



ECONOMIC
LAWS
PRACTICE
ADVOCATES & SOLICITORS

CASE STUDY ON REAL ESTATE AND WORKS CONTRACT (Rohit Jain, Advocate)

RRC, JAIPUR
January 2020

GROUPING OF CASE STUDIES

What's
NEW
What's
NEXT



**Real Estate
- GST**



RATE & VALUE
(Case Study
No1,3,9,10,11)



CREDITS
(Case Study
No 4,5,7)



JDA / RDA
(Case Study
No. 2,6,8)



SUPPLY

SECTION – 7

all forms of supply of goods and/or services such as sale, transfer, barter, exchange, license, rental, lease or disposal made or agreed to be made for a consideration

by a person in the course or furtherance of business

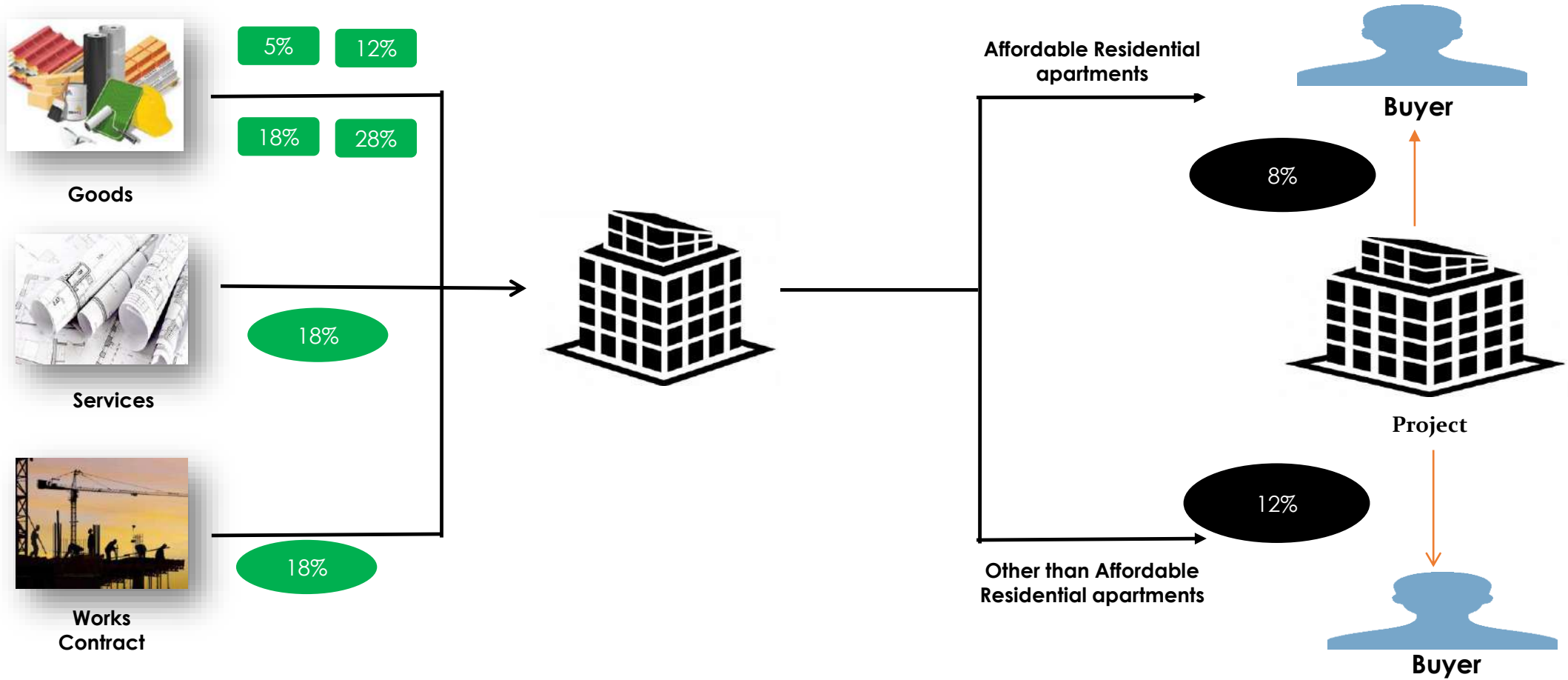
SCOPE OF LEVY

- GOODS - every kind of movable property other than money and securities

- SERVICES - means anything other than goods, money and securities

- SCHEDULE III – TRANSACTION NOT SUPPLY - Sale of land and, subject to clause (b) of paragraph 5 of Schedule II, sale of building

SCENARIO UPTO MARCH 31, 2019





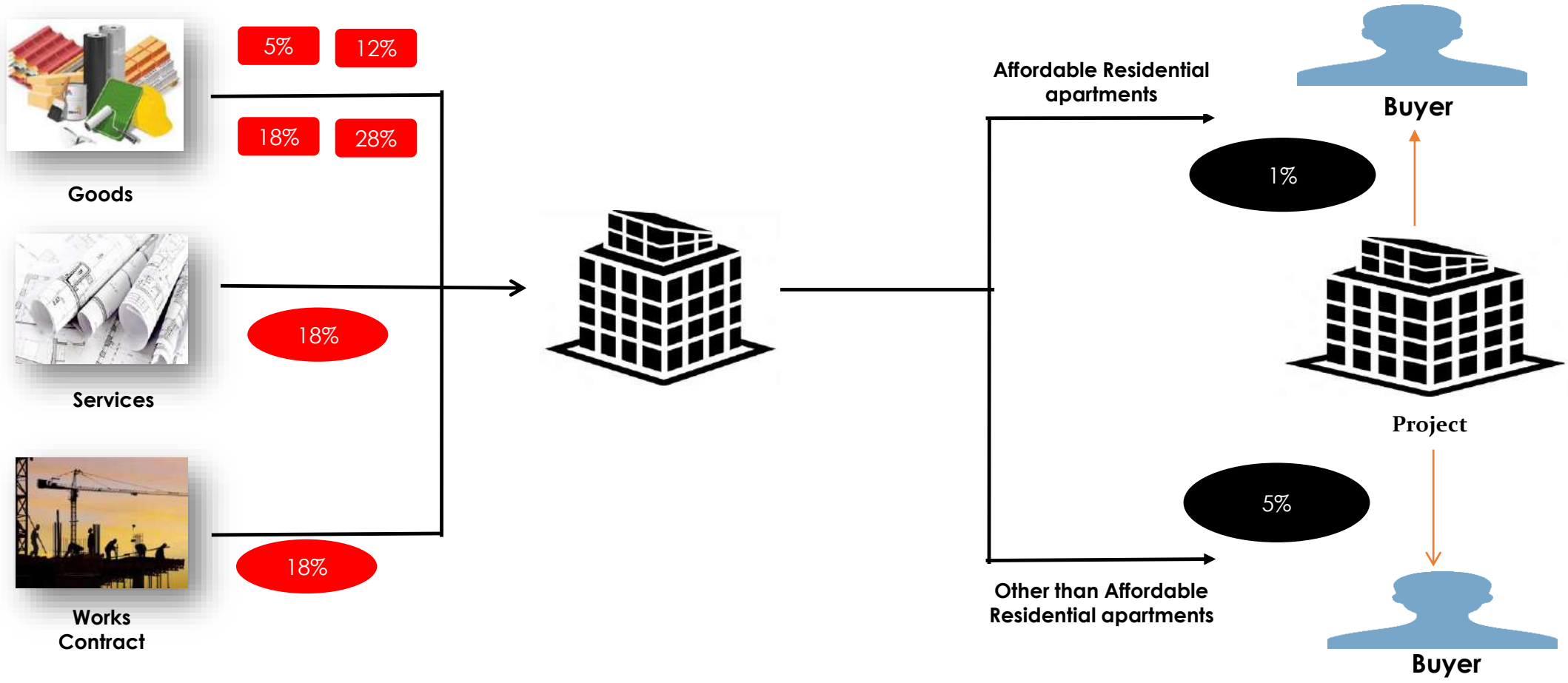
**April 1, 2019
onwards**

**No ITC for New Projects
/ Ongoing Projects
opted for new tax rate**

**Refer Notification No
03/2019 – Central Tax
Rate dated 29.03.2019**

SCENARIO POST APRIL 1, 2019

(new Projects / Ongoing Projects opting for New Scheme)



Constitutional Validity of GST rate without ITC



No authority under law to restrict ITC vide Rate Notifications



GST Rate conditional on non-availment of ITC cannot be the only/mandatory rate option



Illustrations under law itself providing multiple rate options for the same supply (GTA, etc)



Such rate regime is discriminatory in nature and thus, violative of Article 14 of Constitution of India



Such rate regime obstructs freedom of trade or business, thus violative of Article 19(1)(g) of the Constitution of India



Denial of ITC results in cascading of taxes and is in direct breach of the intent underlying the implementation of GST regime

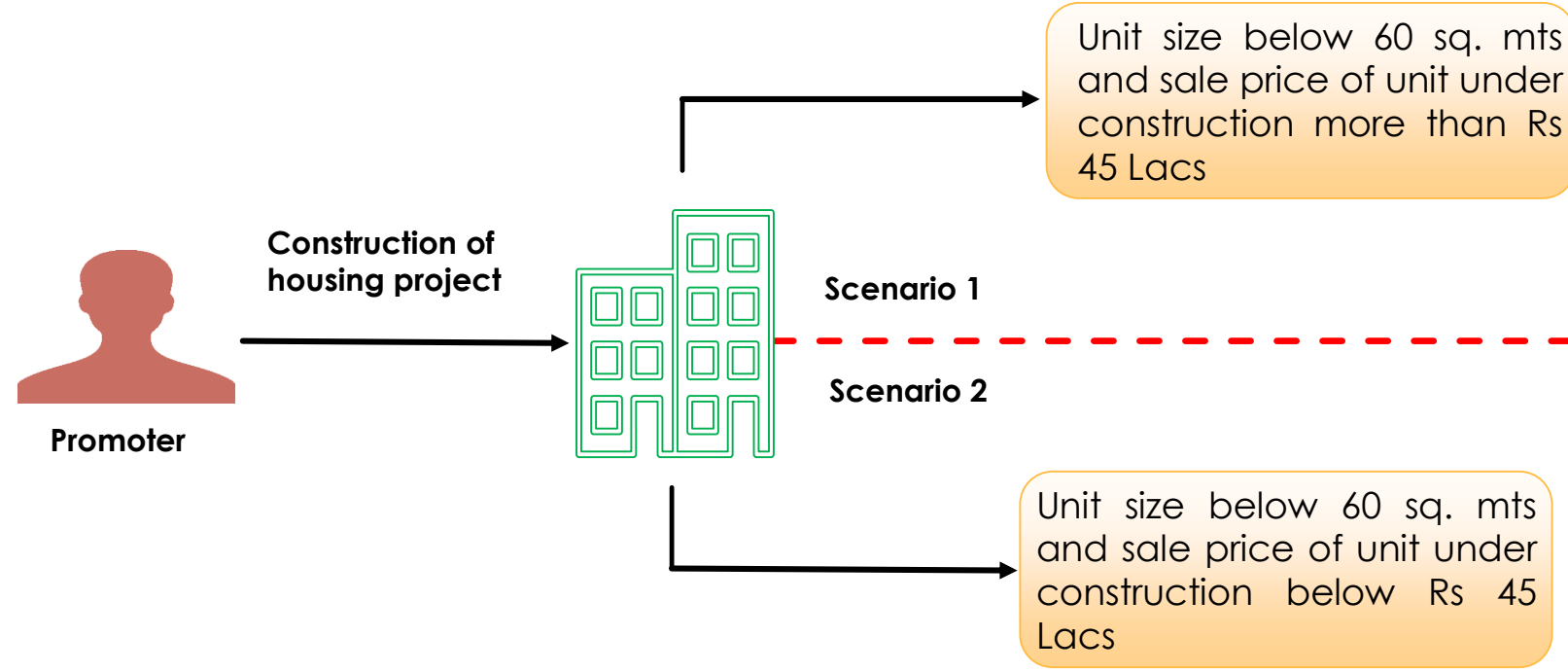


CASE STUDY 1

CONCESSIONAL RATE OF GST ON AFFORDABLE HOUSING PROJECT OPTING FOR NEW TAX RATE

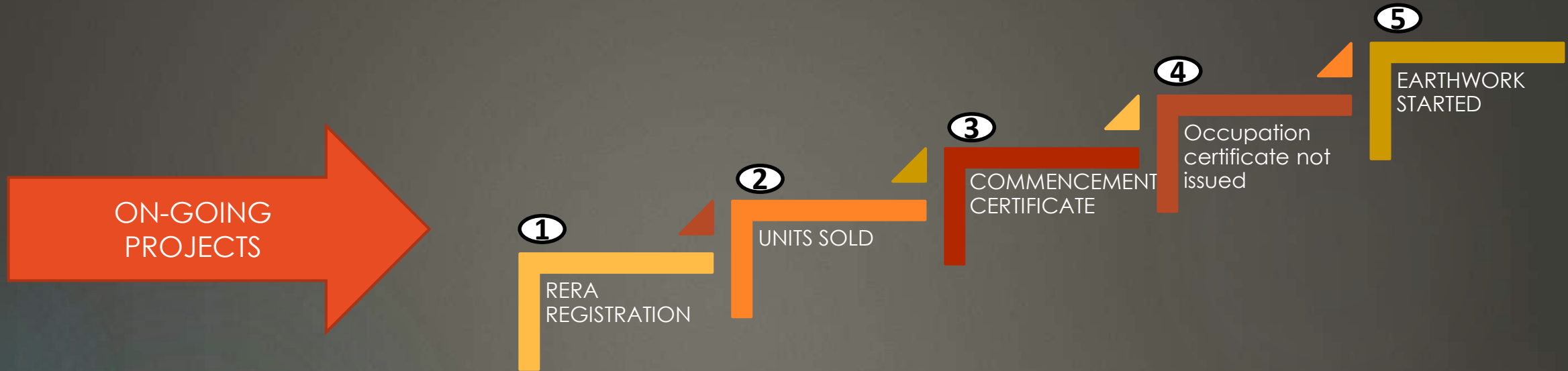
- Applicable rate of GST
 - < Rs 45 Lakh
 - > Rs 45 Lakh

- What is the rate of GST applicable to works contract services provided for the project.



