

**A Presentation On
“Contemporary Issues in
Real Estate Sector”**

**At
“Real Estate Summit 2021 –
Untangling The Complexities”**

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“Man is a thinking animal, a talking animal, a toolmaking animal, a building animal, a political animal, a fantasizing animal. But, in the twilight of a civilization, he is chiefly a taxpaying animal.”

[Hugh MacLennan]

Saga of Indirect taxation of Real Estate Sector

- **Levy of Sales Tax/VAT on indivisible contracts**
 - States' attempt to levy Sales Tax on the transfer of property in goods involved in the execution of an indivisible contract.
- **State of Madras vs. Gannon Dunkerley & Co. (Madras) Ltd.**
 - **1958 AIR 560 SC**
 - Contract of building is one, entire and indivisible. There is no sale of movables (building materials). The contract for building is not a contract for sale of goods'.

Saga of Indirect taxation of Real Estate Sector...

- **Introduction of the concept of „Deemed sale“ in Constitution of India**
 - ❑ Constitution (46th Amendment) Act, 1982 w.e.f. 02.02.1983
 - ❑ Insertion of clause (29A) in Article 366 and concept of ‘_Deemed Sale’ for the purpose of levy of Sales Tax/VAT on certain transactions though in ordinary sense, these transactions may not qualify to be considered as ‘_sale’
 - ❑ [For the text of Article 366(29A), refer Slides 19]

Saga of Indirect taxation of Real Estate Sector...

- **Builders' Association of India vs. UOI – AIR 1989 SC 1371 (5-Member Constitution Bench)**

“After the 46th amendment, the works contract which was indivisible one, is by a legal fiction altered into one for sale of goods and the other for supply of labour and services. After 46th amendment, it has become possible for States to levy tax on value of goods involved in a works contract in the same way in which the sales tax was leviable on the price of goods and materials supplied in a building contract which had been entered into two distinct and separate parts.”

- **Gannon Dunkerley & Co. vs. State of Rajasthan -1993 AIR SCW 2621 (5-Member Constitution Bench)**

– Taxable event in works contract is the transfer of property in goods involved in execution of a works contract. In works contract, property in goods should pass on the principle of accretion, accession or blending when the works contract is getting executed. If property in goods pass after execution of works contract, it is ‘sale’ and not ‘transfer of property in goods involved in execution of works contract’.

Significant judicial pronouncements

1. M/s. G. S. Promoters vs. UOI – 2011 (21) STR 100 (P&H)

2. MCHI vs. UOI – 2012-TIOL-1095-HC-MUM-VAT

- Appeal admitted by SC on 30.03.2012 - 2017 (52) STR J205 (SC)

- Appeal pending in 2018 (13) GSTL 3 SC

- Constitutional validity of levy of service tax or VAT, as the case may be, on the sale of under-construction flats upheld

3. K. Raheja Development Corp. vs. State of Karnataka - 2006 (3) STR 337 (SC)

- Construction of residential and commercial complex are liable to turnover tax. Agreement made before completion of construction is works contract.

Significant judicial pronouncements...

4. Larsen & Toubro Ltd. vs. State of Karnataka – 2014(303) ELT 3 (SC-LB)

- Indivisible contracts can be segregated into (i) contract for sale of goods involved in works contract and (ii) for supply of labour and service [para 63 and 101(viii)]
- ‘Works Contract’ is a contract for undertaking or bringing into existence some ‘works’ [para 76]
- Dominant nature test is not relevant for ‘works contract’. Even if dominant intention of contract is not to transfer the property in goods and rather it is rendering of service, then also sales tax can be imposed on materials used in such contracts if such contract otherwise has elements of works contract [para 101 (vi)]
- Development agreements/Tripartite agreement between owner of land, developer and purchaser of flat is a ‘works contract’ [para 111]

Significant judicial pronouncements...

- Building contract is a species of works contract [para 101(iv)]
- If agreement is entered into after flat or unit is already constructed, then there would be no 'works contract' as there was no purchaser when the building was under construction [para 117]
- Works contract would be from stage of entering into agreement. The value addition made to the goods transferred after the agreement is entered into with flat purchaser can only be made chargeable to tax by State Government.

Significant judicial pronouncements...

5. Commr. of C.Ex. & Cus. Vs. Larsen & Toubro Ltd. - 2015 (39) STR 913 (SC)

- Prior to 01.06.2007, service tax was leviable only on contracts simpliciter and not composite indivisible works contract
- No charging section specifically levying service tax only on works contracts
- Delhi HC's judgement in G.D. Builders vs. UOI - 2013 (32) STR 673 (Del) overruled
- Exemption notifications were immaterial as the levy itself was non-existent
- Taxation powers of Centre and States are mutually exclusive – There is no concurrent power of taxation and entries are to be found only in Lists I and II of the Constitution – If taxing statute transgresses into prohibited exclusive field, it is liable to be struck down
- Taxation and assessment machinery provisions – In their absence, law is vague and it is arbitrary to assess to tax subject.

Significant judicial pronouncements...

6. BHARAT SANCHAR NIGAM LTD. Vs. UNION OF INDIA - 2006 (2) S.T.R. 161 (S.C.)

- Telephone service - Valuation - Sales tax on same transaction on which service tax is levied by Union Government - Aspect theory would not apply to enable value of services to be included in sale of goods or price of goods in the value of service. *[para 85]*
- Sales tax - Article 366(29A) of the Constitution of India - By introducing separate categories of ‘deemed sales’, meaning of the word ‘goods’ is not altered - It does not give a licence for assumption that a transaction is a sale and then to look around for what could be the goods - Definitions of composite elements of a sale such as intention of parties, goods, delivery etc. continue to be defined according to known legal connotations - In this sense, State of Madras v. Gannon Dunkerley & Co. (Madras) Ltd. [AIR 1958 SC 560] found to have survived introduction of above Article - However, this does not mean that content of these concepts remain static - Courts must move with times. *[para 41]*

Significant judicial pronouncements...

- Service and sale of goods in a composite transaction - Taxability - Sales tax - Imposition of - Composite transactions of service and sale of goods other than those mentioned in Article 366(29A) of the Constitution of India - Test for determining whether the transaction in truth represents two discernible, distinct and separate contracts giving the State power to separate agreement to sell from agreement to render service, and impose tax on the sale - It is whether the parties have in mind or intend separate rights arising out of the sale of goods - If there was no such intention there is no sale even if the contract could be disintegrated - Test for deciding whether a contract falls into one category or the other is to as what is the substance of the contract, in other words the dominant nature-test
- Sales tax - Imposition of - Contracts covered by six sub-clauses of Clause (29A) of Article 366 of the Constitution of India - Their sale element is separable and may be subjected to sales tax by the States under Entry 54 of List II and dominant nature test is not applicable. *[para 47]*

Significant judicial pronouncements...

- Taxation of goods and services - Aspects doctrine - It merely deals with legislative competence - Subjects which in one aspect and for one purpose fall within the power of a particular legislature may in another aspect and for another purpose fall within another legislative power - They might be overlapping; but it must be in law - Same transaction may involve two or more taxable events in its different aspects - But overlapping does not detract from distinctiveness of aspects - However, this does not allow State to entrench upon Union List and tax services by including cost of such service in value of goods - Even in composite contracts which are by legal fiction deemed to be divisible under Article 366(29A) of the Constitution of India, value of goods involved in execution of whole transaction cannot be assessed to Sales Tax. *[1989 (3) SCC 634; 1993 (1) SCC 365 relied on]. [paras 80, 81, 82]*

Disputed issues – whether the legacy continues?

- Levy of tax on sale of under-construction flats/units and its constitutional validity
- Whether sale of under-construction flats/units would amount to provision of service?
- Valuation mechanism (or its absence)
- Validity of valuation on the basis of the value of similar flats/units sold by the builder in certain situations
- Inclusion of cost of land in the taxable value
- Inclusion of value of free issue material in the taxable value
- Restricted scope of entry relating to ‘works contract’ in terms of Section 65(105)(zzzza) as in force upto 30.06.2012
- Taxability of development rights
- Taxability of Transferable Development Rights

Disputed issues – whether the legacy continues?...

- Taxability of Joint Development Agreements between the landowner and the builder/developer under area sharing or revenue sharing (or both) arrangements
- Taxability in case of re-development of society
- Taxability of the corpus fund, accommodation allowance, etc. received by the members of the society from the developer in case of re-development of society
- Taxability of ‘free of cost’ flats allotted by the developer to the members of the society in case of re-development
- Taxability in case of redevelopment under SRA/MHADA schemes
- Entitlement to CENVAT Credit
- Reversal of CENVAT Credit in case of flats/units sold after OC
- Conflict between the entries relating to ‘construction service’ and ‘works contract service’

Real Estate Sector under GST regime - A dawn of new era ?

□ **The Constitution of India as amended by the Constitution (101st Amendment) Act, 2016 w.e.f. 12.09.2016 (relevant abstracts)**

246A. Special provision with respect to goods and services tax.—(1) Notwithstanding anything contained in articles 246 and 254, Parliament, and, subject to clause (2), the Legislature of every State, have power to make laws with respect to goods and services tax imposed by the Union or by such State.

(2) Parliament has exclusive power to make laws with respect to goods and services tax where the supply of goods, or of services, or both takes place in the course of inter-State trade or commerce. Explanation.—The provisions of this article, shall, in respect of goods and services tax referred to in clause (5) of article 279A, take effect from the date recommended by the Goods and Services Tax Council.

