Agenda Item 2A - GST TREATMENT OF LAND & BUILDING (REAL ESTATE)

1.1 Presently, under service tax law, the following services relating to real estate (land and building) are subjected to service tax: -

(1) Any lease, tenancy, easement, license to occupy land;
(2) Any lease or letting out of the building including a commercial, industrial, or residential complex for business or commerce.

Both are covered under renting of immovable property, which has been declared a service under the Finance Act, 1994.

1.2 Further, 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, is chargeable to service tax.

It is proposed to treat the aforesaid activities under GST as supply of service (Model GST Law).

2.1 Under the Service Tax law, an activity which constitutes merely transfer of title in goods or immovable property is excluded from the definition of service [section 65B (44) of Finance Act].

2.2 Under the GST regime, it is proposed to subject supply of goods or services to GST. Goods have been defined under the Constitution to include "*all materials, commodities and articles*". Likewise, services have been defined under the Constitution "*as anything other than goods*". Goods and services tax have been defined in the Constitution to mean "*any tax on supply of goods, or services or both except taxes on the supply of the alcoholic liquor for human consumption".* Supply has been defined in the model GST law in the broadest possible sense and includes sale.

2.3 What is presently being taxed under service tax law is provision of service in relation to land and buildings. Under the proposed GST, the taxable event is supply of goods or services [Articles 246A & 286 of the Constitution]. However, immovable property has not been included in the definition of goods in the model GST law. As mentioned in paras 1.1 and 1.2, only supply of services in relation to land and building has been proposed to be subjected to GST.

2.4 Thus, supply of immovable property (land and buildings) has been kept outside the purview of GST. It is felt, that this would distort the GST particularly when there is no constitutional or legal impediment to levy GST on supply of land and building to GST due to the following reasons: -

(i) Stamp duty, which is levied under Article 268, is with reference to documents and is collected by the Centre on documents listed in Entry 91 of the Union List while by the States on documents listed in Entry 63 of the State List. Therefore, the argument that because legal conveyance of title of land and buildings attracts stamp duty, they cannot be subjected to GST is facile because stamp duty is levied on documents while GST would be levied on the supply of land and buildings, whether as goods or services ("aspect theory" upheld by the Supreme Court in a host of judgements). Renting/leasing

of land and buildings are subjected to service tax presently. Documents pertaining to such renting/leasing are subjected to stamp duty.

(ii) Entry 49 of the State List reads thus: -

"Taxes on lands and buildings"

It is felt that this entry is not an impediment to levy of GST on supply of lands and buildings because of the "aspect theory" upheld by the Supreme Court: while the stock of lands and buildings is subjected to tax by the States on the aspect of possessing land and buildings, the supply aspect can be subjected to GST.

(iii) Most international jurisdictions subject supply of land and building to GST/VAT (Australia, Canada, New Zealand, Malaysia, Singapore, South Africa, EU & UK).

(iv) Presently, because both VAT and service tax are leviable on under construction property and not on flats sold after completion of construction, buying an under construction flat is more taxing for a buyer.

(v) Further, though service tax and VAT are charged generally @ 4.5% and 1% of the value of the flat (which includes the value of the undivided share of land) respectively, there are embedded taxes in the flat. The total tax incidence in respect of flats in non-metros is more than that in metros. In fact, where the value of land is less, the incidence of service tax and VAT is more (embedded taxes). GST on supply of land and building will equalize the tax incidence in respect of houses in metros and non-metros.

(vi) Without levying GST on supply of land and building, it would be very difficult to complete the input tax credit chain (ITC) and allow ITC in respect of construction services and construction material used in creation of immovable property which is further used for carrying out taxable activities. This is highly distortionary. While at the behest of business and industry, the ITC chain would get liberalized, the tax administration would forever be saddled with non-completion of ITC chain thereby resulting in disincentives to obtain taxable invoices for availing input tax credit. Non-inclusion of land and building in GST results in cascading of taxes.

(vii) Gains from GST arising out of a comprehensive tax base, would be negated owing to a large hole in the tax base [As per MOSPI data, construction sector constitutes almost 9% of the total gross value added (GVA) in the country]. This is for the reason that levy of GST on supply of land and buildings would be an impediment to the generation, flow and parking of black money.

(viii) Land and building are not on the same footing as alcoholic liquor for human consumption as the latter is constitutionally outside the definition of goods and services tax (para 2.2 above).

3. In view of the discussion in the forgoing paras, it is imperative that supply of land and building is subjected to GST. However, certain categories of such supplies may be exempted in public interest. These are listed below: -

(I) Supply of vacant land for the purposes of agriculture.

(II) Supply of land for construction of, -

a a civil structure or any other original works pertaining to a scheme under Jawaharlal Nehru National Urban Renewal Mission or Rajiv Awas Yojana;

b a civil structure or any other original works pertaining to the 'In –situ rehabilitation of existing slum dwellers using land as a resource through private participation' under the Housing for All (Urban) Mission/Pradhan Mantri Awas Yojana, only for existing slum dwellers;

c a civil structure or any other original works pertaining to the Beneficiary-led individual house construction /enhancement under the Housing for All (Urban) Mission/Pradhan Mantri Awas Yojana;

d a structure meant for funeral, burial or cremation of deceased;

e a single residential unit, on land admeasuring not more than 100 square metres;

f low-cost houses up to carpet area of 60 square meters per house in a housing project approved by competent authority empowered under the 'Scheme of Affordable Housing in Partnership' framed by the Ministry of Housing and Urban Poverty Alleviation, Government of India;

g low cost houses up to a carpet area of 60 square meters per house in a housing project approved by the competent authority under:

1) the "Affordable Housing in Partnership" component of the Housing for all (Urban) Mission/ Pradhan Mantri Awas Yojana;

2) any housing scheme of a State Government.

h Post-harvest storage infrastructure for agriculture produce including cold storage for such purposes.

(III) Sale of:

a) houses constructed under Rajiv Awas Yojana;

b) houses constructed under 'In –situ rehabilitation of existing slum dwellers using land as a resource through private participation' under the Housing for All (Urban) Mission/Pradhan Mantri Awas Yojana, only for existing slum dwellers.

c) low-cost houses up to carpet area of 60 square meters per house in a housing project approved by competent authority empowered under the 'Scheme of Affordable Housing in Partnership' framed by the Ministry of Housing and Urban Poverty Alleviation, Government of India;

d) low cost houses up to a carpet area of 60 square meters per house in a housing project approved by the competent authority under:

i. the “Affordable Housing in Partnership” component of the Housing for all (Urban) Mission/ Pradhan Mantri Awas Yojana;

ii. any housing scheme of a State Government.

(IV) Sale of residential premises other than new residential premises.

Note: - 1) A residential premise is new when any of the following apply:

1. it has not previously been sold as residential premises
2. a new building replaces a demolished building on the same land.

4.1 We may prescribe a different rate of GST for supply of land vis-à-vis supply of buildings, with full ITC of both.

4.2 Further, the amount of stamp duty paid on land or buildings, may be allowed to be excluded from the value of land or buildings, for levy of GST on their respective supply.

4.3 Alternatively, the amount of GST payable may be reduced by the amount of stamp duty paid on the land or buildings, subject to the condition that no refund of ITC would be availed under the duty inversion clause of GST law.

This issue is submitted to GST Council for consideration and decision as may be deemed proper.