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Input Tax Credit and its Impact on Real Estate Prices

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ABSTRACT

Real estate has been a contentious issues when it comes to indirect taxation. Under GST, it has faced various issues related to rates, input tax credits, and the value of supply. Various representations have been made to the Government for simplification and reduction of rates. The government has also been revisiting and reviewing the tax regime when it comes to real estate sector. One such issue was very high tax rate on the enduser i.e. consumers of real estate projects. The government was also of the opinion of reducing the tax rate in this segmentas it would provide a boost to the residential segment. Accordingly, lower rates were introduced through various government notifications. This paper deals with the issue of credit of input tax which the supplier under the post-notification phase is not allowed to claim and explains how it could backfire and thereby affect the end recipients again i.e. consumers in a negative way.

Keywords: Input tax credit; Residential real estate segment; Destination principle; Value added principle; Input tax ineligibility.

1.0 Introduction

The 'input tax credit' is the highlighting feature of Goods and Service Tax. The main contention to include this mechanism in indirect tax regime is to do away with the cascading effect of Tax. Under pre-GST regime the taxes on Goods and Services was undergoing the vice of tax on tax which is also known as cascading effect of the tax. The main burden in the previous system was on the consumers with a higher amount of taxes being paid. Thus to do away with this mischief GST was introduced which was based on VAT system of taxation i.e. only the taxes are to be on the extra value-added up by the supplier on a cumulative chain of suppliers adding their value so as an aid to facilitate the final output supply (Batra, 2019).

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To understand the whole working of the mechanism of input tax we have to understand the concept of credit upon which this mechanism actually works. Say when a product is to be produced there are various stages which may also involve various suppliers some pertaining to services such as by technical personnel, transportation services etc. moreover it may also consist of goods such as raw materials and as such the final supplier with the help of all the inputs, processes and creates the final product to be supplied to the consumers being the recipient. It is interesting to note that all the inputs be it supply of service or goods to the final supplier are also liable to charge respective GST irrespective of the fact that the final supplier would also be liable to collect GST from the end user. Thus to remove such cascading effect of taxes, the concept of 'credits' has been introduced under which the final supplier when paying the output tax could claim the credit of input tax which were paid by the suppliers of services or goods as the case may be. Such credits may also be used in future to set off future tax liability. This would benefit the end supplier as he is now under the burden to only pay tax on his added value to the final product. Interestingly the excess credits which remained unclaimed are stored in the Electronic Credit Ledger¹ and thereby it can be used by the 'final supplier' so as to redeem it against future tax liability or ask for a refund of the credits (ClearTax, 2020).

Therefore, the concept of value added taxation is an important tool as such that even though at the supplier's level it may increase the burden on him to maintain proper account books and periodical returns but aids the supplier so as to claim the credits of input tax which has been already paid by previous suppliers and collected from the present supplier, thereby lowering the tax burden of the main supplier (ClearTax, 2020). Whereas at the level of the end recipient it lowers the tax liability significantly i.e. lowering the overall price of the end product. Therefore, it is a win-win situation for both supplier and recipient with the use of Input Tax Credit mechanism.

2.0 ITC under Current Study

Input Tax Credit (ITC) is fundamental principle under Goods and Services Tax (GST) regime. ITC is a credit of GST charged upon goods and services which are intended to be used in course or in furtherance of business and it includes tax payable under reverse charge mechanism. Only the registered person is eligible to avail the ITC credited to his electronic credit ledger on fulfillment of conditions prescribed in GST Act. The mechanism of ITC helps in making value addition possible, which helps in seamless flow of credit in supply chain thereby avoiding double taxation and making GST consumer friendly.

The present paper will discuss the recent changes introduced in GST with respect to real estate sector, specifically the reduction of GST rate with ineligibility of ITC on residential and affordable housing real estate project. ITC Mechanism has important objectives of avoiding double taxation and reducing cascading effect, it is the ITC Mechanism which help in reducing the tax burden on final consumer. The new notification now reduces the effective tax rates on residential and affordable housing project, where effective tax rate will be 5% for residential project and 1% for affordable housing project. The above reduction of tax rate is a welcomed measure but it has complicated the already complex GST regime by making the above residential project ineligible for ITC.

