ADVANCE RULING NO. 07/DAAR/2018 dated 05.10.2018

(In Application No: 07/DAAR/2018 dated 30.01.2018)

Name and Address of the Applicant	:	M/s NBCC (India) Limited, NBCC Bhawan, Lodhi Road, New Delhi-110003
GSTIN of the Applicant	:	07AAACN3053B1Z2
Date of Application	:	30.01.2018
Clause(s) of Section 97(2) of CGST/DGST Act, 2017, under which the question raised	:	(g) Whether any particular thing done by the applicant with respect to any goods or services or both amounts to or results in a supply of goods or services or both, within the meaning of that term
Date of hearing(s) for admission	:	23.02.2018
Date of Final Hearing(s)	:	09.03.2018, 06.04.2018
Date of receipt of further written submissions from applicant	:	09.03.2018
Date of receipt of comments from (Centre)	:	28.03.2018
Date of receipt of comments from (State)	:	22.02.2018
Present for the Applicant	:	Shri PK Sahu, Advocate
Present for the Revenue (Centre)	:	Shri Prem Chand, Superintendant, CGST (Delhi East)
Present for the Revenue (State)	:	Shri SS Bajwan, Assistant Commissioner, DGST (Ward-115)

Despatch NO - 488/DAAR/2018/Dated/05/10/2018

Vijay Kumar

Statement of Facts:

The applicant is a Government of India enterprise and engaged in project management consultancy, real estate development and EPC contracts. It has signed a memorandum of understanding on 25.10.2016 with Ministry of Housing and Urban Affairs (MoHUA), Government of India, wherein MoHUA has appointed the applicant as the executing agency for redevelopment of colonies having "General Pool Residential Accommodation" (in short GPRA) and "Government Pool Office Accommodation" (in short GPOA) at Nauroji Nagar, Sarojini Nagar and Netaji Nagar in Delhi. Under this arrangement, the applicant is required to organise construction of GPRA (i.e. dwelling units), GPOA (i.e. office spaces), commercial space and supporting infrastructure, such as local convenience shopping centre, banquet hall/ community centre, creche, schools, hospital/dispensary, ATM/Banks, parking facilities, parks and play grounds etc. at the specified locations in place of old existing buildings. The applicant is also required to maintain the constructed buildings for thirty years after construction. The transaction between the applicant and MoHUA under the said MOU is not a subject matter before this authority.

2. As per the MOU dated 25.10.2016, the estimated cost of abovementioned redevelopment work and maintenance thereof for thirty years is Rs. 24,682 crores which shall be met from free-hold sale of specified commercial built-up area. The sale proceeds of commercial built-up area shall be deposited in an escrow account which shall be managed by Capital Management Committee constituted by MoHUA. Capital Management Committee shall review the status of the escrow account on yearly basis, determine the amount, accrued in excess of 20% of the total cost of the said redevelopment work which is required to be deposited in Consolidated Fund of India. MoHUA will be responsible for allotment/handing over of commercial space to the allottees/shopkeepers/schools after completion of the project. L&DO shall be responsible for relocation and rehabilitation of JJ clusters, if any.

3. In terms of the MOU dated 25.10.2016, the applicant has announced sale of commercial super built-up area on behalf of MoHUA through e-auction on MSTC website on 30.05.2017 and 05.12.2017. In the e-auction details given on MSTC website, inviting bid for sale of proposed built-up area in the buildings to be constructed by the applicant as part of re-development work, it is mentioned that the applicant is selling the proposed built-up area on behalf of MoHUA. The terms and conditions of such sale provide that Government of India through nominated officer will sign the agreement to sell and sale deed with the successful bidder.

4. The applicant had applied to Real Estate Regulatory Authority (RERA) on behalf of MoHUA, Government of India, for registration under the Act, but the Regulator had refused to give such registration in its letter dated 11.08.2017. In this letter, it has been stated that application by the present applicant (i.e. NBCC) for registration of the project considering

MoHUA as the promotor cannot be accepted. In these circumstances, the applicant has applied for registration under RERA as per the instructions of MoHUA.

5. In the abovementioned factual background, the applicant is seeking advance ruling in respect of any GST liability on sale of built-up area on behalf of MoHUA in the colonies redeveloped by it for MoHUA.

Details of Question on which Advance Ruling is requested:

6. Whether the applicant is liable to pay GST on sale of commercial super built-up area on behalf of Ministry of Housing and Urban Affairs, Government of India, in the colonies being re-developed at Nauroji Nagar, Netaji Nagar and Sarojini Nagar at Delhi?

Views of the Applicant:

7. The applicant is of the view that it is not liable to pay GST on sale of commercial super built-up area being developed by it at Nauroji Nagar and Sarojini Nagar in Delhi for the following reasons:

The applicant is not liable to pay GST on sale of commercial super built-up area on behalf of MoHUA, Government of India, because it cannot be construed as supplier of service while selling built-up space on behalf of the Government in the colonies under redevelopment.

8. A person is liable to pay GST on its transactions which are falling within the "scope of supply" as prescribed in section 7 of CGST Act as reproduced below:

(1) For the purposes of this Act, the expression "supply" includes–

(a) all forms of supply of goods or services or both such as sale, transfer, barter, exchange, licence, rental, lease or disposal made or agreed to be made for a consideration by a person in the course or furtherance of business;

(b) import of services for a consideration whether or not in the course or furtherance of business;

(c) the activities specified in Schedule I, made or agreed to be made without a consideration; and

(d) the activities to be treated as supply of goods or supply of services as referred to in Schedule II.

(2) Notwithstanding anything contained in sub-section (1), —

(a) activities or transactions specified in Schedule III; or

(b) such activities or transactions undertaken by the Central Government, a State Government or any local authority in which they are engaged as public authorities, as may be notified by the Government on the recommendations of the Council,

shall be treated neither as a supply of goods nor a supply of services.

(3) Subject to the provisions of sub-sections (1) and (2), the Government may, on the recommendations of the Council, specify, by notification, the transactions that are to be treated as—

(a) a supply of goods and not as a supply of services; or

(b) a supply of services and not as a supply of goods.

9. In case of supply of goods and services within a State, it would be a dual GST, the Union/Centre and the State/Union Territory would simultaneously levy CGST and SGST/ UTGST on a common base. Provisions of CGST and SGST are in pari materia, levying tax on the same transactions in unified manner.

10. Under section 9 of the CGST Act, tax is payable by the taxable person on the transaction value of supply of goods or services, except in the situations carved out in section 9(3) and 9(4) of the Act where the receiver of the supply of goods or services is liable to pay tax.

9. Levy and collection.

(1) Subject to the provisions of sub-section (2), there shall be levied a tax called the central goods and services tax on all intra-State supplies of goods or services or both, except on the supply of alcoholic liquor for human consumption, on the value determined under section 15 and at such rates, not exceeding twenty per cent., as may be notified by the Government on the recommendations of the Council and collected in such manner as may be prescribed and shall be ***paid by the taxable person****.*

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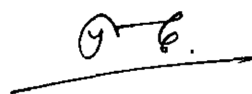
(3) The Government may, on the recommendations of the Council, by notification, specify categories of supply of goods or services or both, the tax on which shall be paid on reverse charge basis by the recipient of such goods or services or both and all the provisions of this Act shall apply to such recipient as if he is the person liable for paying the tax in relation to the supply of such goods or services or both.

(4) The central tax in respect of the supply of taxable goods or services or both by a supplier, who is not registered, to a registered person shall be paid by such person on reverse charge basis as the recipient and all the provisions of this Act shall apply to such recipient as if he is the person liable for paying the tax in relation to the supply of such goods or services or both.



11. From a combined reading of section 2(107), which defines "taxable person", and sections 2(105), 22 and 24 of the CGST Act, it can be appreciated that a supplier of goods or services is a taxable person. Hence, ordinarily, supplier of goods or services is liable to pay tax on the consideration received by him. Therefore, it is necessary to examine the documents describing the transaction to understand who are the supplier and the receiver. The applicant has to perform its activities as per the MOU signed on 25.10.2016 with MoHUA. In terms of the MOU, the applicant is responsible for development of the area for MoHUA by constructing of dwelling units, commercial space and supporting infrastructure and maintaining thereof for thirty years. The applicant has no interest in the area constructed by it except receiving its remuneration prescribed in MOU. For the work assigned to the applicant, the applicant is entitled to receive cost plus 8% of such cost from MoHUA. The total cost of the development has been estimated Rs. 24,682 crores and, MoHUA has decided to recover such cost by selling built-up area in commercial building. The MOU states that applicant shall invest up to Rs. 1500 crore into the project from own funds and, for this, it would get interest @ 12% p.a. till it is returned. In addition, the applicant would receive 1% of the sale proceeds on account of sale related expenses. From these terms, it is clear that it is MoHUA which is selling such built-up area, not the applicant. In the developed area, the applicant is not acquiring any interest or right and, therefore, there is no question of it selling any built-up commercial area, being constructed by it, on its own account.

12. The fact that the applicant is not selling proposed built-up area in the buildings under construction on its own account but acting on behalf of the Government is also reflected from the fact that it has no control or right on the sale proceeds except for recovering the cost of development undertaken by it. The MOU specifically provides that the sale proceeds of the commercial built-up area shall be deposited in an escrow account which shall be managed by Capital Management Committee constituted by the Government. Capital Management Committee shall review the status of the escrow account on yearly basis and determine the amount which is accrued in excess of 20% of the total cost of the said redevelopment work to be deposited in Consolidated Fund of India.

13. Further, in the e-auction details given on MSTC website, inviting bids for sale of proposed built-up area in the buildings to be constructed by the applicant as part of re-development work, it is mentioned that the applicant has announced sale of commercial super built-up area on behalf of MoHUA. The terms and conditions of the sale further provide that Government of India through its nominated officer will sign the agreement to sell and sale deed with successful bidders. Hence, the applicant is merely constructing the buildings for MoHUA. It is not like a promotor or developer who is selling the units in the building constructed by it. Therefore, the applicant cannot be held responsible for payment of GST on sale of commercial space as it cannot be construed as taxable person making any taxable supply to the persons who had booked the space/units in the buildings. The applicant is not liable to pay GST on the amount received from sale of built-up area,

irrespective of taxability of the transactions with the bidders. If at all, the Government is the taxable person.

14. The applicant submits that it cannot be held responsible for payment of GST merely because it is registered under Real Estate Regulation Act (RERA), 2016, as promotor of the said project. The applicant has received a letter dated 14.09.2017 from MoHUA, in which the Ministry has asked it to apply for registration under RERA as promotor. It has taken registration under RERA being a representative of MoHUA. In fact, the applicant cannot be construed as promotor under RERA. The provision of section 2(zk) of the Act is reproduced below:

(zk) "promoter" means,—

(i) a person who constructs or causes to be constructed an independent building or a building consisting of apartments, or converts an existing building or a part thereof into apartments, for the purpose of selling all or some of the apartments to other persons and includes his assignees; or

(ii) a person who develops land into a project, whether or not the person also constructs structures on any of the plots, for the purpose of selling to other persons all or some of the plots in the said project, whether with or without structures thereon; or

(iii) any development authority or any other public body in respect of allottees of—

(a) buildings or apartments, as the case may be, constructed by such authority or body on lands owned by them or placed at their disposal by the Government; or

(b) plots owned by such authority or body or placed at their disposal by the Government, for the purpose of selling all or some of the apartments or plots; or

(iv) an apex State level co-operative housing finance society and a primary co-operative housing society which constructs apartments or buildings for its Members or in respect of the allottees of such apartments or buildings; or

(v) any other person who acts himself as a builder, coloniser, contractor, developer, estate developer or by any other name or claims to be acting as the holder of a power of attorney from the owner of the land on which the building or apartment is constructed or plot is developed for sale; or

(vi) such other person who constructs any building or apartment for sale to the general public.

