

GST on Transferable Development Rights (TDR)

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GST शास्त्र – Mystery of applicability of GST on Transferable Development Rights (TDR)

[CA Yogesh Ingale 22 Apr 2018 28,059 Views 3 comments Goods and Services Tax | Articles](#)

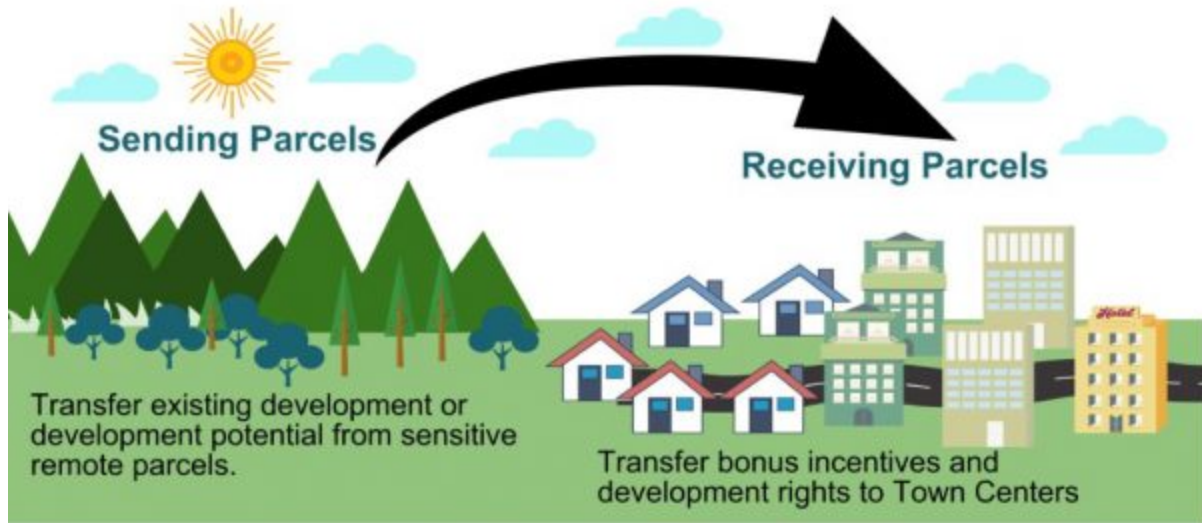
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◆ Introduction – What is TDR ?

When an owner of land transfers his rights of developing a land to a government, local authority or corporation, they use the same land for infrastructure projects such as road widening, metro rail projects, park, garden, schools, new roads or for any other projects of public utility. DRC (Development rights certificate) will then be issued to owner of the land, the main purpose of whole process is to acquire the required amount of land in hassle free manner. Now this DRC will allow the land owner an **additional built up area** in return of the area for which he has relinquish his rights and enables him to develop the given area by himself or transfer his rights for consideration.

DRC issued to land owner, which is transferable, is known as transferable development rights (TDR), which can be transferred to another entity.



applicability of GST on TDR

◆ Legal ambiguity :

a) Whether supply of TDR is to be treated as supply of goods or supply of services ?

For the purpose of applicability of GST, there must be supply of either goods or services. As per definitions, “goods” means every kind of movable property. Definition of movable property is not provided under CGST Act, 2017. As per section 3(36) of The General Clauses Act, 1897, movable property shall mean property of every description, except immovable property.

As per section 2(102) of **CGST Act, 2017**, “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.

While question remain unanswered as to whether TDR is to be regarded as goods or services, as per various judicial pronouncements, TDR is termed as immovable property.

b) Entry 2(a) of Schedule II Vs. Entry 5 of Schedule III of CGST Act, 2017 –

Schedule III of CGST Act, 2017 which prescribes certain supply to be treated neither as supply of goods nor supply of service includes sale of land and building and hence not leviable to GST.

Further, schedule II of CGST Act, 2017 makes it mandatory to treat any lease, tenancy, easement, license to occupy land as a supply of service.

In the light of above, one needs to identify legal connotation of terms lease or license (needless to say that TDR cannot be treated as tenancy or easement) and also needs to refer landmark judicial pronouncement that whether benefits to arise out of land is to be treated as immovable property or not.

c) **Notification no. 4/2018 – Central Tax (Rate) dt. 25th January, 2018** prescribes time of supply in certain situations where development rights are transacted. Issuance of this notification led to more confusion as government presumed the applicability of GST on TDR.

◆ Analysis of legal connotations of terms mentioned under entry 2 of schedule II of CGST Act, 2017 & judicial pronouncements:

a. Whether TDR can be termed as lease ?

Lease as defined under section 105 of Transfer of Property Act, 1882 is as follows :-

*“A lease of immovable 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” Essentially the **periodicity, perpetuity and right to enjoy such property for certain time** are the main elements of a lease.*

Why TDR is not a lease ?

