

# GST Issues in Real Estate Sector



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## Real estate trends to look out for in 2021

Robust demand for affordable housing

Buyers likely to prefer large, secure homes

Tier-2 and tier-3 cities to witness greater demand

Ready homes to remain a preferred option

Taxation of real estate sector has **always been critical issue**. The major reason is that the sector is still unorganized.

The complications started after introduction of State tax on works contract. The problem aggravated after introduction of service tax on works contract.

The State tax and Service tax was merged on introduction of **GST w.e.f. 1-7-2017**. However, many **issues were still unresolved**.

Hence, the **GST structure on real estate services relating to residential and commercial apartments has been thoroughly altered w.e.f. 1-4-2019**.



# Issues under Real Estate Sector

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- Renting and Leasing of Immovable Property
- **Real Estate Projects under RERA**
- **TDR/FSI/Long Term lease**
- **Sale of Land and Developed Plots**
- Works Contracts
- Government related construction contracts

# Discussion Points

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- ❑ Highlights of Revised Scheme for Builders/Developers from 1st April 2019
- ❑ ITC Reversal for Builders/Developers
- ❑ Taxability of Development Rights/TDR/FSI
  - ❑ Pre GST-Regime
  - ❑ GST Regime from 1<sup>st</sup> July 2017 to 31<sup>st</sup> March 2019
  - ❑ GST Regime from 1<sup>st</sup> April 2019
- ❑ Joint Development Models and Implications on Developer & Landowner
  - ❑ Area Sharing Model
  - ❑ Revenue Sharing Models
  - ❑ Other Arrangements
- ❑ Sale of Developed Plots
- ❑ Q & A

# Constitutional Background

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Taxes on lands and buildings is a **State subject** – Entry 49 of List II of Seventh Schedule – Article 246

However, Article 246A of Constitution confers **concurrent powers to Centre and State to make laws with respect to tax on goods and services** – these are overriding powers

**Services means anything other than 'goods'** – Article 366(26A) of Constitution

Thus, **'services' can cover immovable property**

# Sale of complex before completion

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As per **para 5(b) of Schedule II** of CGST Act, **construction of complex, building, civil structure, except** where entire consideration for sale has been received after issuance of completion certificate, where required, by the competent authority or after its first occupation, whichever is earlier [**deeming provision**]

As per para 6(a) of Schedule II of CGST Act, **works contract** shall be treated as **supply of service**

Interestingly, as per Article 366(29A) of Constitution of India, tax on transfer of property in goods involved in execution of works contract is deemed to be sale of goods

# Sale after first occupation or completion certificate, whichever is earlier – no GST

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As per para 5 of Schedule III read with para 5(b) of Schedule II of CGST Act, If entire consideration is received **'after issuance of completion certificate, where required, by the competent authority or after its first occupation, whichever is earlier'**, the promoter (builder or developer) is not liable to pay GST.

The words **'after its first occupation'** are confusing.

'Occupation' by whom? The 'occupation' should be of that particular apartment which is being sold or any apartment in that complex?

As per FAQ (Part I) No. 29 issued by CBI&C *vide* circular F No. 354/32/2019-TRU dated 7-5-2019, 'first occupation' means **'first occupation' of the project in accordance with laws, rules and regulations of State/Central Government or any other authority**. Thus, mere staying in the apartment before obtaining **completion/occupancy certificate** will not be considered as 'first occupation'.

Thus, the FAQ (Part I) treats 'first occupation' as equivalent to completion/occupancy certificate. If so, the words *'or its first occupation whichever is earlier'* become redundant. It is well settled that an interpretation which treats some words as otiose or redundant should not be adopted.

In many places, there is delay in issuing completion certificate/occupancy certificate. However, the customers start occupying the apartments.

However, such occupation is illegal occupation.



# Transactions out of GST ie. Neither goods nor services – para 5 of Schedule III of CGST Act

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- **Sale of land**
- **Sale of building or apartment after its completion** i.e. after completion certificate has been obtained from competent authorities

**Issue of sale of Developed Plots – with common facilities like gym, club house, temple, security office etc. – care required**

From 1st April 2019

# Revised GST structure w.e.f. 1-4-2019

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- **Radical Changes** made w.e.f. 1-4-2019 – **ITC abolished for residential segment**– no option to pay GST at higher rate and claim ITC
- The revised scheme applies to residential and commercial apartments which are **covered under RERA** [Real Estate (Regulation and Development) Act, 2016].
- The provisions do not apply to **construction of single houses or works contracts not covered under RERA**
- **"Promoter"** shall have the same meaning as assigned to it in section 2(zk) of the Real Estate (Regulation and Development) Act, 2016 [RERA] - clause (xvii) of paragraph 4 of Notification No. 11/2017-CT (Rate) and 8/2017-IT (Rate) both dated 28-6-2017 inserted w.e.f. 1-4-2019.
- The new scheme is **compulsory for projects commenced on or after 1-4-2019**. In respect of ongoing projects as on 31-3-2019, the promoter has option to shift to new scheme w.e.f. 1-4-2019 (without ITC) or continue under earlier scheme (with ITC)

# GST Rates

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- Under new scheme, the **Effective GST rates** for residential apartments are as follows –
  - (a) CGST 0.5% plus SGST/UTGST 0.5% (**total 1%**) or IGST 1% (**without ITC**) for **affordable residential apartments**
  - (b) CGST 2.5% plus SGST/UTGST 2.5% (**total 5%**) or IGST 5% (**without ITC**) for **other residential apartments.**
- In respect of **commercial apartments (shops, offices, godowns etc.) in RREP**, the GST rate is CGST 2.5% plus SGST/UTGST 2.5% (**total 5%**) or IGST 5% (**without ITC**).
- In respect of construction of **commercial apartments (other than RREP)**, the GST rate is CGST 6% plus SGST/UTGST 6% (**total 12%**) or IGST 12% (**with ITC**).

