

GST

Issues in Works Contract transaction with relevant Advance Rulings

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ORGANISED BY THE GOODS & SERVICES TAX PRACTITIONERS'
ASSOCIATION OF MAHARASHTRA

Agenda

- ▶ Works contract V/S construction contracts
 - ▶ Nature of supply in case of construction of complexes
- ▶ Transitional provisions
- ▶ Classification – rate of tax – Notified projects
- ▶ Issues in
 - ▶ redevelopment projects
 - ▶ JDA
- ▶ Anti-profiteering
- ▶ Relevant Advance Ruling

Introduction of VAT & SERVICE TAX on Contractor and Builders

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- ▶ **Sec.2(24) of MVAT Act defines sales, and Explanation 1(ii) includes the following:**

the transfer of property in goods (whether as goods or in some other form) involved in the execution of a 13[14[works contract including], an agreement for carrying out for cash, deferred payment or other valuable consideration, the building, construction, manufacture, processing, fabrication, erection, installation, fitting out, improvement, modification, repair or commissioning **of any movable or immovable property;**]

- ▶ **Sec.65(54) of Service Tax Act defines works contract as:**

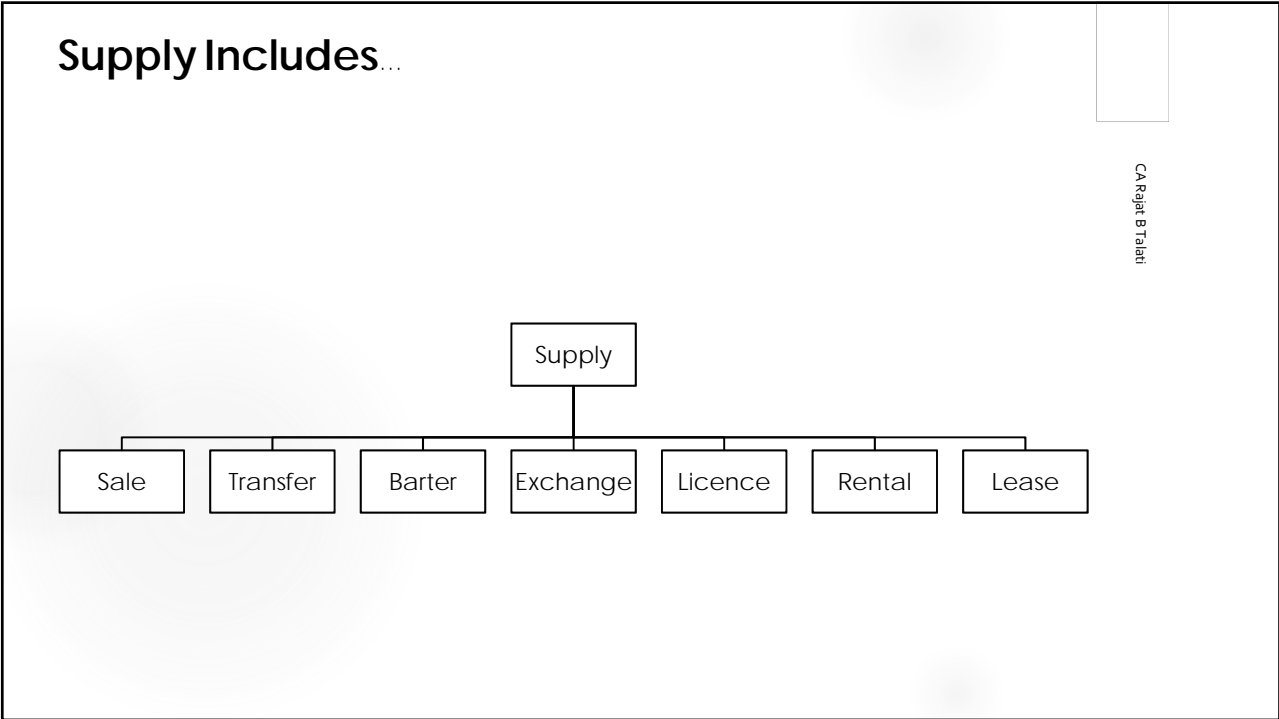
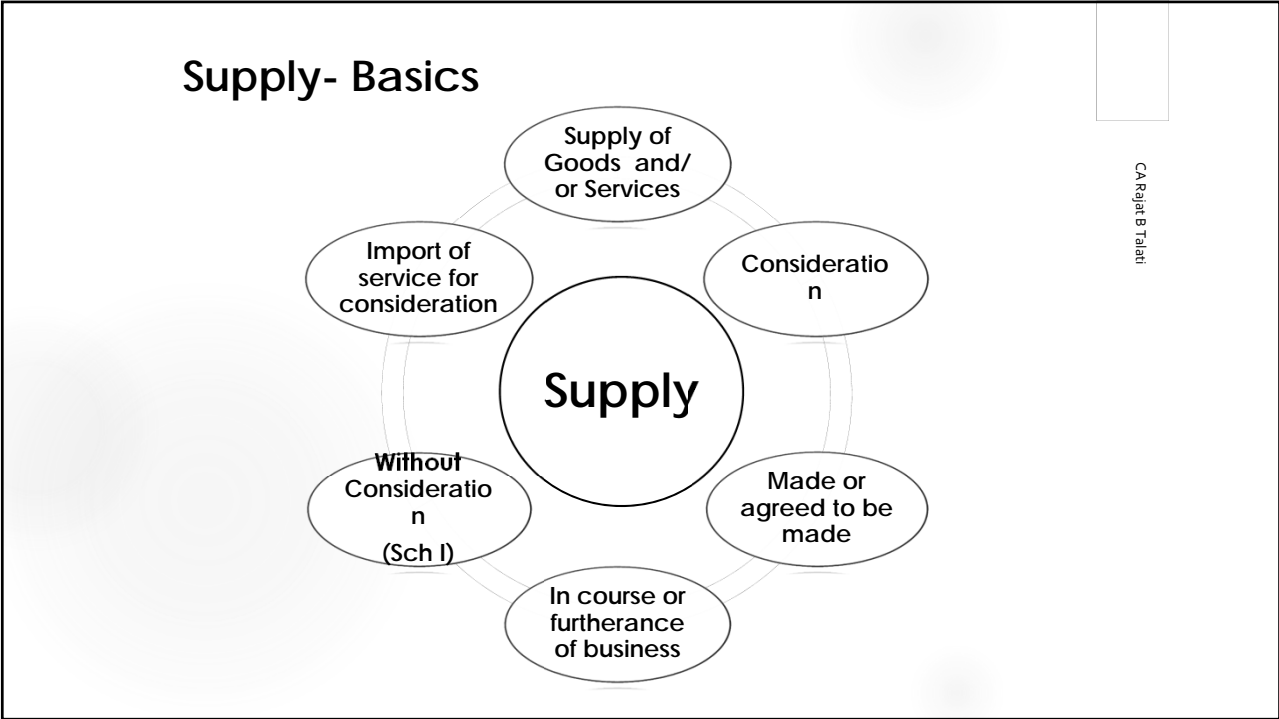
“works contract” means **a contract wherein transfer of property in goods involved in the execution of such contract is leviable to tax as sale of goods** and such contract is for the purpose of carrying out construction, erection, commissioning, installation, completion, fitting out, repair, maintenance, renovation, alteration **of any movable or immovable property** or for carrying out any other similar activity or a part thereof in relation to such property;

