

Recent Amendments *qua* Real Estate including JDA and Re-development



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Notifications effectuating 47th GST Council meet

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ITC – COMMERCIAL LEASE

IMPACT OF RECENT AMENDMENTS

Concessional GST Rate for Subcontractors

12% GST was applicable on following activities as mentioned in the Rate Notification No. 11/2017 Central Tax (Rate)	
3(v)(da)	Projects of Infrastructure status (more than 50% area belongs to houses less than 60 sq. mtrs)
3(va)	Affordable Residential Apartments more than 50% of the area in a project pertains to affordable housing and price charged to the customer nearest to the date of execution on sub-contractor agreement is less than 45 Lakhs
3((iv)(b)	Jawaharlal Nehru National Urban Renewal Mission or Rajiv Awas Yojana
3(iv)(c) (d) (da) and (db)	Different Schemes of PMAY (In-situ redevelopment, Beneficiary led house construction, CLSS, Economic weaker section houses)
3(v)(b)	Single residential unit (not a part of residential complex)
3(v) (c) and (d)	Housing project approved by specific Authorities having houses upto carpet area of 60 Sq. Mtrs
3(vi) (c)	Construction of residential complex meant for self use of employees

W.E.F July 18, 2022

THESE ENTRIES OMITTED

Notification No 03/2022 – Central Tax Rate dated 13.07.2022





Impact - Tax Position Pre & Post July 18, 2022

ENTRY	SCHEME	RATE – PRE-AMENDMENT	RATE – POST AMENDMENT
3(v)(da)	Infrastructure Status	12%	18%
3(va)	Affordable Residential Apartment	12%	18%
3(iv) to 3(vi) (other than above entries)	Various entries	12%	18%
Residual services		18%	18%

Issue I: Change in Rate of Tax – Time of Supply *[Section 14]*

Following three events are important in a transaction:

- Supply of goods/ services
- Raising of invoice
- Receipt of payment

Period of happening of any of the two events above will decide the applicable rate.

Supply of Goods/ Services	Raising of Invoice	Receipt of Payment	Applicable Rate
Before change in Rate	After change in Rate	After change in Rate	New Rate
Before change in Rate	Before change in Rate	After change in Rate	Old Rate
Before change in Rate	After change in Rate	Before change in Rate	Old Rate
After change in Rate	Before change in Rate	After change in Rate	New Rate
After change in Rate	Before change in Rate	Before change in Rate	Old Rate
After change in Rate	After change in Rate	Before change in Rate	New Rate

If the payment is credited in the bank account within four working days from the date of change in the rate of tax – it shall be deemed that the same has been received before change in rate of tax

Issue II: Concessional Benefit of 8% for Ongoing projects – Continued?...

Description of Services	Rate
<p><i>(ie) Construction of an apartment in an ongoing project under any of the schemes specified in sub-item (b), sub-item (c), subitem (d), sub-item (da) and sub-item (db) of item (iv); sub-item (b), sub-item (c), sub-item (d) and sub-item (da) of item (v); and sub-item (c) of item (vi), against serial number 3 of the Table, in respect of which the promoter has exercised option to pay central tax on construction of apartments at the rates as specified for this item. (Provisions of paragraph 2 of this notification shall apply for valuation of this service)</i></p>	<p><i>Effective rate 8%</i></p>

Entry 3(iv), 3(v) and 3(vi) of the Rate Notification (which are referred in the aforesaid entry) are deleted with effect from July 18, 2022



Whether the benefit of concessional rate of 8% available under Entry 3(ie) would continue for the ongoing projects after July 18, 2022?



...Concessional Benefit of 8% for Ongoing projects – Continued?

“Reference by Incorporation”

Where a statute is incorporated, by reference, into a second statute, the repeal of the first statute does not affect the second statute

U.P. Avas Evam Vikas Parishad v. Jainul Islam[(1998)2SCC 467]

"17. (...). But if it is a legislation by incorporation the rule of construction is that repeal of the earlier statute which is incorporated does not affect operation of the subsequent statute in which it has been incorporated. So also any amendment in the statute which has been so incorporated that is made after the date of incorporation of such statute does not affect the subsequent statute in which it is incorporated and the provisions of the statute which have been incorporated would remain the same as they were at the time of incorporation and the subsequent amendments are not to be read in the subsequent legislation."

Nagpur improvement Trust and others vs. Vasantrao and others (2002 (7) SCC 657)

"31. (...) In a case where a statute is incorporated, by reference, into a second statute, the repeal of the first statute by a third does not affect the second. The later Act along with the incorporated provisions of the earlier Act constitutes an independent legislation which is not modified or repealed by a modification or repeal of the earlier Act. (...)"

Benefit of concessional rate may continue on account of reference by incorporation

Liquidated Damages- Real Estate

Liquidated damages - Circular (Key Clarifications)...



Services such as agreeing to tolerate an act/agreeing to refrain from an act should be a contractual agreement i.e. two parties, one of which expressly or impliedly agrees to do or to abstain from doing & other party agrees to pay consideration for it *Ex. Non compete agreement*



Necessary and sufficient nexus between supply and consideration



Services contemplated under Para 5 (e) cannot be presumed to exist just because there is a flow of money between the parties



Liquidated damages for breach of contract is not a consideration for tolerating an act but a compensation for the losses suffered and is a penalty for discouraging such acts



For tax to be levied, such payment must be for an independent activity of tolerating an act

