

GST - REAL ESTATE & REDEVELOPMENT – PRACTICAL ISSUES

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GST - REAL ESTATE SECTOR AREAS

Works Contracts

Government
related
Construction
Contracts

Real Estate
Projects under
RERA

TDR/FSI/Long
Term lease

Sale of Land and
Developed Plots

Renting and
Leasing of
Immovable
Property

CGST / SGST PROVISIONS

Act

- Section 9
- 7 (1A)
- Sch. II – 5 (b) and 6 (a)
- Sch. III
- Sec. 13/14
- Sec. 15
- Sec. 16/ 17
- Sec. 34
- Sec. 140 (6)
- Sec. 171

Rule

- Rule 27, 28
- Rule 30
- Rule 42/43

Not. No.

- 25/2018
- 3/2019
- 4/2019
- 5/2019
- 6/2019
- 7/2019
- 8/2019
- ROD 4/2019

Circulars

- FAQ 7.05.2019
- FAQ 14.05.2019

WHAT IS 'WORKS CONTRACT'

"Works contract" means a contract for **building, construction, fabrication, completion, erection, installation, fitting out, improvement, modification, repair, maintenance, renovation, alteration or commissioning** of any **immovable property** wherein **transfer of property in goods (whether as goods or in some other form) is involved** in the execution of such contract- section 2(119) of CGST Act.

Works contract as defined in section 2(119) of CGST Act is '**supply of service**' - para 6(a) of Schedule II of CGST Act.



TRANSACTIONS RELATING TO REAL ESTATE

COVERAGE OF REAL ESTATE TRANSACTIONS UNDER GST

The definition of 'service' is very wide at it covers anything other than 'goods'.....

Thus, technically, any transaction in real estate can be subject to GST, unless specifically excluded.

INCLUDED

As per deeming provisions contained in **Schedule II** of CGST Act and SGST Act, GST can be levied on following transactions relating to real estate.

- **Any lease, tenancy, easement, license to occupy land** [The lease of tenancy of land can be of any period - even 99 or 999 years].
- **Any lease or letting out of the building including a commercial, industrial or residential complex for business or commerce, either wholly or partly** [This covers renting or leasing of building. Even renting of part of residential complex for business or commerce will be subject to GST].
- **Renting of immovable property** [Since lease of building and land is already covered in aforesaid clauses, this can cover **other immovable property like plant and machinery**].
- **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. [This covers sale of apartments *before it is occupied*.].

EXCLUDED

As per **Schedule III** of CGST Act read with section 7(2)(a) of CGST Act, following matters will **not** be treated as supply of goods or services –

- **Sale of land** and,
- **subject to para 5(b) of Schedule II, sale of building** [Para 5(b) of Schedule II covers sale of complex (now termed as 'apartment' after 1-4-2019), building or civil structure or a part thereof, before its completion]

Thus, sale of apartment, building or civil structure or part thereof, **after its completion or first occupation** will not be subject to GST.

WHAT IS FIRST OCCUPATION ?

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?

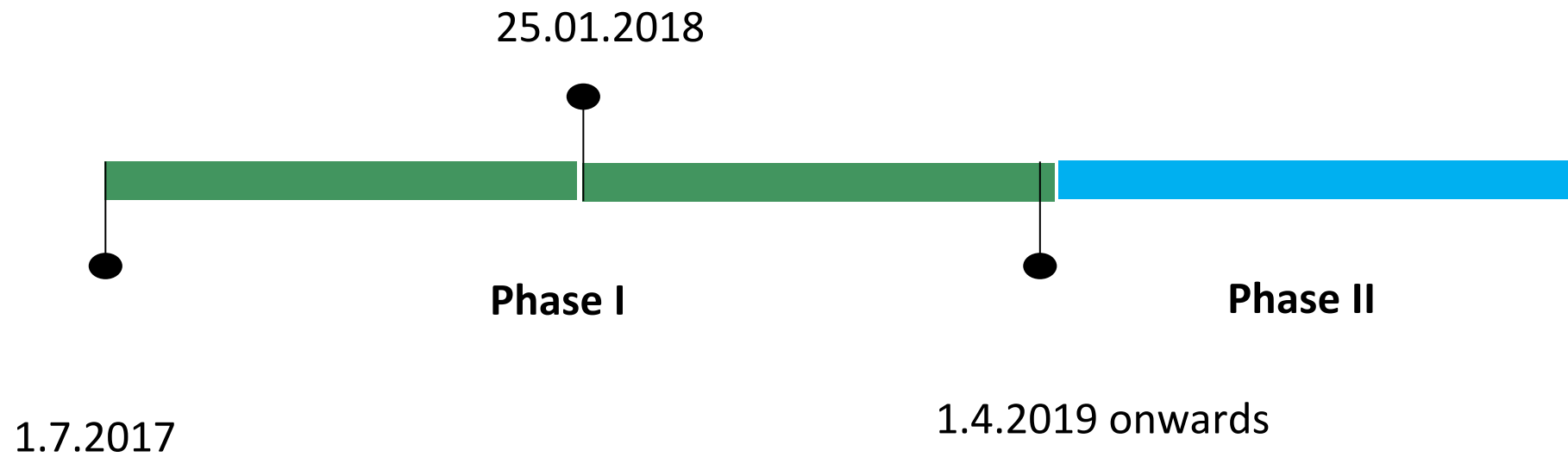
As per FAQ (Part I) No. 29 issued by CBI&C vide circular F No. 354/32/2019-TRU dated 7-5-2019, 'first occupation' means '**first occupation of the project in accordance with laws, rules and regulations of State/Central Government or any other authority**'. Thus, mere staying in the apartment before obtaining **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.