Explanation:- For the purposes of this clause, where the person who constructs or converts a building into apartments or develops a plot for sale and the persons who sells apartments or plots are different persons, both of them shall be deemed to be the promoters and shall be jointly liable as such for the functions and responsibilities specified, under this Act or the rules and regulations made there under;

15. From the above, it seems that a person who is not selling planned unit in a complex under development and merely constructing the building for the land owner cannot be construed as promotor and, therefore, such person cannot be saddled with the responsibility of a promotor under the Act. Therefore, registration under RERA, which is not warranted under the law would not have any implication on the tax liability under GST laws on the revenue generated from the sale of the proposed units in the planned buildings.

MoHUA, Government of India, is not liable to pay GST on sale of commercial built-up space, as this relates to function entrusted to a municipality under Article 243W of the Constitution.

16. GST is payable on supply of goods and services if such goods and services are not exempted from tax. Notification No. 12/2017-Central Tax (Rate) dated 28.06.2017 provides for exemption from tax in respect of certain supplies. An extract of this Notification relevant for the applicant case, is given below:

Notification No. 12/2017- Central Tax (Rate) New Delhi, the 28th June, 2017

In exercise of the powers conferred by sub-section (1) of section 11 of the Central Goods and Services Tax Act, 2017 (12 of 2017), the Central Government, on being satisfied that it is necessary in the public interest so to do, on the recommendations of the Council, hereby exempts the intra-State supply of services of description as specified in column (3) of the Table below from so much of the central tax leviable thereon under sub-section (1) of section 9 of the said Act, as is in excess of the said tax calculated at the rate as specified in the corresponding entry in column (4) of the said Table, unless specified otherwise, subject to the relevant conditions as specified in the corresponding entry in column (5) of the said Table, namely:-

Sl. No.	Chapter, Section, Heading, Group or Service Code (Tariff)	Description of Services	Rate (per unit)	Condition
(1)	(2)	(3)	(4)	(5)

4	Chapter 99	Services by Central Government, State Government, Union territory, local authority or governmental authority by way of any activity in relation to any function entrusted to a municipality under article 243 W of the Constitution.	Nil	Nil
6	Chapter 99	Services by the Central Government, State Government, Union territory or local authority excluding the following services— a) services by the Department of Posts by way of speed post, express parcel post, life insurance, and agency services provided to a person other than the Central Government, State Government, Union territory; b) services in relation to an aircraft or a vessel, inside or outside the precincts of a port or an airport; c) transport of goods or passengers; or **d) any service, other than services covered under entries (a) to (c) above, provided to business entities.**	Nil	Nil

A similar exemption has been given for payment of Delhi GST.

17. It may be noticed that as per provisions made against S. No. 4 of the above table any activity of Central Government, State Government, etc. in relation to any function entrusted to a municipality under article 243W of the Constitution is not exigible to GST. The applicant submits that the present construction activity of MoHUA fulfils this prescription. Article 243W of the Constitution reads as under:

243W. Powers, authority and responsibilities of Municipalities, etc. — Subject to the provisions of this Constitution, the Legislature of a State may, by law, endow —

(a) the Municipalities with such powers and authority as may be necessary to enable them to function as institutions of self-government and such law may contain provisions for the devolution of powers and responsibilities upon Municipalities, subject to such conditions as may be specified therein, with respect to -

(i) the preparation of plans for economic development and social justice;

(ii) the performance of functions and the implementation of schemes as may be entrusted to them including those in relation to the matters listed in the Twelfth Schedule;

(b) the Committees with such powers and authority as may be necessary to enable them to carry out the responsibility conferred upon them including those in relation to the matters listed in the Twelfth Schedule.

18. As per the above Article of the Constitution, State legislatures can empower municipalities to function as institutions of self-government with respect to preparation of plans for economic development and social justice and performance of functions and implementation of schemes as may be entrusted to them. Further, these functions may include matters listed in Twelfth Schedule of the Constitution. Twelfth Schedule contains the following activities.

(a) Urban planning including town planning.

(b) Regulation of land-use and construction of buildings.

(c) Planning for economic and social development.

(d) Roads and bridges.

(e) Water supply for domestic, industrial and commercial purposes.

(f) Public health, sanitation conservancy and solid waste management.

(g) Fire services.

(h) Urban forestry, protection of the environment and promotion of ecological aspects.

(i) Safeguarding the interests of weaker sections of society, including the handicapped & mentally retarded.

(j) Slum improvement and upgradation.

(k) Urban poverty alleviation.

(l) Provision of urban amenities and facilities such as parks, gardens, playgrounds.

(m) Promotion of cultural, educational and aesthetic aspects.

(n) Burials and burial grounds; cremations, cremation grounds; and electric crematoriums.

(o) Cattle pounds; prevention of cruelty to animals.

(p) *Vital statistics including registration of births and deaths.*

(q) *Public amenities including street lighting, parking lots, bus stops and public conveniences.*

(r) *Regulation of slaughter houses and tanneries*

19. The activities given in Twelfth Schedule quoted above, relevant to the present context, are urban planning including town planning, regulation of land use and construction of buildings and planning for economic & social development. The applicant submits that construction and sale of houses (residential as well as commercial) by municipalities are in line with the provisions of Article 243W of the Constitution. Article 243W enables State Legislatures to endow municipalities with such powers as may be necessary for self-governance. The activities of the municipalities pertain to implementation of any scheme as may be entrusted to them as also those specified in Twelfth Schedule. The municipalities are not only to plan but also implement different schemes. Construction of housing and market complexes by municipalities is a regular function. They construct as well as sell/lease of houses/commercial space. The activities of MoHUA, Government of India, are akin to urban planning/town planning, regulation of land-use and construction of buildings as well as planning for socio-economic development. This is supported by the following recital given in the MoU dated 25.10.2016 signed by MoHUA, Government of India with the applicant.

> *"AND WHEREAS, there is an acute shortage of Government housing, especially in the National Capital Region (NCR) in various categories. Redevelopment of old Government housing colonies as per latest Delhi Master Plan-2021 norms has been identified as one of the strategies to overcome this shortage. The augmentation of Government Housing stock, by redevelopment of old colonies, would not only replace the old dilapidated buildings with modern environment friendly houses, but also provide an opportunity for optimum utilization of land-a scarce resource, by applying a higher Floor Area Ratio (FAR) as permissible under the latest Master Plan norms. Accordingly, the Government of India has decided to redevelop the following three GPRA colonies through NBCC (India) Ltd."*

20. The planning authorities are not only responsible for formulating plans for development in their areas, but also for executing the said plans. This is evident from the extracts of relevant portions from Maharashtra Regional and Town Planning Act, 1966.

> *33. Plans for areas of Comprehensive development:-*
>
> *(1) Any time after the publication of notice regarding preparation of draft Development plan under section 26, a Planning Authority may prepare plan or plans showing proposals for the development of an area or areas which in the opinion of the Planning Authority should be developed or re-developed as a*

whale (hereinafter referred ta as "the area or areas af Camprehensive develapment"); and in particular such plans shall pravide far:-

> *(a)* *detailed development of specific areas far urban renewal, hausing shopping centres, industrial areas, civic centres, educational and cultural institutians;*
>
> *(b)* *cantral of architectural features, elevatian and frantage af buildings and structures;*
>
> *(c)* *dealing satisfactorily with areas af bad layouts, obsolete develapment and slum areas and re-location af papulatian;*
>
> *(d)* *open spaces, gardens, playgraunds and recreatian areas.*

(2) When the plans far an area ar areas af Camprehensive develapment are prepared, whether ar nat separately, the Planning Autharity shall fallow the same pracedure before submissian af these plans to the State Government for sanction as is pravided by sectians 25, 26, 27, 28, 29, 30 and 31 as respects a draft Develapment plan and submit such plan or plans from time ta time to the State Gavernment for sanctian, alongwith a repart -

> *(a)* *explaining the prapasals and the stages of development pragramme by which it is proposed ta execute the plan ar plans;*
>
> *(b)* *giving an appropriate estimate of the cost involved in executing the propasals af the plan ar plans.*

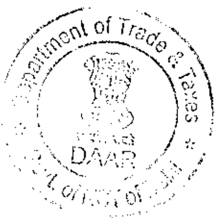
(3) The State Gavernment may, after cansulting the Directar af Tawn Planning by natificatian in the Official Gazette, sanctian the plan or plans far the area ar areas af camprehensive development either withaut, ar subject ta such modificatians as it may cansider necessary not later than three manths of the date of receipt of such plans from the Planning Authority ar nat later than such further periad as may be extended by the State Gavernment.

21. The Supreme Court in ***Manohar Joshi v. State of Maharashtra, (2012) 3 SCC 718***, has dealt with the role of municipalities as under:

Role of municipalities

201. *The municipalities which are the Planning Autharities for the purpase af bringing abaut the arderly development in the municipal areas, are given a place af pride in this entire pracess. They are expected ta render wide-ranging functians which are now enumerated in the Constitutian. They are naw given a status under Part IX-A of the Canstitutian intraduced by the Seventy-fourth Amendment w.e.f. 1-6-1993.*

202. *Article 243-W lays down the powers of the municipalities to perfarm the functians which are listed in the Twelfth Schedule. For perfarming these functians, planning becames very impartant. ….*



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Importance of the spaces for public amenities

> ***208.*** *As we have seen, the MRTP Act gives a place of prominence to the spaces meant for public amenities. An appropriately planned city requires good roads, parks, playgrounds, markets, primary and secondary schools, clinics, dispensaries and hospitals and sewerage facilities amongst other public amenities which are essential for a good civic life.*

22. The legality of construction of a commercial complex has been upheld by the Supreme Court of India in ***G.B. Mahajan and Others vs. Jalgaon Municipal Council and Others, (1991) 3 SCC 91***. Here, Jalgaon Municipal Council contemplated erection of an Administrative Building and commercial complex on a piece of its land for better use of the same. The construction of the project was to be done through a developer at his own cost and he was to handover certain constructed space to the municipality free of cost. The developer was free to sell his share of the space and the allottees (buyers) were to be given occupancy right for a period of 50 year under section 272 (1) of Maharashtra Municipalities Act, 1965. They were expected to pay rents to the Municipal Council for a period of 50 years at the rate prescribed in the scheme. The project was awarded to a real estate developer by the Municipality through competitive bidding. However, this was challenged by the appellants in the Bombay High Court on the following grounds:

(a) That the scheme of financing of the project was unconventional and was not one that was, as a matter of policy, open and permissible to a governmental authority. The municipal authority could either have put up the construction itself departmentally or awarded the execution of the whole project to a building contractor. The method of financing and execution of the project are ultra vires the powers of the Municipal authority under the Act.