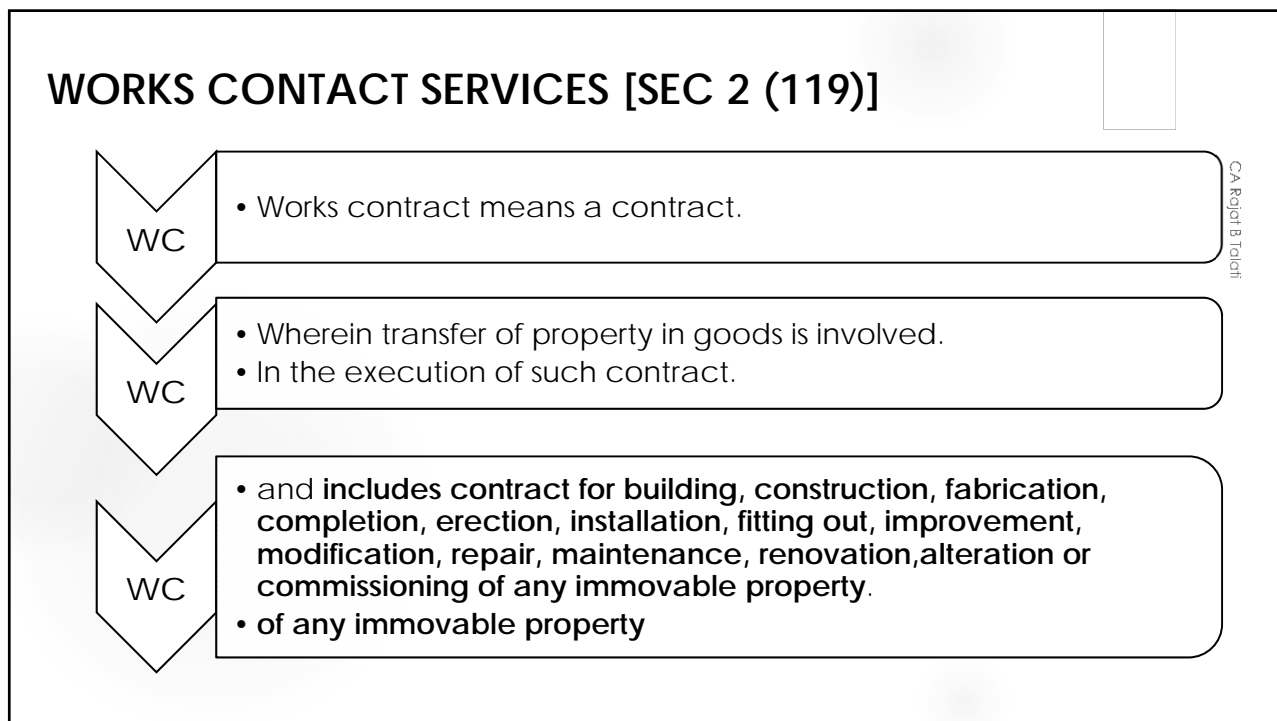
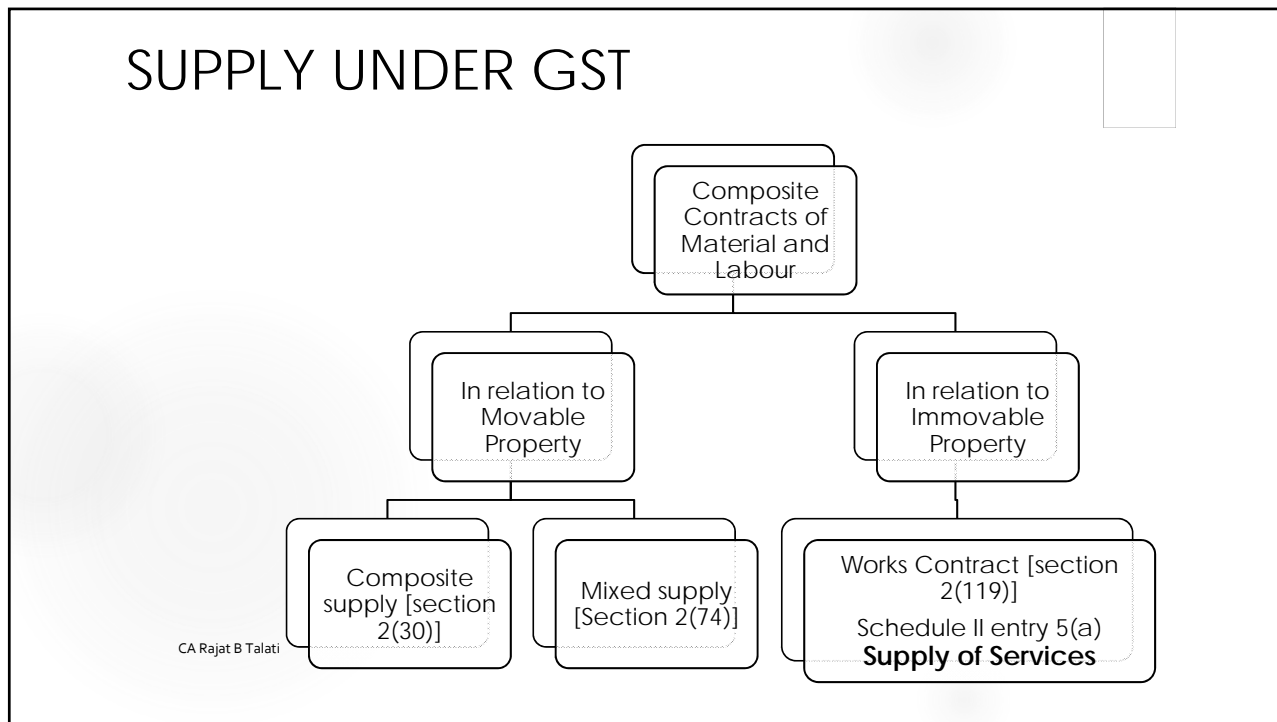
TAX ABILITY PRE AND POST GST

