THE MAHARASHTRA APPELLATE AUTHORITY FOR ADVANCE RULING FOR GOODS AND SERVICES TAX

(Constituted under Section 99 of the Maharashtra Goods and Services Tax Act, 2017)

ORDER NO. MAH/AAAR/RS-SK/25 /2020-21 **Date-** 26.08.2020

BEFORE THE BENCH OF

(1) Shri Rakesh Kumar Sharma, MEMBER (Central Tax)

(2) Shri Sanjeev Kumar, MEMBER (State Tax)

Name and Address of the Appellant:	M/s. Vilas Chandanmal Gandhi, Sigma one, Near MIT College, Kothrud, Pune-411038
GSTIN Number	27AAVPG7805Q1ZS
Clause(s) of Section 97(2) of CGST/SGST Act, 2017, under which the question(s) raised:	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 Personal Hearing:	17.08.2020
Present for the Appellant:	Shri S.S. Gupta, Chartered Accountant
Details of appeal	Appeal No. MAH/GST-AAAR-24/2019-20 dated 11.03.2020 against Advance Ruling No. GST-ARA-40/2019-20/B-06 dated 15.01.2020
Jurisdictional Officer	State Tax officer Pune-2 Division

(Proceedings under Section 101 of the Central Goods and Services Tax Act, 2017 and the Maharashtra Goods and Services Tax Act, 2017)

At the outset, we would like to make it clear that the provisions of both the CGST Act and the MGST Act are the same except for certain provisions. Therefore, unless a mention is specifically made to such dissimilar provisions, a reference to the CGST Act would also mean a reference to the same provisions under the MGST Act.

2. The present appeal has been filed under Section 100 of the Central Goods and Services Tax Act, 2017 and the Maharashtra Goods and Services Tax Act, 2017 **[hereinafter referred to as "the CGST Act and MGST Act"]** by M/s. Vilas Chandanmal Gandhi,

Sigma one, Near MIT College, Kothrud, Pune-411038 **(herein after referred to as "the Appellant")** against the Advance Ruling No. **GST-ARA-40/2019-20/B-06, dated 15.01.2020,** passed by the Maharashtra Authority for Advance Ruling (MAAR).

BRIEF FACTS OF THE CASE

3.1 The Appellant, M/s. Vilas Chandanmal Gandhi, holding GST Registration No. 27AAVPG7805Q1ZS, is an owner of the land situated within the limits of Pune Municipal Corporation (PMC).

3.2 The Appellant, with an objective to develop the land, owned by him, entered into an agreement with a developer, namely, M/s. Amar Builders and Developers, a Partnership Firm, to develop the said land jointly and share the profits through distribution of sale proceeds after development of the land by way of construction of residential/ commercial project. The terms of the above said agreement are mentioned as under:

- The Appellant agreed to assign/ transfer the development rights in land to the M/s. Amar Builders and Developers (Developer);
- The said assignment/ transfer of rights in land was for the purpose of construction of residential/ commercial project on the land;
- The Developer agreed to pay consideration in the form of 45% of the sale proceeds of the project to be developed;
- Further, the developer had given Rs. 3,60,00,000/- (Rs. Three Crores Sixty Lakhs only) to the Appellant as security deposit to be refunded within a month after completion of the project on the underlying land,

3.3 Thus, in view of the above agreement, the Appellant and the Developer, were enjoying the rights in the land jointly.

3.4 Thereafter, both the parties tried to vacate/ remove the reservation of the said land casted in light of Draft Development Plan for Pune City sanctioned by the Municipal

Corporation of Pune City (PMC). However, later they realized that vacating/ removing reservation may not be possible and was adversely impacting the financials of the Appellant as well as the Developer.

3.5 Hence, the rights in the said land were required to be surrendered. However, as the PMC was not paying compensation in cash and TDR's/ FSI were given as consideration for surrendering the joint rights in land to PMC in terms of Development Control Regulations.

3.6 Consequently, the Appellant and the Developer entered into a supplementary agreement, the terms of which are as under:

- The Appellant and developer agreed that the reservation on land could not be removed/ vacated. This could result in financial losses;

- Hence, the rights in the land (of the Appellant as well as of the Developer) would be surrendered to PMC and TDR/ FSI would be obtained as consideration;

- The TDR/ FSI to be obtained would be shared between the Appellant and the Developer in the ratio of 73:27;

- The proportionate TDR/ FSI would be transferred by the Appellant in favour of the Developer or the Appellant would transfer the proportionate sale proceeds (out of the sale of TDR/ Additional FSI) to the Developer.

3.7 Accordingly, the Appellant surrendered the rights in the said land in favor of the Pune Municipal Corporation. In consideration of the same, the PMC awarded TDR's/ FSI to the Appellant.

3.8 Both the parties later decided to sell a part of the TDRs/ FSI to Vamona Developers Pvt. Ltd. (VDPL) and share the sale proceeds in the agreed ratio. Consequently, the Appellant entered into agreement/ deed of assignment with Vamona Developers Pvt. Ltd.