(b) That the terms of the agreement with the developer that the latter be at liberty to dispose of the occupancy rights in the commercial complex in such manner and on such terms as it may choose would amount to an impermissible delegation of the Statutory functions of the Municipal Council under section 272 of the Act to the developer.

(c) That the project, in effect, amounted to and involved the disposal of municipal property by way of a long term lease with rights of sub-letting in favour of the developer violative of Section 92 of the 'Act'.

(d) That the scheme is arbitrary and unreasonable and is violative of Article 14 of the Constitution. The project is patently one intended to and does provide for an unjust enrichment of respondent 6 at public expense.

The High Court however, did not accept the above grounds and the appellants moved the Supreme Court. The Supreme Court dismissed the appeals and held as under:

A project, otherwise legal, does not become any the less permissible by reason alone that the local authority, instead of executing the project itself, had entered into an agreement with a developer for its financing and execution. The criticism of the project being 'unconventional' does not add to or advance the legal contention any further. The question is not whether it is unconventional by the standard of the extant practices, but whether there was something in the law rendering it impermissible. Though there is a degree of public accountability in all governmental enterprises, but the present question is one of the extent and scope of judicial review over such matters. With the expansion of the State's presence in the field of trade and commerce and of the range of economic and commercial enterprises of government and its instrumentalities there is it an increasing dimension to governmental concern for stimulating efficiency, keeping costs down, improved management methods, prevention of time and cost overruns in projects, balancing of costs against time scales, quality control, cost-benefit ratios etc. In search of these values it might become necessary to a adopt appropriate techniques of management of projects with concomitant economic expediencies. These are essentially matters of economic policy which lack adjudicative disposition, unless they violate constitutional or legal limits on power or have demonstrable pejorative environmental implications or amount to clear abuse of power. This again is the judicial recognition of administrator's right to trial and error, as long as both trial and error are bona fide and within the limits of authority. in the ever increasing tempo of urban life and the emerging stresses and strains of planning, wide range of policy aptions not inconsistent with the objectives of the statute should be held permissible. Therefore, in the context of expanding exigencies of urban planning it will be difficult for the court to say that a particular policy option was better than another. The contention that the project is ultra vires the powers of the Municipal Council is not acceptable.

23. Therefore, MoHUA is also not liable to pay GST on sale of commercial built-up space, as this relates to function entrusted to a municipality under Article 243W of the Constitution.

The applicant is not liable to pay GST on sale of built-up space prior to 01.07.2017.

24. The applicant submits that some built-up space has already been sold through e-action on 30.05.2017 and, instalment of sale price has been received prior to 01.07.2017, i.e. prior to notification of GST laws. Section 173 of the GST Act, 2017 states that Chapter V

of the Finance Act, 1994, which provides for levy of service tax on the services provided or to be provided, shall be omitted. However, section 174(2) saves the liability accrued under the said Chapter V of Finance Act, 1994. Prior to 01.07.2017, service tax was payable on every "service", and included declared service under Finance Act, 1994. Under section 66E(b) of the said Act, construction of building/complex intended for sale to a buyer, where the consideration is received wholly or partly prior to issuance of completion certificate has been enumerated as "declared service". However, there was no legislative mechanism to determine the value of declared service in a composite transaction of sale of constructed flat which includes transfer of land. Hence, no service tax was payable on consideration received under agreements to sell units in the complex prior to completion of construction. Delhi High Court in ***Suresh Kumar Bansal vs. UOI, 2016 (43) S.T.R. 3 (Del.)***, has held that no service tax was payable on the consideration received from a prospective buyer for sale of unit in a residential complex being developed by virtue of explanation to section 65(105)(zzzh) as applicable prior to 01.07.2012 on the ground that there is no mechanism under the Act to levy service tax on the service portion of the transaction. This conclusion of the High Court decision in ***Suresh Kumar Bansal*** case is valid even after amendment in the Finance Act, 1994, with effect 01.07.2012.

25. Even assuming that service tax was payable on the transaction of sale of commercial space treating it as a declared service under section 66E(b) of Finance Act, 1994, there was exemption for the service rendered by government agencies, on the same reasoning as in case of GST. It is because this activity is in relation to functions entrusted to a municipality under Article 243W of the Constitution and exemption under S. No. 39 of Mega Exemption Notification No.25/2012-ST dated 20.06.2012 reads as under:

> "Services by a governmental authority by way of any activity in relation to any function entrusted to a municipality under Article 243W of the Constitution".

On comparison of the exemption provision under the two laws, it is evident that under the Service Tax Law, exemption was given to service provided by a governmental authority, whereas such exemption has been given to Central Government, State Government, Union Territory, local authority or governmental authority under the GST Law. In other words, Central Government, State Government etc. have been added in the exemption notification under the GST Law. Under Service Tax Law, exemption was granted to governmental authority, a subset of Government, but not to the Government. There was an obvious anomaly. This anomaly has been removed in the subsequent GST legislations. In ***Gem Granites v. Commr of I.-T., Tamil Nadu" AIR 2005 SC 1455,*** relying upon its decision in ***Municipal Committee v. Manilal 1967(2) SCR 100*** and ***Pappu Sweets and Biscuits v. Commissioner of Trade Tax, U.P. 1998(7) SCC 228***, the Supreme court has held that subsequent legislation may be looked into to fix the proper interpretation to be put on the statutory provisions as stood earlier. Therefore, it can be inferred that the sale/leasing services provided by MoHUA prior to 01.07.2017, i.e. during service tax regime, are exempt,

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being in the nature of a function entrusted to municipality under Article 243W of the Constitution.

26. Even otherwise, GST cannot be levied on a part of consideration received for a continuing transaction which was not taxable earlier. It may be noticed that sale of flat is a single supply which is performed over a period of time. Under GST law, tax is payable on supplies made on or after 01.07.2017. But in a composite supply which has already commenced prior to 01.07.2017, the amount received after 01.07.2017 cannot be considered as consideration attributable to any supply taking place after 01.07.2017. It is cardinal principle of the law that a single supply cannot be vivisected to tax two segments differently. Further, there is no mechanism under the law to segregate the composite transaction and derive the value of supply made after 01.07.2017 in a case, where supply commenced prior to 01.07.2017. Section 13 of the Act cannot be construed as mechanism to split a composite contract. This section merely provides that the liability to pay tax on service shall arise at the time of supply as determinable under this section. This section does not prescribe levy of tax on the supply made prior to 01.07.2017.

27. In ***Govind Saran Ganga Saran vs. Commissioner of Sales Tax, 1985 (155) ITR 0144 SC***, the Supreme Court has prescribed the essential components to levy a tax and held that any uncertainty or vagueness in the legislative scheme defining any of those components of the levy will be fatal to its validity. Out of the prescribed four components, one is "the measure or value to which the rate will be applied for computing the tax liability". The Court observed as under:

> *The components which enter into the concept of a tax are well known. The first is the character of the imposition known by its nature which prescribes the taxable event attracting the levy, the second is a clear indication of the person on whom the levy is imposed and who is obliged to pay the tax, the third is the rate at which the tax is imposed, and the fourth is the measure or value to which the rate will be applied for computing the tax liability. If those components are not clearly and definitely ascertainable, it is difficult to say that the levy exists in point of law. Any uncertainty or vagueness in the legislative scheme defining any of those components of the levy will be fatal to its validity.*

28. In ***CIT vs. B.C. Srinivasa Setty, 1981 (128) ITR 294 SC***, the Supreme Court, with reference to section 45 of the Income Tax Act, 1961, has held that when there is a case to which the computation provisions cannot apply at all, it is evident that such a case was not intended to fall within the charging section by observing as follows:

> Section 45 is a charging section. For the purpose of imposing the charge, Parliament has enacted detailed provisions in order to compute the profits or gains under that head. No existing principle or provision at variance with them can be applied for determining the chargeable profits and gains. All transactions encompassed by s. 45 must fall under the governance of its

computation provisions. A transaction to which those provisions cannot be applied must be regarded as never intended by s. 45 to be the subject of the charge. This inference flows from the general arrangement of the provisions in the I.T. Act, where under each head of income the charging provision is accompanied by a set of provisions for computing the income subject to that charge. The character of the computation provisions in each case bears a relationship to the nature of the charge. Thus, the charging section and the computation provisions together constitute an integrated code. When there is a case to which the computation provisions cannot apply at all, it is evident that such a case was not intended to fall within the charging section. Otherwise, one would be driven to conclude that while a certain income seems to fall within the charging section there is no scheme of computation for quantifying it. The legislative pattern discernible in the Act is against such a conclusion. It must be borne in mind that the legislative intent is presumed to run uniformly through the entire conspectus of provisions pertaining to each head of income. No doubt there is a qualitative difference between the charging provision and a computation provision. And ordinarily the operation of the charging provision cannot be affected by the construction of a particular computation provision. But the question here is whether it is possible to apply the computation provision at all if a certain interpretation is pressed on the charging provision. That pertains to the fundamental integrality of the statutory scheme provided for each head.

29. Since the statutory machinery provided for determining the tax payable fails with respect to the supply performed partly before and partly after 01.07.2017, GST cannot be levied on such transactions. Hence, where sale has already been taken place prior to 01.07.2017, no GST is payable on the consideration which has been received after the said date.

The applicant is not liable to pay GST on consideration received under an agreement to sale of constructed units in a building which is under construction.

30. From the terms of sale of the built-up area in the buildings to be constructed, it may be noted that design and layout of the building has already been comprehended and, it is merely entering into agreement to sell the predesigned units in the buildings which is to be constructed. Transfer of built-up area would take place after construction of the building. Transaction of sale of constructed space cannot be construed as "supply" in terms of section 7 of the Act, read with paragraph 5 of Schedule III of the Act. In Schedule III, activities or transactions which shall be treated neither as a supply of goods nor supply of service are specified. In paragraph 5 of Schedule III, "sale of land and, subject clause (b) of paragraph (5) of Schedule II, sale of building" has been mentioned. Hence, the transaction of sale of units in constructed buildings is transaction of sale of building and, therefore, covered in paragraph 5 of Schedule III of the Act.

31. It is relevant to mention that the transaction in the present case is not covered in clause (b) of paragraph (5) of schedule II of the Act and, therefore, it is not excluded from paragraph 5 of Schedule III. Clause (b) of paragraph (5) of the Schedule II is reproduced below:

SCHEDULE II

ACTIVITIES TO BE TREATED AS SUPPLY OF GOODS OR SUPPLY OF SERVICES

*****

5. Supply of services

The following shall be treated as supply of services, namely: —

(a) ****

(b) 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 has been received after issuance of completion certificate, where required, by the competent authority or after its first occupation, whichever is earlier.

