



Goods and Service Tax on Real Estate Transactions (w.e.f. April 01, 2019)

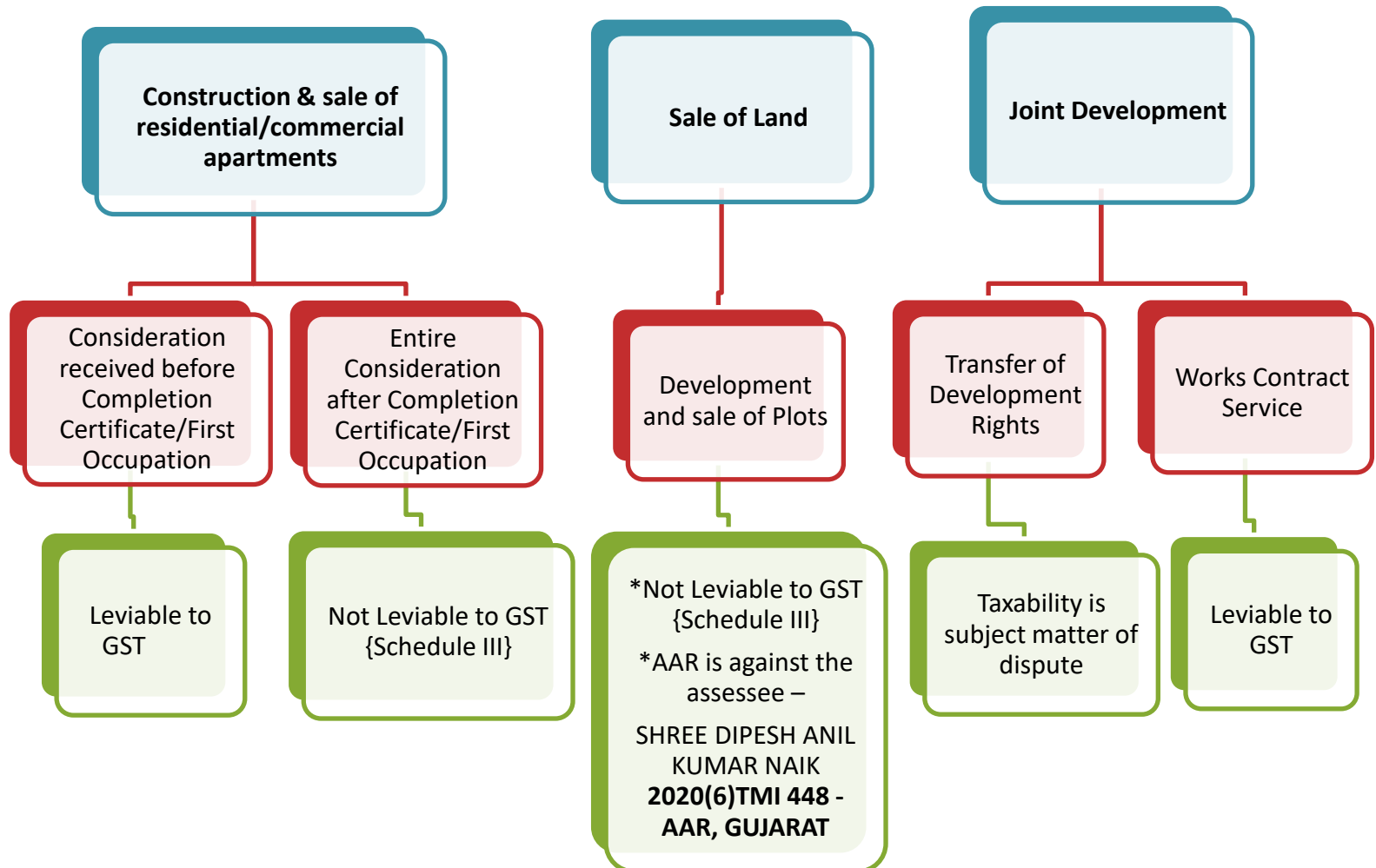
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Introduction

- ✓ This industry is very unique and has its peculiar features not applicable to any other industry
- ✓ Indirect tax implications on real estate has been a tricky issue ever since its presence in the country.
- ✓ In erstwhile taxation regime builders/contractors were required to comply with the provisions of Finance Act, 1994 (i.e. Service Tax) and relevant State VAT Acts.
- ✓ W.e.f. 01.07.2017, such taxes have been substituted with one single tax namely Goods and Services Tax (“GST”)



Real Estate Transactions



Relevant Provisions

Schedule II [Section 7]

Activities to be treated as “Supply of Goods” or “Supply of Services”

5. Following shall be treated as supply of services;

(a)

(b) *construction of a complex, building, civil structure or a part thereof, including a complex or building intended for sale to a buyer, wholly or partly, except where the entire consideration has been received after issuance of completion certificate, where required, by the competent authority or after its first occupation, whichever is earlier.*

6. Composite supply

The following composite supplies shall be treated as a “supply of services”;

(a) *works contract as defined in clause (119) of section 2;*

Relevant Provisions

Section 2(119)

“works contract” means a contract for **building**, construction, **fabrication**, completion, erection, installation, fitting out, improvement, **modification**, repair, maintenance, renovation, alteration or commissioning of any immovable property wherein transfer of property in goods (whether as goods or in some other form) is involved in the execution of such contract;

Notes : (a) Three activities Building, Fabrication and modification added

(b) Only of any immovable property

(c) Transfer of property in goods and not consumption of material

Schedule III [Section 7]

Activities treated neither as “Supply of Goods” or “Supply of Services”

5. Sale of land and, subject to clause (b) of paragraph 5 of Schedule II, sale of building.

Scope of this Entry ?

Whether partially constructed building subject to GST?

