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વિષય- ચુકવેલ FSI (Floor Space Index) પર RCM ની જવાબદારી અદા કરવા બાબત.

ઉપરોક્ત વિષય અન્વયે જણાવવાનું કે માન.સંયુક્ત રાજ્યવેરા કમિશનરશ્રી, વિભાગ-૧૦ રાજકોટ દ્વારા Rajkot Municipal Corporation (RMC) પાસેથી FSI (Floor Space Index) પેટે ચુકવેલ રકમની વિગતો મેળવવામાં આવેલ હતી. જે અન્વયે આપશ્રી દ્વારા વર્ષ ૨૦૧૭-૧૮ના સમયગાળા દરમિયાન રૂ.2094438/- FSI (Floor Space Index) પેટે ચુકવેલ છે. ઉક્ત રકમ પર નીચે મુજબની કાયદાકીય જોગવાઈઓ મુજબ RCM ભરવાપાત્ર છે.

Legal Provision:

1.1 Definitions of "goods" and "services" are given in clause (52) and clause (102) of Section 2 of the GST Act respectively, which are reproduced below:

(52) "goods" means every kind of movable property other than money and securities but includes actionable claim, growing crops, grass and things attached to or forming part of the land which are agreed to be severed before supply or under a contract of supply;

(102) "services" means anything other than goods, money and securities but includes activities relating to the use of money or its conversion by cash or by any other mode, from one form, currency or denomination, to another form, currency or denomination for which a separate consideration is charged;

1.2 Section 7 of the GST Act determines the scope of supply (of goods or services), which is re-produced as under:

"(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;

.....
(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.
.....

1.3 Definition of the word "business" is given in section 2 (17) of the GST Act, which is reproduced below:

"business" includes —

.....
(i) any activity or transaction undertaken by the Central Government, a State Government or **any local authority in which they are engaged as public authorities;**"

1.4 In exercise of the powers conferred under section 7 (2) (b) of the GST Act, the Government has issued a Notification No. 14/2017-ST (rate) dt. 30.06.17 which was subsequently amended vide Notification No. 16/2018- State tax (rate) dt. 26th July, 2018. Notification No. 14/2017-ST (rate) dt. 30.06.17 after the said amendment is reproduced below:

..... following **activities or transactions undertaken by the Central Government or State Government or Union territory or any local authority in which they are engaged as public authority, shall be treated neither as a supply of goods nor a supply of service, namely: -**

"Services by way of any activity in relation to a function entrusted to a Panchayat under article 243G of the Constitution or to a Municipality under article 243W of the Constitution."

The words **"or to a Municipality under article 243W of the Constitution"** come into force with effect from 27th of July, 2018.

1.5 As per the Notification No. 14/2017-ST (rate) dt. 29.07.2017 from 29th of July, 2018, services by way of any activity in relation to a function entrusted to a municipality under 243W of the constitution, undertaken by the local authority shall

be treated as neither as a supply of goods nor a supply of service. The said article 243W reads as follows:

243W. Powers, authority and responsibilities of Municipalities, etc.- Subject to the provisions of this Constitution, the Legislature of a State may, by law, endow-

(a) the Municipalities with such powers and authority as may be necessary to enable them to function as institutions of self-government and such law may contain provisions for the devolution of powers and responsibilities upon Municipalities, subject to such conditions as may be specified therein, with respect to-

(i) the preparation of plans for economic development and social justice;

(ii) the performance of functions and the implementation of schemes as may be entrusted to them including those in relation to the matters listed in the Twelfth Schedule;

(b) the Committees with such powers and authority as may be necessary to enable them to carry out the responsibilities conferred upon them including those in relation to the matters listed in the Twelfth Schedule.

1.6 As per the entry at Sr. No. 1 to the Twelfth Schedule of our Indian Constitution, "Urban planning including town planning" is a function entrusted to Municipalities.

1.7 As per entry 16 (iii) Heading 9972 in Notification 11/2017 ST (rate), rate of SGST is 9% on Real estate services. Thus, total rate of CGST & SGST on Real estate service is 18%.