Explanation. — For the purposes of this clause —

(1) the expression "competent authority" means the Government or any authority authorised to issue completion certificate under any law for the time being in force and in case of non-requirement of such certificate from such authority, from any of the following, namely: —

(i) an architect registered with the Council of Architecture constituted under the Architects Act, 1972 (20 of 1972); or

(ii) a chartered engineer registered with the Institution of Engineers (India); or

(iii) a licensed surveyor of the respective local body of the city or town or village or development or planning authority;

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

32. Under this entry, construction of building for sale has been classified as service. The intending buyers would not receive any construction service. They would be buying constructed built-up space as promised to them. The scope of this entry cannot be enlarged to cover a situation where building has been constructed for self. There is no contract for construction of any building for any of the intending buyers. The whole complex is being constructed for MoHUA. This entry cannot be interpreted to levy tax on land and building which is exclusively in States' domain being enumerated in State list in Seventh Schedule of the Constitution.

33. It is relevant to mention that Article 366(29A) of the Constitution has no application in GST laws. Therefore, there is no deemed sale in construction contract. The legal fiction introduced by this Article has no application to any law other than sales tax. In ***Southern Petrochemical Industries Co. Ltd. Electricity Inspector & ETIO, (2007) 5 SCC 447***, an attempt was made by the appellant to apply the extended meaning of sale in Article 366(29A)(d) to the expression "sale" appearing in Entry 53 (taxes on sale or consumption of electricity) of List II of the Seventh Schedule. The Supreme Court in para 145 has rejected this by stating that the legal fiction, which is applicable to Entry 54 of List II, is not for the purpose of Entry 53. In ***Geo Miller & Co. (P) Ltd. vs. State of M.P., (2004) 5 SCC 209***, the assessee wanted to take advantage of the extended meaning of sale in Article 366(29A)(b) by applying it to the expression "sale" appearing in M.P. Entry Tax Act, 1976. The Supreme Court held that the legal fiction applicable to Entry 54 cannot be applied to Entry 52 covering entry tax.

34. During the hearing, the applicant has given additional submissions wherein they have mentioned the following case law to support their various contentions:

i. **Navi Mumbai Municipal Mazdoor Union vs. The State of Maharashtra [Judgement dated 1st October 2014 in Writ Petition No. 2720/2013]**- Under Article 243W, State Legislature may endow municipalities with powers and responsibilities in regard to planning, economic development, social justice, etc. [Para 36, 37]

ii. **Farzana Khan vs. Municipal Corporation of Greater Mumbai, 2018 SCC Online Bom 314** – Under Maharashtra Regional Urban Planning Act, 1966, municipalities are entrusted with duties of town planning for planned development of urban areas. "Development" means inter alia building, engineering and other operations in or over land or redevelopment of any land. [Para 27 to 32]

iii. **Ram Krishan Mahajan vs. Union Territory of Chandigarh (2007) 6 SCC 634** – Municipality fund can be applied for providing residential, commercial and medical facilities. [Para 13 & 15]

iv. **Nagarpalika Parishad vs. State of U.P., 2010 SCC Online All 1956: (2011) 84 ALR (SUM 19)** – Under the powers, authorities and responsibilities defined in Article 243W and 12th Schedule of Constitution, Nagar Palika Parishad could undertake construction and auctioning of shops. [Para 7, 8 and 10]

v. **GB Mahajan and Others vs. Jalgaon Municipal Council and Others, (1991) 3 SCC 91** – Jalgaon Municipal Council constructed commercial complex engaging a developer and allowed the developer to sell some units itself. The Supreme Court approved the mode of financing as a permissible policy for urban planning. [Paras 6, 7, 22, 26]

vi. **Suresh Kumar Bansal vs. Union of India, 2016 (43) STR 3 (Del.)** – In agreement to sell real estate unit by booking, no service is render. Such a

contract is to sell an immovable property. [Paras 27]. Without any machinery provisions for bifurcating the taxable value, different tax treatments cannot be accorded to two segments of a contract. [Para 48]

Comments of Jurisdictional Officer (SGST):

35. The dealer is working as PSU engaged in construction activities for Government Department. The dealer has entered into MOU dated 25.10.2016 with MoHUA, Government of India to sell the built-up area located in Netaji Nagar, Sarojini Nagar and Nauroji Nagar. The built-up area available for sale is made the part of MOU. The dealer has the option to sell the complete area to one person or a part. The dealer is selling commercial area specifically.

36. In view of the facts that the dealer is either contractor or builder for construction of property as per clause 3.9, 1.1, 1.2, 1.4 etc of MOU and as per other relevant clauses of contract, the question no.1 is required to be answered against the dealer as he is liable to pay GST on the sale of commercial build-up property.

37. Similarly, answer to question no. 2 is also required to be answered against the dealer as he is either working as per contract as a builder or contractor, therefore liable to pay GST on sale of build up property. The municipality clause mentioned by the dealer is not applicable to him, which is clear on plain reading of Article 243W of the Constitution.

Comments of Jurisdictional Officer (CGST):

38. The applicant in the case is NBCC (India) Limited and not the MoHUA and therefore it appears that the question asked in respect of MoHUA should not be admissible for advance Ruling in terms of Section 95 and 97 of the CGST Act.

39. As per Para 6(a) of Schedule II of the CGST Act, 2017, Works Contract Service shall be treated as supply of services. Thus, there is no dispute as to whether or not Works Contract Service is supply of service. As per notification 11/2017-Central Tax (Rate) dated 28.06.2017, services provided to Central Government or State Governments by construction/ repair/ maintenance has been taxed at Nil rate of Central Tax, except for those cases where the construction is meant to be for commerce, industry or any other business or profession. In the instant case, as M/s NBCC India Limited will construct and sell built-up space for commercial purposes such as shop, schools, etc., the applicant is liable to pay GST on such sale.

40. Applicant is of the view that MoHUA, GOI, are not liable to pay GST on commercial built-up space as this relates to functions entrusted to party under Article 243W of the Constitution of India.

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41. Article 243W of the Constitution of India, read with the 12th Schedule, stipulates that the functions relating to planning, land use regulations, roads, bridges, fire services, slum development and improvement, etc. are of the nature which is beneficial to all residents specially the weaker section of the society. These functions are also mostly related to improvement of quality of life by providing better public amenities to the common man, with special emphasis on weaker sections of the society. In the instant case M/s NBCC India Limited will be selling the commercial built-up area for commercial purposes which will not be of substantive benefit to the common man and so these activities carried out by M/s NBCC India Limited/ MoHUA, in this case, is not covered under the functions entrusted to municipalities under Article 243W of the Constitution of India.

42. Applicant has submitted that they are not liable to pay GST on sale of built-up space prior to 01.07.2017 as some built-up space had already been sold and some instalments of the sale price had been received prior to 01.07.2017.

43. As already discussed above, these activities cannot be construed to be covered under Article 243W of the Constitution of India and hence the services are taxable. Regarding the determination of value of declared service in a composite transaction of sale of constructed flat, which includes transfer of land, as per Service Tax Determination of Value Rules, 2006, as amended, Works Contract, where sale of land was included in the part of transaction, was taxable and the valuation was determined at 40% of the total amount charged as considereation.

44. In GST, similar activities are to be taxed at two-thirds of the transaction value as per notification 11/2017-Central Tax (Rate) dated 28.06.2017.

45. Regarding some payment received before GST and part payment after GST, a combined reading of Section 7, Section 13 and Section 142 of the CGST Act, 2017, stipulates that such part payment made after GST attracts GST for sale of under construction flats which were sold before 01.07.2017.

46. Regarding the liability to pay GST on consideration received under an agreement to sale of units in a building under construction, para 5(b) of Schedule II of the CGST Act, 2017 clearly states that only that construction activity is exempt where consideration has been received after issuance of completion certificate or after its first occupation, whichever, is earlier. Regarding Composite Works Contract, when the land is a part of the construction of complex or building, only two-thirds of the consideration shall be treated as taxable value.

47. In view of above, the applicant is liable to pay GST on consideration received under an agreement to sale of constructed units in a building which is under construction.

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RELEVANT NOTIFICATIONS:

48. S. No. 4 and 6 of Notification No. 12/2017 – Central Tax (Rate) dated 28.06.2017 and parallel SGST and IGST notifications:

Sl. No.	Chapter, Section, Heading, Group or Service Code (Tariff)	Description of Services	Rate (%)	Condition
(1)	(2)	(3)	(4)	(5)
4	Chapter 99	Services by Central Government, State Government, Union territory, local authority or governmental authority by way of any activity in relation to any function entrusted to a municipality under article 243 W of the Constitution.	Nil	Nil
6	Chapter 99	Services by the Central Government, State Government, Union territory or local authority excluding the following services— a) services by the Department of Posts by way of speed post, express parcel post, life insurance, and agency services provided to a person other than the Central Government, State Government, Union territory; b) services in relation to an aircraft or a vessel, inside or outside the precincts of a port or an airport; c) transport of goods or passengers; or d) any service, other than services covered under entries (a) to (c) above, provided to business entities.	Nil	Nil

49. It is observed that vide Notification No. 14/2018-Central Tax (Rate) dated 26.07.2018, certain amendments have been made in the Notification No. 12/2017- Central Tax (Rate) dated 28.06.2017 and against S. No. 4, in column (3), the words 'Central Government, State Government, Union Territory, local authority or" have been omitted.

50. Hence, after the said amendment, the exemption under S. No. 4 of Notification No. 12/2017- Central Tax (Rate) dated 28.06.2017 is admissible only if such services are provided by a "governmental authority".

Relevant Constitutional Provisions:

51. The Clause (e) of the Article 243P of the Constitution of India defines that 'Municipality' means an institution of self government constituted under Article 243Q.

52. The Clause (1) of the Article 243Q of the Constitution of India reads as follows:

243Q: Constitution of Municipalities:-

(1) There shall be constituted in every State,—

(a) a Nagar Panchayat (by whatever name called) for a transitional area, that is to say, an area in transition from a rural area to an urban area;

(b) a Municipal Council for a smaller urban area; and

(c) a Municipal Corporation for a larger urban area,

in accordance with the provisions of this part:

Provided that a Municipality under this clause may not be canstituted in such urban area or part thereof as the Governor may, having regard to the size of the area and the municipal services being provided or proposed to be provided by an industrial establishment in that area and such other factors as he may deem fit, by public notification, specify to be an industrial township.

53. Hence, according to the Article 243Q of the Constitution of India, only Nagar Panchayats, Municipal Councils and Municipal Corporations are considered as Municipalities. However, in certain urban areas, called industrial townships, an industrial establishment may provide municipal services and a Municipality may not be constituted in that urban area. However, it appears that Ministry of Housing and Urban Affairs (MoHUA) or NBCC are not covered in Article 243Q either as a Municipality or as an industrial establishment for a notified industrial township in place of a Municipality.

54. The Article 243W of the Constitution of India reads as under:

243W Powers, authority and responsibilities of Municipalities etc.

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Subject to the provisions of this Constitution, the Legislature of a State may, by law, endow—

(a) the Municipalities with such powers and authority as may be necessary to enable them to function as institutions of self-government and such law may contain provisions for the devolution of powers and responsibilities upon Municipalities, subject to such conditions as may be specified therein, with respect to—

(i) the preparation of plans for economic development and social justice;

(ii) the performance of functions and the implementation of schemes as may be entrusted to them including those in relation to the matters listed in the Twelfth Schedule;

(b) the Committees with such powers and authority as may be necessary to enable them to carry out the responsibilities conferred upon them including those in relation to the matters listed in the Twelfth Schedule.

