



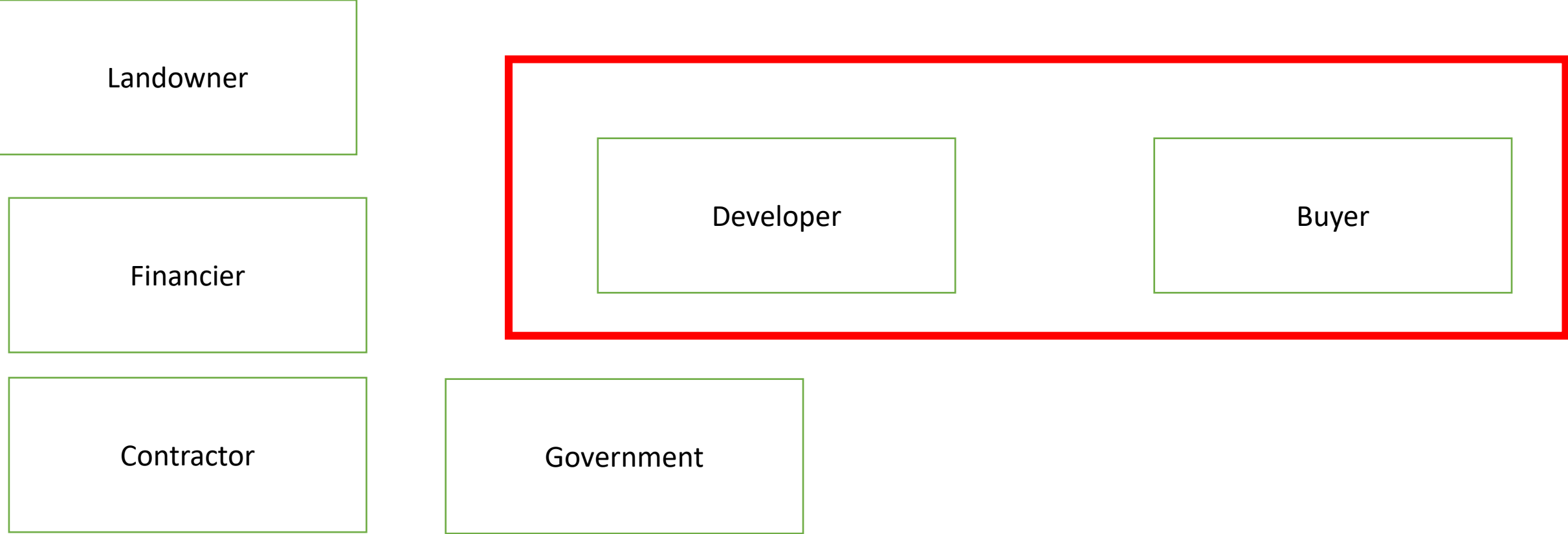
**S. B. GABHAWALLA & CO.**  
CHARTERED ACCOUNTANTS

# Real Estate Sector – Select Issues

# Indirect Taxes on Real Estate : Perpetual Work in Progress??

Year	Legislative Change
2004-2005	Category for Construction of Residential Complex
2007	Category for Works Contract Services
2010	Explanation to Construction Service Category to tax sale of under construction units
2012	List of Declared Service includes sale of under construction units
2017	GST introduced. Interplay of Schedules II & III yet to be settled
2018	Schedule II made only a subject matter of classification – retrospective amendment
2019	New Scheme of Taxation for Builders and Developers

# Typical Business Model



# Transactions between developer & buyer: Whether taxable?

- Section 2(102) – Definition of ‘service’
  - “services” means anything other than goods, money and securities
- Activities to be treated as supply of services : Entry 5(b), Schedule II
  - 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
- Activities or transactions to be treated as neither supply of goods nor supply of services - Entry 5, Schedule III
  - Sale of land and, subject to clause (b) of paragraph 5 of Schedule II, sale of building.