Projects –New Scheme

Real Estate Project (**REC**)
[Commercial Apartments >15%]

Residential Real Estate Project
(**RREC**)
[Commercial Apartments <15%]

Fully
Commercial

Mixed
Project

Fully
Residential

Mixed
Project

Relevant Definitions

Project

- The term “**project**” shall mean a **Real Estate Project** or a **Residential Real Estate Project**. – N.No. 03/2019 – CT(R) dt. 29.03.2019

Real Estate Project (REP)

- The term “Real Estate Project (REP)” shall have the same meaning as assigned to it in clause (zn) under section 2 of the Real Estate (Regulation and Development) Act, 2016 (16 of 2017). - N.No. 03/2019 – CT(R)
- The said definition in **Clause (zn)** reads as under:
- “**Real Estate Project**” means the development of a building or a building consisting of apartments, or converting an existing building or a part thereof into apartments, or the development of land into plots or apartment, as the case may be, **for the purposes of selling all or some of the said apartments** or plots or building, as the case may be, and includes the common areas, the development works, all improvements and structures thereon, and all easement, rights and appurtenances belonging thereto;

Relevant Definitions

Residential Real Estate Project (RREP)

- The term “Residential Real Estate Project (RREP)” shall mean a REP in which the **carpet area of the commercial apartments** is not **more than 15 per cent. of the total carpet area (or 17.6% of residential area)** of all the apartments in the REP; - *N.No. 03/2019*

Carpet area

- The term “carpet area” shall have the same meaning as assigned to it clause (k) under section 2 of the Real Estate (Regulation and Development) Act, 2016 (16 of 2017). - *N.No. 03/2019*
- The said definition in Clause (k) reads as under:
- ***“Carpet Area” means the net usable floor area of an apartment, excluding the area covered by the external walls, areas under services shafts, exclusive balcony or verandah area and exclusive open terrace area, but includes the area covered by the internal partition walls of the apartment.***

Relevant Definitions

Apartment - N.No. 03/2019

- The term “**apartment**” shall have the same meaning as assigned to it in clause (e) of section 2 of the Real Estate (Regulation and Development) Act, 2016 (16 of 2016);
- The said definition in Clause (e) read as under:
- *“Apartment” whether called **block, chamber, dwelling unit, flat, office, showroom, shop, godown, premises, suit, tenement, unit or by any other name**, means a separate and self-contained part of any immovable property, including one or more rooms or enclosed spaces, located on one or more floors or any part thereof, in a building or on a plot of land, **used or intended to be used for any residential or commercial use** such as residence, office, shop, showroom or godown or for carrying on any business, occupation, profession, or trade, or for any other type of use ancillary to the purpose specified;*

Residential Apartment - N.No. 03/2019

- The Term “Residential apartment” shall mean an apartment intended for residential use as declared to the Real Estate Regulatory Authority or to competent authority;

Commercial Apartment - N.No. 03/2019

“Commercial apartment” shall mean an apartment other than a residential apartment.

Need of
classification

Concessional
Rate of GST

- Project into REP & RREP
- Apartments in to Residential & Commercial

- **Commercial Apartment taxable @12% in REP**
- **Commercial Apartment taxable @5% in RREP**

Three activities are undertaken by Promoter



Supply of Goods

Supply of Services

Sale of Land/Undivided
portion of land

Sale of land is out of the purview of GST; therefore; value of the same to be reduced for charging GST.

Land Value:- Deemed Deduction

Notification No-11/2017 [CTR] dated 28.06.2017

Relevant Extract is as under:

*“..... the value of such transfer of land or undivided share of land, as the case may be, in such supply shall be deemed to be **one third** of the **total amount** charged for such supply”*

Total Amount” means sum total of

- consideration charged for construction service; **and**
- amount charged for transfer of land or undivided share of land, as the case may be.

*ISSUE: 1.Cause of worry for metro where cost of land is as high as 80 % to 90%
2.CAN A PROMOTER TAKE DEDUCTION OF ACTUAL VALUE OF LAND.
3. IS THERE ANY OTHER WAY TO DEAL WITH THE SITUATION*

- ❖ 1/3rd deduction might be sufficient if project is in suburban/rural areas.
- ❖ In metro cities actual land value is almost 60-90%.
- ❖ Deemed deduction of 1/3rd value towards land value **for all tax payers** is unreasonable, arbitrary, violates principles of equity [i.e. every person who is equal in the eyes of the laws shall be treated equally] laid down under Article 14 of the Constitution as it treats 'unequal treated as equal'.
- ❖ Deeming value of land, amounts to taxing the land component
- ❖ Sale of land is out of purview of GST; however; vide this deeming valuation land value is being taxed indirectly.
- ❖ 1/3rd value can be challenged as such provisions are in **violation of the Constitution of India and can only be applicable where no bifurcation towards construction charges and land is available.**

CAN A Promoter TAKE DEDUCTION OF ACTUAL VALUE OF LAND BY ENTERING SEPARATE CONTRACTS FOR SALE OF LAND/UNDIVIDED PORTION OF LAND AND CONSTRUCTION SERVICES

- ❖ Deemed value of 1/3rd of **total amount** charged is towards land/undivided portion of land.
- ❖ Total Amount means sum total of amount charged for construction services **and** amount charged for transfer of land/undivided share of land
- ❖ As per GST provisions supply under above arrangement shall be considered single supply which is squarely covered under Paragraph 5 (b) of Schedule II to CGST Act, 2017.
- ❖ Advance ruling in case of **M/S. KARA PROPERTY VENTURES LLP (2019 (3) TMI 924 - AUTHORITY FOR ADVANCE RULING, TAMILNADU) dated 21.01.2019**, Hon'ble authority held that though there exists separate agreement for sale of land/undivided share land, the GST shall be paid on the total value including the amount charged towards land thereby implying that **deemed deduction of 1/3rd is mandatory in all cases and actual value of land is to be ignored.**
- ❖ Ruling binding only on applicant and not general.

GST Rates

Period	Up to 31.03.2019	
Nature	Affordable Residential Apartments	Other Residential /Commercial Apartments
GST Rate	12%	18%
Land Deduction	1/3 rd	1/3 rd
<u>Effective Rate of GST</u>	<u>8%</u>	<u>12%</u>
N.N 11/2017 CT(R)	3(ie)	3(if)

In case of On-going projects **[where Promoter has availed option to pay tax as per old rates]** above rate shall be applicable even after 01.04.2019.

