Resident Welfare Associations – Exemption under GST – Madras High Court Rules in favour of RWA

- Contributed by CA Sri Harsha

The birth of Resident Welfare Association (for brevity 'RWA') is guided by Section 11(4)(e) of Real Estate (Regulation & Development) Act, 2016. The said section mandates that promoter should enable the formation of RWA under the local laws. In absence of such local laws, the section mandates that RWA must be formed within 3 months from the majority of allottees having booked their apartment.

RWAs are formed primarily with an objective to protect and upkeep the welfare of all the members who are the owners of apartments forming part of such residential complex. All RWAs are incorporated with intention of 'no profit no loss' and guided by bye-laws which are agreed at the time of incorporation.

Basis such bye-laws, different RWAs collect different types of fees from members for provision of certain services. The most common fees are corpus, admission fee, transfer fee, No-Objection Certificate fee and other similar items. Majority of RWAs in their bye-laws have modus operandi which must be adopted for each type of fee charged by them. The bye-laws would also contain provisions dealing with accounting treatment of such fee, purposes for which a particular fee can be used, purposes for which a particular fee cannot be used, the timing of usage, the necessary approval for such usage, the nature of investments into which the idle funds of RWAs can be made into and various other aspects. Apart from the said fee, RWAs will also collect monthly maintenance charges from all the members against provision of specific services. The services will include the upkeep of common area, common amenities, security services and various others.

In our previous article, we have dealt with certain challenges faced by RWAs from the income tax perspective and deal with exemptions available to such RWAs from goods & services tax (GST) perspective. The same is available at https://www.sbsandco.com/blog/sbs-wiki-e-journal-aug-2019.

In the above piece, we have authored certain FAQs under GST laws qua RWAs and answered them. One of the FAQ was relating to the exemption available to RWA, wherein we have stated that the exemption was available upto Rs 7,500, but the circular stated otherwise. For immediate reference, the FAQ #9 and our response is as under:

S No	FAQ	Response
9	We are RWA, where we collect monthly contribution of Rs 10,000/- from each member. In this situation, should we charge GST on Rs 10,000/- or Rs 2,500/- (after taking exemption of Rs 7,500/-)?	• In our view, it should be after taking an exemption of Rs 7,500/-, that is tax to be paid on Rs 2,500/-. The reason being that exemption entry under Entry 77(c) of Exemption Notification provides ***exemption upto Rs 7,500/-.*** Hence, upto Rs 7,500/- an exemption can be taken. • However, Circular 109[1] clarifies that tax must be paid on Rs 10,000/- and not on Rs 2,500/-. In simpler words, the circular clarifies that tax has to be paid without taking an exemption of Rs 7,500/-.

[1] Circular 109/28/2019-GST dated 22 July 19

The above Circular 109 was recently challenged in a writ petition before Honourable Madras High Court by Greenwood Owners Association & Others[2]. In this article, let us understand the issue involved and the judgment passed by Honourable High Court. Before proceeding further, a brief introduction of GST and its applicability on RWAs is pre-requisite and lets do the same.

Introduction:

Section 7 of Central Goods & Services Tax Act, 2017 (for brevity CT Act) deals with scope of 'supply'. As per the said section, supply includes all forms of supply of goods or services or both such as sale, exchange, barter, transfer, license, rental, lease or disposal made or agreed to made for consideration by a person in course or furtherance of business.

Thus, the services carried on by RWAs to its members for consideration, will fall under the ambit of supply. However, the question that has to be answered is whether such services are provided by RWAs can be called as in course or furtherance of 'business'. The phrase 'business' is defined vide Section 2(17). Sub-section (e) specifically categorizes provision by a club, association, society or any such body (for a subscription or any other consideration) of the facilities or benefits to its members as 'business'. Hence, the supplies made by RWAs can be called as 'business', for the purposes of GST laws.

Under the GST laws, the Principle of Mutuality is not recognised and the members and RWAs are treated as separate persons and the services provided by RWAs is considered as supply and taxed accordingly. However, the above view became questionable after the Honourable Supreme Court upheld the applicability of Principle of Mutuality in the context of pre- GST regime in the matter of Calcutta Club Limited[3] [also read our article on the said judgment Concept of Mutuality - A Real Concern].

In order to put rests to such speculations, Section 7 of CT Act was retrospectively amended vide Finance Act, 2021, with effect from 1st July 17 to state that the activities or transactions, by a person other than an individual, to its members or constituents or vice-versa, for cash, deferred payment or other valuable consideration, constitutes supply. An explanation was also inserted to clarify that the person and its members or constituents shall be deemed to be two separate persons and the supply activities or transactions inter se shall be deemed to take place from one person to another.

The explanation states that the above is notwithstanding to anything contained in any other law for the time being in force or any judgment, decree or order of any court, authority or tribunal. The role of explanation is to take down the views that the rationale as stated in Honourable Supreme Court in the matter of Calcutta Club Limited (supra) is also applicable to GST laws and the recognition of principle of mutuality in the income tax law does not have any say in GST laws.