GST PROVISIONS FOR REAL ESTATE SECTOR - TIME ZONE/ CHRONOLOGY



PHASE I

GST ON CONSTRUCTION OF RESIDENTIAL, COMMERCIAL OR INDUSTRIAL COMPLEX FROM 01-7-2017 UPTO 31-3-2019

Provisions in respect of GST on construction of residential or commercial complex were contained in Sr No. 3(i) of Notification No. 11/2017-CT (Rate) and 8/2017-IT (Rate) both dated 28-6-2017 as existing upto 31-3-2019. **This Sr No. has been completely altered w.e.f. 1-4-2019.**

The effective tax rate was 12% upto 31-3-2019 assuming the land value as one-third of total amount charged for supply of such service. Input Tax Credit was available.

The general rate of GST on construction and works contract service was 18% (9% CGST plus 9% SGST) or 18% IGST. However, in case of construction of complex, the builder charges a amount which is inclusive of land or undivided share of land. In that case, the land value will be taken as one third (33.33%) of total amount (i.e. value including land value) and GST is payable on balance amount.

Thus, effectively GST rate was 12% (6% CGST plus 6% SGST) or 12% IGST, upto 31-3-2019:

NO SEPARATE TAX FOR SUPPLY OF LAND OR UNDIVIDED SHARE OF LAND ON LEASE AS PART OF COMPOSITE SUPPLY OF FLATS

When a builder sales flat to buyer, he also transfers to him undivided share of land by way of lease or sub-lease the service falls under heading 9972.

In such cases, the value of service for GST is *Nil*, if the amount charged for such lease or sub-lease is one-third of total amount charged for composite supply or less than one-third of total amount charged - Sr No. 16(ii) of Notification Nos. 11/2017-CT (Rates) and 8/2017-IT (Rates) dated 28-6-2017 inserted w.e.f. 25-1-2018.

The detailed wording is quite clumsy, but its essence is that such supply of land by way of leasing may be during (a) construction of complex (b) low cost housing under specified scheme or (c) Construction of residential or commercial apartments [amendment w.e.f. 1-4-2019].

Even otherwise, since supply of flat is a composite contract, there should not be any separate tax on lease of land.

SUB-CONTRACTOR LIABLE TO PAY TAX @ 18%

The sub-contractor providing works contract service is liable to pay tax @ 18% as the amount charged by him to main contractor does not include value of land.

(*For Affordable housing projects concessional rate of 12% is applicable)

REVERSAL OF ITC ON FLATS REMAINING UNSOLD AT TIME OF COMPLETION CERTIFICATE

There will be some unsold flats at the time of receipt of building completion certificate/occupancy certificate. GST will not apply when such ready possession flats are sold at a later date. The Input Tax Credit which was availed will have to be proportionately reversed.

Formula for such reversal has been specified in rule 42 of CGST Rules. However, this rule is not at all suitable to calculate reversal. However, if you go strictly by that rule, reversal will apply as and when the flats are sold as the formula in rule 42 talks of 'tax period' which is a financial year. ITC, turnover and value of exempt supply has to be considered for 'tax period'.

Thus, legally, it was not required to reverse ITC as soon as completion certificate was obtained.

Now the provisions are completely changed w.e.f. 1-4-2019.