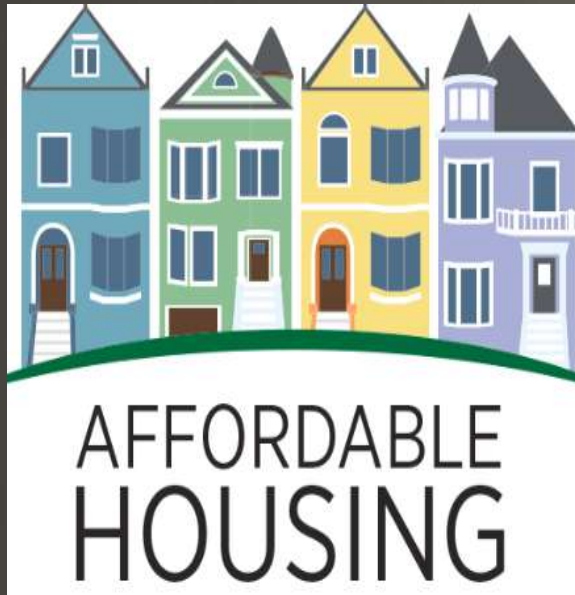
The Promoter has opted for new scheme as per Notification No. 3/2019-Central Tax (rate) dated 29-3-2019

...PROJECT UNDER NEW PROVISIONS



*“project which commences on or after 1st April, 2019” shall mean a project **other than an ongoing project;**”*

Definition of Affordable Housing



NOTIFICATION NO. 3/2019-CENTRAL TAX (RATE) DATED 29-3-2019



Adobe Acrobat
Document

(xvi) the term "affordable residential apartment" shall mean,—

(a) a residential apartment in a project **which commences on or after 1st April, 2019**, or in an ongoing project in respect of which the promoter has not exercised option in the prescribed form to pay central tax on construction of apartments at the rates as specified for item (ie) or (if) against serial number 3, as the case may be, having carpet area not exceeding 60 square meter in metropolitan cities or 90 square meter in cities or towns other than metropolitan cities and **for which the gross amount charged is not more than forty five lakhs rupees**

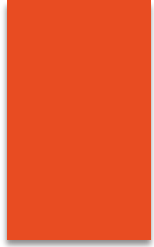
For the purpose of this clause,

- (i).....; -
- (ii).....;

(b) an apartment being **constructed in an ongoing project** under any of the schemes specified in sub-item (b), sub-item (c), sub-item (d), sub-item (da) and sub-item (db) of item (iv); sub-item (b), sub-item (c), sub-item (d) and **sub-item (da) of item (v)**; and sub-item (c) of item (vi), against serial number 3 of the Table above, in respect of which the promoter has not exercised option to pay central tax on construction of apartments at the rates as specified for item (ie) or (if) against serial number 3, as the case may be

INFRASTRUCTURE STATUS

(Entry No. 3(v)(da) of Rate Notification)



More than 50% FSI used for units having carpet area more than 60 sq. mtrs units

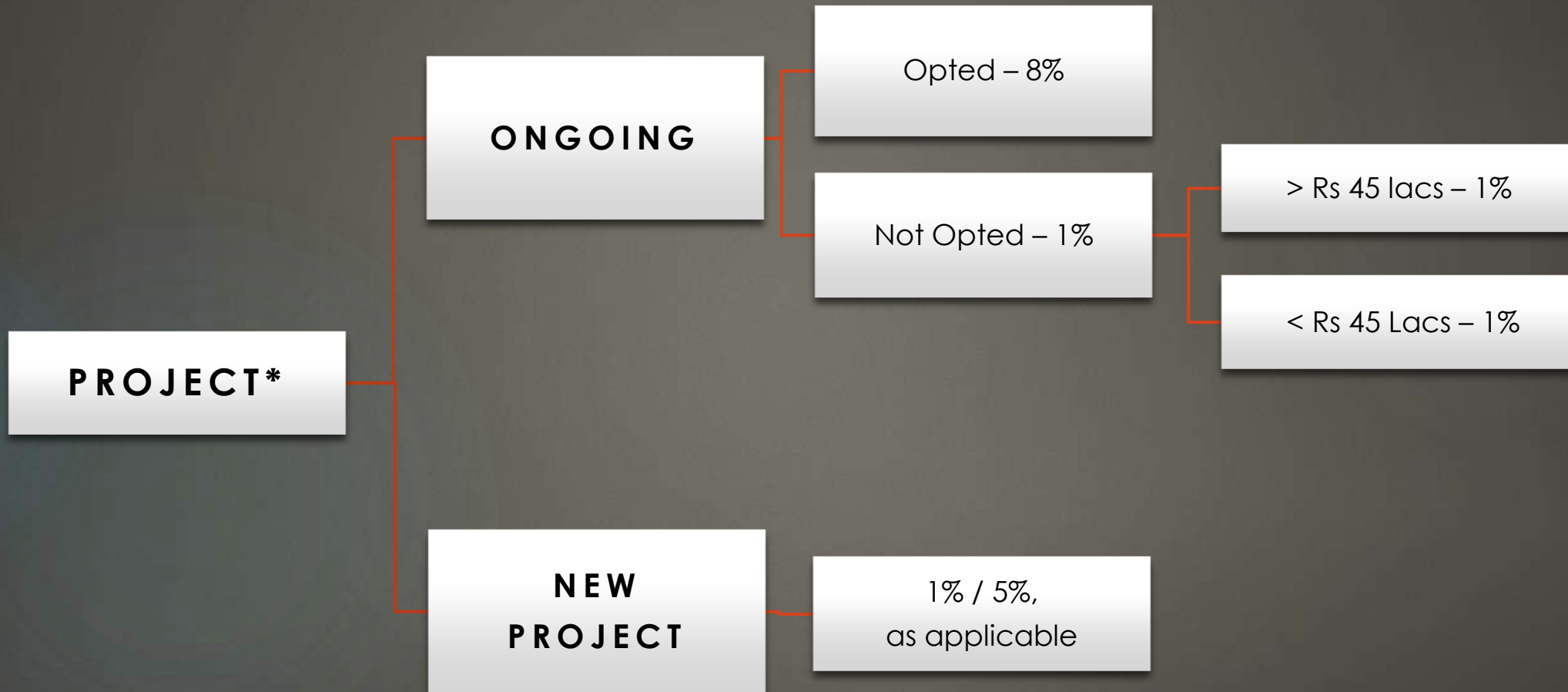
[vide Notification No 01/2018 Central Tax (Rate) dated 25.01.2018

- (v) Composite supply of works contract as defined in clause (119) of section 2 of the Central Goods and Services Tax Act, 2017 other than that covered by items (i), (ia), (ib), (ic), (id), (ie) and (if) above, supplied by way of construction, erection, commissioning, or installation of original works pertaining to,
 - (a)....(d)...
 - (da) **low-cost houses** up to a carpet area of 60 square metres per house in an **affordable housing project** which has been given **infrastructure status** vide notification of Government of India, in Ministry of Finance, Department of Economic Affairs vide F. No. 13/6/2009-INF, dated the 30th March, 2017
 - (e)...

“Affordable Housing” is defined as a housing project using at least 50% of the Floor Area Ratio (FAR)/Floor Space Index (FSI) for dwelling units with carpet area@ of not more than 60 square meters. 13



AFFORDABLE SCHEME



* Notification No 11/2017 – Central Tax (Rate) dated 28.06.2017 [as amended from time to time]

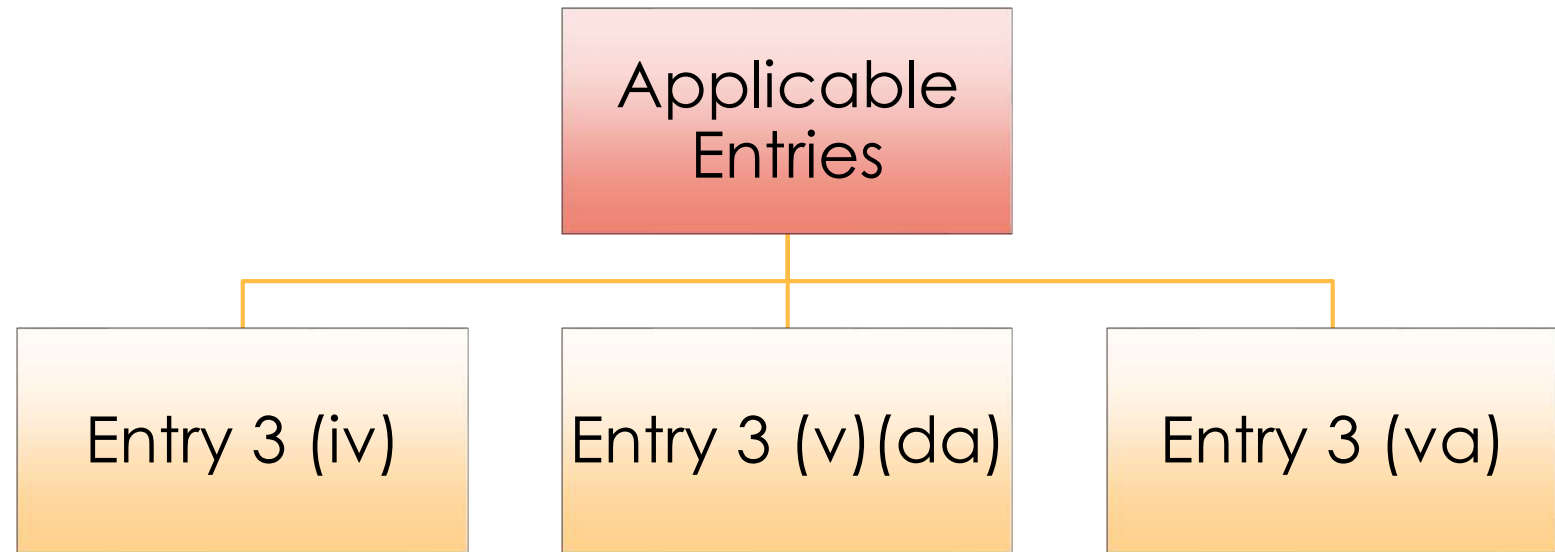


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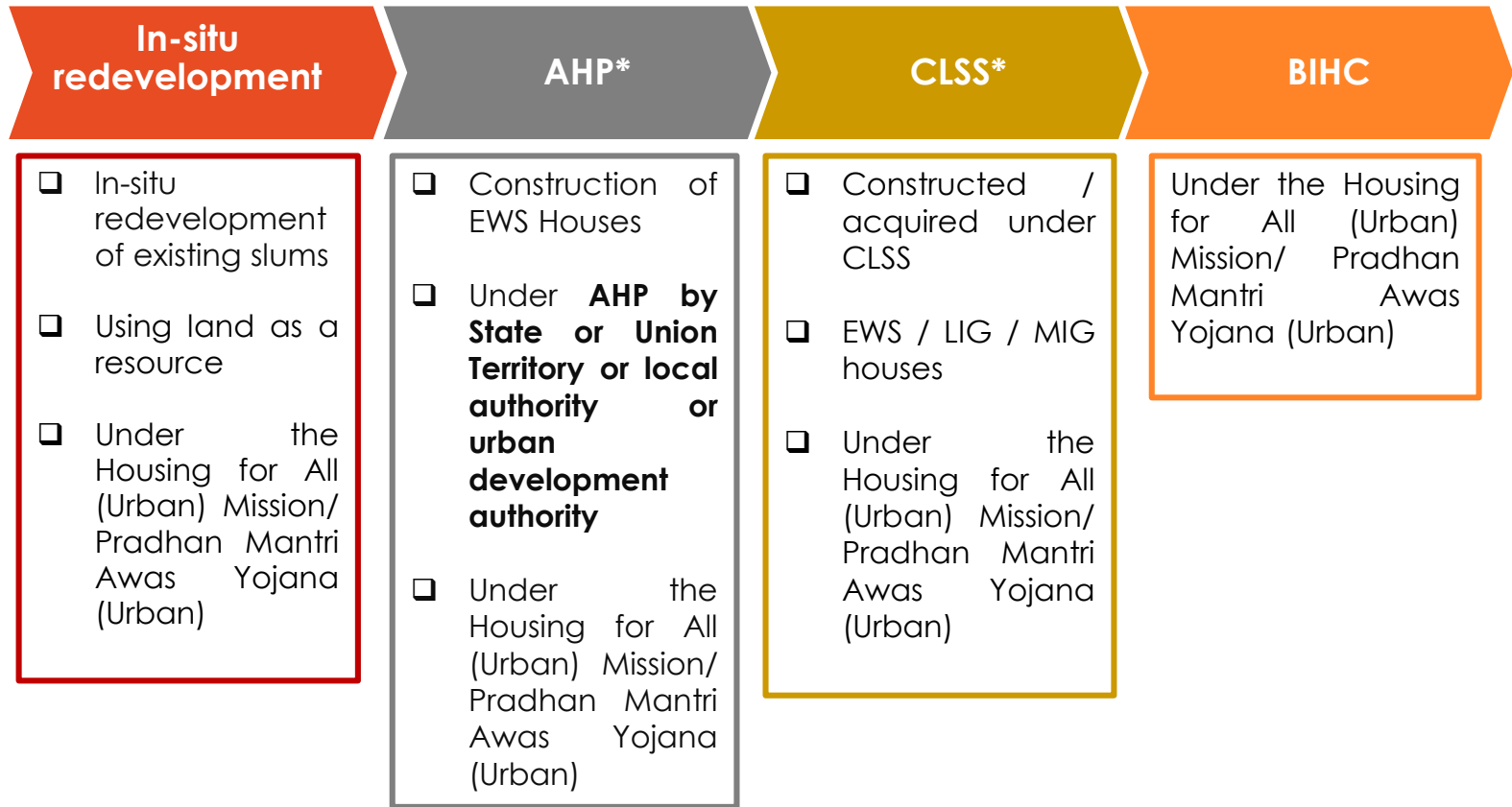
Works Contractor

