

NATIONAL CONFERENCE ON "GST"

**CONFERENCE ON FINER ISSUES IN REAL
ESTATE SECTOR & WORKS CONTRACT IN
GST**

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REAL ESTATE – TOPICS

- 1) Before & After 01-04-2019
- 2) Option of Ongoing Project
- 3) Rate of Tax on Affordable & Non-Affordable Apartment
- 4) Supply of TDR/Long Term Lease
- 5) Reverse Charge of TDR/Long Term Lease
- 6) Landowner-Promoter
- 7) Time of Payment
- 8) Compliance to Condition for New Rate
- 9) Reversal of Credit
- 10) Maintenance of Record
- 11) Activity of Plotted Development
- 12) Cancellation of Flat
- 13) Issues in Redevelopment

□ BEFORE AND AFTER 01-04-2019

- Upto 31.03.2019, rate of construction of residential complex service after claiming deduction of $1/3^{\text{rd}}$ for the value of land was 12% and construction of flats under affordable housing was taxed at the rate of 8%.
- W.e.f. 01.04.2019, new rates were notified and builders were given an option to avail one option. Either they can continue to charge 12% and 8% and avail input tax credit or they can opt for new rates and forgo the input tax credit.

The provisions related to new rates are explained in the upcoming slides.

❑ BEFORE AND AFTER 01-04-2019

- Gujarat High Court in the case of **Munjaal Manishbhai Bhatt 2022 (5) TMI 397** has held that deeming fiction of 1/3rd land abatement can be applied only where actual value is not ascertainable and the mandatory application of such deeming fiction where the actual value of land is ascertainable is clearly contrary to the provisions of CGST Act. Relevant para reads as follows,

123. While we so conclude, the question is whether the impugned paragraph 2 needs to be struck down or the same can be saved by reading it down. In our considered view, while maintaining the mandatory deduction of 1/3rd for value of land is not sustainable in cases where the value of land is clearly ascertainable or where the value of construction service can be derived with the aid of valuation rules, such deduction can be permitted at the option of a taxable person particularly in cases where the value of land or undivided share of land is not ascertainable.

124. The impugned paragraph 2 of Notification No. 11/2017-Central Tax (Rate) dated 28th June 2017 and the parallel State tax Notification is read down to the effect that the deeming fiction of 1/3rd will not be mandatory in nature. It will only be available at the option of the taxable person in cases where the actual value of land or undivided share in land is not ascertainable.

❑ OPTION OF ONGOING PROJECTS

- As on the date of change over as on 01/04/2019, the notification provided the option to on-going projects either to continue with the old rate of tax with credit or switch over to new rate of tax.
- The builder/developer was required to reverse the appropriate amount of credit on or before September-2019.
- In case the option to shift to new tax regime is selected, the method of computation for reversal of credit is given in Annexure-1 and Annexure-2 of Notification No. 3/2019 – CT (Rate) which amends Notification No. 11/2017 – CT (Rate) needs to be followed.
- As per the notification such option was to pay the tax at the old rate required to be exercised by availing Annexure-IV of the Notification with the Jurisdictional Commissioner of the registered person.

❑ OPTION OF ONGOING PROJECTS

- However, even if the Annexure IV is not filed, it was presumed that the builder/developer has opted to pay the tax on new regime. The Annexure-4 was:
 - a) Required to be filed for each projects separately.
 - b) It was required to be submitted physically.
 - c) Option once exercised could not be changed subsequently.
- **Issue 1: Can developer & landowner opt for different rates (i.e. 12% / 5%) under the same project which has single RERA registration?**
- **Issue 2: Suppose, a builder has opted for 12% rate and filed Annexure IV accordingly. However, now the project is taken over by new builder who cannot file Annexure IV now. Whether new builder will have to pay 5% or 12% GST?**
- **Issue 3: A company is developing a project under a single RERA registration comprising of 1,00,000 sq. ft. area. Company has opted to GST @ 12%. After April 2019, extra area of 5,000 sq. ft. has been added to the existing project. Whether the project will still be considered as “ongoing” w.r.t. 5,000 sq. ft. area?**

❑ RATE OF TAX ON AFFORDABLE AND NON-AFFORDABLE APARTMENTS

- The term 'affordable apartments' have been defined in clause 4(xvi) of Notification No. 11/2017-CT (Rate). The tax rate is 1%.
- The alternative definition is given in clause (a) and (b). The condition for sale price of Rs. 45 lacs are only applicable for clause (a) and not applicable for clause (b).
- Thus, the builder/developer who were availing benefit of concessional rate of tax in different clauses of Entry No. 3 of Notification No. 11/2017 – CT (Rate) will continue to avail such benefits even if the sale price of the apartments is above Rs. 45 lacs in clause (b).
- The notification itself laid down the method of computing Rs. 45 lacs. Therefore, the provisions of Section 15 for determination of transaction value will not apply.
- In case of apartments are non-affordable the tax rate of 5% is payable for all the apartments.