1.8 As per entry 5 in Notification 13/2017 ST (rate), in cases where services i.e. real estate services, if supplied by the local authority to any business entity located in the taxable territory, tax is payable by recipient of services under RCM. The said entry is reproduced as under:

Sl. No.	Category of Supply of Services	Supplier of service	Recipient of Service
(1)	(2)	(3)	(4)
5	Services supplied by the Central Government, State Government, Union territory <u>or local authority</u> to a business entity excluding, - (1) renting of immovable property, and (2) services specified below-	Central Government, State Government, Union territory <u>or local</u>	Any business entity located in the taxable territory

	<p>(i) services by the Department of Posts by way of speed post, express parcel post, life insurance, and agency services provided to a person other than Central Government, State Government or Union territory or local authority;</p> <p>(ii) services in relation to an aircraft or a vessel, inside or outside the precincts of a port or an airport;</p> <p>(iii) transport of goods or passengers</p>	<u>authority</u>	
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1.9 The Government of India, Ministry of Finance, Department of Revenue (Tax Research Unit) has clarified through various Frequently Asked Questions (FAQs) on real estate through F. No. 354/32/2019-TRU, Dated the 7th May, 2019. Relevant FAQs are reproduced below:

Sr. No.	Question	Answer
11	What is the rate of GST applicable on transfer of development rights, FSI and long term lease of land?	<p>.....</p> <p>TDR or FSI or long term lease of land used for construction of commercial apartments shall attract GST of 18%.</p>

1.10 The Government of India, Ministry of Finance, Department of Revenue (Tax Research Unit) has clarified through various Frequently Asked Questions (FAQs) on real estate through F. No. 354/32/2019-TRU, Dated the 14th May, 2019. Relevant FAQs are reproduced below:

Sr.	Question	Answer
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No.		
7.	<p>In the formula prescribed under first proviso to Entry 41A of the Notification 12/2017- CT (R), as amended by Notification 4/2019 CT (R), what rate shall be taken to determine the value to be ascribed to the "GST Payable on TDR or FSI or both for construction of the residential apartments in the project but for exemption contained therein" as no specific rate has been prescribed in Notification 11/2017 CT-Rate or any other notification?</p> <p>What is the rate applicable to output supply of TDR or FSI?</p> <p>Whether the quantum of TDR or FSI (including additional FSI) or both shall be taken only in respect of un-booked apartments as on the date of issuance of Completion Certificate or first occupation of the project for the purpose of formula?</p>	<p>The GST on transfer of development rights or FSI (including additional FSI) is payable at the rate of 18% (9% + 9%) with ITC under Sl. No. 16, item (iii) of Notification No. 11/2017 - Central Tax (Rate) dated 28-06-2017 (heading 9972).</p> <p><u>There is no exemption on TDR or FSI (Addl. FSI) for construction of commercial apartments.</u> Therefore, GST shall be payable on TDR or FSI (including additional FSI) or both used in respect of</p> <p>(i) carpet area of commercial apartment and</p> <p>(ii) un-booked residential apartments as on the date of issuance of Completion Certificate or first occupation of the project for the purpose of formula.</p>
8.	<p>In case of Redevelopment, Slum Rehabilitation or similar arrangements, the Developer will be constructing two types of units i.e. one which</p>	<p>The apartments given to the original inhabitants or the slum dwellers in redevelopment project or slum rehabilitation project are given by the</p>

<p>is allotted to existing occupiers for no monetary consideration and second which is sold in the market to outside buyer. Price at which the unit is being sold to the outsider is determined in a manner to factor cost of construction of both type of units so that the unit to existing occupiers may be allotted free of monetary consideration. It may be clarified whether the Input Tax Credit in relation to construction of units to be allotted to existing occupiers, in case of residential project opted for old rates or commercial projects, shall be allowed to the Developer</p>	<p>promoter against consideration <u>received by them in the form of TDR/ FSI/ monetary consideration</u> from the original inhabitants in case of redevelopment projects and <u>from the Government in case of slum rehabilitation projects</u>. The supply of service by way of construction of such apartments against construction wholly or partly <u>in the form of TDR/FSI is a taxable supply subject to GST</u>.</p> <p>Wherever tax is paid on construction of such apartments at the effective rates of GST of 8%/ 12% with ITC, the promoters shall be eligible for ITC, including ITC in relation to construction of units to be allotted to the existing occupiers even though there may not be a monetary consideration but the consideration is in the form of grant of TDR/FSI.</p>
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2. Analysis of legal provision and fact of the case:

2.1 As per the definition of "business", the activity or transaction undertaken by the local authority i.e. by the RMC in which it is engaged as public authorities can be considered as "business". As the activity of providing FSI against fee (i.e. consideration) is not considered as "goods", may be considered as supply of "services" unless such activity is covered under Notification No. 14/2017-ST (rate) dt. 30.06.17. Here, the extent and scope of the phrase "*Services by way of any activity in relation to any function*" that is entrusted to a Municipality under Article 243W of the Constitution as mentioned in the notification no. 16/2018- State Tax (Rate),

dated 26.07.2018 (amendment in Notification No. 14/2017-ST (rate) dt. 30.06.17) is required to be analyzed.