Where no option exercised/New Projects

Period	W.e.f. 01.04.2019			
Nature	Affordable Residential Apartments	Other Residential Apartments	Commercial Apartments [RREP]	Commercial Apartments [REP]
GST Rate	1.5%	7.5%	7.5%	18%
Land Deduction	1/3rd	1/3rd	1/3rd	1/3rd
<u>Effective Rate of GST</u>	<u>1%</u>	<u>5%</u>	<u>5%</u>	<u>12%</u>
N.N 11/2017 CT(R)	3(i)(ic)	3(ia)(id)	3(ib)	3(if)

Affordable Residential Apartment

- A. A residential apartment, having carpet area not exceeding 60 square meter (646 Sq. Feet) in metropolitan cities or 90 square meter (969 Sq. Feet) in cities or towns other than metropolitan cities **and** for which the gross amount charged is not more than forty-five lakhs rupees.

For the purpose of this clause, -

Metropolitan cities are *Bengaluru, Chennai, Delhi NCR (limited to Delhi, Noida, Greater Noida, Ghaziabad, Gurgaon, Faridabad), Hyderabad, Kolkata and Mumbai (whole of MMR) with their respective geographical limits prescribed by an order issued by the Central or State Government in this regard.*

Gross amount shall be the sum total of:

- ✓ Amount Charged for Construction Services and
- ✓ Amount charged for the transfer of land or undivided share of land, as the case may be including by way of lease or sub lease; and
- ✓ Any other amount charged by the promoter from the buyer of the apartment including preferential location charges, development charges, parking charges, common facility charges etc.

Issue: Whether charges like **EDC and IDC** (payable to the authorities and not charged by promoter for his supplies) shall be considered as part of composite supply and shall be liable to tax at the concessional rate of tax i.e. 1.5% or 5% as the case may be?

- B. An apartment being constructed in an ongoing project [in respect of which the promoter has not exercised option to pay tax on old rates] under the existing central and state housing schemes shall be covered in new scheme.

Reduced Rates- Option or Compulsion

Ongoing Residential
Projects

Optional

New Residential
Projects

Compulsory

Whether 5% GST [with NO ITC] can be levied on Commercial Apartments in REP?

No, GST to be levied @12% [Entry No 3(if) N.N 11/2017 CT(R)]

Conditions for Reduced Rates

- No ITC available and GST needs to be paid in **CASH only**.
- ITC not availed to be reported in GSTR-3B.
- In ongoing projects, where promoter opts for reduced rates, ITC needs to be reversed.
- 80% value of Inputs and Input Services to be procured from **REGISTERED Persons**. However Cement (100%) to be procured from registered person. Otherwise, RCM.
- Capital goods (100%) to be procured from registered person.

80% value of Inputs and Input Services to be procured from REGISTERED Persons.

❑ Why this Condition:

To safeguard revenue. As ITC is not available therefore; Promoter will procure from unregistered persons.

For e.g.

Particulars	Registered Suppliers	Un-Registered Suppliers
Purchases	1,00,000	1,00,000
GST	18,000	-
Total	1,18,000	1,00,000
Government Revenue	18,000	-

❑ What If this condition not met:

Tax under RCM to be paid by Promoter :

- (a) on supplies of inputs and input services which fall short of 80%,
 - (b) on supplies of cement from unregistered persons, and
 - (c) on supplies of capital goods from unregistered persons
- [Notification **07/2019 – CT (R) dated 29.03.2019**]

❑ Following shall not to be considered:

- ✓ Services by way of grant of development rights,
- ✓ Long term lease of land or Floor Space Index (FSI),
- ✓ Electricity
- ✓ High speed diesel, motor spirit, natural gas
- ✓ Capital Goods

- ❑ Where Cement is received from unregistered person, the promoter is mandatorily required to pay tax on such cement under RCM.

For e.g.

Particulars	Supplier	Percentage %
Purchase of Input/Input Services	Registered	60
<u>Cement</u>	Un-registered	10
Other Input/Input Services	Un-registered	30
Promotor shall be liable to pay GST under RCM		<ul style="list-style-type: none"> ✓ Firstly, On Cement - 10% ✓ Then on balance 10% w.r.t input/input services from unregistered suppliers

Particulars	Supplier	Percentage %
Purchase of Input/Input Services	Registered	60
Cement	Un-registered	25
Other Input/Input Services	Un-registered	15
Promotor shall be liable to pay GST under RCM		<ul style="list-style-type: none"> ✓ On Cement - 25% even if limit of 80% crosses.

- ❑ Where **tax is paid** on inputs and input services **under reverse charge**, it shall be **deemed that same have been procured from registered persons**.

- ❑ **Project wise** accounts of inward supplies from registered as well as unregistered suppliers needs to be maintained.

- ❑ **Details of shortfall** needs to be submitted electronically by end of quarter following the FY.

Time of Supply / GST Rates - RCM

Particulars	Input/Input Services	Cement	Capital Goods
Period of Calculation	Financial Year or part of FY till date of completion certificate/First Occupation	Monthly	Monthly
Time of Supply	Not Later than month of <u>June</u> following the end of FY	Month in which cement received	<p>Earlier of following:</p> <ul style="list-style-type: none"> ✓ Date of receipt of goods ✓ Date of payment in books/Bank Statement ✓ Date immediately following 30 days from date of invoice <p>Entry in books if not determinable as per above.</p>
GST Rate	18%	28%	Rate of respective goods
Relevant Notification	<p>Entry 39, N.N 11/2017 – CT (R) inserted vide N.N 03/2019 – CT (R)</p> <p>Entry 452Q, N.N 01/2017 – CT (R) inserted vide N.N 08/2019 – CT (R)</p>	Entry 18, Schedule IV of N.N 01/2017 CT (R)	N.N 01/2017 CT (R)

Important aspects of 80% Limit

Import of Goods

Import of goods is not specifically mentioned under RCM; however since GST has been paid at the time of filing BE; therefore; the same to be considered from registered person.

Composition dealers

Composition dealers are registered persons; therefore; to be covered under 80% limit.

Whether Exempted supplies to be considered in 80% limit

80% value of input and input services to be received from registered suppliers. Further, input/input service shall include exempted goods/services.

Excess procurement

Excess procurement [more than 80%] from registered suppliers in a year cannot be adjusted against shortfall of another year as period of calculation of shortfall is on yearly basis.