MULTIPLE ENTRIES



3(iv) of Rate Notification*

Construction, erection, commissioning, installation, completion, fitting out, repair, maintenance, renovation, or alteration of a civil structure or any other original works pertaining to;



* Notification No 11/2017 – Central Tax (Rate) dated 28.06.2017 [as amended from time to time]

3 (va) of Rate Notification

[vide Notification No 03/2019 Central Tax (Rate) dated 29.03.2019]

Nature of Supplier & Supply

Composite supply of works contract as defined in clause (119) of section 2 of the Central Goods and Services Tax Act, 2017, other than that covered by items (i), (ia), (ib), (ic), (id), (ie) and (if) above, supplied by way of construction, erection, commissioning, installation, completion, fitting out, repair, maintenance, renovation, or alteration of affordable residential apartments covered by sub- clause (a) of clause (xvi) of paragraph 4 below, in a project which commences on or after 1st April, 2019, or in an ongoing project in respect of which the promoter has not exercised option to pay central tax on construction of apartments at the rates as specified for item (ie) or (if), as the case may be, in the manner prescribed therein,

Conditions to be fulfilled

- *Provided that carpet area of the affordable residential apartments as specified in the entry in column (3) relating to this item, is not less than 50 per cent. of the total carpet area of all the apartments in the project*
- *Value of the apartments shall be the value of similar apartments booked nearest to the date of signing of the contract for supply of the service specified in the entry in column (3) relating to this item;*
- **On nonfulfillment of conditions** – *The promoter shall be liable to pay such amount of tax on reverse charge basis as is equal to the difference between the tax payable on the service at the applicable rate but for the rate prescribed herein and the tax actually paid at the rate prescribed herein*

LEGAL PRINCIPLES



TWO BENEFICIAL NOTIFICATIONS – ASSESSEE CAN OPT FOR MORE BENEFICIAL

- ❑ Works Contractor have multiple beneficial entries
- ❑ Works Contractor can opt for an entry which is more beneficial to him
- ❑ Judicial Precedents –
 - ∞ H.C.L Limited v/s Collector of Customs, New Delhi (2001)130 E.L.T. 405 (S.C.).
 - ∞ Collector Of Central Excise, Baroda v/s Indian Petro Chemicals [1997 (92) E.L.T. 13 (S.C.)]

NO CONDITIONS CAN BE READ INTO THE NOTIFICATION

- ❑ Notification 11/ 2107 does not restraint the works contractor to opt for either beneficial entry
- ❑ Settled principal that no additional condition can be added which is not provided in the Notification
- ❑ Judicial Precedents –
 - ∞ Shriram Vinyl & Chemical Industries Limited [2001 (129) E.L.T. 278 (S.C.)],

LEGAL PRINCIPLES



NOTIFICATION SHOULD BE READ STRICTLY – NO SCOPE FOR INTENTION

- ❑ Notification has to be strictly read and interpreted
- ❑ Judicial Precedents –
 - ∞ NTB International P. Ltd v/s Commissioner of Customs, Mumbai [2005 (184) E.L.T. A123 (S.C.)]
 - ∞ Commissioner of Customs (Prev.), Mumbai v/s M. Ambalal & Co [2010 (260) E.L.T. 487 (S.C.)]

INTERPRETATION SHOULD NOT MAKE ANY ENTRY OF THE NOTIFICATION REDUNTANT / OTIOSE

- ❑ An interpretation which renders a piece of legislation as redundant should be avoided
- ❑ Judicial Precedents –
 - ∞ Bansal Wire Industries Limited v/s State of U.P [2011 (269) E.L.T. 145 (S.C.)]
 - ∞ Collector v/s Jiyajeerao Cotton Mills Limited [1990 (45) E.L.T. A33 (S.C.)]

CONCLUSION – APARTMENTS < 60 SQ. MTRS

% OF PROJECT	VALUE	STATUS	ENTRY	BENEFIT
> 50%	< Rs 45 lacs	Ongoing (New) / New Project	v(da)	Only on affordable houses
			(va)	Entire Project
> 50%	< Rs 45 lacs	Ongoing (Old)	v(da)	Only on affordable houses
> 50%	> Rs 45 lacs	Ongoing (New) / New Project	v(da)	Only on affordable houses
> 50%	>Rs 45 lacs	Ongoing (Old)	v(da)	Only on affordable houses
< 50%	< Rs 45 lacs	Ongoing (New) / New Project	(va)	Metro City – No Benefit
				Non-Metro – Upto 90 sq. mtrs
< 50%	> Rs 45 lacs	Ongoing (New) / New Project	-	No benefit
< 50%	<> Rs 45 lacs	Ongoing (Old)	-	No benefit

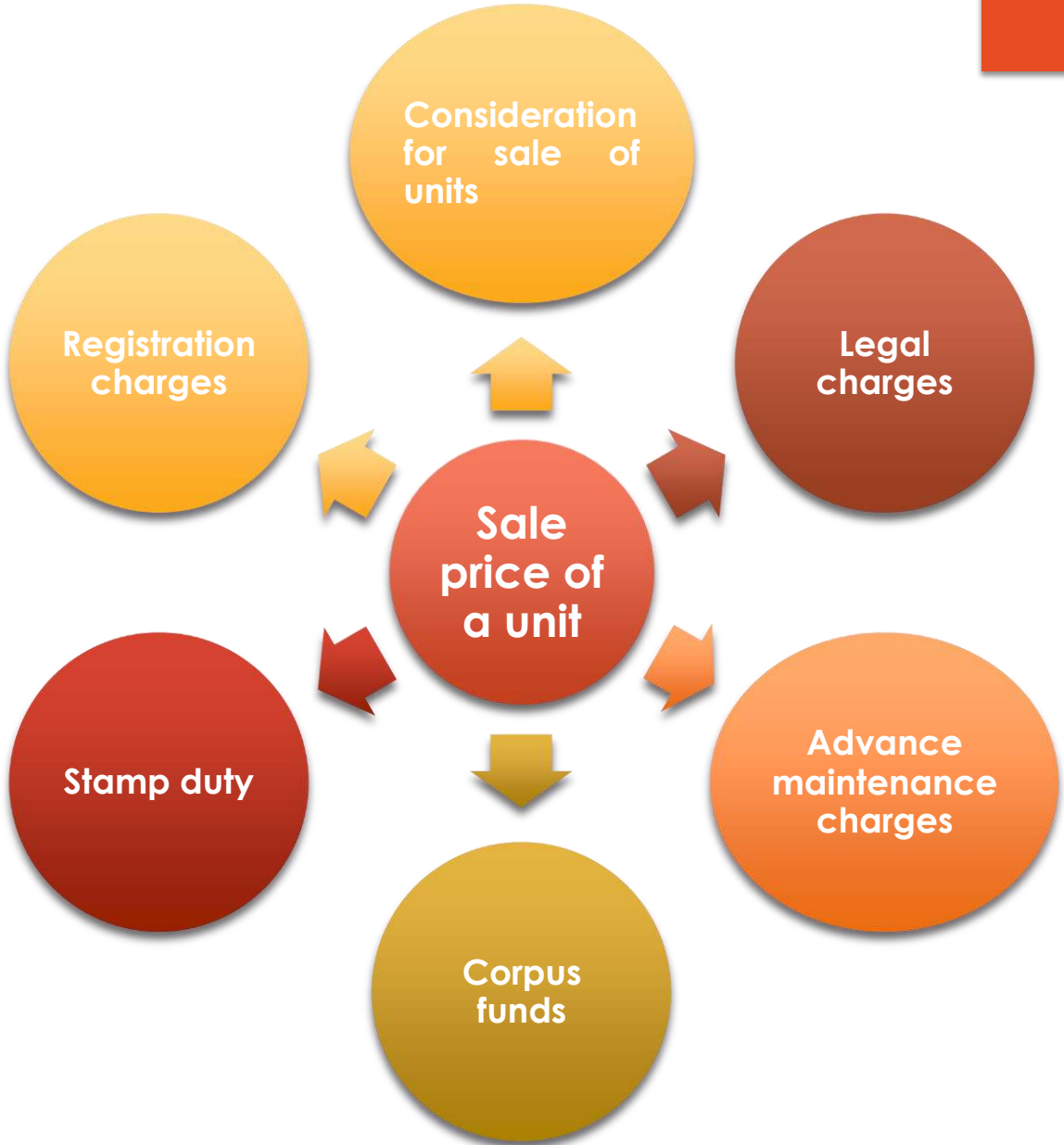
ADDITIONAL CHARGES

CASE STUDY 3

GST on various other charges recovered from the buyers on sale of under-construction apartment

Queries

- Applicability of GST on various charges/deposits collected from prospective buyers over and above the consideration for sale of units
- If GST is Applicable, then what is the applicable rate of tax



RELEVANT STATUTORY PROVISIONS

Composite Supply

- (30) “composite supply” means a supply made by a taxable person to a recipient consisting of two or more taxable supplies of goods or services or both, or any combination thereof, which are naturally bundled and supplied in conjunction with each other in the ordinary course of business, one of which is a principal supply;

Principal Supply

- (90) “principal supply” means the supply of goods or services which constitutes the predominant element of a composite supply and to which any other supply forming part of that composite supply is ancillary

Section 8

- a composite supply comprising two or more supplies, one of which is a principal supply, shall be treated as a supply of such principal supply

Explanation to Para 2 & 2A

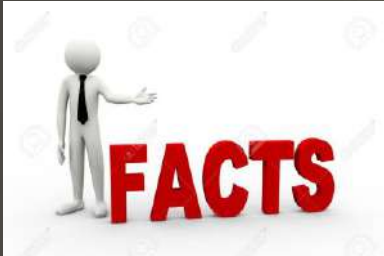
- “total amount” means the sum total of (a) consideration charged for aforesaid service; and
- (b) amount charged for transfer of land or undivided share of land, as the case may be including by way of lease or sublease



**RECENT
TRENDS**

JUDICIAL UPDATES

Bengal Peerless Housing Development Company Limited (2019-TIOL-137-AAR-GST)



- The Applicant is engaged in the business of developing residential housing project and supplying construction service to recipients for possession of dwelling unit
- The applicant also provides services like preferential location service, which includes services of floor rise and directional advantage.
- The Applicant sought a ruling as to whether such supply constitutes a composite supply with construction service as the principal supply and if so, whether abatement is applicable under sl. No. 3(i) r/w paragraph 2 of notification 11/2017-CTR on the entire value of the composite supply.