These rates apply where supply of services involves transfer of land or undivided share of land and its charges are included in the amount charged to customer.

## Comparison of the new scheme with the old rates of GST:

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Sl.No	Description	Effective New Rate	Effective Old Rate
1.	Construction of <b>affordable Residential Apartment</b> by a promoter	1%	8%
2.	Construction of <b>Other than affordable Residential Apartment</b> by a promoter	5%	12%
3.	Construction of <b>commercial apartment in RREP</b> by a promoter	5%	12%
4.	Construction of <b>commercial apartment in REP</b> by a promoter	12%	12%

# Other Points

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- **REP – Real Estate projects.** [definition under RERA] – can cover both residential and commercial apartments (shops, offices, godowns) – **Commercial apartment means other than residential apartment**
- **RREP – It means REP with commercial apartments not more than 15% of total carpet area** [No parallel definition in RERA] – balance residential apartments – common buildings are not ‘commercial apartments’
- **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.**

**[also an apartment being constructed in an ongoing project as on 1<sup>st</sup> April 2019 under any of the schemes specified\* ( without any monetary cap)]**

- In case of ongoing projects as on 1-4-2019, the promoter has **option to opt for earlier provisions of tax i.e. with utilization of ITC**. If promoter intends to continue under old scheme, he has to submit declaration in specified form to jurisdictional Commissioner before 20-5-2019.
- If the promoter does not submit such **declaration**, he is deemed to have opted for the new scheme.
- In case of ongoing projects, if the promoter intends to shift to new scheme (of 1%/5%) w.e.f. 1-4-2019, he is required to refund excess ITC availed as on 31-3-2019 or get credit of ITC less claimed as on 31-3-2019.
- In respect of new projects, the tax (CGST, SGST/UTGST or IGST as applicable) shall be paid in cash by debiting the **electronic cash ledger only** [without utilising Input Tax Credit].

# Concessional rate on ongoing projects if promoter continues under old scheme with ITC

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- Promoter had option to continue under old scheme with ITC in case of ongoing projects as on 31-3-2019.
- In that case, the earlier GST rate of 18% [effective 12% of gross amount charged includes value of land]
- In some ongoing projects, GST rate is 12% [effective 8% if gross amount charged includes value of land], if promoter continues under old scheme. These cover schemes under Pradhan Mantri Awas Yojana, Rajiv Awas Yojana, Affordable Housing, low cost houses etc.



# Reverse Charge if procurement from unregistered Person (**Shortfall Tax**)

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- All **cement** for the project must be purchased from registered supplier only. If not so received, the promoter is required to pay **GST @ 28% under reverse charge** by promoter (even if total value of supplies received from registered suppliers is more than 80%).
- After considering payment of GST on cement under reverse charge, **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 service **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
- If there is **shortfall** in procurement from registered suppliers, i.e. if still requirement of procurement of 80% from registered suppliers is not achieved, **GST @18% is payable on value to the extent of shortfall. This adjustment is 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.
- Where **GST paid under reverse charge u/s 9(3)**, it will be **treated as procured from registered person**
- **Inward supplies of exempted goods /services included for calculating 80%**

# Project-wise Accounts

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- 'Project' as per RERA
- All accounts are to be maintained project-wise. **Each project can be treated differently** e.g. for some projects, promoter may opt for **1%/5% scheme** and for some projects **8%/12% scheme** - FAQ (Part I) No. 24 issued by CBI&C *vide* circular F No. 354/32/2019-TRU dated 7-5-2019.
- **If project is big**, advisable to have separate GST Registration for each project – even more than one project within mega project
- As per FAQ (Part I) No. 30 issued by CBI&C *vide* circular F No. 354/32/2019-TRU dated 7-5-2019, even within same building, **two separate projects can be registered e.g. 1st to 10th floor for one project and 11th to 20th for another project**. These will be considered as distinct projects.

# Liability of services of contractor or sub-contractor

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- The contractor or sub-contractor supplying service to promoter or other contractor is liable to pay **tax @ 18%** in case of construction of **commercial apartments or residential apartments other than affordable apartments.**
- In case of services of contractor or sub-contractor for construction of **affordable apartments, the GST rate is 12%** (The carpet area of affordable residential apartments should be at least 50% of total carpet area of all the apartments in the project)
- **Input Tax Credit is available.**
- For the purpose of determining whether the apartments at the time of supply of the service are affordable residential apartments, 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.**
- In case it **finally turns out that the carpet area of affordable residential apartments was less than 50%** of total carpet area of all the apartments, the **promoter shall be liable to pay difference between normal tax payable and the tax collected at concessional rate from the buyers, under reverse charge basis.**
- The contractor can rely on declaration by promoter that the project meets conditions of concessional rate on the works contract service - FAQ (Part II) No. 23 issued by CBI&C *vide* circular F No. 354/32/2019-TRU dated 14-5-2019.