3.9 In order to obtain clarity on the leviabilty of GST on the transaction of sale of TDR, the Appellant filed the **Advance Ruling application dated 21.08.2019** under section 97 of the CGST Act,2017 (herein after referred to as **"the application"**) before the Maharashtra Authority for Advance Ruling **(herein after referred to as "the Ruling Authority or MAAR").** The Appellant applied for advance ruling on the following questions:

> **" a) Whether GST is leviable on sale of Transferable Development Rights ('TDR')/ Floor Space Index ('FSI') received as consideration for surrendering the joint rights in land in terms of Development Control Regulations and granted in light of the article of agreement dated 18th December 2017 entered between the Appellant and Pune Municipal Corporation ('PMC') read with Development Control Regulations.**
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> **b) If yes, what will be the classification under GST and what will be the applicable rate of GST?"**

3.10 The Applicant/Appellant had submitted before the Advance Ruling Authority as under:

(a) That sale of TDR/Additional FSI does not amount to taxable supply under GST, being in the nature of transaction of sale of land/immovable property, and accordingly, the same is covered under clause 5 of Schedule III to the CGST Act, 2017;

(b) The Applicant had referred to various other legislations such as Section 3(4) of the Bombay Land Revenue Code, 1879, Section 2(z) of the Real Estate (Regulation and Development) Act, 2016, to explain the term "immovable property", and contended that the immovable property includes land and land includes the benefits arising out of land, thereby arguing that the TDR/FSI are nothing but the benefits arising out of land, and hence would fall under the category of immovable property, the transaction of which is not covered under the scope of supply, as the same is covered under clause 5 of the Schedule III to the CGST Act, 2017, and hence would not be subject to GST.

(c) However, the Applicant/Appellant had made alternative submissions stating that the sale of TDR/Additional FSI may be taxable under GST as the scope of supply is very wide. They further submitted that the term "service" is wide enough to cover everything other than goods, money and securities. Therefore, a view can be formed that sale of TDR/FSI would be considered as supply of service.

(d) In support of their above interpretation, they referred to the Notification No. 4/2018 -C.T. (Rate) dated 25.01.2018, thereby submitting that though the above said notification has been issued in respect of the joint development agreement, there is a transfer of development rights, thereby further submitting that the Government intended to tax all the transactions of TDR/Additional FSI under GST.

(e) They further referred to the Notification No. 4/2019 -C.T. (Rate) dated 29.03.2019, which amends the Notification No. 12/2017-C.T. (Rate) dated 28.06.2017 in as much as service by way of transfer of development rights/additional FSI were made exempt subject to the certain conditions contained therein.

(f) They also referred to the Notification No. 5/2019 -C.T. (Rate) dated 29.03.2019 amending Notification No. 13/2017 -C.T. (Rate) dated 28.06.2017, whereby service by way of transfer of development rights/Additional FSI by any person to the promoter was made taxable under reverse charge. They also referred to the Notification No. 6/2019-C.T. (Rate) dated 29.03.2019, which provides that the in case, the promoter who receives the development rights against the consideration in the form of construction service or against the monetary consideration, GST liability shall arise on the date of issuance of completion certificate.

3.11 **The MAAR, vide their Advance Ruling Order No. GST-ARA-40/2019/B-06 dated 15.01.2020, held that GST is leviable on the sale of TDR/ FSI. They, further, held that the said transaction would fall under the Heading 9972, i.e. at Sl. No.16, entry (iii) of Notification No. 11/2017-C.T. (Rate) dated 28.06.2017, attracting GST at the rate of 18 % (9% CGST + 9%SGST). The Advance Ruling Authority has based its ruling on the basis of FAQs on real estate, issued by the Ministry of Finance, vide F. No. 354/32/2019-T.R.U. dated 14.05.2019, and the provisions laid under the Notification No. 4/2018-C.T. (Rate) dated 25.01.2018 read with the Notification No. 13/2017-C.T. (Rate) dated 28.06.2017 as amended by the Notification No. 05/2019-C.T. (Rate) dated 29.03.2019.**

3.12 Being aggrieved by the aforesaid Advance Ruling Order, the Appellant have filed the present appeal.

GROUNDS OF APPEAL

4. The Appellant, in their Appeal memorandum, has, inter alia, mentioned the following grounds of appeal:

4.1 That the sale of TDR/FSI cannot be taxed under the GST law, as the same is in the nature of transaction of sale of land/immovable property, which is covered under Schedule III to the CGST Act, 2017 (Activities or transaction which shall be treated neither as supply of goods nor as supply of services);

4.2 The Appellant has referred to the other statutes for the definition of the term "land" as the term "land" has not been defined under the GST Act. One such reference was made to Bombay Land Revenue Code, 1879 for the definition of the "Land", wherein the term "Land" has been defined as under:

"Land" includes benefits to arise out of land, and things attached to the earth, or permanently fastened to anything attached to the earth and also shares in or charges on the revenue or rent of village or other defined portions of territory.