The paper will further discuss how the mechanism of ITC ineligibility for residential real estate project is not in line with basic principles of GST like Destination principle and Value Addition principle. The paper will further discuss how ineligibility of input tax credit will not reduce in prices of residential apartments despite reduction in effective tax rate, this is because in short run the new compliances introduced and ineligible ITC will become the cost of construction thereby increasing the cost of apartments. Further the anti-profiteering mechanism in GST is ambiguous due to the level of granularity of anti-profiteering analysis, transaction cost incurred on account of GST implementation. So with the ineffective implementation of anti-profiteering mechanism and ambiguity revolve around it will not help in the reduction of cost of apartments.

Taxation on real estate services has always been a contentious issue and major reason for problems in taxation of real estate has been the unorganized nature of real estate sector. The present structure of GST for real estate services has been thoroughly overhauled by the Government vide Notification No. 3, 4, 5, 6, 7, & 8 of 2019 dated 29/09/2019 w.e.f. 01/04/2019. So at present there are two schemes in implementation that is pre-notification scheme for ongoing project and post notification scheme with lower tax rates. The objective of introducing new tax rates has been to lower the tax burden on consumers and boost the sector which has been in slump in last five years.

The major reasons for introduction of new tax rates are, the industry has been in down turn due to lower economic growth which has led to lower demand for housing apartment, the demonetization of Indian currency had negative impact on sector because of its unorganized nature which was predominated by cash based economy and unplanned implementation of GST. The new scheme tries to reduce some of the problems associated with sector particularly the unorganized nature of real estate sector by compulsory procurement from registered person and simplifying the scheme of taxation to avoid the cascading effect and spillover.

2.1 Objective of study

The objective of this paper would be to first critically analyse the Notifications which was recently passed in the 34th Meeting of the GST council to lower the rate of real estate sector w.e.f. 01/04/2019 but with no ITC and comparing it with the pre-Notification phase, and its impact on overall prices of the real estate for the consumers.

2.2 Issues involved

Whether input tax credit ineligibility under the new scheme for the real estate sector with a lower tax rate would be able to uplift the slow down trend in residential real estate segment by reducing the burden on the recipients i.e. end consumers?

3.0 GST under Pre-Notification Phase

3.1 Residential apartments

The word 'service' under GST has been given a very wide definition as such it includes everything except goods, money and securities.² And reading the definition with Schedule II Para 5(b)³ conjointly with Para 5 of Schedule III (which now also includes apartments)⁴, it is clear that the activities with respect of construction in real estate are deemed as service with an exception that in cases where the entire consideration has been received after issuance of completion certificate or after its first occupation in these scenarios the transactions would not be deemed as supply but sale instead and thereby would not attract any GST. This is the general rule so as to identify which all activities would be liable to pay GST and which are not a subject of GST.

Let us now look at the tax rate i.e. GST on construction activities namely the construction of residential, commercial or Industrial buildings till 31st March 2019 i.e. pre-notification phase.

Under Services Accounting Code (SAC) entry 9954, the General rate of GST on construction was 18% i.e. 9% CGST and 9% SGST/UTGST in Intra-State Supply or 18% IGST in case of Inter-State Supply. But interestingly in Notification No. 11 of 2017 (Central tax Rate)⁵ and Notification No. 8 of 2017 (Integrated Tax Rate)⁶ and para 2 of both the Notification specifically provides that in such cases of construction activities, it is to be deemed that out of the total consideration, the developer/builder is charging 1/3rd consideration with respect to the respective transfer of undivided share in the apartment or building as the case may be (PWC, 2018). Thus the effective GST taxable on such transfer is reduced to $2/3^{rd}$ of the actual rate i.e. 18-6=12%, meaning thereby in case of intra- State Supply (6% CGST+ 6% SGST or UTGST) and in case of inter-State 12% IGST (PWC, 2018).

However, when the constructor or developer is the recipient of services from the subcontractor, under such situation the subcontractor was liable to charge GST @18% as now it tends to be a works contract because the exception of deduction of 1/3rd is only available when the so-called constructed property, complex, apartments are transferred i.e. when conveyance takes place to the end-recipient i.e. consumers. Thus the service by sub-contractor is not allowed to lowered tax rate which is allowed to the Main Contractor with relate to supply to the end Consumers.