√ Lease is transfer of right for a certain period of time or in perpetuity. TDR is transfer of rights permanently.

√ Lease gives revocable right to enjoy property while transfer of TDR is irrevocable.

√ Lease gives right to enjoy while TDR gives right to develop.

√ Lessor may re-gains possession of property after lease term which is not the case in respect of TDR.

In the light of above factors, TDR cannot be termed as “lease”.

b) Whether TDR can be termed as license ?

It was held by Apex court in Associated Hotels of India Vs R. N. Kapoor case,

“Under the aforesaid section (section 52 of the Indian Easements Act, 1882), if a document gives only a right to use the property in a particular way or under certain terms while it remains in possession and control of the owner thereof, it will be a licence. The legal

possession, therefore, continues to be with the owner of the property, but the licensee is permitted to make use of the premises for a particular purpose'. But for the permission, his occupation would be unlawful. It does not create in his favour any estate or interest in the property."

Why TDR is not a license ?

In the light of above parameters, following can be concluded –

√ A license is not connected with the ownership of property while TDR is irrevocable right and it creates interest in property.

√ Licensor's discretion stands in case of license while in case of TDR the developer has the discretion to develop land.

√ Control remains with licensor in case of license however, no control remains with transferor of TDR.

In the light of above factors, TDR cannot be termed as "license".

c) Land includes benefits arise out of land –

Immovable property or land is not defined under GST Act. In the absence of such definition, following can be referred –

√ As per section 3(p) of the Right to Fair Compensation, Transparency in Land Acquisition, Rehabilitation Act, 2013, defines land as,

*"land" includes **benefits to arise out of land**, and things attached to the earth or permanently fastened to anything attached to the earth.*

√ As per section 3(26) of General Clause Act, 1897, –

*"Immovable property" shall include land, **benefits to arise out of land**, and things attached to the earth, or permanently fastened to anything attached to the earth.*

√ It was held by hon'ble Bombay High Court in the case of Sadoday Builders Pvt. Ltd. Vs. The Jt. Charity Commissioner Nagpur Diocesan Trust Association and M.P.V. Contractors, Builders and Developers,

*The Division Bench has held that since **TDR is a benefit arising from the land, the same would be immovable property** and therefore, an agreement for use of TDR can be specifically enforced. The said dictum of the Division Bench is later on followed by a learned single Judge of this Court in 2009 (4) Mh.L.J. 533 in the matter of Jitendra Bhimshi Shah v. Mulji Narpar Dedhia HUF and Pranay Investment and Ors. The learned judge relying upon*

the judgment of the Division Bench in Chheda Housing Development Corporation (supra) has held that the TDR being an immovable property, all the incidents of immovable property would be attached to such an agreement to use TDR.

√ There are many other judicial pronouncements which follows same view.

◆ **Notification issued under section 148 of CGST Act, 2017 :**

√ **Notification no. 4/2018 – Central Tax (Rate) dt. 25th January, 2018**, issued in exercise of powers conferred by section 148 of CGST Act, 2017. The notification specifies certain class of registered person for which special procedure to determine time of supply in case of supply of development rights has been specified.

√ It implies that as government is specifying Time of Supply in certain circumstances, it presumed the applicability of GST on transfer of development rights.

√ Section 148 of CGST Act, 2017, confers the power of Central Government to notify certain classes of registered persons and special **procedures** to be followed by such persons including those with regard to registration, furnishing of return, payment of tax and administration of such persons.

◆ **Summary of above discussion and conclusion: –**

a) TDR is benefit arising from the land and hence it is to be treated as immovable property.

b) Immovable property is not leviable to tax under GST.

c) However, as per powers conferred by section 148 of CGST Act, 2017, government may specify certain classes of persons and procedure to be followed by such persons.

d) Hence, transfer of development rights is liable to GST as per available provisions, notifications etc. unless specifically challenged in the court of law.

◆ **Impact on real estate sector :**

a) Due to applicability of GST on transfer of development rights, real estate sector will face problem of working capital blockage as the tax amount involved in such transactions is huge.

b) Provisions of GST act do not allow refunds of accumulated input tax credit balance in case of real estate sector.

c) Cost of construction, in such scenario, may increase considering time value of blocked working capital.

◆ ICAI's representation in this regard :

a) Institute of Chartered Accountants of India made representation in this regard on 27th March, 2018.

b) It is suggested to insert following wordings in Para 2 of schedule II, to avoid conflict between schedule II & Schedule III –

“2. Land and Building

(a) any lease, tenancy, easement, license or any other right to occupy land is a supply of services

(b)

Subject to a deduction of consideration, if any, actually paid or payable specifically towards sale of land and building referred to in paragraph 5 of schedule III”

(Above article was written on 21st April, 2018. For any queries & feedback, reach us at yogesh.ingale@yriassociates.com)

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