Relevant Definitions:

Section 2(59)

“input” means any goods other than **capital goods** used or intended to be used by a supplier in the course or furtherance of business;

Section 2(60)

“input service” means any service used or intended to be used by a supplier in the course or furtherance of business;

Important aspects of 80% Limit

Compliance of 80% limit in REP [Commercial Apartments>15%]

FAQ (Part II) on real estate dated 14.05.2019

Sl. No.	Question	Answer
5.	<p>In case of a Real Estate Project, comprising of Residential as well as Commercial portion (more than 15%), how is the minimum procurement limit of 80% to be tested, evaluated and complied with where the Project has single RERA Registration and a single GST Registration and it is not practically feasible to get separate registrations due to peculiar nature of building(s)?</p>	<p>The promoter shall apportion and account for the procurements for residential and commercial portion <u>on the basis of the ratio of the carpet area of the residential and commercial apartments</u> in the project.</p>

Illustration:

A promoter has procured following goods and services [other than development rights, long term lease of land FSI, electricity, high speed diesel, motor spirit, natural gas], for construction of a **residential real estate project** [Commercial Apartments <15%] during a financial year.

Particulars	Supplier	Percentage %	Amount(Rs)
Purchase of Input/Input Services	Registered	20	200
Purchases from composition dealers	Registered	10	100
Input/Input Services where tax paid under RCM.	Deemed- Registered	10	100
Import of Goods [GST paid]	Deemed- Registered	10	100
Cement	Un-registered	15	150
Other Input/Input Services including Exempt Supplies	Un-registered	35	350
Total		100	1000
Promotor Liability			Cement [150@28% = 42] Plus Other Supplies [150@18%=27]

Illustration:

A promoter has procured following goods and services [other than development rights, long term lease of land FSI, electricity, high speed diesel, motor spirit, natural gas], for construction of a **real estate project** [Commercial Apartments>15%] say carpet area of **commercial apartments is 600 sq. ft** and **residential apartments is 400 sq. ft** during a financial year.

Particulars	Supplier	Percentage %	Amount (Commercial+ Residential)	Cost apportion to residential apartments [40%=400/1000*100]
Purchase of Input/Input Services	Registered	20	200	80
Purchases from composition dealers	Registered	10	100	40
Input/Input Services where tax paid under RCM.	Deemed-Registered	10	100	40
Import of Goods [GST paid]	Deemed-Registered	10	100	40
Cement	Un-registered	15	150	60
Other Input/Input Services including Exempt Supplies	Un-registered	35	350	140
Total		100	1000	400
Promotor Liability			Cement [60@28% = 16.80] Plus Other Supplies [60@18%=10.80]	

Development & Sale of Plots

Consideration charged towards land & development charges separately

Sale during development of plots

Sale after development of plots

Supply of land per se does not fall under clause 5 of schedule II as no building /complex is being constructed, rather **developments activities is being carried for self & developed plots sold to buyers.**

Sale of Land not leviable to GST
Schedule III

Sale of Land not leviable to GST
Schedule III

GST Implication on Collaboration Agreements

Collaboration Agreements	Most Common type of transaction in real estate
Types	<ul style="list-style-type: none">➤ Area Sharing➤ Revenue Sharing➤ Both
Transactions covered	<ul style="list-style-type: none">➤ Transfer of Development Rights by landowner to the Promoter➤ Construction of units by Promoter for the landowner (in case of area sharing and mix arrangements)➤ Sale of units by the Promoter/landowner (units of its share) to the third parties➤ Payment of consideration on the basis of specified % of revenue earned on sale of units

What is meant by Development Rights-?

- Permission given by landowner for development of land/building
- Apart from transfer of physical possession, also authorises the Promoter to:
 - do all such acts/ apply before authorities for development of land/building.
 - create mortgage on the land in order to raise finance
 - advertise the project in such mode as may deem fit to the Promoter
 - sell, allot, lease, license etc. the saleable area and other spaces available in the project
- ***In nutshell landowner gives all its rights over the land and gives full authority to the promoter to enjoy the land in the manner of his choice. For all purposes, therefore, the landowner extinguishes its interest in the land in favor of promoter on execution of collaboration agreement.***

GST Implications on Transfer of Development Rights

<p>Sale of Land</p>	<p>As per clause (5) of Schedule III stipulates that sale of Land shall be treated neither as supply of goods nor supply of services i.e. sale of land is outside the ambit of GST</p>
<p>Is transfer of development rights can be considered as sale of land ?</p>	<ul style="list-style-type: none"> ➤ Land has not been defined GST Law ➤ As per Section 3(a) of the Land Acquisition Act, 1894, <u>benefits arising out of land shall also to be included</u> in the definition of land only. ➤ In case of <u>M/s Chheda Housing Development Corporation v. Bibijan Shaikh Farid [2007 (3) MhLj 402, Bombay High Court]</u>, Hon'ble Bombay High Court held development rights as benefits arising out of land. ➤ The aforesaid judgment was further been followed in the case of Sadoday Builders Private Ltd vs The Jt.Charity Commissioner [W.P NBO.4543 OF 2010]. ➤ Further, in the case of M/s DLF Ltd versus Commissioner of Service Tax, Gurugram [2019 – VIL – 300 – CESTAT – CHD – ST] dated 22.05.2019 and DLF Commercial Projects Corporations Vs Commissioner of Service Tax, Gurugram [2019 – VIL – 299 – CESTAT – CHD – ST] dated 22.05.2019, the Hon'ble Tribunal is of the view that development rights shall be considered as 'benefits arising out of land' and accordingly, shall get covered under the ambit of 'immovable property'. ➤ Transfer of FSI/development rights is benefit arising out of land.

GST Implications on Transfer of Development Rights

Is transfer of development rights can be considered as sale ?

- **Sale has not been defined in GST Law.**
- As per various dictionary meanings/another acts, the term 'sale' means **transfer of ownership or title in a property** from **one person to another** for a consideration. Moreover, in common parlance also, the term 'sale' is construed as 'transfer of ownership' in respect of any goods or property.
- At the time of transferring development rights, the **landowner, generally, transfers all the rights** in such land to the promoter. In other words, after the receipt of development rights, the promoter can exercise all the rights of owner on such land.
- In following **decisions of courts** it is also held that **Development /collaboration agreement is effectively an agreement of sale of land** wherein the landowner transfers all its rights in the land to the developer and also extinguishes all its rights in such land in favour of Developer.
- **Faqir Chand Gulati Versus Uppal Agencies Pvt Ltd [2008 (12) S.T.R. 401 (S.C.)] dated 10.07.2008**
- **Radhe Developers And Ors versus Income Tax Officer [(2008) 113 TTJ Ahd 300] dated 29.06.2007**
- In view of the aforesaid discussion, a conclusion can be drawn that the **transfer of development rights is akin to the sale of land only.**

Development Rights = Benefit arising out of land = Land = Not subjected to GST

Government Intends to Levy GST on Development Rights

Relevant notifications in this regard have been encapsulated hereunder:

Notification No 04/2018 – CT (R) dated 25.01.2018

- **Time of supply** in case of transfer of development rights by landowner and construction services provided by Promoter.

