Research Paper
(Abridged)

Real-Estate Valuation – Claiming of Actual Land Value as Deduction under GST

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Research Paper on

"Real-Estate Valuation – Claiming of Actual Land Value as Deduction under GST"

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Background:

Goods and Services Tax (GST) is one of the biggest indirect tax reforms since independence. It has replaced various indirect taxes such as VAT, Excise Duty, Service Tax, Sales Tax, Entertainment Tax, etc. However, the transactions in immovable property are still outside the purview of GST. The States have exclusive power to tax the transactions in immovable properties. The taxability of real estate transactions involving composite supply of goods, services and land is one of the most debated issues under the pre-GST law which continued even under GST. This paper discusses about the deeming fictions created in respect of the real estate transactions and the issues involved therein, challenges being faced by the taxpayers and the probable/alternate solutions that can be looked at. The objective is to study whether the taxpayer can take the actual land value as deduction (wherever the land value is determinable), instead of the deemed value of 1/3rd of the total value (construction + land) charged from the customer.

Before GST, VAT was levied on the sale of goods in construction activity while service tax was levied on the service component (Labour). The 3rd element, being land, liable to Stamp duty, levied by the States. Both Service tax & VAT laws has made provisions to identify its respective components and if not ascertainable, option was given to the taxpayer for paying tax at composite rates.

Pre-GST laws had always given chance for ascertaining the actual value of taxable event and only if the same was not ascertainable, then deemed value after prescribed deductions came into play. After GST, the first 2 components (being goods and services) were subsumed into a single tax (GST) and the 3rd component (i.e., land) continued to be liable for Stamp duty & is kept out of GST. This required the lawmakers to provide mechanism to tax only the 2 out of 3 components.

Consequently, the Government, vide Notification No.11/2017-CT(R) dated 28.06.2017 as amended, provided that the non-taxing component (land) is 1/3rd of total amount charged, thereby fixing the land value in real estate transaction irrespective of whether actual land value is identifiable or not.

This has led to a lot of litigation especially in cases of real-estate transactions in cities, where the land value may comprise much more than 1/3rd of total amount charged. Let's now analyse various contentions against such deemed deduction for land value.

Contentions against deemed 1/3rd Land Deduction

Contention 1: Whether the deemed 1/3rd deduction for land can be considered as "Valuation" for GST purposes?

Under GST, the valuation mechanism has been prescribed in Section 15 of CGST Act, 2017. Section 15(1) states that the **value of 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 subject to the following conditions:

- that the supplier and recipient are not related and
- the price is the sole consideration

This sub-section is applicable only in the following three scenarios:

- Supply of Goods or
- Supply of Services or
- Both i.e., the composite supply of goods and services

The sub-section would not be applicable in case of a transaction involving the composite supply of goods, services **and immovable property.** Thereby, resort has to be made to other sub-sections.

Sub-sections (2) and (3) are not applicable in the case. Sub-section (4) states that where the value of supply cannot be determined under sub-section (1), the same shall be determined in such manner as may be prescribed i.e., the valuation mechanism as prescribed (in the Rules).

On perusal of the rules 27 to 35 of CGST Rules 2017, it is quite clear that none of the prescribe rules provides for valuation mechanism for transactions involving the supply of goods, service and immovable property. Therefore, even the valuation rules are not applicable in the instant case.

Now, sub-section (5) of Section 15 is the only sub-section that is left unexamined. This sub-section starts with a non-obstante clause and states '*Notwithstanding anything contained in sub-section (1) or sub-section (4), the value of such supplies as may be notified by the Government shall be determined in such manner as may be prescribed*'.

That means, the Central Government would be notifying certain services and the value of such notified supplies shall be determined in the manner as may be prescribed. The word 'prescribed' has been defined under Section 2(87) which means prescribed by rules made under this act on the recommendations of the council.

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On a strict interpretation of Section 15(5) read with Section 2(87), it is evident that the Central Government can notify the supplies by way of a notification, but the value of such supplies shall be determined as prescribed in rules. Thus, it means the valuation mechanism cannot be notified in a notification itself. Unless the valuation mechanism is prescribed in rules, the same is not valid and the valuation mechanism prescribed by way of Notification is not valid.