Construction service is the dominant element in the bundle of services provided , buyers of the service of constructing dwelling units in such upscale residential complexes expect, apart from the preferential location of the dwelling unit, the right to use car parking space and enjoyment of common areas and facilities like landscaped gardens, gym, conference hall, club with swimming pool etc. and which are usually bought as a bundle while booking the flat. Therefore, the Applicant is providing a composite supply, construction being the principal supply, and the supply is thus taxable under sl. No. 3(i) r/w paragraph 2 of notification 11/2017-CTR

RULING OVERRULED BY THE AAAR (2019-TIOL-68-AAAR-GST)



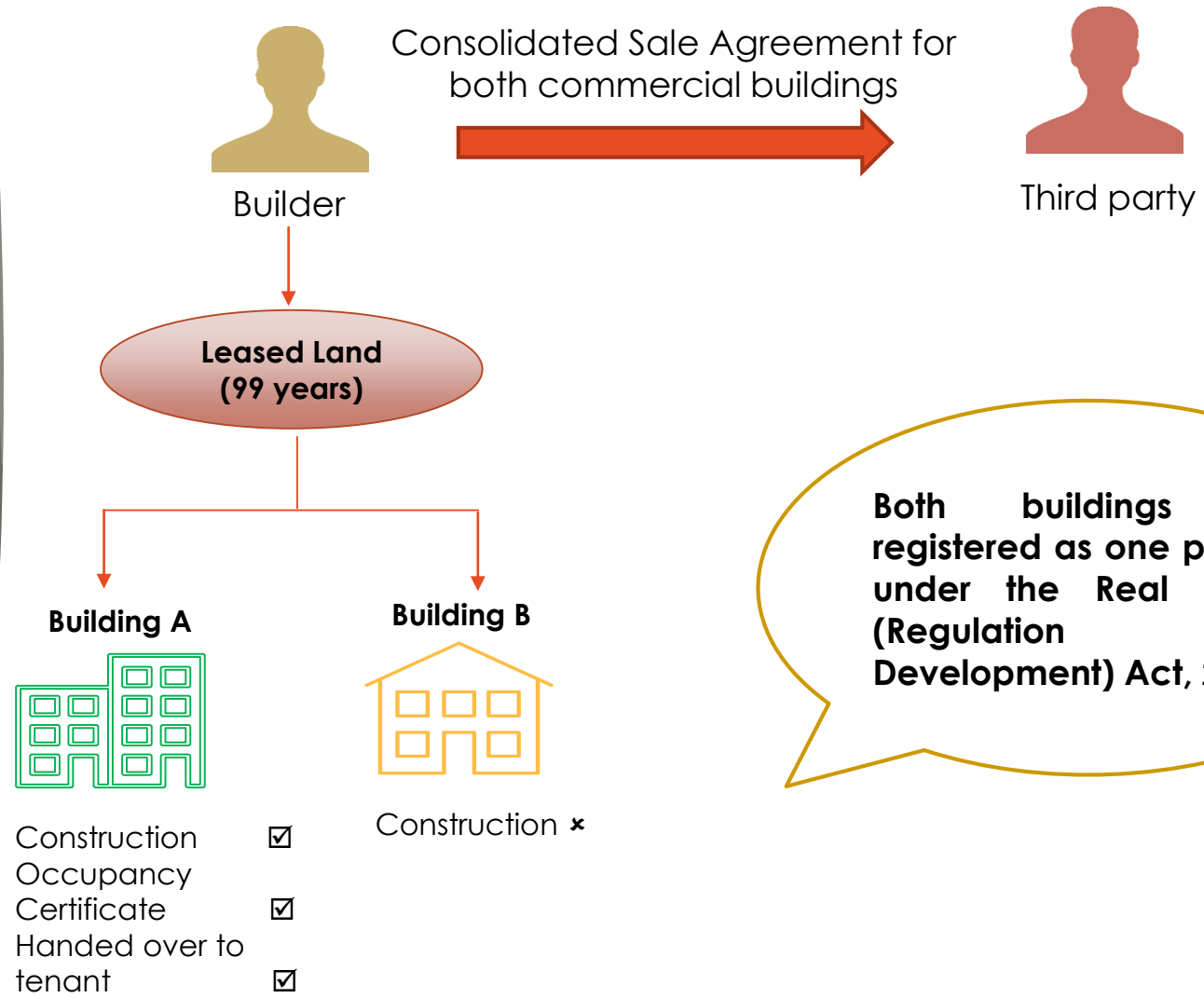
- AAAR modified the order of the AAR and held that PLS is attributable to the choice of the purchaser in respect of floor rise and directional advantage. Hence, PLS cannot be treated as naturally bundled with construction service in the ordinary course of business.
- The abatement, which is allowed on the value of construction service, as the plot of land on which construction is done is not liable to GST and cannot be deemed to be applicable in respect of PLS, which is altogether a separate service having no association with the land.
- It is clear from the categorization that PLS should come under Serial No. 3(iii) of the Services Rate Notification as the other two categories are clearly defined. No abatement has been provided for service mentioned under Serial No. 3(iii) of the Rate Notification.
- Decision as above in respect of PLS will also hold for right to use car parking space
- AAR had passed its ruling in respect of right to use car parking space and common areas and facilities also, which was not prayed for in the applicant



CASE STUDY 9

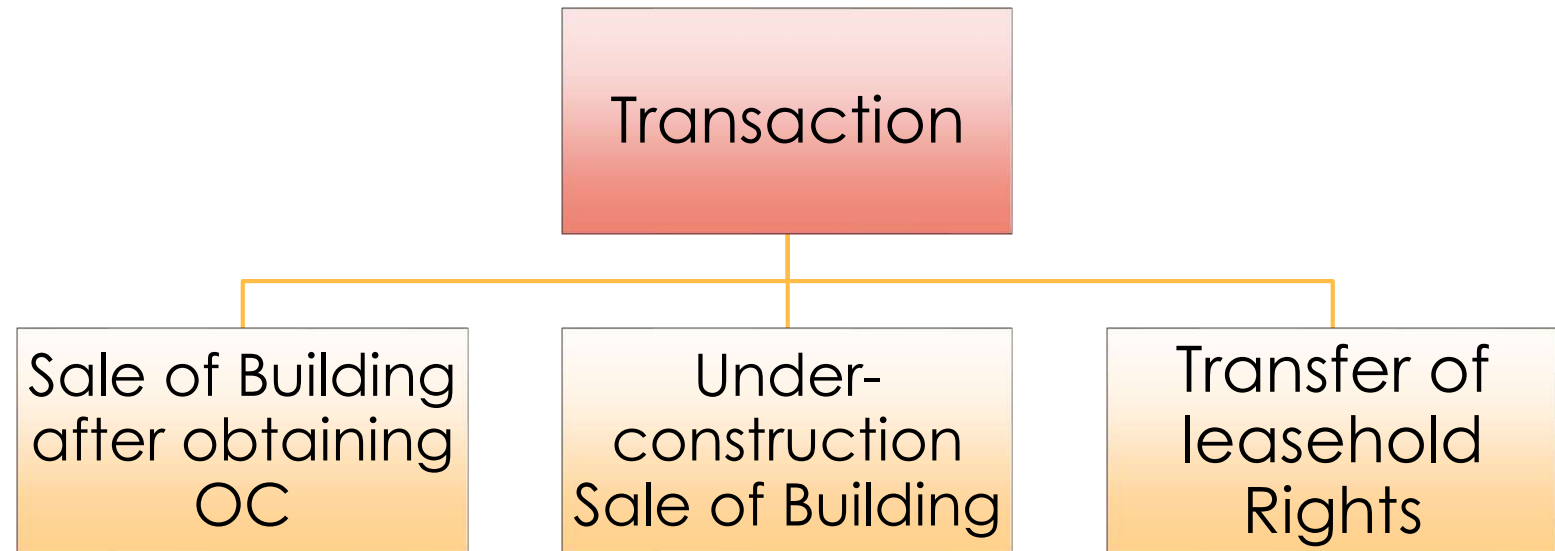
GST IMPLICATIONS ON SALE OF BUILDINGS CONSTRUCTED ON LEASEHOLD LAND

- What would be the GST implications on sale of buildings where one building is complete but other is under construction?
- What is the GST rate applicable on the underlying transaction?



Both buildings are registered as one project under the Real Estate (Regulation & Development) Act, 2016

MULTIPLE ASPECTS



SALE OF BUILDING – RELEVANT PROVISIONS

SCHEDULE II - Activities to be treated as supply of goods or services

5. The following shall be treated as supply of services, namely:—

(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.

SCHEDULE III- Activities or transactions which shall be treated neither as supply of goods nor supply of services

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

Schedule II - Activities to be treated as supply of goods or services

2. *Land and Building*
 (a) *any lease, tenancy, easement, license to occupy land is a supply of services;*



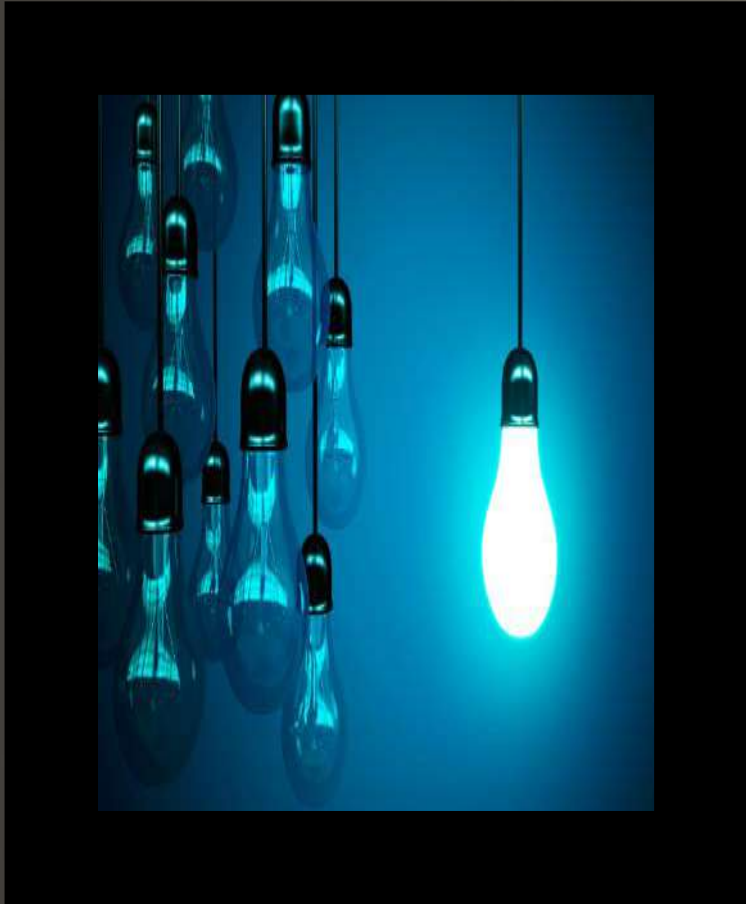
Transfer of leasehold land is supply of service and liable for GST @ 18%

Transfer of leasehold land as a part of sale of under construction building – specific deduction has been provided

Transfer of leasehold land as a part of sale of completed building – no exemption or deduction

- How to determine rationale method for bifurcation of contract price?
- Mixed supply vis-à-vis composite supply?

ANALYSIS



Position I

- Composite Supply
- Entire consideration not liable

Position - II

- Composite / Mixed Supply
- Liable @ 12%

Position – III

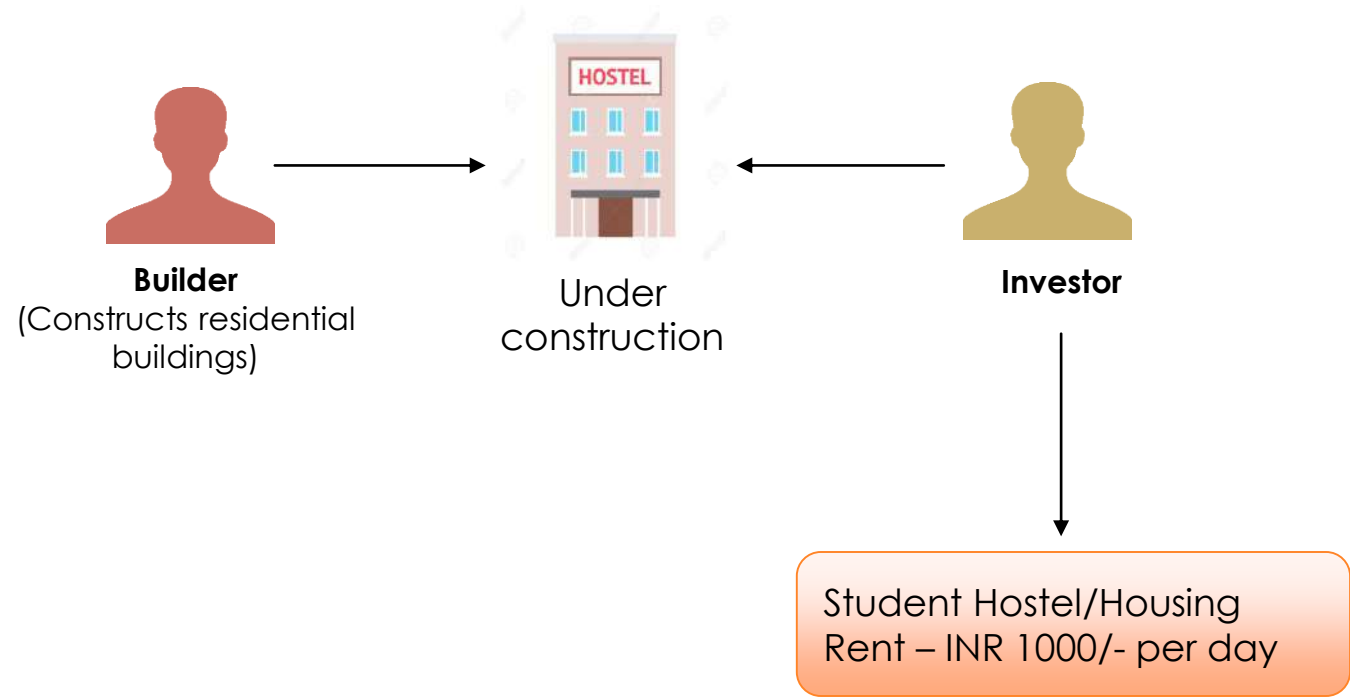
- Individually to be taxed
- Respective rate



CASE STUDY 10

GST IMPLICATIONS ON HOSTEL ACCOMODATION

- What would be the applicable GST rate on following transactions
 - ✓ Services provided by Builder to investor?
 - ✓ Student accommodation services provided by the investor
- Whether input tax credit of GST charged by the Builder is available to the investor?



