

## Assignment of leasehold rights in industrial land not leviable to GST

### Facts of the case

- Gujarat Industrial Development Corporation (GIDC), established under the Gujarat Industrial Development Act, 1962, acts as a nodal agency of the Government of Gujarat for development of industrial estates in Gujarat.
- GIDC enters into a license agreement with Lessee to set-up industrial units subject to approval and permission from regulatory authorities. Upon fulfilment of the terms and conditions of the license agreement, registered lease deed is executed between GIDC and Lessee for allotting plots of land on long-term lease for 99 years (Original Lease) subject to such terms and conditions as mentioned in allotment letter. As per the terms of the Original Lease, the Lessee would be liable to pay an upfront premium ('Premium') along with periodic rentals.
- Subsequently, the leasehold rights of the plot of land ('Assignment Rights') along with the building constructed thereon (by the Lessee ('Assignor')) may be assigned by such Lessee / Assignor to a third-party ('Assignee') *vide* the Assignment Agreement. However, for executing the Assignment Agreement, a prior approval is required from GIDC and the same is provided by GIDC upon receipt of transfer fees from the Assignee.

### Issue

- Whether the transfer of Assignment Rights by Assignor to Assignee along with building constructed thereon against consideration can be considered as a 'supply of service' leviable to GST?
- If the answer to the above is affirmative, whether input tax credit ('ITC') of GST paid on such supply would be available *qua* the Assignee?

### Observations and ruling of the High Court

- **Scope of the term 'property':**
  - In strict legal parlance, the term 'property' is used to designate a right of ownership or an aggregate of rights that are guaranteed and protected by Government. It has been defined as the right to possess, right to use, right to enjoy and dispose of a thing and right to exclude everyone else from interfering with it.
  - Thus, the 'property' has been defined as any vested right of any value which refers to both the actual physical object (i.e., plot of land and building) as well as various incorporeal ownership rights in the object such as the right to possess, right to enjoy the income from, right to alienate, etc.
- **Scope of the term 'immovable property':**
  - Immovable property is not defined under the GST law. Hence, reference is made to the definition provided in Section 3(26) of General Clauses Act, 1897 ('General Clauses Act'), Section 3 of Transfer of Property Act, 1882 ('TOPA') and Section 2(6) of Registration Act, 1908 ('Registration Act'). The definition of 'immovable property' provided in the Registration Act and the General Clauses Act *inter alia* includes '*... benefit(s) to arise out of land*'.
  - The gist of the relevant provisions under the Gujarat Stamp Act, 1958 ('Stamp Act'), Registration Act and TOPA *qua* the Assignment Agreement is summarised hereunder:

- Assignment Agreement for transfer of leasehold rights along with building is required to be compulsorily registered under the Registration Act.
  - Under the Stamp Act, where the lease is for more than 98 years, stamp duty payable on lease deed is same as duty payable on conveyance.
  - Under TOPA, an 'immovable property' would either be a tangible or an intangible right relating to a plot of land as sale is an absolute transfer by assignment along with underlying interest that the Assignor has on land and building.
- Therefore, the term 'immovable property' includes in addition to the right of ownership, the aggregate of rights that are guaranteed and protected by further agreement or contract between the owner and the Lessee.
- **Whether the Assignment of Rights constitutes a transfer of 'immovable property'?**
- The Assignment of Rights are at par with transfer of immovable property since such rights are nothing but benefits arising out of 'immovable property', and hence, would come within the scope of 'immovable property' as defined in General Clauses Act and Registration Act.
  - The Supreme Court in *Gopal Saran Vs. Satya Narayana [1989 (3) SCC 56]* held that the term 'assignment' would include transfer by a party of all its rights to some kind of property, usually intangible property such as rights in lease, mortgage, agreement of sale or a partnership. Hence, assignment of leasehold rights is also subjected to levy of stamp duty as applicable on transfer of 'immovable property'.
  - Applying the above to the present case, it was construed that -
    - The Assignment of Rights extinguishes the estate of Assignor in 'immovable property' and all legal relationships between Assignor / Lessee and GIDC are severed, and the Assignee becomes liable for the obligation under the Assignment Agreement.
    - By way of Assignment Agreement, the Lessee has transferred leasehold rights which is over and above the actual physical plot of land and building. Such rights encompass incorporeal ownership rights in such land and building like right to possess, right to enjoy income from, right to alienate, etc.
    - The transaction of sale and transfer of leasehold rights by the Assignor in favour of Assignee divests the Assignor of all the rights in the property. Therefore, the interest in the immovable property in the form of leasehold rights cannot be said to be different than the immovable property itself.
    - Thus, when Assignor transfers absolute right by way of sale of leasehold rights in favour of the Assignee by way of Assignment Agreement, the same shall be transfer of 'immovable property' as leasehold rights are nothing but benefits arising from immovable property.
- **Whether GST is leviable on transfer of Assignment Rights, being an immovable property?**
- On perusal of the definition of the term 'service' under Section 65B(44) of the Finance Act, 1994 ('Finance Act'), it appears that under the erstwhile Service tax law, there was a specific exclusion for transfer of title in immovable property. Thus, the legislature did not intend to levy Service tax on transfer of immovable property under the pre-GST regime. Moreover, development rights, being benefits arising from land were not leviable to Service tax.
  - A perusal of Statement of Objects and Reasons appended to Central Goods and Services Tax Bill, 2017, indicates that **the legislative intent was to subsume all existing indirect taxes in a single tax called the GST** that is to be levied on supply of goods / services at each stage of supply chain by converging any tax that is being levied on supply of goods or services.
  - In *Munjaal Manishbhai Bhatt Vs. Union of India [2022 (104) GSTR 419]*, it was observed that the intention of introduction of GST regime was not to change the basis of taxation of the Value Added Tax and Service tax regime and that supply of land in every form was excluded from the purview of the GST laws.
  - Since the legislature intended to subsume the existing indirect taxes and considering that leasehold rights represent a greater right and interest in land than developments rights, it can be construed that the principles enumerated above for the levy of Service tax prevailing under the Service tax law would continue to apply even under the GST law and consequently, no tax would be levied on transfer of leasehold rights with building.
  - Reference is made to Notification No. 11/2017-Central Tax (Rate) dated 28 June 2017 wherein the levy of GST on construction services is on a value excluding a third of the total amount charged for such supply and includes transfer by way of lease or sub-lease. As a result, it can be construed that even for the levy of GST on construction services, the value of land transferred by way of lease is to be excluded considering such value as the value of immovable property which is transferred.

