MCHI

Representations before the High Level Tax Committee for the Real Estate Sector

INDIRECT TAX

Part I – Revenue impacting aspects

Section	Present Provisions	Issues	Suggestions for Amendment	Rationale for Amendment
Section 66E (a) – Renting	• As per the current regime 'Renting of immovable property' is defined under	Service tax on renting and Credit of Service tax on	• If at all, the government continues to levy service tax	Not allowing credit leads to cascading of

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of immovable property is a declared service	declared service and liable to service tax • No credit of Service tax on construction activity is available against output Service tax liability on renting of immovable property service.	construction activity against output service tax liability on renting of immovable property service	on 'renting' , we recommend that: - Interest and penalty for the past period should be waived considering that the matter has been a subject matter of varied interpretation and litigation. - Either credit of input taxes against payment of output service tax on renting should be allowed OR in case the credit is not allowed, service tax should be levied at a lower rate or on a lower value (by prescribing suitable abatements) to negate the cascading effect of taxes. • It is recommended that credit of input Service tax paid on construction service should be allowed against Service tax liability on renting of immovable property service or any other service	taxes.

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New provision suggested (Section 65B(44) – Definition of service)	• Development rights denote various rights associated with the land. Taxability of development rights has not been clarified under the current regime • Circular No. 151 /2 /2012-ST dated 10 February, 2012, issued in the context of erstwhile law, clarified that sale of land by the landowner is not a taxable service	Service tax on 'Transfer of development rights'	It is recommended that a suitable clarification should be issued to provide that the transfer of development rights would not attract Service tax	• Under the current regime, the definition of service specifically excludes an activity which constitutes merely a transfer of title in immovable property • Transfer of development rights would not be liable to Service tax as transfer of development rights would be considered as transfer of the title in an immovable property to the developer • Further, transfer of development rights is a State subject and the land owner is required to pay Stamp duty on such transfers depending upon the State specific legislation. To illustrate, in the State of Karnataka, transfer of development rights attract Stamp Duty as the definition of immovable property includes development rights

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Rule 6 of the Cenvat Credit Rules, 2004 ('CCR')	In terms of Rule 6 of CCR, a provider of both taxable and exempt service is liable to reverse credit pertaining to exempt service	Full credit should be available to Developer even if certain flats are sold after issuance of completion certificate or commercial space • Some flats/ apartments may remain unsold at the time completion certificate is issued to the Developer. Sale of such flats after receiving completion certificate would qualify as 'sale' • Accordingly, the Developer would become both, provider of taxable service viz. construction of flats sold before issuance of completion certificate and seller of immovable property viz. construction of flats sold after issuance of completion certificate	It is recommended that 100% credit should be admissible to the Developer, irrespective of the quantum of flats sold after issuance of completion certificate	• As mere transfer of title in immovable property has been excluded from the definition of 'service', the same would not qualify as 'service' • Restriction as provided under Rule 6 of the CCR is not applicable to the Developer and there is no need to reverse any proportionate credit for flats sold by Developer after receipt of completion certificate. This is so because, sale of flats (after receipt of completion certificate) constitutes sale of immovable property, which does not qualify as 'service'

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New exemption suggested S.No. 14 of Exemption Notification No.25/2012-ST dated 20.06.2012	• Service tax is levied on the basis of Negative List of Service regime with effect from 1 July, 2012. • Under the current regime, Service tax exemption on construction of residential buildings having single residential unit has been provided comparing to 12 residential units as provided under the erstwhile regime	Service tax on small residential projects	We recommend that status quo should be maintained and the earlier exemption of construction of upto 12 residential units should be continued to promote affordable housing.	• Removal of exemption on residential buildings would have a significant detrimental impact not only on the sector but also on millions of people, who aspire for affordable Real Estate as this will result in escalation of Real Estate prices on account of levy of Service tax

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New Provision suggested	• Service tax on PLC and ECS has not been clarified under Negative list regime • PLC and ECS of units in a residential complex or a commercial complex is a feature as all units cannot be similarly situated • As per the erstwhile law Service Tax was levied as a separate service on builders for providing preferential location of the complex on extra charges • Service tax was charged on full value without the benefit of abatement provided under notification 1/2006 as in case of other services like commercial construction and construction of residential complex service	Service tax on 'Preferential Location' (PLC) and 'Equal Car Space' (ECS)	It is recommended that a suitable clarification should be issued to the effect that benefit of abatement would be applicable to all incidental charges such as PLC, ECS etc which are naturally bundled, irrespective whether or not such charges are shown separately on the invoice	• Any payment for PLC and ECS feature are in fact only a payment towards an inbuilt element of the value of the property. Stamp duty as such is also paid on the gross value of the sale amount of the transaction, simply covering the aforementioned services • Service in relation to providing PLC and ECS are inseparable from construction of residential complex service. As per the industry practice, these services are provided as a bundled service along with construction activity. Hence, the services should be considered as naturally bundled service and it should be considered as construction service