GST & The Constitutional Framework...

269A. Levy and collection of goods and services tax in course of inter-State trade or commerce.— (1) Goods and services tax on supplies in the course of inter-State trade or commerce shall be levied and collected by the Government of India and such tax shall be apportioned between the Union and the States in the manner as may be provided by Parliament by law on the recommendations of the Goods and Services Tax Council.

Explanation.—For the purposes of this clause, supply of goods, or of services, or both in the course of import into the territory of India shall be deemed to be supply of goods, or of services, or both in the course of inter-State trade or commerce.

GST & The Constitutional Framework...

366. Definitions.—In this Constitution, unless the context otherwise requires, the following expressions have the meanings hereby respectively assigned to them, that is to say—

... ..
(12A) — goods and services tax|| means any tax on supply of goods, or services or both except taxes on the supply of the alcoholic liquor for human consumption;

... ..
(26A) — Services|| means anything other than goods;

(26B) — State|| with reference to articles 246A, 268, 269, 269A and article 279A includes a Union territory with Legislature;

... ..

GST & The Constitutional Framework...

(29A) — tax on the sale or purchase of goods|| includes—

- (a) a tax on the transfer, otherwise than in pursuance of a contract, of property in any goods for cash, deferred payment or other valuable consideration;
- (b) a tax on the transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract;
- (c) a tax on the delivery of goods on hire-purchase or any system of payment by instalments;
- (d) a tax on the transfer of the right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration;

GST & The Constitutional Framework...

(e) a tax on the supply of goods by any unincorporated association or body of persons to a member thereof for cash, deferred payment or other valuable consideration;

(f) a tax on the supply, by way of or as part of any service or in any other manner whatsoever, of goods, being food or any other article for human consumption or any drink (whether or not intoxicating), where such supply or service, is for cash, deferred payment or other valuable consideration,

and such transfer, delivery or supply of any goods shall be deemed to be a sale of those goods by the person making the transfer, delivery or supply and a purchase of those goods by the person to whom such transfer, delivery or supply is made;

GST & The Constitutional Framework...

- SEVENTH SCHEDULE (Article 246) List I–Union List

84. Duties of excise on the following goods manufactured or produced in India, namely:–

- (a) petroleum crude;
- (b) high speed diesel;
- (c) motor spirit (commonly known as petrol);
- (d) natural gas;
- (e) aviation turbine fuel; and
- (f) tobacco and tobacco products.

.... ..

92. Taxes on the sale or purchase of newspapers and on advertisements published therein. (*omitted*)

.... ..

92C. Taxes on services (*omitted*)

GST & The Constitutional Framework...

- SEVENTH SCHEDULE (Article 246) List II–State List

18. Land, that is to say, rights in or over land, land tenures including the relation of landlord and tenant, and the collection of rents; transfer and alienation of agricultural land; land improvement and agricultural loans; colonization

49. Taxes on lands and buildings.

...

52. Taxes on the entry of goods into a local area for consumption, use or sale therein. *[omitted]*

53. Taxes on the consumption or sale of electricity.\

54. Taxes on the sale of petroleum crude, high speed diesel, motor spirit (commonly known as petrol), natural gas, aviation turbine fuel and alcoholic liquor for human consumption, but not including sale in the course of inter-State trade or commerce or sale in the course of international trade or commerce of such goods.

...

GST & The Constitutional Framework...

List II - State List

55. Taxes on advertisements other than advertisements published in the newspapers and advertisements broadcast by radio or television. *[omitted]*

... ..

62. Taxes on entertainments and amusements to the extent levied and collected by a Panchayat or a Municipality or a Regional Council or a District Council.

- Important Terms & Definitions
- Legislative Provisions
- Schedules

Relevant Statutory Definitions - S.2 of the CGST Act

- **S.2. In this Act, unless the context otherwise requires, -**

(17) "business" includes -

- (a) any trade, commerce, manufacture, profession, vocation, adventure, wager or any other similar activity, whether or not it is for a pecuniary benefit;
- (b) any activity or transaction in connection with or incidental or ancillary to sub-clause (a);
- (c) any activity or transaction in the nature of sub-clause (a), whether or not there is volume, frequency, continuity or regularity of such transaction;
- (d) supply or acquisition of goods including capital goods and services in connection with commencement or closure of business;
- (e) provision by a club, association, society, or any such body (for a subscription or any other consideration) of the facilities or benefits to its members;

Relevant Statutory Definitions - S.2 of the CGST Act...

- (f) admission, for a consideration, of persons to any premises;
- (g) services supplied by a person as the holder of an office which has been accepted by him in the course or furtherance of his trade, profession or vocation;
- (h) activities of a race club including by way of totalisator or a license to book maker or activities of a licensed book maker in such club; and
- (i) any activity or transaction undertaken by the Central Government, a State Government or any local authority in which they are engaged as public authorities;

Relevant Statutory Definitions - S.2 of the CGST Act....

(19) “**capital goods**”, means goods, the value of which is capitalized in the books of account of the person claiming the input tax credit and which are used or intended to be used in the course or furtherance of business;

(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;

Illustration.— Where goods are packed and transported with insurance, the supply of goods, packing materials, transport and insurance is a composite supply and supply of goods is a principal supply;

Relevant Statutory Definitions - S.2 of the CGST Act...

- (31) “**consideration**” in relation to the supply of goods or services or both includes-
- (a) any payment made or to be made, whether in money or otherwise, in respect of, in response to, or for the inducement of, the supply of goods or services or both, whether by the recipient or by any other person but shall not include any subsidy given by the Central Government or a State Government;
 - (b) the monetary value of any act or forbearance, in respect of, in response to, or for the inducement of, the supply of goods or services or both, whether by the recipient or by any other person but shall not include any subsidy given by the Central Government or a State Government:

Provided that a deposit given in respect of the supply of goods or services or both shall not be considered as payment made for such supply unless the supplier applies such deposit as consideration for the said supply;

Relevant Statutory Definitions - S.2 of the CGST Act...

- (47) **||exempt supply||** means supply of any goods or services or both which attracts nil rate of tax or which may be wholly exempt from tax under section 11, or under section 6 of the Integrated Goods and Services Tax Act, and includes non-taxable supply;
- (52) **||goods||** means every kind of movable property other than money and securities but includes actionable claim, growing crops, grass and things attached to or forming part of the land which are agreed to be severed before supply or under a contract of supply;
- (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;
- (60) **||input service||** means any service used or intended to be used by a supplier in the course or furtherance of business;
- (62) **||input tax||** in relation to a registered person, means the central tax, State tax, integrated tax or Union territory tax charged on any supply of goods or services or both made to him and includes—
- (a) the integrated goods and services tax charged on import of goods;
 - (b) the tax payable under the provisions of sub-sections (3) and (4) of section 9;

Relevant Statutory Definitions - S.2 of the CGST Act...

- (c) the tax payable under the provisions of sub-sections (3) and (4) of section 5 of the Integrated Goods and Services Tax Act;
- (d) the tax payable under the provisions of sub-sections (3) and (4) of section 9 of the respective State Goods and Services Tax Act; or
- (e) the tax payable under the provisions of sub-sections (3) and (4) of section 7 of the Union Territory Goods and Services Tax Act, but does not include the tax paid under the composition levy;
- **(78)** "non-taxable supply" means a supply of goods or services or both which is not leviable to tax under this Act or under the Integrated Goods and Services Tax Act;

Relevant Statutory Definitions - S.2 of the CGST Act...

- **2.(84)** "person" includes—
 - (a) an individual;
 - (b) a Hindu Undivided Family;
 - (c) a company;
 - (d) a firm;
 - (e) a Limited Liability Partnership;
 - (f) an association of persons or a body of individuals, whether incorporated or not, in India or outside India;
 - (g) any corporation established by or under any Central Act, State Act or Provincial Act or a Government company as defined in clause (45) of section 2 of the Companies Act, 2013;

Relevant Statutory Definitions - S.2 of the CGST Act...

- (h) any body corporate incorporated by or under the laws of a country outside India;
- (i) a co-operative society registered under any law relating to co-operative societies;
- (j) a local authority;
- (k) Central Government or a State Government;
- (l) society as defined under the Societies Registration Act, 1860;
- (m) trust; and
- (n) every artificial juridical person, not falling within any of the above;
- (87) “**prescribed**” means prescribed by rules made under this Act on the recommendations of the Council;
- (90) “**principal supply**” means the supply of goods or services which constitutes the predominant element of a composite supply into which any other supply forming part of that composite supply is ancillary;

Relevant Statutory Definitions - S.2 of the CGST Act...

- (98) “**reverse charge**” means the liability to pay tax by the recipient of supply of goods or services or both instead of the supplier of such goods or services or both under sub-section (3) or sub-section (4) of section 9, or under sub-section (3) or sub-section (4) of section 5 of the Integrated Goods and Services Tax Act;
- (100) “**Schedule**” means a Schedule appended to this Act;
- (101) “**securities**” shall have the same meaning as assigned to it in clause (h) of section 2 of the Securities Contracts (Regulation) Act, 1956;
- (102) “**services**” means anything other than goods, money and securities but includes activities relating to the use of money or its conversion by cash or by any other mode, from one form, currency or denomination, to another form, currency or denomination for which a separate consideration is charged;
- **Explanation.-** For the removal of doubts, it is hereby clarified that the expression services includes facilitating or arranging transactions in securities;

Relevant Statutory Definitions - S.2 of the CGST Act...

