

Transfer of development rights under Joint Development Agreement is a 'service' and not an outright 'sale of land' – Telangana HC

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Summary

The Telangana High Court (HC) has held that the transfer of development rights by way of a Joint Development Agreement (JDA) does not qualify as an outright 'sale of land'. The HC observed that, neither there is a mere transfer of development rights nor there is an automatic transfer of ownership or title rights over any portion of land belonging to the landowner in favour of the developer. The HC highlighted that the JDA is not a medium of transfer of title, it is rather an arrangement which permits the developer to enter and undertake construction activities upon the land owned by the landowner. This qualifies as a supply of 'service' in exchange for consideration in the form of construction services. The petitioner is offering construction services to landowners in exchange for the landowners transferring the development rights.

Facts of the case

- M/s. Prahitha Constructions Private Limited (petitioner) is engaged in the business of construction of commercial properties and has entered a JDA with the landowners.
- The petitioner had agreed to construct three towers of the annexed building with modern, common amenities and facilities.
- The petitioner sought a declaration that transfer of development rights of land by the landowners by executing a JDA would be equivalent to 'sale of land' and should not be liable to GST.
- Accordingly, the petitioner challenged the constitutional validity of Notification No. 04/2018-CT(Rate) dated 30 September 2019, which imposed GST on such transaction.

Petitioner's contentions

- The petitioner contended that by executing the JDA, the landowners have transferred the development rights in land for carrying out the development.
- Accordingly, the transfer of development rights in land would tantamount to sale of land and not be liable to GST.

- Emphasising that JDA is a mere medium through which the landowners sell the land to the developer, the petitioner highlighted that the landowners receive residential or commercial property against the corresponding conveyance.
- Such transfer of development rights results in sale of land, which is considered neither a supply of goods nor service and is outside the ambit of GST.
- The petitioner asserted that tax cannot be levied through a notification in the absence of explicit provisions or proper mechanism for determining quantum of tax.
- Furthermore, the impugned notification did not prescribe any methodology for offer of development rights. Therefore, such a delegated legislation exceeded jurisdiction and violated the statute.
- Accordingly, the said notification was illogical, arbitrary, unconstitutional and violative of Articles 14, 246A and 265 of the Indian Constitution.

Telangana HC's observations and judgement [WP No. 5493/2020, Order dated 09 February 2024]

- **JDA is not a medium of transfer of title in land:** Upon evaluating the terms of the JDA, the HC observed that the

right, title and ownership of the property or part thereof does not stand transferred to the petitioner merely by execution of JDA. The right entitlement in land accrues in favour of the petitioner only upon fulfilment of conditions/milestones/stages.

- **Transfer of development rights is a 'service' provided by the landowner in exchange for construction services:** The HC explained that JDA is an arrangement which permits the petitioner to undertake construction activities on the land owned and possessed by the landowner. Upon completion of the construction, the petitioner is entitled to share in land proportionate to the petitioner's share in built-up area, as consideration for the development, which will be conveyed through a separate sale deed. If the construction is not completed within the prescribed time or any default/breach of terms by the petitioner, would not entitle the petitioner of any right. The HC affirmed that such transfer of development right permitting the petitioner to enter and undertake development qualifies as a 'service' by the landowner and not an 'outright sale' of land to the petitioner in exchange for

construction services to the landowner as consideration.

- **Transfer of development rights is not transfer of ownership rights:** The HC highlighted that the petitioner would be permitted to sell his share of developed property only when the underlying proportionate land is conveyed in his favour. The proportionate share in land is transferred to the petitioner by way of sale deed only upon the receipt of completion certificate (CC) of the project. Accordingly, the HC affirmed that transfer of development right by way of JDA is a permissive possession and not delivery of possession and cannot be brought within the ambit of sale.
- **Impugned notification only prescribes the point of taxation:** The HC observed that the impugned notification did not create a charge on transfer of development right rather prescribed the time of supply, i.e., the point when the tax is required to be paid. Essentially, the purpose of the impugned notification is to determine that the tax will be paid at the time of executing delivery of the possession of the underlying land upon receipt of CC. Basis the above, the HC dismissed the petition.

Our comments

The issue of leviability of GST on the transfer of development rights has been a contentious issue. The term 'immoveable property' as defined under the Transfer of Property Act, 1882 includes land and benefits arising out of land. The Bombay HC, in the case of Chheda Housing Development Corporation, considering the above definition had classified development rights as an immoveable property being a 'benefit arising out of land'. The judgement was followed in Sadoday Builders Private Limited.

In the erstwhile service tax regime, the Tribunal Chandigarh Bench, in the case of DLF Commercial Projects Corporation, placed reliance upon the above judgements and held that there is no element of 'service' provided by the landowner to the developer under the JDA *vis-à-vis* transfer of development right and accordingly no service tax is applicable. The Revenue had filed SLP against the Tribunal's ruling, which has been accepted by the Supreme Court (SC) and final verdict is pending.

However, the Karnataka Advance Ruling Authority in the case of Patrick Bernarndinz D'sa, without taking into consideration the above judgements, held that transfer of development rights is a supply of service and therefore, liable to GST. The Telangana HC, in the instant case, has also dismissed the petition without considering the above Bombay HC judgements.

Considering this ruling will have substantial implications for builders and developers, it is likely to be challenged before the Supreme Court.

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