# Transactions between developer & buyer: Whether taxable?

- Conservative View

- Sale of under construction units                                      Liable for GST
- Sale of completed units    Not Liable for GST

- Possible Legal View

- How to interpret the term 'service'? Does sale of under construction units bear the trait of service?
- Schedule II is merely for classification and cannot determine taxability
- Ad Hoc Deduction for Land Valuation is unconstitutional
- Since no carve out is provided for construction already completed before transaction of sale is entered into, the valuation mechanism fails and therefore the levy fails

# Transactions between developer and buyer: Tax Rates

Scenario	Entry	Effective Tax Rate
Affordable Residential Apartments in RREP*	3(i)	1% - No ITC
Other Residential Apartments in RREP*	3(ia)	5% - No ITC
Commercial Apartments in RREP*	3(ib)	5% - No ITC
Affordable Residential Apartments in Non RREP*	3(ic)	1% - No ITC
Other Residential Apartments in Non RREP*	3(id)	5% - No ITC
*Ongoing Affordable Housing Projects, etc.	3(ie)	8% - with ITC
Commercial Apartments in Non RREP	3(if)(i)	12% - with ITC
*Ongoing Residential Apartments in RREP	3(if)(ii)	12% - with ITC

## Conditions

- No ITC to be claimed
- To be paid by debiting Cash ledger only
- Reverse Proportionate Credit as on 31 March 2019
- 80% of Procurement from Registered Dealers only / Pay RCM on Shortfall
- Maintain Project wise Financial Year wise records

# Transactions between developer & buyer : Time of Supply

- Conservative View:
  - Continuous Supply of Services – Section 31(5)(c) – Completion of each milestone
  - OR
  - Receipt of Advance      WHICHEVER IS EARLIER
- Litigative View:
  - Transaction does not constitute a continuous supply.
  - Receipt of Advance



# Transactions between developer & buyer: Impact of Cancellations?

- **Conservative View:**
  - Situations mentioned in Section 34 not satisfied
  - GST Credit note cannot be issued
  - Refund can be claimed either by developer or buyer since transaction did not fructify
- **Possible View**
  - Concepts of Deficiency in service and reduction in taxable value wide enough to cover these situations.
  - GST Credit Note can be issued within the timelines specified
  - Refund can be claimed if the timelines are overshoot
  - In case of advances, suo motu adjustment can be claimed subject to Section 54(8)(c)

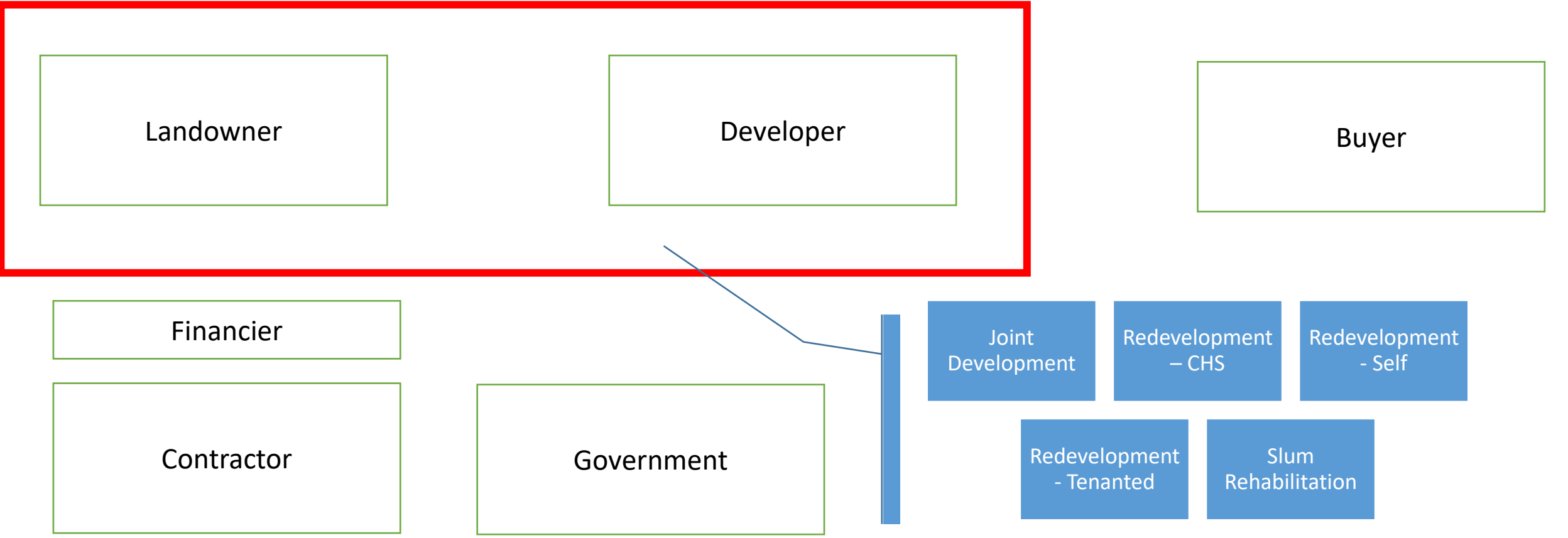
# Transactions between developer & buyer: Cancellations & Transfers