(107) “taxable person” means a person who is registered or liable to be registered under section 22 or section 24;

(108) “taxable supply” means a supply of goods or services or both which is leviable to tax under this Act;

(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;

Important Legislative Provisions

- **S.7 – “scope of supply” – [as last amended by The Finance Act, 2021]**
 - (1) For the purposes of this Act, the expression “supply” includes-
 - (a) all forms of supply of goods or services or both such as sale, transfer, barter, exchange, licence, rental, lease or disposal made or agreed to be made for a consideration by a person in the course or furtherance of business;
 - aa) the activities or transactions, by a person, other than an individual, to its members or constituents or vice-versa, for cash, deferred payment or other valuable consideration.*
- *Explanation.—For the purposes of this clause, it is hereby clarified that, notwithstanding anything contained in any other law for the time being in force or any judgment, decree or order of any Court, tribunal or authority, the person and its members or constituents shall be deemed to be two separate persons and the supply of activities or transactions inter se shall be deemed to take place from one such person to another.*
- *(Clause (aa) and the explanation thereto are inserted and deemed to have been inserted w.e.f 01.07.2017 by S.108 of the Finance Act, 2021)*

Important Legislative Provisions

- (b) import of services for a consideration whether or not in the course or furtherance of business ***and;***
- (c) the activities specified in Schedule I, made or agreed to be made without a consideration;

Important Legislative Provisions...

~~(d) the activities to be treated as supply of goods or supply of services as referred to in Schedule II*.~~

(1A) where certain activities or transactions constitute a supply in accordance with the provisions of sub-section (1), they shall be treated either as supply of goods or supply of services as referred to in Schedule II;**

- (2) Notwithstanding anything contained in sub-section (1),—

(a) activities or transactions specified in Schedule III; or

(b) such activities or transactions undertaken by the Central Government, a State Government or any local authority in which they are engaged as public authorities, as may be notified by the Government on the recommendations of the Council, shall be treated neither as a supply of goods nor a supply of services.

[*Omitted by the CGST (Amendment Act), 2018 w.e.f 01.07.2017]

[Inserted by the CGST Amendment Act, 2018 w.e.f 01.07.2017]**

Important Legislative Provisions...

S.7 – “scope of supply” continue

- (3) Subject to the provisions of sub-sections (1), **(1A)** and (2), the Government may, on the recommendations of the Council, specify, by notification, the transactions that are to be treated as—
- (a) a supply of goods and not as a supply of services; or
 - (b) a supply of services and not as a supply of goods.

Important Legislative Provisions...

- **S. 9 – “Levy and collection”- [Amended by CGST (Amendment) Act, 2018 w.e.f. 01.02.2019]-**
 - (1) Subject to the provisions of sub-section (2), there shall be levied a tax called the central goods and services tax on all intra-State supplies of goods or services or both, except on the supply of alcoholic liquor for human consumption, on the value determined under section 15 and at such rates, not exceeding twenty per cent., as may be notified by the Government on the recommendations of the Council and collected in such manner as may be prescribed and shall be paid by the taxable person.
 - (2) The central tax on the supply of petroleum crude, high speed diesel, motor spirit (commonly known as petrol), natural gas and aviation turbine fuel shall be levied with effect from such date as may be notified by the Government on the recommendations of the Council.
 - 3) The Government may, on the recommendations of the Council, by notification, specify categories of supply of goods or services or both, tax on which shall be paid on reverse charge basis by recipient of such goods or services or both and all the provisions of this Act shall apply to such recipient as if he is person liable for paying tax in relation to the supply of such goods or services or both.

Important Legislative Provisions...

~~(4). The central tax in respect of the supply of taxable goods or services or both by a supplier, who is not registered, to a registered person shall be paid by such person on reverse charge basis as the recipient and all the provisions of this Act shall apply to such recipient as if he is the person liable for paying the tax in relation to the supply of such goods or services or both~~

- **(4) The Government may, on the recommendations of the Council, by notification, specify a class of registered persons who shall, in respect of supply of specified categories of goods or services or both received from an unregistered supplier, pay the tax on reverse charge basis as the recipient of such supply of goods or services or both, and all the provisions of this Act shall apply to such recipient as if he is the person liable for paying the tax in relation to such supply of goods or services or both.***

[*substituted by The CGST Amendment Act, 2018 w.e.f. 01.02.2019]

Important Legislative Provisions...

S. 11 – Power to grant exemption from tax.

(1) Where the Government is satisfied that it is necessary in the public interest so to do, it may, on the recommendations of the Council, by notification, exempt generally, either absolutely or subject to such conditions as may be specified therein, goods or services or both of any specified description from the whole or any part of the tax leviable thereon with effect from such date as may be specified in such notification.

(2) Where the Government is satisfied that it is necessary in the public interest so to do, it may, on the recommendations of the Council, by special order in each case, under circumstances of an exceptional nature to be stated in such order, exempt from payment of tax any goods or services or both on which tax is leviable.

Important Legislative Provisions...

(3) The Government may, if it considers necessary or expedient so to do for the purpose of clarifying the scope or applicability of any notification issued under sub-section (1) or order issued under sub-section (2), insert an explanation in such notification or order, as the case may be, by notification at any time within one year of issue of the notification under sub-section (1) or order under sub-section (2), and every such explanation shall have effect as if it had always been the part of the first such notification or order, as the case may be.

***Explanation.*—For the purposes of this section, where an exemption in respect of any goods or services or both from the whole or part of the tax leviable thereon has been granted absolutely, the registered person supplying such goods or services or both shall not collect the tax, in excess of the effective rate, on such supply of goods or services or both.**

Important Legislative Provisions...

S. 15 – Value of taxable supply.

- (1) The value of a supply of goods or services or both shall be the transaction value, which is the price actually paid or payable for the said supply of goods or services or both where the supplier and the recipient of the supply are not related and the price is the sole consideration for the supply.
 - (2) The value of supply shall include—
 - (a) any taxes, duties, cesses, fees and charges levied under any law for the time being in force other than this Act, the State Goods and Services Tax Act, the Union Territory Goods and Services Tax Act and the Goods and Services Tax (Compensation to States) Act, if charged separately by the supplier;
 - (b) any amount that the supplier is liable to pay in relation to such supply but which has been incurred by the recipient of the supply and not included in the price actually paid or payable for the goods or services or both;
-

Important Legislative Provisions...

- (c) incidental expenses, including commission and packing, charged by the supplier to the recipient of a supply and any amount charged for anything done by the supplier in respect of the supply of goods or services or both at the time of, or before delivery of goods or supply of services;
- (d) interest or late fee or penalty for delayed payment of any consideration for any supply; and
- (e) subsidies directly linked to the price excluding subsidies provided by the Central Government and State Governments.

Explanation.— For the purposes of this sub-section, the amount of subsidy shall be included in the value of supply of the supplier who receives the subsidy.

Important Legislative Provisions....

- (3) The value of the supply shall not include any discount which is given—
 - (a) before or at the time of the supply if such discount has been duly recorded in the invoice issued in respect of such supply; and
 - (b) after the supply has been effected, if—
 - (i) such discount is established in terms of an agreement entered into at or before the time of such supply and specifically linked to relevant invoices; and
 - (ii) input tax credit as is attributable to the discount on the basis of document issued by the supplier has been reversed by the recipient of the supply.
- (4) Where the value of the supply of goods or services or both cannot be determined under sub-section (1), the same shall be determined in such manner as may be prescribed
- (5) Notwithstanding anything contained in sub-section (1) or sub-section (4), the value of such supplies as may be notified by the Government on the recommendations of the Council shall be determined in such manner as may be prescribed

Important Legislative Provisions....

Explanation.—For the purposes of this Act,—

- (a) persons shall be deemed to be "related persons" if—
 - (i) such persons are officers or directors of one another's businesses;
 - (ii) such persons are legally recognised partners in business;
 - (iii) such persons are employer and employee;
 - (iv) any person directly or indirectly owns, controls or holds twenty-five per cent or more of the outstanding voting stock or shares of both of them;
 - (v) one of them directly or indirectly controls the other;
 - (vi) both of them are directly or indirectly controlled by a third person;
 - (vii) together they directly or indirectly control a third person; or
 - (viii) they are members of the same family;
- (b) the term "person" also includes legal persons;
- (c) persons who are associated in the business of one another in that one is the sole agent or sole distributor or sole concessionaire, howsoever described, of the other, shall be deemed to be related.

Important Legislative Provisions.....

S. 16 – Eligibility and conditions for taking input tax credit.

(1) Every registered person shall, subject to such conditions and restrictions as may be prescribed and in the manner specified in section 49, be entitled to take credit of input tax charged on any supply of goods or services or both to him which are used or intended to be used in the course or furtherance of his business and the said amount shall be credited to the electronic credit ledger of such person.

Important Legislative Provisions...

- **S. 17 – Apportionment of credit and blocked credits – (Old Provisions)**

- (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.

Important Legislative Provisions...

S.17 (3)&(5) – Substituted provisions effective from 01.02.2019

- (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.
- *Explanation.—For the purposes of this sub-section, the expression "value of exempt supply" shall not include the value of activities or transactions specified in Schedule III, except those specified in paragraph 5 of the said Schedule.*

Important Legislative Provisions

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

.....

(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.

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

....

Important Legislative Provisions...

Explanation.—For the purposes of this Chapter and Chapter VI, the expression “plant and machinery” means apparatus, equipment, and machinery fixed to earth by foundation or structural support that are used for making outward supply of goods or services or both and includes such foundation and structural supports but excludes—

- (i) land, building or any other civil structures;
- (ii) telecommunication towers; and
- (iii) pipelines laid outside the factory premises.