2.2 The powers and responsibilities of a Municipality as per Articles 243W of the Constitution of India are inclusive in nature and are not confined to the matters listed in the 12th Schedule of the Constitution. There are many services related to the activities carried out in relation to any function entrusted to a Municipality under article 243W of the Constitution which are ancillary or incidental in nature and are not listed in the 12th Schedule. The moot question in this regard is whether all of such services would also qualify for "No Supply of Services" as per the aforesaid notification.

2.3 It is pertinent to note that the expression "in relation to" is a very broad expression which pre-supposes another subject matter. The expression "in the manufacture" takes in **within its compass, all processes which are directly related to the actual production.**"

2.4 Thus, it appears that the element of direct relation or integral connection should be the determining factor to qualify for "No Supply of Services" in the aforesaid cases which is required to be established on the basis of critical test that completion of respective function enlisted under Article 243G/243W of the constitution would not be possible without performance of the services for which the benefit is sought.

2.5 In order to avail the benefit of the aforesaid notification, the services in form of providing FSI against charging fees by the RMC should have the element of direct relation or integral connection with "Urban planning"

2.6 The reasons for considering the supply of FSI as "taxable services" are enumerated below:

- (a) In the instant case, it appears that supply of FSI against collection of fees is not integral part of "town planning". Here, transaction of supply of FSI by the RMC to the taxpayer merely commercial activity. Performance or non-performance of "town planning work" has no nexus with activity per se the supply of FSI, which is entirely independent to each other. Supply of FSI to the business entity serves the only purpose of generating revenue for local authority.
- (b) In the aforesaid Notification No. 14/2017 ST (Rate), the phrase "Services by way of any activity in relation to a function entrusted to a Municipality under article 243W of the Constitution" does not mean "Commercial"

activities under consideration". Thus, the said activity in form of the supply of FSI against charging fees by RMC being an independent taxable supply of services, would not be qualified for and could not be treated as "No Supply of Services".

- (c) These reasons are also supported by the clarifications issued by the Government of India, Ministry of Finance, Department of Revenue (Tax Research Unit) through various Frequently Asked Questions (FAQs) on real estate.

Thus, as per entry-16 (iii) in Notification No. 11/2017 state tax (rate) read with entry-5 in Notification No. 13/2017 state tax (rate), tax under RCM is payable by the taxpayer as recipient of services.

આમ, ઉક્ત વિગતે આપશ્રીને ઉક્ત ચુકવેલ રકમ રૂ.2094438/- પર 1૮% લેખે RCM ભરવાપાત્ર થાય છે. જેથી આપશ્રી દ્વારા RCM ની જવાબદારી અદા કરેલ હોય તો તે અંગે પુરાવા અત્રેની કચેરી અથવા ઉપર મુજબના મેઇલ આઇડી પર દિન-પમાં રજુ કરવા આથી જણાવવામાં આવે છે. કોઇ પુરાવા રજુ ન કર્યે આપે ઉપરોક્ત વિગતે વેરાકીય જવાબદારી અદા કરેલ નથી તેમ માની ગુજરાત માલ અને સેવા અધિનિયમ-૨૦૧૭ અને કેંદ્રીય માલ અને સેવા અધિનિયમ-૨૦૧૭ કલમ ૭૩ અન્વયે એડજ્યુડિકેશન/વસુલાતની કાર્યવાહી કરવામાં આવશે જેની નોંધ લેશો.

Date-20/09/2023

Place-Rajkot

Sign

Digitally Signed
Signed by: MOHAMMAD
M. GOLWALA
Reason: FSI
INTIMATION
Location: RAJKOT
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16:12:43

M.M.GOLWALA

State Tax Officer (3)

Unit-90, RAJKOT.