

Notification providing for mandatory deeming fiction for deduction towards value of land is ultra-vires the provisions of GST and Constitution

The Hon'ble Gujarat High Court in ***Munjaal Manishbhai Bhatt v. Union of India [R/Special Civil Application No. 1350 of 2021 dated May 06,2022]*** has quashed and set aside the order passed by the AAAR, providing for mandatory deeming fiction for deduction of value of land. Held that, the Notification providing for a mandatory fixed rate of deduction of 1/3rd of total consideration towards the value of land is ultra-vires the provisions as well as the scheme of the Central Goods and Services Tax Act, 2017 ("**the CGST Act**"), and application of such mandatory uniform rate of deduction is discriminatory, arbitrary, and violative of Article 14 of the Constitution of India. Further held that, the deeming fiction of 1/3rd of total consideration towards the value of land will not be mandatory in nature and it will only be available at the option of the taxable person in cases where the actual value of land or undivided share in land is not ascertainable.

Facts:

Munjaal Manishbhai Bhatt ("**the Petitioner**") is a practicing advocate in this High Court, who entered into an agreement with the Navratna Organisers & Developers Pvt. Ltd. ("**the Respondent**"), for the purchase of a plot of land and construction of bungalow on that land by the Respondent and distinct consideration was agreed upon the agreement for the sale of land and construction of a bungalow on the land.

As per the agreement, the Petitioner was liable to pay all taxes including the Goods and Services Tax ("**GST**"). The Petitioner bona fide believed that by virtue of such clause he would be liable to pay tax on the consideration payable for construction of bungalow in as much as it would constitute supply of construction service under the CGST Act.

The Respondent however, relying upon the ***entry no. 3(if) of the Notification No. 11/2017-Central Tax (Rate) dated June 28, 2017*** ("**the Impugned Notification**") informed the Petitioner, that the Petitioner would be liable to pay GST @ of 18% on the entire consideration payable for land as well as construction of bungalow after deducting 1/3rd of the value towards the land and raised an invoice.

Subsequently, an advance ruling were sought by the Petitioner w.r.t. the tax liability on supply of developed land, wherein, it was held that the deduction for sale of land was admissible only to the extent of 1/3rd of the total consideration on the basis of the Impugned Notification. Such ruling was affirmed by the AAAR, Gujarat.

This petition is filed challenging the validity of the Impugned Notification and against the advance ruling passed by the AAAR, Gujarat.

The Petitioner contended that the Impugned Notification leads to a consequence whereby tax is imposed on land which is never sought to be taxed by the statute, and thus, ultra-vires the provisions of the CGST Act as well as arbitrary and violating Article 14 of the Constitution of India.

Issue:

Whether such mandatory deeming fiction fixing the value of land is ultra-vires the provisions of the CGST Act and/or violative of Article 14 of the Constitution of India?

Held:

The Hon'ble Gujarat High Court in *R/Special Civil Application No. 1350 of 2021 dated May 06, 2022* held as under:

- Analysed Section 15 of the CGST Act and observed that statutory provisions requires valuation in accordance with actual price (where available) and hence, tax has to be imposed on such actual value. Consequently, deeming fiction can be applied only where actual value is not ascertainable.
- Noted that, GST cannot be imposed on developed land when development is done before entering into agreement with buyer, as such development activity was not undertaken for the prospective buyer.
- Stated that, the Notification cannot provide for a fixed deeming deduction towards value of land in a case where agreement clearly stipulates specific consideration for sale of land and for construction of bungalow. Further, the GST Council had clearly contemplated that the deduction was inserted only in the context of flats wherein value of undivided share of land was unascertainable.
- The Impugned Notification under the CGST Act, which provide for a mandatory fixed rate of deduction of 1/3rd of total consideration towards the value of land is ultra-vires the provisions as well as the scheme of the CGST Act. Application of such mandatory uniform rate of deduction is discriminatory, arbitrary, and violative of Article 14 of the Constitution of India.
- Quashed and set aside the order passed by the AAAR, Gujarat, on the grounds that the ruling is based on the Impugned Notification.
- Held that, the Impugned Notification is read down to the effect that the deeming fiction of 1/3rd will not be mandatory in nature. It will only be available at the option

of the taxable person in cases where the actual value of land or undivided share in land is not ascertainable.

- Directed the Respondent to refund the excess amount of tax collected and deposited with the Government treasury to the Petitioner.

Relevant Provision:

Section 15 of the CGST Act:

“Value of taxable supply.

15. (1) The value of a supply of goods or services or both shall be the transaction value, which is the price actually paid or payable for the said supply of goods or services or both where the supplier and the recipient of the supply are not related and the price is the sole consideration for the supply.

(2) The value of supply shall include—

- (a) any taxes, duties, cesses, fees and charges levied under any law for the time being in force other than this Act, the State Goods and Services Tax Act, the Union Territory Goods and Services Tax Act and the Goods and Services Tax (Compensation to States) Act, if charged separately by the supplier;*
- (b) any amount that the supplier is liable to pay in relation to such supply but which has been incurred by the recipient of the supply and not included in the price actually paid or payable for the goods or services or both;*
- (c) incidental expenses, including commission and packing, charged by the supplier to the recipient of a supply and any amount charged for anything done by the supplier in respect of the supply of goods or services or both at the time of, or before delivery of goods or supply of services;*
- (d) interest or late fee or penalty for delayed payment of any consideration for any supply; and*
- (e) subsidies directly linked to the price excluding subsidies provided by the Central Government and State Governments.*

Explanation.—*For the purposes of this sub-section, the amount of subsidy shall be included in the value of supply of the supplier who receives the subsidy.*

(3) The value of the supply shall not include any discount which is given—

(a) before or at the time of the supply if such discount has been duly recorded in the invoice issued in respect of such supply; and

(b) after the supply has been effected, if–

(i) such discount is established in terms of an agreement entered into at or before the time of such supply and specifically linked to relevant invoices; and

(ii) input tax credit as is attributable to the discount on the basis of document issued by the supplier has been reversed by the recipient of the supply.

(4) Where the value of the supply of goods or services or both cannot be determined under sub-section (1), the same shall be determined in such manner as may be prescribed.

(5) Notwithstanding anything contained in sub-section (1) or sub-section (4), the value of such supplies as may be notified by the Government on the recommendations of the Council shall be determined in such manner as may be prescribed.”

Entry no. 3(if) of the Impugned Notification:

“3	Heading 9954 (Construction services)	(if) Construction of a complex, building, civil structure or a part thereof, including,- (i) commercial apartments (shops, offices, godowns etc.) by a promoter in a REP other than RREP, (ii) residential apartments in an ongoing project, other than affordable residential apartments, in respect of which the promoter has exercised option to pay central tax on construction of apartments at the rates as specified for this item in the	9 Provided that in case of ongoing project, the registered person shall exercise one time option in the Form at Annexure IV to pay central tax on construction of apartments in a project at the rates as specified for item (ie) or (if), as the case may be, by the 20th of May, 2019; Provided also that where the option is not exercised in Form at annexure IV by the 20th of May, 2019, option to pay tax at the
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(2) In case of supply of service specified in column (3), in item (i); 88[(i) (ia), (ib), (ic), (id), (ie) and (if)] against serial number 3 of the Table above, involving transfer of land or undivided share of land, as the case may be, the value of such supply shall be equivalent to the total amount charged for such supply less the value of transfer of land or undivided share of land, as the case may be, and the value of such transfer of land or undivided share of land, as the

case may be, in such supply shall be deemed to be one third of the total amount charged for such supply.”

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