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New Provision suggested [Notification CE 12/ 2012 dated 17 March 2012 (entry 206 and 186)]	• Prefabricated structures are often casted for construction of civil structures (boundary walls, pipes) • As per notification CE 12/ 2012 dated 17 March 2012 (entry 206), excise duty is exempt only where goods specified under chapter 7305 or 7308 is fabricated at site of work • Further certain goods (ceramic products, stone work) are exempted under the above notification (entry 186), where manufactured at site that has been defined as premises specifically made available under the contract for such activities	Excise duty on prefabricated structures/ goods manufactured at site	Goods manufactured/ fabricated for civil work of a building by the contractor or sub-contractor should be exempt from excise duty	• Such structures are not intended to be resold but purely used in the construction activities • Such structures are tailor made for the project • In certain cases, the goods are not manufactured at a location that can be considered as 'site' • Further, in other cases, the site is generally not defined under the contract as the intention is to engage the contractor for construction work and such activities are incidental to such scope of work • Consequently, the above conditions have led to a lot of hardship

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Section 65B(41) – Definition of renting	• Under the stamp duty law, long term leasing of vacant land (say for 99 years) is treated at par with conveyance and the same attracts stamp duty • Separately, the definition of 'renting' includes leasing, licensing or other similar arrangements. • CESTAT Delhi, in the case of M/s Greater Noida Industrial Development Authority v. CCE, Noida [2012-TIOL-44-CESTAT-DEL] in the context of service tax laws as applicable for the period prior to 1 July 2012, while granting stay the Tribunal held that long term lease is akin to sale and would not be covered under 'renting of immovable property'	Service tax on long term lease of land	It is recommended that the definition of 'renting' provided under service tax law should be suitably amended to exclude long term lease of a period more than the threshold period, so that genuine long term lease transaction does not get covered under the taxable service head renting of 'immovable property', and the double taxation can be avoided	• Since the definition of renting does not provide any reference to the tenure for which the leasing is made, even long term lease of land may get included in the purview of service tax • In such case, while on one hand, the long term lease of land would amount to conveyance of immovable property, on the other hand, it may also attract service tax

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New Provision suggested (Erstwhile regime - Circular No. 334/1/2010-TRU dated 26 February 2010)	• Under the current regime, no exclusion/ exemption towards the External Development Charges (EDC) and Internal Development Charges (IDC) collected by Developer has been provided from the levy of Service tax • Under the erstwhile regime, Departmental Circular No. 334/1/2010-TRU dated 26 February 2010 clarified that, "Development charges, to the extent they are paid to the State Government or local bodies, would be excluded from the taxable value…". Thus, under the erstwhile regime, EDC and IDC to the extent they were paid to the State Government/ local bodies were specifically excluded and were not liable to Service tax	Service tax on EDC/ IDC	It is recommended that a suitable clarification/ notification should be issued to provide that EDC/ IDC are exempted from Service tax	• EDC and IDC are collected on actual on behalf of the Government and are not for providing of any service, no Service tax should be applicable on such charges • The intention of the erstwhile law should continues to apply under the current regime as well and Service tax should not be applicable where the charges are collected on actual

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Section 66E (b)	• It is common practice among customers to book flats during the beginning of construction and thereafter sell them when the construction is about to be completed or immediately before the completion certificate is issued by the Developer • Under the erstwhile regime, receipt of consideration before issuance of completion certificate for construction of a complex intended for sale, by builder or any person authorized by the builder was liable to Service tax • Under the current regime, the words 'by builder or any person authorized by the builder' have been omitted in the new Section. Accordingly, in absence of aforesaid words, there is ambiguity whether second/ subsequent sale by a customer would qualify as a declared service liable to Service tax	Service tax on transfer of under-constructed flats by a customer	It is recommended that it should be clarified that resale of under-construction flats would not be liable to Service tax	• In terms of Para 6.2.8 of the Guidance Note, it has been clarified that second sale of under-construction flat by a person to another should not fall under the declared service category as the said person is not providing any construction service • On the other hand, Para 6.2.3 provides that where a flat is transferred by a land owner (prior to issuance of completion certificate) who has been allotted flats under a collaboration agreement, the same would be liable to Service tax • Where Service tax is made applicable on re-sale of flats, the same would lead to practical compliance issues, as all re-sellers selling property of more than INR 10 Lakhs would be liable to obtain registration, pay Service tax and undertake all related compliances. This would lead to undue burden on such re-sellers • Basis the above, while the Guidance Note has given contradictory positions, we believe that no Service tax should be leviable in either of the cases since under either of the above scenarios no service is provided by a buyer/ land owner