55. The "Twelfth Schedule" of the Constitution of India reads as under:

1. *Urban planning including town planning.*
2. *Regulation of land-use and construction of buildings.*
3. *Planning for economic and social development.*
4. *Roads and bridges.*
5. *Water supply for domestic, industrial and commercial purposes.*
6. *Public health, sanitation conservancy and solid waste management.*
7. *Fire services*
8. *Urban forestry, protection of the environment and promotion of ecological aspects.*
9. *Safeguarding the interests of weaker sections of society, including the handicapped and mentally retarded.*
10. *Slum improvement and upgradation.*
11. *Urban poverty alleviation.*
12. *Provision of urban amenities and facilities such as parks, gardens, playgrounds.*
13. *Promotion of cultural, educational and aesthetic aspects.*
14. *Burials and burial grounds, cremation , cremation grounds and electric crematoriums.*
15. *Cattle ponds; prevention of cruelty to animals.*
16. *Vital statistics including registration of births and deaths.*
17. *Public amenities including street lighting, parking lots, bus stops and public conveniencies.*
18. *Regulation of slaughter houses and tanneries.*

56. From Article 243W and Twelfth Schedule of the Constitution of India, it is observed that Municipalities are endowed with certain powers and responsibilities by the State Legislatures so as to enable them to function as institutions of local self government. The entry 'Regulation of land use and construction of buildings' in the Twelfth Schedule signify that 'regulation of construction of buildings' is covered in the said Twelfth Schedule. However, the said entry does not cover 'construction of buildings'. The Article 243W of the Constitution specifically mentions that powers and responsibilities of Municipalities extend to 'preparation of plans for economic development and social justice' and 'performance of functions and implementation of schemes' including those which are in relation to matters listed in the Twelfth Schedule. The construction of huge commercial complex are not covered in Article 243W or in Twelfth Schedule of the Constitution.

DISCUSSIONS:

57. The applicant, M/s NBCC (India) Limited has been appointed as implementing/executing agency by the Ministry of Housing and Urban Affairs (MoHUA), Government of India, for re-development of Nauroji Nagar, Sarojini Nagar and Netaji Nagar colonies in Delhi. The applicant is required to organise construction of GPRA (i.e. General Pool Residential Accommodation), GPOA (i.e General Pool Office Accommodation), commercial built-up space/area and supporting infrastructure such as local convenience shopping centre, banquet hall/community centre, crèche, schools, hospitals/dispensary, ATM/Banks, parking facilities, parks and playgrounds etc. in place of old existing buildings. The applicant is also required to maintain the constructed buildings for thirty years after construction. However, the present application for Advance Ruling is only regarding GST liability on freehold sale of commercial built-up space to general public.

58. The terms and conditions of Memorandum of Understanding (MoU) dated 25.10.2016 between Ministry of Housing and Urban Affairs (MoHUA), Government of India and NBCC (India) Limited for redevelopment of Nauroji Nagar, Netaji Nagar and Sarojini Nagar GPRA colonies by NBCC, who has been appointed as Executing/Implementing Agency by and on behalf of MoHUA, are as follows:

58.1 NBCC will execute the construction of approximately 15,510 dwelling units of various categories, i.e. from Type II to Type VI in Netaji Nagar and Sarojini Nagar in accordance with the approved redevelopment scheme.

58.2 NBCC will execute construction of approx. 2.42 lakh square meters office space for General Pool Office Accommodation (GPOA) in Netaji Nagar. NBCC will execute the construction of approx. 2.16 lakh square meters supporting social infrastructure in Sarojini Nagar, Nauroji Nagar and Netaji Nagar. NBCC will execute the construction of approx. 8.07 lakh square meters commercial Built-up Area (BUA) in Nauroji Nagar (2.97 lakh sqm) and parts of Sarojini Nagar (5.09 lakh sqm).

58.3 The social Infrastructure facilities to be developed may include the following:

- Local Convenient Shopping centre/market
- Banquet Hall/Community Centre
- Creche/play schools
- Primary and Sr. Secondary schools
- Skill Development Centre
- Post Office
- Banks and ATMs
- Dispensary/Hospital
- Adequate parking facilities
- Neighbourhood Parks and play grounds
- Public toilets (bio-degradable)
- Solid and Liquid waste management facility
- Any other social infrastructure as per the area specific requirement.

58.4 The total estimated cost of the project to be executed by NBCC would be Rs. 24,682 crores, which includes the cost of construction and maintenance for a period of 30 years.

58.5 Colony wise break up of estimated cost:

S. No.	Name of the Colony	Estimated Cost (Rs. in crores)	O&M costs for 30 years (Rs. in crores)	Total Estimated Cost (Rs. in crores)
1	Nauroji Nagar (commercial)	2,694	Nil	2,694
2	Netaji Nagar	5,466	1010	6,476
3	Sarojini Nagar (Residential)	8,583	2018	10,601
	Sarojini Nagar (commercial)	4,911	Nil	4,911
	Total	21,654	3,028	24,682

58.6 The total cost of the project shall be met from free hold sale of commercial BUA in Nauroji Nagar (25 acres with BUA of 2,97,000 sqm), parts of Sarojini Nagar (42 acres with BUA of 5,09,990 sqm), and surplus Shops built as a part of Social Infrastructure in seven GPRA colonies executed by CPWD and NBCC, after keeping aside requisite number of shops for the existing allottees in all the colonies.

58.7 The sale shall be conducted through transparent bidding system using e-auction.

58.8 If the amount realised from the sale is not enough to meet the cost of construction, maintenance costs for 30 years and NBCC's investment with interest, then up to 10% of residential BUA is to be sold by NBCC on free hold basis for further revenue generation. However, sale of residential space may be avoided.

58.9 NBCC shall invest upto Rs. 1,500 crore into the project from own funds, in phases, as and when required or as directed by the Capital Management Committee. NBCC is entitled to a fixed interest @ 12% per annum on their investment till it is returned. The investment along with interest shall be returned by MoHUA to NBCC from the amount realised through sale of commercial BUA.

58.10 The entire proceeds from saleable BUA shall be deposited in an Escrow account opened by the Ministry in a selected nationalised bank through invitation of an Expression of Interest (EoI)/Request for Proposal (RFP) from various banks. The Escrow Account shall be managed by the Capital Management Committee constituted by MoHUA. CMC will devise a format for operating the Escrow Account and institute a proper mechanism for its operation and audit of this account.

58.11 As the operationalization of Escrow Account will be some time, the immediate fund requirement for undertaking preparatory activities for implementation of the project may be met from an initial investment into the interim Escrow Account, on loan basis, as and when required or as directed by the CMC. The interim Escrow Account shall be merged with the Escrow Account after its operationalisation.

58.12 The Capital Management Committee shall review the status of Escrow Account on yearly basis, and determine the amount, accrued in excess of 20% above the total cost approved by the Cabinet for redevelopment of all the seven GPRA colonies, to be deposited in Consolidated Fund of India (CFI).

58.13 NBCC shall be paid Project Management Charges (PMC) @ 8% of the approved/ estimated cost or actual cost, whichever is less for redevelopment of areas by them. The agency charges and interest @ 12% per annum as cost of capital on investment are mutually exclusive to each other. In addition, 1% of the sale proceeds shall be payable to NBCC on account of expenditure towards appointment of real estate consultant, publicity, e-auction etc., of commercial and residential areas.

58.14 NBCC shall maintain the buildings constructed by them in the following manner:-

(i) **Maintenance of GPRA & GPOA:** NBCC would be responsible to maintain the assets, services of the GPRA Colonies & GPOA including Social Infrastructure as well as special repairs for a period of 30 years. The

expenditure on this account shall be met from Maintenance Corpus Fund (MCF) created for the purpose. The amount in MCF will be transferred from Escrow Account, wherein sale proceed shall be parked. For special repairs, a lump sum provision will be made as determined by Empowered Committee. MCF will be managed by Capital Management Committee (CMC) and every year, a percentage of MCF will be fixed for annual general maintenance & special repair of GPRA Colonies & GPOA including social infrastructures, on submission of a detailed proposal by NBCC. The power to incur expenditure shall be delegated to NBCC in respect of colonies developed by them. CMC should be approached only in case of additional works beyond the amount approved for annual general maintenance.

(ii) **Common & other services of saleable commercial built-up area:** The regular maintenance of saleable built up area shall be on chargeable basis at the prevailing market rates in terms of per sft. area as mutually agreed and decided with the occupants/buyers. A sinking fund will be created from one-time lump sum payments from buyers for replacement of plant and equipment, special repairs and value additions during maintenance period.

58.15 The milestones with respect to time schedules will be fixed for completion of project. For any delay, attributable to Project Management Consultant (PMC), NBCC is liable to pay penalty at the rate of Rs. 5.00 per sq. feet per month on delayed uncompleted work, subject to overall limit of 10% of the agency charges of NBCC.

58.16 NBCC will incorporate advanced state of art technologies during construction, minimizing the pollution hazard, improving quality and reducing the overall completion timelines. They will award the works on EPC (Turnkey/Design & Build) contract, wherever possible.

59. **Role of Ministry of Housing and Urban Affairs (MoHUA):** The following actions shall be undertaken by MoHUA:

59.1 MoHUA shall handover all the three Colonies mostly free from all encumbrance and encroachment. The encumbrance free land shall be handed over on "as it is where it is" basis after occupants of GPRA are relocated by Directorate of Estate (DoE), MoHUA.

59.2 DoE shall be responsible for the allotment/handing over of shops to the existing allotees/shop keepers after completion of the project.

59.3 DoE shall be responsible for handing over the schools constructed as a part of redevelopment to the concerned authorities (NDMC/Delhi Govt.) after completion.

59.4 MoHUA will facilitate the change of land use as per MPD 2021 norms to facilitate the construction of GPOA in Netaji Nagar and saleable commercial space in Sarojini Nagar, Nauroji Nagar and in social infrastructure to be developed in all seven colonies, if required.

60. **Role of Implementing Agency (NBCC):** NBCC would be implementing the project from concept till commissioning and would be rendering all the services both for pre constructional activities and post constructional activities as follows:

60.1 Pre-constructional activities such as requisition from the client, approval of preliminary plans by client, preparation of preliminary estimate & approval, approvals from statutory bodies and local bodies, call of tender for appointment of agencies etc., for demolition of existing structures, obtaining all pre-construction clearances/approvals from respective authorities.

60.2 Construction stage consists of obtaining approval of design/drawing of the layout plan, execution of work through contract management, supervision of work, periodical testing and commissioning, maintenance of all documents and records, handling disputes/litigation, if any, during construction stages, all audits by Government agencies, implementation of labour bye-laws and others etc.

60.3 Post construction activities consists of obtaining completion certificate from local bodies including fire clearance, handling over of the project on completion to the allottees/buyers, settlement of accounts, handling of disputes/litigation, if any, with the agencies/contractors engaged for the construction.