- **Leasehold Rights vis-à-vis Assignment Rights:**
  - The Assignment Agreement is not a **composite deed of lease and a deed of sale but is a deed of divesting all rights in favour of Assignee**. Accordingly, the Assignee becomes liable to GIDC on the covenants running with the land and hence, is liable to stamp duty.
  - In the present case, what is being assigned by Assignor for a consideration is not only the leasehold land allotted by GIDC but also the building constructed thereon.
  - Thus, the entire land and building is transferred along with leasehold rights and interest in land which is a capital asset in the form of an immovable property. Further, Assignor has earned benefits out of land by way of constructing and operating a factory building / shed which constitutes a *'profit a prendre'* which is also an immovable property.
- Thus, the scope of the term 'services' would not include transfer of lease hold rights as the same is transfer of immovable property, being a benefit arising out of an immovable property consisting of land and building. As a result, the Assignment Rights would not be subjected to the levy of GST.
- **European Union Council Directive dated 28 November 2006 ('EU Directive'):**
  - Article 25 states that a supply of service *may inter alia* consist of the transaction of *'the assignment of intangible property, whether or not the subject of a document establishing title'*.
  - This directive is not applicable to the present case in as much as Assignment Rights are an immovable property by themselves and are not in the nature of an intangible property.
- **Whether the Assignment Rights are covered under Schedule III?**
  - The tax authorities had contended that only sale of land and building are covered in Schedule III to the CGST Act, and hence, only such sale of land and building would be treated neither as supply of goods nor as supply of services.
  - The above contention is not tenable basis the following:
    - The transaction of assignment is nothing but an absolute transfer of right and interest arising out of land which would amount to transfer / sale of immovable property.
    - Leasehold rights are to be considered as sale of land and hence, they would be outside the purview of the scope of 'supply' under Section 7 of CGST Act.
    - Considering the above, the transfer of Assignment Rights by the Assignor would be outside the scope of supply of 'service'.
- Although the High Court was not called upon to determine the taxability of recoveries (premium and transfer fees) made by GIDC from the Assignor or Assignee (as the case may be), the same was commented upon by the High Court, mentioning that -
  - Premium charged for allotment of land followed by periodical lease rentals is a supply of service in relation to land and building i.e., renting of immovable property.
  - Transfer fees would be leviable to GST as it would amount to supply of services by GIDC giving permission to transfer leasehold rights by Assignor in favour of Assignee.
- In view of the foregoing analysis, it was held that -
  - Assignment by sale and transfer of leasehold rights of plot of land allotted by GIDC to Assignor in favour of Assignee shall be **assignment / sale / transfer of benefits arising out of "immovable property"** and consequently, the Assignee would become the lessee of GIDC in place of Assignor.
  - Consequently, transfer of Assignment Rights would not be leviable to GST and hence, the question of eligibility to claim ITC of GST paid by Assignee would not arise.
  - The prayer of the tax authorities for stay of the operation and implementation of this ruling was rejected by the High Court.

