commercial units on the land & is also willing to transfer the completed commercial units to the prospective buyers;
- that the transaction between the applicant and the Hubtown is relating to transfer of development rights and not relating to works contract services;
- that according to them the most appropriate classification is consideration is sale of building and in terms of entry number 5 of schedule III of the CGST Act, 2017, it will be treated neither as a supply of goods nor a supply of services.

13. Personal hearing was granted on 09.2.2023 and 28.2.2023 wherein CA Nirav Malkan and CA Akhil Shah appeared on behalf of the applicant and reiterated the facts as stated in the application. During the course of personal hearing it was further stated

- that the applicant does not pay anything to GSRTC;
- that there was sale of commercial units and hence the transaction was not leviable to GST.

Discussion and findings

14. At the outset, we would like to state that the provisions of both the CGST Act and the GGST Act are the same except for certain provisions. Therefore, unless a mention is specifically made to such dissimilar provisions, a reference to the CGST Act would also mean a reference to the same provisions under the GGST Act.

15. We have considered the submissions made by the Applicant in their application for advance ruling as well as the submissions made during the course of personal hearing. We have also considered the issue involved, the relevant facts



& the applicant's submission/interpretation of law in respect of question on which the advance ruling is sought.

16. Before advertng to the submissions made by the applicant, we would like to reproduce the relevant provisions for ease of reference:

• **Section 7. Scope of supply.-**

(1) For the purposes of this Act, the expression –

"supply" includes-

(a) all forms of supply of goods or services or both such as sale, transfer, barter, exchange, licence, rental, lease or disposal made or agreed to be made for a consideration by a person in the course or furtherance of business;

¹[aa) the activities or transactions, by a person, other than an individual, to its members or constituents or vice-versa, for cash, deferred payment or other valuable consideration.

Explanation .-For the purposes of this clause, it is hereby clarified that, notwithstanding anything contained in any other law for the time being in force or any judgment, decree or order of any Court, tribunal or authority, the person and its members or constituents shall be deemed to be two separate persons and the supply of activities or transactions inter se shall be deemed to take place from one such person to another.]

(b) import of services for a consideration whether or not in the course or furtherance of business; ²[and]

(c) the activities specified in Schedule I, made or agreed to be made without a consideration; ³[****]

(d) ⁴[****].

³[(1A) where certain activities or transactions constitute a supply in accordance with the provisions of sub-section (1), they shall be treated either as supply of goods or supply of services as referred to in Schedule II.]

(2) Notwithstanding anything contained in sub-section (1),-

(a) activities or transactions specified in Schedule III; or

(b) such activities or transactions undertaken by the Central Government, a State Government or any local authority in which they are engaged as public authorities, as may be notified by the Government on the recommendations of the Council,

shall be treated neither as a supply of goods nor a supply of services.

(3) Subject to the provisions of ⁶[sub-sections (1), (1A) and (2)], the Government may, on the recommendations of the Council, specify, by notification, the transactions that are to be treated as -

(a) a supply of goods and not as a supply of services; or

(b) a supply of services and not as a supply of goods.

• **SCHEDULE II.**

Activities ¹ [or transactions] to be treated as supply of goods or supply of services

2. Land and Building

(a) any lease, tenancy, easement, licence to occupy land is a supply of services;



(b) any lease or letting out of the building including a commercial, industrial or residential complex for business or commerce, either wholly or partly, is a supply of services.

• **SCHEDULE III.**

Activities or transactions which shall be treated neither as a supply of goods nor a supply of services

5. Sale of land and, subject to clause (b) of paragraph 5 of Schedule II, sale of building.

17. At the outset, we find that the applicant in the application has enclosed the deed of assignment entered on 9.3.2021 between Hubtown and the applicant. On going through the same, what is significant to the present dispute is reproduced below for ease of reference *viz*

- GSRTC has granted permission in writing to Hubtown permitting assignment of development rights in respect of said land;
- M/s. Hubtown has entered into concession agreement dated 12.5.2011 with GSRTC to develop Gita Mandir bus terminal facility & commercial units thereto;
- M/s. Hubtown pursuant to the above concession agreement is entitled to develop proposed commercial units admeasuring 1670 sq. mtrs.; that Hubtown is desirous of assigning the said right of construction, marketing allotment and demise of the said commercial units in favour of the applicant for consideration pursuant to the permission of GSRTC on as is where is basis;
- In consideration of the sum of Rs. 4.70 crores, paid by the applicant to Hubtown, it assigns the below mentioned rights to applicant\
 - Right to construct commercial units;
 - Right to market and promotion of the said commercial units;
 - Right to execute lease deeds as confirming party and obtain premia from the third party lessee for a lease of 90 years;
- The applicant shall construct the commercial unit as per and in accordance with the concession agreement and the plan passed by the Municipal corporation
- That the lease deed shall be for 90 years from the date of construction completion.