Notification No 04/2019 – CT (R) dated 29.03.2019

- **Conditional exemption** to transfer of development rights [on or after 01.04.2019] w.r.t residential apartments.

Notification No 05/2019 – CT (R) dated 29.03.2019

- **Reverse charge** has been made applicable on the services supplied by way of transfer of development rights.

Notification No 06/2019 – CT (R) dated 29.03.2019

- **Time of supply** in case of development rights/FSI/Long term lease by the promoter.

Liability in case of transfer of development rights/FSI/long term lease of land [for 30 years or more]

Description	On or After 01.04.2019	Before 31.03.2019
Person liable for payment of GST	<p>Promoter under reverse charge <i>[Sr Nos. 5B and 5C of Notification No. 13/2017-CT (R) as inserted vide N.N 05/2019-CT(R) dated 29.03.2019]</i></p>	Provider of Service under forward charge - Landowner
<p style="text-align: center;">Time of Supply</p> <p><i>[where consideration paid in form construction of residential / commercial apartments]</i></p>	<p>Date of completion certificate of project or its first occupation, whichever is earlier</p> <p>[Notification No. 6/2019-CT (R) dated 29-3-2019]</p>	<p>when the Promoter, transfers possession or the right to the land owner by entering into a conveyance deed or similar instrument (allotment letter)</p> <p>[Notification No. 4/2018-CT (Rate) dated 25-1-2018]</p>

Description	On or After 01.04.2019	Before 31.03.2019
<p>Time of Supply</p> <p><i>[In case of Monetary consideration]</i></p>	<p><u>Residential Apartment</u> Date of completion certificate of project or its first occupation, whichever is earlier [Notification No. 6/2019-CT (R) dated 29-3-2019]</p> <p><u>Commercial Apartment</u> Earlier of following: <ul style="list-style-type: none"> ✓ Date of payment ✓ Date immediately following 60 days from the issuance of invoice/any other document [Contract] If not determinable from above then date of entry in books of accounts. [Section 13(3) of CGST Act, 2017]</p>	<p>Earlier of following:</p> <ul style="list-style-type: none"> ✓ Date of issuance of invoice if issued within 30 days ✓ When contract is executed ✓ Date of receipt of payment <p>[Section 13(1) of CGST Act,2017]</p>
<p>Value of Supply</p>	<p>Value of similar apartments charged by promoter from independent buyers <u>nearest to the date on which development rights/ FSI is transferred to promoter.</u></p> <p style="text-align: center;"><i>Plus</i></p> <p>Monetary Consideration [Para 1A of Notification No. 12/2017-CT (R) dated 28-6-2017 inserted vide N.N 04/2019-CT (R) dated 29.03.2019]</p>	<p>Applying the ratio of valuation rules, cost incurred by the Promoter for constructing the area belonging to landowner plus some reasonable margin of Promoter to be considered as consideration in the hands of landowner for such transfer of development rights.</p> <p style="text-align: center;"><i>Plus</i></p> <p>Monetary Consideration</p>
<p>GST Rate</p>	<p>18%</p>	<p>18%</p>

Exemption on transfer of development rights/FSI/Long term lease for Residential Apartments

[Entry 41A & 41B of N. No 12/2017-CT(R) inserted vide N.N 04/2019 dated 29.03.2019]

W.e.f. 01.04.2019	Exemption is available on transfer of development rights/FSI/Long term lease on or after 01.04.2019.
Applicability	Available only in case of residential apartments which are sold prior to date of completion certificate/First Occupation.
Amount of Exemption	<p>(GST payable on TDR/FSI/Long term lease for Project X Carpet area of the <u>residential apartments</u> in the project)</p> <hr/> <p>Total carpet area of the residential and commercial apartments in the project</p>
If all residential Apartments not booked	Promoter shall be liable to pay tax under RCM on proportionate value of development rights/FSI/Long term lease attributable to residential apartments not booked up date of completion certificate/First occupation

Tax Computation	<p>(GST payable on TDR/FSI/Long term lease for <u>residential apartments</u> X Carpet area of unbooked-residential apartments)</p> <hr/> <p>Total carpet area of the residential apartments in the project</p>
Maximum Liability (Ceiling limit)	<ul style="list-style-type: none"> ✓ 1%/5% of the value of un-booked residential apartments. ✓ Value shall be deemed to be equal to the value of similar apartments charged by the promoter <u>nearest to the date of issuance of completion certificate or first occupation, as the case may be.</u>

Liability in case of construction of area pertaining to landowners share

Description	On or After 01.04.2019	Before 31.03.2019
Person liable for payment of GST	Promoter as supplier	Promoter as supplier
Time of Supply	Date of completion certificate of project or its first occupation, whichever is earlier [Notification No. 6/2019-CT(R) dated 29-3-2019]	when the Promoter transfers possession or the right to the person supplying the development rights by entering into a conveyance deed or similar instrument [Notification No. 4/2018-CT (Rate) dated 25-1-2018]
Value of Supply	Total amount charged for similar apartments nearest to date on which development rights/FSI are transferred less 1/3rd of total amount charged as value of land [Para 2A of Notification No. 11/2017-CT (R) inserted vide N.N 03/2019 dated 29.03.2019]	Applying the ratio of valuation rules, cost incurred by the Promoter for constructing the area belonging to landowner plus some reasonable margin of Promoter to be considered as consideration in the hands of landowner for such transfer of development rights.
GST Rate	7.5% (Residential)/ 18% (Commercial - REP)	18%

Illustration:

Landowner has entered into a collaboration agreement dated **01.05.2019** with **Promoter for** developing and constructing a project. Landowner has transferred development rights in consideration of transfer of 25% of carpet area [both in residential and commercial] and paid sum of Rs. 50,00,000/- on 20.05.2019. Further, 75% share will pertain to Promoters share.