# ITC Reversal Rule amended for Real estate Sector



# ITC Reversal

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Where **promoter opts to pay tax at full rate (8%/12%) after availing ITC, proportionate reversal of Input Tax Credit** is required in respect of apartments remaining unsold as on date of completion or first occupation, whichever is earlier.

The reversal is required to be made on date of completion of project. Reversal should be 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 will be on basis of carpet area** and not on basis of value.

# Purchaser (customer) selling or surrendering before completion certificate

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- **Purchaser of apartment may sale before completion certificate –**
  - In my view he is not liable to pay GST as he is not supplier of construction service and he is not in business of sale of apartment (though even casual transaction can be taxed) – dispute possible
- **Promoter can adjust GST only if he refunds the amount with GST**
- If customer **cancels booking, the promoter deducts certain amount.** On that amount, GST @ 18% applies as it is **‘tolerating an act or situation’** – deemed service

# Is the deeming provision in respect of value of land legally valid?

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- The deeming provision states that **value of land will be 'deemed to be one third of total amount charged.**
- There is **no option available to promoter to deduct actual value of land** involved in sale of apartment instead of deemed value - FAQ (Part I) No. 36 issued by CBI&C *vide* circular F No. 354/32/2019-TRU dated 7-5-2019.
- The **provision applies even when the promoter enters into two agreements - one for sale of undivided share in land and other for construction of superstructure** - *Kara Property Ventures LLP, In re* (2019) 73 GST 289 = 103 taxmann.com 279 (AAR- TN).
- In many cases (in particularly large cities), the value of land is actually much more than 33% of total amount charged. In such cases, the promoter is required to pay GST at value much higher than actual value of construction.
- It is well settled that any '**deeming provision**' **cannot override a section. The 'value' cannot exceed value as specified in section 15 of CGST Act, red with relevant valuation rules in CGST Rules.**
- In my view, it is **possible to challenge** this deeming provision, though, of course, final result is uncertain.



# PLC, EDC, Parking Space Charges, Club Membership Deposit

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- Prime Location Charges, External Development Charges (EDC), parking space charges etc.
- These are **'naturally bundled services'** and should form part of **'total amount'** charged for **purpose of GST**
- Club Membership deposit or fee is not **'naturally bundled service'** and should be taxable at hands of club
- **Maintenance service** provided by promoter till housing society or Resident Welfare Association (RWA) is constituted – **GST @ 18% - exemption of Rs 7,500 per month not available**

# Types of Joint Development Arrangements

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- Often promoter enters into agreement with land owner in respect of Real Estate Project. **Land owner transfers development rights to promoter**
- In some cases, land owner has **revenue sharing arrangement** with promoter. In that case, promoter is liable to pay GST on entire supplies of apartment.
- In some cases, land owner-promoter is allotted some apartments ie. **area sharing arrangement**, which he sales on his own account either before completion or after completion.
- Some times, Joint Development Agreement is executed and **separate joint venture company or AOP** is constituted
- And some times, **joint venture without forming a separate entity**

# Is Development Rights

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# GST ?



# Notification No. 4/2018-CT (Rate), dated 25-1-2018 (applicable upto 31/03/2019)

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As per the notification No. 4/2018-CT (Rate), dated 25-1-2018, the **liability of promoter** (earlier termed as developer, builder etc.) **and the land owner to pay GST shall arise at the time 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).**

Thus, even if completion certificate is not obtained, if specific apartments are conveyed by conveyance deed to land-owner, GST liability arises.

In my view, liability cannot arise when the promoter only identifies some apartments which will be given to land-owner at a later stage.

# Reverse Charge on TRD/FSI

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- The GST payable by **promoter under reverse charge** on TDR, FSI, upfront amount for long term lease w.e.f. 1-4-2019
- **There is no reverse charge for transactions upto 31-3-2019**
- For transactions upto 31-3-2019, in case of landowner, liability arises when apartments are handed over to landowner
  
- TDR Sale by SRA developers / landowner **to the trader** will be liable to **GST @ 18% on Forward Charge.**

# Exemptions of GST on TDR/FSI

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- In respect of development rights or FSI transferred or payment of upfront amount for long term lease of land on or after 1-4-2019 proposed to be used for **residential apartments, GST is not payable on TDR, FSI or payment of upfront amount for long term lease of land if residential apartment is sold before completion. (whether area share or revenue share)**
- However, if some residential apartments **remain unsold** on date of completion, **proportionate GST is payable** on TDR, FSI or long term lease of land by promoter under reverse charge.
- 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 after 1-4-2019, whether or not commercial apartments are sold before obtaining completion certificate. **The tax is payable by promoter under reverse charge.**
- **Upfront amount for long term lease of industrial plots** of development of infrastructure business provided by specified Government agencies. **If leased plot not used for intended purpose, GST payable**
- **Ancillary services relating to long term lease like transfer fee, conversion fee - taxable**

# Exemption to the extent of residential apartments sold before completion

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As per the principle,

The first step is to calculate **GST payable on development rights transferred, which pertain to residential apartments.**

**(A) GST on transfer of development rights/FST attributable residential apartments** = GST payable on TDR or FSI for construction of the project] × (carpet area of the residential apartments in the project) ÷ (Total carpet area of the project) .