60.4 NBCC shall execute the project only after getting building plans approved as per the statutory requirements and after approval of design by the Empowered Committee.

60.5 NBCC shall obtain environmental clearance for the redevelopment work in three colonies assigned to them from SEIAA, Delhi.

60.6 The supervision of all the works shall be done by the NBCC, which shall strictly adhere to the quality norms applicable as per specifications, IS codes, National Building Codes etc.

60.7 NBCC would be responsible for maintenance of the assets, services of the GPRA & GPOA including supporting social infrastructure (including special repairs) for a period of 30 years. The expenditure shall be met from the Maintenance Corpus Fund created from the sale proceeds.

60.8 The regular maintenance of saleable built up area shall be done by NBCC on chargeable basis in terms of per sft. area at the prevailing market rates, as mutually agreed and decided with the occupants/buyers.

60.9 NBCC shall handover the completed structures and services of GPRA complex & GPOA including Social Infrastructure facilities along with inventory of fixtures to the Ministry or any other nominated agency by the Ministry upon its completion.

60.10 NBCC shall not be liable to pay any property tax or other taxes, rents, charges, claims (past or future) in respect of properties developed for the project on the corresponding land.

60.11 All the required approvals from the local bodies such SEIAA, NDMC, DUAC, Delhi Fire Services, Airport Authority of India (AAI), National Monument Authority (NMA), MOEF, Tree cutting permission etc. will be obtained by NBCC. Assistance of MoHUA may be sought where necessary and the same shall be provided forthwith to NBCC.

61. To finance the re-development scheme, the following saleable built up area is likely to be available to NBCC for commercial exploitation:

(i) Approx. 8.07 lakh sqm. commercial Built Up Area in Nauroji Nagar and parts of Sarojini Nagar,

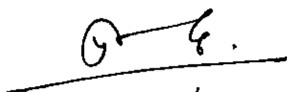
(ii) Surplus shops to be constructed by NBCC and CPWD as a part of Social Infrastructure in all the seven colonies, after earmarking sufficient number of shops for existing allottees.

(iii) Up to 10% of total residential area developed (only if needed.)

62. The saleable commercial and residential (if needed) areas for the revenue realization would have separate identity and clearly earmarked at the time of final urban planning of the entire project. Further, the detailed planning of the redevelopment colonies will seek to integrate the infrastructure requirements of the surroundings areas. Sale of commercial area should aim at giving maximum benefits to the Government.

63. NBCC shall provide a draft sale agreement to be executed between MoHUA and buyers consisting detailed terms and conditions of sale. Later on, the relevant conditions will become part of the sale deed at the time of execution.

64. The sale deed shall be signed between the land owning agency i.e. L&DO, MoHUA and the buyer. The stamp duty and all other charges/expenses in connection with the sale deeds/ documents of the space will exclusively be borne by space buyer on rates prevailing at the time of registration of the sale deed.



65. The entire proceeds from the saleable built up area will be deposited in the Escrow Account. In addition, all income accrued from the sale of earth, demolition and construction waste (bricks, iron, wood and others) etc., shall be deposited into the Escrow Account. The interest accrued thereon shall also be credited to the Escrow Account.

66. NBCC shall open and maintain separate Books of Accounts for each colony to be redeveloped by them. NBCC shall submit quarterly returns of the physical and financial progress of the project to MoHUA in the format prescribed by the CMC.

67. The ownership of GPRA and GPOA including social infrastructure shall continue to be with the Government of India and these shall be handed over to the Government after completion.

68. After completion and commissioning of the redevelopment project, any surplus funds available shall be deposited into the Consolidated Fund of India.

69. The Jurisdictional Officer (CGST) has argued that the applicant is M/s NBCC (India) Limited and not the MoHUA and therefore the question no. 2 i.e. whether MoHUA is required to pay GST or not, should not be admissible for advance ruling in terms of Section 95 and 97 of the CGST Act.

70. The above view of the Jurisdictional officer (CGST) has been considered. However, ruling in respect of question no. 1 i.e. whether NBCC (India) Limited is required to pay GST or not, cannot be given unless taxability of the sale of commercial units is also decided. Hence, question no. 2 is also being taken up by this Authority.

71. The issues for decision in this case are:

(i) Whether the applicant is liable to pay GST on sale of commercial super built up area on behalf of MoHUA, Government of India, by considering the applicant also as the supplier of service while selling such commercial built-up space as an agent on behalf of the Government of India in the colonies under redevelopment.

(ii) Whether the MoHUA, Government of India, is liable to pay GST on sale of commercial built-up space, and whether it relates to any function entrusted to a municipality under Article 243W of the Constitution.

(iii) Whether the applicant is liable to pay GST on sale of built-up space for which part of the consideration was received prior to 01.07.2017, and partly on or after 01.07.2017

(iv) Whether the applicant is liable to pay GST on consideration received under an agreement to sale of constructed units in a building which is under construction.

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Question No.1:

72. As far as the first issue mentioned above is concerned i.e. whether the applicant is liable to pay GST on sale of commercial super built up area on behalf of MoHUA, Government of India, in the colonies under redevelopment, the first argument of the applicant is that they cannot be considered as 'supplier of services'. They have stated that under Section 9(1) of the CGST Act, 2017, the CGST is required to be paid by the taxable person but they cannot be called "taxable person" which is defined in Section 2(107) of the CGST Act, 2017. However, before deciding whether the applicant can be called a "taxable person", it needs to be decided that whether, the applicant can be called an "agent" under Section 2(5) of the CGST Act, 2017.

73. It is observed that construction of the said commercial built up area is being done through contractors by the applicant on behalf of the Ministry of Housing and Urban Affairs (MoHUA). The sale of such commercial built up area is being done by e-auction by the applicant on behalf of the Ministry of Housing and Urban Affairs. The 'agreement to sell' and 'Sale deed' with the successful bidder will also be signed by the nominated officer of the Ministry of Housing and Urban Affairs. However, the applicant shall facilitate the execution of 'Sale deed'. Hence, the role of the applicant in the entire project is that of an agent of MoHUA i.e. the applicant is an executing/implementing agent of the MoHUA.

74. However, the allotment letter/demand letter to the successful bidder is to be issued by the applicant. Also, as per the terms and conditions of Sale, any amount towards GST on payment shall also be payable by the allottee/buyer to the applicant.

75. The MoU between the MoHUA & NBCC is not on Principal-to-Principal basis. It is also not on partnership /joint venture /collaboration basis. There is no mutual revenue, profit or loss sharing arrangement between the two. The applicant is not acquiring any right or interest in the project. It is not selling the commercial built-up units on its own account. The applicant is simply acting as an agent of MoHUA.

76. Section 2(5) of the CGST Act, 2017 reads as follows:

"agent" means a person, including a factor, broker, commission agent, arhatia, del credere agent, an auctioneer or any other mercantile agent, by whatever name called, who carries on the business of supply or receipt of goods or services or both on behalf of another;

77. Since, it is admitted by the applicant that they are constructing and selling the commercial built-up space on behalf of the Ministry of Housing and Urban Affairs (MoHUA), it is held that they are covered as "agent" in Section 2(5) of the CGST Act, 2017.

78. Further, it may now be decided whether the applicant can be called "supplier" of services which is defined under Section 2(105) of the CGST Act, 2017.

79. Section 2(105) of the CGST Act, 2017 reads as follows:

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"supplier" in relation to any goods or services or both, shall mean the person supplying the said goods or services or both and shall include an agent acting as such on behalf of such supplier in relation to the goods or services or both supplied;

80. Since, the above definition of "supplier" includes an agent, who is supplying services on behalf of another, it is held that the applicant can be called "Supplier" under Section 2(105) of the CGST Act, 2017, in relation to the sale of commercial built-up space and contention of the applicant that they cannot be called supplier of such services, is not acceptable.

81. Section 2(107) of the CGST Act, 2017 reads as follows:

"taxable person" means a person who is registered or liable to be registered under section 22 or section 24;

82. Now, it may be decided whether the applicant is required to be registered under Section 22 or Section 24 of the CGST Act, 2017 while supplying services as an agent on behalf of Ministry of Housing and Urban Affairs (MoHUA).

83. Section 22 of the CGST Act, 2017 reads as follows:

Persons liable for registration:

(1) Every supplier shall be liable to be registered under this Act in the State or Union territory, other than special category States, from where he makes a taxable supply of goods or services or both, if his aggregate turnover in a financial year exceeds twenty lakh rupees:

Provided that where such person makes taxable supplies of goods or services or both from any of the special category States, he shall be liable to be registered if his aggregate turnover in a financial year exceeds ten lakh rupees.

Explanation.—For the purposes of this section,—

(i) the expression "aggregate turnover" shall include all supplies made by the taxable person, whether on his own account or made on behalf of all his principals;

84. Section 24 of the CGST Act, 2017 reads as follows:

Compulsory registration in certain cases:

Notwithstanding anything contained in sub-section (1) of section 22, the following categories of persons shall be required to be registered under this Act,—

(vii) persons who make taxable supply of goods or services or both on behalf of other taxable persons whether as an agent or otherwise;

85. From the above, it is observed that under Explanation (i) to Section 22 and Clause (vii) of Section 24 of the CGST Act, 2017, the applicant is compulsorily required to be registered while acting as an agent for supply of services.

86. Hence, the applicant can be called 'taxable person' as per Section 2(107) of the CGST Act, 2017.

87. From the combined reading of Sections 2(5), 2(105), 2(107), 22 and 24 of the CGST Act, 2017, it is clear that the applicant is covered in the definitions of "Agent", "Supplier" and "Taxable Person" in respect of the said project while providing services on behalf of the Ministry of Housing and Urban Affairs. Further, the applicant is falling under the categories of persons under Section 22 and also under Section 24 requiring compulsory registration in respect of the said project.

88. Hence, the contention of the applicant that they cannot be construed as "supplier" of service as they are selling the commercial built up space on behalf of the Ministry of Housing and Urban Affairs (MoHUA) is not acceptable. Accordingly, they are liable to pay GST under Section 9(1) of the CGST Act, 2017, being taxable person as per Section 2(107) of the said Act in respect of the said project. The sale of the commercial built-up area by the applicant on behalf of MoHUA cast a responsibility on the applicant to also collect and/or deposit GST on the taxable supply of goods or services, even, if they are acting only as an agent of the MoHUA. The contention of the applicant that they are not having any interest or right in the said project and they are not supplying the said services on their own account are not relevant as they are admittedly acting as an agent of the MoHUA, and agents are covered in the definition of "supplier" and "taxable persons" in the CGST Act, 2017, and are liable to pay GST as per Section 9(1) of the CGST Act, 2017.

89. The contention of the applicant that they are not covered in the definition of promoter under Section 2(zk) of the Real Estate Regulation Act, 2016 does not appear to be relevant in the present case.

Question No. 2:

90. The second issue for decision is whether the MoHUA, Government of India, is liable to pay GST or the same is exempted if the sale of commercial built-up space, relates to any function which is entrusted to a municipality under Article 243W of the Constitution.