Additional Information;

Total Carpet Area of Project	5,00,000/- sq ft [500 units]
Carpet Area of Residential Apartments	4,00,000/- sq ft [400 units]
Carpet Area of Commercial Apartments	1,00,000/- sq ft [100 units]
Landowners share of Residential Apartments	1,00,000/- sq ft [100 units]
Landowners share of Commercial Apartments	25,000/- sq ft [25 units]

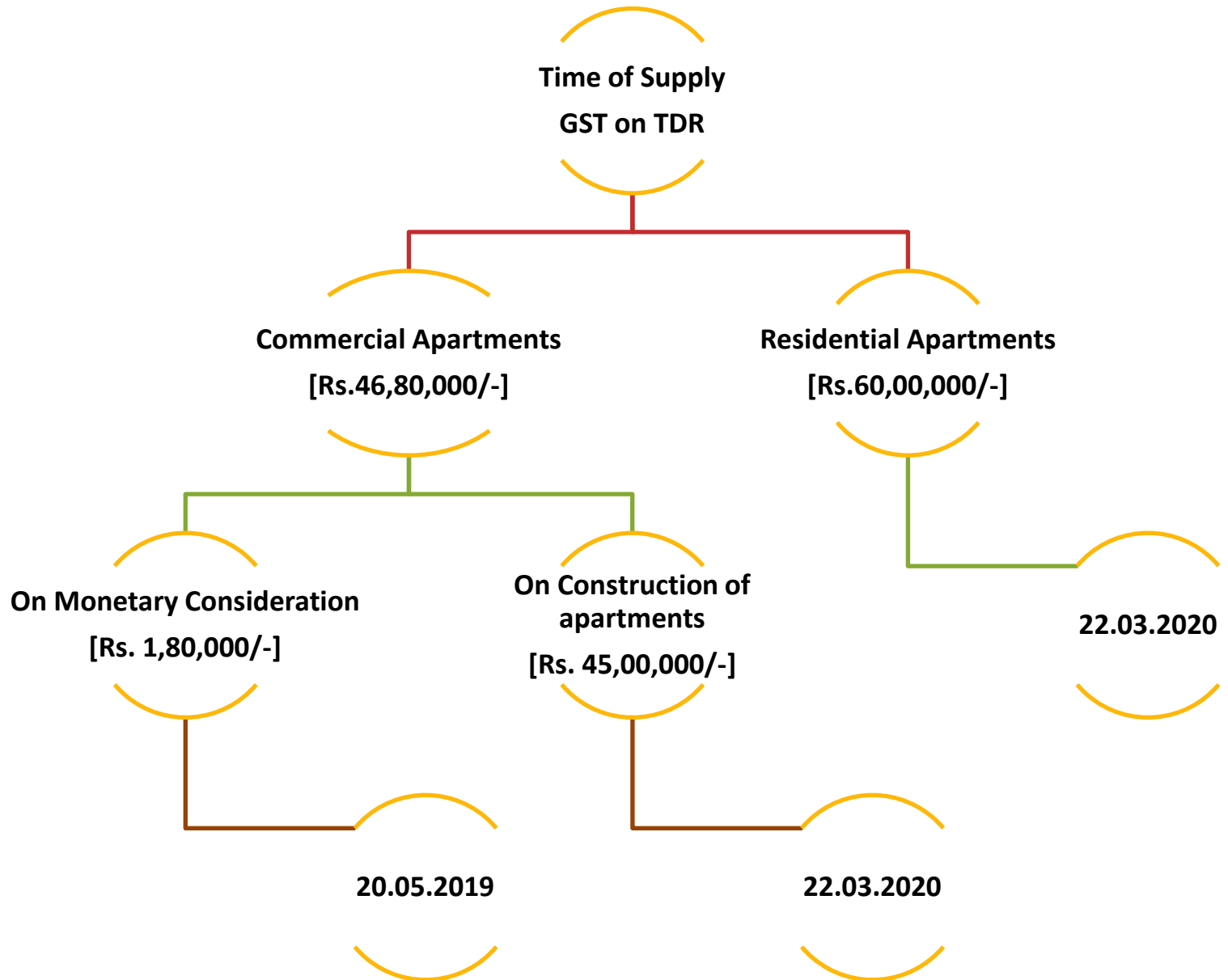
First sale of apartment has been made on 25.05.2019 at Rs. 10,00,000/-.

Further, last sale prior to the date of completion certificate [22.03.2020] has been made for Rs. 12,00,000/- and 100 [1,00,000 sq ft] residential apartments remain unsold till the date of completion certificate.

Compute GST liabilities in the hand of Promoter ?

GST on Transfer of Development Rights

Particulars	Amount
Monetary consideration	50,00,000
Add: Value of Similar units nearest to the date when rights transferred	12,50,00,000 (10,00,000 X 125)
Total Value of Development Rights	13,00,00,000
GST Payable @18%	2,34,00,000
Amount of Exemption [if all residential apartments sold prior to CC] (GST Payable [2,34,00,000] X Carpet area Residential [3,00,000])/ Total Carpet Area [375000]	1,87,20,000
Un sold residential area	1,00,000 sq ft.
GST to be paid on Development rights w.r.t Residential Apartments (GST Payable on residential area [1,87,20,000] X unsold residential area [1,00,000])/Total Residential Area [300000]	62,40,000
Maximum Liability ([5% of value of unsold units]=12,00,000 X 100 X 5%) w.r.t residential apartments	60,00,000
GST to be paid on Development rights w.r.t Commercial Apartments	46,80,000
Total GST on Development Rights [60,00,000 + 46,80,000]	1,06,80,000



GST on construction of landowner's area

Particulars	Residential	Commercial
Value of Similar units nearest to the date when rights transferred	10,00,00,000	2,50,00,000
Less: 1/3 rd Land Deduction	3,33,33,333	83,33,333
Taxable Value	6,66,66,667	1,66,66,667
GST@ 7.5%/18%	50,00,000	30,00,000
Time of Supply [Date of Completion Certificate/First Occupation]	22.03.2020	22.03.2020

JOINT DEVELOPMENT – REVENUE SHARING

Landowner and Developer enter into Joint Development Agreement

Landowner contributes land and Developer contributes time and resources to develop the land.