NO REFUND OF ITC EVEN IF INPUT TAX CREDIT MORE THAN GST PAYABLE ON OUTWARD SUPPLY IN CASE OF CONSTRUCTION OF COMPLEX

In case of inverted duty rates (i.e. input tax credit more than tax payable on outward supply), there is provision of refund of excess credit under section 54(3) of CGST and SGST Act.

However, in case of services of construction of complex [specified in Item 5(b) of Schedule II of CGST Act], refund of unutilized ITC will not be available - Notification No. 15/2017-CT (Rate), dated 28-6-2017.

This provision is not relevant after 1-4-2019 where the promoter opts for payment of GST @ 1%/5%.

PHASE II

GST ON REAL ESTATE PROJECTS AND DEVELOPMENT RIGHTS W.E.F. 1-4-2019

Major changes have been made w.e.f. 1-4-2019 in respect of GST on real estate projects, Transfer of development rights, sale of FSI and long-term lease of land for construction of apartments.

REVISED GST STRUCTURE W.E.F. 1-4-2019

- **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

- 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:

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

OTHER POINTS

- 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 1st 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].

REVERSE CHARGE IF PROCUREMENT FROM UNREGISTERED PERSON (**SHORTFALL TAX**)

- Promoter is required to procure **all capital goods** and **at least 80% of inputs and input services** from registered suppliers. If not so procured, tax is payable by promoter on the balance amount.
- **All cement** must be purchased from registered supplier only. If not so received, the promoter is required to pay GST @ 28% under reverse charge by promoter.
- **After considering payment of GST on cement under reverse charge (if any), 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.
- 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.
- In case of capital goods procured from unregistered person, the promoter is liable to pay GST under reverse charge.

- **Inputs and input services on which tax is paid on reverse charge basis** shall be deemed to have been purchased from registered person.
- The promoter shall maintain **project wise account of inward supplies from registered and unregistered supplier** and **calculate tax payments on the shortfall at the end of the financial year** and shall submit the same in the prescribed form electronically on the common portal by end of the quarter following the financial year. The **tax liability on the shortfall** of inward supplies from unregistered person so determined **shall be added to** his output tax liability in the month not later than the **month of June following the end of the financial year.**
- **Input Tax Credit not availed shall be reported every month by reporting the same as ineligible credit in GSTR-3B**

PROJECT-WISE ACCOUNTS

- '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

- 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

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

- **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?

- 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, read with relevant valuation rules in CGST Rules.**