Accommodation Services

Relevant Entry of Notification No. 12/2017- Central Tax(Rate) dated June 28, 2017

Sr. No	CTH	Description of Services	Rate
12	Heading 9963 or Heading 9972	Services by way of renting of residential dwelling for use as residence	Nil
14	Heading 9963	Services by a hotel, inn, guest house, club or campsite, by whatever name called, for residential or lodging purposes, having value of supply of a unit of accommodation below one thousand rupees per day or equivalent	Nil

Construction Services

Relevant Entry of Notification No. 11/2017- Central Tax(Rate) dated June 28, 2017

Sr. No	CTH	Description of Services	Rate
3	Heading 9954	(xii) Construction services	18%

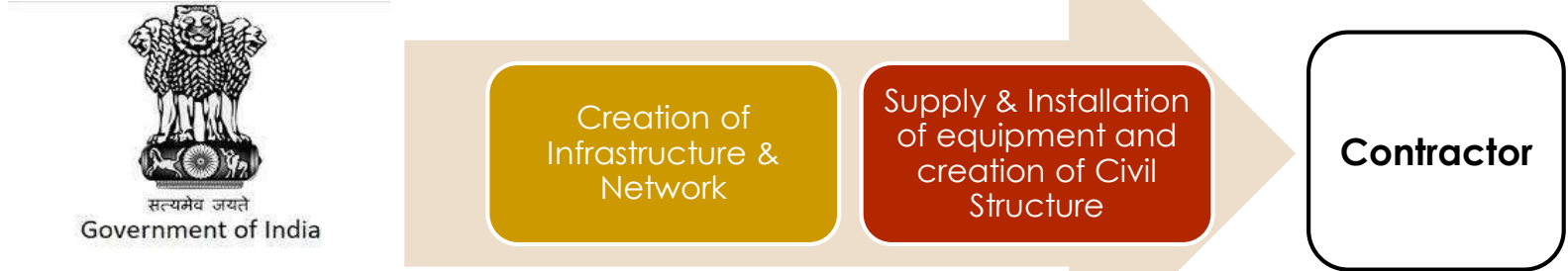
CASE STUDIES



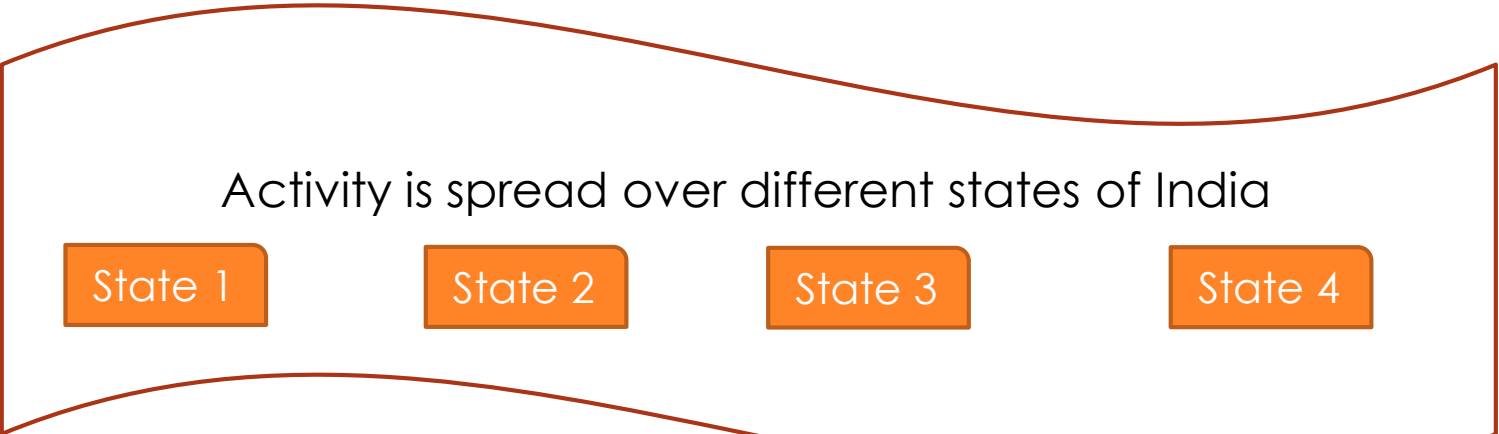
CASE STUDY 11

GST IMPLICATIONS ON SETTING UP OF NETWORK

- What are the GST implications on the transaction?
- Whether the Contractor would be eligible to avail ITC of GST paid on goods and services used for execution of project?



Network is not intended to be used for generating revenue



Relevant Entry of Notificationn 11/2017 dated June 28, 2017

How to determine 'meant predominantly for use other than for commerce?'

	Rate	
<p>(vi) Composite supply of works contract as defined in clause (119) of section 2 of the Central Goods and Services Tax Act, 2017, provided to the Central Government, State Government, Union Territory, a local authority, a Governmental Authority or a Government Entity by way of construction, erection, commissioning, installation, completion, fitting out, repair, maintenance, renovation, or alteration of –</p> <p>(a) a civil structure or any other original works meant predominantly for use other than for commerce, industry, or any other business or profession;</p>	6%	<p>Provided that where the services are supplied to a Government Entity, they should have been procured by the said entity in relation to a work entrusted to it by the Central Government, State Government, Union territory or local authority, as the case may be</p>

Section 12(3) of the IGST Act

(3) The place of supply of services, -

(a) directly in relation to an immovable property, including services provided by architects, interior decorators, surveyors, engineers and other related experts or estate agents, any service provided by way of grant of rights to use immovable property or for carrying out or co-ordination of construction work; or

(b)

shall be **the location at which the immovable property** or boat or vessel, as the case may be, **is located or intended to be located** :

Explanation.—Where the immovable property or boat or vessel is located in more than one State or Union territory, the supply of services shall be treated as made in each of the respective States or Union territories, in proportion to the value for services separately collected or determined in terms of the contract or agreement entered into in this regard or, in the absence of such contract or agreement, on such other basis as may be prescribed.

IMPACT OF GST ON JOINT DEVELOPMENT AGREEMENTS



Constitutional Validity of GST on TDR

Proposition I

- Transferable Development Rights ('TDR') is a direct consequence of a "land".
- Judicial Precedents
 - *Anand Behera v. State of Orissa*,
 - *State of Orissa v. Titagarh Paper Mills Company Limited*

Proposition II

- Goods, services and immovable property, are 3 distinct species/categories
- Distinct, independent and exclusive set of laws, providing levy, collection and assessment ought to be provided for each specie.
- While framing the legislations ought to follow this distinction
- There cannot be any overlapping or encroachment.
- Judicial Precedents
 - *M/s. Hoechst Pharmaceuticals Ltd v. State of Bihar*
 - *State of Kerala v. Mar Appraem Kuri Co. Ltd.*

Proposition III

- When the levy is *per se* not sustainable, any attempt to levy or collect GST, will run foul of the Article 265 of the Constitution which states that "*no tax shall be levied or collected except by authority of law*".
- Attempt to levy GST on TDR is clearly in the teeth of Article 265.
- Judicial Precedents
 - *Raja Jagannath Baksh Singh v. State of U.P.*
 - *Commissioner of Income Tax, Udiapur, Rajasthan v. Mcdowell and Co. Ltd.,*

TIME OF PAYMENT

(Applicable prior to 01 April 2019)

Notification No. 4/2018 – Central Tax(Rate) dated 25 January 2018

As per Notification No. 4/2018 – Central Tax (Rate) dated 25 January 2018,

- a) registered persons who supply development rights to a developer, builder, construction company or any other registered person against consideration, wholly or partly, in the form of construction service of complex, building or civil structure; and
- b) registered persons who supply construction service of complex, building or civil structure to supplier of development rights against consideration, wholly or partly, in the form of transfer of development rights,

shall in respect of each of the above supply of services be liable to pay GST liability at the time of when the said developer, builder, construction company or any other registered person, as the case may be, transfers possession or the right in the constructed complex, building or civil structure, to the person supplying the development rights by entering into a conveyance deed or similar instrument (for example allotment letter).

Notification
4/2018



TIME OF PAYMENT

(Applicable on or after 01 April 2019)

Notification No. 6/2019 – Central Tax(Rate) dated 29 March 2019

Promoter who receives development rights or Floor Space Index (FSI) (including additional FSI) on or after 1st April, 2019 for construction of a project against consideration payable or paid by him, wholly or partly, in the form of construction service of commercial or residential apartments in the project or in any other form including in cash will be liable to pay GST on:

- (a) the consideration paid by him in the form of construction service of commercial or residential apartments in the project, for supply of development rights or FSI (including additional FSI);
- (b) the monetary consideration paid by him, for supply of development rights or FSI (including additional FSI) relating to construction of residential apartments in project;

on the date of issuance of completion certificate for the project, where required, by the competent authority or on its first occupation, whichever is earlier.

Notification
6/2019



CONDITIONAL EXEMPTION FOR TDR

(Applicable prior to 01 April 2019)

Notification No. 4/2019- Central Tax(Rate) dated June 28, 2017

Sr. No	CTH	Description of Services	Rate	Conditions
41A	Heading 9972	Service by way of transfer of development rights (herein refer TDR) or Floor Space Index (FSI) (including additional FSI) on or after 1st April, 2019 for construction of residential apartments by a promoter in a project, 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. The amount of GST exemption available for construction of residential apartments in the project under this notification shall be calculated as under: [GST payable on TDR or FSI (including additional FSI) or both for construction of the project] x (carpet area of the residential apartments in the project ÷ Total carpet area of the residential and commercial apartments in the project)	Nil	Provided that the promoter shall be liable to pay tax at the applicable rate, on reverse charge basis, on such proportion of value of development rights, or FSI (including additional FSI), or both, as is attributable to the residential apartments, which remain un-booked on the date of issuance of completion certificate, or first occupation of the project, as the case may be, in the following manner -

Entry 41A of Notification No. 4/2019

EXPLANATION TO NOTIFICATION NO 04/2019

1A. Value of supply of service by way of transfer of development rights or FSI by a person to the promoter against consideration in the form of residential or commercial apartments shall be deemed to be equal to the value of similar apartments charged by the promoter from the independent buyers nearest to the date on which such development rights or FSI is transferred to the promoter.

1B. Value of portion of residential or commercial apartments remaining un-booked on the date of issuance of completion certificate or first occupation, as the case may be, shall be deemed to be equal to the value of similar apartments charged by the promoter nearest to the date of issuance of completion certificate or first occupation, as the case may be



LAND DEDUCTION - PARA 2 & 2(A)

PARA 2 –

In case of supply of service specified in column (3), in item (i); (i) (ia), (ib), (ic), (id), (ie) and (if), against serial number 3 of the Table above, involving transfer of land or undivided share of land, as the case may be, the value of such supply shall be equivalent to the total amount charged for such supply less the value of transfer of land or undivided share of land, as the case may be, and 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.

PARA 2 (A) —

Where a registered person transfers development right or FSI (including additional FSI) to a promoter against consideration, wholly or partly, in the form of construction of apartments, the value of construction service in respect of such apartments shall be deemed to be equal to the Total Amount charged for similar apartments in the project from the independent buyers, other than the person transferring the development right or FSI (including additional FSI), nearest to the date on which such development right or FSI (including additional FSI) is transferred to the promoter, less the value of transfer of land, if any, as prescribed in paragraph 2 above

LIABILITY QUA TRANSFER OF DEVELOPMENT RIGHTS



Nature of Transaction	Liability	Person Liable	Value	Time of Payment
JDA (Land Owner)	Yes	RCM	Proportion to Post OC sale (Similar Flats)	Completion Certificate (CC)
Society	Litigious	-	-	-

1. It is assumed that the transaction is being undertaken on or after April 1, 2019
2. RCM – Reverse Charge Mechanism

SOCIETY DEVELOPMENT

POINTS FOR ANALYSIS

- ▶ Is there any supply by the Society to the Promoter ?
 - ▶ No transfer of Development Rights by Society to Promoter
 - ▶ Re-development vis-à-vis Self redevelopment
 - ▶ In the course or furtherance of business
- ▶ Society – Impact of registered society viz-a-viz unregistered Society

COMPARATIVE ANALYSIS

Self Re-development

Under supervision of Society Members

Property rights remain with society

No POA in favour of the developer

Re-development

Re-development by builder

Development rights given to the Developer **shall be non-transferrable**

The DA / POA / PAA to be executed and registered under Registration Act 1908

CLAUSES IN PERMANENT ALTERNATE ACCOMMODATION AGREEMENT (PAA)

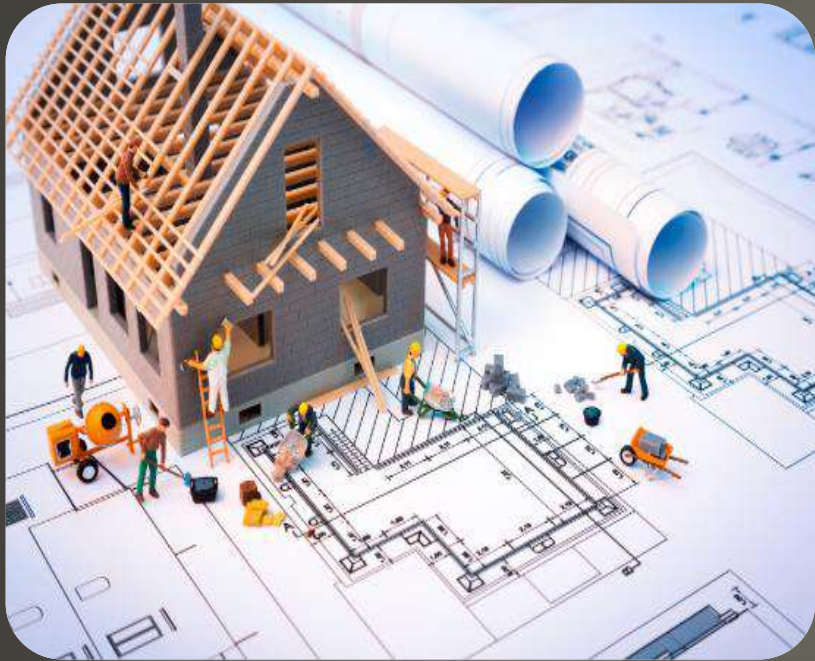
- ▶ *The occupant has agreed and consented to re-development of the said property as a part of the project or in the manner deemed fit and in consideration thereof said Developer has agreed to permanently re-accommodate the occupant in the new building to be constructed on the said layout by allotting a permanent alternate accommodation (described herein) “on ownership basis” to the occupant in lieu of the current premises*
- ▶ *3. In view of the Developer agreeing to provide permanent alternative accommodation on “ownership basis” to the Tenant as provided in this Agreement and the Owner/ Developer agreeing to comply with various obligations as provided hereinafter, the Tenant hereby confirms that the Tenant is agreeable to Owner redeveloping the said Land through the Developer and hereby agrees to render all necessary co-operation to the Owner and the Developer as may be required by them respectively in the course of the redevelopment of the said Land as recited above and shall sign and deliver all documents, NOC’s, consents, applications etc. as may be necessary for the said purposes including inter alia the consent to be submitted to the MHADA in the prescribed formats for the purpose of undertaking the redevelopment of the said Land inter alia under the provisions of Regulation 33 (7) of the DCR, 1991*