The second step is to calculate **GST payable by promoter on un-booked residential apartments.**

**(B) GST payable on residential apartments remain un-booked on date of completion** = [GST payable on TDR or FSI for construction of the residential apartments in the project but for the exemption contained herein] × (carpet area of the residential apartments in the project which remain un-booked on the date of issuance of completion certificate or first occupation ÷ Total carpet area of the residential apartments in the project)

The **exemption available** on transfer of development rights/FSI attributable to residential apartments which were booked prior to date of completion = **(A) - (B).**

### **Upper limit for tax on residential apartments :**

The tax payable in terms of above shall not exceed 0.5% of CGST + 0.5% of SGST/UTGST of the value in case of affordable residential apartments and 2.5% of CGST + 2.5% of SGST/UTGST of the value in case of residential apartments other than affordable residential apartments remaining un-booked on the date of issuance of completion certificate or first occupation.

### **Time when liability of promoter arises :**

The liability to pay GST on the said portion of the development rights or FSI, or both, or upfront amount paid for long term lease of land, shall arise **on the date of completion or first occupation of the project, as the case may be, whichever is earlier.**



# Value of supply of service of development rights or FSI by land-owner to promoter

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**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** - para 1A of Notification Nos. 12/2017-CT (Rate) and 9/2017-IT (Rate) both dated 28-6-2017 inserted w.e.f. 1-4-2019.

As per paragraph 2 of Notification No. 11/2017-CT (Rate) dated 28-6-2017, the value will be equal to total amount charged less one third of total amount as value of land.

Really, value of land is much higher than one third and cost of construction is much less than two third

Thus, GST is payable on much higher amount i.e. **beyond section 15 of CGST Act.**

# Valuation of construction service provided by promoter to land-owner

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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 (see below) - para 2A of Notification Nos. 11/2017-CT (Rate) and 8/2017-IT (Rate) both dated 28-6-2017 as inserted w.e.f. 1-4-2019.

# Issues in Valuation

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- **Open market value** at the time of supply [rule 27 (a) of CGST Rules]
- **Value of supply of similar of apartments of like kind or quality**, if open market value not available [rule 27 (c) of CGST Rules]
- **Is the value of construction of similar apartments given to others comparable with apartments given free to transferor of development rights or FSI?**
- It is obvious that value of land is recovered by promoter from buyers of apartments who pay in cash. Thus, **value of land is apportioned only on apartments which are sold for cash and not on all apartments**. Thus, the value of land is included in the price charged to buyers. In fact, it is much higher than the average value of land, if such value was apportioned on all apartments.
- **110% of cost of provision of service** [Rule 30 of CGST Rules]

## Liability in case of transfer of development rights or FSI or long-term lease of land

Description	Development rights/FSI transferred on or after 1-4-2019	Development rights/FSI transferred on or before 31-3-2019
<p><b>Person liable for payment of GST on transfer of development rights or FSI for construction of project [commercial or residential apartments]</b></p>	<p><b>Promoter under reverse charge</b> [Sr Nos. 5B and 5C of Notification No. 13/2017-CT (Rate) dated 28-6-2017 as inserted w.e.f. 1-4-2019]</p>	<p><b>Transferor of development rights/FSI or lessor giving land on lease under forward charge</b></p>
<p><b>Time when liability of GST on transfer of development rights arises</b> when <b>consideration</b> is given by promoter in form of <b>construction</b> of commercial or residential apartments</p>	<p><b>Date of completion certificate</b> of project or its first occupation, whichever is earlier [Sr No. (a) of Notification No. 6/2019-CT (Rate) dated 29-3-2019]</p> <p>Payable by Promoter under reverse charge</p>	<p>when the developer, builder (now promoter) transfers <b>possession or the right</b> to the person supplying the development rights by entering into a conveyance deed or similar instrument [Notification No. 4/2018-CT (Rate) dated 25-1-2018]</p> <p>Payable by transferor under forward charge</p>

Description	Development rights/FSI transferred on or after 1-4-2019	Development rights/FSI transferred on or before 31-3-2019
<p><b>Time when liability of GST on transfer of development rights</b> arises when consideration is paid by promoter in cash (<b>monetary consideration</b>)</p>	<p>(i) In respect of <b>residential apartments - Date of completion certificate</b> of project or its first occupation, whichever is earlier [Sr No. (b) Notification No. 6/2019-CT (Rate) dated 29-3-2019]</p> <p>(ii) In respect of <b>commercial apartments - Date of when payment is made by promoter for transfer of rights</b> or FSI to supplier of service or within 60 days from contract (whichever is earlier) [section 13(3) of CGST Act providing for time of supply]</p> <p>Payable by Promoter under reverse charge</p>	<p><b>When agreement is executed or payment received</b>, whichever is earlier [section 13(1) of CGST Act providing for time of supply]</p> <p>Payable by transferor under forward charge</p>
<p><b>Time when liability for payment of GST arises</b> in case of <b>upfront amount</b> paid by promoter for <b>long term lease</b> of land</p>	<p>(i) In respect of <b>residential apartments - Date of completion certificate</b> of project or its first occupation, whichever is earlier [Sr No. (c) Notification No. 6/2019-CT (Rate) dated 29-3-2019]</p> <p>(ii) In respect of <b>commercial apartments - Date of when payment is made by promoter to supplier of service</b> or within 60 days from contract (whichever is earlier) [section 13(3) of CGST Act providing for time of supply]</p> <p>Payable by Promoter under reverse charge</p>	<p><b>When agreement is executed or payment received</b>, whichever is earlier [section 13(1) of CGST Act providing for time of supply]</p> <p>Payable by lessor under forward charge</p>