The tax rate has been lowered with the advent new notification i.e. from April 1, 2019, and with that, the vice with respect to issues with ITC has also been introduced in the system which would be dealt in the upcoming sections.

3.1.1 Input tax credit with respect to pre notification regime

With the above-mentioned rates, the general rule with respect to the construction activities might seem to us to be pretty high but in this phase, the main constructor/ builder/ developer was allowed to claim input tax credit against an inward supply of Goods and Services, so as to comply with the broader framework of GST that is to follow the value addition taxation thereby to lower the tax liability of the supplier only to the extent the value enhanced by respective supplier. Secondly, to do away with the cascading effect of indirect taxes.

One of the advantages of having the option of claiming credit was that the supplier was allowed to use such credits against similar future liability to pay tax. Thus utilization of such credits in a general way also helped the main supplier to reduce its tax liability only to the extent the value it has added with respect to the Supply.

With the above advantages of the ITC provided one such situation might arise where the supplier of service i.e. constructor, has availed the credits for supply but on or after the date of issuance of completion certificate some of the apartments are left unsold. In such cases under Para 5(b) of Schedule II and Para 5 of Schedule III, the prospective conveyance of properties would be deemed as Sale and not Supply for the purpose of GST and thereby the Supplier would be under an obligatory duty to proportionately reverse the extra credit so availed to the revenue. Either the contractor can pay back by the credits available in its Electronic Credit Ledger or if there are insufficient credits available within the Electronic Credit ledger, it would be deemed such amount is due to be paid as GST to the Revenue by the Registered Supplier/Constructor.

3.2 Affordable housing

The rate of GST under pre-Notification period for the affordable housing is provided at the rate of 12% under SAC 9954 (v) c and d, under the same Notification no.

11/2017⁷ Central Rate Tax and Notification no. 8/2017⁸ of Integrated Rate Tax. Again going with the Point 2 of the same notification the effective rate after deeming 1/3rd value of the consideration for conveying the undivided share in the land, the effective rate applicable on such affordable housing or low-cost housing is 8% (12%-4%) i.e. in case of Intra-State Supply (4% CGST and 4% SGST/ UTGST) and in inter-State Supply 8% IGST.

Another such kind of scheme is that of Pradhan Mantri Awas Yojana and similar government projects where the contractors/developers are exempt so as to pay the tax under Notification no. 12/2017 and Notification no. 9/2017. But since it being an exempt supply, in this no ITC could be availed therefore this would be not of concern in our research.

One such Condition to be fulfilled is to comply with the threshold limit of each house/apartment which should not be more than 60 square metres per house/apartment and approved by the Competent Authority.

3.2.1 Input tax credit with respect to affordable/low-cost housing under pre notified phase

Just like the above-mentioned rules with respect to residential construction activities even here credits against the input tax were allowed to be claimed by the supplier of service and the same rule also applies to the sub-contractor which charges a concessional rate of 12% for the works-contract to the main contractor against which the main contractor can claim ITC.

3.3 Post Notification Phase

3.3.1 New scheme under GST for real estate sector

Indirect tax mechanism saw a turn around with the coming of Goods and Services Tax, the same can be said with respect to taxation of Real Estate under GST. The mechanism with respect to real estates was contentious and the manner it was brought in a time of downturn in the real estate sector had further complicated the taxation issue. The Government has been planning to change the tax structure under GST for real estate sector specifically residential real estate sector and this led to new amendments in GST law and rules and several notifications where issued.

The major rationale for bringing in new changes in GST for real estate sector is that the complexity and contentious issues involved in current set up, the sector from last five to six years is facing downturn due to lower level of demand. The importance of real estate in a larger economy from point of employment generation, consumption of inputs and capital goods, and revenue generation for the state through stamp duty. The cost of residential housing has steadily been increasing partly due to high tax incidence and lack of affordable housing due to focus on a commercial and high-end residential project in the sector. To provide every Indian with an opportunity to have a house of its own under affordable housing schemes. Under the current GST regime, the tax incidence on end consumer is very high and by lowering tax incidence consumption can be increased. The difficulty under the current regime are in tracing compliances with respect to provisions of anti-profiteering.