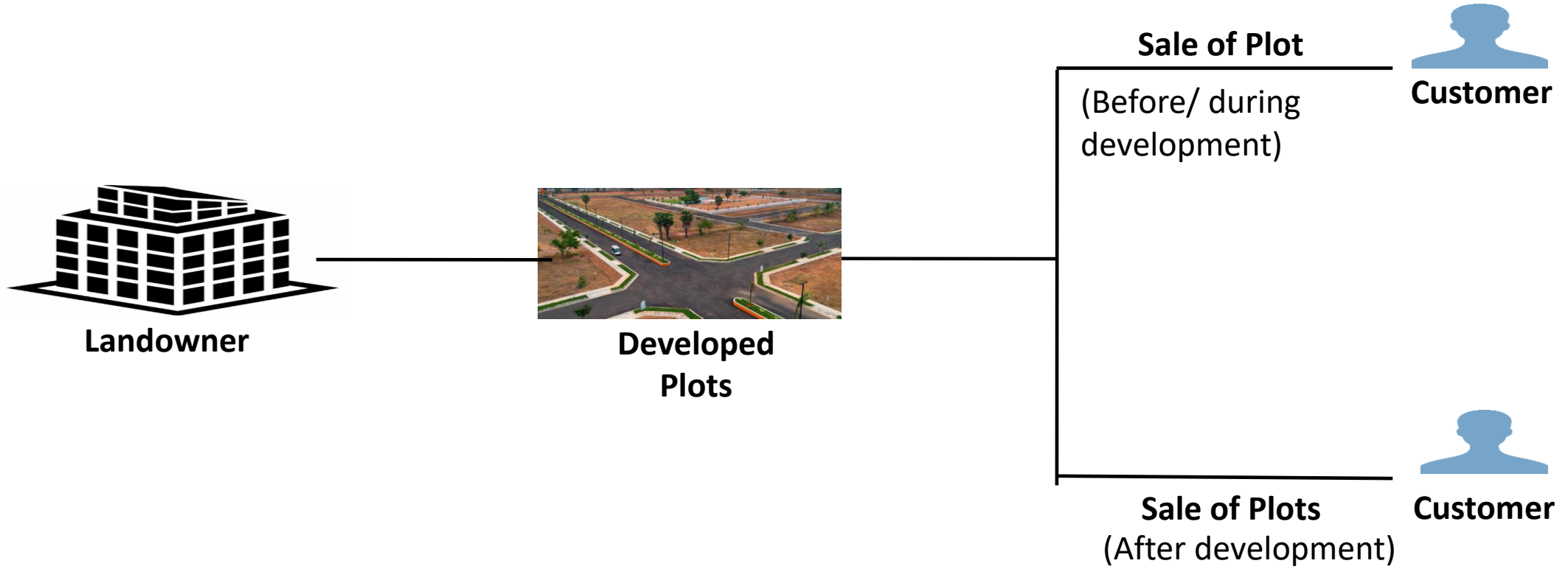
...Liquidated damages - Circular (Key Clarifications)

- Real estate related examples and taxability as per the Circular

Example in the Circular	Taxability
Builder refraining from constructing higher floor against a compensation from the neighbouring project to protect its sunlight	Taxable
Liquidated damages for breach of a contract, unless it is an independent activity of agreeing to refrain from doing an act or tolerating an act	Non-taxable
Penalty paid by the developer for delayed construction of house	Non-taxable
Forfeiture of earnest money by the seller in case of breach of 'agreement to sell' an immovable property	Non-taxable
Termination fee for early termination of lease of immovable property- being a facility provided	Taxable

Sale of developed plot

Background



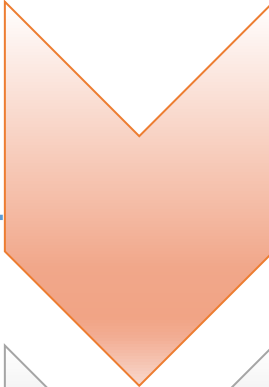
The development activity includes land levelling, drainage, water pipelines etc.

Scope of Levy


SUPPLY

SECTION – 7

all forms of supply of goods and/or services such as sale, transfer, barter, exchange, license, rental, lease or disposal made or agreed to be made for a consideration by a person in the course or furtherance of business

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

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

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

Implications under GST



APPLICABILITY OF GST ON SALE OF DEVELOPED PLOTS

Sale of developed plot is not equivalent to sale of land and hence, GST would be applicable

- ***Dipesh Anilkumar Naik [2022 (61) G.S.T.L. 454 (App. A.A.R. - GST - Guj.)]***
- ***Bhopal Smart City Development Corporation Limited [2022 (7) TMI 411 - Appellate Authority for Advance Ruling, Madhya Pradesh]***
also ruled- Value of service shall be total amount (-) 1/3rd deduction towards land

Sale of developed plot after completion of development activities is equivalent to sale of land and covered under Schedule III and not liable to GST

- ***Dharmic Living Private Limited [2021 (53) GSTL 462 (AAR - GST - Ker.)]***
- ***PPD Living Spaces Private Limited [2018 (18) G.S.T.L. 95 (A.A.R. - GST)]***



Recent Clarifications

Circular 177/09/2022-TRU dated August 3, 2022



14. Whether sale of land after levelling, laying down of drainage lines etc., is taxable under GST

14.2) As per Sl no. (5) of Schedule III of the Central Goods and Services Tax Act, 2017, 'sale of land' is neither a supply of goods nor a supply of services, therefore, sale of land does not attract GST

14.3) **Land may be sold either as it is or after some development** such as levelling, laying down of drainage lines, water lines, electricity lines, etc. It is clarified that sale of such developed land is also sale of land and is covered by Sr. No. 5 of Schedule III of the Central Goods and Services Tax Act, 2017 and accordingly does not attract GST.

14.4) However, it may be noted that any service provided for development of land, like levelling, laying of drainage lines (as may be received by developers) shall attract GST at applicable rate for such services

Clarity Awaited

01



Applicability of GST

Whether GST would be applicable on sale of plot where agreement is executed before or during the development of land?

02



Rate and Valuation

If yes, what would be the applicable GST rate and valuation of such services?

Land Deduction

Land Deduction – Ongoing Contentious Issue....

