

## **Real Estate (Development and Regulation) Act, 2016 and its implications on Service Tax Provisions**

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Basic necessity for a prosperous living for any human being is Food, Clothing and Shelter. Out of these three, generally “Shelter” is the most expensive constituent for which every person has various dreams. It forms part of infrastructure development of a country too which is an important benchmark to judge the development of any state, region or country. The growth of real estate sector (which includes residential homes, commercial properties, flats and plots) in last 20 years has been unprecedented. According to a survey, in India every year more than 10 lac people buy homes and approximately Rs 3.5 lac crores is invested in property. There are more than 70000 developers or real estate builders operating in country and interestingly India holds Guinness World Record of owing largest number of privately owned homes in the world. However still there is a long way to go and Government of India has a vision of Housing for All by 2022.

Being such a huge sector for investment and consumption, in which numerable stakeholders are associated, it is unfortunately still unregulated and lacks standardization. The consumers often are unable to procure complete information, or enforce accountability against builders and developers in the absence of effective regulation. The grievance redressal system for consumers is also time consuming and nerve-wrecking. The practices are not as transparent as they should have been which has led to growth of real estate sector in an unorganized and to an extent unprofessional manner.

To counter such concerns with an objective of regulation and promotion of the real estate sector and to ensure sale of plot, apartment or building or sale of real estate project, in an efficient and transparent manner and to protect the interest of consumers in the real estate sector and to establish an adjudicating mechanism for speedy dispute redressal a legislation was intended. From there the seeds of Real Estate (Development and Regulation), 2016 have been sown.

The bill was awaited since 2013. It was ultimately handed over to Select Committee in Rajya Sabha in which there were 21 members who examined more than 400 witness, spent around 2-3 months, went around to 8 major cities in India for survey and had more than 250 representations. Finally, on 10<sup>th</sup> March 2016 the Rajya Sabha passed the bill and on 15<sup>th</sup> of March 2016, Lok Sabha passed the bill. The president gave his assent for the bill on 25<sup>th</sup> March 2016 and finally it was published in Official Gazette on 26<sup>th</sup> March 2016 to be called as Real Estate (Development and Regulation) Act 2016. (hereinafter to be read as “REDRA”). Few provisions of Act now applicable from 1<sup>st</sup> May, 2016.

Although REDRA is a central law which shall be applicable to federal structure throughout the length and breadth of this country except to state of Jammu & Kashmir. However, every State Government shall be an appropriate government to implement the given law. They do not have to

pass any state legislation for implementing it but it shall have the rule making powers as per realities and adaptations of the State where such rules shall be made and tabled in state legislature and then operation of given Act shall then take place.

## **Salient Features**

The salient features of the Act are the following:

### **1. Who is covered by this Act?**

- a. **Promoters:** Builder of buildings, apartments or a developer or a landowner who gets building constructed from builder for purpose of selling or Land developer who sells developed plots or a development authority shall also be called as Promoter.
- b. **Allottes:** means the person to whom a plot, apartment or building, as the case may be, has been allotted, sold (whether as freehold or leasehold) or otherwise transferred by the promoter, and includes the person who subsequently acquires the said allotment through sale, transfer or otherwise. Tenants are not included here.

### **2. What is Real Estate?**

- a. **Apartment:** a separate and self-contained part of any immovable property, including one or more rooms or enclosed spaces, located on one or more floors or any part thereof, in a building or on a plot of land, used or intended to be used for any residential or commercial use.
- b. **Building:** Any structure or erection or part of a structure or erection which is intended to be used for residential, commercial or for the purpose of any business, occupation, profession or trade, or for any other related purposes;
- c. **Real Estate Project:** Real estate project" means the development of a building or a building consisting of apartments, or converting an existing building or a part thereof into apartments, or the development of land into plots or apartment, as the case may be, for the purpose of selling all or some of the said apartments or plots or building

### **3. Real Estate Regulatory Authority**

Under the Act, the purchasers of real estate units from a promoter would have a forum called the "Real Estate Regulatory Authority" which will be set up within one year from the date of coming into force of the Act.

### **4. Registration with the Regulatory Authority**

- a. The promoter has to register their real estate project (residential as well as commercial) with the Regulatory Authority before booking, selling or offering apartments for sale in such projects. In case a project is to be promoted in phases, then each phase shall be considered as a standalone project, and the promoter shall obtain registration for each phase.

- b. Further, in case of ongoing projects on the date of commencement of the Act which have not received a completion certificate, the promoter of such project shall make an application to the Regulatory Authority for registration of their project within a period of three months of the commencement of the Act.

## **5. Carpet Area**

Under the Act, developers can sell units only on carpet area, which means the net usable floor area of an apartment. This excludes the area covered by the external walls, areas under services shafts, exclusive balcony or verandah area and exclusive open terrace area, but includes the area covered by the internal partition walls of the apartment.