91. It is observed that under S. No. 4 of Notification No. 12/2017 – Central Tax (Rate) dated 28.06.2017 (as applicable upto 25.07.2018), Services supplied by the Central Government, State Government, Union Territory, local authority or Governmental authority are fully exempted from payment of CGST provided that the said services are by way of any activity in relation to any function entrusted to a municipality under Article 243W of the Constitution. A similar exemption is applicable from payment of SGST and IGST also.

92. It is observed that vide Notification No. 14/2018-Central Tax (Rate) dated 26.07.2018, certain amendments have been made in the Notification No. 12/2017- Central Tax (Rate) dated 28.06.2017 and against S. No. 4, in column (3), the words 'Central Government, State Government, Union Territory, local authority or" have been omitted.

93. Hence, after the said amendment, the exemption under S. No. 4 of Notification No. 12/2017- Central Tax (Rate) dated 28.06.2017 is admissible only if such services are provided by a "governmental authority".

94. The expression "governmental authority" has not been defined in Notification No. 12/2017 – Central Tax (Rate) dated 28.06.2017 but the same has been defined in Explanation to Clause (16) of Section 2 of the IGST Act, 2017 as follows:

> *Explanation.—For the purposes of this clause, the expression "governmental authority" means an authority or a board or any other body,—*
>
> *(i) set up by an Act of Parliament or a State Legislature; or*
> *(ii) established by any Government,*
>
> *with ninety per cent. or more participation by way of equity or control, to carry out any function entrusted to a municipality under article 243W of the Constitution;*

95. Hence, a "governmental authority" must be set up or established specifically to carry out any function entrusted to a municipality under Article 243W of the Constitution. However, MoHUA has not been established for the purposes of discharging functions entrusted to Municipalities. Hence, the Ministry of Housing and Urban Affairs (MoHUA) does not appear to be covered in the definition of 'governmental authority' and impugned services rendered by MoHUA are not covered under S. No. 4 of Notification No. 12/2017 – Central Tax (Rate) dated 28.06.2017, as amended.

96. Also, under S. No. 6 of the said Notification, services supplied by the Central Government, State Government, Union Territory or local authority are fully exempted except for certain specified services like postal services, transport services and also except for services which are provided to business entities.

97. Since, sale of commercial built-up units is a service provided to business entities, such services provided by MoHUA are also not covered in S. No. 6 of the said Notification No. 12/2017 – Central Tax (Rate) dated 28.06.2017.

98. The applicant has contended that the construction of commercial built up space in the said project is covered in S. No. 4 of the said Notification. They have claimed that the functions of Municipalities given in Twelfth Schedule of the Constitution i.e. Urban planning including town planning, regulation of land use and construction of buildings and planning for economic and social development covers the construction and sale of market complexes

and hence the construction of commercial built-up space in the redevelopment colonies is also covered in Twelfth Schedule of the Constitution as a function entrusted to a municipality under Article 243W of the Constitution.

99. On the other hand, the jurisdictional officer (CGST) has argued that Article 243W and Twelfth Schedule of the Constitution covers functions which are beneficial to all residents and mostly related to improvement of quality of life by providing better public amenities to the common man. However, in the present case, the applicant will be selling the commercial built up area for commercial purposes which will not be of substantive benefit to the common man.

100. The applicant has mentioned para 201, 202 and 208 of the Hon'ble Supreme Court judgement in the case of Manohar Joshi vs. State of Maharashtra reported in (2012) 3 SCC 718. However, in the said case, the issue for decision was regarding power of the State Government to interfere in the decision making powers of the Municipalities. The scope of Article 243W or Twelfth Schedule of the Constitution was not under decision in that case. Hence, the said case law is not relevant in the present case.

101. The applicant has also argued that in the case of GB Mahajan vs Jalgaon Municipal Council reported in (1991) 3 SCC 9, the legality of construction of a commercial complex by a Municipality has been upheld by the Hon'ble Supreme Court of India. However, the said judgment is not relevant in the present case as the said judgement pertains to a case where construction of a Central Administrative building intended to be used by the Municipal Council for locating its own offices and an adjacent structure to be used as a vegetable market and a commercial complex on a plot of land owned by the Municipality was being executed through a Developer of real estate using his own funds and which was challenged on the argument that the local authority instead of executing the project itself had wrongly entered into an agreement with the developer for its financing and execution. The said judgement does not deal with the issue of scope of Article 243 W or Twelfth Schedule of the Constitution of India.

102. The applicant has also mentioned para 36 and 37 of the decision of the Hon'ble Bombay High Court in Civil Writ Petition No. 2720/2013 in the case of Navi Mumbai Municpal Mazdoor Union v/s The State of Maharashtra. However, the said case which pertains to abolition of octroi and imposition of Local Body Tax by the State of Maharashtra without consent of the Municipalities thereby adversely affecting their autonomy granted to them under Articles 243P and 243W of the Constitution is not relevant in the present case. The said paras 36 and 37 provides that subject to the provisions of the Constitution, it is the legislature of a state which may by law endow the Municipalities with such powers and authority as may be necessary to enable them to function as Institutions of self Government and State Government is the source of their powers. In the present case, there seems to be no State law which has entrusted the applicant or the MoHUA to construct such a huge

commercial built-up area for sale to general public. Further, the construction of such commercial built-up area does not enable them to function as Institution of self-Government.

103. Similarly, para 27 to 32 of the Judgment of the Hon'ble High Court of Bombay in Farzana Khan v/s Municipal Corporation of Greater reported in Mumbai 2018 SCC Online Bom 314 in PIL No. 119 of 2017 mentioned by the applicant is not relevant to the present case as the said judgement pertains to erection of hoardings by a company on the land owned by the Airports Authority of India, touching a public road. The issue was whether permission from Municipal Corporation was required to be taken by the Airport Authority of India. In para 27 to 32 of the said judgement, the provisions of the Maharashtra Regional Planning Act, 1966 have been discussed which are also not relevant in the present case.

104. Similarly, para 13 and 15 of the Judgement of Hon'ble Supreme Court in the case of Ram Krishan Mahajan Vs. Union Territory of Chandigarh reported in (2007) 6 SCC 634 mentioned by the applicant pertains to acquisition of land by the Chandigarh Administration for use by municipality. It was challenged in the said case that municipality funds had been misused. It was held by the Hon'ble Supreme Court that Municipal funds could be applied for providing residential, commercial and medical facilities. In the said case, scope of Article 243W or Twelfth Schedule of the Constitution was not discussed. Hence, the said judgement is not relevant in the present case.

105. Similarly, in para 7, 8 and 10 of the Judgement of Hon'ble Supreme Court in the case of Nagarpalika Parishad vs State of UP reported in 2010 SCC online All 1959, the issue was whether Additional District Magistrate was empowered to restrain the Municipality from auction of shops. The scope of activities covered under Article 243W or Twelfth Schedule of the Constitution was not subject matter of the judgment. Hence, the said judgement is not relevant in the present case.

106. It has been submitted by the applicant during the hearing that as per Section 42 of the Delhi Municipal Corporation Act, 1957, the obligatory functions of the Corporation includes:

(k) the **construction and maintenance of municipal markets** and slaughter houses and the regulation of all markets and slaughter houses.

(wa) the preparation of plans for economic development and social justice.

(x) the fulfilment of any other obligation imposed by or under this Act or any other law for the time being in force.

107. Section 43 of the Delhi Municipal Corporation Act, 1957 gives details of discretionary functions of the corporation.

108. Similarly, under Section 200 of the said Act the Corporation can sell any immovable property belonging to the Corporation.

109. It appears that the Delhi Municipal Corporation may be carrying out certain obligatory or discretionary functions which may include construction of municipal markets for public convenience. However, construction of huge commercial built-up area for the purpose of sale cannot be considered to be covered in Article 243W of the Constitution and hence cannot be considered as exempted under S. No. 4 of the Notification. No. 12/2017 – Central Tax (Rate) dated 28.06.2017.

110. On the contrary, it has been observed from the CESTAT Final Order No. A/89050-89051/2017-WZB/STB, dated 18.07.2017 (reported in 2017 (9) TMI – 786) in the case of Commissioner of Central Excise, Goa V/s Mormugao Municipal Council (MMC) that MMC, who was engaged in collecting rent contested payment of Service Tax and argued that certain markets were made by them as per their duty under the Constitution of India. They had argued that the renting of immovable property service in such markets cannot be considered as taxable service as the said markets were developed in discharge of Constitution responsibility under Article 243W of the Constitution of India and the 12th Schedule thereunder. They argued that they were not engaged in the trade or commerce and the shop rent out are not in the course of furtherance of business or commerce but are statutory responsibility under the Goa Municipality Act and are for discharge of Constitutional obligation.

111. Hon'ble CESTAT held that perusal of Entries 12 and 17 of Schedule XII clearly shows that what has been mentioned thereunder is provisions of urban amenties and facilities, such as park, gardens, playgrounds. The market cannot be considered to be, the responsibility under S. No. 12 of the 12th Schedule. Similarly, Sr. No. 17 relates to street lighting, parking lots, bus stops and public convenience. These amenities do not include market by any stretch of imagination. Thus to state that construction of market is a constitutional responsibility cast upon the MMC is misplaced.

112. Further, the Ministry of Housing and Urban Affairs cannot be called Municipality under Articles 243P and 243Q of the Constitution of India.

113. The Government of India (Allocation of Business) Rules, 1961 has allocated wide ranging functions to the Ministry of Housing and Urban Affairs. However, it cannot be said that such responsibilities relates to functions entrusted to municipalities under Article 243W and Twelfth Schedule to the Constitution of India.

114. In view of the above, it is held that services for commercial built-up space by the Ministry of Housing & Urban Affairs (MoHUA) are not covered in Twelfth Schedule r/w Article 243W of the Constitution of India and hence not exempted from payment of GST under S. No. 4 of Notification No. 12/2017 – Central Tax (Rate) dated 28.06.2017. Further,

from 26.07.2018, the exemption is limited to services supplied by the Governmental Authorities. Also, the said services are not covered in S. No. 6 of the said Notification.

Question No. 3

115. The third issue for decision is whether the commercial built up area against which a part of the consideration has been received prior to 01.07.2017 i.e. prior to the appointed date of 01.07.2017 defined under Section 2(10) of the CGST Act, 2017, can be subjected to GST on the amount received on or after 01.07.2017 or not.

116. It is observed that construction of commercial built-up space is a continuous supply of service and in many cases, the part of the service may be rendered in pre-GST period i.e. upto 30.06.2017 and remaining part of the service may be supplied in GST period i.e. on or after 01.07.2017. In such cases, Point of Taxation Rules, 2011 issued under Finance Act, 1994 could be referred to for determination of liability to pay Service Tax.