Description	Development rights/FSI transferred on or after 1-4-2019	Development rights/FSI transferred on or before 31-3-2019
<p><b>Exemption available on transfer of development rights/FSI</b> to promoter or payment for long term lease</p>	<p>(i) transfer or payment for construction of <b>residential apartments is exempt</b> [Sr No. 41A and 41B of Notification No. 12/2017-CT (Rate) dated 28-6-2017 inserted w.e.f. 1-4-2019]</p> <p>(ii) Supply of land on <b>long lease for industrial plots</b> by Government or Government under-takings is exempt [Sr No. 41 of Notification No. 12/2017-CT (Rate) dated 28-6-2017 inserted w.e.f. 13-10-2017]</p>	<p>Supply of land on <b>long lease for industrial plots</b> by Government or Government undertakings is exempt [Sr No. 41 of Notification No. 12/2017-CT (Rate) dated 28-6-2017 inserted w.e.f. 13-10-2017]</p>
<p><b>Liability of payment of GST on construction service</b> provided to transferor of development rights or FSI</p>	<p><b>Promoter [as supplier of service]</b></p>	<p><b>Developer/Builder (now termed as Promoter) [as supplier of service]</b></p>

Description	Development rights/FSI transferred on or after 1-4-2019	Development rights/FSI transferred on or before 31-3-2019
<p><b>Time when liability of promoter to pay GST on construction service</b> provided to transferor of development rights or FSI arises</p>	<p><b>Date of completion certificate</b> of project or its first occupation, whichever is earlier [Sr No. (d) of Notification No. 6/2019-CT (Rate) dated 29-3-2019]</p>	<p>when the developer, builder (now promoter) transfers <b>possession or the right</b> to the person supplying the development rights by entering into a conveyance deed or similar instrument [Notification No. 4/2018-CT (Rate) dated 25-1-2018]</p>
<p><b>Value of construction service</b> when registered person transfers development rights to promoter against consideration of construction of apartments</p>	<p><b>Total amount charged for similar apartments nearest to date on which development rights are transferred</b> less one third of total amount charged as value of land [Para 2A of Notification No. 11/2017-CT (Rate) dated 28-6-2017 inserted w.e.f. 1-4-2019]</p> <p>If value is calculated on aforesaid basis, the 'value' will be much higher than that provided in section 15 of CGST Act, which is legally impermissible.</p>	<p><b>Total amount charged for similar apartments nearest to date on which development rights are transferred</b> less one third of total amount charged as value of land [Para 2A of Notification No. 11/2017-CT (Rate) dated 28-6-2017 inserted w.e.f. 1-4-2019] <b>[Though inserted w.e.f. 1-4-2019, the provision should apply to valuation of construction services provided after 1-4-2019, even if agreement for transfer of development rights or FSI was executed prior to 1-4-2019]</b></p>

Description	Development rights/FSI transferred on or after 1-4-2019	Development rights/FSI transferred on or before 31-3-2019
<p><b>Value of service of transfer of development rights</b> or FSI to promoter against consideration in form of residential or commercial apartments</p>	<p><b>Value of similar apartments charged by promoter from independent buyers nearest to the date on which development rights</b> or FSI is transferred to promoter - para 1A of Notification No. 12/2017-CT (Rate) dated 28-6-2017 inserted w.e.f. 1-4-2019.</p> <p>As per paragraph 2 of Notification No. 11/2017-CT (Rate) dated 28-6-2017, the value will be equal to total amount charged less one third of total amount as value of land.</p> <p>In fact, if value is calculated on aforesaid basis, the 'value' will be much higher than that provided in <b>section 15 of CGST Act</b>, which is legally impermissible.</p>	<p>Even earlier, as per CBI&amp;C Instruction No. 354/311/2015-TRU dated 20-1-2016, the <b>value of similar flats was to be considered.</b></p> <p>If value is calculated on aforesaid basis, the 'value' will be much higher than that provided in <b>section 15 of CGST Act</b>, which is legally impermissible.</p>
<p><b>Value of portion of residential or commercial apartments remaining un-booked</b> on date of issuance of completion certificate or first occupation</p>	<p><b>Value of similar apartments nearest to date of issuance of completion certificate</b> or first occupation, whichever is earlier - para 1B of Notification No. 12/2017-CT (Rate) dated 28-6-2017 inserted w.e.f. 1-4-2019]</p>	<p><b>Not applicable</b> as there was no exemption to transfer of development rights or FSI in respect of residential apartments. ★</p>



Description	Development rights/FSI transferred on or after 1-4-2019	Development rights/FSI transferred on or before 31-3-2019
<p><b>Time when liability of promoter to pay GST under reverse charge</b> on transfer of development rights or FSI or long term lease relating to unsold residential apartments as on date of completion certificate</p>	<p><b>Date of completion certificate</b> or first occupation of the project [second proviso to Sr Nos. 41A and 41B of Notification No. 12/2017-CT (Rate) dated 28-6-2017 inserted w.e.f. 1-4-2019]</p>	<p><b>Not applicable</b></p>

# Land owner himself selling apartments before completion

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In some cases, the land owner himself sales apartments before completion. In that case, he has to charge GST. **He can take ITC of GST charged to him by promoter**