Thus, in view of the above definition of the term 'land', the Development rights in the land can be construed as land, and therefore, any transaction pertaining to the sale of the TDR would be out of the purview of the GST.

4.3 To support the above contention, they have cited various Court judgments. They have, inter alia, referred to the Hon'ble Bombay High Court judgment in the case of **Chheda Housing Development Vs. Bibijan Shaikh Farid & Ors.2007 (3) Mah.L.J.P. 402,** wherein the Hon'ble High Court inter alia has observed as under:

".....a benefit arising from the land is immovable property. FSI/TDR, being a benefit arising from the land, consequently must be held to be immovable property ....."

4.4 That the term service has to be given popular and common parlance meaning, and therefore cannot include transaction of sale of immovable property.

4.5 It has been further contended by the Appellant that purpose and object of GST is not to levy tax on transaction of immovable property as the same has been introduced by subsuming erstwhile Service Tax, Central Excise and VAT.

4.6 It has been further contended by the Appellant that the transaction of the sale of TDR/FSI would not get covered under the Heading 9972 of the Notification No. 11/2017 –C.T. (Rate) dated 28.06.2017, as the same was not in the nature of "Real Estate Services".

4.7 They have further alleged that Advance Ruling Authority had based its judgment merely on the FAQs issued by the Government, which does not have legal force.

RESPONDENT'S / DEPARTMENT'S SUBMISSION

5. The submissions made by the Department/Respondent is reproduced as under:

5.1 After going through the Advance Ruling order, the submission made by the Appellant and the facts of the case, in this Appeal, it is seen that, the Appellant has transferred the land to Pune Municipal Corporation (PMC) and in consideration of the same, the PMC awarded TDR's/ FSI, as consideration instead of consideration in cash. After, receiving the TDR/FSI the Appellant decided to sell/supply the said TDR/FSI in the open Real Estate market. Accordingly, the Appellant has sold said TDR/FSI to M/s. Vamona Developers Pvt. Ltd. (M/s. VDPL). Therefore, the Appellant have entered into two different agreements regarding TDR/FSI, as follows: -

A) Agreement with PMC: -

The Appellant has transferred his land to the PMC vide Possession Receipt dated 29.11.2017 and by way of an Agreement dated 18.12.2017 which is registered at the

office of Sub Registrar Haveli No. 11, at Serial No. 12939/2017. In consideration of the same, the PMC awarded TDR's/ FSI as consideration instead of consideration in cash.

B) <u>Agreement with M/s. Vamona Developers Pvt. Ltd. (VDPL): -</u>

The Appellant later on decided to sell/supply the TDRs/ FSI to M/s. VDPL. Consequently, the Appellant have entered into agreement/ deed of assignment with M/s. VDPL. Initially, the Appellant have not charged GST on the said transaction of supply of TDR/FSI to M/s. Vamona Developers Pvt. Ltd. (VDPL). Later on, the Appellant raised invoice with GST.

5.2 In view of above para, there are two different agreements regarding TDR/FSI. And, accordingly two different transaction i.e. one for transfer of Land against consideration in form of TDR/FSI. And, second is sale/supply of said TDR/FSI to M/s. Vamona Developers Pvt. Ltd. (VDPL).

5.3 In exercise of the powers conferred by sub-section (1) of section 9, sub-section (1) of section 11, sub-section (5) of section 15 and sub-section (1) of section 16 of the Central Goods and Services Tax Act, 2017 (12 of 2017), the Central Government, on the recommendations of the Council, and on being satisfied that it is necessary in the public interest so to do, notifies that the central tax, on the intra-State supply of services of Real Estate Services (heading 9972) shall be levied at the rate 9% (CGST), therefore, effective rate is @ 18% (with SGST). As, the service of supply of the TDR/FSI is covered under SI. No. 16, item (iii) of Notification No. 11/2017 – Central Tax (Rate) dated 28.06.2017 (heading 9972). Therefore, the GST on TDR/FSI is payable at the rate of 18% (9% CGST+ 9% SGST).

5.4 Further, while answering the FAQ, on real estate, dated 07.05.2019 and dated 14.05.2019 related to TDR/FSI, it is answered that, the service of supply of the TDR/FSI is covered under SI. No. 16, item (iii) of Notification No. 11/2017 – Central Tax (Rate) dated 28.06.2017 (heading 9972). Therefore, the GST on TDR/FSI is payable at the rate of 18% (9% CGST+ 9% SGST).