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Particulars	VAT	GST
Tax liability	1% on Agreement value on date of registration	Time of Supply of service
ITC	No ITC	Eligible for ITC
Composition	Yes	No
OMS Purchase	Purchased on Full rate of Tax, no ITC available	can take credit of IGST





CONTRACT FOR SUPPLY & INSTALLATION OF ELECTRICAL EQUIPMENT.

?

why

Action

- Composite supply.
- Mixed supply.
- Works contract services.

- It is important to decide .
- It will impact on GST Rate to be levied.
- ITC to be claimed.

- Careful examination of contract.
- Identify components to support the decision.
- Documentation

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Composite Supply

- ▶ It is a transaction where two or more supplies are involved.
- ▶ Such supplies are naturally bundled and supplied in combination
- ▶ in the ordinary course of business.
- ▶ **GST levied on principal supply.**

Supply of goods
(Principal Supply)

+

Transit insurance

→

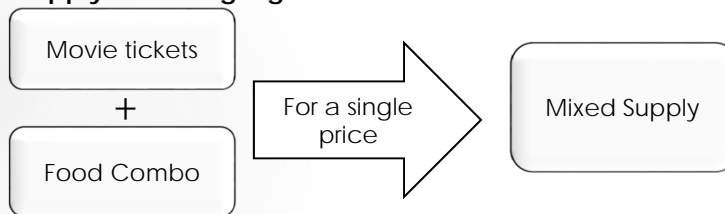
Composite
Supply

Naturally bundled

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Mixed Supply

- ▶ It is a transaction which comprises of two or more supplies for a single price.
- ▶ Both the supplies are independent & equally important
- ▶ GST levied on principal supply.
- ▶ **Supply attracting highest rate of tax will be considered as supply** for GST



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Continuous Supply of Services definition¹² Sec.2(33) of the CGST Act, 2017

- ▶ *supply of **services** which is*
- ▶ *provided, or agreed to be provided, continuously or on recurrent basis, under a **contract**, for a*
- ▶ ***period exceeding three months** with periodic payment obligations and includes supply of such services as the Government may, subject to such conditions, as it may, by notification, specify*

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Works Contract definition Sec.2(119) of the CGST Act, 2017

13

- ▶ *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;*

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Works contract V. Composite Contract

- ▶ PEW Engg. (P) Ltd dt. 21.12.2018 – West Bangalore
 - ▶ Retrofitting of air break system on wagon is a composite supply
 - ▶ Air break system are not 'immovable property' it is not works contract
- ▶ Eifeel Hills & Dales Developers (P) Ltd – AAR-MAH dt. 14.12.18
 - ▶ Plumbing contract
 - ▶ Activities cannot be divided into two parts – supply of goods and services; which are infact inseparable.
 - ▶ It is works contract
 - ▶ Electrical contract is also composite contract & is works contract

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Works contract V. Financial Model

- ▶ Super Wealth Financial Enterprise (P) Ltd AAR dt/ 6.8.2018 AAR-Orissa
 - ▶ Energy performance contract entered into with municipal corporation for street lighting. Operations & maintenance fees collected
 - ▶ **Is it exempt?** In terms of notifications 12/2017 – C. T.(Rate) dt.28.6.17 (being function of local authority under Article 243w of constitution of India?)
 - ▶ Contract involves
 - ▶ Replacement of light bulbs with energy efficient LED lights
 - ▶ Maintaining the same lighting fixtures & replacing them wherever LED lamps fails
 - ▶ Submission of monthly energy saving report, O&M fees collected
 - ▶ To be handed over to the municipal corporation at the end of project period i.e. 4 years
 - ▶ Setting monitoring system

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Works contract V. Financial Model (cont..)

