

Tax / GST treatment to be given in case of cancelled flats

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GST compliance for real estate has always been a nightmare considering the frequent changes in the rates, tax structure, GST returns to be filed, so on and so forth. Assessee to be tax compliant has to look for ways and means to make the tax compliances easier. An attempt was made to simplify the GST compliance relating to real estate and to reduce the GST cost to the ultimate customer by way of introducing a new scheme of rate. But the new scheme also does not look simple.

GST applicability on the customer advances received for the sale of constructed apartment was always a puzzle with the GST rates, deduction towards land, availability of input tax credit etc.,. Added to this confusion is the GST treatment for cancelled flats.

In this article, an attempt is made to simplify the understanding of the tax/GST treatment to be given at the time of flat cancellations by the customers in various scenarios as listed below -

Scenario I - Flat booked by the customer in service tax regime and cancelled in GST regime

Scenario II - Flat booked by the customer in GST regime (July'17 to Mar'18) and is cancelled in FY 18-19 (before Sep'18)

Scenario III - Flat booked by the customer in GST regime (July'17 to Mar'18) and is cancelled in FY 18-19 (after Sep'18)

Scenario IV - Flat booked by the customer in FY 18-19 and is cancelled in FY 19-20 (assuming new scheme (GST @5%) is opted by the builder

Let us discuss the tax treatment to be given in each of the scenario in detail -

Scenario I - Flat booked by the customer in service tax regime and cancelled in GST regime

Facts

A flat is booked by the customer during the service tax regime and service tax is paid on the amount received in the service tax regime. Later on, the same flat is cancelled by the customer in the GST regime and the amount received from the customer is refunded along with service tax.

Analysis

- The service tax paid on such cancelled flats neither can be adjusted against the consequent liability under GST nor the taxes paid can be availed as credit in GST regime. As the taxes paid are refunded to the customer and the ultimate tax burden is on the builder, the only option available to the builder is to apply for refund of the taxes paid on such cancelled flats.

- As per Sec. 142(5) of CGST Act, 2017, any refund claim of taxes/duty paid under the earlier law, is made by the assessee on account of services not provided, then the same shall be disposed of in accordance with the provisions of earlier law itself and the refund shall be paid in cash only.
- Under earlier law, provisions of Sec.11B of Central Excise Act, 1944 were made applicable for refund of any service tax vide Sec. 83 of the Finance Act, 1994. Sec. 11B specifies the time limit of 1 year from the relevant date for claiming refund and the relevant date to be considered is the date of payment of taxes.
- However, in this case, the date of cancellation of the flat by the customer shall be considered as the relevant date for calculating the time limit of 1 year for refund, as the event that led to refund of taxes is the cancellation by the customer. If cancellation would not have happened, the refund claim would not have arisen at all. Similar view was taken in the following judicial pronouncements –
- CCE, Pune Vs. Ispat Profiles India Ltd. 2007(220) E.L.T. 218 (Tri. Mumbai) SS Agro Industries Vs. Commr. of Cus., Air Cargo (Export), New Delhi – 2014 (309) E.L.T. 334 (Tri. - Del.)

Conclusion

Hence, if any flat booked in service tax regime, on which service tax was paid on the consideration received, is cancelled in GST regime and the entire amount along with taxes is refunded to the customer then the builder can go for refund of the service tax paid within 1 year from the date of cancellation by the customer. However, if the tax paid is not refunded to the customer, then builder cannot go for refund of the same as the customer has borne the ultimate tax burden. In such a case the customer can claim the refund.

Scenario II - Flat booked by the customer in GST regime (July'17 to Mar'18) and is cancelled in FY 18-19 (before Sep'18)

Facts

A flat is booked by the customer in the period starting from July'17 to March'18 and is cancelled in FY 18-19 (before Sep'18) and the amount received from the customer is refunded along with GST.

Analysis

- In accordance with sec.34 of the CGST Act, 2017, where there is any deficiency in the services supplied, then the supplier can issue a credit note and adjust the amount of GST mentioned in the credit note against the subsequent GST liability by disclosing the credit note in the GST returns accordingly. However, such credit note for any financial year cannot be issued later than September month of the following financial year or the date of furnishing of the annual returns for that particular financial year, whichever is earlier.
- For example, the credit note pertaining to the invoice issued in FY 17-18, cannot be issued after September'18 and the taxes paid cannot be adjusted. (Assuming the annual returns for FY 17-18 is not filed till September'18).