- Cancellation Charges/Transfer Fees levied by Developer – Liable for GST @ 18%
- Compensation Received by the buyer for price difference:
  - Is there an element of service rendered by buyer to the developer?
  - Is the service in the course or furtherance of business?

# Developer Taxation : Input Related Challenges

- Blanket Denial of ITC – whether constitutionally correct?
  - Whether it is a condition or a restriction?
  - Whether the condition or restriction is prescribed?
  - What is the scope of Notification 11/2017-CT?
  - Is the condition mentioned in Notification 11 for applicability of rate or eligibility of credit?
  - Can a tariff entry prescribe a conditional rate without any fall-back option?
  - What is the impact of non fulfilment of condition?

# Typical Business Model



# Transactions between landowner & developer: Possible Scenarios

## Supply

- Land
- Partially Developed Land
- Development Rights

## Consideration

- Cash
- Developed Area for Self Use
- Developed Area for Further Sale
- Share in Gross Revenue
- Share in Profits

# Supplies by Landowners:

- Supply of land – clearly excluded from GST – Schedule III
- Supply of partially developed land – excluded from GST
- Grant of Development Rights under Development Agreement
  - Conservative View
    - Liable for GST under Reverse Charge Mechanism – Notification 5/2019 Entry 5B
    - Tax to be paid by the developer at the time of occupation certificate – Notification 6/2019
    - Tax Payable only to the extent of unsold inventory on the date of occupation certificate – Notification 4/2019 Entry 41A
    - Valuation – Market Value or as per para 2A?
  - Possible View
    - Development Rights is as good as sale of land and therefore excluded
    - RCM Notification covers only TDR & FSI (Transfer vs. Grant)
    - No GST Payable

# Consideration by Developers : Is it also a supply?

- The following are transactions in money and therefore clearly excluded
  - Cash
  - Share in Gross Revenue
  - Share in Profits
- The concept of barter becomes relevant where developed area is provided to the landowner, either for 'self use' or 'further sale'
- Litigative View
  - Is this a barter of goods or services or both and is it covered under Section 7(1)?
  - Does Entry 5(b) specifically deal with barterers?
  - Does the definition of consideration under section 2(31) cover barterers?
  - Does Entry 5(b) deal with construction for self use or only with construction for further sale?