Renewed structure under GST for real estate sector

GST council in its 33rd and 34th meeting has issued several notifications on 29 March 2019 bringing in changes in GST law for real estate sector which will be effective from 1 April 2019. The scheme has been introduced by central tax rate notification dated 29 March 2019 vide Notification No. As 3/2019, 4/2019, 5/2019, 6/2019, 7/2019 and 8/2019. Similar notifications have been issued under IGST and SGST laws.

b. Application of new scheme under GST

- i. Apartments constructed by a promoter in a project that is intended for sale to a buyer, wholly or partly, where any part of the consideration is received before issuance of the Completion certificate, where required by the competent authority, or first occupation, whichever is earlier, which commences on or after 01.04.20199
- ii. Apartments constructed by a promoter in a project that are intended for sale to a buyer, wholly or partly, where any part of the consideration is received prior to the issuance of the completion certificate, where required by the competent authority, or first occupation, whichever is earlier (hereinafter referred to as the cut-off date), which is an ongoing project in respect of which the promoter has not exercised the option of paying tax at the rates applicable prior to 01.04.2019 (Singh, 2020).

From the above, it is stated that the projects which will be commencing after 01.04.2019 promoter has to mandatorily accept the new scheme and need to pay taxes accordingly and for the ongoing project that is a project before 01.04.2019, promoters have an option of either continuing with the existing scheme or opt for the new scheme.

c. Different segments of apartments under new scheme

i. Residential real estate projects: Notification no. 3/2019 has explained the conditions for residential real estate project under explanation 4(x ix). It defines residential real estate project as a project in which the proportion of carpet area of the commercial apartment does not exceeds 15% of total carpet area of all

- apartments in residential real estate project. Therefore, we have two types of residential projects, projects with only residential apartment and project with residential apartment with the commercial apartment where carpet area is not more than 15% of total carpet area.
- ii. Commercial real estate project: Projects having carpet area of more than 15% of total carpet area as commercial apartments have been categorized as a commercial project.
- iii. Affordable residential apartments: Explanation 4(x vi) of notification no. 3/2019 defines affordable residential apartment as apartment having a carpet area of 60 sq.mts.in metropolitan cities and carpet area of 90 sq.mts.in other than nonmetropolitan cities. There is a ceiling of consideration to qualify as affordable housing project that is 45 lakh rupees (Chaudhary, 2019).

d. Applicable tax rates under the new scheme

- i. Residential real estate project will have to pay GST at 7.5% with 1/3rd deduction for the value of land available the effective tax rate for such a project will be 5%. Residential project with a commercial apartment of less than 15% of carpet area will have to pay GST at 7.5% with a deduction for the value of land available the effective tax rate will be 5%. For ongoing projects, the promoter has an option of continuing with the old scheme of the tax rate that is 18% with 1/3rd deduction of land value i.e. effective rate will be 12% with the eligibility of input tax credit. Under the new scheme, the effective tax rate has been lowered to 5% with noneligibility for claiming the credit for paid Input tax.
- ii. Commercial real estate project will have to pay GST at 18% with 1/3rd deduction for the value of land available the effective tax rate for such projects will be 12% with the eligibility of claiming the input tax credit. With respect to the commercial project, there has been no change from the old scheme where the tax rate was 18% with an effective tax rate at 12% and eligible for claiming the input tax credit.
- iii. The affordable apartment segment will have to pay GST at 1.5% with 1/3rd deduction for the value of land available the effective tax rate will be 1% with noneligibility for an input tax credit (Hiregange, 2019).

e. The compliance requirement for new concessional rates

i. Under the new scheme, the tax liability shall be paid by debit to electronic cash ledger only.