Held

- ▶ Not a 'pure labour' contract as 'involving supply of any goods'
- ▶ Section 2(119) – terms used as 'replacement, fitting out, repair & monitoring' – used in the contract is indisputably 'works contract'.

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Split Contract – Supply & Service

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- ▶ Cable Corporation of India Ltd AAR-MAH dt. 12.12.2018
 - ▶ Separate contract for
 - ▶ Testing and supply of equipment
 - ▶ All other activities required to be performed for commissioning of the project including transportation insurance etc
 - ▶ Cross fall breach provision
 - ▶ Held:
 - ▶ Composite supply of works contract
- ▶ Also refer: Emco Ltd – AAR-MAH dt. 10.12.2018 and Skipper Ltd AAR West Bengal dt. 26.11.2018) –

Schedule II: Activities to be treated as Supply of Services

Sr. No. 2
Land and Building
(a) any lease, tenancy, easement, licence to occupy land is a supply of services;
(b) any lease or letting out of the building including a commercial, industrial or residential complex for business or commerce, either wholly or partly.

Sr. No. 5
(a) renting of immovable property;
(b) construction of a complex, building, civil structure or a part thereof,

except where the entire consideration has been received after issuance of completion certificate or after its first occupation, whichever is earlier.

Sr. No. 6
Composite supply
The following composite supplies shall be treated as a supply of services, namely:—
(a) works contract as defined in clause (119) of section 2;

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Exemptions provided for Services (Notification No. 12/2017 dated 28th June, 2017)

Sr. No.10

(Heading 9954)

- pure labour contracts under the Housing for All (Urban) Mission or Pradhan Mantri Awas Yojana.

Sr. No.11

(Heading 9954)

- pure labour contracts pertaining to a single residential unit otherwise than as a part of a residential complex

Sr. No.12

(Heading 9963/9972)

- renting of residential dwelling for use as residence.

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Rates of Tax under GST

Notification No. 11/2017 dt. 28.6.2017	Rate of Tax for Services	Sr.No.3 (i)-Construction of Complex (ii)Composite supply of works contract	18% (CGST+SGST)
Notification no. 20/2017 dt. 22.8.2017 Notification no.24/2017 dt.21.9.2017 Notification no.31/2017 dt.13.10.2017 Notification no.46/2017 dt.14.11.2017 Notification no.1/2018 dt.25.01.2018	Amendment to Notification No. 11	(iii)(a) historical monument, archaeological site, etc (iii)(b) canal, dam or other irrigation works (iii)(c) pipeline, conduit or plant (iv)(a) a road, bridge, tunnel, etc (iv)(b) Jawaharlal Nehru National Urban Renewal Mission or Rajiv Awas Yojana (iv)(c)/(d) Housing for All (Urban) Mission/Pradhan Mantri Awas Yojana (iv)(da) constructed under Scheme of Affordable Housing - EWS	12% (CGST+SGST)

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Rates of Tax under GST

...contd

		(iv)(db)houses constructed or acquired under CLSS for EWS/LIG/MIG-1/MIG-2 (iv)(e)/(f)pollution control or effluent treatment plant except as part of factory/a structure meant for funeral, burial or cremation of deceased (v)(a) railways, including ,monorail and ,metro (v)(b)Single residential unit (v)(c)(d)(da) low-cost houses up to a carpet area of 60 sq.mt, housing for all, PMAY (Scheme of Affordable Housing) (v)(e)post-harvest storage infrastructure & cold storage	
Residual Rate of Tax	Rate of Tax for Services	(xii)Other Construction Services	18% (CGST+SGST)
TDS		TDS to be deduct by Central Government or State Government, Local authority, Government agencies, Such persons or category as notified by the Government - more than 2.5lakh	1%CSGT+1%SGST & 2% IGST

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Sub- contractor- rate of tax

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- ▶ Where part of the construction is qualifying as 'Affordable housing" and the remaining not.
- ▶ What rate of GST applicable? 12% or 18%
 - ▶ How to compute?
 - ▶ Should it be proportionate?
- ▶ Refer Note- dt. 25.1.2018 Notification 1/20118 CGST- Rate
 - ▶ Construction services - Affordable housing –Para 3(v)(da)
- ▶ **AAR- MAH – Prajapati Developers dt 3.7.2018**