Constructed units are sold and revenue is shared between the landowner and the developer in the agreed ratio.

No service provider-recipient relationship between landowner & developer.

Both are jointly developing land and selling it ultimately to buyers. Accordingly, no one is supplying service to one another. **Old World Hospitality Limited Versus CST [2017 (2) TMI 1176 - CESTAT NEW DELHI.**

Transaction between Landowner and Developer not exigible to GST

GST implication shall arise only on sale of constructed units, if consideration is received from buyer prior to CC or first occupation.

ITC Issues

Eligible credit in case of REP [Commercial Apartments>15%]

- Rule 42 & 43 of CGST Rules prescribes method of reversal of ITC w.r.t residential apartments.
- **Broadly, eligibility is as under:**
 - *ITC of inward supplies exclusively used for commercial apartments is allowed*
 - *ITC of inward supplies exclusively used for residential apartments is not allowed*
 - *Common ITC is allowed to the extent of carpet area of commercial apartments, divided by total carpet area of the project*

Availability of ITC even in case of Residential Apartments – Only ongoing projects

- Available only to landowner w.r.t GST charged by promoter towards supply of construction of Apartments. Applicable only on ongoing projects.
- No Other ITC allowable.
- Available only if landowner further supplies such apartments to his buyers before issuance of completion certificate/ first occupation.
- Payment of GST by landowner on such supply should not be less than the tax charged by Promoter

ITC Issues

Practically, landowner cannot utilise ITC and there shall be accumulation of ITC

- Time of supply of construction of landowner's apartments shall be the date of completion certificate or First occupation whichever is earlier.
- Accordingly, promoter shall charge GST and ITC of same allowable to landowner only at the completion of project.
- Meanwhile landowner sold its share of apartments [before completion certificate] but since time of supply of promoter supplies have not arisen, landowner has no option but to discharge GST liability in cash only.
- Now at completion no more GST liability arises to landowner as project is completed and no GST to be payable if same has been sold after receiving the completion certificate/first occupation.
- **ITC so available shall be dead asset for the landowner in the absence of other GST liability within same GSTIN.**

ITC OF CONSTRUCTION ALLOWED - M/S. SAFARI RETREATS PRIVATE LIMITED AND ANOTHER VERSUS CC OF CGST & OTHERS [2019 (5) TMI 1278 - ORISSA HC] dated 17.04.2019 – Appeal admitted in SC in Nov, 2019

- *In our considered opinion the provision of Section 17(5)(d) is to be read down and the narrow restriction as imposed, reading of the provision by the Department, is not required to be accepted, inasmuch as keeping in mind the language used in EICHER MOTORS LTD. VERSUS UNION OF INDIA [1999(1)TMI 34 - SUPREME COURT], the very purpose of the credit is to give benefit to the assessee.*
- *In that view of the matter, if the assessee is required to pay GST on the rental income arising out of the investment on which he has paid GST, it is required to have the input credit on the GST, which is required to pay under Section 17(5)(d) of the CGST Act.*
- **Whether ITC of Lifts, Escalators, etc. shall be admissible to Malls, Hotels, etc. if capitalised to Plant & Machinery or it shall be considered as part of building itself?**

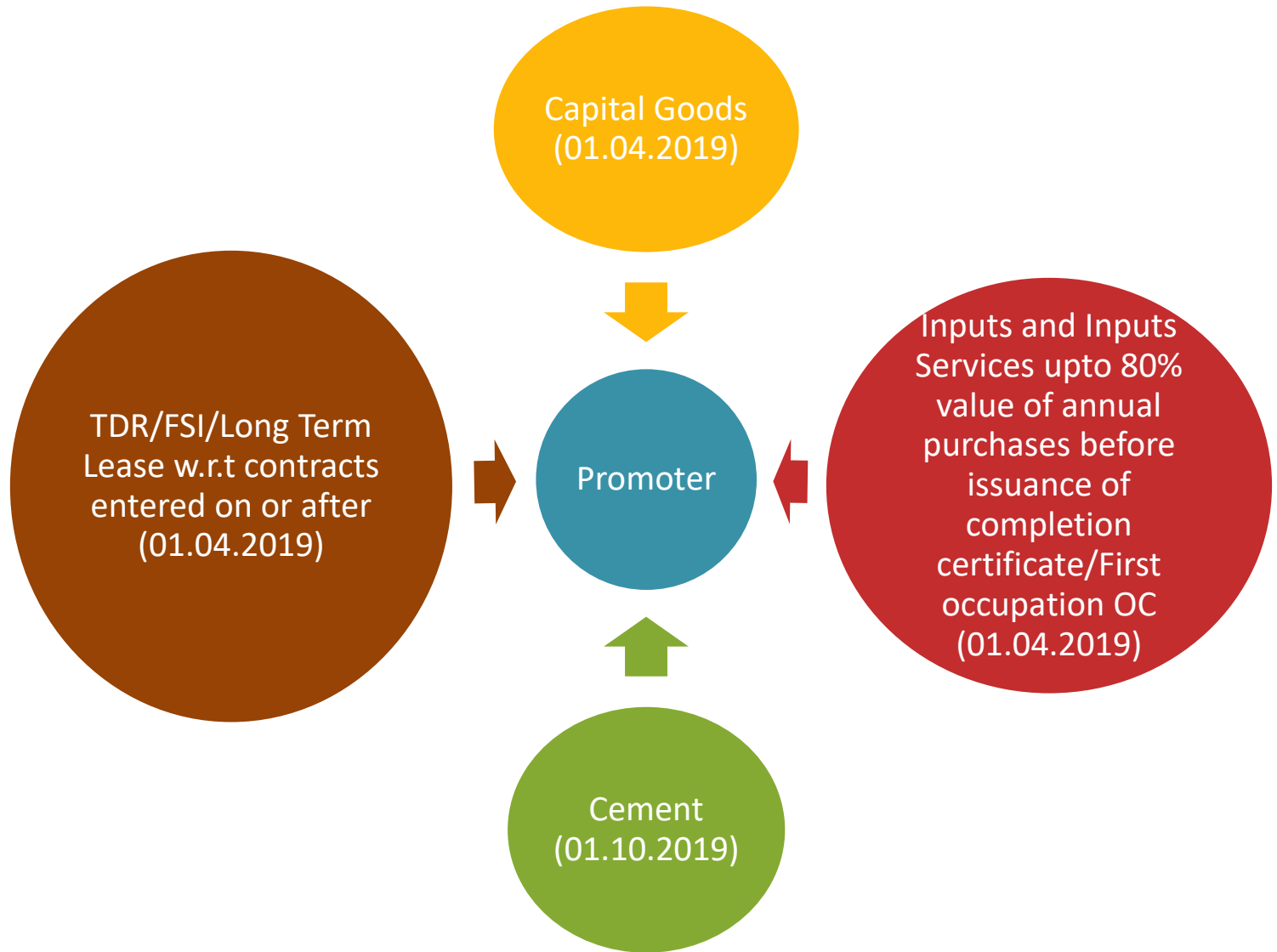
CENVAT CREDIT AVAILED TILL CC, NOT LIABLE FOR REVERSAL - THE PRINCIPAL COMMISSIONER VERSUS M/S ALEMBIC LTD. [2019 (7) TMI 908 - GUJARAT HIGH COURT] dated 12.04.2019