S.148. Special procedure for certain processes.— The Government may, on the recommendations of the Council, and subject to such conditions and safeguards as may be prescribed, notify certain classes of registered persons, and the special procedures to be followed by such persons including those with regard to registration, furnishing of return, payment of tax and administration of such persons.

SCHEDULE II

SCHEDULE II **[See section 7]**

ACTIVITIES (OR TRANSACTIONS*) TO BE TREATED AS SUPPLY OF GOODS OR SUPPLY OF SERVICES

5. Supply of services

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

- (a) renting of immovable property;
- (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

[* inserted by the Amendment Act, 2018 w.e.f. 01.02.2019]

SCHEDULE II...

Explanation.—For the purposes of this clause—

- (1) the expression "competent authority" means the Government or any authority authorised to issue completion certificate under any law for the time being in force and in case of non-requirement of such certificate from such authority, from any of the following, namely:—
- (i) an architect registered with the Council of Architecture constituted under the Architects Act, 1972; or
 - (ii) a chartered engineer registered with the Institution of Engineers (India); or
 - (iii) a licensed surveyor of the respective local body of the city or town or village or development or planning authority;
- (2) the expression "construction" includes additions, alterations, replacements or remodelling of any existing civil structure;
-

SCHEDULE II...

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; and
- (b) supply, by way of or as part of any service or in any other manner whatsoever, of goods, being food or any other article for human consumption or any drink (other than alcoholic liquor for human consumption), where such supply or service is for cash, deferred payment or other valuable consideration.

7. Supply of Goods -

The following shall be treated as supply of goods, namely;

Supply of goods by any incorporated association or body of persons to a member thereof for cash, deferred payment or other valuable considerations.

[Paragraph 7 omitted and deemed to have been omitted w.e.f 01.07.2017 by the S.22 of the Finance Act, 2021]

SCHEDULE III

SCHEDULE III

[See section 7]

ACTIVITIES OR TRANSACTIONS WHICH SHALL BE TREATED NEITHER AS A SUPPLY OF GOODS NOR A SUPPLY OF SERVICES

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

Tax Structure under GST for the Real Estate Sector from 01.07.2017 and up to 31.03.2019

Tax Structure up to 31.03.2019

- Sale of under-construction residential flats/units - 12% or 8% (with ITC)
- Sale of under-construction commercial units - 12% (with ITC)
- Works contracts - 18% (with ITC)
- Joint Development - owner's share - 12% or 8%
(construction with land rights) (with ITC) or 18% (in case of works contract)
(with ITC)
- Sale of completed flats/units - NIL (with ITC reversal)

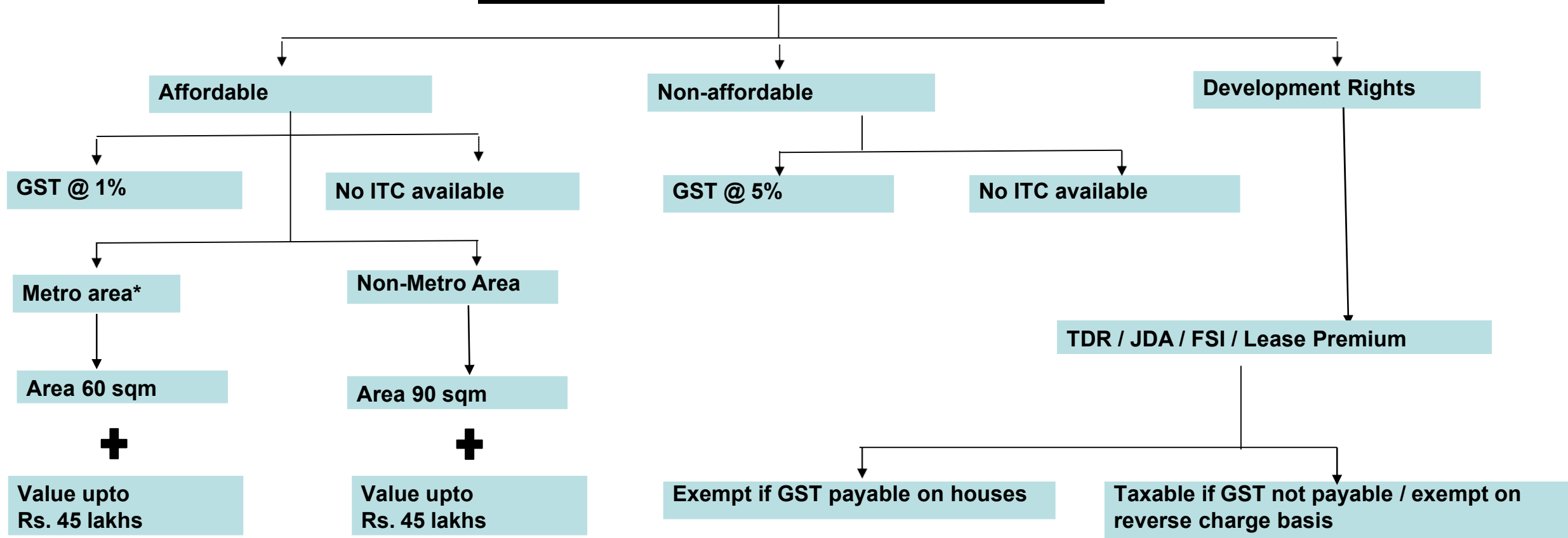
New Tax Structure - Presumptions or Wishlist ?

- Fair price for the house to the buyer and attractive affordable housing
 - ***What about the denial of ITC and its impact on cost ?***
- Protection of the buyer's interest and non-passing of ITC to become a non-issue
 - ***Profiteering by all and sundry assumed;***
- Mitigation of the cash flow problem by exempting the development rights, long term lease premium, FSI, etc.
 - ***Presumptive solution to an assumed problem; half-hearted solution***
- Better pricing due to removal of unutilized ITC at the end of the project
 - ***Will it still not remain a cost besides being a litigative issue ?***
- Simple tax structure and tax compliance for the builders
???????

A
New Tax Structure
for the
Real Estate Sector
(with effect from 01.04.2019)

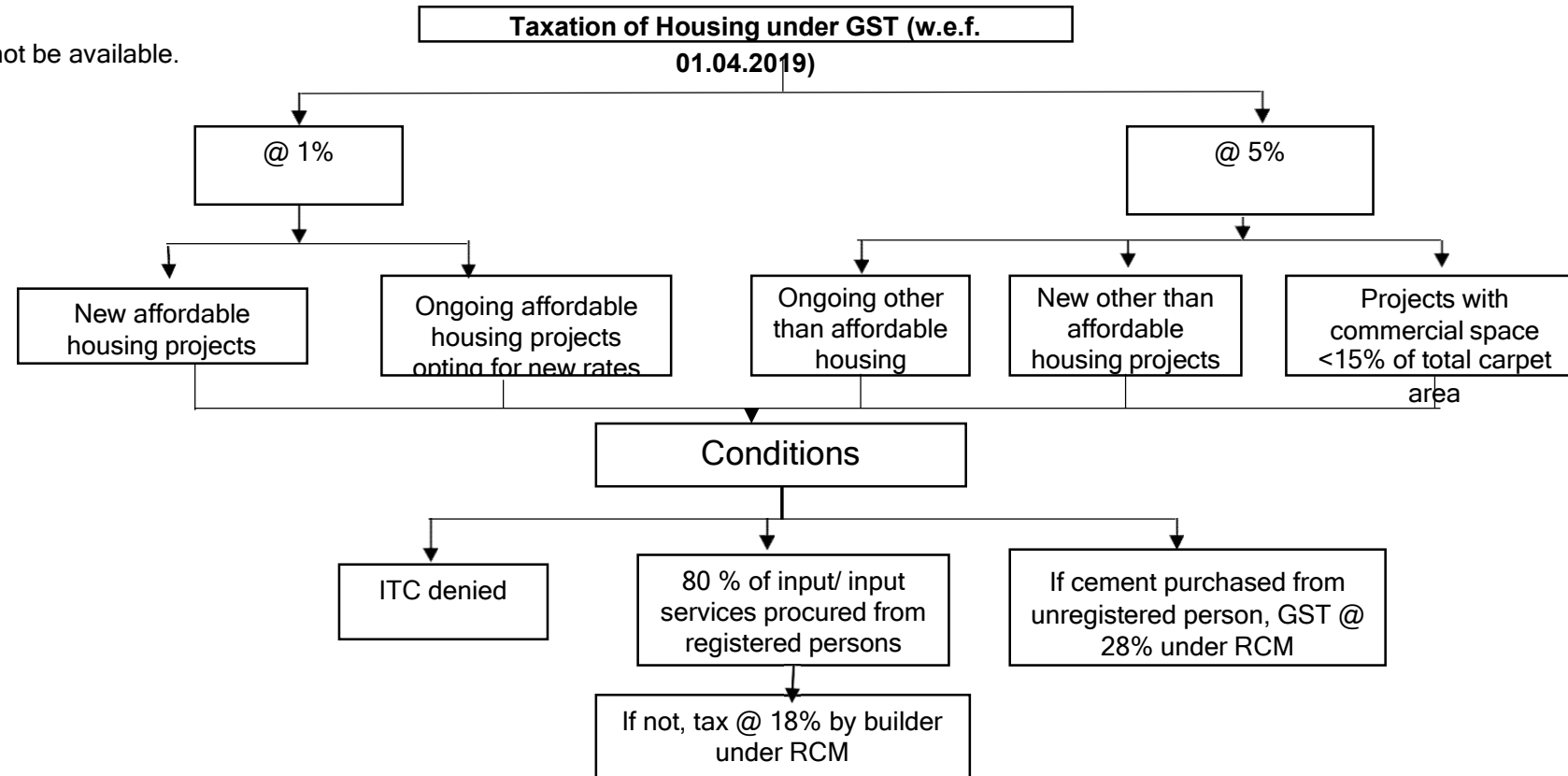
Taxation of Housing under GST

Taxation of Housing under GST (w.e.f. 01.04.2019)