Munjaal Manishbhai Bhatt Vs. UOI [2022-TIOL-663-HC-AHM-GST]



Facts:

Petitioner entered into an agreement for purchase of land and construction of bungalow thereon. The agreements identify consideration for land and construction services separately



Issue :

Standard deduction of 1/3rd of the price towards land in case of valuation of construction service is violative of Article 14 and ultra vires to Article 246A of the Constitution

Relevant Provisions - Para 2 of Rate Notification

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

...Land Deduction – Ongoing Contentious Issue

High Court Ruling

1/3rd deduction towards value of land is *ultra-vires* GST scheme and violative of Article 14. Such provision should be read down i.e., should not be mandatory and shall apply only where such value is not ascertainable

- Sec. 15 provides that valuation of supply would be the price actually paid / payable and where such price is available, GST is to be levied on such actual value. Deeming fiction can be applied only where actual value is unascertainable
- Mandatory application of deeming fiction of 1/3rd value towards land even though the actual value of land is ascertainable is *ultra-vires* the statutory provision
- Deduction contemplated only in the context of flats wherein it was difficult to ascertain the value of the undivided share of land

Open Issues

- Can developers claim deduction of actual value of land?
- Applicability of the judgment where bifurcation towards land and construction services is not provided in the agreement?
- How to ascertain value of land? [Ready Reckoner value/ Market value]



Relevant Transactions Un-addressed



EXEMPTION TO LONG TERM LEASE OF LAND

GST exemption to be extended to long term lease of the land as it is akin to transfer of land

01



TAXABILITY OF TDR

Schedule III to be amended to exclude benefits arising from land such as TDR, FSI etc.

02



VALUATION *QUA* CONSTRUCTION SERVICES PROVIDED TO LANDOWNER/ EXISTING MEMBERS

03



ITC *QUA* CONSTRUCTION OF BUILDING USED FOR LEASING SHALL BE ALLOWED OR GST ON RENTING SHALL BE REDUCED TO 5%

04

**Writ Petitions/
Representations
on these issues
are pending**

SOCIETY RE-DEVELOPMENT

Residential development ON OWN LAND



18%

28%

Goods



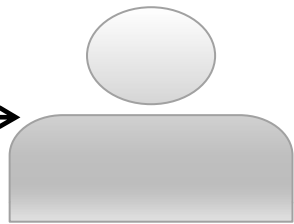
18%

Services



18 /
12%

Works
Contract



Developer

Residential apartments

5%

Buyer



Project

1%

Affordable Residential
apartments

Buyer



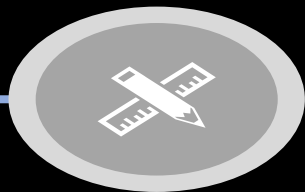
Society Re-development



WHO



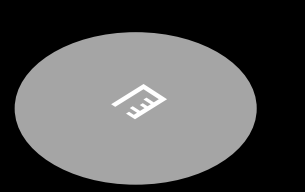
WHAT RATE



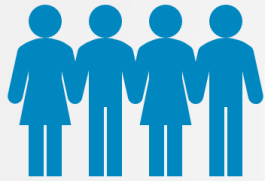
WHICH VALUE



WHEN



WHETHER ITC



TRANSFER OF DEVELOPMENT RIGHTS BY SOCIETY

TRANSACTION 1

Constitutional Validity of GST on TDR

Proposition I

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

Proposition II

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

Proposition III

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

WRIT petitions filed before various High Courts

WHO – PROMOTER UNDER RCM

Notification No. 5/2019 – Central Tax(Rate) dated 29 March 2019

ENTRY 5A - Services supplied by any person by way of transfer of development rights or Floor Space Index (FSI) (including additional FSI) for construction of a project by a promoter

ENTRY 5B - Long term lease of land (30 years or more) by any person against consideration in the form of upfront amount (called as premium, salami, cost, price, development charges or by any other name) and/or periodic rent for construction of a project by a promoter.





CONDITIONAL EXEMPTION

Conditional Exemption on transfer of
Development Rights

*[Notification No 04/2019 Central Tax
(Rate) dated 29.03.2019]*

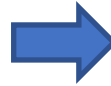
Exemption is available on transfer of development rights subject to fulfilment of following conditions:

- 1 The same is transferred on or after April 1, 2019;
- 2 It is used for the construction of residential apartments by a promoter;
- 3 Apartments in the project are intended for sale to a buyer whether wholly or partly

**GST payable to the extent residential apartments remain
unsold**

WHICH VALUE – NOTIFICATION 04/2019

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



Similar Flat Value
[nearest to date of transfer]

X

Development Rights (Sq. Ft.)

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



Similar Flat Value
[nearest to date of OC]