Both land owner promoter and developer promoter should opt for identical option i.e. 1%/5% or 8%/12%

However, there is **time mismatch**

As per clause D of Notification No. 6/2019-CT (Rate) dated 29-3-2019, in case of supply of construction service by promoter against consideration in the form of development rights or FSI (including additional FSI) shall arise on **date of completion certificate of project by competent authority or first occupation, whichever is earlier.**

– as **liability of land owner is immediate while liability of developer-promoter is when completed apartment is handed over to land owner promoter.**

Hence, **ITC may be unusable. No provision for refund.**

The **only option is** to raise tax invoice by promoter developer in respect of apartments which the land owner promoter intends to sale before obtaining completion certificate

# Tolerating an act or situation

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- Cancellation charges
- Penalty for breach of contract
- Forfeiture of deposit or advance as penalty
- Surrender of tenancy rights
- Tenant getting rent for alternate accommodation (tenant liable)
- Cheque bouncing charges
- Notice Pay

# Practical Examples

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**Question** - A promoter has entered into **agreement to sale a residential apartment** with carpet area of 120 Sq M, to customer on 1-5-2019.

The breakup of his charges are as follows –

- (a) Price of flat - Rs 100 lakhs
- (b) Prime Location Charges (PLC) - Rs 2 lakhs
- (c) Charges for covered parking - Rs 2.5 lakhs
- (d) Club membership deposit (for club to be formed after construction is complete) - Rs 3 lakhs.
- (e) Charges for carrying out modifications as required by customer - Rs 1 lakh
- (f) Stamp duty for executing sale deed on actual basis - Rs 4 lakhs
- (g) Documentation charges - Rs 50,000
- (h) Maintenance charges - Rs 2 lakhs.

The promoter received payment of Rs 10 lakhs before construction was complete and balance amount was received after obtaining completion certificate.

The promoter had used cement, steel and building material during construction, on which SGST paid was Rs 70,000 and CGST - Rs 70,000. While providing maintenance services, the promoter had used input goods and services on which tax paid was as follows - CGST - Rs 2,000 SGST - Rs 2,000.

Compute the tax payable by promoter.

**Answer** - The main service is construction of apartment for Rs 100 lakhs. Some other services are provided which are normally provided while providing this service. This is termed as '**composite supply**'. These are - PLC - Rs. 2 lakhs, Charges for covered parking - Rs. 2.5 lakhs, Modification charges - Rs. 1 lakh, Documentation charges - Rs. 50,000. Thus, total value of service for construction of apartment is Rs 106 lakhs.

Tax payable by promoter through electronic cash ledger on Rs 106 lakhs- SGST @ 2.5% Rs 2.65 lakhs and CGST @ 2.5% - Rs 2.65 lakhs. Total Rs 5.30 lakhs. No input tax credit is available.

Maintenance charges of Rs 2 lakhs not part of construction service of apartment. These are not part of 'composite service' of construction. Hence on maintenance charges - SGST @ 9% - Rs 18,000. CGST @ 9% - Rs 18,000. ITC of SGST of Rs 2,000 and CGST of Rs 2,000 is available to promoter. Hence, tax payable by promoter on maintenance charges through electronic cash ledger is - CGST - Rs 16,000 and SGST - Rs 16,000.

Club membership fee of Rs. 3 lakhs is only a deposit to be handed over to club when formed. At that stage, the club will be liable to pay GST on this amount.

Stamp duty is not a part of service. It is only reimbursement of expenses incurred on behalf of customer.

Tax is payable on entire amount even if only part amount was received prior to completion of construction of apartment.

# GST payable by promoter under reverse charge

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**Question** - A promoter entered into agreement with landowner for transfer of development rights on 15-5-2019. The promoter had agreed to give apartments consisting of 40% of the carpet area to landowner. The real estate project was of 100 apartments of same size. Out of these 100 apartments, 40 apartments were to be given by promoter to landowner. It was agreed that promoter will make all the bookings and sales, even of apartments given to landowner. The project was registered under RERA and construction commenced in August 2019.

The promoter started booking of apartments in September 2019. The rate offered was Rs 75 lakhs per apartment and first two apartments were booked at that rate.

The construction was completed on 20-11-2021. Five apartments were sold in October 2021 for Rs 102 lakhs each.

Calculate value of transfer of development rights on which the promoter is liable to pay GST under reverse charge (without considering the exemption available in respect of residential apartments booked prior to 20-11-2021) and the GST payable.

**Answer** - The development rights were transferred in May 2019. The booking rate at that time was Rs 75 lakhs. Hence, value of supply of service is Rs 50 lakhs (two-third of Rs 75 lakhs). Since 40 apartments were to be given to landowner, the total value of transfer of development rights -  $40 \times 50 = \text{Rs } 2,000$  lakhs.

GST payable of transfer of development rights = 18% of Rs 2,000 lakhs = Rs 360 lakhs.

The value of un-booked apartments is to be considered on basis of value of similar apartments booked nearest to date of completion. The apartments were booked by promoter for Rs 102 lakhs in October 2021. Hence, value of the apartment nearest to date of completion is Rs 68 lakhs (two-third of Rs 102 lakhs).

Since 30 residential apartments remained un-booked on date of completion certificate, the value of un-booked apartments =  $68 \times 30 = \text{Rs } 2,040$  lakhs.