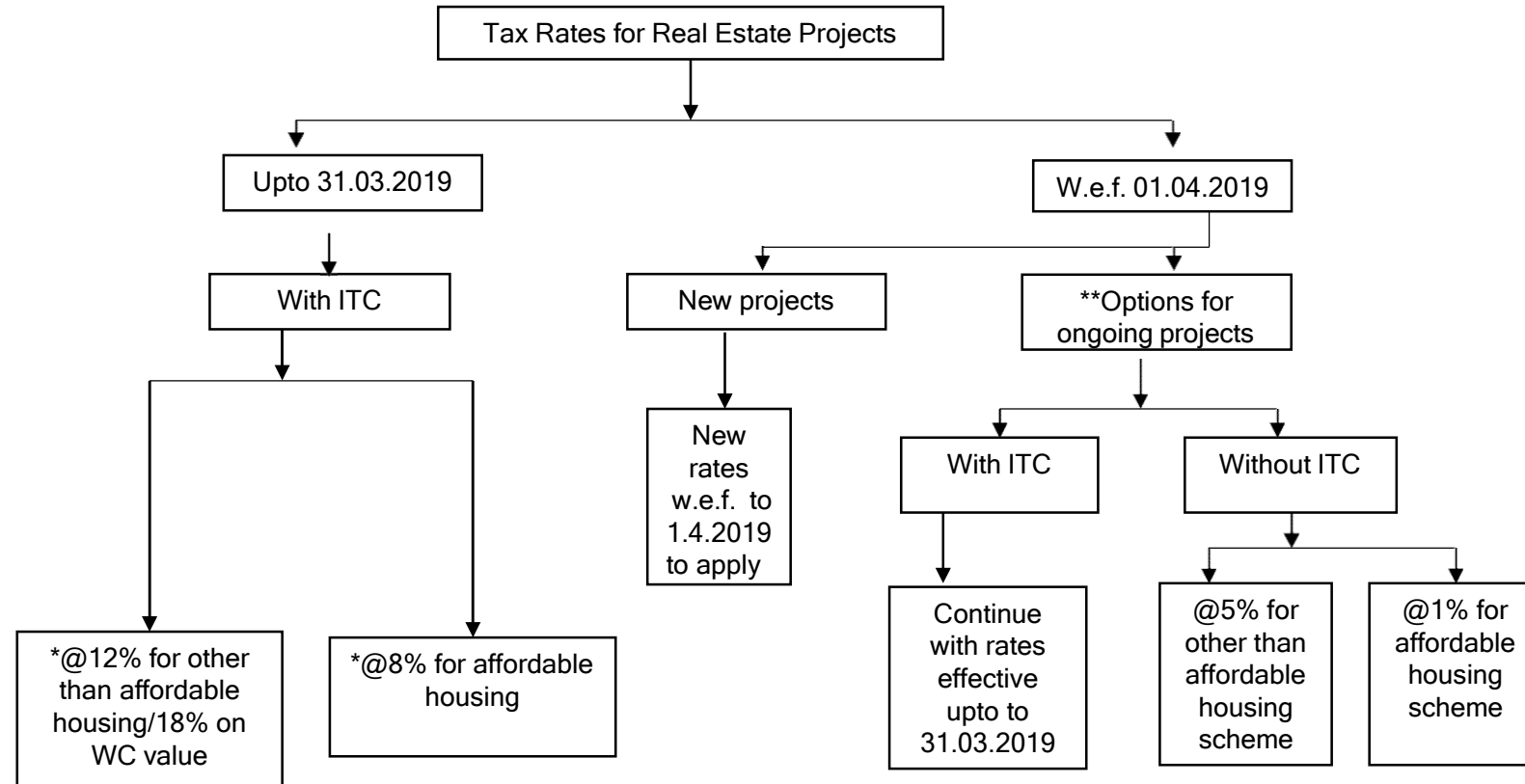


New Tax Rates without ITC w.e.f. 1.4.2019 for housing projects

Input Tax Credit shall not be available.



Applicability of new tax rates:



Notification no.11/2017-CT(R) -extracts

Prior to 1.4.2019

Sl. No.	Chapter, Section or Heading	Description of Service	Rate (%)
(1)	(2)	(3)	(4)
1	Chapter 99	All Services	
2	Section 5	Construction Services	
3	Heading 9954 (Construction services)	(i) 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. (Provisions of paragraph 2 of this notification shall apply for valuation of this service)	9

Notification no.11/2017-CT(R) -extracts

Prior to 1.4.2019....

Sl. No.	Chapter, Section or Heading	Description of Service	Rate (%)
		(ii) composite supply of works contract as defined in clause 119 of section 2 of Central Goods and Services Tax Act, 2017.	9

Salient features of the Notifications

- The highlights of revised scheme are as follows: -
- Revised scheme applicable to residential apartments (in REP and RREP) and commercial apartments in RREP which are covered under RERA
- Provisions not applicable to construction of single houses or works contracts not covered under RERA.
- The new scheme is compulsory for projects commenced on or after 01.04.2019. In respect of on-going projects as on 31.03.2019, the promoter has option to shift to new scheme w.e.f. 01.04.2019 (without ITC) or continue under earlier scheme (with ITC).

Salient features of the Notifications...

- Under new scheme, the effective rate of GST are as follows:
 - (a) For residential Apartment:
 - i. CGST 0.5% plus SGST/UTGST 0.5% (total 1%) or IGST 1% (without ITC) for affordable residential apartments;
 - ii. CGST 2.5% plus SGST/UTGST 2.5% (total 5%) or IGST 5% (without ITC) for other residential apartments.
 - (b) For Commercial apartments (shops, offices, godowns etc.):
 - i. In RREP - CGST 2.5% plus SGST/UTGST 2.5% (total 5%) or IGST 5% (without ITC).
 - ii. Other than RREP - CGST 6% plus SGST/UTGST 6% (total 12%) or IGST 12% (with ITC).

Salient features of the Notifications...

- A Promoter shifting to new scheme (of 1%/5%) w.e.f. 01.04.2019, in case of on-going project, required to refund excess ITC availed as on 31.03.2019 (in case of excess availment of ITC) or get credit of ITC less claimed as on 31.03.2019.
- RREP (Residential Real Estate Projects) means Real Estate Project (REP) of residential apartments with commercial apartments not more than 15% of total carpet area of REP.
- Affordable Residential Apartment means apartment 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 Rs. 45 lakhs.
- Revised effective rates are applicable where supply of services involves transfer of land or undivided share in land and the value thereof is included in the amount charged to the customer.

Salient features of the Notifications...

- In respect of new projects commenced on or after 01.04.2019, the tax, as applicable, payable in cash by debiting the electronic cash ledger only [benefit of ITC not allowed].
- In case of on-going projects as on 01.04.2019, the option to continue under the old scheme (with ITC benefit) to be exercised by filing a declaration in a specified form with Jurisdictional Commissioner on or before 10.05.2019.
- Non-filing of such declaration by the Promoter as stipulated would mean that the Promoter shall be deemed to have opted for the new scheme.

Salient features of the Notifications...

- Transfer of the development right or FSI (including additional FSI) by the landowner-promoter to promoter (developer-promoter) against consideration, wholly or partly, whether in cash or in kind is considered as taxable.
- If landowner-promoter transfer development right or FSI (including additional FSI) to Promoter (developer-promoter), against consideration wholly or partly, in the form of construction of apartments, the developer-promoter shall pay tax on supply of construction of apartments to the landowner-promoter. The landowner-promoter can take credit of taxes charged from him by the developer promoter, if the landowner-promoter further supplies such apartments to his buyers before issue of CC or first occupation, whichever is earlier and tax paid is not less than the amount of tax charged to him on construction of such apartment by the Developer-Promoter.

Salient features of the Notifications...

- GST not payable in respect of development rights or FSI transferred or payment of upfront amount for long term lease of land on or after 01.04.2019 proposed to be used for residential apartments, if residential apartment is sold before completion. However, in case of the residential apartments remaining unsold on the date of issue of completion certificate, or first occupation of the project, proportionate GST is payable on TDR, FSI or long term lease of land by developer-promoter under reverse charge.
- No GST is payable 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.***

Salient features of the Notifications...

- In case of commercial apartments, GST is payable on development rights or FSI transferred or payment of upfront amount for long term lease of land, whether or not commercial apartments are sold before obtaining completion certificate. The tax is payable by promoter under reverse charge.
- Where promoter opts to pay tax at full rate (8%/12%) after availing ITC (in case of on-going projects), proportionate reversal of ITC is required to be made in respect of apartments remaining unsold as on date of issue of completion certificate or first occupation, whichever is earlier.
- Reversal to be made as per rule 42 of CGST Rules in respect of inputs and input services and rule 43 of CGST Rules in respect of capital goods.
- Such reversal to be on the basis of carpet area and not on the basis of value.