X

Area remain unsold

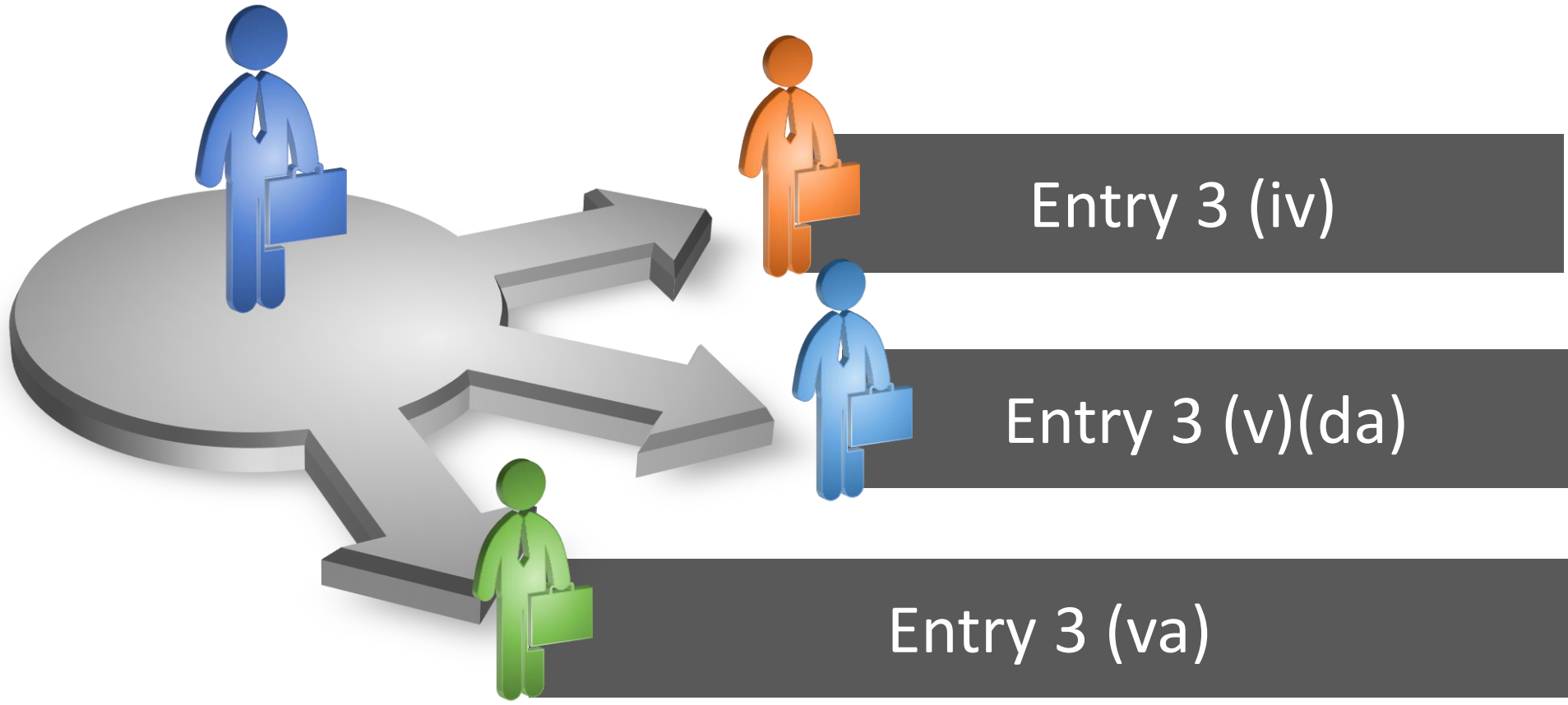
GST Implications- Snapshot

	Transfer of Development Right
APPLICABILITY	Conditional exemption — Only for residential apartments — Subject to residential apartments sold pre-OC
RATE	18%
RESPONSIBILITY	Developer (Under Reverse Charge)
VALUATION	Value of similar apartment sold nearest to date of transfer of DR
VALUATION CAPPING (Only for residential apartment)	Capping at 5% /1% of the value of area remain unsold based on market value on date of OC
TIME OF PAYMENT	On receipt of OC or before receipt of OC [vide Notification 03/2021- CT(Rate) dated June 2,2021]
ITC	Not available

Works Contract - By Contractor to Developer

TRANSACTION 2

Relevant Sub-contractor Entries in the Rate Notification



The said Entries have been deleted vide Notification 03/2022- Central Tax (Rate) dated July 13, 2022

Due to the said amendment, contractors are liable to pay GST @18% irrespective of scheme

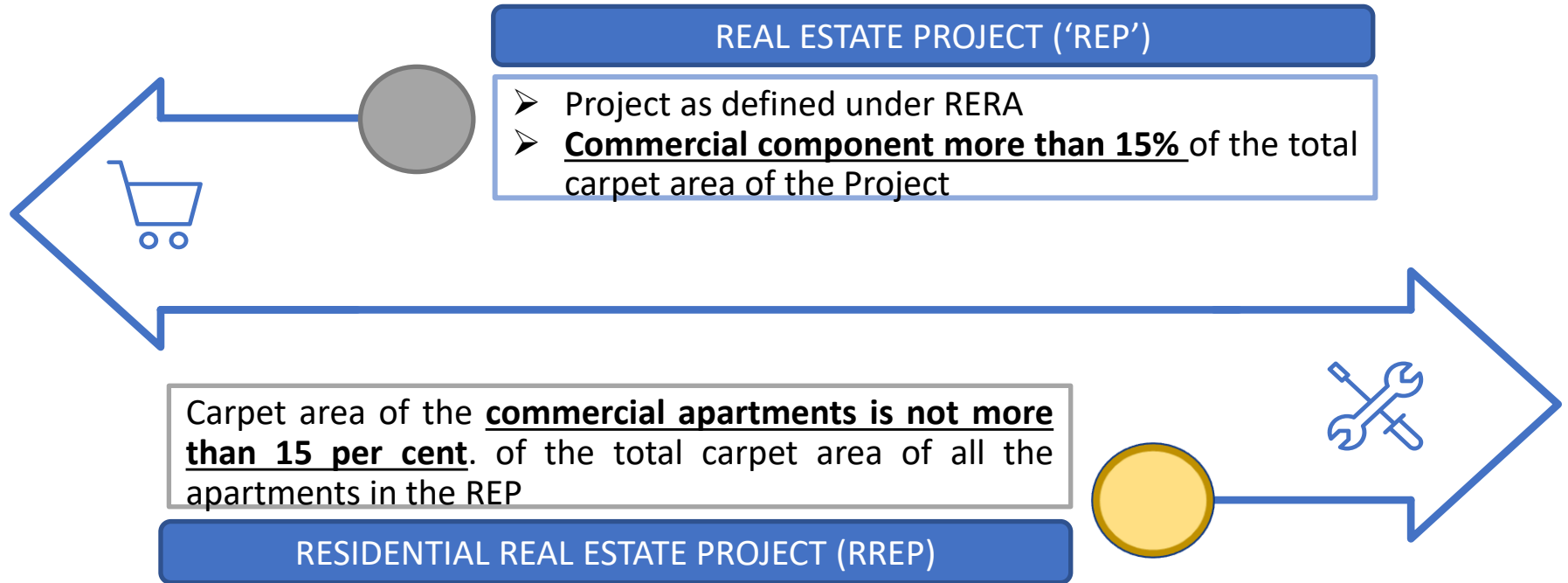
Sale of Apartments to New Buyers

TRANSACTION 3

Real Estate Projects



HOUSING



Commercial Component	Project Status	Rate on sale of Commercial Units	ITC
Upto 15%	RREP	5%	Not Available
More than 15%	REP	12%	Proportionate available