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Section 66D(k) Circular F.no. 354/237/2013 -TRU dated 10th Jan 2014	• Under the negative list regime, it appears that only a 'distribution or transmission licensee' would qualify for exemption. • Further, in terms of Para. 4.11.2 of the Guidance Note, it has been clarified that Service tax would be applicable on charges collected by a Developer or a housing society for distribution of electricity unless it is entrusted with such function by the Central or a State Government or is a distribution licensee under the Electricity Act. • Circular no. 354/237/2013-TRU dated 10th Jan 2014, clarified that in case of electricity bills issued in the name of RWA, service tax shall be leviable on charges recovered by RWA from the owners of the apartment in respect of electricity consumed for common use of lifts etc. • It may be noted that in various Supreme Court and High Court judgments, electricity has been held to be 'goods'. Accordingly, supply of electricity by a Developer should qualify as supply of goods which has been specifically excluded from the definition of 'service'	Service tax on Electricity charges collected by Developers should continue to be outside the levy of Service tax.	It is recommended that appropriate clarification should be issued to the effect that recovery of any electricity charges by Developers would continue to be outside the purview of Service tax.	• Developer provides electricity to the flat owners/ society and collect charges in either of the following ways: - In case of onward supply of electricity after procuring the same from the State Electricity Boards, consumption charges are recovered on actual from the flat owners on the basis of allotted sub-metres - In case of Captively generated electricity (generated by using DG sets), the cost of the same is recovered from flat owners on actuals. • Electricity is supplied by the Developer merely for convenience of the residents and thus, the Developer acts as a via media between the State Electricity Board and the end consumer and does not provide any service. Accordingly, the same should continue to be outside the purview of Service tax

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Section 66B	• Under the Negative List regime, all advances retained by service provider in the event of cancellation of contract of service by service receiver become taxable • Further, as per Paragraph 3.1.1 of the Guidance Note, the phrase "agreed to be provided" has been interpreted that advances that are retained by the service provider in the event of cancellation of contract of service by the service receiver become taxable as these represent consideration for a service that was agreed to be provided	Service tax on advances forfeited for cancellation of agreement	It is recommended that no Service tax should be levied on advances forfeited for cancellation of agreement	• Taxability of advances received for services 'agreed to be provided' is based on the basic premise that services will actually be provided. However, taxing of advances forfeited, where no service is actually provided, is against the basic principles of Service tax law • Further, the definition of 'service' itself provides that service means 'any activity carried out by a person', thus, performance of an activity is an essential ingredient to qualify as a 'service'. However, in case of forfeiture of advances, there is no actual activity being carried out. Accordingly, no Service tax should be levied on forfeiture of advances • Additionally, assuming that the forfeited advances are liable to Service tax, it is not clear whether Service tax would be charged on the whole value or the abated value of the forfeited amount

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S.No. 13 (a) of Exemption Notification no.25/2012-ST dated 20.06.2012	• Under the new regime, construction, repair, maintenance of roads for use by general public is exempted • Further, Paragraph 7.9.3 of the Guidance Note also clarifies that construction of roads in a residential complex would be taxable	Service tax on construction, repair, maintenance of roads	It is recommended that blanket exemption on construction, repairs, maintenance etc. of roads (whether used by general public or not) should be provided	• Whether a particular road is for use by general public or not would have to be determined on a case to case basis, e.g. a road within a society is primarily for society members. Accordingly, one view could be that same is not for general public. Alternately, a view may be taken that in the absence of any restriction, it is for general public • The levy of tax on the above activity would burden the common man who needs protection against price rise in basic infrastructure facilities. Additionally, the above levy runs counter to the basic objective of the Government to provide affordable housing