That in terms of the aforementioned agreement, the applicant on payment of consideration of Rs. 4.70 crores has been assigned the right to construct commercial units ad-measuring 1670 square meters as per approved plan; that the right of marketing and promotion of the said commercial units is transferred to the applicant; that the right to execute lease deed as confirming party and obtain premia [consideration] from the third party lessees for a lease of ninety years is bestowed on the applicant.

18. We find that the applicant has also submitted a copy of the lease deed between GSRTC, R J Bhavsar, [the lessee], M/s. Hubtown and the applicant. On



going through the lease deed, what is significant to the present dispute is reproduced below for ease of reference viz [relevant extracts]

- *A. The Government of Gujarat 'GOG' acting through GSRTC has decided to implement the project through private sector participant on the commercial build, operate and transfer basis.....*
- *GSRTC conferred upon the Concessionaire the rights to develop the project on a commercial build operate and transfer basis 'BOT' inter alia the rights to build, develop, construct, finance, design operate and maintain the (i) Bus Terminal Facilities (the 'BTF') and (ii) the commercial facility to be developed on the said land in accordance with the terms and conditions set out in the said concession agreement.*
- *2.1 In consideration of the premium of Rs. 13 lacs paid by the lessee to the confirming party no. 2 in the manner set out & the payment of the rent hereby reserved to be made by the lessee to the lessor as set out hereinafter and subject to the terms covenants and agreements on the part of the lessee as contained herein the lessor hereby grants the lease unto the lessee.....*
- *2.3 The lessee represents, undertakes and warrants that he/she/it expressly understand and agrees that*
 - i.....*
 - ii. upon expiry of the lease period as set out herein the lease hold rights in the leased premises shall expire and the entitlement, right and interest in leased premises shall revert in favour of GSRTC without any third party interest in any manner whatsoever together with the physical possession thereof and the lessor thereafter shall be entitled to deal with the leased premises and the said land in the manner it may deem fit without any restriction with any person*
 - iii. The ownership of the said land at all times hereinafter shall remain with GSRTC while the lessee shall only be entitled to the lease hold rights in the leased premises for the lease period as set out herein and nothing in this lease deed shall directly or indirectly create any ownership rights of lessee of whatsoever nature in the said land and/or in the leased premises save and except for leasehold rights detailed above.*
- *3(i)The lessor hereby grants on lease the leased premises beingfor a period of 90 years commencing from*
- *3(ii)Upon expiry of the lease period, this lease deed shall come to an end and the lessee and/or the sub lessee and /or the subsequent transferee/assignee shall without any demur or delay remove all the goods belonging and hand over the vacantof leased premises*
- *5. Over and above the premium amount of Rs. 13 lacs the lessee shall pay to the lessor annual lease rent of Re 1/- per sq mtr for the built up area of the leased premises for the first three years..... and thereafter the same will be enhanced by 200%for every subsequent block of 10 years or part thereof;*
- *5ii In the event of the lessee defaulting in payment of the rent within seven days of the due date the amount thus due for payment shall attract interest calculated @ SBI benchmark prime lending rate plus 2% additional charges per annum from the original due date of the payment till the date of actual payment. However, in the event of the delay in such payment of the rent by the lessee to the lessor during 30 days notice of termination issued by the lessor, the lessor shall be entitled to terminate this lease deed in accordance with clause 14 below.*
- *10.iii The lessee shall from time to time & at all times hereinafter duly abide by the terms and conditions of the Concession agreement, deed of assignment all the statutory approvals including the ones set out in the approved plans & the BU permission, the lease deed, the bye laws that may be formed by the concessionaries/confirming party no. 2 &/or the management body & all the prevailing laws of the land affecting the holding of the leased premises as well as the development of said CF in the said project.*
- *10 v The lessee shall use the leased premises or any part thereof or permit the same to be used only for commercial office purpose as per the approvals as well as the concession agreement, deed of assignment & the lease deed shall not use it for any other purpose(s) & the lessee shall be solely responsible & liable to bear the consequences arising from*



such negligence & the lessor/concessionaire/confirming party no. 2 shall be in no manner be held responsible or liable for the same.

