



INCOME TAX

Real Estate Act comes into force from 01st May 2017

Ongoing and new projects shall be registered with Regulatory Authorities by July end Model Regulations issued by the Government

Ending the nine year long wait, regulation of real estate sector involving over 76,000 companies across the country becomes a reality from May 1, 2017 with the Real Estate (Regulation & Development) Act, 2016 coming into force.

With all the 92 Sections of the Act coming into effect, developers shall get all the ongoing projects that have not received Completion Certificate and the new projects registered with Regulatory Authorities within three months i.e. by July end. This enables the buyers to enforce their rights and seek redressal of grievances after such registration.

Ahead of the Act coming into force, Ministry of Housing & Urban Poverty Alleviation has formulated and circulated Model Real Estate Regulations for adoption by the Regulatory Authorities in the States/UTs. Under these Regulations, developers are required to display sanctioned plans and layout plans of at least 3 feet X 2 feet size at all marketing offices, other offices where properties are sold, all branch offices and head office of the promoters in addition to the site of project.

Some of the major provisions of the Act, besides mandatory registration of projects and Real Estate Agents include:

1. Depositing 70% of the funds collected from buyers in a separate bank account in case of new projects and 70% of unused funds in case of ongoing projects;
2. Projects with plot size of minimum 500 sq.mt or 8 apartments shall be registered with Regulatory Authorities;
3. Both developers and buyers to pay the same penal interest of SBI's Marginal Cost of Lending Rate plus 2% in case of delays;
4. Liability of developers for structural defects for five years; and
5. Imprisonment of up to three years for developers and up to one year in case of agents and buyers for violation of orders of Appellate Tribunals and Regulatory Authorities.

Deemed consideration for transfer of unquoted shares under section 50CA

A new section 50CA of the Income Tax Act which was introduced during the year states that where the consideration on transfer of a capital asset, being shares of a company (other than quoted share), is less than the fair market value (FMV), then the FMV shall be deemed to be the full value of consideration for computing due taxes. This will be effective from Assessment Year 2018–19 (effective Financial Year 2017–18).

This new section 50CA targets on shares of companies (other than quoted shares) that are transferred for lesser value than the FMV. While there are many internationally accepted methods of valuation, one is unsure which one to apply for the current section while determining FMV. However, assessees may get some indication on the valuation of shares from

EDITORS NOTE

Dear Readers, this 12th edition, Features Real Estate Act, unquoted shares in Income Tax. Impact of GST on E-Commerce.

As usual, expecting your valuable suggestions for improving in order to make it more relevant and useful.

We thank all of you for the encouraging feedback.

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TAX DUE DATES - MAY 2017

Monthly Compliances		
Sl. No	Particulars	Due Date
1	Payment of Service Tax	06-May-2017
2	TDS / TCS Payment/Remittance	07-May-2017
3	PF Payment	15-May-2017
4	VAT Monthly Payment/Monthly Return	20-May-2017
5	ESIC Payment	21-May-2017
6	PF Return	25-May-2017
7	Certificate of tax deducted at source to employees in respect of salary paid and tax deducted during 2016-17	31-May-2017

Half yearly Compliances		
Sl. No	Particulars	Due Date
1	ESI Half Yearly Return for period -October 2016 to March 2017	12-May-2017

Annual Compliances		
Sl. No	Particulars	Due Date
1	Filing of Annual Return of LLP to ROC in Form- 11	30-May-2017





Rule 11UA, which is prescribed for identifying value under section 56(2).

On the other hand, for transactions undertaken at less than the FMV, the transferee may be additionally taxed under the new section 56(2)(x) on the ground that he/ she has understated the purchase consideration. Thus, the above mechanism may lead to dual taxation of the same consideration, that is, the difference between the FMV and the declared consideration in the hands of the two taxpayers, the transferor and transferee.

Further, there is no provision for reference to a valuation officer in case of any dispute as provided for in similar sections, such as sections 43CA and 50C. Hence, this might lead to several tax litigations without resolution unless a similar clause is inserted or the rules are made unambiguous.

Another important aspect is that the section only applies to transfer of shares other than the quoted shares. The term "Quoted Shares" has been defined as "the shares quoted on any recognized stock exchange with regularity from time to time, where the quotation of such share is based on the current transaction made in the ordinary course of business."