5.5 The Appellant has referred definitions of "Land" and "Immovable property" under various Acts, and with the help of these definitions, the Appellant have submitted that, immovable property includes land and land includes the benefits arising out of land. They have further submitted that; developmental rights can be classified as land or benefits to arise out of land. They have placed reliance on the judgments of Hon. Bombay High Court in the cases of **M/s. Chheda Housing Development Vs. Bibijan Shaikh Farid & Ors. 2007 (3) Mah.L.J.P. 402 and M/s. Sadoday Builders Private Limited Vs. Joint Charity Commissioner 2011 (6) Bom CR 42** wherein the Hon'ble High Court inter alia observed that: -

> **".....a benefit arising from the land is immovable property. FSI/TDR, being a benefit arising from the land, consequently must be held to be immovable property ....."**

5.6 It is to mention here that, the Appellant has transferred the land to PMC. And, in consideration of the same, the PMC awarded TDR's/ FSI as consideration instead of consideration in cash. After, receiving the TDR/FSI the Appellant decided to sell/supply the said TDR/FSI in the open market of Real Estate with a motive of profit. Accordingly, the Appellant has found a buyer (M/s. Vamona Developers Pvt. Ltd. (VDPL)) for the said TDR/FSI and sold TDR/FSI to M/s. Vamona Developers Pvt. Ltd. (VDPL).

5.7 The transaction of TDR/FSI received to the Appellant from PMC against transferred of his land, was not for consideration for taxation (i.e. whether on this transaction GST leviable or not) before the Advance Ruling Authority. But the subsequent transaction with M/s. Vamona Developers Pvt. Ltd. (VDPL) for consideration for taxation before the Advance Ruling Authority. Accordingly, the Advance Ruling authority held that, the subsequent separate transaction with M/s. Vamona Developers Pvt. Ltd. (VDPL) is a taxable transaction.

5.8 In the subsequent transaction, the Appellant has supplied the TDR/FSI in the open market with a motive of profit. The sale price of TDR/FSI depends on the real estate market situation at the time of supply of TDR/FSI. Therefore, the value of TDR/FSI given by the PMC to the Appellant, may vary as per situation of real estate market, at

the time of supply of TDR/FSI in the open market. Therefore, it is clear that, it is a supply of Service transaction and not related to earlier transaction with PMC in any way. And also, the subsequent separate transaction by the Appellant with M/s. Vamona Developers Pvt. Ltd. (VDPL) is not related to Land also.

5.9 Thus, the facts of cases before Hon'ble Bombay High Court and in the present case are very different. Therefore, the reliance placed by the Appellant in the case of **M/s. Chheda Housing Development Vs. Bibijan Shaikh Farid & Ors. 2007 (3) Mah.L.J.P. 402 and in the case M/s. Sadoday Builders Private Limited Vs. Joint Charity Commissioner 2011 (6) Bom CR 42** is misplaced.

5.10 In view of above submissions, the Advance Ruling Authority has correctly determined that, supply of TDR/FSI is a service and the GST on TDR/FSI is payable at the rate of 18% (9% CGST + 9% SGST). Therefore, the Appellant's submission may please be rejected and MAAR may please be confirmed.

PERSONAL HEARING

6. A personal hearing in the matter was held on 17.08 2020 which was attended by Shri S. S. Gupta, C.A. and Shri Vinod Awtani, C.A., as representatives of the Appellant, and by Shri N V Sorate, Dy. Commissioner, State Tax and Shri S C Gaikwad, State Tax Officer, in the capacity of the Jurisdictional Officers / Respondent in the subject appeal matter.

6.1 During the course of the said personal hearing, Shri S.S.Gupta, the representative of the Appellant, submitted a written brief, dated 11.08 2020, and a compilation of the tax provisions/tax laws and reiterated the submissions made therein. He submitted that sale of TDR/Additional FSI, is not liable to GST. In support of this, he made the following additional submissions apart from the earlier submissions, which were made during the time of filing of the instant appeal.:

(a) that the transfer of TDR cannot be covered under the definition of service, as such definition has to read in the context of the GST Act. The Appellant further contended that the scope of the term "anything" in the definition of service needs to be understood in the context of the GST scheme and cannot cover all transactions;

(b) that the TDR will be considered as immovable property;

(c) that TDR is akin to money, and thereby not leviable to GST;

(d) that the activity of transfer of Development Rights is not taxable under Sl. No. 16(iii) of the Notification No. 11/2017-C.T. (Rate), dated 28.06.2017, as the activity of sale of TDR are not in the nature of Real Estate Services, which is evident from the explanatory notes to the aforesaid notification, which covers various services under the Heading "Real Estate Services".

(e) that reliance on Notification No. 4/2018-C.T. (Rate), dated 25.01.2018 & Notification No. 13/2017-C.T. (Rate) as amended by the Notification No. 05/2019-C.T. (Rate), dated 29.03.2019 is misplaced as leviability of tax cannot be determined on the basis of merely entries appeared on any Rate/Exemption Notification or any other notification.

(f) that the Appellant case was not maintainable in the Advance Ruling as the subject transaction related to the sale of TDR was completed before the filing of the Advance Ruling application, whereas the advance ruling can be filed in the issues related to only those supply of goods and services or both, which is being undertaken or proposed to be undertaken by the Applicant. In the present case, the subject transaction was already undertaken by the Appellant much before the filing of the application before the Maharashtra Advance Ruling Authority.