Rate of Tax for Sub-Contractors

Notification No. 1/2018-Central Tax (Rate) dt.25th January 2018

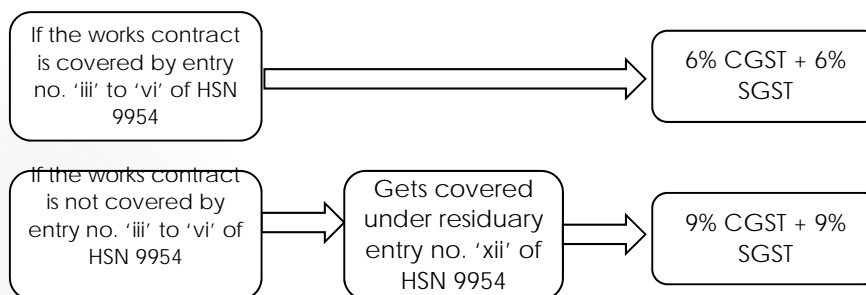
- Contractor providing the following **services to Central Government, State Government, Union territory, a Local Authority, a Governmental Authority or a Government Entity shall** be leviable to tax at the below given rates:-

Particulars	Tax Rate
Entry (iii)- (a)historical monument, archaeological site, etc or (b)canal, dam or other irrigation works; (c) pipeline, conduit or plant etc. OR Entry (vi)- (a)civil structure or any other original works other than for commerce, industry, or any other business or profession or (b) structure for use as (i) an educational, (ii) a clinical, or(iii) an art or cultural establishment; or (c)a residential complex predominantly meant for self-use or the use of their employees	6%
Entry (vii)- works contract involving predominantly earth work (that is, constituting more than 75per cent. of the value of the works contract)	2.5%

- However, a **Sub-Contractor providing the above services to the Main Contractor shall also** be taxable at the above given rates vide Notification No. 1/2018-Central Tax (Rate) dt.25th January 2018

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Summary of Works Contract Rate



Who is Governmental Authority?

- ▶ Notification no. 31 of Central Tax (Rate), 2017 dated 13th October 2017 defines Governmental Authority as under:

***Governmental Authority** means an authority or a board or any other body;*

*(i) **set up by an Act** of Parliament or a State Legislature; or*

*(ii) **established** by any Government,*

*with 90% or more participation by way of equity or control, **to carry out any function entrusted to a municipality** under Article 243 W of the Constitution or to a Panchayat under Article 243 G of the constitution.*

Govt Contract – non- commercial purpose

- ▶ A2Z Infra Engg. Ltd – Chhatisgarh AAR dt.29.11.2018
 - ▶ If the activity of a state funded authority is limited to funding the project &
 - ▶ It is to be used predominantly for commercial purposes
 - ▶ Concessional rate as per 24/2017 – CT(Rate) not available

Activities entrusted by Govt to entity

- ▶ Shreeji Infra India (P) Ltd – Madhya Pradesh AAR dt.26.10.2018
 - ▶ Govt entity – concessional rate
 - ▶ Construction of residential quarters for workers / staff by M P Power Generation Co. Ltd
 - ▶ The construction of quarters not related to the activity of generation of electricity entrusted by the State Govt.
 - ▶ Works contract taxable @18%

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EPC contracts & GST

- ▶ EPC contract for setting up of solar power generating system
 - ▶ Works contract taxable @ 18% (SAC9954)
 - ▶ **[AAR Maharashtra - Giriraj Renewables Pvt. Ltd. vs Maharashtra State Advanced Ruling No. GST-ARA-01/2017/B-01 dated 17th Feb 2018]**
 - ▶ supply is considered as a works contract
 - ▶ Composite contract for the supply and installation has to be treated as works contract as not a chattel is sold as a chattel.
 - ▶ Solar Power Plant cannot be shifted from one place to another without dismantling the same.
 - ▶ Draft contract provided by dealer specifies that 60-70% is principal supply of photovoltaic module. But there are no documentary evidences. Therefore, this is not acceptable.

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EPC contracts & GST [cont..]