Rate of GST

TYPE OF APARTMENT	PROJECT STATUS	CARPET AREA	PRICE	TAX RATE
RESIDENTIAL	RREP / REP	Less than 90 sq. mtrs	Less than INR 45 lacs	1%
		Less than 90 sq. mtrs	Greater than INR 45 lacs	5%
		Greater than 60 sq. mtrs	Less than INR 45 lacs	5%
		Greater than 60 sq. mtrs	Greater than INR 45 lacs	5%
COMMERCIAL	RREP	NA	NA	5%
	REP	NA	NA	12% (With ITC)

Constructed Apartments Handed Over to the Society

TRANSACTION 4

GST Implications – Snapshot



	Area provided to Society
APPLICABILITY	Liable
RATE	5% / 1%, as the case may be
RESPONSIBILITY	Developer (Under Forward Charge)
VALUATION	Value of similar apartment sold nearest to date of transfer of DR
TIME OF PAYMENT	In tax period not later than tax period in which OC is received
ITC	Not available

GST: घर से-
बड़ा टैक्स

Transaction 1 & 4 subsumed in Transaction 3

- Tax liability discharged on gross amount charged which subsumes all costs including value of units handed over to Society
- Demand of tax on value of such units tantamount to DOUBLE TAXATION??
- Further worsen by no ITC, stamp duty on DA and Sale resulting into MULTIPLE TAXATION???

Representations filed :

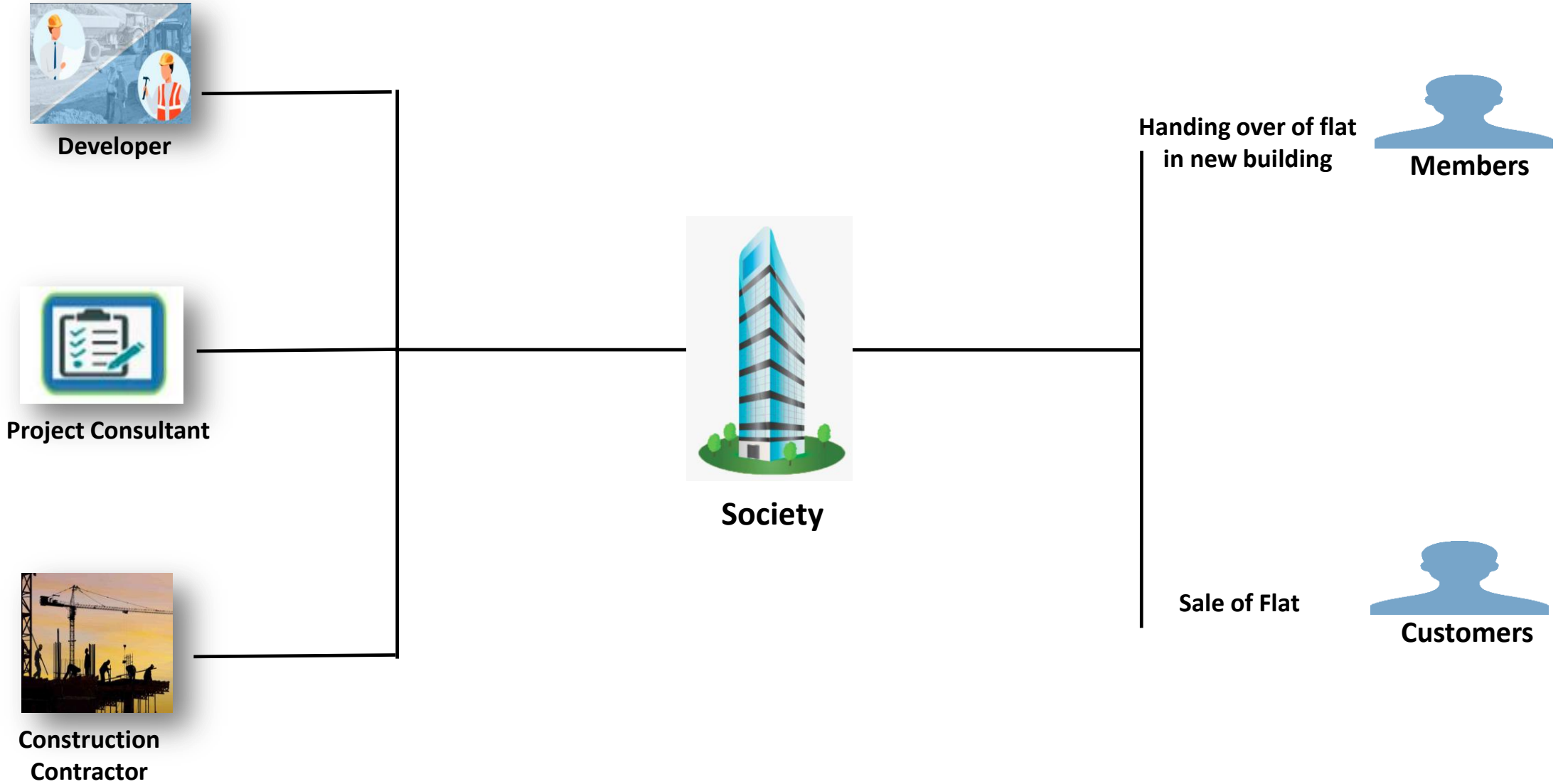
Units handed over to Members should not be subjected to GST

OR

GST paid on services provided to existing members should be available as ITC – as it is effectively in the nature of captive consumption