**Question** - In the aforesaid example, out of 100 apartments, 30 were commercial apartments and 70 were residential apartments. Carpet area of each is 100 Sq M. Out of these, 20 commercial apartments and 40 residential apartments were booked prior to date of completion certificate. Value and carpet area of commercial and residential apartments are same. Calculate the exemption available to promoter in respect of GST on development rights and GST payable by promoter under reverse charge on transfer of development rights.

**Answer** - The calculations are as follows -

GST payable on transfer of development rights is Rs 360 lakhs (as above).

Carpet area of residential apartments of project =  $70 \times 100 = 7,000$  Sq M

Total carpet area of residential and commercial apartments =  $100 \times 100 = 10,000$  Sq M

Carpet area of residential apartments which remain un-booked on date of completion =  $30 \times 100 = 3,000$  Sq M.

(A) *GST on FSI attributable residential apartments* = GST payable on FSI x (carpet area of the residential apartments) / (Total carpet area of the project).

Hence, (A) GST on FSI attributable residential apartments =  $360 \text{ lakhs} \times 7,000/10,000 = \text{Rs } 252 \text{ lakhs}$ .

(B) GST payable on residential apartments remain un-booked on date of completion = [GST payable on development rights] x (carpet area of the residential apartments which remain un-booked / Total carpet area the project)

Hence, (B) GST payable on residential apartments remain un-booked on date of completion =  $252 \times 3,000/7,000 = \text{Rs } 108 \text{ lakhs}$ .

The value nearest to date of completion is Rs 2,040 lakhs (as in above example). Thus, GST payable on un-booked residential apartments is Rs 51 lakhs of CGST plus Rs 51 lakhs of SGST/UTGST due to the ceiling. Hence, (B) = Rs 102 lakhs.

Exemption available on development rights pertaining to residential apartments which were booked prior to date of completion = (A) - (B) =  $252 - 102 = \text{Rs } 150 \text{ lakhs}$

GST payable by promoter on transfer of development rights under reverse charge = Total GST Rs 360 lakhs - Exemption available on transfer of development rights pertaining to residential apartments transferred prior to completion certificate 150 lakhs = Rs 210 lakhs.

Thus, the developer is liable to pay Rs 210 lakhs under reverse charge as GST on transfer of development rights.

**Check** - This can be checked by making same calculations in different way.

GST on transfer of development rights/FSI attributable commercial apartments = GST payable on TDR or FSI (including additional FSI) or both or on upfront amount payable in respect of service by way of granting of long term lease of thirty years, or more for construction of the project] x (carpet area of the commercial apartments in the project) ~ (Total carpet area of the residential and commercial apartments in the project).

Thus, (i) GST on transfer of development rights/FSI attributable commercial apartments = 360 lakhs x 3,000/10,000 = Rs 108 lakhs.

Add (ii) GST payable on un-booked residential apartments - Rs 51 lakhs CGST plus Rs 51 lakhs SGST/UTGST (or Rs 102 lakhs IGST) (due to the limit of 2.5% of CGST plus 2.5% of SGST/UTGST of value)

Total GST payable by promoter under reverse charge = (i) + (ii) = 108 + 102 = Rs 210 lakhs.

# 'Landowner Promoter'

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## Landowner promoter can take ITC of GST charged to him by developer promoter but not of other input services –

Landowner promoter can take ITC of GST charged to him by developer promoter but not of other input services - FAQ (Part II) No. 2 issued by CBI&C vide circular F No. 354/32/2019-TRU dated 14-5-2019.

## Landowner Promoter can avail ITC even if he does not make cash payment to developer-promoter –

As per second proviso to section **16(2) of CGST Act**, ITC cannot be taken **if payment is not made to supplier within 180 days**.

In this case, the '**payment**' is made in form of **FSI/TDR even before service is supplied**. Hence, Landowner Promoter can avail ITC even if he does not make cash payment to developer-promoter - FAQ (Part II) No. 2 issued by CBI&C vide circular F No. 354/32/2019-TRU dated 14-5-2019.

# Sale by 'landowner promoter'

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**Question - XYZ is landowner.** He transfers development rights of land to PQR Co. Ltd. The PQR Co. Ltd. agrees to supply 20 duly constructed apartments to XYZ. PQR Co. Ltd. identifies 20 apartments in the building plan, which will be handed over to XYZ after completion. PQR Co. Ltd. is entering into contract with other independent buyers to sale the apartment **@ Rs 120 lakhs**. XYZ enters into agreement with a buyer to sale one of the identified apartments **@ Rs 123 lakhs**. Explain how the transaction should be effected.

**Answer -** PQR Co. Ltd. is charging Rs 120 lakhs for an apartment. After deducting land value equal to one third of Rs 120 lakhs, the value of taxable service is Rs 80 lakhs. **PQR Co. Ltd. will charge CGST @ 3.75% and SGST @ 3.75% on Rs 80 lakhs (which is same as CGST @ 2.5% and SGST @ 2.5% on Rs 120 lakhs).**

Thus, PQR Co. Ltd. will raise tax invoice on XYZ charging CGST of Rs 3,00,000 and SGST of Rs 3,00,000 (total Rs 6 lakhs).

XYZ will raised tax invoice on his buyer charging 2.5% CGST and 2.5% SGST on Rs 123 lakhs. Thus, he will charge CGST Rs 3,07,500 and SGST Rs 3,07,500. He will take credit of CGST and SGST charged to him and pay Rs CGST of Rs 7,500 and SGST of Rs 7,500 through electronic cash ledger.