- ii. The total input tax credit will be restricted according to Annexure 1 and 2 of notification no. 3/2019 and if any excess input tax credit was availed the same has to be returned.
- iii. The developer of a project has to pay GST by way of forward charge mechanism with the ineligibility of input tax credit. The landlord will be eligible for the input tax credit provided he has sold the flats independently before 31.03.2019 and tax charged by him shall not be less than tax charged by the developer.
- iv. If the promoter has procured cement from a non-registered person before 31.03.2019 then under reverse charge mechanism the promoter will pay GST at 28%. With respect to capital goods procured from a non-registered person, GST has to be paid under reverse charge mechanism at the applicable rate.
- v. Procurement of inputs for a financial year up to 80% shall be from a registered person. Following are ineligible as inputs, grants of development rights, long term lease of land, floor space index, electricity, high-speed diesel, motor spirit and natural gas. If there is any shortfall with respect to the procurement of inputs from a registered person, the same will be paid by the promoter under reverse charge mechanism at 18% (Datey, 2020).
- vi. The developer is duty-bound to maintain details of inputs procured in a project wise manner and should report the non-availed input tax credit as ineligible credit.

4.0 Issue under new Regime of GST for Real Estate

4.1 Whether input tax credit ineligibility under the new scheme with a lower tax rate would be able to reduce the costs of Real Estate?

Steps taken under the new scheme are welcome but they are not in line with GST principles. GST is based on two important principles, namely 'destination principle' and 'value added principle'. Destination-based principle states that the supply of goods and services will be taxed at the point of consumption meaning thereby it promotes destination-based tax regime. The value added principle states that the obligation to pay tax arises at each stage of the supply chain and on value addition in each stage of the supply chain.

The above two principle leads to following conclusions that GST is paid by supplier and thereafter collected from the consumer, it is to be technically be paid by the end consumer and not by the business consumer who just adds up the value and pass on to next supplier in the supply chain, it is a tax on value addition at each point in the supply chain, and it is a tax on consumption of product from end supplier. As GST is a tax on private consumption so it will not be funded by business-like promoters. The GST provides the business person (registered persons) a way out through the mechanism of claiming of credits of the input tax so already paid and therefore helps the suppliers in the supply chain to effectively cascade down the tax liability through the supply chain till it reached the end-recipient i.e. shifting entire tax liability on the consumer.

Under the new scheme which is in continuation after 01.04.2019 has reduced the tax rate of GST for residential real estate project from effective tax rate of 12% to 5% and for Affordable apartments from an effective tax rate of 8% to 1%. These changes in tax structure were introduced to reduce the tax burden on end consumer as well as to increase demand in the real estate sector. The changes brought in tax rates are welcomed but here the real vice has been introduced whereby under the new scheme no ITC would be allowed to be claimed by the end suppliers (in our case the builder, promoter, developer etc.). As we have seen that value addition is an important principle of GST, ineligibility of input tax credit will lead to break the concept of value addition in supply chain therefore effectively lead to cascade up the liability in the supply chain on to the final supplier rather than the end-user because both the taxes are lowered in the new notification moreover the final supplier would not be allowed to claim the credits of the input tax paid by him to the previous supplier in the supply chain. The important principle of destination-based tax is so as to shift the tax burden on the final consumer but due to ineligibility of input tax credit, the tax burden will be shared by consumers by paying lower tax and mostly by the promoter by not providing him input tax credit thereby violating the core principles of GST that are Destination Principle and Value Addition Principle.

4.2 Input tax ineligibility will not help in the reduction of costs of apartments

Input tax credit under the GST regime has a well-developed and well-defined structure which is comprehensive and has a mechanism of cross utilization of credit between CGST, SGST and IGST. Input tax credit in the construction sector has a significant impact as it results in overall tax neutrality by giving input tax credit on raw materials used and construction services availed. Due to the access to free input tax credits on GST paid for goods and services purchased, and outward supply tax rate being lower compared to many items used to have higher tax rates, the result will be very low cash flow is involved in paying GST on the outward supply. This mechanism of input tax credit will ultimately help in reducing the cost of the promoter and which is expected to be passed on potential buyers.