OPTION II

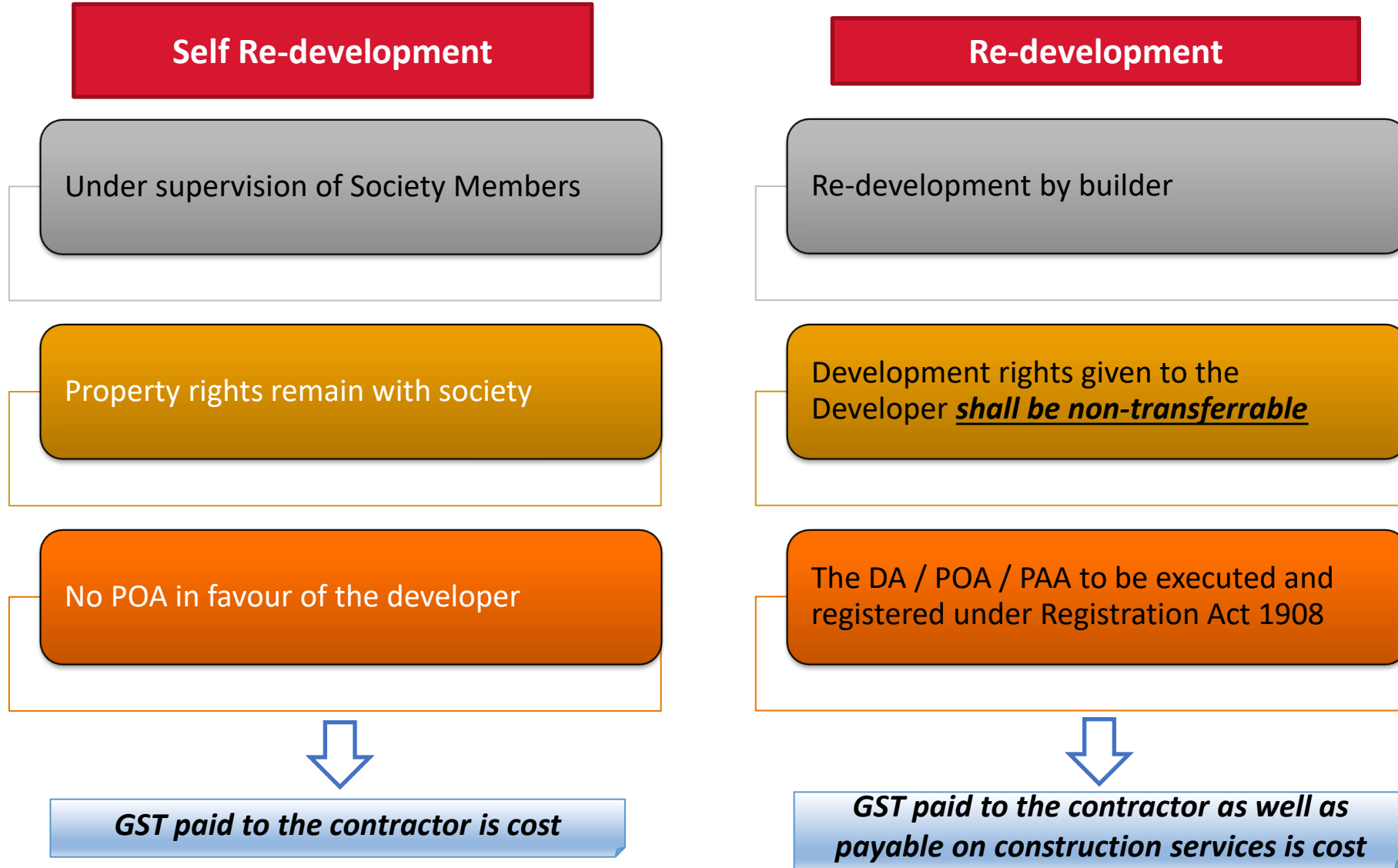
Structure I- Society Self Re-Development



Department may dispute that there is a supply of service from society to members.