Salient features of the Notifications...

- A Promoter availing the benefit of 1%/5% required to purchase cement from registered supplier only. Failure to do so would make the promoter liable to pay GST @ 28% under RPM (even if total value of supplies received from unregistered suppliers is less than 80%).
- After considering payment of GST on cement under reverse charge, if applicable, at least 80% of the procurement of inputs and input services [other than services by way of grant of development rights, long term lease of land (against upfront payment in the form of premium, salami, development charges, etc.) or FSI (including additional FSI), electricity, high speed diesel, motor spirit, natural gas] used in supplying the real estate project shall be received from registered supplier only. [In case of interest received, it can be considered as received from registered supplier, if Bank/FI/Company giving loan are registered under GST].

Salient features of the Notifications...

- In case of any shortfall in procurement from registered suppliers i.e. non-adherence to the requirement of procurement of 80% from registered suppliers, GST @ 18% payable on value to the extent of shortfall (irrespective of the rate applicable on the goods or services procured by the promoter). The adjustment to be done financial year-wise and not project-wise.
- In case of capital goods procured from unregistered person, the promoter is liable to pay GST under reverse charge.

Disputed issues & Constitutional Challenges

Constitutional Validity of Notn. No. 3/2019 - CT (Rate)

- ❑ Not. No. 03/2019- CT (Rate) issued amending the parent Not. No. 11/2017- CT (Rate) - issued under:
 - Section 9 (1), (3), (4)
 - Section 11 (1)
 - Section 15 (5)
 - Section 16 (1)
 - Section 148 - Special procedure for certain persons

- ❑ Hybrid mixture of provisions - validity ?

- ❑ Section No. 9(1)
 - Charging Provision
 - Can the Notification issued under this provision prescribe conditions?

Constitutional Validity of Notn. No. 3/2019 - CT (Rate)

- S. 9 (3)
 - Reverse charge mechanism (RCM) in case of the specified categories of supplies.
 - Not. No. 05/2019-CT (R) refers.

- S. 9 (4) (as substituted and in force w.e.f. 01.02.2019)
 - RCM in case of the specified class of persons obtaining the supplies from the unregistered persons.
 - Not. No. 07/2019-CT (R) refers.

- Not. No. 12/2017-CT(R) dt. 28.06.2017 issued under S.11(1) amended by Not. No. 04/2019-CT (R).
 - Opening paragraph amended;
 - 'S.11(1)' substituted and S.9 (3) and (4), S. 15(1) and S.148 inserted.
 - Validity?
 - Can 'RCM' be a 'Rate Notification'?

Constitutional Validity of Notn. No. 3/2019 - CT (Rate)...

❑ Section No. 11(1)

- Power of CG to grant exemption
- Can the Notification issued under section 11(1) merely prescribe the conditions ?

❑ Section 15(5)

- Power of CG to prescribe the manner for the determination of value of the notified supplies
- Relevance of S.15(5)

❑ Section 16(1)

- ITC provision
- Can a Notification be issued under this provision?

Constitutional Validity of Notn. No. 3/2019 - CT (Rate)...

□ Section No. 148

- Special procedure for certain persons
- Furnishing of returns, payment of tax and administration of such persons.

Can a conditional notification be made compulsory?

- ❑ Notification is conditional - can it be made mandatory ?
 - Relevance of the explanation to section 11
- ❑ Notification No. 2/2019 - CT (Rate) dt. 07.03.2019 -
- ❑ CBIC's views in FAQs - are they constitutionally valid ?
- ❑ Where two exemptions available – Assessee has option to choose – this principle is well established by courts in various judicial precedents (few of them are listed below)
 - Indian Petro Chemicals - 1997 (92) ELT 13 (SC) - Specific Vs. General
 - HCL Ltd. - 2001 (130) ELT 405 (SC)
 - Share Medical Care - 2007 (209) ELT 321 (SC)

Consequences of the non-adherence to the conditions

- What will be the consequences?
- Will the residual entry apply?
- Tax payable @18% w/o deduction for the cost of land? Is it valid?
- Will the notification fail on this count?

A surprising omission of Item(ii) of Entry 3 ; A surprising omission of Item(ii) of Entry 3 ;

Section 53A of the Income Tax Act, 1961 Not. No. 11/2017-CT (R) and its implications

- A surprising omission of Item(ii) of Entry 3 ; Reasons Unknown
- Is it intentional or by oversight?
- Implications of the omission
- Items (iii) to (ix) covers ‘composite supply of works contract’
- Does the omission mandate the Assessee to pay tax on total value of the construction including value of land?
- New clause (va) covers ‘composite supply of works contract’ restricted to only affordable residential apartments, new or ongoing, for which option to pay tax at the old rates has not been exercised - Entry is restrictive in its scope

Omission of entry on works contract from Not. No. 11/2017-CT (R) and its implications...

- As item (ii) stands omitted, no similar option to pay GST on service component for residential projects other than affordable housing
- Is this valid and sustainable?
- SC in L & T's case - 2014 (303) ELT 3 - Construction agreement entered by builders/developers with end-customers will clearly get covered under the definition of 'works contract'
- S.2(119) defining works contract includes construction
- Residual entry (xii) reads 'construction service other than (i), (ia) to (if), (iii) to (v), (va), (vi) to (xi)'

- Implications

Omission of entry on works contract from Not. No. 11/2017-CT (R) and its implications...

- Does residual entry cover only ‘construction services’? Would that mean S.2(119) becomes redundant?
- Amended item (xiii) excludes newly inserted items
- Newly inserted items uses the expression ‘construction’
 - Does it refer to only ‘service’ or ‘works contract’?
- Can new projects launched after 01.04.2019 take benefit of this entry?
- Relevance of the SC judgement in L & T’s case – 2015(39) STR 913 -Taxability of indivisible works contracts prior to 01.06.2007

Levy of GST on immovable property

- In respect of the supplies covered by the new items, provisions of para 2 made applicable
- Value of land deemed to be 1/3rd of the total amount including the amount charged for the transfer of land
- What happens if the land value is over and above 1/3rd? Can it be considered as levy of GST, by implications, on the immovable property, i.e. land?
- Legislative competence of the Union to levy tax on immovable property - implications of the *non-obstante clause* in Article 246A
- Would levy be violative of Article 265 of the Constitution?
- Gujarat High Court in *Munjaal Manishbhai Bhatt Vs. UOI* (Order dt.27.01.2021 in SCA No.1350 of 2021)

Levy of GST on immovable property...

- Para 5 (b) - is it subject to challenge being lacking legislative competence and violative of Article 246A and 265?
- Is there a mandatory levy of tax on immovable property under all new items inserted in Sr.No.3?
- Whether the presumption that the value of land is 1/3rd of the total amount charged is arbitrary?
- Observations of SC in L & T's case - 2014 (34) STR 481
- Are the new entries with para 2 susceptible to Constitutional challenge on various counts?

Levy of tax on Construction Services in terms of Entry 5(b) of Schedule II

- Intent and purpose behind Schedule II - Categorization of supplies
- If the transaction does not satisfy the test of being a ‘supply’ in terms of S.7(1), the question of its categorization does not arise
- Legal position now affirmed with retrospective amendment to S.7 by the Amendment Act of 2018
- Deletion of clause (d) and insertion of new clause (1A)
- Entry 5(b) of Schedule II - Entry will get attracted only if the transaction is ‘supply’
- However, ‘supply’ is defined in S.7(1) in respect of ‘goods’ or ‘services’ or both and not immovable property - Article 246A

Levy of tax on Construction Services in terms of Entry 5(b) of Schedule II...

- Entry is subject to Constitutional challenge being violative of Article 366 (29A)
- L & T's case in (34) STR 481 - Construction covered by 'works contract'
- Entry 5(b) vis-à-vis Article 366 (29A)(b)
- Is Entry 5(b), after amendment, a non-starter?

Levy in respect of Transfer of Development Rights

- Are the development rights in the nature of immovable property and can come within the scope of 'taxable supply' and consequential levy of tax?
- Definition of 'land' in the Constitution and the different enactments
- 'Sale of land' outside the scope of supply - Schedule III
- Are the amending entries of Sr.no.3 of the Notification requiring developer/promoter to pay tax under reverse charge in respect of grant of development rights without jurisdiction and without authority of law?

GST implications in case of Joint Development Agreements

- Allotment of constructed area in lieu of Development Rights as landowner's share
- Is the transaction in the nature of exchange or barter in immovable property and outside the scope of the levy?
- Valuation of landowner's share based on the similar apartments sold nearest to the time to the independent buyer
- No purchaser during construction – SC in L & T's case – 2014 (303) ELT 3 (SC) - Activity of construction, in the absence of purchaser during construction would not be a works contract
- Applicability of para 5(b) of Schedule II in such cases

GST implications in case of Joint Development Agreements...

- Bombay HC in Chheda Housing Development's case - Whether FSI / TDR could be termed as a benefit arising from the land?
- Chhaturbhuji D. Kapadia vs. CIT - 2003 (260) ITR 491 (Bombay)

Levy on Construction and Sale of apartment by the landowner

- Landowner selling his share of constructed area received from the developer, before issue of OC is declared liable to pay tax
- Validity of levy of tax on the landowner
- Is this not a levy on re-sale of the apartment which is a transaction in immovable property?
- Use of the expression 'registered person' to describe the 'landowner-promoter' - Implications
- Amended Col.5 contains various conditions - Can a condition (Proviso) create or assume the levy?
- Sale of his share of constructed area by the landowner before the issue of CC
 - What shall be the rate of tax?