To support the argument that the word 'prescribe' should be given limited meaning, reliance is placed on the Andhra Pradesh High Court decision in case of **GMR Aerospace Engineering [2019 (31) G.S.T.L. 596 -A.P.]** held that "*The word "prescribe" is verb. Generally, no enactment defines the word "prescribe". But the SEZ Act 2005 defines the word "prescribe" under Section 2(w) to mean the rules framed by the Central Government under the SEZ Act, 2005. The space is also not left unoccupied, as the Central Government has issued a set of Rules known as "the Special Economic Zones Rules, 2006", wherein the Central Government has prescribed the terms and conditions for grant of exemptions under Rule 22. Therefore, there is no question of comparing the terms and conditions prescribed in Rule 22 with the terms and conditions prescribed in the notifications issued under any one of five enactments listed in Section 26(1) to find out whether there was any inconsistency."*

Reliance can also be placed on Patna High Court decision in case of Larsen & Toubro Ltd. Vs State of Bihar reported in [(2004) 134 STC 354] wherein it was observed as follows:
"21. The word "prescribed" according to the Clause (r) of Section 2 of the Act means prescribed by Rules made under the Act. When the State Legislature says that something is to be done in accordance with law then that is to be done in that manner and as prescribed and not otherwise. ***When the State Legislature says that the word "prescribed" means prescribed by the Rules then whatever is to be prescribed for making each and every section or any section of the Act workable must be prescribed under the Rules…***

However, it is seen that no services are notified under Section 15(5) by the Government till date. But the preamble to notification No.11/2017-CT(R) dated 28.06.2017 refers sub-section (5) to Section 15 without any specific mention regarding notified supplies under the said sub-section.

Even assuming that Government has notified the supply of services involving transfer of land or undivided share of land under Section 15(5) in the above-referred notification, the prescription of 1/3rd of the total amount charged as deemed land value will not hold good as the Government does not have the power to prescribe valuation mechanism in a notification under such sub-section and is only having power to notify "supplies". Hence, the same would not hold good.

Contention 2: Delegation of Authority to issue Notification for Valuation:

It is important to know the difference between the rules and the notifications as many times the notifications issued were declared as *ultra vires* the Act or Rules. Usually, the Parliament passes the legislation which would be known as the parent act, and delegates the power to implement the law by making rules, to the administrative authorities i.e., delegated legislation.

However, the administrative authority cannot go beyond the parent act while framing the rules. Further, the usual formula used for promulgating the rules is by notifying the same by way of a notification. The important issue that needs to be understood is that though the rules are notified by issuing notifications, it does not make the notification and the rules same. Any rule incorporated under the law shall not go beyond the act and any Notification issued under the act shall not go beyond the act and the rules made under that act.

Even assuming that Section 15(5) of CGST Act, 2017 authorises the prescription of valuation mechanism in a Notification, the same would be suffering from the *vires* of excessive delegation as the valuation mechanism is the crucial factor based on which the tax is to be collected and the same cannot be delegated to the administrative authority. What can be delegated to the executive agency is only the ancillary function of making rules for efficient execution of the policy laid down by the Legislature in the law made by it.

The Legislature can neither delegate its policy making function to the executive nor can the executive while exercising rule-making power under delegated legislation can venture into policy making area and make rules laying down the policy. In this regard, reliance is placed on Supreme Court decision in case of Devi Das Gopal Krishnan & Others Vs State of Punjab 2002-TIOL-1026-SC-CT-CB wherein the Supreme Court has held that:

'19. Further citation is unnecessary, for the principle of excessive delegation is well settled and the cases are only illustrations of the application of the said principle. The law on the subject may briefly be stated thus:

An overburdened legislature or one controlled by a powerful executive may unduly overstep the limits of delegation. It may not lay down any policy at all; it may declare its policy in vague and general terms; it may not set down any standard for the guidance of the executive; it may confer an arbitrary power on the executive to change or modify the policy laid down by it without reserving for itself any control over subordinate legislation. *This self effacement of legislative power in favour of another agency either in whole or in part is beyond the permissible limits of delegation. It is for a Court to hold on a fair, generous and liberal construction of an impugned statute whether the legislature exceeded such limits. But the said liberal on struction should not be carried by the Courts to*

the extent of always trying to discover a dormaint or latent legislative policy to sustain an arbitrary power conferred on executive authorities. ***It is the duty of the Court to strike down without any hesitation any arbitrary power conferred on the executive by the legislature.***