6.2 Shri N. V. Sorate, the jurisdictional officer, reiterated the written submission filed by him, and contended that the Advance Ruling issued by the Maharashtra Advance Ruling Authority is correct in law and hence, the appeal is not maintainable.

DISCUSSIONS AND FINDINGS

7. We have carefully gone through the appeal memorandum encapsulating the facts of the case and the grounds of the appeal along with the other relevant documents. We have also examined the impugned ruling passed by the Advance Ruling Authority, wherein it was held that GST was leviable on the sale of TDR/ FSI under the Heading 9972, i.e. at Sl. 16, entry (iii) of Notification No. 11/2017-C.T. (Rate) dated 28.06.2017, attracting GST at the rate of 18 % (9% CGST + 9%SGST). The Advance Ruling Authority has based its ruling on the Sl. No. 7 of FAQs (part II), issued vide F. No. 354/32/2019-T.R.U. dated 14.05.2019, covering real estate issues, and the provisions laid under the Notification No. 4/2018-C.T. (Rate) dated 25.01.2018 read with the Notification No.

13/2017-C.T. (Rate) dated 28.06.2017 as amended by the Notification No. 05/2019-C.T. (Rate) dated 29.03.2019. All these above-mentioned Notifications are related to the supply of service by transfer of the TDR/FSI.

8. The first issue raised by the Appellant is that the Advance Ruling order is not maintainable because Advance Ruling can be given only on a transaction proposed to be undertaken and not which has already been undertaken. It is surprising that the Appellant has taken this stand as it is the Appellant himself who had approached the Advance Ruling Authority for Advance Ruling on a transaction which has already been undertaken by them. There is a legal principle - Quod Approbo Non Reprobo' which means that one thing which is approved will not be rejected at the same time. One cannot both approbate and reprobate i.e one cannot accept and reject at the same time. The Appellant cannot both accept the purview or scope of 'Advance Ruling' (as evident from its willingness to raise the question in the first place) and then reject it. The Appellant has himself approached the authority for Advance Ruling, willingly participated in the proceedings and now has at the appellate stage raised the issue of maintainability of an issue which was itself raised by them. Therefore, against the peculiar background of the case we do not find it at all necessary to deal with the argument of the Appellant.

9. The main issue raised by the Appellant is that the Sale of TDR/ Additional FSI does not amount to taxable supply under GST being in nature of transaction of sale of land/ immovable property and covered under Clause 5 of Schedule III of CGST Act. To substantiate his claim, Appellant has taken support of the definition of the term "goods" as defined in the CGST Act, 2017 and has submitted that the said definition includes the word 'moveable property' which has not been defined in the CGST Act. The Appellant has referred to the other statutes for the definition of the term "land" as the term "land" has not been defined under the GST Act. One such reference was made to Bombay Land Revenue Code, 1879 for the definition of the "Land", wherein the term "Land" has been defined as under:

"Land" includes benefits to arise out of land, and things attached to the earth, or permanently fastened to anything attached to the earth and also shares in or charges on the revenue or rent of village or other defined portions of territory.

10. In short as per the Appellant's submission, in view of the above definition of the term 'land', the Development rights in the land can be construed as land only and therefore, any transaction pertaining to the sale of the TDR would be sale of land and will be a

"no supply" transaction being covered under Clause 5 of Schedule III of CGST Act,2017 and out of the purview of the GST law. To support the above contention, Appellant has cited various court judgments. The judgments referred to by the Appellant are judgements of the Bombay High Court in the case of Chheda Housing Development Vs. Bibijan Shaikh Farid & Ors.2007 (3) Mah.L.J.P. 402, and and M/s. Sadoday Builders Private Limited v. Joint Charity Commissioner 2011 (6) Bom CR 42 wherein the Hon'ble High Court, inter alia, observed as under:

"…. a benefit arising from the land is immovable property. FSI/TDR, being a benefit arising from the land, consequently must be held to be immovable property …… "

Thus, the High Court while interpreting the meaning of the term 'TDR' has resorted to the definition of 'immoveable property' under the General Clauses Act, 1897 and has concluded that as 'TDR' is a benefit arising out of land, it is 'immoveable property'. However, the issue before us is the interpretation of the term 'land' and whether TDR being classified under 'land' comes under the scope of the clause (5) of Schedule III to the CGST Act, 2017. This issue has not been decided by the judgements quoted by the Appellant, simply because the issue was not before the Court and the High Court had no instance or opportunity to decide whether "TDR' comes under the definition of land. They have held that TDR is immoveable property which does not help the case of the Appellant as the whole argument is whether TDR being a 'benefit arising out of land' comes under the scope of Clause 5 of Schedule III to the CGST Act, 2017,or not.