➤ CA YASHWANT J. KASAR 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

- 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

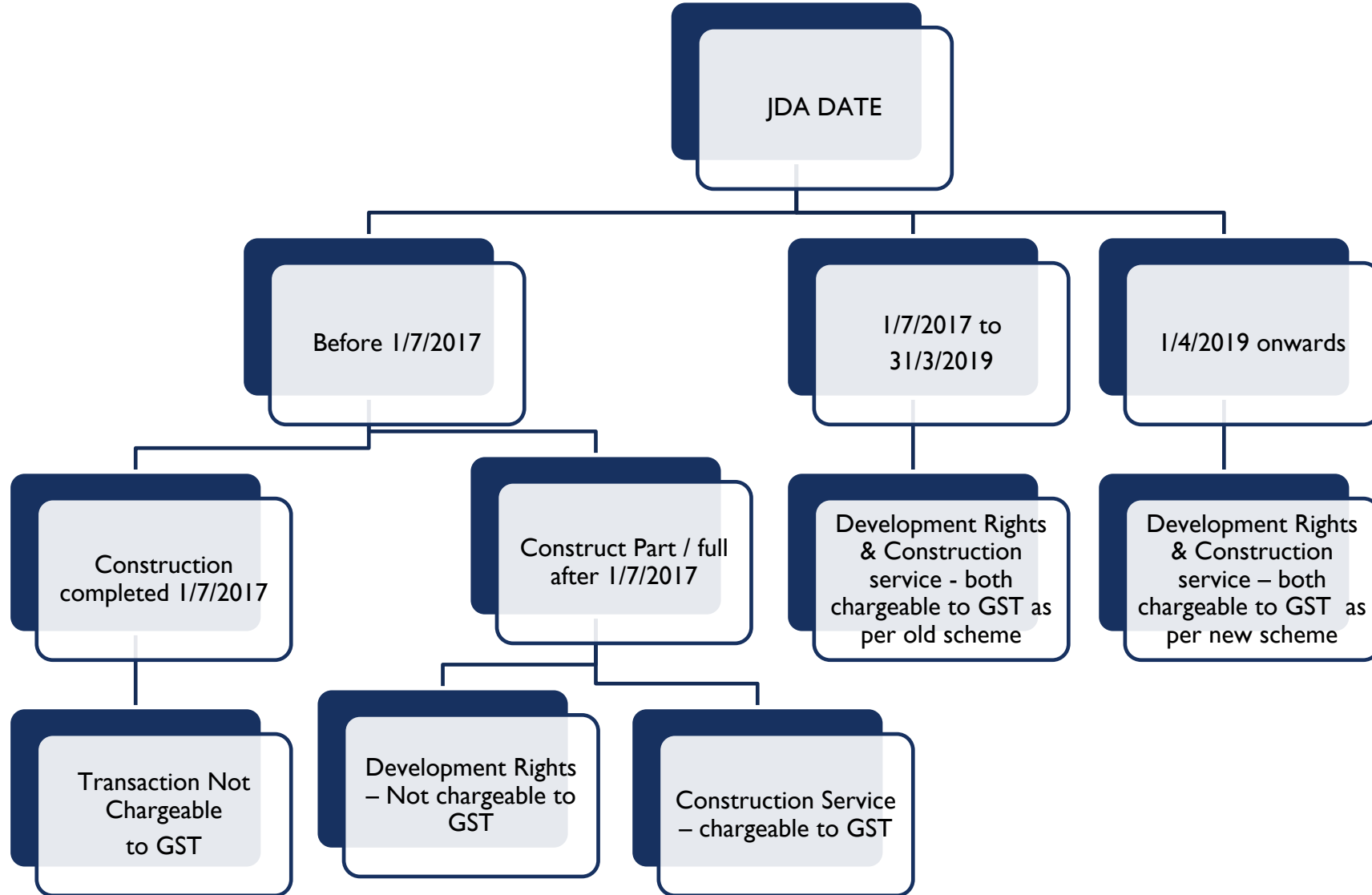
Often promoter enters into agreement with land owner in respect of Real Estate Project. **Land owner transfers development rights to promoter**

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.

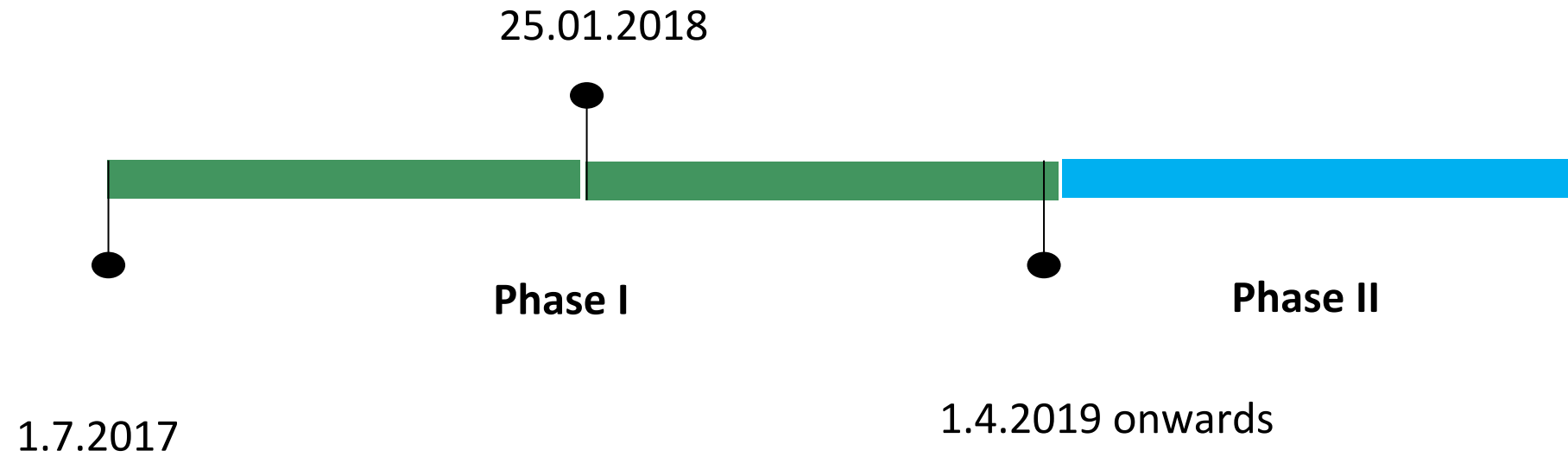
In some cases, land owner-promoter is allotted some apartments ie. **area sharing arrangement**, which he sales on his own account either before completion or after completion.