## **6. 70% of realization from allottees in a separate bank account**

- a. The Act mandates that a promoter shall deposit 70% of the amount realized from the allottees, from time to time, in a separate account to be maintained in a scheduled bank.
- b. The promoter shall be entitled to withdraw the amounts from the separate account. However, such withdrawal can only be made after it is certified by an engineer, an architect and chartered accountant in practice that the withdrawal is in proportion to the percentage of completion of the project and is for the project only.
- c. The promoter is also required to get his accounts audited within six months after the end of every financial year by a practicing chartered accountant. , Further, he is required to produce a statement of accounts duly certified and signed by such chartered accountant, and it shall be verified during the audit that (i) the amounts collected for a particular project have been utilized for the project; and (ii) the withdrawal has been in compliance with the proportion to the percentage of completion of the project.

## **7. Revocation or lapse of registration**

- a. The Regulatory Authority may revoke the registration granted on receipt of a complaint or *suo moto* or on the recommendation of the competent authority in case (i) the promoter makes a default in doing anything required under the Act or the rules or regulations made thereunder; (ii) the promoter violates any terms of the approvals granted for the project; and (iii) the promoter is involved in any kind of unfair practice of irregularities.
- b. In the event the registration is revoked by the Regulatory Authority or it lapses, the Regulatory Authority shall:
  - i. debar the promoter from accessing the website in relation to the project, specify his name in the list of defaulters on its website and also inform other Regulatory Authorities in other States and Union territories about such cancellation;
  - ii. facilitate the remaining development works to be carried out by competent authority or the association of allottees or in any other manner as may be determined by the Regulatory Authority. However, the association of allottees shall have a first right of refusal for carrying out the remaining development works; or

## **8. Website of the Regulatory Authority**

The promoter shall, upon receiving his login Id and password, create his web page on the website of the Regulatory Authority and enter all details of the proposed project including:

- i.** details of the registration granted by the Regulatory Authority;
- ii.** quarterly up-to-date list of the number and types of apartments or plots or garages, as the case may be, booked;
- iii.** quarterly up-to-date status of the project along with the list of approvals obtained and approvals pending subsequent to commencement certificate; and

## **9. Limit on receipt of advance payment**

A promoter shall not accept a sum more than 10% percent of the cost of the apartment, plot, or building, as the case may be, as an advance payment or an application fee, from a person without first entering into a written agreement of sale with such person and register the said agreement of sale, under any law for the time being in force.

## **10. Restriction on addition and alteration in the plans**

- a.** The promoter cannot make any addition or alteration in the approved and sanctioned plans, structural designs, specifications and amenities of the apartment, plot or building without the previous consent of the allottee.
- b.** The promoter also cannot make any other addition or alteration in the approved and sanctioned plans, structural designs and specifications of the building and common areas within the project without the previous written consent of at least two-thirds of the allottees, other than the promoter, who have agreed to take apartments in such a building.

## **11. Restriction on transfer and assignment**

The promoter shall not transfer or assign his majority rights and liabilities in respect of a project to a third party without obtaining prior written consent from two-thirds of the allottees, except the promoter, and without the prior written approval of the Regulatory Authority.

## **12. Real Estate Appellate Tribunal**

In addition to the establishment of the Regulatory Authority, a Real Estate Appellate Tribunal (Appellate Tribunal) shall also be formed where any person aggrieved by any direction or decision made by the Regulatory Authority or by an adjudicating officer, may make an appeal before the Appellate Tribunal within a period of 60 days from the date of receipt of a copy of the order or direction.

### **13. Offences and Penalty**

Stringent penal provisions have been prescribed under the Act against the promoter in case of any contravention or non-compliance of the provisions of the Act or the orders, decisions or directions of the Regulatory Authority or the Appellate Tribunal which are the following:

- i.** If promoter does not register its project with the Regulatory Authority – the penalty may be up to 10% of the estimated cost of the project
- ii.** If promoter does not comply with the order of the Regulatory Authority - imprisonment of up to three years and a further penalty of up to 10% of the estimated cost, or both; and
- iii.** In case the promoter provides any false information while making an application to the Regulatory Authority– the penalty may be up to 5% of the estimated cost of the project or construction.

## **Implication on Service Tax Provisions of RERDA 2016**

Provisions of Service Tax vide Chapter V of Finance Act 1994 have impacted real estate taxation drastically ever since it has been levied. Further, with effect from 1-7-2012, when provisions of service tax were overhauled completely it impacted real estate transactions with deep penetration. Now with implementation of Real Estate (Regulation and Development) Act 2016 which is a game changer for real estate industry, its interplay with provisions of Chapter V of Finance Act 1994 shall be quite interesting for professional understanding. Few points of conflicts, difference and consonance are enumerated below:

### **1. Applicability- RERDA vs Service Tax**

Construction Service has been declared as service vide Section 66E(b) of The Finance Act 1994 which is can be read as:

*construction of a complex, building, civil structure or a part thereof, including a complex or building intended for sale to a buyer, wholly or partly, except where the entire consideration is received after issuance of completion-certificate by the competent authority.*

*(II) the expression "construction" includes additions, alterations, replacements or remodelling of any existing civil structure;*

Further as per definition of term service given under section 65B(44)(a)(i) of the Act service does not include

*an activity which constitutes merely, a transfer of title in goods or immovable property, by way of sale, gift or in any other manner; or.*

Also per entry no 14(b) of mega exemption notification no 25/2012-ST dated 20.6.2012, *Services by way of construction, erection, commissioning, or installation of original works pertaining to a single residential unit otherwise than as a part of a residential complex; are exempt from service tax.*

However, under RERA 2016, exemption from registration with regulatory authority is for only following types of real estate projects:

- i. Where the area of land proposed to be promoter does not exceed 500 square meters or the number of apartments to be constructed in the project does not exceed eight apartments.
- ii. Projects where the completion certificate has been received prior to the commencement of the Act;
- iii. Projects for the purpose of renovation or repair or re-development which does not involve marketing, advertising, selling and new allotment of any apartment plot or building.