The new scheme introduced on 01.04.2019 has reduced the tax rate on residential apartments but it has a condition of ineligibility of Input Tax Credit. It is stated that it will lead to a lower tax burden on home buyers. But the conditionality's

attached to the scheme as mentioned above, it is said that it will reduce the tax burden but likely to increase the cost. The cost will be increased because the input tax credit which is not available will become the cost of construction, the minimum requirement of 80% of input services and inputs from a registered person and 100% capital goods will be ineligible for an input tax credit (Datey, 2020). Further, the compliance cost of maintaining records project was even though project being under same GSTIN, Reverse Charge Mechanism, filling of information every financial year as well as at the completion of the project (PWC, 2019).

It is expected that the new mechanism will bring in certain advantages like a reduction of tax on apartments where the land value is at the higher end and reduction due to low record keeping due to ineligibility of input tax credit. But the advantages provided by input credit tax eligibility is more than when compared to the new scheme which is the reduction of tax on apartments where the land value is at the lower end the promoter will be able to utilize input tax credit on inputs and input services and developer need not pay taxes on reverse charge mechanism for procurement of cement, capital goods and a shortfall of 80% on total purchase from a non-registered person. A promoter can avail input tax credit of inputs, input services and capital goods where he is not eligible for concessional rate of tax and such input tax can be utilized against the liability arising under another project.

4.3 Anti-profiteering provision and reduction of cost

Section 171 of CGST Act provides that it is mandatory to pass on benefits to the consumer due to the reduction in tax or from input tax credit by way of reduction in prices of products. Due to changes in the tax rate for real estate sector to reduce the final value of apartments, the anti-profiteering clause application will lead to a revision of selling price of apartments for developers who have opted for a new scheme of concessional tax rates. The anti-profiteering regulation seeks to prevent businesses from minting excessive profit on account of reduction in tax rate or from input tax credit but the provision is ineffective because of no clear guidance and explicit rules. The antiprofiteering mechanism is ambiguous due to the level of granularity of anti-profiteering analysis, transaction cost incurred on account of GST implementation (PWC, 2019). So with the ineffective implementation of anti-profiteering mechanism and ambiguity revolving around it, this will not help in reduction of cost of apartments (Datey, 2020).

5.0 Conclusion and Way Ahead

After going through the rates and rules which were present during the prenotification phase and also looking at the post-notification phase, it seems to us that even though the motive of the authorities might have been lowering the rate of GST applicable after 01.04.2019 to lower the burden of taxes to the end-user but in doing so they have disallowed the claim of credits which has already been paid via input tax by the promoter i.e. final supplier thereby even though the government might be collecting less tax by the consumers but it would also block the credits which were otherwise allowed to the final supplier meaning thereby that in one way or another the government would anyway collect taxes.

It is not to be thought that the previous rates and procedures were good enough, but only because of its inherent flaw it was desired for changes. But by issuing this new notification with lowered rates and ineligible ITC it has arisen the complexities and forced the Final supplier to enhance the price of the real estate so as to recover all the ineligible credits against which the Input tax was already paid. Moreover, with the recent changes, we have altogether deviated from the core principles of GST i.e. Destination based Consumption Tax Principle and Value-added Principle.

Since no prudent businessman would lower the profits by paying the input tax by himself and not be able to claim it at a later period. For such a situation the supplier would certainly shift the tax burden again on the end-user by increasing the price of the apartments, etc. (RSM, 2020) In such a situation the consumer is anyway paying the tax even after the 2019 Notification under which he is ought to pay a lowered rate of tax. With this situation, the whole object of the authorities goes in vain as the price of the real-estate would not decrease and it would hardly boost the downtrodden real-estate sector.

To conclude the issue of input tax ineligibility in new scheme for real estate sector and reduction of cost of the apartment it can be said that as the new scheme does not abide by the basic principles of GST such as destination principle and value-added principle, it will lead to increase in the cost of apartments by input tax becoming the cost of construction, by increasing cost due to compliance of reverse charge mechanism and procurement conditionality of 80% from a registered person and inefficient mechanism under the anti-profiteering provision and such tax liability again shifting back on the consumers (RSM, 2020).

Endnotes

- The Central Goods and Service Tax Act, Chapter V § 16(1) (2017).
- The Central Goods and Service Tax Act, Chapter I § 2(102) (2017).
- 3. Id, Schedule II, Para 5(b).
- 4. Id, Schedule III, para 5.

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