Further, Section 15(5) also does not prescribe any guidelines regarding the manner to arrive at the valuation mechanism by the administrative authority. In absence of specific guidelines, the delegation of notifying the valuation mechanism for a certain type of transactions would amount to excess delegation and the same would not be valid. Therefore, the delegation of legislative power to the executive has to be with clear policy guidelines and under close supervision of the Legislature.

For further judgements and interpretations in this regard, please refer to the full-length research paper.

Contention 3: Whether land gets indirectly taxed due to the fixed 1/3rd valuation?

It is a known fact that the land value may not be the same across the country as the same depends on the location of the land. In metros, the cost of land would be high and in towns and rural areas, it would be low. The cost of construction may not vary much when compared to the land value, whether in metros or in rural areas. Deeming 1/3rd of the total amount charged as land value would lead to levy of GST on the land value in metros, whereas in the non-metros the construction service would not get completely taxed. Following illustration gives a bird's eye picture of the issue involved in claiming the deemed deduction towards land:

City	Guesstimate Cost of Construction per SFT (A)	Guesstimate Cost of Flat per SFT including land value (B)	Average value of land (C=B-A)	% of land value (C/B*100)
Ooty	1500	2000	500	25
Hyderabad	2375	5000	2625	52.50
Bangalore	2500	7500	5000	66.67
New Delhi	2750	12000	9250	77.08
Mumbai	3125	20000	16875	84.38

Based on the above illustration, it can be evidenced that claiming of 1/3rd deduction towards land value is beneficial in certain cases and is not beneficial in certain cases. In certain cities, the value of land would be equivalent to 98% of the entire cost of the project.

From the valuation prescribed in the notification, it is evident that the land value is getting taxed in the guise of valuation which otherwise can be taxed only by State Government as it forms part of List-II to Seventh Schedule of Constitution.

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Thus, levy of GST on land value, indirectly not allowed under Article 246A of the Constitution of India is being levied due to the deeming fiction. We should also understand there would be cases where the land value is less than 1/3rd value and in such cases the Government is collecting less taxes.

Article 246A gives power to make laws to tax goods and services, whereas "**goods" does not include immovable property** such as land. So, taxing land indirectly under GST is against the Constitution.

Under the Stamp Duty Act, the taxable event is transfer or sale of the property. Under GST, the taxable event is supply i.e., sale, transfer, barter or exchange, etc. of any goods or services or both. When land is not at all a goods, there is no supply and levy fails and the deeming fiction cannot extend the scope of the levy. Hence, taxing the land value indirectly is not permissible.

During the 7th GST Council meeting this issue came up for consideration before the Council wherein majority of the State's representatives opposed the levy of GST on land and buildings. In view of the objections raised by the members, the Council decided not to introduce GST on land and building at this stage and agreed that this issue could be revisited after a year or so of the implementation of GST. It is significant to note that the GST Council did not say that it is against the Constitution.

During the 15th GST Council meeting, where GST rates on several goods and services were discussed, the Maharashtra and Gujarat State Finance Ministers opposed the 1/3rd land deduction proposed by the Fitment Committee. Maharashtra State Finance Minister was of the view that the flat cost consists of at least 50% of land cost in Maharashtra. Giving 30% land deduction will lead to litigation and Courts may give adverse judgements on this. He suggested giving the land value according to the ready reckoner or stamp duty value. The discussion in this meeting and consequently issue of notification No.11/2017-CT(R) dated 28.06.2017 deeming the value of land as 1/3rd of the total amount charged itself shows that the Government has acted arbitrarily and without any scientific reason to arrive at the basis of 1/3rd.

Further, it may also be noted that India has adopted the federal taxing method from Australia. Australia also has this Commonwealth (Central) and State government taxing system where both the Centre and States can levy taxes. Stamp duty on transfer of property can be levied by the State. At the same time, GST also can be levied by the Commonwealth Government since the supply definition under the Australian GST covers levy of GST on the property also. But that is not the case with India. Under our GST, "goods" does not include immovable property.