Thus implication of aforesaid differences is:

- (i) Under RERA 2016, sale of single residential unit is also covered however exemption from levy of service tax is provided to same under mega exemption notification.
- (ii) Under RERA 2016, sale of plotted lands is also covered however transfer of title in immovable property is outside the definition of service.
- (iii) Under RERA 2016, repair, renovation or re-development of real estate projects is not covered but under service tax same is taxable as service.

## **2. Compensation paid to Allottees by Promoters**

As explained in aforesaid paragraphs in case the promoter is unable to hand over possession of the real estate project to the allottees (i) in accordance with the terms of the agreement of sale; or (ii) due to discontinuance of his business as a promoter on account of suspension; or (iii) revocation of his registration or for any other reason, then the promoter shall be liable, on demand being made by the allottee, to return the amount received by him from the allottee with interest and compensation at the rate and manner as provided under the Act.

However, where an allottee does not intend to withdraw from the project, he shall be paid interest by the promoter for every month of delay, till the handing over of the possession, at a prescribed rate.

Under provisions of Service as per section 66E(e) agreeing to the obligation to refrain from an act, or to tolerate an act or a situation, or to do an act is a service and is leviable to service tax. However only those acts which is service at first place, compensation for breach of same should be leviable to service tax.

Thus now, after enactment of RERDA 2016, any interest component in compensation awarded to allottees for breach of terms or not handing over of possession of real estate project by promoter shall fall under ambit of Section 66E(e) as declared service and shall be leviable to service tax and allottees shall be liable to pay service tax on the same. However, any compensation awarded against real estate project in relation to plots should not be covered by given section since at first instance sale of plotted land was not liable to service tax.

Further any such compensation paid to allottees along with service tax shall not constitute as input service as defined under Rule 2(1) of CENVAT Credit Rules 2004 and thus no CENVAT Credit of same shall be allowed to promoters for discharging their service tax liability.

## **3. Project Wise maintenance of amount received from allottees in Escrow Account**

The Act mandates that a promoter shall deposit 70% of the amount realized from the allottees, from time to time, in a separate account. This is intended to cover the cost of construction and the land cost and the amount deposited shall be used only for the concerned project. The promoter shall be entitled to withdraw the amounts from the separate account, to cover the cost of the project, in proportion to the percentage of completion of the project.

However, in a given case, a promotor can have more than 1 real estate project in progress. According to rules of CENAVT Credit utilization no one to one co-relation for use of CENVAT Credit is required. It means CENVAT Credit available for a project A can be used for payment of service tax payable on Project B. But the way provisions of RERDA 2016 are worded same can lead to violation of provisions made there under and penalty can be invoked. In lack of clarity on given matter a situation can arise where a promotor is required to use CENVAT Credit in relation to a project for payment of output service tax liability on same project. This shall lead to increase in cost of project and ultimately liquidity of promotors shall be hampered. The situation shall worsen in case development of project in a phased manner.

#### **4. Reconciliation of details submitted under RERDA 2016 and CENVAT of input services claimed under Service Tax and CENAVT Credit Rules 2004.**

Under RERDA 2016, every promotor shall be required to disclose details of architects, contractors, real estate agent, structural engineer in relation to project at the website under the regulatory authority. The same shall be available for public access.

Hence it shall be mandatory on part of promotor to ensure that details of aforesaid entities from whom services are claimed are properly mentioned there. A situation can arise where a reconciliation between information submitted on website and input services in form of expenses in profit and loss account of promotor on which CENVAT Credit has been availed can be asked by department authorities. In case of discrepancy, question on genuineness of these transactions can be raised and a possibility of unnecessary scrutiny and disallowance of valid CENVAT Credit of various input services can arise.

Inspite of above still the problem of delay in grant of completion certificate or occupancy certificate by appropriate authorities has not been addressed. It has caused huge litigation in Service Tax and shall kill the spirit of Real Estate (Regulation and Development) Act 2016 if not addressed in future.

To sum up, RERDA 2016 shall have impact on various concepts of service tax provisions too and thus shall have lot of points to ponder for professionals, promotors and ultimately for consumer.



## **Abstracts:**

To counter such concerns with an objective of regulation and promotion of the real estate sector and to ensure sale of plot, apartment or building or sale of real estate project, in an efficient and transparent manner and to protect the interest of consumers in the real estate sector and to establish an adjudicating mechanism for speedy dispute redressal a legislation was intended. From there the seeds of Real Estate (Development and Regulation), 2016 have been sown.

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