GRANT CLAUSES IN RE-DEVELOPMENT AGREEMENT

- ▶ *The Federation for itself and on behalf of the said Societies has appointed the Developer (on the request of Keystone) for undertaking the redevelopment of the said Property and hereby grants unto the Developer the development rights with respect to the said Land more particularly described in Schedule hereunder written and delineated in red colour boundary line on the plan annexed hereto and marked as Annexure [●] in the manner and on the terms and conditions set out in this Agreement together with the right to use and utilize the total available floor space index of the said Property being the Aggregate FSI in the manner, the Developer deems, fit and proper.*

- ▶ *3.1 The Society has appointed the Name of the Developer (“Developer”) for undertaking the Re-development of the said Property and hereby grants unto the Developer the Development Rights with respect to the said Property more particularly described in the Schedule hereunder written and delineated in Green colour boundary line on the plan annexed hereto and marked as Annexure “1” in the manner and on the terms and conditions set out in this Agreement together with the right to use and utilize the total available floor space index of the said Property being the Aggregate FSI in the manner, the Developer deems, fit and proper.*

LIABILITY QUA CONSTRUCTION SERVICES



Nature of Transaction	Liability	Responsibility	Value	Time of Payment
JDA (Land Owner)	Yes	FCM	Similar Flats	Completion Certificate (CC)
Society	Yes	FCM	Litigious	Completion Certificate (CC)

1. It is assumed that the transaction is being undertaken on or after April 1, 2019
2. FCM – Forward Charge

DEVELOPER TO SOCIETY POINTS FOR ANALYSIS

- ▶ Is there any supply by the Developer to the Society?
 - ▶ Exchange of Immovable Property
 - ▶ Entire revenue offered for tax and therefore is there any further supply [*Vasantha Green Projects [2018-TIOL-1611-CESTAT-HYD]*]
- ▶ Apartments intended to be sold to buyers
 - ▶ Typically clauses of permanent alternate accommodation is on ownership basis
- ▶ Applicable Entry (ia) / (if) / (xii)
- ▶ Valuation ?

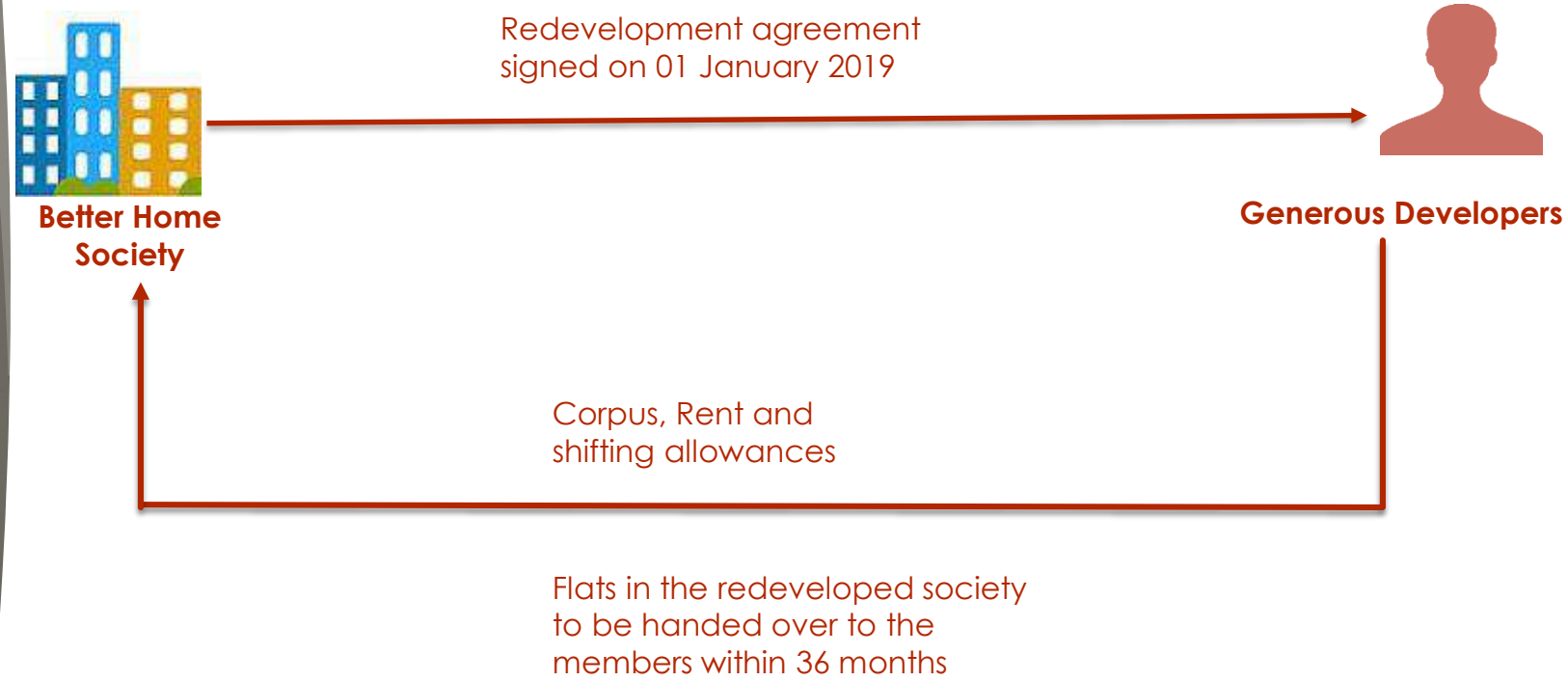
An architectural rendering of a modern high-rise building. The building features a prominent vertical garden facade with multiple levels of greenery. The facade is composed of light-colored panels and dark wood accents. The building is set against a clear blue sky. In the foreground, there are several palm trees and a paved area. A black rectangular box with white text is overlaid on the right side of the image.

CASE STUDY 2 & 6

Re-development Project

Queries

- Whether the society is required to pay GST qua the transaction with the Promoter
- Whether the Promoter is required to pay GST qua this transaction
- GST implications from various aspects but not limited to time of supply, valuation, credit eligibility and credit reversal
- Will it make any difference to the answers if the redevelopment agreement was signed on 01 June 2019
- Will it make any difference if Better Home Society was not registered under GST



'Better Home Society' is a society with various amenities therein including but not limited to swimming pool and health club and has obtained registration under GST. Better Home Society has appointed 'Generous' Developers for undertaking redevelopment of their society



CASE STUDY 8

Joint Development Project

What are the GST implications on the below transactions:

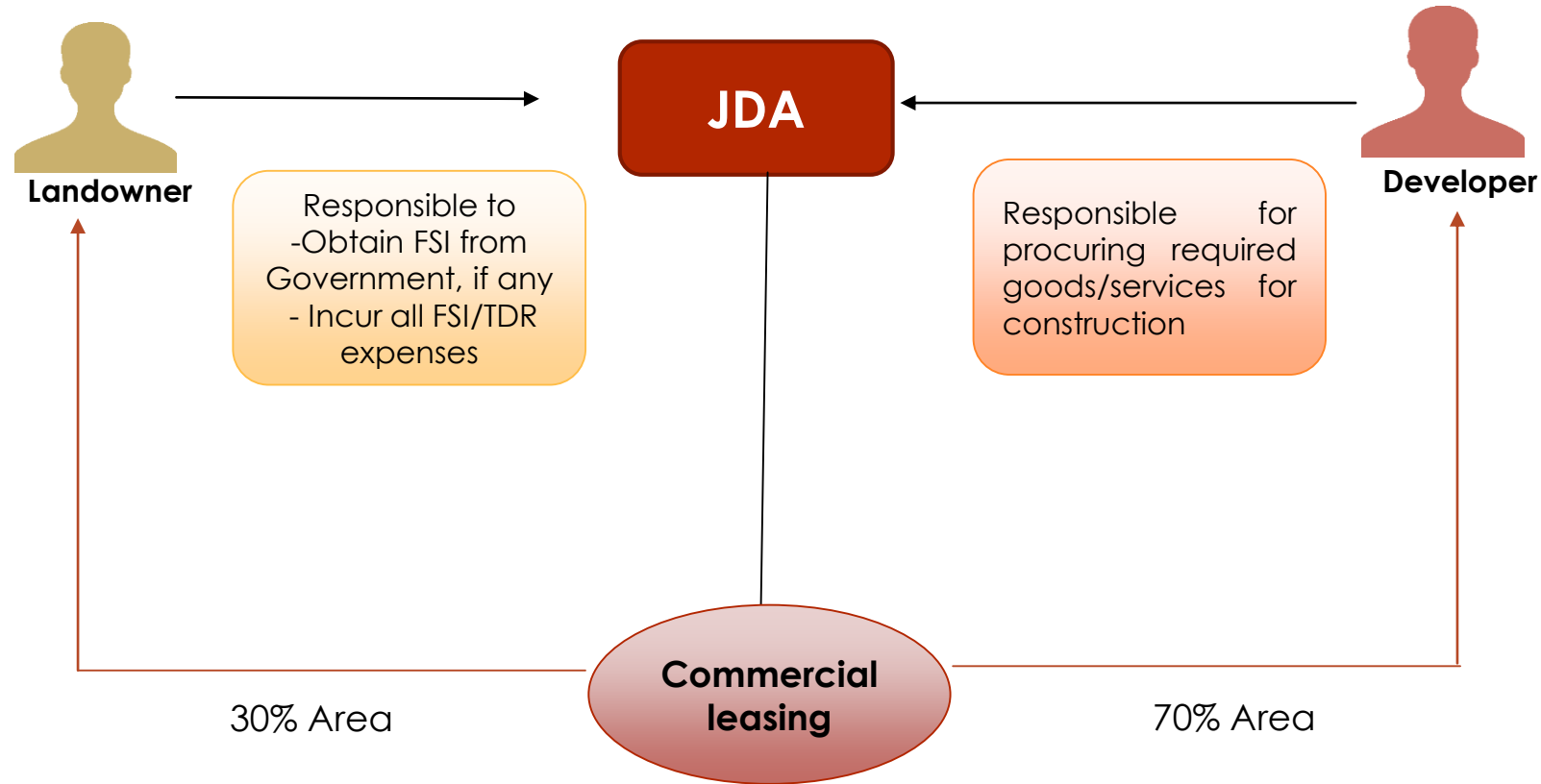
Transaction # I: Transfer of Development Rights by the Landowner

Transaction # II: Construction services provided by the Developer to the Landowner