11. The question for decision before us is' **Whether TDR in itself is "land and Building" or "Immovable property other than Land & Building"?**

This issue has been decided by Hon'ble ITAT in case of Income-tax Officer v. Shri Prem Rattan Gupta, ITA No.5803/Mum/2009, in relation to Section 50 C of the Income Tax Act, 1961. Transfers of immovable property are required to take place at a fair valuation as per Income tax laws. The Mumbai Bench of the Income Tax Appellate Tribunal ('ITAT') ruled, that the Transfer of Development Rights ('TDR') and Floor Space Index ('FSI') cannot be subject of consideration under the fair valuation provisions of Section 50 C of the Income Tax Act, 1961 ('Act'). The ruling was based on the rationale that section 50C refers to 'land and building' and TDR being immoveable property is a much bigger concept than the term 'land and building'. The issue was that, one, Shri. Prem Rattan Gupta, was the joint owner of property and

development agreement was entered into by him with the Public Works Department and the Thane Municipal Corporation ('Acquiring Authorities'), as per which the entire plot was agreed to be sold for development. The assessing officer was of the view that the property should be valued for more since it had development rights attached to it. The key issue in this case therefore was the means of valuation of the 134 Sq. m. transferred by the co-owners (of which the taxpayer owned 67 Sq.m), and whether the value of TDR should be included in the fair value of land transferred by the taxpayer. The ITAT observed that, the DVO (Departmental Valuation Officer) should exclude value of FSI and TDR for the purpose of section 50C of the Act as the section uses the expression 'land or building' and not 'immoveable property' which may have a wider connotation It is decided that the Transfer of Development Rights ('TDR') and Floor Space Index ('FSI') cannot be subject of consideration under the fair valuation provisions of section 50 C of the Income Tax Act, 1961. It observed in Para 5 as follows,

> *"Para 5- The Ld. D.R. relied on the decision of the Hon'ble High Court of Bombay in the case of Chedda Housing Development vs. Babijan Sheikh Farid - 2007 (3) MLJ 402 (Bom) in which their Lordships have interpreted the definition of 'immovable property' under General Clauses Act, 1897.* ***In our humble opinion, the term 'immovable property' has a very wide meaning then the words 'land and building'. Sec. 50C refers to land and building and not to immovable property as whole.*** *Hence, the reliance placed by the Ld. D.R. on the decision of the Hon'ble jurisdictional High Court in case of Chedda Housing Corporation (supra) is not helpful to the revenue.*
>
> *Para 6... The DVO should only consider net of land transfer to Developer by the assesse after considering acquisition made by the Govt. as well as Thane Municipal Corporation as discussed hereinabove* ***and also to exclude the value of TDR or additional FSI included in the consideration shown in the Development Agreement.****"*

In the judgment referred above it is held in clear words that Transferable Development Right is not land, but "A right arising out of land and hence it is an immovable property. **Thus on the basis of above judgments the contention of the Appellant that** *the Development rights in the land can be construed as land only and therefore, any transaction pertaining to the sale of the TDR would be sale of land only and will be no supply transaction being covered under Clause 5 of Schedule III of CGST Act,* **is not acceptable.**

12. The Appellant has referred to various definitions of the term 'land' occurring under other legislations where the term land has been defined to include 'benefits arising out of land' and as TDR is a benefit arising out of land it will also come under Clause 5 of schedule III to the CGST Act, 2017. We do not agree with the argument of the Appellant as the Clause 5 speaks only of 'land' and 'building'. Neither the GST Act nor the schedules define 'land' or choose to do that. In that case there is no need to qualify the term land by ascribing any meaning to it or defining it by borrowing definitions from other laws. The CGST law does not make a reference to any other law while mentioning 'land' in Schedule III. Also, if it had wanted to widen the scope of 'land' to include 'benefits arising out of land' it could have very well done so. Schedule III to the CGST Act, 2017 is so to speak an exemption notification and exemption notifications have to be strictly interpreted. The Supreme Court in the case of "Dilip Kumar and Company (App 3327 of 2007 dated 30.7.2018)", have clearly laid down the law that the exemption notification should be interpreted strictly; the burden of proving applicability would be on the assessee to show that his case comes within the parameters of the exemption notification. Also, when there is ambiguity in an exemption notification which is subject to strict interpretation, the benefit of such ambiguity cannot be claimed by the subject/assessee and it must be interpreted in favour of the Revenue. The words of the Supreme Court are clear. The term 'land' has to be interpreted strictly and cannot be extended to cover 'benefits arising out of land'.

13. The next issue to be decided is **whether supply of "TDR" is supply of "service" or supply of "Goods".** To decide the issue, we have to refer to the definition of goods and services as provided in the Constitution of India as well as under the CGST Act,2017- Article 366(12) and (26A) of the Constitution of India define 'goods' and 'services'. which are reproduced here under,

(12) "goods" includes all materials, commodities, and articles

(26A) "Services" means **anything other than goods**;

Under the CGST Act 'goods' and 'services' are defined as under,

Section 2. In this Act, unless the context otherwise requires, —

.....

