

EY Tax Alert

Gujarat HC holds assignment of leasehold rights is not liable to GST

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Executive summary

This Tax Alert summarizes the recent ruling¹ of the Gujarat High Court (HC). The issue pertains to levy of goods and services tax (GST) on assignment of leasehold rights by lessee (assignor) to a third party (assignee).

The key observations of the HC are:

- ▶ Immovable property is not defined under the CGST Act, however, the same is defined in the other enactments and it includes benefits arising out of land.
- ▶ The petitioner has transferred leasehold rights which is over and above the actual physical plot of land and building, encompasses incorporeal ownership right in such land and building such as the right to possess, to enjoy the income from, to alienate, or to recover ownership of such right from one who has improperly obtained the title.
- ▶ In case of lease, the title over the plot remains with GIDC with all other rights reverting to it on expiry of lease period, whereas transaction of transfer of leasehold rights by the assignor in favour of assignee divest assignor of all the absolute rights in the property.
- ▶ Under the Service Tax law, even the development rights which are the benefits arising from land were not liable to tax. Leasehold right is in fact a greater right and interest in land than development rights. The principle under the service tax regime continues to apply under the GST regime.
- ▶ What is assigned by the assignor to the assignee is not only the land allotted by GIDC on lease but the entire land along with building which was constructed on such land. The same is a capital asset in the form of an immovable property.

Accordingly, HC held that assignment of leasehold rights is not leviable to GST.

¹ TS-03-HC(GUJ)-2025-GST



Background

- ▶ Gujarat Industrial Development Corporation (GIDC) has allotted plots of land to industrial entities on long term lease for a period of 99 years.
- ▶ Lease deed permitted the lessee to assign the leasehold rights and interest in the plot to any other person subject to approval of GIDC.
- ▶ Department has issued the summons/ show cause notices demanding GST from the lessees (assignors) who have assigned the leasehold rights and interest in their plots allotted by GIDC to assignee.
- ▶ Aggrieved, writ petitions were filed before the Gujarat High Court.

HC Ruling

- ▶ The ownership of the plot of land allotted by GIDC remains with it and only the right of possession and occupation are transferred by way of leasehold rights in favour of allottee.
- ▶ Allotment of land which is undisputedly an immovable property on lease would be covered by clause 5(a) of the Schedule II of the CGST Act and therefore, the same would be liable to GST.

However, one-time upfront amount would attract Nil rate of tax as per the exemption notification² subject to specified conditions.

- ▶ Transfer fee would also be subject to GST @ 18% as it amounts to supply of services by GIDC giving permission to transfer the leasehold rights by the assignor in favour of assignee.
- ▶ Deed of assignment of leasehold rights is subjected to stamp duty under the Gujarat Stamp Act, 1958 and it is also compulsorily required to be registered under the Registration Act, 1908.
- ▶ The petitioners contended that assignment of leasehold rights is nothing but a sale and transfer of benefits arising out of immovable Property and thus, covered under Schedule III.

Immovable property is not defined under the CGST Act, however, same is defined in the other enactments.

As per Section 3(26) of the General Clauses 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.

Also, as per section 2(6) of Registration Act, 1908, "immovable property" includes land, buildings, hereditary allowances, rights to ways, lights, ferries, fisheries or any other benefit to arise out of land, and things attached to the earth, or permanently fastened to anything which is attached to the earth, but not standing timber, growing crops nor grass.

- ▶ What the petitioner has transferred by way of assignment is leasehold rights which is over and above the actual physical plot of land and building, encompasses incorporeal ownership right in such land and building such as the right to possess, to enjoy the income from, to alienate, or to recover ownership of such right from one who has improperly obtained the title.
- ▶ Considering the provisions of Transfer of Property Act, it emerges that immovable property would either be tangible or intangible right, which relates to plot of land as sale is an absolute transfer by assignment along with whatever interest, lessee-assignor is having on the land and building.
- ▶ As per the Gujarat Stamp Act, instrument of lease of more than 98 years is considered at par with the conveyance for the sale of immovable property for the purpose of levying stamp duty.
- ▶ In case of lease, the right of ownership of plot remains with GIDC which will revert back on expiry of lease period, whereas transaction of sale and transfer of leasehold rights by the assignor in favour of assignee divest assignor of all the absolute rights in the property.
- ▶ In a taxing statute, there is no room for any intendment, but regard must be had to the clear meaning of the words and entire matter is governed only by the language of the provision.³
- ▶ When leasehold right is transferred by the assignor in favour of assignee by execution of deed of assignment, it would be nothing but transfer of an "immovable property" in view of the settled legal position that lease for 99 years or for a long term in consideration of premium paid is as much an alienation as sale or mortgage.
- ▶ Considering the definition of service under GST in juxtaposition to section 65B(44) of the Finance Act, 1944, there was specific exclusion of transfer of title in immovable property from definition of 'service' itself which clearly shows that there was no intention of the legislature to impose tax on transfer of immovable property.
- ▶ Under the Service Tax law, even the development rights which are the benefits arising from land were not liable to tax. Leasehold right is in fact a greater right and interest in land than

² Notification No. 12/2017 - CT(R) dated 28 June 2017

³ (1989) 1 SCC 44, (1992) 1 SCC 418, (1999) 3 SCC 346, AIR 1957 SC 657

development rights, and the principle under the service tax regime would continue even to apply under the GST regime.

- ▶ Reference was made to the minutes of meeting of 5th GST Council which clearly noted that service tax was not leviable on transfer of immovable property and a specific proposal was made to impose GST on sale of immovable property.

Later, it was decided to defer imposition of tax on land and building and thereafter, clause 5 of Schedule III of the GST Act covered sale of land and building which fortifies the intention of the GST Council not to impose tax on transfer of immovable property.

- ▶ Further, what is assigned by the assignor to the assignee is not only the land allotted by GIDC on lease but the entire land along with building thereon which was constructed on such land. The same is a capital asset in form of an immovable property.
- ▶ Therefore, the contention of the Department that what is excluded is only sale of land and building, and service includes interest in immovable property is not tenable.
- ▶ Accordingly, HC held that provisions of section 7(1)(a) of the CGST Act providing for scope of supply read with clause 5(b) of Schedule II and Clause 5 of Schedule III would not be applicable to transaction of assignment of leasehold rights of land and building and same would not be subject to GST as provided under section 9 of the CGST Act.

Comments

The recent ruling has resolved a longstanding dispute, favoring taxpayers. Distinguishing assignment from lease, the ruling emphasized on treating benefits arising out of land as immovable property.

Businesses may need to consider whether the principles established by the High Court can be applied to determine the taxability of development rights under GST framework.

Notably, the Telangana High Court in the case of Prahitha Construction Private Limited [TS-60-HC(TEL)-2024-GST] concluded that the transfer of development rights does not equate to the sale of land. Instead, it falls within the scope of "service" and thus, subject to GST.

Taxpayers who have paid taxes on such assignments may explore the possibility of seeking refunds. An important consideration would be whether the two-year time limit for claiming refunds applies under given circumstances.

It remains to be seen whether the Department will challenge the ruling before the Supreme Court.

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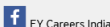
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