Transaction # III: FSI obtained from the Government by Landowner

Transaction # IV: Whether input tax credit is available to the Developer

Transaction # V: Leasing of commercial property





ECONOMIC
LAW
PRACTICE
11-2004 11-480 10-10-11

CREDIT RELATED CASE STUDIES

CASE STUDY 4

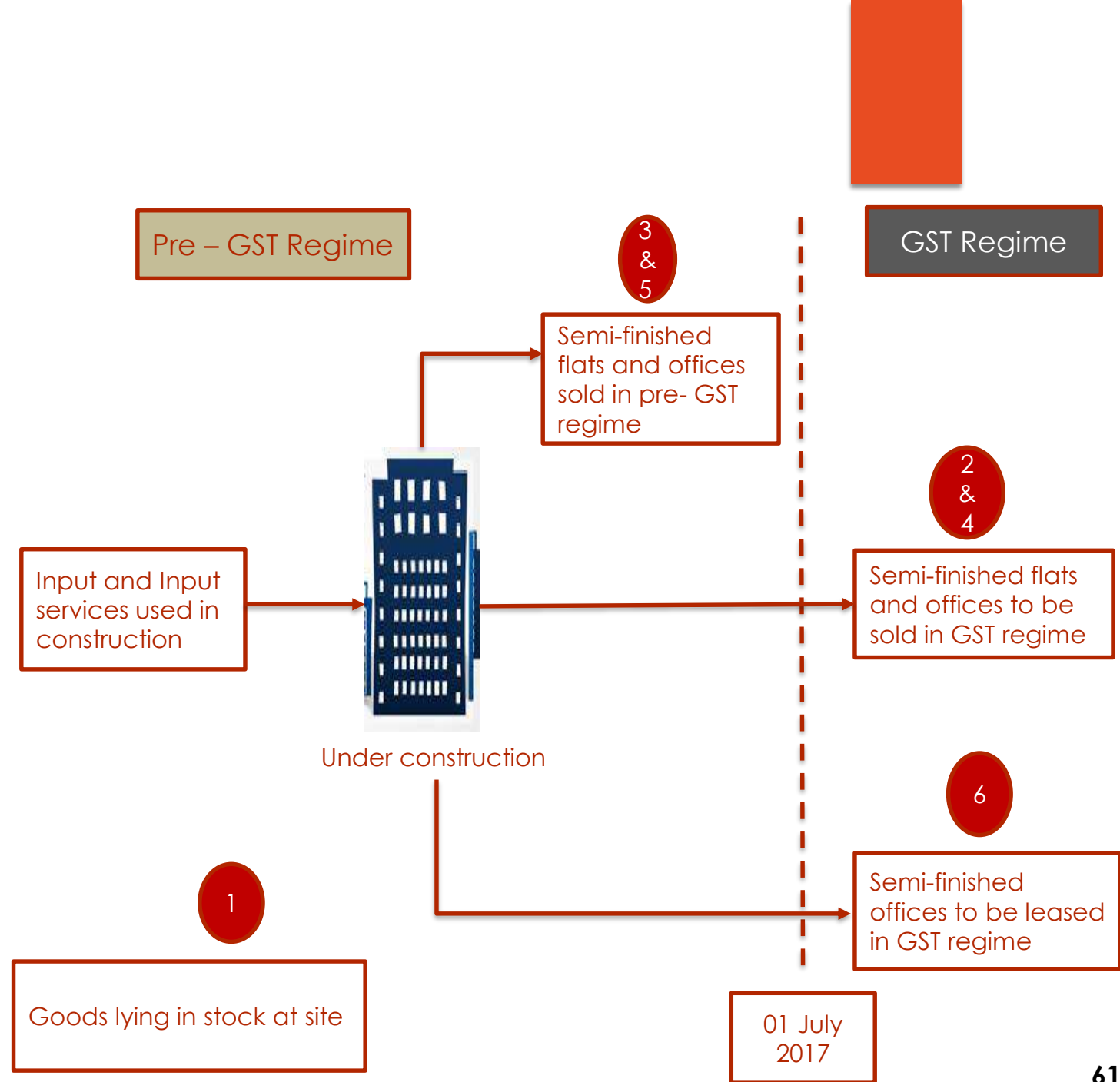
Transitional credit of goods
and services

TRANSITIONAL CREDIT

- Determine the eligibility of the input tax credit to be transitioned under GST in the following cases:

- 1: Goods lying in stock as on 30 June 2017**
- 2: Goods and services used in semi-finished flats which are unsold as on 30 June 2017**
- 3: Goods and services used in semi-finished flats sold as on 30 June 2017**
- 4: Goods and services used in semi-finished offices which are unsold as on 30 June 2017**
- 5: Goods and services used in semi-finished offices sold as on 30 June 2017**
- 6: Goods and services used in semi-finished offices to be leased post 01 July 2017**

- Whether the answer changes under situation **2** and **4** if the unsold units continue to remain unsold till the date of receipt of Occupancy Certificate?



Relevant Provisions

Section 140(3)

- As per Section 140(3) of the Central Goods and Services Tax Act, 2017 ('CGST Act'), a registered person engaged in providing works contract service and availing benefit of Notification No. 26/2012 – Service Tax dated 20 June 2012, shall be entitled to take credit of **eligible duties in respect of inputs held in stock and inputs contained in semi-finished or finished goods held in stock** on the appointed day subject to the following condition:
 - a. such inputs or goods are used or intended to be used for making taxable supplies under CGST Act
 - b. the said registered person is eligible for input tax credit on such inputs under CGST Act
 - c. the said registered person is in possession of invoice or other prescribed documents evidencing payment of duty under the existing law (erstwhile indirect tax laws) in respect of such inputs
 - d. such invoices or other prescribed documents were issued not earlier than 12 months immediately preceding the appointed day
 - e. the supplier of services is not eligible for any abatement under CGST Act

BLOCK CREDIT UNDER GST

[Section 17(5) of the CGST Act, 2017]



- (5) Notwithstanding anything contained in sub-section (1) of section 16 and subsection (1) of section 18, input tax credit shall not be available in respect of the following, namely:—
- (a) to (b)...
 - (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
 - (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.
 - (e) to (i)...

BUILDING USED FOR RENTAL INCOME - NO ITC ON GOODS AND SERVICES USED FOR CONSTRUCTION

CONCLUSION

Sr. No.	Query	Transitional Credit
1	Goods lying in stock as on 30 June 2017	Yes (excluding offices intended for lease)
2	Goods used in semi-finished flats which are unsold as on 30 June 2017	Available but litigious
3	Goods used in semi-finished flats sold as on 30 June 2017	May be available but litigious
4	Goods used in semi-finished offices which are unsold as on 30 June 2017	Available but litigious
5	Goods used in semi-finished offices sold as on 30 June 2017	May be available but litigious
6	Goods used in semi-finished offices to be leased post 01 July 2017	Not available
7	Whether the answer changes under situation 2 and 4 if the unsold units continue to remain unsold till the date of receipt of Occupancy Certificate	No



OCCUPANCY CERTIFICATE

CASE STUDY 5

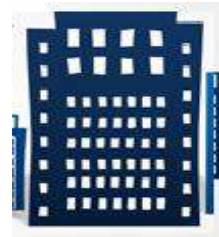
Reversal of ITC on receipt of Occupancy Certificate

- Credit reversal in each of the following cases incase of single occupancy certificate for the entire project which was received in the month of:

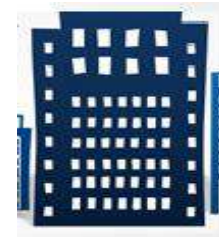
- December 2017
- December 2018
- December 2019

I. Opted for Single Occupancy Certificate

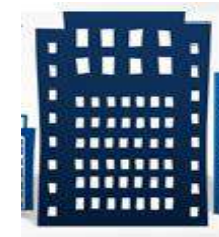
OC received in December 2017



OC received in December 2018

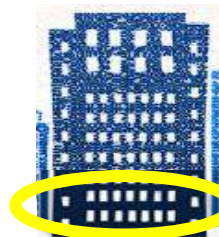


OC received in December 2019



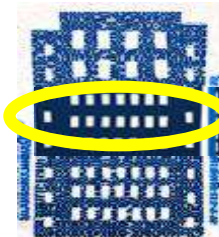
II. Opted for Partial Occupancy Certificate

December 2017



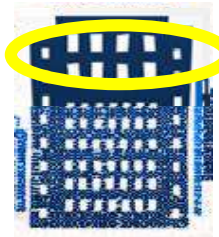
OC received for 1st to 20th floor

December 2018



OC received for 21st to 40th floor

December 2019



OC received for 41st to 50th floor

- Change in implication where the Promoter applied and received partial occupancy certificate for the Project :

- Upto 20th floor - December 2017
- From 21st to 40th floor - December 2018
- From 41st to 50th floor - December 2019

- Whether area based reversal applicable pre-April 1, 2019 ?
- Reversal of credit for the entire period for OC received prior to April 1, 2019 ?
- Availability of credit even after receipt of OC ?
- Possession granted in case of partial OC?
- Inclusion of transitional credit at the time of reversal of credit?
- Position qua services availed in respect of particular apartments?

Removal of Difficulties

Order No. 4 dated 29 March 2019 (ROD 4)

Now, therefore, in exercise of the powers conferred by section 172 of the said Act, the Central Government, on recommendations of the Council, hereby makes the following Order, namely:-

1. *Short title.* -- This Order may be called the Central Goods and Services Tax (Fourth Removal of Difficulties) Order, 2019.
2. *For the removal of difficulties, it is hereby clarified that in case of supply of services covered by clause (b) of paragraph 5 of Schedule II of the said Act, the amount of credit attributable to the taxable supplies including zero rated supplies and exempt supplies shall be determined on the basis of the area of the construction of the complex, building, civil structure or a part thereof, which is taxable and the area which is exempt.*
3. *This Order shall come into force with effect from the 1st day of April, 2019*

Removal of Difficulty Order

SPECIFIC MENTION OF EFFECTIVE DATE AS APRIL 1, 2019

- ❑ The order provides for the effective date as April 1, 2019
- ❑ In all other ROD, no specific date provided
- ❑ This clearly indicate that the intention to have this ROD from April 1, 2019

REMOVAL OF DOUBT UNDER ERSTWHILE REGIME DO NOT HAVE RETROSPECTIVE EFFECT

- ❑ In the erstwhile regime - Settled principle of law that mere use of the term 'for removal of doubts' cannot make any law retrospective
- ❑ Judicial Precedents –
 - ∞ Union Of India V. Martin Lottery Agencies Ltd [2009 (14) S.T.R. 593 (S.C.)]
 - ∞ L&T Komatsu Ltd v. Commr of C.Ex , S.T. & Cus, Bangalore – IV, [2016(344) E.L.T. 632 (Tri- Bang)]

CREDIT APORTIONMENT

[Section 17(1) / (2) / (3) of the CGST Act, 2017]



- (1) Where the goods or services or both are used by the registered person partly for the purpose of any business and partly for other purposes, the amount of credit shall be restricted to so much of the input tax as is attributable to the purposes of his business.
- (2) Where the goods or services or both are used by the registered person partly for effecting taxable supplies including zero-rated supplies under this Act or under the Integrated Goods and Services Tax Act and partly for effecting exempt supplies under the said Acts, the amount of credit shall be restricted to so much of the input tax as is attributable to the said taxable supplies including zero-rated supplies.
- (3) The value of exempt supply under sub-section (2) shall be such as may be prescribed, and shall include supplies on which the recipient is liable to pay tax on reverse charge basis, transactions in securities, sale of land and, subject to clause (b) of paragraph 5 of Schedule II, sale of building.

Relevant extract of Rule 42 prior to 01 April 2019

Rule 42 of CGST Rules - Manner of determination of input tax credit in respect of inputs or input services and reversal thereof

The amount of input tax credit credited to the electronic credit ledger of registered person, be denoted as 'C1' and calculated as:

$$C1 = T - (T1 + T2 + T3);$$

T - Total input tax in a tax period;

T1 - Exclusively for the purposes other than business

T2 - Exclusively for effecting exempt supplies.

T3 - Credit is not available under sub-section (5) of section 17.

The input tax credit left after attribution of input tax credit as above, shall be called common credit, be denoted as 'C2' and shall be calculated as:

$$C2 = C1 - T4;$$

T4 - Exclusively for effecting supplies other than exempted but including zero rated supplies

D1 - The amount of common input tax credit attributable towards exempt supplies:

$$D1 = (E/F) \times C2$$

E - aggregate value of exempt supplies during the tax period

F - total turnover in the State of the registered person during the tax period

D2: amount of credit attributable to non-business purposes if common inputs and input services are used partly for business and partly for non-business purposes

D2 - 5% of C2

Total credit reversal: D1 + D2



Rule 42 – prior to 01 April
2019

Relevant extract of Rule 42 post to 01 April 2019

Rule 42 of CGST Rules - Manner of determination of input tax credit in respect of inputs or input services and reversal thereof

Rule 42 – post 01 April 2019

The amount of input tax credit credited to the electronic credit ledger of registered person, be denoted as 'C1' and calculated as:

The input tax credit left after attribution of input tax credit as above, shall be called common credit, be denoted as 'C2' and shall be calculated as:

C2 = C1 - T4;

T4 - Exclusively for effecting supplies other than exempted but including zero rated supplies

D1 - The amount of common input tax credit attributable towards exempt supplies:

D1=(E/F) x C2

E - aggregate carpet area of the apartments, construction of which is exempt from tax plus aggregate carpet area of the apartments, construction of which is not exempt from tax, but are identified by the promoter to be sold after issue of completion certificate or first occupation, whichever is earlier

F - aggregate carpet area of the apartments in the project

D2: amount of credit attributable to non-business purposes if common inputs and input services are used partly for business and partly for non-business purposes

D2 – 5% of C2

Total credit reversal: D1+ D2



Rule 42 - post 01 April 2019

Explanation: For the purpose of this clause, it is hereby clarified that in case of supply of services covered by clause (b) of paragraph 5 of Schedule II of the said Act, value of T4 shall be zero during the construction phase because inputs and input services will be commonly used for construction of apartments booked on or before the date of issuance of completion certificate or first occupation of the project, whichever is earlier, and those which are not booked by the said date

M/s. Alembic Ltd. Vs. CCE, Vadodara-I, 2018

[(10) TMI 1557- CESTAT Ahmedabad]



FACTS

1. Assessee engaged in development of real estate projects and availed CENVAT Credit
2. Assessee obtained completion certificate on 24-02-2014 on which date 35% units remain unsold
3. Assessee intimated authorities about proportionate credit availment after date of obtaining completion certificate
4. Assessee was asked to reverse CENVAT Credit
5. SCN was issued to the assessee



ISSUE

Whether the Assessee was required to reverse any portion of the Cenvat Credit availed by it, after receipt of Completion Certificate for the projects.