❑ SUPPLY OF TDR / LONG TERM LEASE

- The Entry No. 41A of Notification No. 12/2017 – CT (Rate) which has been added by Notification No. 4/2019 – CT (Rate) exempts supply of TDR from payment of tax used for construction of residential apartments subject to the conditions specified therein.
- The condition is that the promoter is required to compute the payment of tax by two methods discussed below (specified in the notification) and pay the tax amount whichever is higher.
 - a) Compute the tax @ 18% on value of TDR. The value of TDR will be the value of apartments as on the date of transfer of TDR, remaining unsold on the date of Occupation Certificate.
 - b) 5% of the value of apartments remaining unsold as on the date of Occupation Certificate. The value of apartments will be determined on the basis of rate prevailing on the date of receipt of Occupation Certificate.

□ SUPPLY OF TDR / LONG TERM LEASE

- In case, the project is for construction of wholly commercial apartments, the exemption from payment of tax will not be available. However, the tax will be continued to be paid by the promoter on reverse charge basis as per Notification No. 5/2019 – CT (Rate).
- However, in case of RREP/REP projects, the tax on TDR to the extent used for commercial apartments will be payable by the promoter, and for residential apartments, the tax on sale of TDR will be exempt subject to the conditions mentioned in Notification No. 12/2017-CT (Rate).
- In case supply of TDR is for construction of commercial apartments and supplier receives the consideration in any form other than the constructed premises, the tax will be payable upfront on supply of TDR.
- However, if the consideration to the supply is in the form of constructed premises, the tax will be payable on the date of receipt of Occupation Certificate. However, it will be advisable to pay tax earlier so that the credit can be obtained by the landowner.

❑ REVERSE CHARGE OF TDR / LONG TERM LEASE

- Notification No. 13/2017-CT (R) has been amended by Notification No. 05/2019-CT (R) to provide for payment of tax on reverse charge basis of following supplies,

Sr. No.	Category of supply of services	Supplier of Service	Recipient of Service
5B.	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	Any person	Promotor
5C	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.	Any person	Promotor

- RCM is applicable even for Commercial property & even for periodic rent towards long term lease.

❑ LANDOWNER-PROMOTER

- The landowner who are unable to develop the property themselves transfers the development right to the developer in consideration of constructed premises.
- The developer is liable to pay GST on such constructed premises handed over to the landowner.
- Notification No. 11/2017-CT (Rate) specifically provides that the landowner will be entitled to the credit of such GST paid which can be utilized by him on payment of GST on sale of such premises.
- The credit can be availed by the landowner only when the sale of property and the payment of tax by the builder happens while the property is under construction.
- The notification is applicable only for residential property.

□ TIME OF PAYMENT

- As per Notification No. 6/2019 – CT (Rate) the tax on the constructed premises handed over to the landowner/developer will be payable at the time of obtaining Occupation Certificate.
- However, the tax on the supply of TDR on reverse charge basis will be payable upfront when the TDR is supplied for development of commercial apartments and the consideration is not paid in the form of constructed premises.
- If the consideration is paid in the form of constructed premises, the tax will be payable at the time of Occupation Certificate.

❑ COMPLIANCE TO CONDITIONS FOR NEW RATE

- Tax shall be paid in Cash. Closing balance of ITC should not be used.
- ITC cannot be taken except to the extent of transition credit as calculated as per Annexure I & II of the notification.
- Where value of input and input services received from registered suppliers falls short of the said threshold of 80%, tax will have to be paid by the promoter under RCM @ 18%.

(a) In computing value of 80%, the purchase/obtaining of services by way of grant of TDR/FSI, long term lease premium of land, electricity, high speed diesel, motor spirit, natural gas will not be computed.

(b) Where cement is received from an unregistered person, the promoter shall pay tax at the applicable rates of cement under RCM. [benefit of 80% is not available]. Tax shall be paid in the month in which cement is received.