# Area provided by Developer to Landowner: Tax Implications at Developer's hands

- **Conservative View:**

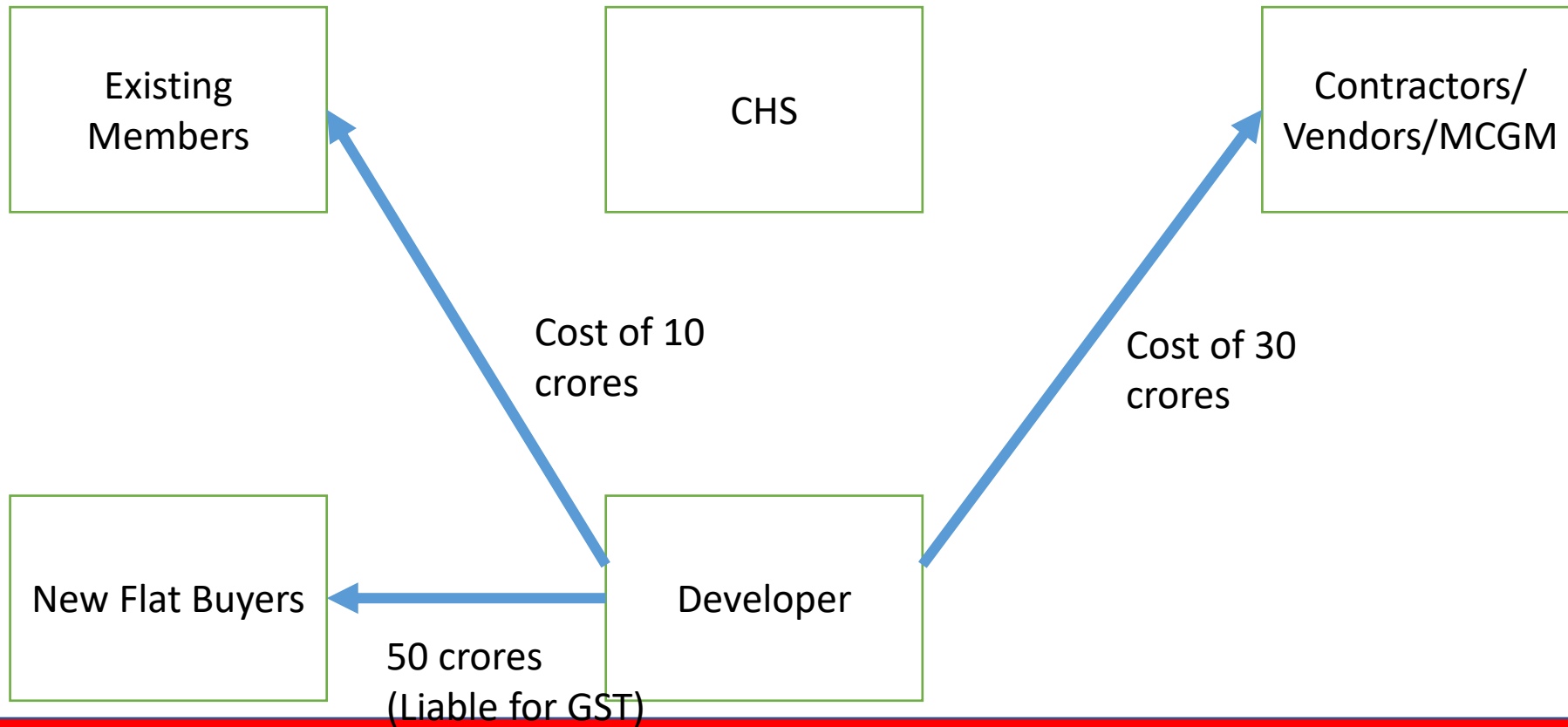
- Tax to be paid by the developer at the time of occupation certificate – Notification 6/2019
- Value to be calculated as per para 2A of Notification 3/2019
  - the value of construction service in respect of such apartments shall be deemed to be equal to the Total Amount charged for similar apartments 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



# Tax Implications on Resale by Landowner

- Possible View
  - Not Liable for GST since there is no activity of construction
- Conservative View
  - Charge GST to the end buyer
  - Claim Input Tax Credit of tax charged by developer
  - Brings in Commercial Parity between Landowner Sales and Developer Sales