- 14.2The Lessee (without prejudice to any other rights of the Lessor under this lease deed) or in case of any other events or defaults as set out herein below shall be liable for **termination** of this Lease deed
 - i. Failure on the part of the lessee to pay the lessor the rent in accordance with the provision of this lease deed;
 - ii. Any violation or non compliance by the lessee or its successor in title or the sub lessee of the terms and conditions of this lease deed;
 - iii. The lessee using or permitting or causing the use of the leased premises for the purposes other than those as contemplated in the lease deed;
 - iv. The lessee doing or permitting to be done or happening of any act, matter deed or thing in violation of applicable laws & applicable permits in the leased premises;
 - v. The lessee dealing with the leased premises inter alia mortgaging, assigning or otherwise creating charge over its leasehold rights in contraventions to the terms and the manner set out here in favor of any third party;
 - vi. Change in management control of the lessee whereby such amended entity is involved in or undertaking any business activity which relates to the bus transport business/activities & competing directly or indirectly with the lessor herein.....

19. Thus what needs to be examined by us is whether the said transaction wherein the applicant received one time premium from the lessee would fall within the ambit of the definition of **Supply** under GST. The term "Supply" as defined under section 7 of the GST Act, 2017, is already reproduced *supra* & hence is not being repeated for the sake of brevity.

20. In terms of Schedule II of the CGST Act, 2017, [reproduced *supra*] any lease, tenancy, easement, license to occupy land is a supply of service. Further, any lease or letting out of building including a commercial, industrial or residential complex for business or commerce, either wholly or partially is a supply of service. The applicant's averment is that since this is a sale of building wherein consideration has been received after the issuance of completion certificate, in terms Sl. No. 5 of Schedule III, the transaction shall be treated neither as a supply of goods nor a supply of service. During the course of personal hearing, the authorized representative of the applicant was harping on this specific point to highlight that the transaction would not attract GST levy. However, to the specific query as to how a sale can be executed by someone who does not hold a title of the property/goods, evoked no response from the authorized representative of the applicant.

21. We find that the term '**Lease**' is not defined under the GST Act. However, reference could be drawn from the Transfer of Property Act, 1882 wherein under Section 105, it is stated as follows:



"A lease of immoveable property is a transfer of a right to enjoy such property, made for a certain time, express or implied, or in perpetuity, in consideration of a price paid or promised, or of money, a share of crops, service or any other thing of value, to be rendered periodically or on specified occasions to the transferor by the transferee, who accepts the transfer on such terms."

As is already mentioned *supra*, the applicant has stated in the submissions that a lease of 90 years is as akin to sale but the above definition of lease clearly shows lease could be of perpetuity. Therefore, quantum of time has no relation in determination of lease or sale.

22. In terms of notification No. 12/2017-CT(Rate), dated 28.6.2017, Renting of immovable property is defined as follows:

(zz) "renting in relation to immovable property" means allowing, permitting or granting access, entry, occupation, use or any such facility, wholly or partly, in an immovable property, with or without the transfer of possession or control of the said immovable property and includes letting, leasing, licensing or other similar arrangements in respect of immovable property

As is evident, from the lease deed we observe that the agreement made between the applicant, GSRTC, Hubtown and the lessee for 90 years can by no stretch of imagination be termed as a **sale** but in fact is a lease, as the nomenclature suggest with many restrictions though with a right to further sublet in favour of third parties, for residue period of lease **only** in the manner set out in the lease deed subject further to the condition that in case there is violation of any condition by lessee, the lease deed will automatically be treated as cancelled. Whereas, in ordinary course assuming that a person purchases a commercial plot/unit, he becomes an absolute owner of the plot/unit and there is sale deed between seller and purchaser. On purchase of commercial plot/unit, there is no requirement of renewal or extension of the sale after a certain period. The purchaser of the commercial units is also not required to pay any type of annual lease premium for the commercial units so purchased. Also the purchaser/owner is under no restriction as far as sale of the commercial units is concerned meaning thereby he can sell the plot/units to anybody and no permission is required from original seller as such purchaser consequent to sale deed is believed to have an absolute right of possession on land. However, in the present case, the lessee has to pay to the lessor ie GSRTC, advance annual lease rental of Re 1/- per square metre for the built up



area of the leased premises for the first three years and thereafter the same shall be enhanced by 200% for every subsequent block of 10 years or part thereof.