(52) **"goods"** means every kind of movable property other than money and securities but includes actionable claim, growing crops, grass and things attached to or

forming part of the land which are agreed to be severed before supply or under a contract of supply;

(102) **"services"** means anything other than goods, money and securities but includes activities relating to the use of money or its conversion by cash or by any other mode, from one form, currency or denomination, to another form, currency or denomination for which a separate consideration is charged;

Further Clause 5 in Schedule III to CGST Act,2017 says that -

Schedule III- [see section7]- Activities or transactions which shall be treated neither as a supply of goods nor a supply of services

Clause 5: Sale of land and, subject to clause (b) of paragraph 5 of Schedule II, sale of building

14. After going through the above definitions under the CGST Act, 2017, it is seen that, transferable development right that is TDR is an immovable property and hence not covered under the definition of goods. But the transfer of development right which is an immovable property is covered under the definition of service as the definition of service is very wide and it covers anything other than goods under its ambit. Hence as per the definition of supply under Section 7 of the CGST Act, 2017, the transfer of TDR made for consideration in the course or furtherance of business is supply of service and taxable as per the provisions of CGST Act, 2017. It is again made clear that levy of a tax is not on land but levy of tax is on the benefits arising out of the land, which are in the nature of service.

15. The Appellant has stated that popular and common parlance meaning needs to be given to the term 'services' and it cannot include transaction of sale of immoveable property. The Appellant has further given the definitions of service under various other laws to drive home the point that TDR is not a service. We can only say that the definition of 'service 'under the CGST law is wide and broad and defining TDR as a service does not lead to any absurdity. The definition of service is broadened so as to cover all commercial transactions within its ambit and sale of TDR is a commercial transaction. There is no section under the Act which explicitly prohibits the taxation of TDR. The Schedule III to the CGST Act, 2017 only mentions 'land' to be outside the ambit of GST and not 'benefits' arising out of land. TDR is a benefit arising out of land and not land itself. Therefore, it is liable to tax.

16. The Appellant has argued that the term 'anything 'in the definition of service has to be read in the context and has referred to a number of judgements to reinforce their submission that the definition of 'service' has to be understood in the context of the GST scheme and cannot cover all transactions. We have gone through the submissions as well as the judgements quoted by the Appellant. Firstly, it needs to be clear that the Courts have said that the definitions have to be read the context only when if not done so, it leads to an absurd conclusion. The judgements of the Tribunals quoted by the Appellant –Zee Telefilms (2006 (4) STR 349) and BCCI (7) 2007 STR 384 have precisely held the same- that the definition has to be read in a context to avoid absurdities. In interpreting that TDR comes under 'Services' we do not feel that by doing so the same leads to any obvious absurdity. The Appellant has also not pointed out any absurdity or illogicality in the conclusion drawn that TDR is a service. It is like any other commercial transaction amenable to tax. Also as mentioned earlier only sale of land is outside the purview of tax and it is clear that TDR is not land and therefore interpreting TDR as a service and therefore taxable, does not seem to us an absurd conclusion in the sense that it leads to the taxation of something either expressly prohibited by law or prohibited by the use of common logic or reason.

17. The Appellant has further argued that TDR was not taxable under the Finance Act, 1994 and was also not amenable to tax under the VAT Act and by referring to the Statement of Objects and Reasons (SOR) has sought to prove that the intention of GST law was to bring together all existing taxes and not to tax anything newly. Therefore, what was not taxable under the earlier laws cannot be taxed under the GST law. We are afraid we cannot agree with the argument of the Appellant. Firstly, whether TDR was taxable under the earlier laws or not cannot be an issue for discussion before us and therefore we cannot examine the Circular/Education Guide before us for its relevance. Assuming for the sake of argument that it was not taxable under the earlier law, we can only say that the law has to be interpreted as per the provisions incorporated in it and not as per the Statement of Objects and Reasons (SOR). Looking up the SOR as a tool for interpretation is only permissible when the law itself is ambiguous and cannot be interpreted by the plain meaning of the words without arriving at an absurd result. The law of Interpretation of Statutes looks upon the SOR as an external aid of interpretation to be put to use only when only when the wordings of the provisions/statutes are ambiguous. In the instant case, we have on the interpretation of the statute arrived at the conclusion that TDR is a service and find no ambiguity whatsoever in the wordings

of the statute and therefore do not find the need to go back to the SOR as an aid to interpretation.

18. We also do not agree with the submission of the Appellant that TDR is money. It is given in lieu of money and just because it is given in lieu of money it does not get the status of money. Money is already defined under the CGST Act, 2017 and it does not include TDR. Under the GST Act, *"Money" means Indian legal tender or any foreign currency, cheque, promissory note, bill of exchange, letter of credit, draft, pay order, traveler cheque, money order, postal or electronic remittance or any other instrument recognized by the Reserve Bank of India when used as consideration to settle an obligation or exchange with Indian legal tender of another denomination but shall not include any currency that is held for its numismatic value.* It is clear from the definition that TDR is not money.