For further judgements and interpretations in this regard, please refer to the full-length research paper.

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Contention 4: Notification 11/2017-CT (R) is arbitrary and unconstitutional to the extent of deemed 1/3rd Land Deduction

The Supreme Court in a catena of decisions held that any action undertaken by the Central Government or State Government arbitrarily would amount to a violation of Article 14 of the Constitution of India and becomes invalid. Further, it was also held that when the actual value is available the statutes or rules cannot prescribe a deemed value ignoring the actual value. Few of the decisions which had discussed this issue are as follows

a. **Supreme Court in case of Wipro Limited Vs UOI 2015 (319) ELT 177 (SC)** while examining the validity of deemed value of loading and unloading as 1% of the FOB value for the purpose of determining the assessable value for calculating the customs duty it was held that "*The proviso now stipulates 1% of the free on-board value of the goods irrespective of the fact whether actual cost is ascertainable or not. Having referred to the scheme of Section 14 of the Rules in detail above, this cannot be countenanced. This proviso, introduces fiction as far as addition of cost of loading, unloading and handling charges is concerned even in those cases where actual cost paid on such an account is available and ascertainable. Obviously, it is contrary to the provisions of Section 14 and would clearly be ultra vires this provision. We are also of the opinion that when the actual charges paid are available and ascertainable, introducing a fiction for arriving at the purported cost of loading, unloading and handling charges is clearly arbitrary with no nexus with the objectives sought to be achieved.* ***On the contrary, it goes against the objective behind Section 14 namely to accept the actual cost paid or payable and even in the absence thereof to arrive at the cost which is most proximate to the actual cost. Addition of 1% of free on-board value is thus, in the circumstance, clearly arbitrary and irrational and would be violative of Article 14 of the Constitution.***

This decision clearly states that when the actual value is available, the prescription of deemed value is not valid as the same is arbitrary and irrational. Since the background of the present issue and the issue involved in these decisions are one and the same, it can be concluded that the taxpayer can claim the actual value of land as deduction wherever available and the deeming of 1/3rd value as land value is arbitrary and irrational and will not hold good.

b. **The Supreme Court in case of Indian Acrylics Vs UOI 1999 (113) ELT 373 (SC) it was held that** "*7. The exchange rate fixed by the Reserve Bank of India is the accepted and determinative rate of exchange for foreign exchange transactions.* ***If it is to be deviated from to the extent that the notification dated 27th March 1992 does, it must be shown that the Central Government had good reasons for doing so****. The Reserve Bank of India's rate, as we have*

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pointed out, was Rs. 25.95, the rate fixed by the notification dated 27th March 1992 was Rs. 31.44, so that there was difference of as much as Rs. 5.51. ***In the absence of any material placed on record by the respondents and in the absence of so much as a reason stated on affidavit in this behalf, the rate fixed by the notification dated 27th March, 1992 must be held to be arbitrary.***

This decision states the when the government is prescribing a deemed value deviating from the actual value available, then it must have a good reason for doing so. If there is no reason, the deemed value shall become invalid. On-going through the GST Council Meeting Minutes, it is quite evident that no reason has been recorded while deeming the value of land as 1/3rd of total amount.

For further judgements and interpretations in this regard, please refer to the full-length research paper.

Contention 5: Even assuming the valuation mechanism prescribed under Notification No. 11/2017-CT(R) is valid, whether the prescription of 1/3rd of total value as land value is correct?

On a plain reading of the notification, it is clear that the taxpayer is not allowed to take the actual land value as a deduction. Even the same was clarified in CBIC FAQ on real estate sector Q.No.36, wherein it was clarified that actual value of land cannot be taken as a deduction, only 1/3rd value as prescribed in Notification No. 11/2017-CT(R) should be taken as a deduction.

Based on various jurisprudence (as discussed in the full-length research paper), it is clear that usage of word 'shall' is not a determinative factor to check whether the deduction given is mandatory or directory and the importance is given to the purpose of enactment, its nature, legislative intent while making the provision. In the instant case, the deemed deduction is incorporated with an intent to exclude the value of land from the purview of GST.