From the above retrospective amendment, it is clear that the intention of the legislature under GST regime, is to bring tax on the supplies between the associations and its members. Now that there is more clarity on the taxability, let us proceed further.

[2] 2021 (7) TMI 591 – Madras High Court
[3] 2019 (10) TMI 160 – Supreme Court

Since the supplies made by RWAs fall under the ambit of Section 7, the supplies would be subjected to tax under the charging section, Section 9. However, if the aggregate turnover of RWAs does not exceed Rs 20 lakhs during a financial year, then in terms of Section 22 of CT Act, RWAs are not obliged to register under GST laws.

The GST law also provide an exemption vide Entry 77 of Notification No 12/2017 – CT (R). Said Entry provides an exemption for services provided by an unincorporated body or a non- profit entity registered under any law for the time being in force, to its own members by way of reimbursement of charges or share of contribution upto an amount of Rs 7,500/- per month per member for sourcing of goods or services from a third person for the common use of its members in a housing society or a residential complex.

Issue:

The issue before the Honourable Madras High Court in the matter of Greenwood Owners Association & Others is the ruling of Advance Authority, which held that once the amount crosses Rs 7,500, the entire amount is taxable and the Circular 109.

Hence, the precise question involved in the matter is, whether the RWA is entitled for exemption upto the contribution from member of Rs 7,500 or once the contribution exceeds Rs 7,500, the said exemption is lost. In other words, taking clue from the FAQ #9 above, whether the RWA is entitled for exemption upto Rs 7,500 and be taxable only on Rs 2,500 or whether the entire amount of Rs 10,000 is taxable, since it crosses Rs 7,500. Circular 109 clearly states that once the contribution amount exceeds Rs 7,500, the entire amount would be taxable.

Analysis by Honourable Madras High Court:

The petitioner's principal grievance is that the Circular 109 is contrary to the express language mentioned in Entry 77 of Notification No 12/2017 – CT (R). The petitioner stated that when the exemption entry clearly uses the phrase ***'upto',*** meaning that exemption shall be granted upto Rs 7,500 and balance would only be taxable (in cases where the contribution exceeds Rs 7,500), the Circular's interpretation that once the amount crosses Rs 7,500, the entire amount is to be taxed has to be quashed. The petitioner also referred to Article 13(3) of the Constitution of India to submit that 'law' would include any ordinance or bye law, rule, regulation, notification, custom or usage but does not include 'circulars'. Accordingly, the petitioner pleaded that Circular 109 which intends to withdraw the exemption granted in Entry 77 is required to be quashed.

The Counsel for Respondent pleaded that the tax has to be on the basis of Section 15 of Central Goods and Services Tax Act, 2017 (for brevity 'CT Act') and the amount collected constitutes the transaction value and therefore tax has to be paid on the entire amount. It is further pleaded that exemption under Entry 77 provides a range and once the same is exceeded, the entire amount becomes taxable. It was further pleaded that following the decision of Honourable Supreme Court in the matter of Dilip Kumar & Company[4], since there is an ambiguity in the exemption notification, the matter should be settled in favour of revenue.

[4] 361 ELT 577

The Honourable Madras High Court after hearing to both the parties, stated that, since there is no ambiguity in the interpretation of exemption notification, the decision in the matter of Dilip Kumar & Company does not apply. The Court further held that the Entry 77 is clear that the exemption is available upto Rs 7,500.

The Court referring to the SSI Exemption under the excise laws, Entry 30 of Mega Exemption Notification under the service tax laws and other related entries stated that, in a case where legislature intends that the exemption shall apply only to cases where the amount charged does not exceed a specified limit, the language adopted is clear to mean that the 'exemption shall apply only where the gross amount charged for such service does not exceed'.

Further, by referring to Entry 78 of Notification No 12/17 – CT (R), the Court stated that the exemption is available for specified artist only when the consideration charged is less than Rs 1.5 lakhs. If the consideration is more than Rs 1.5 lakhs, the exemption is not available for the reason of the type of language used in Entry 78, which is as 'if the consideration charged for such performance is not more than one lakh and fifty thousand rupees'. Since, the language used in Entry 78 is different from Entry 77, the interpretation available for Entry 78 cannot be applied to Entry 77.

The Court stated that term 'upto' hardly needs to be defined and connotes an upper limit. It is interchangeable with the term 'till' and means that any amount till the ceiling of Rs 7,500 is exempted. The Court further rejected the contention that Rs 7,500 is slab for the reason that slab rate comes into play, only when an income upto certain slab is at lower rate and income above such slab, is another rate and since in the instant case there are no slabs, the concept of slab does not trigger. Accordingly, the Court held that Entry 77 provides for exemption till Rs 7,500 and only amounts post Rs 7,500 is only taxable, quashing the Advance Ruling and Circular 109.

The above is a welcome judgment since it puts rests to unnecessary litigation and burden on RWAs. Already, RWAs are constrained by lot many other issues under various other laws, the Circular 109 created an additional burden on them. Hence, the judgment arrived in right time putting an end to unwanted protracted litigation.