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New Provision suggested [S.No.9 of Exemption Notification no.25/2012-ST dated 20.06.2012]	• Under the erstwhile regime, renting of following immovable property were not liable to service tax: - Vacant land whether or not having facilities clearly incidental to the use of such vacant land - Land used for educational, sports, circus, entertainment and parking purposes • However, under the new regime, only few activities such as renting of immovable property to an educational institution has been excluded from levy of Service tax	Service tax on renting of vacant land for parking, sports etc.	It should be clarified that the erstwhile exemptions from renting of immovable property for specified purposes would continue in the new regime as well	Activities of public importance like renting of immovable property to sports bodies, vacant land for parking purposes etc. were specifically exempted, in line with the objectives of the Government and keeping in view the interests of public at large
New Provision suggested [S.No.29(h) of Exemption Notification no.25/2012-ST dated 20.06.2012]	• Under the new regime, Notification No. 25/2012-ST provides an exemption to sub-contractor providing services by way of works contract to another contractor providing works contract service which is exempt from Service tax e.g. construction of road • However, there is no such exemption for 'pure labour services' provided to such a contractor	Service tax on pure labour services provided by sub-contractor to contractor	It is recommended that pure labour services provided by sub-contractor to contractor providing exempt works contract service should also be exempted from Service tax	Pure labour services are an integral part of the input cost for Developers, and no exemption for such services has been provided in the current regime, it would result in additional tax cost

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New Provision suggested	Cement and Bricks are not included in the existing list of 'Declared goods'	Cement and Bricks should be included in the existing list of 'Declared goods'	In order to make affordable housing a reality, it is recommended that cement and bricks should be included in the list of 'Declared goods'	• Currently, steel being an essential input for construction is included in the list of 'Declared goods' prescribed under Section 14 of the Central Sales Tax Act, 1956. However, cement and brick is ignored, which is equally important as steel. Non inclusion of the same in the declared goods, make the housing exorbitant. • For e.g. current VAT rate of cement is generally 12.5% or more. In case cement is included in the list of 'Declared goods', VAT would be levied at the rate of 5%.
New Provision suggested	Currently, exemption from payment of CST is available on inter-state supplies to SEZ subject to issuance of Form I by a SEZ unit or developer. However, certain components/ sub assemblies are not manufactured by the main contractor but bought from specialized agencies and directly taken to the site. However, there is no provision for issuance of Form I by the main contractor such that sub-contractors can also claim such CST exemption	SEZ exemption from payment of CST on supplies by sub-contractor to the main contractor	Provision for issuance of Form I by the main contractor for supplies to SEZ by sub-contractors so that sub-contractors can also claim such CST exemption, should be incorporated	Absence of provision for issuance of Form I by the main contractor so that sub-contractors can also claim CST exemption, results in additional tax costs

Part II – Procedural aspects

Section	Present Provisions	Issues	Suggestions for Amendment	Rationale for Amendment
New Provision suggested [Rule 3 of 'Point of Taxation Rules, 2011']	• The Point of Taxation Rules (PoT Rules) for Service tax introduced w.e.f 1 April 2011 *vide* notification 18/2011-ST as amended by notification 25/2011-ST has brought significant change in the point of taxation of service tax shifting the liability to pay service tax from collection basis to the point earliest of 'date of issue of invoice' or 'date of receipt of payment, including advance'. • The date of completion of services for construction services has been defined to be the date of completion of that event which requires periodic payment (i.e. date of milestone payment) as per the contract between the service provider and service recipient.	Applicability of 'Point of Taxation Rules, 2011' in Real Estate	The PoT rules must be duly amended so as to provide specific dispensation for real estate industry. The real estate developers should be allowed to continue making payment of service tax on 'receipt basis' instead of 'accrual basis' as prevailing earlier. Further, in case of allotment of built-up space in lieu of development rights in land, it should clarified that point of taxation should arise only upon completion of construction	• It is a common thing in construction of real estate projects that work gets delayed for a temporary period due to social, environmental and legal reasons and the work does not get completed on the specified date. In such event, saddling the project with service tax liability on such date specified in the contract, even though the construction for such milestone is not complete would only lead to additional cost in terms of working capital requirements. • The payment of service tax on the basis of payment milestones would entail the impractical task of tracking each and every milestone date in each and every flat sale contracts entered by the developer with millions of flat buyers located in India, to pay service tax for the services that are not even provided • There is ambiguity on point of taxation case of grant of built up space to landowner