Therefore, the compliance made by the assessee by way of deducting the actual value of land satisfies the intention of the legislature. Thereby, there is no serious inconvenience to the Government. From this, we can take an argument that the deemed deduction given in the notification is only directory in nature and not mandatory.

Though it was clarified that actual land value shall not be claimed as a deduction, the Government has not provided any reason behind deeming the land value as 1/3rd of the total amount charged. Further, it is also pertinent to note that the GST Council in its 15th meeting, at para 4.10.1 of the Minutes Book, discussed the issue of deeming the value of land as 1/3rd of the total value charged from the customer wherein the Ministers from Maharashtra opposed the proposal of deeming the land value as the land

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value in the metros would be more than 50% of the total value. Giving 30% land deduction will lead to litigation and courts may give adverse judgements on this.

He suggested that abatement should be given as per the ready reckoner of the land value or the basis of stamp duty. He also referred to the Supreme Court decision in case of M/s. Larsen & Tubro Limited decided on September 26, 2013 and suggested the rates of abatement should be based on the stage of completion of the project.

However, the GST Council has ultimately recommended the issue of notification No.11/201-7-CT(R) deeming the value of land as 1/3rd of the total value. The GST Council has also not revealed any scientific basis on which they have deemed the land value as 1/3rd of the total value. This shows that the same is arbitrary and is in violation of Article 14 and Article 246A of Constitution of India on the following basis:

(1) Arbitrary for the reason that the value of land is deemed at 1/3rd without giving the option to the taxpayer to claim the actual land value as a deduction
(2) Arbitrary for the reason that land value in the metro is usually more than 40%, therefore 33% is arbitrary

Further, the FAQ issued by the CBIC does not have any legal validity which can be challenged along with the Notification No. 11/2017-CT (R).

Contention 6: Whether the deemed deduction amounts to re-writing of contract by the Government?

It is a settled law that the Government cannot re-write the terms of contract entered into between people. Reliance is placed on the Supreme Court judgement in the case of Mangalore Ganesh Beedi Works Vs CIT [(2015) 378 ITR 640 (SC)] wherein it was held that **the Act does not clothe the taxing authorities with any power or jurisdiction to re-write the terms of the agreement** arrived at between the parties with each other at arm's length and with no allegation of any collusion between them.

It was also held by the Delhi High Court in the case of D. S. Bist & Sons Vs CIT [1984] 149 ITR 276 (Delhi) that *"The commercial expediency of the contract is to be adjudged by the contracting parties as to its terms."*

Further, in the case of Maruti Suzuki Vs ACIT (ITA NO. 5237/Del/2011), it was observed as follows:
"Thus, we find that for the purpose of computing the arms length price, the TPO has re-written the agreement / transaction undertaken by the assessee by artificially segregating the single transaction of

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payment of royalty into two transactions of payment of royalty for use of brand name and for use of technology. We agree with ***such re-writing of transaction undertaken by the assessee is inconsistent with the factual realities of the case*** *and is also contrary to the various judicial pronouncements."*

Taking cue from the above decisions, a view is possible that deeming 1/3rd of contract value as land value for the purpose of taxation could amount to re-writing of the agreement which is not consistent with the facts involved and what the commercials agreed between the parties.

Contention 7: Observations in the recent Gujarat High Court judgement

The Gujarat High Court's judgement in the case of Munjaal Manishbhai Bhatt Vs UOI [2022 (62) G.S.T.L. 262 (Guj.)] was the breath of relief to taxpayers wherein the Court read down the deeming fiction of 1/3rd land deduction provided in Notification No. 11/2017 as ultra vires to Schedule III (sale of land).