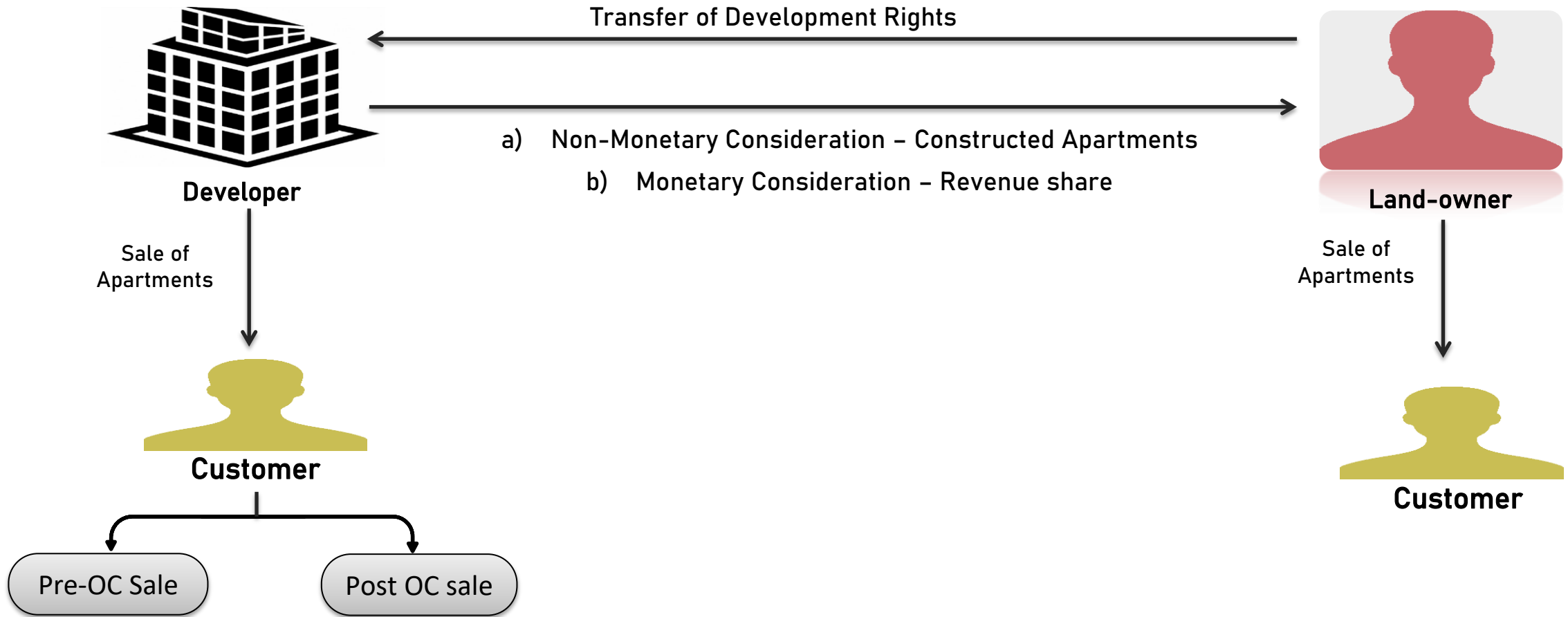


Comparative Analysis



JOINT DEVELOPMENT ARRANGEMENT

Structure under JDA





GST Implications – JDA Residential Development

Transfer of Development Rights by Landowner to Developer

	GST Implications
Applicability of GST	Condition exemption (Subject to flats sold pre-OC)
Rate of tax	18%
Responsibility to discharge GST	Developer (Under Reverse Charge)
Valuation	Value of similar apartment sold nearest to date of transfer of DR (Capping at 5% /1% of the value of area remain unsold based on market value on date of OC)
Time of Payment of GST	In tax period not later than tax period in which OC is received
Credit availability	Not available

Area provided by Developer to the Landowner

	GST Implications
Applicability of GST	Liable
Rate of tax	5%/1%
Responsibility to discharge GST	Developer (Under Forward Charge)
Valuation	Value of similar apartment sold nearest to date of transfer of DR
Time of payment of GST	In tax period not later than tax period in which OC is received
Credit Availability	Available (to the extent sold pre-OC only to Landowner Promoter)

GST Implications – JDA Commercial Development

Transfer of Development Rights by Landowner to Developer

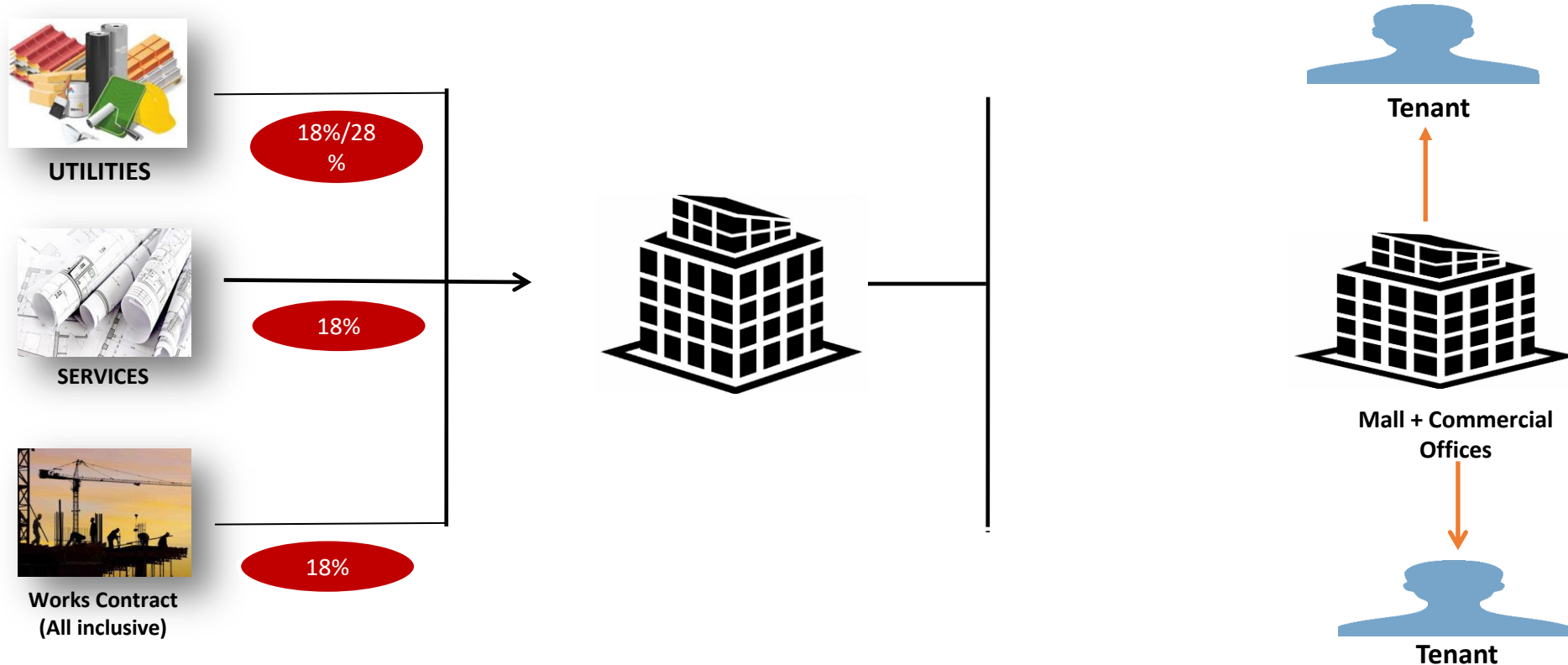
	GST Implications
Applicability of GST	No exemption
Rate of tax	18%
Responsibility to discharge GST	Developer (Under Reverse Charge)
Valuation	Value of similar apartment sold nearest to date of transfer of DR
Time of Payment of GST	In tax period not later than tax period in which OC is received
Credit availability	Available

Area provided by Developer to the Landowner

	GST Implications
Applicability of GST	Liable
Rate of tax	12%
Responsibility to discharge GST	Developer (Under Forward Charge)
Valuation	Value of similar apartment sold nearest to date of transfer of DR
Time of payment of GST	In tax period not later than tax period in which OC is received
Credit Availability	Available

ITC – COMMERCIAL DEVELOPMENT FOR LEASE

Construction Scenario



CONSTRUCTION COST

$$\text{CIVIL WORK} + \text{UTILITIES} = \text{TOTAL COST}$$

Blocked Credit under GST

ITC POSITION – Building used for Rent

No credit on any goods and services used for construction

EXCEPTION – Plant and Machinery

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

- (5) Notwithstanding anything contained in sub-section (1) of section 16 and subsection (1) of section 18, input tax credit shall not be available in respect of the following, namely:—
- (a) to (b)...
 - (c) works contract services when supplied for construction of an immovable property (other than plant and machinery) except where it is an input service for further supply of works contract service
 - (d) **goods or services or both** received by a taxable person for construction of an immovable property (**other than plant or machinery**) on his own account including when such goods or services or both are used in the course or furtherance of business.
 - (e) to (i)...