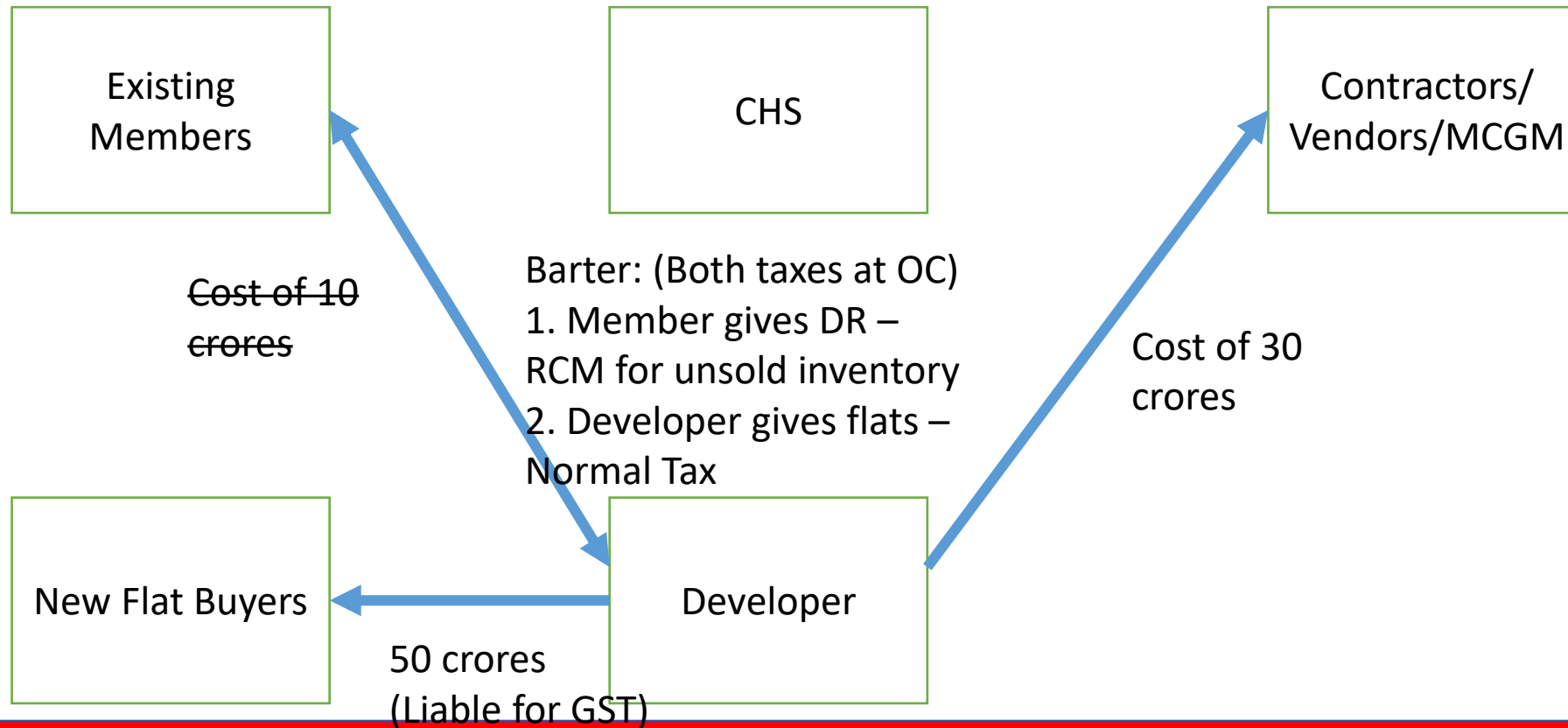
# Redevelopment : CHS



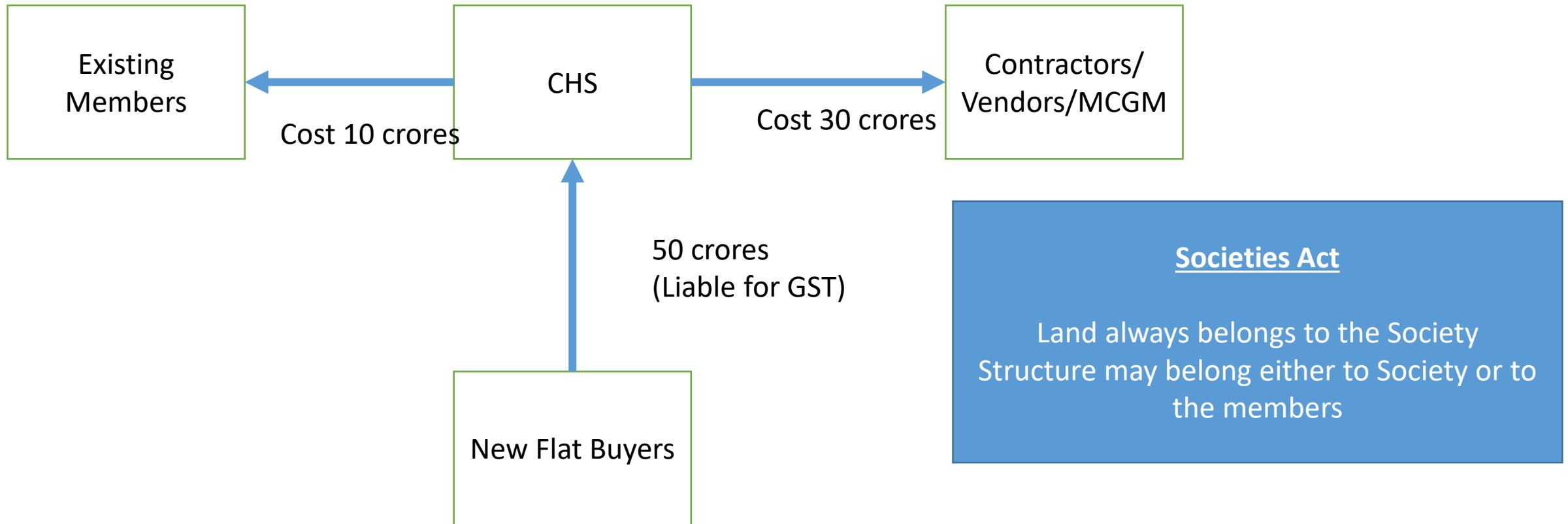
# Taxing Entry : Schedule II Entry 5(b)

- 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
- Does the member grant development right to the developer?
- Is there a consideration?
- Consideration can be paid by third person
- Cost cannot become revenue
- Vasantha Green Projects 2019 (20) GSTL 568

# Redevelopment : CHS : Conservative View



# Self Redevelopment : CHS



# FSI / TDR - Stated Framework :

- Services means anything other than goods
- Exclusion under Schedule III restricts itself to sale of land or buildings
- Transfer of FSI/TDR is neither of the above and therefore taxable
- Notification 5/2019 Entry 5B prescribes for Reverse Charge Mechanism in the hands of the promoter developer
- Tax to be paid by the developer at the time of occupation certificate – Notification 6/2019
- Valuation – Para 1A of Notification 4/2019 - value of similar apartments charged by the promoter from the independent buyers nearest to the date of transfer.
- Tax Payable only to the extent of unsold inventory on the date of occupation certificate and restricted to output tax of unbilled inventory – Notification 4/2019 Entry 41A

# Scope of Supply : Key Ingredients

- Section 7(1)(a)
  - All Forms of Supply
  - **Of Goods or Services or Both**
  - Made or Agreed to be made
  - For a consideration
  - **In the course or furtherance of business**
- Section 7(2) – Notwithstanding .....
- Activities or transactions listed in Schedule III shall be neither supply of goods nor supply of services

# Sale of Land

- Section 2(16) of Maharashtra Land Revenue Code, 1966
  - “land” includes benefits to arise out of the land, and things attached to the earth, or permanently fastened to anything attached to the earth, and also shares in, or charges on, the revenue or rent of villages, or other defined portions of territory
- Regulation 34 of DCR
  - *the development potential of plot /land may be separated from the land itself and can be made available to the owner of the land in the form of “Transferrable Developmental Rights*



# Judicial Precedents

- DLF Commercial Projects Ltd. vs. Commissioner of Service Tax
- Bahadur & Others vs. Sikandar & Others
- Chedda Housing Development Corporation vs. Bibijan Shaikh Farid
- Shadoday Builders Private Ltd. vs. Jt. Charity Commissioner

# Other Conceptual Issues

- Once exemption is granted, can RCM be triggered?
- Can value be defined through an exemption notification?
- What is the scope of RCM entry?
  - Transfer of development rights (TDR) or Floor Space Index (FSI)