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▶ **AAAR Maharashtra – Fermi Solar Farms Pvt. Ltd. Vs Maharashtra State
Advanced Ruling No. MAH/AAAR/SS-RJ/07/2018-19 dated 4th Sep 2018}**

- ▶ The appellant required clarification for rate of tax for two separate contract i.e for supply solar power generating system and supply of installation.
- ▶ Also whether concessional rate is applicable for standalone parts (without supply of PV modules).
- ▶ decided as follows:
 - ▶ Setting up and operation of solar photovoltaic plant is 'works contract' in terms of clause (119) of the sec.2 of the GST Act
 - ▶ Rate of tax for the composite 'works contract' is notified in the notification no 11/2017 of the SGT Act dt and rate of tax is @9% SGST.
- ▶ **Solardirect India – AAR – Rajasthan dt. 20.10.2018**
- ▶ **FRIZO India (P) Ltd – AAR – Rajasthan dt. 20.10.2018**

EPC contracts & GST [cont..]

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- ▶ Also refer:
- ▶ **MP HC – Belectric Photovoltaic India (P) Ltd 2019-VIL-07-MP dt. 2.1.2019**
- ▶ "Discussion on 'solar Power Generating System – System comes into existence only when it is integrated with all plants & machinery.
- ▶ Supply of sub-station equipment as a part of solar generating system is eligible for concessional rate of VAT.

Input Tax Credit (Blocked Credits) Sec. 17(5) of CGST Act, 2017

Clause (c)

- ▶ works contract services when supplied for construction of an immovable property (other than plant and machinery) except where it is an input service for further supply of works contract service;

Clause (d)

- ▶ goods or services or both received by a taxable person for construction of an immovable property (other than plant or machinery) on his own account including when such goods or services or both are used in the course or furtherance of business.

Explanation.—For the purposes of clauses (c) and (d), the expression “construction” includes re-construction, renovation, additions or alterations or repairs, to the extent of capitalisation, to the said immovable property;

Transition to GST : Available?

Credit Balances

- C/f in return
- Unavailed ITC on Capital goods
- Credit on Goods held in Stock
- Claimed as refund
- Credit on goods/Service in transit

Stocks

- Stock in hand
- Stock held of/by agent
- Goods sent on Job Work

Transition to GST : credit Available?

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- ▶ As per
- ▶ Provisions – Sec.140(3)- Sec 140 (6) –
 - ▶ as per VAT / CENVAT return
 - ▶ Fixed rate or Fixed Amt in lieu of tax payable
- ▶ Stock in hand
 - ▶ Input goods
 - ▶ Semi- finished goods
 - ▶ Finished goods

Sec 142 (11) – to the extent

- ▶ No tax under GST – Sec 142(11)(a)
 - ▶ **On goods**- to the extent tax was leviable under the VAT Act
 - ▶ Notwithstanding the time of supply of goods- sec 12
- ▶ No tax under GST – Sec 142(11)(b)
 - ▶ **On services** - to the extent tax was leviable under the Chapter V of the Finance Act , 1994 – Service tax laws
 - ▶ Notwithstanding the time of supply of Services - sec 13
- ▶ No tax under GST– Sec 142(11)(c)
 - ▶ **Where tax was paid both under VAT and Service tax laws**
 - ▶ Tax shall be payable under GST
 - ▶ Taxable person to avail credit of VAT or Ser tax paid under the existing law
 - ▶ To the extent of supplies made after AD and such credit shall be calculated – as prescribed
- ▶ **Internal Circular No. 23A of 2018 dt 1.9.18 for Verification of Tran-1 credit u/s 140(6) & 142(11)(C) of SGST Act – Mah GST Authority**
- ▶ **F No 381/274/2017, 27 Feb 2018 – WIP – Transitional credit not available**

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Vexed Issues in taxation of Builders and Developers

Development Rights v/s Transferable Development Rights

Sec.2(gA) of MRTP Act, 1966 defines "Development Right" as:
right to carry out development or to develop the land or building or both and shall include the transferable development right in the form of right to utilise the Floor Space Index of land utilisable either on the remainder of the land partially reserved for a public purpose or elsewhere, as the final Development Control Regulations in this behalf provide

Regulation 34 of DCR, 1991 defines "Transfer of Development Right" as:
In certain circumstances, the development potential of a plot of land may be separated from the land itself and may be made available to the owner of the land in the form of Transferable Development Rights (TDR). These Rights may be made available and be subject to the Regulations in Appendix VII hereto.