19. As the Act casts a liability on the supplier to pay tax on supply or transfer of TDR, the Central Government, in exercise of the powers conferred by sub-section (1) of section 9, sub-section (1) of section 11, sub-section (5) of section 15 and sub-section (1) of section 16 of the Central Goods and Services Tax Act, 2017 (12 of 2017), on the recommendations of the GST Council notified the rate as 9% (CGST) covered under Sl. No. 16, item (iii) of Notification No. 11/2017 – Central Tax (Rate), dated 28-06-2017 (heading 9972). Therefore, the effective rate of GST on TDR/FSI is 18% (9% CGST + 9% SGST). Further, the Central Government issued Notification No. 4/2018 - C.T. (Rate) dated 25.01.2018, thereby postponing the time of supply till the time of supply of the developer arises. The Government presupposes a liability to pay tax before the time of supply arises.

20. In continuation, the Central Government further issued Notification No. 4/2019 -C.T. (Rate), dated 29.03.2019, which amends the Notification No. 12/2017-C.T. (Rate), dated 28.06.2017 in as much as service by way of transfer of development rights/additional FSI were made exempt subject to the certain conditions contained therein. The Notification No. 5/2019 -C.T. (Rate), dated 29.03.2019 has been issued amending Notification No. 13/2017 -C.T. (Rate), dated 28.06.2017, whereby service by way of transfer of development rights/Additional FSI by any person to the promoter were made taxable under reverse charge. Notification No. 6/2019-C.T. (Rate), dated 29.03.2019, which provides that in case, promoter who receives development rights

against the consideration in the form of construction service or against the monetary consideration, GST liability shall arise on the date of issuance of completion certificate.

All these aforesaid notifications reveal the intention of legislature to tax all the transactions of TDR/Additional FSI under GST.

21. As regards the Appellant's contention that the sale of TDR/FSI would not get covered under entry (iii) of the Heading 9972 of the Notification No. 11/2017-C.T. (Rate), dated 28.06.2017 bearing the description "Real Estate Services" as the same is not appearing under the explanatory notes to the Heading 9972 of the above said notification, it is stated that the explanatory notes indicate the scope and coverage of the heading, group and service codes of the scheme of classification of services, and is merely a guiding tool for the assessee and tax administration for classification of services. Thus, the explanatory notes of the notification would not prevail over the notification itself. i.e. if a service is falling under any head of the notification by virtue of its nature and description, then merely non-appearance of the same in the explanatory notes to that notification would not mean that the services are not covered under that heading.

22. We would like to advert to the Notification No. 4/2019-C.T. (Rate), dated 29.03.2019, which seeks to amend the Notification No. 12/2017-C.T. (Rate), dated 28.06.2017 by inserting entries at Sl. No. 41A in the aforesaid exemption notification, which stipulates that "services by way of transfer of development rights, i.e., TDR, or Floor Space Index (including additional FSI) on or after 1st April, 2019, for construction of residential apartments by a promoter in a project , intended for sale to a buyer, wholly or partly, except where the entire consideration has been received after issuance of the completion certificate, where required by the competent authority or after its first occupation, whichever is earlier, has been exempted subject to certain conditions specified under the said Notification No. 4/2019-C.T. (Rate), dated 29.03.2019. It is noteworthy that the **services described above in the aforesaid Notification No. 4/2019-C.T. (Rate), dated 29.03.2019, has been classified under the Heading 9972**. Thus, on perusal of the aforesaid notification, it is evident that the subject transaction would adequately get classified under the Heading 9972. Now, we refer to the Notification No. 11/2017-C.T.(Rate) dated 28.06.2017 to ascertain the exact entry and the GST rate thereto. On

perusal of the aforesaid Notification, it is observed that the subject transaction would be covered under entry at Sl. No. 16 (iii) of the Notification No. 11/2017-C.T. (Rate), dated 28.06.2017, bearing description "Real estate services other than (i) and (ii) above", and accordingly, would attract GST at the rate of 18% (9% CGST + 9% SGST).

23. Now, in view of the above discussions, we pass the following order:

ORDER

24. We do not find any reason to interfere with the ruling passed by the Maharashtra Advance Ruling Authority, vide their Order No. GST-ARA-40/2019-20/B-06, dated 15.01.2020, in light of above stated reasons. Accordingly, it is held that the sale of TDR/FSI would be leviable to GST under Heading 9972, at the rate of 18% (9% CGST + 9% SGST), as prescribed under the entry at Sl. No. 16 (iii) of Notification No. 11/2017 – Central Tax (Rate), dated 28-06-2017.

Sanjiv Kumar
26/08

(SANJEEV KUMAR)
MEMBER

26/08/2020

(RAKESH KUMAR SHARMA)
MEMBER

Copy to the:-

1. **Appellant;**
2. **AAR, Maharashtra;**
3. **Pr. Chief Commissioner, CGST and C.Ex., Mumbai Zone;**
4. **Commissioner of State Tax, Maharashtra;**
5. **Jurisdictional Officer;**
6. **Web Manager, WWW.GSTCOUNCIL.GOV.IN;**
7. **Office copy.**