



# No GST on sale of under-construction property on 'as is where is' basis

## **Rohan Corporation India Private Limited v. Union of India and Others<sup>1</sup>**

The Karnataka High Court held that GST is not applicable on a sale transaction of under-construction property on 'as is where is' basis by a liquidator; under the terms of the agreement the liquidator was not obligated to provide any construction service to the purchaser, even though the completion certificate for the project was not received. The High Court held that the transaction is in the nature of sale of immovable property and does not fall within the scope of entry no. 5(b) of schedule II, to attract GST.

### **Background**

- The Petitioner is a real estate development company based in Mangalore.
- Liquidation process was initiated against Lotus Shopping Centres Pvt. Ltd. ("Lotus"), which entity was constructing a shopping mall. The National Company Law Tribunal ("NCLT") appointed a liquidator to liquidate the assets of Lotus.
- The Petitioner participated in the e-auction and emerged as the successful bidder for the assets of

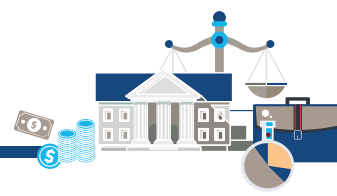
Lotus. The Petitioner initially resisted the levy of GST, proposed by the Liquidator, on the sale of under-construction property by the Liquidator. However, to complete the transaction of purchase of mall, the Petitioner paid the GST to the Liquidator, under protest, and reserved its right to claim refund of the GST amount paid.

- After the execution of sale certificate in favour of the Petitioner (on payment of applicable stamp duty), the Petitioner filed a refund claim of GST of ₹14.32 crores.
- The refund claim was rejected by the refund sanctioning authority, on the ground that the transaction was covered under entry no. 5(b) of schedule II, and correctly liable to GST.

### **Petitioner's arguments**

- The Petitioner argued that as per section 7(1) of the CGST Act, 2017, GST is applicable only on the "supply" of "goods" or "services" or both whereas the transaction in question was one of transfer/sale of immovable property.
- The Petitioner relied upon the judgment of the Supreme Court in Larsen & Toubro Ltd v. State of

<sup>1</sup> TS-924-HC(KAR)-2024



Karnataka<sup>2</sup> to point out that construction activity was taxable under the erstwhile VAT laws, only after a contract is entered into with the buyer. In contrast, in the present case, as no construction service was provided after execution of the sale agreement, entry no. 5(b) of schedule II is not attracted and so, the receipt of completion certificate of the building is an irrelevant aspect of the matter.

- Entry no. 5(b) of schedule II covers situations where there is a performance of construction services of building by a service provider for a service receiver. Whereas the agreement between the Petitioner and Liquidator was for sale of immovable property on 'as is where is basis', and not for construction services.

#### Revenue department's contentions

- The order rejecting refund holds that the impugned transaction is covered under entry no. 5(b) of schedule II, which is liable to GST, and not of sale of immovable property covered under schedule III which grants exemption from payment of GST.
- The Respondents have argued that the petition has no merits and is liable to be dismissed.

#### High Court's analysis and ruling

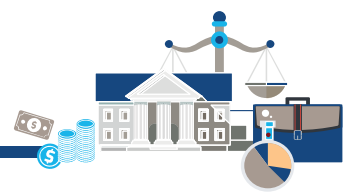
- The High Court noted that for levy of GST on an activity under entry no. 5(b) of schedule II read with section 7(1) of the CGST Act, 2017 the following two criteria should be satisfied:
  - There should be contract for undertaking service of construction by the service provider to the service recipient.
  - Consideration towards the supply of construction service should be received prior to receipt of the completion certificate of the building.
- The High Court held that when the sale of building is on 'as is where is' basis with no further

obligations cast on the Liquidator for constructing the building, there is no *consensus ad idem* for rendering any construction services by the Liquidator (transferor of immovable property).

- The fact of payment of stamp duty on sale transaction further indicates that the transaction is for sale of immovable property and not one for supply of goods or services.
- The High Court also relied upon the judgment in the case of Larsen & Toubro Ltd. vs State of Karnataka wherein it was held that the construction activity undertaken by a builder would be "works contract" under the VAT law, only from the stage the developer enters into a contract with the intending flat buyer. Similarly, the Gujarat High Court in the case of Munjaal Manishbhai Bhat v. Union of India<sup>3</sup> held that the factum of supply of construction service would be initiated only once the agreement is entered into between the supplier and the recipient. Thus, in the present case, when no activity of construction has been carried after entering into the agreement (and, in fact there was no contractual arrangement for this), there cannot be said to be any supply of service of construction to the Petitioner.
- The Court also held that the requirement of receipt of consideration before completion certificate in entry no. 5(b) of schedule II, applies to construction service contracts and, not to transactions of sale/transfer of immovable property simplicitor.

<sup>2</sup> (2014) 1 SCC 708

<sup>3</sup> 2022 (62) GSTL 262 (Guj)

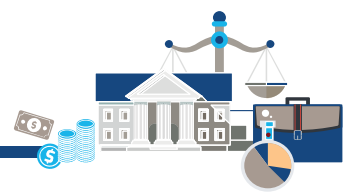


### **Dhruva Comments**

The judgment affirms interpretation of the term and scope of “supply” under section 7 of the CGST Act, 2017 and entries in schedules II and III. This judgment clears the air on similar real estate sector transactions and should discourage attempts at levy of GST on transfer of immovable property without any service provision agreements.

This judgment will be beneficial for the banking and financial services sector too; the ratio of the judgement can be applied to transactions of sale of repossessed immovable properties by banks, NBFCs and to investors who have transacted in immovable property.

Possibility of refund of GST paid by buyers/taxpayers, in similar situations should be examined by them.



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