Various aspects were analysed in this judgment. The following observations were made by the Court:

a) Whether intention is to tax supply of land: Taking into consideration the cases of *Gannon Dunkerley's, K. Raheja Development Corporation* and *Larsen and Toubro Ltd* and the minutes of the 14th GST Council meeting, the Court observed as follows:
"87. Thus the legislative intent is to impose tax on construction activity undertaken by a supplier at the behest of or pursuant to contract with the recipient. ***There is no intention to impose tax on supply of land in any form*** *and it is for this reason that it is provided in the Schedule III to the GST Acts that the supply of land will be neither supply of goods nor supply of services."*

b) Deemed deduction is *ultra* vires to GST provisions: Further, the case of Larsen & Toubro in 2014 (34) S.T.R. 481 (S.C.) was relied on wherein the capping the value of land at 70% of the agreement value under Rule 58 of MVAT Rules was read down to ensure that it did not purport to tax transfer of immovable property. It was held that mandatory application of deeming fiction of 1/3rd of total agreement value towards land **even though the actual value of land is ascertainable is clearly contrary to the provisions and scheme of the CGST Act** and therefore *ultra vires* the statutory provisions.

c) Arbitrariness of the deeming fiction through Notification: The Court observed that:
   (i) Apart from being contrary to the statutory provisions contained in the CGST Act, one of the most glaring features of the impugned deeming fiction is its arbitrariness inasmuch as the same is uniformly applied irrespective of the size of the plot of land and construction therein.

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(ii) In an illustration considered by the Court, although the size of the building is the same size and only difference is the size/value of land, there is vast difference in the value of GST being paid due to deemed 1/3rd deduction for land.

(iii) Such deeming fiction which leads to arbitrary and discriminatory consequences could be clearly said to be violative of Article 14 of the Constitution of India which guarantees equality to all and also frowns upon arbitrariness in law.

d) <u>Arbitrary deeming fiction has no nexus with charge:</u> The Court held that:

(i) the arbitrary deeming fiction by way of delegated legislation **has led to a situation whereby the measure of tax imposed has no nexus with the charge of tax** which is on supply of construction service.

(ii) Reading Section 15(5) with Section 2(87), the prescription under Section 15(5) of the CGST Act has to be by rules and not by notification. Be that as it may, wherever a delegated legislation is challenged as being ultra vires the provisions of the CGST Act as well as violating Article 14 of the Constitution of India, the same cannot be defended merely on the ground that the Government had competence to issue such delegated piece of legislation.

(iii) Even if it is presumed that the Government had the competence to fix a deemed value for supplies, if the deeming fiction is found to be arbitrary and contrary to the scheme of the statute, then it can be definitely held to be ultra vires.

e) Continuing similar mechanism as existed in Service Tax law: It was observed that *"Deduction at fixed percentage was made applicable only where the actual value was not ascertainable. When such workable mechanism for deduction of land was already in force under the service tax regime, the same ought to have been continued. Instead, the Government has chosen to fix a standard rate of deduction* ***<u>without any regard to different possible factual scenarios which is completely arbitrary and violating Article 14 of the Constitution of India."</u>***

f) Consequent to the above decision, the Court directed the Revenue was directed to refund the excess paid GST along with interest of 6% p.a.

<u>Determination of Land Value:</u>

Before claiming the actual land value as deduction, it is pertinent to arrive at the basis on which the land value would be determined. If the assessee is not able to establish the value of land, then claiming of actual land value as deduction would be very difficult.

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The different type of agreements that are prevalent in the industry is as follows

a. Agreement of sale with the consolidated price without any bifurcation towards land
b. Agreement of sale with the consolidated price without any bifurcation towards land but assessee is arriving at the land value on appropriate basis
c. Agreement of sale with bifurcation towards land and construction service
d. Sale of land to customer by entering into a sale deed and then entering into a construction agreement for construction service
e. Sale of semi-finished flat to customer by entering into a sale deed and then entering into a construction agreement for completing the remaining construction

Except in transactions covered under 'd' and 'e' above, the land value is not readily available in transactions covered in 'a', 'b' and 'c'. In these cases, the assessee may look at the following basis for determining the land value

i. Sub-registrar values i.e, value of land prescribed for the purpose of payment of Stamp Duty
ii. Value of % of land given by landowner to developer. For example, if the land owners give his land for development, then then the value of land that would be transferred to developer after completion of construction can be taken as the basis for arriving the land value in each flat. The value of land for this calculation would be based on Sub-registrar values or market value of land.
iii. Actual market value of the land prevailing during the sales period which can be substantiated by obtaining chartered engineer certificate every 3 months

If the land value is not available, the assessee may arrive the value of construction service in accordance with Rule 30 of CGST Rules, 2017 which states that if the value of supply is not determinable in accordance with any of the previous rule, then the value of supply shall be considered as 110% of the cost of construction. The assessee may obtain the Cost Accountant Certificate to substantiate the value of cost of construction.