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**



DEVELOPMENT RIGHTS - TIME ZONE/ CHRONOLOGY



NOTIFICATION NO. 4/2018-CT (RATE), DATED 25-1-2018 (APPLICABLE UPTO 31/03/2019)

- 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 TDR/FSI

- 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

- 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

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

Time when liability of GST on transfer of development rights arises when consideration is given by promoter in form of construction of commercial or residential apartments:

- In a tax period not later than the tax period in which the date of issuance of the completion certificate for the project, where required, by the competent authority, or the date of its first occupation, whichever is earlier, falls. [Sr No. (a) of Notification No. 6/2019-CT (Rate) dated 29-3-2019 amended on 2-6-2021]
- Till 2-6-2021, the liability would arise on date of completion certificate of project or its first occupation, whichever is earlier
- ***Payable by Promoter under reverse charge***

VALUE OF SUPPLY OF SERVICE OF DEVELOPMENT RIGHTS OR FSI BY LAND-OWNER TO PROMOTER

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

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

- **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]

LAND OWNER HIMSELF SELLING APARTMENTS BEFORE COMPLETION

- **Land owner promoter can take ITC of GST charged to him by developer promoter but not of other input services** - Land owner 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.
- **Land Owner 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 TDR even before service is supplied. Hence, Land Owner 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.


Housing Society Redevelopment

Generally in re-development project, land is owned by a society, comprising members of the society with each member entitled to his share by way of an apartment.

When it becomes necessary after the lapse of a certain period, society or its flat owners may engage a promoter (builder/developer) for undertaking re-construction. Society/individual apartment owners give 'No Objection Certificate' (NOC) or permission to the promoter (builder/developer), for re-construction.

The promoter (builder/developer) constructs apartments with same or different carpet area for original owners of apartment and additionally may also be involved in one or more of the following:

- (i) construct some additional apartments for sale to others
- (ii) arrange for rental accommodation or rent payments for society members/original owners for stay during the period of re-construction
- (iii) pay an additional amount to the original owners of flats in the society.



Under this model, the promoter (builder/developer) receives consideration for the construction service provided by him, from two categories of service receivers.

- First category is the society/members of the society, who transfer development rights over the land (including the permission for additional number of apartments), to the promoter (builder/developer).
- The second category of service receivers consist of buyers of apartments other than the society/members. Generally, they pay by cash.

In both the cases, GST is payable as in first case, the promoter receives consideration in form of TDR and in other cases, by cash.

Slum Rehabilitation Projects

In Slum Rehabilitation programmes, Government transfers TDR/FSI to promoter.

The promoter supplies apartments to slum dwellers without monetary consideration.

The apartments constructed in addition to apartments given free to the slum dwellers are sold.

In both the cases, GST is payable - FAQ (Part II) Nos. 8 and 9 issued by CBI&C vide circular F No. 354/32/2019-TRU dated 14-5-2019.

If the apartments fall within the definition of affordable residential apartments, GST rate will be 1% [0.5% CGST plus 0.5% SGST/UTGST]. Similarly, if such apartments are covered under specified schemes, the GST rate will be 1%

TOLERATING AN ACT OR SITUATION

- 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

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.

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.

Refund of tax to unregistered buyers where construction contract is cancelled and credit note not issued due to time limitation

Time limit to issue credit note and adjust taxes which are excess paid

As per section 34(2) of the CGST Act, "Any registered person who issues a credit note in relation to a supply of goods or services or both shall declare the details of such credit note in the return for the month during which such credit note has been issued but not later than the thirtieth day of November following the end of the financial year in which such supply was made, or the date of furnishing of the relevant annual return, whichever is earlier, and the tax liability shall be adjusted in such manner as may be prescribed."

The time limit of 30th November has been in force from the financial year ended 31st March 2022 onwards and for prior financial years, the time limit was the thirtieth day of September.

PRESCRIBING MANNER OF FILING AN APPLICATION FOR REFUND BY UNREGISTERED PERSONS CIRCULAR NO. 188/20/2022-GST [F. NO. CBIC-20001/2/2022 - GST], DATED 27-12-2022

It would be pertinent to mention that sub-section (1) of section 54 of the CGST Act already provides that any person can claim refund of any tax and interest, if any, paid on such tax or any other amount paid by him, **by making an application before the expiry of two years from the relevant date** in such form and manner as may be prescribed. Further, in terms of clause (e) of sub-section (8) of section 54 of the CGST Act, in cases where the unregistered person has borne the incidence of tax and not passed on the same to any other person, the said refund shall be paid to him instead of being credited to Consumer Welfare Fund (CWF).