23. In view of the foregoing, we are of the view that lease of plot for 90 years by the applicant is not “sale of land” but is a lease and therefore, does not fall within the ambit of clause 5 of Schedule III of CGST Act, 2017. Hence, we conclude that this activity i.e. lease of commercial units on payment of one time lease premium and annual premium is a ‘supply’ falling within the ambit of section 7(1) of CGST Act, 2017, which defines supply as “*all forms of supply of goods or services or both such as sale, transfer, barter, exchange, licence, rental, lease or disposal made or agreed to be made for a consideration by a person in the course or furtherance of business*” read with clause 2 of Schedule II of CGST Act, 2017, which specifies that lease of a land or building as a supply.

24. This issue has also been dealt with by the Hon’ble Bombay High Court in the case of Builders Association of Navi Mumbai [Writ Petition No. 12194 of 2017], wherein it was held as follows viz

2. By this writ petition under Article 226 of the Constitution of India, the petitioners are challenging an order levying/collecting the Goods and Service Tax (GST) on the one-time lease premium charged by respondent no. 4 while letting plots of land on lease basis.....

12. A perusal of sections 7, 8, 9, 10 and 11 falling in this Chapter leaves us in no manner of doubt that the expression “supply” includes all forms of supply of goods or services or both such as sale, transfer, barter, exchange, licence, rental, lease or disposal made or agreed to be made for a consideration by a person in the course or furtherance of business. By sub-section (2) and which opens with a non-obstante clause, such activities or transactions undertaken by the Central Government, a State Government or any local authority in which they are engaged as public authorities, as may be notified by the Government on the recommendations of the Council, shall be treated neither as a supply of goods nor a supply of services. Equally, subject to the provisions of sub-sections (1) and (2), the Government may, on the recommendation of the Council, specify, by notification, the transactions that are to be treated as a supply of goods and not as a supply of services or a supply of services and not as a supply of goods. Pertinently, no notification and traceable to sub-section (2) of section 7 has been brought to our notice.

14. On a plain reading of the GST Act, we do not see how we can agree with Mr. Nankani. Mr. Nankani also relies upon Schedule II, which is referable to section 7. These are the activities to be treated as supply of goods or services. The substantive provision section 7 in clearest terms says that the activities specified in Schedule I made or agreed to be made without a consideration and the activities to be treated as supply of goods or supply of services referred to in Schedule II would be included in the expression “supply”. However, clause sub-section (1) of section 7 includes all forms of supply of goods or services or both such as sale, transfer, barter, exchange, licence, rental, lease or disposal



made or agreed to be made for a consideration by a person in the course or furtherance of business. We referred to the definitions simply to reinforce our conclusion that the CIDCO is a person and in the course or in furtherance of its business, it disposes of lands by leasing them out for a consideration styled as one-time premium. Therefore, if one refers to Schedule II, section 7, then, Item No. 2 styled as land and building and any lease, tenancy, licence to occupy land is a supply of service. Any lease or letting out of a building, including commercial, industrial or residential complex for business, either wholly or partly is a supply of service. It is settled law that such provisions in a taxing statute would have to be read together and harmoniously in order to understand the nature of the levy, the object and purpose of its imposition. No activity of the nature mentioned in the inclusive provision can thus be left out of the net of the tax. Once this law, in terms of the substantive provisions and the Schedule, treats the activity as supply of goods or supply of services, particularly in relation to land and building and includes a lease, then, the consideration therefor as a premium/one-time premium is a measure on which the tax is levied, assessed and recovered. We cannot then probe into the legislation any further.