Valuation of constructed area allotted to landowners

- Para 2A inserted w.e.f. 01.04.2019
 - Value of construction deemed to be equal to total amount charged for similar apartments in the project from the independent buyers (other than landowner)
 - Nearest to the date on which DRs or FSI is transferred to the promoter
 - Absence of statutory provisions for levy of GST on the landowner's share
 - Can the valuation provision apply in the absence of any service element (transaction is in immovable property) in the JDA?
 - SC in ACER India Ltd. - 2004 (172) ELT 289 (SC)
-

Valuation of constructed area allotted to landowners...

- Valuation of landowner's share – verbatim reproduction of earlier Circular No. 151/2/2012-ST dated 10.02.2012
 - Is the provision ultra vires and beyond the scope of S.15 besides being arbitrary and unreasonable as regards valuation of landowner's share?
 - Impossibility of obtaining value of similar apartments sold to independent buyers when such sales takes place much later
 - *“Law does not compel a man to do that which he cannot possibly do”*
 - In case of landowner's share of constructed area, indirect inclusion of value of land (proportionate) on account of adoption of the value of similar apartments sold to the independent buyers – Is this permissible in law?
-

Valuation of constructed area allotted to landowners...

- Para 2A
 - Validity of the provision
 - Adoption of the value of the similar apartment sold to the independent buyers
 - Effect of the inclusion of the value of land, if any, charged to the independent buyers vis-à-vis the valuation in case of the Landowner's share
 - Does the levy fail the test laid down - B.C. Srinivasa Shetty's case
 - No such provision in existence prior to 01.07.2017 and between 01.07.2017 and 31.03.2019.
-

Taxability of the transfer of development rights

❖ **Leviability of Service Tax/GST on the transfer of the Development Rights by the landowner to the Developer:**

□ **Service Tax:**

- Relevant period: Post 01.07.2012 (Negative List based levy of Service Tax regime)
- Service as defined in S.65B (44) of the FA
 - ✓ Exclusions:
 - transfer of title in goods or immovable property by way of sale, gift or in any other manner;
 - such transfer, delivery or supply of any goods which is deemed to be a sale within the meaning of clause (29A) of Article 366 of the Constitution
 - Whether Development Rights (DRs) constitute an immovable property?

Taxability of the transfer of development rights

- ✓ Definitions of ‘immovable property’ under the various enactments
- ✓ Definitions of ‘Development Right’ and ‘Floor Space under (FSI), under the various Enactments.
- Immovable property includes ‘land’, benefit arising out of land, things attached to the earth or permanently fastened to anything attached to the earth...’
- Meaning and scope of the term ‘Land’
 - ✓ Definitions under the various Enactments
 - ✓ Includes ‘benefits to arise out of land...’
- ‘Benefit to arise out of land’ - origin of the benefit traceable to the existence of land-inextricable link to land.

Taxability of the transfer of development rights

- Whether transfer of Development Rights constitute transfer of title in immovable property?
 - ✓ Term Title is a broader expression of law which need not be always understood as akin to Ownership
 - ✓ Title in a property may take various forms of a right in a property such as right to possess, right to develop, right to occupy, right to tenancy, right of easement, etc.
 - ✓ Development Rights is one of such rights
 - ✓ Judicial pronouncements
 - ✓ Transfer of Development Rights constitutes transfer of title in immovable property whether or not accompanied with the transfer of ownership in land.

Taxability of the transfer of development rights

- ✓ Irrevocable transfer of Development Rights in the present case
- ✓ Transfer of one of the rights in land is permissible. The ownership of an ‘Immovable Property’ consists of ‘bundle of rights’ each one of them severable and independent
- ✓ R.34 of DCR – ‘the development potential of land may be separated from the land itself in certain circumstances.’
- **Constitutional Perspective**
 - ✓ Entry 49; List II of the Seventh Schedule Constitution
 - ✓ State Legislatures empowered to impose tax on ‘Land and buildings’
 - ✓ Entry 18 of the List-II:
 - ‘Land, that is to say, rights in or over the land.’

Taxability of the transfer of development rights

- **Conclusion:**

- ✓ Transfer of Development Rights by landowner to Developer against the allotment of the constructed area in terms of the Agreement is a transaction in ‘immovable property’ or involving a ‘transfer of title in immovable property’
- ✓ Excluded from the scope of ‘service’ as defined in S.65B(44) and not exigible to Service Tax.

- **GST:**

- Levy of GST not attracted at the transaction involving transfer of Development Rights took place during Pre-GST period.
- Assuming ‘transfer of Development Rights’ is ‘taxable’, the ‘taxable event’ has taken place during Pre-GST period
- Grant of possession/allotment of the constructed area by the Developer to landowner during Post-GST cannot create or give birth to an independent ‘taxable event’ attracting levy of GST.

Taxability of the transfer of development rights

- Relevance and validity of the CBEC's Circular No. 151/2/2012-ST dt. 10.02.2012 & Instruction No. 354/311/2015-TRU dt. 20.01.2016.
 - Relevance and validity of the CBEC's Circular No. 44/18/2018-GST dt. 02.05.2018
 - Relevance and validity of the Not. No.4/2018-CT (Rate) dt. 25.01.2018 issued under S.148 of the CGST Act
 - Para 6.2.1 of the Education Guide (Service Tax)
- ❖ **Leviability of Service Tax and/or GST on the constructed units allotted by the Developer to landowner:**
- Service Tax:**
- Does the transaction/arrangement constitutes 'exchange of immovable property'?
 - Is there a 'consensus ad idem' on the provision of service by and between the contracting parties?

Taxability of the transfer of development rights

- **Conclusion:**

- ✓ Service tax is not leviable on the constructed area allotted by the Developer to landowner.

- **GST:**

Levy not attracted for the same reasons

- ❖ **Whether the transfer/grant of „Development Rights“ by landowner to the Developer constitutes „consideration“ in the hands of the Developer?**
- Bombay HC in Sumer Corporation -(2017) 82 taxmann.com 369 (Bom)
- Transfer/grant of DRs may constitute ‘consideration’ in the hands of the Developer under Service Tax & GST
- ❖ Determination of ‘value’ of Development Rights transferred to the Developer and the constructed area allotted to the landowner:
- ❖ Whether the question of any taxability will arise in case of the landowner/promoter (landowner) in case of the sale from his area of unit during the construction period after 01.04.2019.

Taxability of the transfer of development rights

❖ „Relevant date“:

Service Tax:

- S.67A - Date of determination of rate of tax, value of taxable service and rate of exchange.
- POT Rules, 2011 - Rule 3
- Date of issue of invoice or date of completion of service (if invoice is not issued within the prescribed period) or date of receipt of the payment, whichever is earlier.
- Is the date of execution of the JDA a relevant date?

GST:

- Whether the question of the determination of relevant date or time of supply arises under GST?
- S.12 of the CGST Act.

Taxability of the transfer of development rights

- 'Value' of the 'Development Rights' transferred to the Developer and 'constructed area' allotted to landowner:
 - Service Tax:
 - S.65B(44) of the FA
 - 'Consideration' is pre-requisite to attract the levy
 - 'Consideration' not defined
 - S.67 - Valuation provisions
 - Valuation Rules, 2006
 - Does the Valuation Rules provide for the manner of the determination of 'value' of the DRs?
 - CBEC's clarification and Education Guide - Determination of 'value' - Sanctity thereof.
 - GST:
 - S.15 of the CGST Act
 - Valuation Rules - Chapter IV of the CGST Rules
 - Rules 27 to 31 - Applicability and relevance

Taxability of the transfer of development rights

Conclusions:

- Does the valuation mechanism fail both, under Service Tax and GST, in so far as the determination of the value of DRs is concerned ?
- Does the levy fail?

Taxability of the transfer of development rights

❖ GST & Constitutional Perspective

- Article 246A of the Constitution
- Powers of the Parliament and the State Legislature to **make laws with respect to goods and services tax imposed by the Union or by such State**
- Non-obstante clause in Article 246 ‘Notwithstanding anything contained in Article 246 and 254...’
- Entry 18 & 49 of List 11 i.e. State List
- ‘Goods’ as defined in S.2(52) of the CGST Act
- ‘Service’ as defined in S.2(102)
- Exclusions of ‘Sale of Land’ and ‘Sale of Building’ vide Entry 5 of Sch.III of the CGST Act - Was it required at all?
- Tax on ‘Immovable Property’ and on ‘Immovable Property-based transactions/activities’ - Distinction
- Pendency of the matter before the 9-Judges Bench of SC in Mineral Area
Development Authority vs. Steel Authority of India - (2011) 4 SCC 450 - Cited in 2018 (13) GSTL 3 (SC).

Restriction on ITC u/s 17(5)(d)

- Leviability of GST on leasing @ 18%
- Admissibility of ITC on the goods or services or both used in the construction of the commercial complex
- ❖ Ratio of the judgement of the Orissa HC in Safari Retreats Pvt. Ltd -2019-TIOL-1088-HC-ORISSA-GST [‘Notice issued’ in 2019-TIOL-489-SC-GST]
- Genesis of the Controversy

Restriction on ITC u/s 17(5)(d)

- Position under the erstwhile Service Tax regime
 - Circular No. 98/1/2008-ST dt. 04.01.2008
 - ✓ Sai Samhita Storages Pvt. Ltd. vs. CCE
-2010-TIOL-1751-CESTAT-BANG.
 - ✓ **Approved** in 2011-TIOL-863-HC-AP-CX
 - ✓ Mundra Port & SEZ Ltd. vs. CCE
-2008-TIOL-1691-CESTAT-AHM
 - ✓ Reference answered in favour of the Appellant in 2015-TIOL-1288-HC-AHM-CX
 - ✓ CCE vs. Jawahar Mills Ltd. - 2002-TIOL-87-SC-CX
 - ✓ CCE vs. SLR Steels Ltd. -2011-TIOL-892-HC-KAR-EX
 - ✓ Amendments to R.2(k) and 2(l) of CCR, 2004 w.e.f. 01.04.2011 followed by another amendment w.e.f. 01.07.2012

GST on the sale of developed plots

Issue:

- ❖ Whether the sale of developed plots would attract the levy of GST?