❑ COMPLIANCE TO CONDITIONS FOR NEW RATE

(c) Values of inward supplies received should be calculated during the financial year (or part of the financial year till the date of issuance of CC/OC) and for each project.

(d) The said tax payments on the shortfall shall be submitted in the prescribed form electronically on the common portal by end of the quarter following the financial year. The said tax liability be added to the output tax liability in the month not later than June following the end of the financial year.

- Inputs and input services on which tax is paid on reverse charge basis shall be deemed to have been purchased from registered person;
- ITC not availed shall be reported every month by reporting the same as “Ineligible Credit” in Row No. 4(D)(2) in GSTR-3B.

❑ COMPLIANCE TO CONDITIONS FOR NEW RATE

- Issue 1: Form GSTR-3B has been amended vide Notification No. 14/2022-CT dated 05-07-2022. In Amended GSTR-3B, Row No. 4(D)(2) reads as “Ineligible ITC under section 16(4) and ITC restricted due to PoS provisions”. Where to show the above “ineligible credit” in amended GSTR-3B?
- Issue 2: The company has incurred expenses like Land Survey, Consultancy charges etc. for proposed Real Estate Project. Till date, it is not known whether the project will be Residential or Commercial. What will be the treatment of ITC,
 - if Project deal is executed
 - if Project deal is not executed

❑ REVERSAL OF CREDIT

- Rule 42 of the CGST Act has been amended w.e.f. 01/04/2019. As per this rule, the credit will have to be reversed based on the carpet area of the project and not on the basis of value.
- **For RREP**
- In case of ongoing projects, if the developer has opted to continue to pay the tax at the earlier rate the reversal of credit will be done at the time of obtaining Occupation Certificate based on the area.
- In case the developer has opted to pay the tax at the new rate, reversal will be done at the time of opting for new rate.
- In case of new project, the question for reversal does not arise as the reversal cannot be taken.

□ REVERSAL OF CREDIT

○ For REP

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- In case the developer has opted to pay the tax at the new rate, reversal will be done at the time of opting for new rate.
- In case of new project, proportionate reversal as per Rule 42 will be done on monthly basis since ITC w.r.t. commercial apartment is eligible. Final reversal as on the date of OC will have to be done.

□ MAINTENANCE OF RECORDS

- The builder will have to maintain the records for each project separately to substantiate that 80% cost of inputs and input services have been obtained from registered persons.
- He will also have to ensure that the credit not availed by him is reflected in Form GSTR-3B.

❑ ACTIVITY OF PLOTTED DEVELOPMENT

- As per Sr. No. 5 of Schedule III of the CGST Act, 2017, sale of land is kept outside the purview of GST.
- In case of plotted development, the land is sold by the developer to plot owner and activities like levelling, laying drainage lines, electricity lines etc. is carried out.
- As per Circular No. 177/09/2022 – TRU dated 03-08-2022 (para 14), land sold after some development, like levelling, laying down of sewage lines etc., is also covered within Sr. No.5 of Schedule III and hence no GST is payable.
- It appears that other services provided by the developer to the plot owner, such as club house facility, garden, maintenance services, etc. is liable to GST.

❑ CANCELLATION OF APARTMENT

- It is very common in Real Estate Sector that the customer cancels the flat booked by him. In such case, the company must have already paid GST @ 5% while receiving advance at the time of booking from the customer.
- Company may forfeit the amount of advance already paid or may separately charge cancellation charges.
- **Issue: Whether the company will be liable to charge GST @ 18% on cancellation charges received or GST @ 5% is to be charged since it is not a separate supply?**
- Recent CBIC Circular No. 178/10/2022-GST dated 03-08-2022 has clarified that facilitation supply of allowing cancellation of an intended supply against payment of cancellation fee or retention or forfeiture of a part or whole of the consideration or security deposit in such cases should be assessed as the principal supply. Hence, it will attract same GST Rate as that of principal supply.

❑ CANCELLATION OF APARTMENT

- Refund of GST on cancellation of apartment – It is possible to obtain refund of GST paid within 2 years provided the application is made by the purchaser.

❑ ISSUES IN REDEVELOPMENT

- Whether a view can be taken that no GST is payable in case of receipt of development rights from society as it is not in course of business?
- Whether a view can be taken that no GST is payable on area developed for society or land owner on the basis of Vasantha Greens judgement?
- What will be the value of flats given to society members in case of society redevelopment where the flats sold in open market are having altogether different amenities and different construction quality?
- What is the time of payment of GST in case of redevelopment?

THANK YOU

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