21. We are, therefore, of the clear view that the demand for payment of GST is in accordance with law. The said demand cannot be said to be vitiated by any error of law apparent on the face of the record. In these circumstances, we do not find any merit in the writ petition. It is accordingly dismissed. Rule is discharged. There would be no order as to costs

25. We find that in the additional submission, the applicant has claimed that at best their services would fall within the ambit of item (1) clause (if) of Sl. No. 3, of notification No. 11/2017-Central Tax (Rate) dated 28.6.2017 as amended vide notification No. 3/2019-Central Tax (Rate) dated 29.3.2019. On going through the same we find that it relates to

(if) Construction of a complex, building, civil structure or a part thereof, including,- (i) commercial apartments (shops, offices, godowns etc.) by a promoter in a REP other than RREP,

Consequently, the applicant further argues that this transaction would not fall within the ambit of supply of services in view of the fact that the entire consideration has been received after issuance of completion certificate [Sl. No 5(b), Schedule II]. The agreements/lease deed provided by the applicant nowhere suggest that the consideration received by the applicant for which the applicant is before us seeking an advance ruling is related to construction of complex, building, civil structure or a part thereof. Thus, the question of this transaction falling within the ambit of Sl. No. 5 (b), Schedule II, does not arise. Moreover, schedule III, Sr. No. 5 would not apply since it relates to sale of land/building, which is not the case herein. Hence the submission made by the applicant is not tenable and is therefore rejected.



26. The applicant has also relied upon the judgment of the Hon'ble Gujarat High Court SCA No. 1350/2021 in the case of Munjaal Manishbhai Bhatt. The Hon'ble High Court vide its judgement dated 6.5.2022, held as follows [relevant extracts]

3 By this writ application under Article 226 of the Constitution of India, the writ applicant has prayed for the following reliefs:

"A. This Hon'ble Court may be pleased to strike down and declare Entry 3(if) of Notification No. 11/2017-Central Tax (Rate) as well as Entry 3(if) of Notification No. 11/2017 – State Tax (Rate) along with paragraph no. 2 of both the notifications as being ultra-vires Section 7(2) of the GST Acts read with Entry No. 5 of Schedule III to the GST Acts as well as ultra-vires Section 9(1) and Section 15 of the GST acts;

B. In any case this Hon'ble Court may be pleased to strike down and declare Entry 3(if) of Notification No. 11/2017-Central Tax (Rate) as well as Entry 3(if) of Notification No. 11/2017 – State Tax (Rate) along with paragraph no. 2 of both the notifications as being manifestly arbitrary, grossly discriminatory and violating Article 14 of the Constitution of India as well as ultra-vires Article 246A of the Constitution of India;

C. Without prejudice to the above and in the alternative this Hon'ble Court may be pleased to declare that impugned paragraph no. 2 of Notification No. 11/2017-Central Tax (Rate) and Notification No. 11/2017 – State Tax (Rate) is applicable only qua sale of flats/building units wherein undivided share in land is transferred along with constructed flats/units without separate consideration being fixed towards sale of land;

D. This Hon'ble Court may be please to declare that tax under the GST Acts cannot be imposed on consideration expressly receivable/payable towards sale/purchase of land;

E. This Hon'ble Court may be pleased to issue writ of mandamus or writ in the nature of mandamus or any other appropriate writ or order directing the 4th Respondent not to collect tax under the GST Acts on consideration fixed for sale of land;

F. Pending notice, admission and final hearing of this petition, this Hon'ble Court may be pleased to allow the Petitioner to deposit the tax amount under the GST Acts qua purchase of land under protest with the 4th Respondent and such deposit may please be treated as refundable to the Petitioner subject to the outcome of the present Petition;

G. Ex parte ad interim relief in terms of prayer F may kindly be granted;

H. Such further relief(s) as deemed fit in the facts and circumstances of the case may kindly be granted in the interest of justice for which act of kindness your petitioner shall forever pray.

CONCLUSION

122 In the result, the impugned Paragpragh 2 of the Notification No. 11/2017-Central Tax (Rate) dated 28.6.2017 and identical notification under the Gujarat Goods and Services Tax Act, 2017, which provide for a mandatory fixed rate of deduction of 1/3rd of total consideration towards the value of land is ultra-vires the provisions as well as the scheme of the GST Acts. Application of such mandatory uniform rate of deduction is discriminatory, arbitrary and violative of Article 14 of the Constitution of India.

123 While we so conclude, the question is whether the impugned paragraph 2 needs to be struck down or the same can be saved by reading it down. In our considered view, while maintaining the mandatory deduction of 1/3rd for value of land is not sustainable.



in cases where the value of land is clearly ascertainable or where the value of construction service can be derived with the aid of valuation rules, such deduction can be permitted at the option of a taxable person particularly in cases where the value of land or undivided share of land is not ascertainable.