M/s. Alembic Ltd. Vs. CCE, Vadodara-I, 2018

DECISION OF CESTAT

1. Entitlement to Cenvat credit to be determined at the time of receipt of input services
2. Merely because the output services became exempt later, the credit is not deniable, **in the absence of specific provision**
3. Rule 11 of the Cenvat Credit Rules, 2004 specifically provides for reversal of credit on inputs in case of finished goods becoming exempt later. No specific provisions in the context of Cenvat credit on input services.
4. The Hon'ble Tribunal held that
 - The eligibility/entitlement to credit has to be examined only at the time of receipt of input service
 - Once found to be availed at a time when output service is wholly taxable, and the said credit is availed legitimately
 - Cannot be denied and/or recovered unless specific machinery provisions are made in this regard.

On appeal by the Revenue, the Hon'ble Gujarat HC upheld the Tribunal vide order dated April 12,2019

COMPARATIVE ANALYSIS

UPTO MARCH 31, 2019

Rule 42 was not having specific provision for reversal for real estate

Reversal from the tax period in which OC received

May take position that earlier period reversal not required

Principle of Alembic shall hold good

ON OR AFTER APRIL 1, 2019

Amendment in Rule 42 which specific provision for real estate project

Reversal Working to be based on carpet area

Applicable for OC received after April 1, 2019

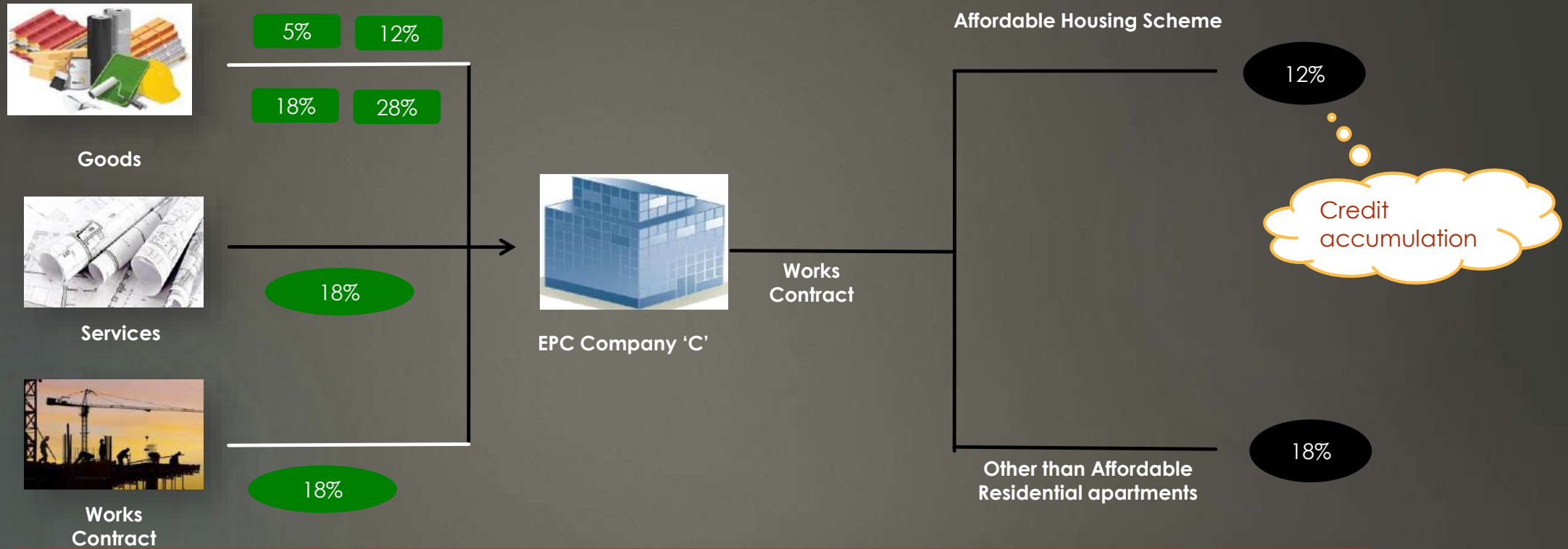
Principle of Daiichi in relation to vested right cannot be taken away



CASE STUDY 7

Credit Accumulation for the Works Contractor

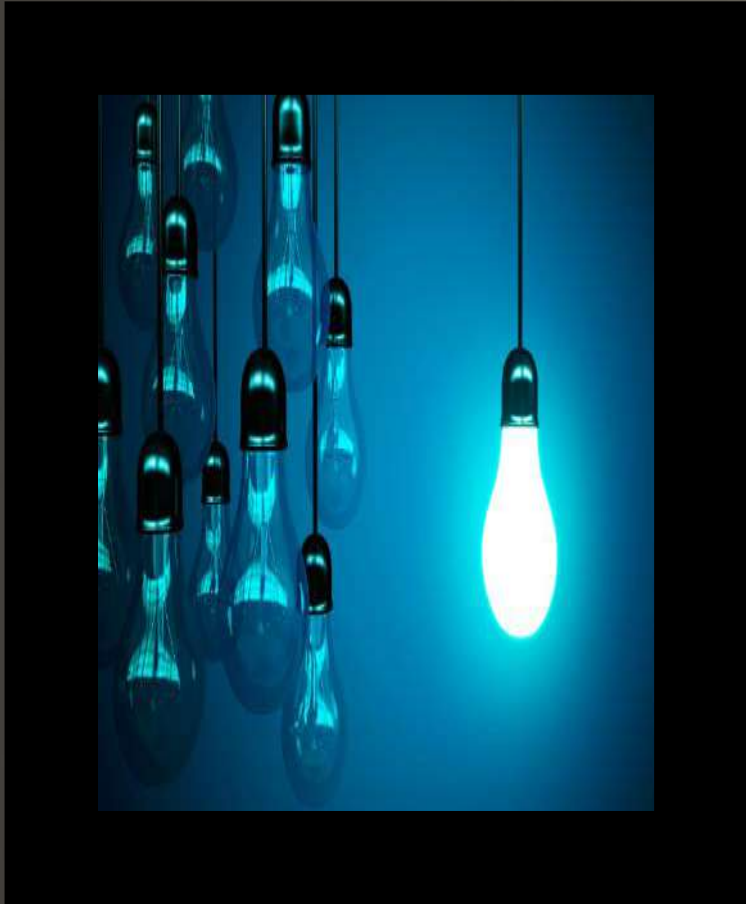
Input tax credit for works contractor



CREDIT ACCUMULATION

- Mr. Honest being works contractor allowed to avail credit
- Generally ITC on procurement is 18% whereas the output liability is 12% for affordable housing residential apartments

OPTIONS FOR UTILIZATION OF EXCESS CREDIT



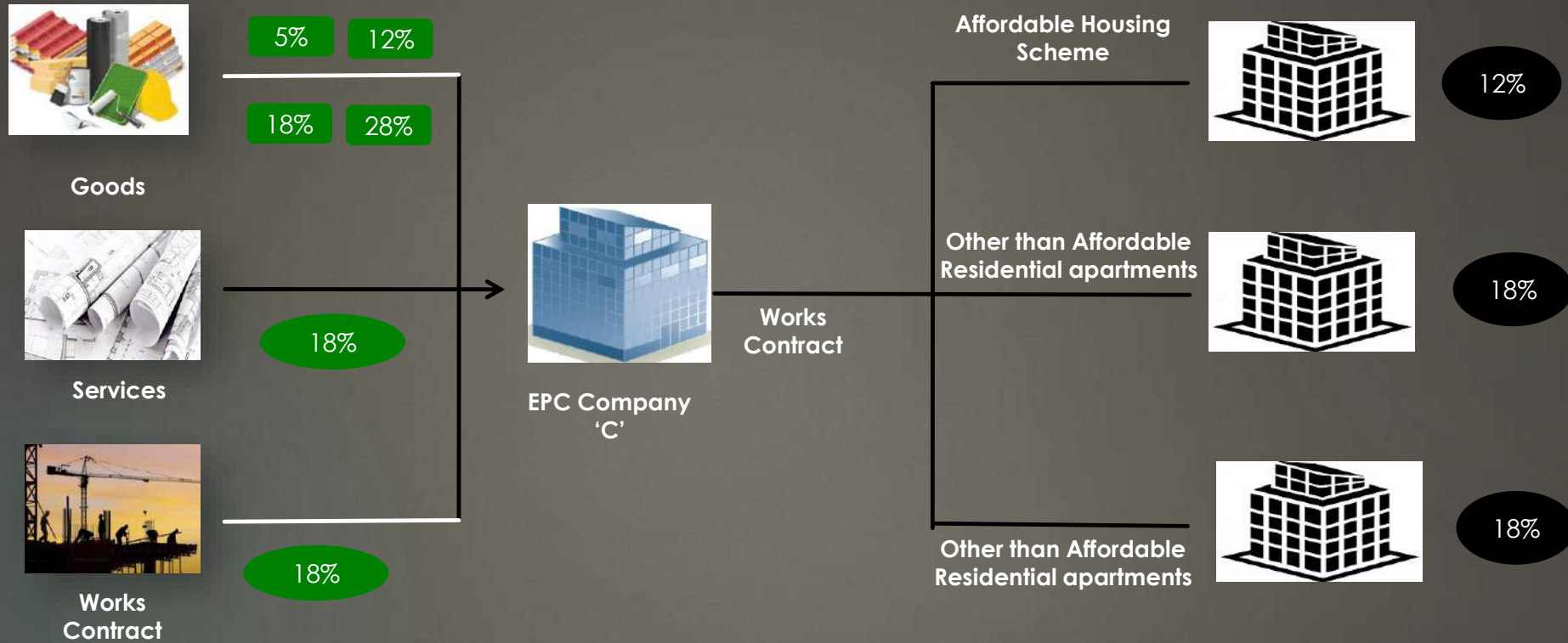
BENEFIT - I

- Cross utilization of ITC across projects

BENEFIT - II

- Claim refund of excess credit

CROSS UTILIZATION OF CREDIT



OPTION I

Excess credit, if any, from Affordable Housing Project can be cross utilized to pay output tax on other EPC contract undertaken by the Works Contractor

Relevant Provisions

Refund under Inverted Duty Structure

- Section 54 of the CGST Act - Refund will be granted in the following cases:
 - zero rated supplies made without payment of tax;
 - where the credit has accumulated on account of **rate of tax on inputs being higher than the rate of tax on output supplies (other than nil rated or fully exempt supplies)**, except supplies of goods or services or both as may be notified by the Government on the recommendations of the Council:

- Rule 89(5) of the CGST Act - Refund of input tax credit in case of inverted duty structure will be granted as per the following formula:

Maximum Refund Amount = {(Turnover of inverted rated supply of goods and services) x Net ITC ÷ Adjusted Total Turnover} - tax payable on such inverted rated supply of goods and services.

Explanation:- For the purposes of this sub-rule, the expressions -

- Net ITC shall mean input tax credit availed on **inputs** during the relevant period other than the input tax credit availed for which refund is claimed under sub-rules (4A) or (4B) or both; and
- Adjusted Total turnover" and "relevant period" shall have the same meaning as assigned to them in sub-rule (4).

Note: It is pertinent to note that the refund will be granted only for ITC of inputs. Therefore, unutilized ITC of input services will be lying in the electronic credit ledger without any recourse to refund.



OPTION II - REFUND OF EXCESS CREDIT...

- ❑ Accumulation of credit - Contractor can claim refund of credit
[Section 54(3) of CGST Act, 2017 read with Rule 89(5) of CGST Rules, 2017]

- ❑ Maximum refund shall be granted as per following formula:

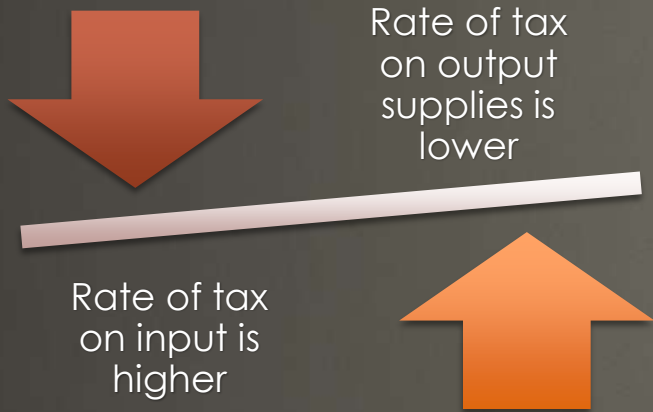
$$\left[\frac{\text{Turnover of inverted rated supply of goods and services} \times \text{Net Input tax credit}}{\text{Adjusted Total Turnover}} \right] \text{ --- Tax payable on such inverted rated supply of goods and services}$$

“Net ITC” shall mean input tax credit availed on inputs during the relevant period other than the input tax credit availed related to deemed export and zero rated supplies

ISSUE

- Refund allowed only for ITC pertaining to inputs and not **input services**.
- Ratio of ITC related to inputs is not substantial to exceed total tax payable
- This may result in either nil refund and / or negligible refund

INVERTED DUTY STRUCTURE



Formula for Refund Under Inverted Duty Structure



- Sub-rule (5) of Rule 89 of the said Rules gives the formula for computation of refund of input tax credit and explanation (a) therein excludes input tax service credit from the definition of Net ITC, though it is shown under the turn over of inverted rated supply of goods and services therein.
- Methodology prescribed under Rule 89(5) of the CGST Rules is erroneous and ultra vires Section 54 of the CGST Act
- Artificial differentiation / discrimination between credit availed on Inputs and Input services is in violation of the CGST Act
- Construction adopted by the Department results in cascading of taxes and defeats the purpose of the CGST Act and intent of Parliament
- WRITs filed and notices issued -
 - Raymond UCO Denim Private Limited Versus The Union of India and others [2019 (8) TMI 1350 - Bombay High Court]



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Thank You

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