From the above discussion, it can be considered that the 1/3rd deemed deduction shall be applied only when the actual land value is not available and wherever the land value is available, the same shall be given as deduction.

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Whether the Government can retrospectively amend the Rules to specify the valuation mechanism for land deduction?

Yes. The government make a retrospective amendment and in this regard, the following principles have been laid down by Supreme Court while examining the retrospective amendment issue in case of **R.C. Tobacco Pvt Ltd [2005 (188) E.L.T. 129 - (S.C.)]**

- A law cannot be held to be unreasonable merely because it operates retrospectively;
- The un-reasonability must lie in some other additional factors;
- The retrospective operation of a fiscal statute would have to be found to be unduly oppressive and confiscatory before it can be held to be unreasonable as to violate constitutional norms;
- Where taxing statute is plainly discriminatory or provides no procedural machinery for assessment and levy of tax or that is confiscatory, the Courts will be justified in striking down the impugned statute as unconstitutional;
- The other factors being period of retrospectivity and degree of the unforeseen or unforeseeable financial burden imposed for the past period;
- Length of time is not by itself decisive to affect retrospectively.

The validity of the retrospective amendment depends on the above aspects. For more judgements and interpretations, please refer to the full-length research paper.

Conclusion:

The authors are of the opinion that 1/3rd deemed deduction towards land is beneficial in non-metros and rural areas, however, the said deduction is very unreasonable in most of the metros wherein the construction is less than the GST paid on land value. From the above discussion, it is clear that deeming the land value as 1/3rd of the total amount charged is not valid for the following reasons and the taxpayer can claim the actual land value as a deduction

a. No valuation mechanism has been prescribed in Act and Rules for a transaction involving the supply of goods, services and land;
b. The valuation mechanism cannot be prescribed by way of a Notification;
c. Deeming 1/3rd of the total amount charged as land value is arbitrary and without any basis;
d. When the actual land value is available, deeming the value of land is not permissible as the same is unreasonable and irrational;
e. The Government cannot tax land indirectly;
f. Even if the valuation rules are retrospectively amended, the deeming of 1/3rd value as land when the actual value is available is violative of Article 14 and 19 of the Constitution of India.

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It is clear from the discussions made in the paper that this issue is not free from litigation. However, the Gujarat High Court judgement in case of Munjaal Manishbhai Bhatt Vs UOI [2022 (62) G.S.T.L. 262 (Guj.)] comes a breath of relief for taxpayers. But it needs to be noted that similar cases have not yet been taken up in the Supreme Court. Till then, litigation continues.

Action Points for Taxpayers:

Taking into consideration the above discussed contentions, following are some scenarios in which a different method of land valuation would prove beneficial in place of 1/3rd land deduction:

a) In case of developers undertaking construction activities in cities and places where land value is high, the option for claiming deduction of actual value of land may be analysed. GST may be paid under protest and refund can be claimed when issue if settled by Supreme Court or when time limit for demand by Department expires.

b) In case of taxpayers who have been paying GST by claiming 1/3rd land deduction may chose to go for refund citing the contentions subject to time limit as per Section 54. Where the tax is already collected from the customers, then the customers may directly file for GST refund. Else, the developer can instead file refund claim if the tax amount is returned to the customer.

c) Taxpayers could submit a representation to the GST Council against such deemed deduction.

d) Taxpayers may choose to file a Writ Petition before the Jurisdictional High Court wherever feasible.

e) It would be preferable to have different agreements for transfer of land and for construction services to enable claiming of actual land value deduction based on the Gujarat HC decision and other views discussed previously.

f) In case of valuation for landlord's share [as per para 2A of Notification No. 11/2017-CT (R)], valuation of 110% of cost, as per Rule 30, may be adopted in place of 1/3rd deduction.

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