In order to enable such unregistered person to file application for refund under sub-section (1) of section 54, in cases where the contract/agreement for supply of services of construction of flat/ building has been cancelled or where long-term insurance policy has been terminated, a new functionality has been made available on the common portal which allows unregistered persons to take a temporary registration and apply for refund under the category '**Refund for Unregistered person**'. Further, sub-rule (2) of rule 89 of Central Goods and Services Tax Rules, 2017 (hereinafter referred to as 'CGST Rules') has been amended and statement 8 has been inserted in FORM GST RFD-01 *vide* Notification No. 26/2022-Central Tax, dated 26-12-2022 to provide for the documents required to be furnished along with the application of refund by the unregistered persons and the statement to be uploaded along with the said refund application.

Relevant Date: Date of issuance of letter of cancellation of the contract/ agreement for supply by the supplier

CASE – I (Pre GST & Old Scheme – Residential Project – Area Sharing)

Date of JDA	15/04/2016
Construction Started	1/09/2017
Construction Completed	30/06/2018
Total Apartments Construction	90 Apartment
Landowner's Share (Consideration for Development Rights)	40 Apartments
Developer's Shares	50 Apartments
Sold before OC / Completion Certificate	20 Apartments
Sold after OC / Completion Certificate	30 Apartments - Not Taxable under GST – Sch III of CGST Act
Whether Development Rights Chargeable to GST ?	No
Whether Landowner's Share of Apartments are chargeable to GST ?	Yes

CASE – 2 (Old Scheme – Residential Project – Area Sharing)

Date of JDA	1/10/2017
Construction Started	15/12/2017
Construction Completed	20/12/2018
Total Apartments Construction	100 Apartment
Landowner's Share (Consideration for Development Rights)	40 Apartments + 2 Crore Monetary consideration
Developer's Shares	60 Apartments
Sold before OC / Completion Certificate	40 Apartments
Sold after OC / Completion Certificate	20 Apartments – Not Taxable under GST – Sch III of CGST Act
Whether Development Rights Chargeable to GST ?	Yes – On Forward Charge Basis by landowner
Whether Landowner's Share of Apartments are chargeable to GST ?	Yes

Value of Apartments allotted to Landowner	Value of Similar Apartments OR Value as per Valuation Rules 27 to 31
Value of Development Rights	Value of Apartments allotted to Landowner + 2 Crore Monetary consideration
Time of Supply for Apartments allotted to Landowner	Date of allotment of possession of Apartments to Landowner – Notification No 4/2018 - CGST R
Time of supply for Developments Rights	Date of allotment of possession of Apartments to Landowner – Notification No 4/2018 - CGST R
Rate of GST for construction of complex service	12% (with ITC)
Rate of GST for Development Rights	18%

CASE – 3 (Old & New Scheme – Residential Project – Area Sharing)

Date of JDA	1/10/2018
Construction Started	1/05/2019
Construction Completed	15/12/2020
Total Apartments Construction	120 Apartment
Landowner's Share (Consideration for Development Rights)	50 Apartments + 1 Crore Monetary consideration + 18 months rent reimbursement
Developer's Shares	70 Apartments
Sold before OC / Completion Certificate	30 Apartments
Sold after OC / Completion Certificate	40 Apartments – Not Taxable under GST – Sch III of CGST Act
Whether Development Rights Chargeable to GST ?	Yes – On Forward Charge Basis by landowner
Whether Landowner's Share of Apartments are chargeable to GST ?	Yes

Value of Apartments allotted to Landowner	Amount charged for similar apartments in the project from the independent buyers nearest to the date of JDA
Value of Development Rights	Value of Apartments allotted to Landowner + 1 Crore Monetary consideration + 18 months rent reimbursement
Time of Supply for Apartments allotted to Landowner	Anytime Before or on the Date of issuance of occupancy / completion certificate
Time of supply for Developments Rights	Anytime Before or on the Date of issuance of occupancy / completion certificate
Rate of GST for construction of complex service	1% or 5% (without ITC)
Rate of GST for Development Rights	18%

CASE – 4 (New Scheme – Residential Project – Area Sharing)