Another point to be noted in this new section is that while the seller pays capital gains tax on the FMV, the FMV may not be available as cost of acquisition for the buyer. This may be damaging, especially in case of intragroup share transfers wherein one entity pays capital gains tax on the FMV without the corresponding cost base being available to the buyer entity.

In summary, this new provision with its ambiguities may end up taxing several genuine transactions at different values than the consideration actually received by the transferor.

CORPORATE LAW

Analysis of appointment of Key Managerial Personnel **APPOINTMENT OF KEY MANAGERIAL PERSONNEL (KMP)** **(Section 203 of the Companies Act 2013)**

Mandatory appointments

This provision in sub section (1) stipulates mandatory having of certain Key Managerial Personnel in a company and if one or more such personnel are not in place, the company needs to appoint him/them. They are MD or CEO or manager and in their absence a WTD, CS and CFO. As can be seen that they are covered under definition of KMP in terms of section 2(51) of the Companies Act 2013, however, a prescribed officer of the Government is not covered.

It is to be noted here that the KMP should be "whole- time" and not part time.

Not all company are mandated to have said KMP but only those companies which belong to such class/es of companies as may be prescribed by the Central Government.

As per Rules 8 and 8 A of Companies (Appointment and Remuneration of Managerial Personnel) Rules 2014, every listed company and every other public company having paid up share capital of Rs 10 crores or more shall have whole time KMP. Moreover, a company other than aforesaid companies which has a paid-up share capital of Rs 5 crores or more shall have a whole-time company secretary.

Chairperson / MD/CEO

The first proviso lays down that, after the commencement of the new Companies Act, at the same time:–

1. An individual shall not be appointed or reappointed, as the chairperson of the company, in pursuance of the articles of association of the company,
2. As well as be appointed or reappointed as MD or CEO of the company.

It transpires from this provision that where an individual is holding the position as a chairperson of a company in that case he or she is restricted to hold the position as MD or CEO of that company. The purpose behind this provision is that an

individual should not hold, at the same time, the dual positions of chairperson and MD/ CEO. This is a usual norm of good corporate governance.

Exceptions

There are however exceptions to this restriction, given in first proviso, in respect of cases where:–

1. The articles of association of such a company provide otherwise, or
2. The company does not carry multiple businesses.

In case of the first exception, a company is free to provide in its articles that an individual is permitted to hold the dual positions of



chairperson and MD/CEO at the same time whether it has single or multiple business/es.

In case of the second exception, which is the alternative provision, it can be interpreted that where a company has a single business, it can have one individual holding, at the same time, the dual positions of chairperson and MD/CEO.

Hence where the company does carry multiple businesses then it is required to have two individuals, one holding the position of chairperson and the other holding the position of MD/CEO.

However, the second proviso lays down that nothing contained in the first proviso shall apply, to:—

1. Such class of companies engaged in multiple businesses, and
2. Which has appointed one or more Chief Executive Officers for each such business.

Appointment through Board resolution

This sub section (2) lays down that every whole-time KMP of a company shall be appointed:—

1. By means of a resolution of the Board, and
2. The said resolution shall contain the terms and conditions of the appointment including the remuneration of the KMP.

From the foregoing it is clear that there cannot be any circulatory resolution of the directors as permitted in terms of section 175 of the Companies Act 2013, for appointment of KMPs. Thus, in a duly convened and conducted board meeting the directors present thereat should deliberate and give their approval to the appointment. The details of the terms and conditions which include remuneration of the KMP should also be deliberated by the Board, decided and the same should be part of the appointing Board resolution.

Subsidiary

This sub section (3) restricts a KMP from holding office in more than one company except in one of its subsidiary companies. If a whole time KMP is permitted to hold an office in the subsidiary company, it appears to be reasonable to interpret that the other office can be of KMP or any other office. Pertinently it is not necessary that the said subsidiary should be a wholly owned subsidiary; however, for such holding of offices requisite Board meeting resolutions of the holding as well as subsidiary company are preferred.

Holding another directorship

The first proviso lays down that the KMP can hold the position of a director of any company with the due permission of the Board which preferably should be by way of passing a resolution at a meeting, although this has not been specifically provided here. It appears from this, that the KMP can only hold one directorship and not more. This, of course, is in addition to his appointment in the subsidiary.