Comments:

- AAR Rulings in :
- Plots developed and sold by the owner:
 - ✓ Satyaja Infratech (2020-TIOL-80-AAR-GST)
 - ✓ Dipesh Anilkumar Naik (2020-TIOL-143-AAR-GST)
 - ✓ PPD Living Spaces Pvt. Ltd. (2018-TIOL-192-AAR-GST)

GST on the sale of developed plots

- Plots developed and sold under Joint Development Agreement:
 - ✓ M/s. Maarq Spaces Pvt. Ltd. (2020-TIOL-28-AAAR-GST)
 - ✓ M/s. Vidit Builders (2020-TIOL-47-AAR-GST).

GST on the sale of developed plots

- Entry 5; Sch.III - Sale of Land - Neither ‘supply of goods’ nor ‘supply of service’
- Sale of Developed Plot – Composite supply where the predominant element is the ‘supply of land’
- Transaction cannot be artificially vivisected
- Transaction remains outside the purview of levy
- Maintainability of the AAR Rulings

GST on the sale of developed plots

- **Latest Ruling by Uttarakhand AAR in Shri Abhishek Darak – 2020- VIL-303-AAR [dt 22/10/2020]**
 - Difference of opinion between the Members
 - Member Shri Amit Gupta:
 - Taxability of Sale of Developed Plots
 - Sale of Developed plot does not constitute the supply of goods or services
 - Not exigible for to GST

GST on the sale of developed plots

- Member Shri Anurag Mishra:
 - Assurance to the purchasers as to the nature and the extent of development that will be carried out as a part of the package

- Entry 5; Sch.III refers to only sale of 'Undeveloped Land' and not of 'Developed Land' – it is a supply of service liable to GST
 - Matter referred to AAAR

Taxability in case of Redevelopment

- **Factual Matrix:**
- Society contemplating the Re-development of the building
- Two options before the Society:
 - ✓ Self-redevelopment
 - ✓ Joint Development with Builder

Taxability in case of Redevelopment

- **Self-redevelopment:**

- ✓ Appointment of PMC & other Contractors
- ✓ Arranging Bank Loan
- ✓ Payment of rent and other sums to the members in respect of the new accommodation
- ✓ Allotment of new flats to the members free of cost
- ✓ Option to the members to accept the offer for the extra area at a reduced price compared to the market price
- ✓ Sale of newly constructed flats to the independent buyers (Non-members)
- ✓ Difference in price charged to the members, non-members and for the stamp duty purpose
- ✓ One-time corpus to the members

Taxability in case of Redevelopment

- Development Model – Society & Builder
 - ✓ Engagement of the Builder
 - ✓ Extra FSI to be given to the Builder as consideration
 - ✓ Builder to pay the rent to the existing members and other specified amounts
 - ✓ Builder to offer extra area to the existing members (Rs.20000/- psft); sell the flats to the independent buyers (Rs.25000/- psft); the value for stamp duty purpose is Rs. 22500/- psft.
 - ✓ Payment of one-time corpus by the Builder to the Society

Taxability in case of Redevelopment

- **Issues:**

- **From the Society & Members Perspective:**

- ❖ Whether the Society under self-development model, can be treated as 'Builder' and be considered liable for GST?
- ❖ Relevance of the concept of mutuality under GST
- ❖ GST implications for the members in respect of the Rent and other amounts received from the Society
- ❖ Leviability of GST on the extra area bought by the members & implications from the valuation perspective
- ❖ GST implications in respect of the flats sold after OC and flats given free of cost to the members
- ❖ Liability of the Society under RCM in terms of R.9(4) of the CGST Act

Taxability in case of Redevelopment

□ From the Builders/Society/Members Perspective:

- ❖ Members' liability to GST in respect of the amounts received from the Builder
- ❖ Leviability of GST on the grant of FSI by the Society to the Builder
- ❖ GST implications in respect of the flats sold to the outsiders & allotted free of cost to the members.
- ❖ GST implications in respect of ITC reversal/payment of tax in respect of the flats sold after OC and allotted free of cost to the members.

❖ Comments:

□ Society"s/Members" Perspective:

- Society as a „Builder“:
 - ✓ Society vis-à-vis independent buyers
 - ✓ Society vis-à-vis Members

Taxability in case of Redevelopment

- **Concepts of 'Business' & Mutuality of Interest:**
- Whether the Society can be said to be engaged in Business?
- S.2(17)(e) of the CGST Act
- S.2(84) – 'person'
- S.7 – 'Supply'
- Whether condition of 'business' is required to be satisfied for the purposes of clause (e) of S.2(17)?

Taxability in case of Redevelopment

- Judicial pronouncements:
 - ✓ SC in Sai Publication Fund -(2002) 126 STC 288 (SC)
 - ✓ SC in State of TN vs. Board of Trustee of the State of Madras
 - -(1994) 114 STC 520 (SC)
 - ✓ Regularity
 - ✓ Continuity of the activities
 - ✓ Profit motive
 - ✓ If the main activity is not business, incidental activity would also not qualify as business
 - ✓ Objective of a Co-op. Society

Taxability in case of Redevelopment

- Concept of ‘Mutuality of Interest’:
 - ✓ **State of WB vs. Calcutta Club Ltd.**
 - -2019-TIOL-449-SC-ST-LB
 - ✓ Does the principle laid down by the SC apply under GST regime?
 - ✓ Pre-requisite of the existence of ‘two persons’?
 - ✓ No deeming fiction?
 - ✓ S.7 (1A) r/w. Sch.II
 - ✓ Incorporated clubs or association vis-à-vis unincorporated bodies
 - ✓ Society acts merely as agent.
- Amendments to S.7 and Sch.II by the Finance Act, 2021 with retrospective effect from 01.07.2017
 - ✓ Is this an attempt to nullify the effect of the judgement in Calcutta Club’s case?

Taxability in case of Redevelopment

- Implications of the amendment
 - ✓ Amendments yet not effective and will come into operation from the appointed date to be notified by the Central Government

Taxability in case of Redevelopment

- GST liability of Members:
 - ✓ Can a member said to be engaged in the business?
 - ✓ S.7 (1A) vis-à-vis Sch.II
 - ✓ ‘Taxable activity’ & ‘Non-taxable activity’
 - Impact on ITC entitlement or threshold?

 - ✓ **AAR in Zaver Shankarlal Bhanushali**
 - ✓ Fallacy in the AAR’s Ruling

Taxability in case of Redevelopment

- GST levy on extra area purchased by the members:
 - ✓ Will the concept of ‘Business’ and ‘mutuality’ be applicable here?
- GST levy on the flats sold to the independent buyers:
 - ✓ Will the levy apply?
 - ✓ Scheme of self-redevelopment

Taxability in case of Redevelopment

- GST implications in respect of the flats sold after OC and given free of cost to the members
 - ✓ Sale of flats after OC
- No GST implications
- Assuming the taxability, no ITC reversal (if availed) is warranted or can be enforced.
- Allotment of free of cost flats to the Members:
- No reversal of Cenvat/ITC is warranted
- Also, linked to taxability of the flats sold to the independent buyers and discharge of GST liability, if any, thereon.
- Does statutory provision exist to provide for such reversal under GST?
- Liability under RCM u/s. 9 (4)
 - ✓ No liability

Taxability in case of Redevelopment

- Builder's/Society/Members' Perspective:
- Members' liability to GST on the amounts received from the Builder
 - ✓ No liability?
- Levy of GST on the grant of FSI by the Society
 - ✓ No liability?
- GST liability or ITC reversal in respect of the flats sold Post-CC or the flats allotted free of cost to the members.
 - ✓ No liability nor reversal warranted?
- Builder's liability to GST on the maintenance charges collected from the buyers before the formation of the society;
 - Kumar Beheray Rathi Vs. CEX Pune - 2013 TIOL 1806 CESTAT - MUM
 - Green Valley Developers Vs. CST 2013 - TIOL - 1198 - CESTAT - MUM
 - CST Vs. Shri Krishna Chaitanya Enterprises & Others 2018 - TIOL - 288 - HC - MUM - ST
 - Whether the ratio laid down in the aforesaid judgements will apply under GST?

Importance of drafting of agreements

- Varied shades of the terms governing the agreements under the Real estate sector
- Terms of the contractual arrangement will depend upon the facts and intention of both the parties
- No standard format of the agreement nor the same is advisable
- One size fit all type of agreement may create legal and business disputes
- Complex Indirect Tax structure and the litigation prone nature of the various issues necessitate a careful approach in drafting of the agreements of any nature
- Any looseness, lacunae or lethargic approach in drafting the agreements may have serious financial implications, whether vis-à-vis the party to the agreement and/or the taxmen.
- Commercial vetting of the agreements is crucial for the Real Estate sector

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