- **Transfer of Development Rights** is the right given by the owner of the land to the developer to construct property upon the land, whereas **Transferable Development Rights (TDR)** has to be purchased from the open market for purpose of constructing additional area on the land.

Redevelopment of Societies

► **Model** and Transactions under Redevelopment

- There are 3 parties involved, the Existing Flat Owners(EFO), Land Owners & the Developer.
 - EFO relinquish their rights upon the land, i.e. transfer the **Development Rights** to the developer
 - & the developer in turn compensates them by giving a newly constructed flat with additional area plus monetary consideration if any.
- 2 supplies are involved
 - transfer of development rights
 - possession of new flats
 - **these are covered under Barter, hence taxable under GST.**
- Also, RCM may be applicable as EFO are unregistered persons.

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Redevelopment project –Barter- Developer side

- On Newly constructed Flat (For Existing Area free of cost) – Taxable at 18% GST [works contract services]
 - On the construction cost? Or 110% of Construction cost?
 - Stamp duty valuation?
 - Open market value?
- On New Flat (For Additional Area free of cost) - Taxable at 18% GST [works contract services]– same as above
- T.O.S. for Barter is when possession/rights is transferred through allotment letter/ conveyance deed. [Noti 4/2018 – CT rate 25..1.2018]
- Flats sold to outside buyers - Taxable at 18% GST subject to 1/3rd Land Dedn. (subject to receipt of CC/OC)

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Redevelopment of Societies

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► Valuation [Sec.15 of CGST Act,2017]

- In case of Barter, it has to be done as per Rule 30 of CGST Rules at 110% of Cost. 18% (CGST+SGST) to be levied.
- Value to be considered is Cost of Construction for Barter.
- For additional area/sale to outside buyers, transaction value (T.V.) has to be adopted after providing Land Cost Deduction of 1/3rd of T.V.

Cancellation of Agreement

- Consider an example where VAT & ST has been paid, and the flat is cancelled under GST.
- **Reversal** of taxes is allowed till earliest of:
 - Due date of return for Sept. of the next year (i.e.20th Oct. of next year)
 - Date of filing of Audit Report
 - Due date of filing Annual return, i.e. 31st December of next year
- **Circular No. 151 /2 /2012-ST** also states that *"the builder/developer would be entitled to take credit under rule 6(3) of the Service Tax Rules, 1994 (to the extent he has refunded the original amount). If the builder/developer resells the flat before the issuance of completion certificate, again tax liability would arise.*
- However, if there are any **Cancellation Charges** retained by the developer, it will be taxable without land deduction and different SAC.

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ITC Reversal on Sale after receipt of O.C.

- ▶ ITC reversal need to be done by following Rule 42 of CGST Rules, 2017
- ▶ Question arises whether reversal of whole project-wise ITC needs to be done??
- ▶ Rule 42 states that reversal of "ITC in a Tax Period" needs to be done, i.e. ITC of the tax period in which such reversal has to be effected (month/quarter)
- ▶ Collector of Central Excise vs. **Dai Ichi Karkaria Ltd.** 1999 (112)ELT 353- also states that "credit need not be reversed if subsequently the final product is exempted from duty and when the credit has been taken legally"
- ▶ Sec.17(5) (c) & (d) talks about non-availment of ITC on construction of immovable property (other than P&M) for own use
- ▶ **Supplies after OC – is it 'own use'? Requires reversal?**

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Anti-Profiteering measure [Sec.171(1) of CGST Act,2017]

- ▶ Sec.171(1) - "Any reduction in rate of tax on any supply of goods or services or the benefit of input tax credit shall be passed on to the recipient by way of commensurate reduction in prices."
- ▶ Old Acts had certain disallowances of taxes paid due to which full input tax credits were not available. However, GST ensures seamless flow of credits, which ensures that there is no blockage of credits which would lead to increase in costs.
- ▶ Hence, any such benefit derived must be passed on to the recipient and not retained by the works contractor/developer.
- ▶ Pl. refer to Press release dated 15.6.2017 - Ministry of Finance -GOI
- ▶ In case of M/s Pyramid Infratech Pvt. Ltd [2018(9) TMI 1107 – National Anti-Profiteering Authority] order is passed.

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Disclaimer: the taxation of builders and Developers under GST law is full of more than one interpretations and reader is advised to take a considered position.

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THANK YOU !!