Appoint or employ a managing director who already holds position

The third proviso which is in line with section 316 of the erstwhile Companies Act 1956 lays down that a company may appoint or employ a person as its MD:—

1. If he is the MD or manager of one, and of not more than one, other company, and
2. such appointment or employment is made or approved by a resolution passed at a meeting of the Board of the company with the consent of all the directors present at the meeting and of which Board meeting, and of the resolution to be moved thereat, specific notice has been given to all the directors then in India.

From this provision it is clear that, in this case, there cannot be circulatory resolution of the directors as laid down in section 175 of the Companies Act 2013, and thus in terms of these provisions, in a duly convened and conducted board meeting the directors present thereat should deliberate and give their approval to the said appointment or employment.

Company cannot have a managing director and a manager

Pertinently, section 196 (1) of the Companies Act 2013 also mandates that a company cannot appoint or employ, at the same time, a managing director and a manager.

Vacation of office

As per this sub section (4), where the office of any whole time KMP is vacated, the resulting vacancy shall have to be filled-up by the Board of directors at its meeting within a period of six months from the date of such vacancy. It may be noted that the vacancy can be for any reason whatsoever.

Penal Provisions

This is a penal provision in sub section (5) stating that if a company contravenes the provisions of this section:—

1. The company shall be punishable with fine, minimum of which is one lakh rupees and maximum of which is five lakh rupees, and
2. Every director and key managerial personnel of the company who is in default shall be punishable with fine which may extend to fifty thousand rupees and where the contravention is a continuing one, with a further fine which may extend to one thousand rupees for every day after the first during which the contravention continues.



Impact of GST on ECommerce

In GST, "electronic commerce" has been defined to mean the supply of goods or services or both, including digital products over digital or electronic network. The term "electronic commerce operator" has been defined to mean any person who owns, operates or manages digital or electronic facility or platform for electronic commerce. These definitions include each of the above discussed models. Certain specific provisions have been introduced in GST for ecommerce.

SERVICE AGGREGATORS

It has been provided that notified categories of service aggregators shall be liable to pay tax on services provided through the aggregator. This in effect means that the entire tax liability in case of service aggregator model of ecommerce shall have to be discharged by the aggregator, instead of the actual service provider. This will ensure that the tax is paid in full, and will also considerably reduce the administration hassles for government.

It has been further provided that in case such operator does not have a physical presence in the taxable territory (i.e. India except Jammu and Kashmir), any person representing such operator for any purpose in the taxable territory shall be liable.

Further, where the electronic commerce operator does not have such representative, it shall appoint a person in the taxable territory for the purpose.

Such provisions have been made to ensure that aggregators which operate from other countries do not escape tax.

It may be noted here that two types of services are involved in the service aggregator model – one is the service rendered by various service providers to the customers through the aggregator, other is the service rendered by the aggregator by way of provision of platform or facility. The above discussed provision the aggregator shall also be liable for tax on its service as an aggregator.

COLLECTION OF TAX AT SOURCES

This provision is applicable to all electronic commerce operators where the consideration for the supply is collected by operator, except notified service aggregators and agents.

This provision is applicable to the ecommerce operators working under the marketplace model. The operator shall be liable to deduct tax at source as and when it remits the payments received from the customers to the respective suppliers.

ONLINE INFORMATION AND DATABASE ACCESS OR RETRIEVAL (OIDAR SERVICE)

As a general rule, the place of provision of such services shall be location of the recipient of services. However, the recipient shall be deemed to be located in the taxable territory, if any two of the following conditions are satisfied:

Address given by the recipient through internet is in taxable territory

The card which is used for settlement of payment has been issued in taxable territory

IP address of the device used by the recipient is in taxable territory

Location of the fixed landline through which service is received by the recipient is in taxable territory. etc.,

In case OIDAR services are supplied by a person located in nontaxable territory to a nontaxable online recipient, the supplier of services shall be liable for payment of tax. He shall take a single registration under the Simplified Registration Scheme (yet to be notified).

A nontaxable online recipient means any

Government, local authority, governmental authority, an individual or any other person

not registered and

receiving OIDAR services

in relation to any purpose other than commerce, industry or any other business or profession

However, it shall not be deemed so, when such intermediary satisfies the following conditions:

The invoice issued by the intermediary clearly identifies the service in question and its supplier in the non taxable territory

The intermediary does not collect or process payment in any manner, nor is responsible for the payment between the parties

The intermediary involved in the supply does not authorize delivery

General terms and conditions of the supply are not set by the intermediary.

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