124 The impugned paragraph 2 of Notification No. 11/2017- Central Tax (Rate) dated 28th June 2017 and the parallel State tax Notification is read down to the effect that the deeming fiction of 1/3rd will not be mandatory in nature. It will only be available at the option of the taxable person in cases where the actual value of land or undivided share in land is not ascertainable.

125 In so far as the writ applicant of the Special Civil Application No.1350 of 2021 is concerned, the value of land is available in the agreement to sale and the same is not challenged by the Respondents in the affidavit in reply. The writ applicant had deposited the amount of tax charged under the GST Acts by the supplier i.e. respondent No.4 under protest and it was clearly observed in the interim order passed by this Court that such payment would be subject to the final outcome of this writ application. Since we have declared the impugned deeming fiction to be ultra-vires and we have read it down to be inapplicable in cases where the actual value of land is unavailable, consequently we direct the concerned GST authority to refund the excess amount of tax under the GST Acts to the writ applicant which has been collected by the respondent No.4 and deposited with the Government treasury. Such refund shall be calculated by determining the actual GST liability on the basis of actual construction value as stipulated in the agreement and such actual liability will be deducted from the total tax charged from the writ applicant and paid into the Government treasury. Refund is to be granted along with the statutory interest at the rate of 6% per annum which is to be calculated from the date of excess payment of tax till the date of refund. The entire exercise of calculation of refund and disbursement of the same with interest shall be completed within 12 weeks from the date of receipt of this order.

126 We are conscious of the fact the writ applicant of the Special Civil Application No.1350 of 2021 is the recipient of service and not the supplier and that the tax has been collected by the supplier from the writ applicant and deposited with the Government treasury. However since the writ applicant has actually borne the burden of tax and such tax was paid under protest by virtue of interim order of this Court, we are directing refund of such tax directly to the writ applicant. It will not be out of place to mention that in fact Section 54 of the CGST Act also envisages claim of refund directly by the recipient if he has borne the burden of tax. It has been so held by the Supreme Court in the case of Mafailal Industries Ltd. v/s Union of India (1997) 5 SCC 536.

As is evident, the facts in the above dispute are different than the one on which the ruling is sought. We find that in the above case, the dispute before the Hon'ble High Court was relating to computing taxable value in construction contracts, wherein it was held that prescribing mandatory uniform rate of deduction of 1/3rd of total amount towards land value in terms of notification No. 11/2017-Central Tax(Rate), instead of actual price of land was *ultra vires*. Hence, the facts being different to the transaction on which advance ruling is sought, the reliance on the above case law by the applicant is not tenable.



27. Further, in terms of notification No. 11/2017-Central Tax (Rate), dated 28.6.2017, the relevant parts of which are reproduced below for ease of reference viz.

Annexure: Scheme of Classification of Services			
S. No.	Chapter, Section, Heading or Group	Service Code (Tariff)	Service Description
(1)	(2)	(3)	(4)
220	Heading 9972		Real estate services
221	Group 99721		Real estate services involving owned or leased property
222		997211	Rental or leasing services involving own or leased residential property
223		997212	Rental or leasing services involving own or leased non-residential property
224		997213	Trade services of buildings
225		997214	Trade services of time-share properties
226		997215	Trade services of vacant and subdivided land

4. Explanation.- For the purposes of this notification,- (i) Goods includes capital goods. (ii) Reference to "Chapter", "Section" or "Heading", wherever they occur, unless the context otherwise requires, shall mean respectively as "Chapter", "Section" and "Heading" in the annexed scheme of classification of services (Annexure).

Sl No.	Chapter, Section or Heading	Description of Service	Rate (per cent.)	Condition
(1)	(2)	(3)	(4)	(5)
16	Heading 9972	Real estate services	9	-

We find that the applicant is liable to discharge GST at the rate of 18%


28. In the light of the above, we rule as under:


RULING

- (i) The one time premium received by the applicant on allotment of completed commercial units/building is taxable supply in terms of section 7 of the CGST/GGST Act, 2017.



- (ii) The supply of the applicant is classified under SAC 9972 and would be leviable to tax at the rate of 18% (i.e. 9% CGST and 9% SGST) in terms of notification No. 11/2017-CT(Rate) dated 28.6.2017.


(MILIND KAVATKAR)
MEMBER (SGST)


(AMIT KUMAR MISHRA)
MEMBER (CGST)

Place: Ahmedabad

Date: 31/03/2023

