

EY Tax Alert

HC holds sale of partly constructed mall on “as-is-where-is” basis is not leviable to GST

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Executive summary

This Tax Alert summarizes the recent ruling of the Karnataka High Court (HC)¹ regarding levy of Goods and Services Tax (GST) on partly constructed mall sold on as-is-where-is basis.

The key observations of the HC are:

- ▶ Entry 5 of the Schedule III read with Section 7(2) of the CGST Act (Central Goods and Services Tax Act, 2017) is only by way of “*ex abundanti cautela*” to show the Legislative intent not to tax sale of land and building.
- ▶ Insisting taxation on partly constructed building on as-is-where-is condition, on the ground that completion certificate is yet to be received will not reflect the true nature of the transaction, as entry 5(b) of Schedule II apply only to agreements meant to provide construction services.
- ▶ There is a distinction between contract for rendering construction services and contract for sale of building, *albeit* incomplete, but as a building per se.

The former is amenable to the GST regime while the latter is amenable to the stamp duty regime.

- ▶ Entry 5(b) is merely a service contract simpliciter and not a composite works contract as under entry 6(a) of the Schedule II.
- ▶ At later stage, depending on whether the recipient of such partly constructed property would hire a contractor or build himself for subsequent completion, the levy under GST law may or may not get attracted.

Basis above, HC held that Revenue made a fundamental error in assuming jurisdiction to tax a sale of mall on “as-is-where-is basis”, even if not completed.

¹ WP No. 12700 of 2023



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Background

- ▶ The petitioner is engaged in development of commercial and residential real estate projects.
- ▶ Another company, operating in similar line of business, liquidated a partly constructed mall to the petitioner as insolvency proceedings were initiated against it.
- ▶ A sale deed was executed between the liquidator and the petitioner for such property on as-is-where-is basis.
- ▶ Petitioner paid the tax under protest and later applied for a refund, claiming there was no supply based on entry 5 of the Schedule III to the CGST Act (Central Goods and Services Tax Act, 2017).
- ▶ However, Revenue rejected the refund application, on the ground of it being a supply of construction services by the liquidator under entry 5(b) of the Schedule II to the CGST Act.
- ▶ Aggrieved, the Petitioner filed an appeal before the Karnataka High Court (HC).

High Court Ruling

- ▶ Entry 5(b) of Schedule II to the CGST Act provides construction services to be a supply of services which reads as follows:

"(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 completion certificate, where required, by the competent authority or after its first occupation, whichever is earlier."
- ▶ Section 7(2) of the CGST Act starts with a non-obstante clause and excludes activities or transactions specified in Schedule III as neither supply of goods nor services.

Entry 5 of Schedule III covers *"Sale of land and, subject to clause (b) of paragraph 5 of Schedule II, sale of building."*

Aforesaid entry is only by way of *"ex abundanti cautela"* (i.e., excess of caution does no harm) to show the Legislative intent not to tax sale of land and completed building.

- ▶ On conjoint reading of the 7th GST Council meeting and Supreme Court (SC) ruling in the case of VKC Footsteps India Pvt Ltd², there is distinction in contract for rendering construction services and

contract for sale of building, *albeit* incomplete, but as a building per se.

The former would be amenable to the GST regime while the latter would be amenable to the stamp duty regime.

- ▶ For a contract to be under Entry 5(b), there should be a *consensus ad idem* between the parties that service provider would provide construction services to the service recipient. Further, payments should have been made and received before the completion certificate.

If these conditions are absent, it would fall under Schedule III as a sale of building simpliciter.
- ▶ Insisting taxation on building on as-is-where-is condition based on the ground that completion certificate is yet to be received, will not reflect the true nature of the transaction, as entry 5(b) apply only to agreements meant to provide construction services.
- ▶ Further, entry 6(a) of the Schedule II provides that the works contract services are supply of services.

Basis SC judgment in the case of Larsen & Toubro Ltd³, entry 5(b) is a service contract simpliciter and not a composite works contract under entry 6(a).

- ▶ SC in the case of Larsen & Toubro Ltd.⁴ held that the activity of construction undertaken by the developer/builder is works contract only from the stage the developer enters in to a contract with the flat purchaser and that it is only the value additions made to the goods transferred after the agreement is entered into with the purchaser, be made chargeable to tax by the Government.
- ▶ The subsequent completion of such property may or may not attract GST depending on whether the recipient would hire a contractor or build himself.
- ▶ Thus, HC held that the Revenue made fundamental error in assuming jurisdiction to tax a sale of mall on "as-is-where-is basis", even if not completed.
- ▶ Accordingly, appeal was allowed, and refund was granted to petitioner.

² 2021 (52) GSTL 513 (SC)

³ 2015 (39) STR 913 (SC)/ (2016) 1 SCC 170

⁴ (2014)1 SCC 708

Comments

- a. The ruling offers much needed clarity on the taxability of transactions involving partially constructed properties. This may significantly reduce litigation within the real estate sector.
- b. Businesses may consider the potential applicability of this ruling to the taxability of leasehold rights and transfer of development rights (TDR), being subjected to stamp duty.
- c. The Revenue authorities may not universally agree with this interpretation across all transaction types. For instance, transactions involving subsequent transfer of partially constructed flats could warrant further examination to understand the implications of this ruling.

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