117. Section 142(10) of the CGST Act, 2017 reads as under:

> *Save as otherwise provided in this Chapter, the goods or services or both supplied on or after the appointed day in pursuance of a contract entered into prior to the appointed day shall be liable to tax under the provisions of this Act.*

118. Further, to avoid double taxation, Section 142(11)(b) of the CGST Act, 2017 provide as under:

> *notwithstanding anything contained in section 13, no tax shall be payable on services under this Act to the extent the tax was leviable on the said services under Chapter V of the Finance Act, 1994;*

119. The applicant has mentioned the order of the Hon'ble High Court of Delhi under W.P. (Civil) No. 2235/2011 in the case of Shri Suresh Kumar Bansal V/s Union of India. It was held that in the case of sale of complex, which is a composite contract, the levy of service tax would be restricted to the service element of the contract, after excluding the value of goods as well as the value of land from such contracts. It was also held that statutory framework must provide for machinery provisions to ascertain the value of such service element which are charged to Service Tax. In Service Tax, the Section 67 of the Finance Act, 1994 and by virtue of Section 67(1)(iii) of the said Act, Rule 2A of the Service Tax (Determination of value) Rules, 2006 provided mechanism to ascertain the value of services and goods in a composite works contract. However, the said Rule did not cater to determination of value of services in case of a composite contract which also involves sale of land. Further, circulars or other instructions could not provide the machinery provisions for levy of tax, which must be provided in the statute or the Rules framed under the statute. In Service Tax, the provision to exclude the value of land was sought to be provided by exemption Notification No. 26/2012 – ST dated 20.06.2012 which had been issued under

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Section 93 (1) of Finance Act, 1994. The scope of the said Section 93 of the said Act, was limited to grant of exemption provided the service tax was leviable under Section 66/66B of the Finance Act, 1994. It was held that the abatement to the extent of 75% or 70% by a notification or a circular cannot substitute the lack of statutory machinery provisions to ascertain the value of services involved in a composite contract.

120. The reliance of the applicant on the judgement of the Hon'ble High Court of Delhi in the case of Suresh Kumar Bansal Vs the Union of India is entirely misplaced. Firstly, the said case pertains to provisions of Section 67 of the Finance Act, 1994, Rule 2A of the Service Tax (Determination of value) Rules, 2006 and Notification No. 26/2012 – ST dated 20.06.2012 whereas the present application for advance ruling is regarding various provisions of the CGST Act, 2017.

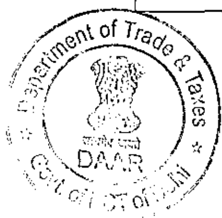
121. The claim of the applicant that such sale of commercial space was exempted from payment of Service Tax under S. No. 39 of Notification No. 25/2012 – ST dated 20.06.2012 is not being examined as the same is beyond the jurisdiction of this Authority.

122. Similarly, the Judgements of Hon'ble Supreme Court in Gem Granites vs Commissioner of IT, Tamil Nadu reported in AIR 2005 SC 1455, Municipal Committee vs Manilal reported in 1967 (2) SCR 100 and Pappu Sweets and Biscuits vs Commissioner of Trade Tax, UP reported in 1998(7) SCC 228 mentioned by the applicant to claim that the services rendered by MoHUA prior to 01.07.2017 i.e. during Service Tax regime were also exempted, are not relevant because this Authority has been set up under GST laws to decide matters pertaining to GST and has no mandate to decide taxability under erstwhile Service Tax laws.

123. It has been argued by the applicant that in a continuous supply of service, where part of the supply has taken prior to 01.07.2017 and part of supply has taken on or after 01.07.2017, GST cannot be levied by vivisecting the value of supply into two parts. However, the said argument is not acceptable as per clarification issued as follows:

124. As per FAQ on GST in respect of Construction of Residential Complex by Builders/Developers:

S.No	Question	Answer
11.	Whether the builders / developers are liable to pay tax again under GST in cases where the Service Tax had already been paid / payable on flats, as per earlier law?	No. In terms of Section 142 (11) (b) of the CGST Act, 2017, GST is not payable to the extent of the Service Tax was paid / payable under the provisions of chapter-V of the Finance Act, 1994. Nevertheless, the leviability of Service Tax on the subject services shall be determined by applying the Point of Taxation Rules, 2011 as per which if services have been provided or deemed to have been provided on or before 30.06.2017, no GST



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		is payable on the same.
15.	Please clarify as to whether Service Tax or GST is payable in respect of on-going projects, for which neither occupancy certificate was received nor it is yet to be occupied, as on the appointed date i.e. 01.07.2017?	The Sec. 142(10) and 142(11) of the CGST Act, 2017 provides for the provisions to deal with the liability towards the ongoing projects. These provisions are explained with reference to the following possible situations:- (i) when the total consideration was received prior to 30.06.2017 from the customers in respect of the property under construction (for which neither occupancy certificate was received nor it is yet to be occupied) - Service tax is/was payable on the consideration received @15% on 1/4th of the consideration; and there would be no GST on the same. (Sec. 142(11)(b)- refers); (ii) when a part of the consideration was received prior to 30.06.2017 from the customers in respect of the property under construction (for which neither occupancy certificate was received nor it is yet to be occupied) - Service tax (ST) is/was payable on the consideration received prior to 01.07.2017 i.e.: @15% on 1/4th of the consideration; and there would be no GST to the extent of that amount for which ST was paid/payable. For the remaining consideration paid/payable on or after 01.07.2017, GST is payable with reference to the date of payment of the balance amount or the date of invoice issued by the builder, whichever is earlier (generally invoice reckons to the payment milestones as per the agreement between the builder/developer and the buyer). (iii) In respect of an ongoing construction project (for which neither occupancy certificate was received nor it is yet to be occupied), when the milestone for payment was achieved by the builder/developer, who raised an invoice within 30 days from the same(as required by law) prior to 30.06.2017, but the payment is received from the customers in respect of the said invoice on or after 01.07.2017, - Service tax is/was payable

		on the consideration so received @15% on 1/4th of the consideration; and there would be no GST to that extent. On the balance amount payable or paid w.r.t the subsequent payment milestones falling on or after 01.07.2017, GST is payable, as mentioned at (ii) above. (iv) when the total consideration is received, as per the agreed terms, on or after 01.07.2017 from the customers in respect of a property under construction (for which neither occupancy certificate was received nor it is yet to be occupied) - GST is payable @ 18%, on 2/3rds of the consideration.

124. Hence, for the reasons mentioned above, the judgements of Hon'ble Supreme Court in the case of Govind Saran Ganga Saran vs Commissioner of Sales Tax, reported in 1985 (155) ITR 0144 SC and CIT vs BC Srinivasa Setty reported in 1981 (128) ITR 294 SC are not relevant in the present case.

125. Hence, it is held that commercial built up space on which some amount of Service Tax had been paid or was payable shall be covered under GST wef 01.07.2017 subject to the provisions of Section 142(11) (b) of the CGST Act, 2017.

Question No.4

126. The fourth issue for decision is whether the applicant is liable to pay GST on consideration received under an agreement involving sale of constructed units in a building which is under construction.

127. The applicant has argued that the sale of commercial built-up area is covered under para 5 of Schedule-III of the CGST Act, 2017 and hence the same cannot be called either as a supply of goods or a supply of services and it falls within the exclusive jurisdiction of the State Government, being sale of immovable property. On the other hand, para 5(b) of Schedule-II of the CGST Act, 2017 specifically provide that 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 has been received after issuance of completion certificate, where required, by the competent authority or after its first occupation, whichever is earlier, will be treated as Supply of Services.

128. It is observed that during Service Tax regime, an Explanation was inserted by the Finance Act, 2010 in the definition of taxable service of 'Construction of Complex' and 'Commercial or Industrial Construction Service' [section 65(105)(zzzh) and 65(105)(zzq)]. Thereby, the construction of buildings intended for sale wholly or partially by builder or

other person authorized by builder before, during or after construction was deemed to be service provided by builder to the buyer. The Explanation provided that in case entire sum is received from the prospective buyers after grant of completion certificate by the authorities competent to issue such certificate, it shall not be a taxable service. In such case, since the sale takes place after completion of building, it will be considered as sale of immovable property. The Declared Service in section 66E(b) is basically to continue levy of tax on construction of premises by a builder, which is intended for sale to a buyer.

129. The above explanation was challenged in the case of Maharashtra Chamber of Housing Industry v/s Union of India [reported in 2012 (34) STT 387] and levy of Service Tax was upheld on the construction of building intended for sale to the buyers.

130. Since, the issues involved in the present case do not pertains to deemed Sale under Article 366(29A) of the Constitution, the judgement of Hon'ble Supreme Court in Southern Petrochemical Industries Co. Ltd v/s Electricity Inspector & ETIO reported in (2007) 5 SCC 447 and in Geo Miller & Co. (P) Limited v/s State of Madhya Pradesh reported in (2004) 5 SCC 209 are not relevant in the present case.

131. As per FAQ on GST in respect of Construction of Residential Complex by Builders/Developers:

S. No.	Question	Answer
1.	Whether sale of a Flat / House by a builder / developer is a supply of a service or a sale of immovable property under GST law?	As per the clause 5(b) of the Schedule II of CGST, Act, 2017, construction of a flat / house/ complex intended for sale is a supply of service. However, if the entire consideration towards the Flat/House/complex is received after the receipt of completion/occupancy certificate from the competent authority or after its first occupation, whichever is earlier, then such activity is neither a supply of goods nor a supply of Service, as provided under Clause 5 of Schedule-III of CGST Act, 2017. Accordingly, a transaction involving sale of such immovable property after initial occupation or after receipt of occupancy certificate, is a sale of immovable property and it does not attract GST.

132. It is observed that the above FAQ has been issued in respect of construction of residential complex but the same is equally applicable in the case of construction of commercial complex also. In view of the above, it is held that the applicant is liable to pay GST on sale of commercial built-up units, as the same has been defined as 'supply of service' under Clause 5(b) of Schedule-II of CGST Act, 2017.

Vinay Kumar

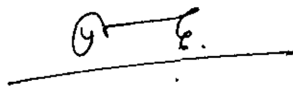
Ruling

133. The applicant is covered in the definitions of "Agent" under Section 2(5), "Supplier" under Section 2(105) and "Taxable Person" under Section 2(107) of the CGST Act, 2017 in respect of the said project while providing services on behalf of the Ministry of Housing and Urban Affairs. Hence, they are liable to pay GST under Section 9(1) of the CGST Act, 2017.

134. The MoHUA, Government of India, is not exempted from payment of GST on sale of commercial built-up space, as it does not relates to any function entrusted to a municipality under Article 243W of the Constitution. Hence, the exemption under S. No. 4 of Notification No. 12/2017 – Central Tax (Rate) and parallel notifications under SGST and IGST are not admissible. After amendment of S. No. 4 of the said Notification by Notification No. 14/2018 – Central Tax (Rate) dated 26.07.2018, only services provided by "governmental authority" are exempted which does not cover the MoHUA. Further, MoHUA, Government of India is not a Municipality under Articles 243P and 243Q of the Constitution. Also, since, such services are being provided to business entities, exemption under S. No. 6 of the said Notification is also not admissible.

135. The applicant is liable to pay GST on the services supplied under GST regime i.e. w.e.f 01.07.2017, even if part of the consideration had been received prior to 01.07.2017.

136. The applicant is liable to pay GST on the sale of commercial built-up area which is under construction, as the same is a 'supply of service' under clause 5(b) of Schedule II of the CGST Act, 2017.



Pankaj Jain
Member (Centre)

Vinay Kumar
Member (State)