**Question** - In aforesaid case, if XYZ sales the apartment **at Rs 117 lakhs**, what will be the tax implications?

**Answer** - PQR Co. Ltd. will issue tax invoice charging CGST of Rs 3,00,000 and SGST of Rs 3,00,000 (total Rs 6 lakhs).

**XYZ will issue tax invoice charging CGST of Rs 3,00,000 and SGST of Rs 3,00,000 (total Rs 6 lakhs), as the tax charged by him cannot be less than the amount of tax charged from him on construction of such apartments by the developer-promoter.**

Thus, XYZ will not be liable to pay any tax through electronic cash ledger but there will be no balance in his electronic credit ledger.

GST implications on  
**‘Sale of Developed Plots’**

And

**‘JDA for Plotted  
Development of Land’**



# Decision of AAR, Gujarat about GST on sale of developed plots

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AAR, Gujarat in *Shree Dipesh Anil Kumar Naik, In re* [Advance Ruling No. GUJ/GAAR/R/2020/11 dated 19-06-2020], has **held that that the sale of a developed plot** ( i.e. sale of land/plot after developing common facilities like water line, telephone line, electricity line, garden, common areas, water harvesting system, drainage system, water pipelines, laying of underground cables, demarcation of individual plots and other facilities as mandated by the development authority) **is not equivalent to the sale of land but tantamount to the rendering of service and would be subject to levy of GST.**

The Advance Ruling Authority further held that the sale of developed plots would be covered under the clause '**construction of a complex intended for sale to a buyer**' under clause 5(b) Schedule II of the CGST Act.



- **Sale of developed plot has always been treated at par with sale of land.** Development of land into plots is mere value addition to land and the land continues to be land after development.
- **No provision of obtaining completion certificate for development of plots**
- **Sale of developed plot is composite supply of 'sale of land' ?**
- AAR has relied on provisions and case law of **RERA and Consumer Protection Act** to justify that sale of land is provision of service covered under '**construction of a complex intended for sale to a buyer**'.
- **What about deduction of Value of land ?**
- **Trade Parlance theory** : Trade never treats sale of plot as 'construction of complex'.
- **Definition in other unconnected law cannot be used to interpret provision in a law**
- **Ambiguity in tax law, assuming if any, to be resolved in favour of taxpayer**
- In respect of health club, club house and play courts, it would be difficult to say that these are part of composite supply of plots. Hence, these amenities should not be included in value of plot. **These should be offered separately on optional and payment basis (In fact, advisable not to mention these in sale deed).**

**Development charges levied separately should be taxable:**

If the promoter/developer charges separately development charges, then obviously GST is payable on development charges @ 18%.

Development of land belonging to landowners is subject to GST when no sale of land is involved – *MAARQ Spaces P Ltd In re* (2019) 111 taxmann.com 368 (AAR-Karn).

# JDA involving Plotted Development of Land

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Joint development agreements (JDAs) constitute one of the major sources of dispute and revenue under GST.

In the ruling by Appellate Authority for Advance Rulings, Karnataka in the case of Maarq Spaces Pvt. Ltd. [2020] 116 taxmann.com 702 (AAAR-KARNATAKA). The Appellate AAR has upheld the ruling of AAR.

**According to the AAAR, the primary purpose of the JDA was development of land and consideration for the same was in the form of share in revenue earned from sale of land/plots.** The transaction was held to be not sale of land simplicitor but coupled with obligation to develop and provide amenities. The Authority held that **the element of service of development was the dominant activity of the appellant and the same was liable to GST.**

For the landowner, the **developer develops the land into saleable plot and also markets the same with prospective buyer through advertisements.** The JDA indicates such activities being performed by **the developer.** As consideration need not necessarily flow from the service recipient in GST law but the amounts received from other parties will also be taken into account, the share out of sale proceeds (of land) can be treated as consideration for such activities performed by the developer.

Similar view has been taken by the Authority for Advance Ruling in the case of **M/s Vedit Builders.**

**There is also difference of opinion amongst the industry over the taxability of such transaction.**

- As per one view, **there is transfer of development rights** when the possession of the land is given to the developer for development of bare land into plots along with a power of attorney to invite customers to buy such plots
- while the other view is that **the developer is merely providing development services** to the land-owner in the capacity of a contractor.

Under such an arrangement for development of land into plotted layout, the following issues need to be analyzed:

- a) **Whether there is only one-sided supply** of services by the developer to the landowner **or** such arrangement **involves two sided supplies** -one by the landowner to the developer in the form of transfer of development right; and other by the developer to the landowner in the form of 'development services'?
- b) **In case there is supply of development right** by the landowner to the developer, **whether such supply would get exempt** from payment of GST as per Notification Number 4/2019-C.T.R dated 29th March 2019 which provides exemption from payment of GST on transfer of development right **for construction of residential apartments.**
- c) The **valuation** of such supplies; and
- d) The **time of supply** of such services.

The above-mentioned issues have not been addressed in Notifications issued for the real estate industry dated 29<sup>th</sup> March 2019 by CBIC. Hence, **such issues remain to be subject matter of interpretation.**

In such a case, the CBIC should clarify the taxability of such transaction of development of bare land into plots including the valuation and time of supply of such services to bring **clarity and uniformity** in the trade and industry.

# Thank You !

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