Disclosure in GST returns

In GSTR-3B - The subsequent month's liability has to be reduced to the extent of credit note (both

taxable value and the taxes) and the net amount shall be disclosed as current month's supplies in table-3 of GSTR 3B return.

In GSTR-1 - If the customer is unregistered, then the value of the credit note shall be reduced from the subsequent month's liability and the net amount shall be disclosed as B2C supplies in table -7 of GSTR-1 return. The credit note issued need not be disclosed separately. However, if the customer is registered, then the credit note issued need not be reduced from the subsequent month's liability in return and shall be disclosed separately in table 9B of GSTR-1.

Conclusion

Hence, if flat is booked in FY 17-18 (from Jul'17 to Mar'18) and GST is paid on the consideration received, then on subsequent cancellation of the booking in FY 18-2019 (before September'18) where the entire amount along with GST is refunded to the customer, then the GST paid can be adjusted against the subsequent liability by issuing a credit note.

Scenario III - Flat booked by the customer in GST regime (July'17 to Mar'18) and is cancelled in FY 18-19 (after Sep'18)

As discussed above, the credit note for the FY 17-18 cannot be issued beyond Sep'18 and hence the taxes paid cannot be adjusted.

Note: Though there is no provision in the law, the GSTIN portal allowed credit notes for the FY 17-18 to be uploaded in the GSTR-1 upto 31st March 2019. One more example, wherein the GST provisions and the GSTIN portal are not in line with each other.

Conclusion

Hence, flat is booked in FY 17-18 (from Jul'17 to Mar'18) and GST is paid on the consideration received, then on subsequent cancellation in FY 18-19 (after Sep'18) the entire amount along with GST is refunded to the customer, the GST paid cannot be adjusted against the subsequent liability by issuing a credit note. The only option left with the builder is to go for refund of the taxes paid under GST within 2 years from the date of cancellation of flat by the customer as per Sec. 54 of the CGST Act, 2017, on the ground that the incidence of tax has been borne by the builder himself and the same is not passed on to the customer.

Scenario IV Flat booked by the customer in FY 18-19 and is cancelled in FY 19-20 (assuming new scheme (GST @5%) is opted by the builder

Facts

Flat booked by the customer in FY 18-19 is cancelled by the in FY 19-20 and the amount received from the customer is refunded along with GST. Builder has opted to pay GST @5% in cash from 1st April 2019 under the new scheme.

Analysis

- Credit note provisions discussed above will be applicable in this case as well. The builder can issue a credit note up to Sep'19 and adjust the taxable value and the taxes paid @12% from

the subsequent month's liability and pay GST @5% in cash on the balance amount.

- Same treatment was explained in the FAQ No. 22 released for real estate by CBIC dated 7th May 2019. (F. No. 354/32/2019 - TRU)

Illustration:

All the above mentioned scenarios can be explained with the help of the following illustration:

Customer	Flat booking date	Flat cancelled date
A	11th June 2016	10th November 2017
B	2nd August 2017	16th April 2018
C	10th December 2017	11th November 2018
D	3rd March 2018	31st December 2018
E	10th October 2018	3rd May 2019

Treatment to be given -

Customer	Action to be taken	Reference
A	As the service tax paid earlier cannot be adjusted against the GST liability, apply for refund of the service tax paid within 1 year from the date of cancellation.	Sec. 142(5) of the CGST Act 2017 & Sec. 11B of the Central Excise Act, 1944.
B	Issue a credit note in the month of Apr'18 and reduce the taxes to the extent of credit note from April'18 liability.	Sec. 34(1) of the CGST Act, 2017
C	Credit note cannot be issued. Apply for refund for the taxes paid within 2 years from the date of cancellation	Sec. 34(1) & 54 of the CGST Act, 2017
D	Credit note cannot be issued. Apply for refund for the taxes paid within 2 years from the date of cancellation	Sec. 34(1) & 54 of the CGST Act, 2017
E	Issue a credit note in the month of Apr'18 and reduce the taxes to the extent of credit note from April'18 liability.	Sec. 34(1) of the CGST Act, 2017 & FAQ No. 22 issued by the CBIC.

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