### BDO in India Comments

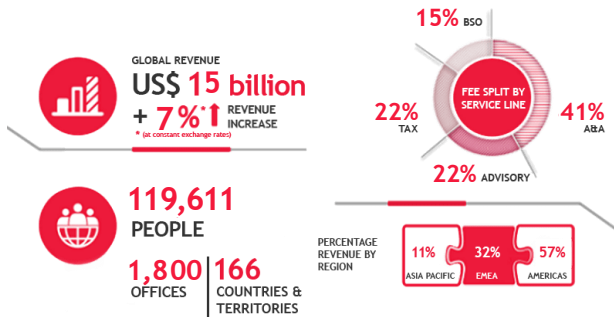
The Gujarat High Court's judgment on the taxability of transfer of leasehold rights along with building thereon provides much-needed clarity for taxpayers, as this was an issue which was contested across the country with number of notices issued and writ petitions filed by the taxpayers. By classifying these rights as benefits arising from land and subsequently categorising them as 'immovable property', the Gujarat High Court has effectively excluded such transactions from the purview of GST.

This decision carries significant ramifications for various taxpayers especially for transfer of units within industrial zones. It would be interesting to assess if the ratio of this judgment can be extended to other transactions relating to land.

*[Gujarat Chamber of Commerce and Industry and Ors. Vs. Union of India and Ors. [TS-03-HC(GUJ)-2025-GST]]*

## ABOUT BDO GLOBAL

BDO is a leading professional services organisation and are global leaders of the mid-tier, with a presence in 166 countries and over 119,661 people working out of more than 1,800 offices. We endeavor to deliver an exceptional client experience through a tailored solutions approach, while partnering with our employees and clients globally.



\*Note: Financial results are as of 30 September 2023

## ABOUT BDO IN INDIA

BDO in India offers Assurance, Tax, Advisory, Business Services & Outsourcing and Digital Services for both domestic and international clients across industries. The team at BDO in India consists of over 10,000 professionals led by more than 350 partners and directors operating out of 19 offices, across 14 key cities.



\*Includes employees from our shared services centres in India

## OUR SERVICES

### ASSURANCE

- Financial Statement Audit and Attestation Services

### MANAGED SERVICES

- Accounting Advisory
- Compliance Management
- Finance & Accounting
- Human Resource Outsourcing (HRO) and Payroll
- Tax Compliance

### BDO EXECUTIVE SEARCH SERVICES

- Board Services
- Executive Assessments
- Executive Search
- Forensic Talent Diligence
- HR Advisory

### TAX

- Customs & International Trade
- Goods & Services Tax (GST)
- Indirect Tax Assessment & Litigation Assistance
- Incentives & ESG
- Tax Technology
- Corporate Tax Services
- Financial Services Tax
- Global Employer Services
- International Tax Services
- Private Client Services
- Tax Outsourcing
- Transfer Pricing

### BDO DIGITAL

- Digital Services
- Technology Products and Solutions

### ADVISORY

- Actuarial Services
- Forensics
- Government Advisory
- IT Risk Advisory & Assurance
- Management Consulting
- Risk Advisory Services
- Sustainability & ESG
- Business Restructuring Services
- Corporate Finance and Investment Banking
- Deal Value Creation
- Financial Due Diligence
- M&A Tax and Regulatory
- Strategy & Commercial Due Diligence
- Valuations
- Research & Insights

## CONTACT US

For any content related queries, you may please write to the service line experts at [taxadvisory@bdo.in](mailto:taxadvisory@bdo.in)

For any other queries or feedback, kindly write to us at [marketing@bdo.in](mailto:marketing@bdo.in)

Ahmedabad | Bengaluru | Bhopal | Chandigarh | Chennai | Coimbatore | Delhi | Goa | Hyderabad | Kochi | Kolkata | Mumbai | Pune | Vadodara

This publication has been carefully prepared, but it has been written in general terms and should be seen as containing broad statements only. This publication should not be used or relied upon to cover specific situations and you should not act, or refrain from acting, upon the information contained in this publication without obtaining specific professional advice. Please contact BDO India LLP to discuss these matters in the context of your particular circumstances. BDO India LLP, its partners, employees and agents do not accept or assume any responsibility or duty of care in respect of any use of or reliance on this publication and will deny any liability for any loss arising from any action taken or not taken or decision made by anyone in reliance on this publication or any part of it. Any use of this publication or reliance on it for any purpose or in any context is therefore at your own risk, without any right of recourse against BDO India LLP or any of its partners, employees or agents.

BDO India LLP, a limited liability partnership, is a member of BDO International Limited, a UK company limited by guarantee, and forms part of the international BDO network of independent member firms.

BDO is the brand name for the BDO network and for each of the BDO Member Firms.

Copyright © 2025 BDO India LLP. All rights reserved. Published in India.

Visit us at [www.bdo.in](http://www.bdo.in)