Date of JDA	1/06/2020
Construction Started	15/10/2020
Construction Completed	20/12/2022
Total Apartments Construction	150 Residential Apartments
Landowner's Share (Consideration for Development Rights)	60 Residential Apartments + 3 Crore Monetary consideration + 24 months rent reimbursement
Developer's Shares	90 Residential Apartments
Sold before OC / Completion Certificate	40 Residential Apartments
Sold after OC / Completion Certificate	50 Residential Apartments – Not Taxable under GST – Sch III of CGST Act
Whether Development Rights Chargeable to GST ?	Yes – On Revers Charge Basis by developer (Conditional exemption available as project is of Residential Units)
Whether Landowner's Share of Apartments are chargeable to GST ?	Yes

Value of Apartments allotted to Landowner	Amount charged for similar apartments in the project from the independent buyers nearest to the date of JDA
Value of Development Rights	Value of Apartments allotted to Landowner + 3 Crore Monetary consideration + 24 months rent reimbursement + Value of Premium FSI , TDR procured by developer
Time of Supply for Apartments allotted to Landowner	Anytime Before or on the Date of issuance of occupancy / completion certificate
Time of supply for Developments Rights	Anytime Before or on the Date of issuance of occupancy / completion certificate
Rate of GST for construction of complex service	1% or 5% (without ITC)
Rate of GST for Development Rights	18% but The tax payable shall not exceed 1% / 5% of value of apartments remaining un-booked on the date of issuance of occupancy / completion certificate

CASE – 5 (New Scheme – Commercial Project – Area Sharing)

Date of JDA	1/10/2020
Construction Started	15/01/2021
Construction Completed	30/12/2022
Total Apartments Construction	100 Commercial Units
Landowner's Share (Consideration for Development Rights)	40 Commercial Units + 2 Crore Monetary consideration
Developer's Shares	60 Commercial Units
Sold before OC / Completion Certificate	35 Commercial Units
Sold after OC / Completion Certificate	25 Commercial Units – Not Taxable under GST – Sch III of CGST Act
Whether Development Rights Chargeable to GST ?	Yes – On Revers Charge Basis by developer – Exemption Not available as project is of Commercial Units
Whether Landowner's Share of Commercial Units are chargeable to GST ?	Yes

Value of Commercial Units allotted to Landowner	Amount charged for similar Commercial Units in the project from the independent buyers nearest to the date of JDA
Value of Development Rights	Value of Apartments allotted to Landowner + 2 Crore Monetary consideration + Value of Premium FSI , TDR procured by developer
Time of Supply for Commercial Units allotted to Landowner	Anytime Before or on the Date of issuance of occupancy / completion certificate
Time of supply for Developments Rights	Anytime Before or on the Date of issuance of occupancy / completion certificate
Rate of GST for construction of complex service	12% (with ITC)
Rate of GST for Development Rights	18%

CASE – 6 (New Scheme – Residential Project – Revenue Sharing)

Date of JDA	1/07/2020
Construction Started	10/08/2020
Construction Completed	15/12/2021
Total Apartments Construction	120 Residential Apartments
Landowner's Share (Consideration for Development Rights)	30% Share in Sales Revenue
Developer's Shares	70% Share in Sales Revenue
Sold before OC / Completion Certificate	80 Residential Apartments
Sold after OC / Completion Certificate	40 Residential Apartments – Not Taxable under GST – Sch III of CGST Act
Whether Development Rights Chargeable to GST ?	Yes – On Revers Charge Basis by developer (Conditional exemption available as project is of Residential Units)
Whether Landowner's Share of Apartments are chargeable to GST ?	NA

Value of Apartments allotted to Landowner	NA
Value of Development Rights	30% Share in Sales Revenue shared with landowner + Value of Premium FSI , TDR procured by developer
Time of Supply for Apartments allotted to Landowner	NA
Time of supply for Developments Rights	Anytime Before or on the Date of issuance of occupancy / completion certificate (Practically on Project Completion)
Rate of GST for construction of complex service	1% or 5% (without ITC)
Rate of GST for Development Rights	18% but The tax payable shall not exceed 1% / 5% of value of apartments remaining un-booked on the date of issuance of occupancy / completion certificate

CASE – 7 (New Scheme – Commercial Project – Revenue Sharing)