Explanation to Section 17(5)

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.

Analysis



Goods falling into one of the categories may qualify as 'plant and machinery'

- ➔ APPARATUS
- ➔ EQUIPMENT
- ➔ MACHINERY

Likely goods which may qualify

- Lifts
- HVAC
- Chillers
- Transformers
- DG Sets
- Crane
- Fire Fighting
- Sewerage Treatment Plant

Landmark High Court Judgement Safari Retreats Pvt.Ltd

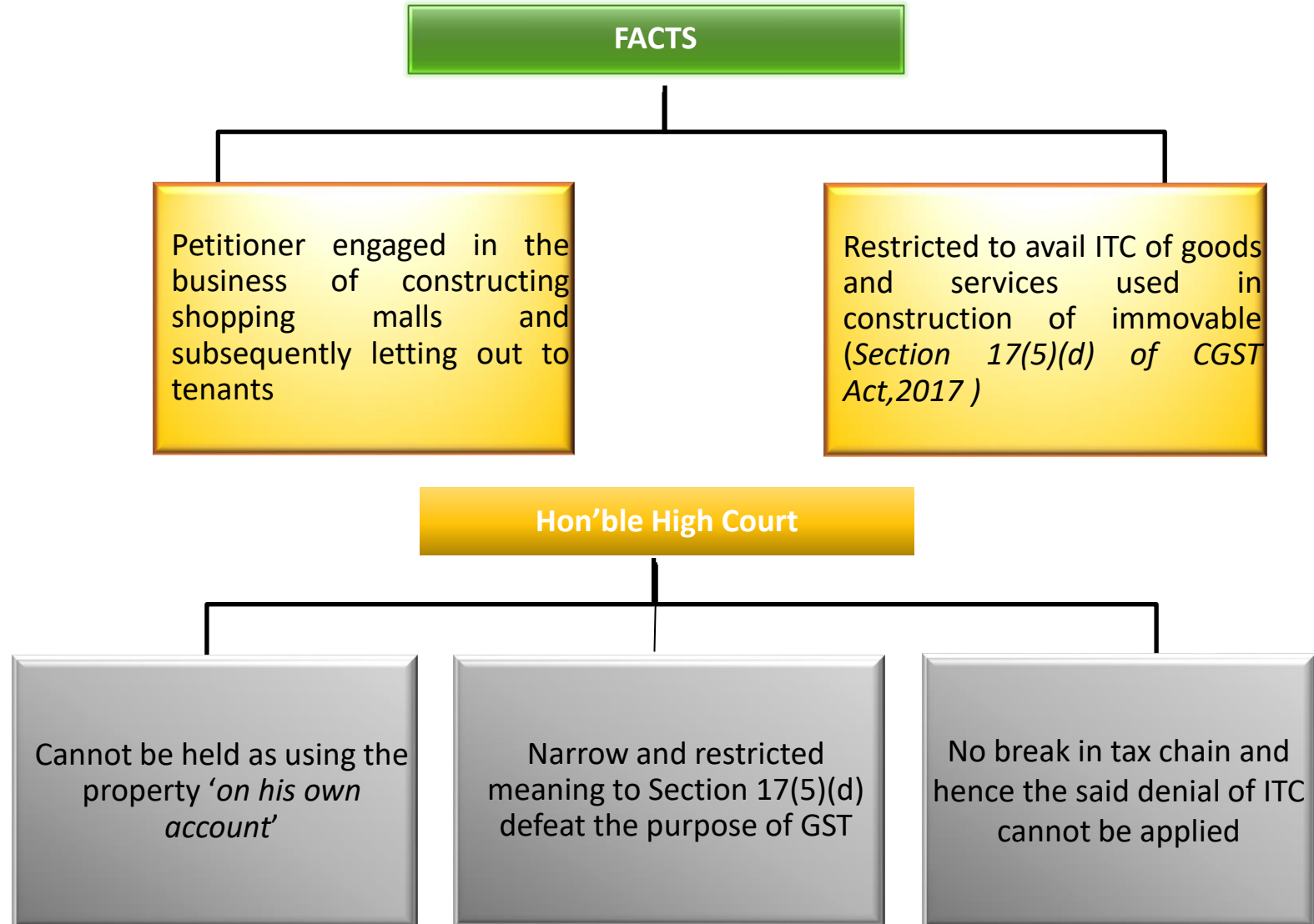


The very purpose of the Act was to make uniform provisions for levy, collection of tax and to prevent multi taxation. Considering the provision under section 17(5)(d), the narrow construction of interpretation put forth by the department is frustrating the very objective of the Act, inasmuch as the petitioner in that case has to pay huge amount of tax without any basis.

In the instant case, the petitioner has retained the property and is not using it for its own purpose, but it is letting out the property, which is covered under the GST law, but still the petitioner has to pay huge amount of GST, to which he is not liable.

In that view, the provision of section 17(5)(d) is to be read down and the narrow restriction as imposed, is not required to be accepted, the very purpose of the credit is to give benefit to the assessee.

If the assessee is required to pay GST on the rental income arising out of investment on which it had paid GST, it is required to have the tax credit paid on inputs and input services.



THANK YOU



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