- *Cenvat credit availed in respect of input service is not required to be paid back under any circumstances and therefore, the respondent was not legally required to reverse any credit which was availed by them during the period 2010 till obtaining completion certificate i.e. during the period when output service was wholly taxable in their hands, merely because later on, some portion of the property was converted into immovable property on account of receipt of completion certificate and on which no service tax would be paid in future-Tribunal therefore, rightly held that once the respondent are not required to reverse any credit availed by them on valid input services availed during the period 2010 till obtaining of completion certificate, the said amounts reversed by them under protest cannot be retained by the revenue authorities and have to be refunded to the respondent.*

ITC ON GOODS DISTRIBUTED BY BUILDERS UNDER PROMOTIONAL SCHEMES

- Whether Builders shall be entitled for ITC of gold coins, luxury cars, and other free gifts given under promotional scheme with the sale of Flats ?

Reverse Charge Mechanism



**WHETHER RCM APPLICABLE IN CASE TRANSFER OF
DEVELOPMENT RIGHTS/FSI IS NOT FOR SALE OF
PROJECT**

Notification No 13/2017-CT(R) dated 28.06.2017 as amended

Sl. No.	Category of Supply of Services	Supplier of service	Recipient of Service
(1)	(2)	(3)	(4)
5B	Services supplied by any person by way of transfer of development rights or Floor Space Index (FSI) (including additional FSI) for construction of a project by a promoter.	Any Person	<u>Promoter</u>

Project:

The term “project” shall mean a Real Estate Project or a Residential Real Estate Project.

Real Estate Project (REP):

The term “Real Estate Project (REP)” shall have the same meaning as assigned to it in clause (zn) under section 2 of the Real Estate (Regulation and Development) Act, 2016 (16 of 2017).

The said definition in **Clause (zn)** reads as under:

*“Real Estate Project” means the development of a building or a building consisting of apartments, or converting an existing building or a part thereof into apartments, or the development of land into plots or apartment, as the case may be, **for the purposes of selling** all or some of the said apartments or plots or building, as the case may be, and includes the common areas, the development works, all improvements and structures thereon, and all easement, rights and appurtenances belonging thereto;*

To cover under the ambit of term project i.e. real estate project, development of land or building must be done for the purpose of further sale thereof.

Promoter:

The term “promoter” shall have the same meaning as assigned to it in clause (zk) under section 2 of the Real Estate (Regulation and Development) Act, 2016 (16 of 2017).

The said definition in **Clause (zn)** reads as under:

"Promoter" means,—

- (i) a person who constructs or causes to be constructed an independent building or a building consisting of apartments, or converts an existing building or a part thereof into apartments, **for the purpose of selling all or some** of the apartments to other persons and includes his assignees; or

- (ii) a person who develops land into a project, whether or not the person also constructs structures on any of the plots, **for the purpose of selling to** other persons all or some of the plots in the said project, whether with or without structures thereon; or

- (iii) any development authority or any other public body in respect of allottees of—
 - (a) buildings or apartments, as the case may be, constructed by such authority or body on lands owned by them or placed at their disposal by the Government; or

 - (b) plots owned by such authority or body or placed at their disposal by the Government, **for the purpose of selling all or some of the apartments or plots**; or

- (iv) an apex State level co-operative housing finance society and a primary cooperative housing society which **constructs apartments or buildings for its Members** or in respect of the allottees of such apartments or buildings; or
- (v) any other person who acts himself as a builder, coloniser, contractor, developer, estate developer or by any other name or claims to be acting as the holder of a power of attorney from the owner of the land on which the building or apartment is constructed or plot is developed **for sale**; or
- (vi) such other person who constructs any building or apartment for sale to the general public.

What if such developed building is not being sold by Promoter?

For e.g. A person sells FSI to another person for the construction and operation of a Banquet hall and not for selling the same; therefore; the same shall not be covered under real estate project, and the person receiving FSI shall not be considered as promoter. Accordingly, accordingly person receiving such FSI did not liable to pay tax w.r.t same under RCM.

Anti-Profiteering

- ✓ In terms of Section 171 (1) of the CGST Act, 2017, the suppliers of goods/services should pass on the benefit of **any reduction in the rate of tax** or **the benefit of input tax credit to the recipients**.
- ✓ In case of Builders it is the **benefit of tax credit on “Inputs”** which was not allowable in pre-GST regime; however; the same is available in GST regime.
- ✓ Accordingly; element of taxes leviable on “Inputs” in pre-GST regime i.e. VAT & Excise Duty needs to be considered for computing benefit to be passed on to recipient.
- ✓ For eg: Any Input say Steel which was subjected to Excise @12.5% and VAT @5%, so total benefit of 17.5% of taxes is available to Builders in GST regime which needs to be computed on proportionate basis w.r.t area of recipient.
- ✓ Due to said benefit of 17.5% an extra burden of Income Tax @33.384% [including cesses] has to borne by Builders resulting; net benefit of 11.66% only.
- ✓ **Whether deduction on account of excess payment of income tax is allowable-??**

Thank you!