Date of JDA	1/07/2020
Construction Started	10/08/2020
Construction Completed	15/12/2021
Total Apartments Construction	120 Commercial Apartments
Landowner's Share (Consideration for Development Rights)	30% Share in Sales Revenue
Developer's Shares	70% Share in Sales Revenue
Sold before OC / Completion Certificate	80 Commercial Apartments
Sold after OC / Completion Certificate	40 Commercial Apartments – Not Taxable under GST – Sch III of CGST Act
Whether Development Rights Chargeable to GST ?	Yes – On Revers Charge Basis by developer (Exemption Not available as project is of Commercial Units)
Whether Landowner's Share of Apartments are chargeable to GST ?	NA

Value of Apartments allotted to Landowner	NA
Value of Development Rights	30% Share in Sales Revenue shared with landowner + Value of Premium FSI , TDR procured by developer
Time of Supply for Apartments allotted to Landowner	NA
Time of supply for Developments Rights	Date of when payment is made by promoter for transfer of rights 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]
Rate of GST for construction of complex service	12% (with ITC)
Rate of GST for Development Rights	18%



PRACTICAL EXAMPLES

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

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 - $40 \times 50 =$ 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 = $68 \times 30 =$ 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 \times (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’

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'

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.

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>Person liable for payment of GST on transfer of development rights or FSI for construction of project [commercial or residential apartments]</p>	<p>Promoter under reverse charge [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>Transferor of development rights/FSI or lessor giving land on lease under forward charge</p>
<p>Time when liability of GST on transfer of development rights arises when consideration is given by promoter in form of construction of commercial or residential apartments</p>	<p>In a tax period not later than the tax period in which the date of issuance of the completion certificate for the project, where required, by the competent authority, or the date of its first occupation, whichever is earlier, falls. [Sr No. (a) of Notification No. 6/2019-CT (Rate) dated 29-3-2019 amended on 2-6-2021] Till 2-6-2021, the liability would arise on date of completion certificate of project or its first occupation, whichever is earlier Payable by Promoter under reverse charge</p>	<p>when the developer, builder (now promoter) transfers possession or the right 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] 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>Time when liability of GST on transfer of development rights arises when consideration is paid by promoter in cash (monetary consideration)</p>	<p>(i) In a tax period not later than the tax period in which the date of issuance of the completion certificate for the project, where required, by the competent authority, or the date of its first occupation, whichever is earlier, falls. [Sr No. (a) of Notification No. 6/2019-CT (Rate) dated 29-3-2019 amended on 2-6-2021] Till 2-6-2021, the liability would arise on date of completion certificate of project or its first occupation, whichever is earlier Payable by Promoter under reverse charge</p> <p>(ii) In respect of commercial apartments - Date of when payment is made by promoter for transfer of rights 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] Payable by Promoter under reverse charge</p>	<p>When agreement is executed or payment received, whichever is earlier [section 13(1) of CGST Act providing for time of supply] Payable by transferor under forward charge</p>
<p>Time when liability for payment of GST arises in case of upfront amount paid by promoter for long term lease of land</p>	<p>(i) In a tax period not later than the tax period in which the date of issuance of the completion certificate for the project, where required, by the competent authority, or the date of its first occupation, whichever is earlier, falls. [Sr No. (a) of Notification No. 6/2019-CT (Rate) dated 29-3-2019 amended on 2-6-2021] Till 2-6-2021, the liability would arise on date of completion certificate of project or its first occupation, whichever is earlier Payable by Promoter under reverse charge</p> <p>(ii) In respect of commercial apartments - Date of when payment is made by promoter to supplier of service or within 60 days from contract (whichever is earlier) [section 13(3) of CGST Act providing for time of supply] Payable by Promoter under reverse charge</p>	<p>When agreement is executed or payment received, whichever is earlier [section 13(1) of CGST Act providing for time of supply] 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>Exemption available on transfer of development rights/FSI to promoter or payment for long term lease</p>	<p>(i) transfer or payment for construction of residential apartments is exempt [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 long lease for industrial plots 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 long lease for industrial plots 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>Liability of payment of GST on construction service provided to transferor of development rights or FSI</p>	<p>Promoter [as supplier of service]</p>	<p>Developer/Builder (now termed as Promoter) [as supplier of service]</p>

Description	Development rights/FSI transferred on or after 1-4-2019	Development rights/FSI transferred on or before 31-3-2019
<p>Time when liability of promoter to pay GST on construction service provided to transferor of development rights or FSI arises</p>	<p>In a tax period not later than the tax period in which the date of issuance of the completion certificate for the project, where required, by the competent authority, or the date of its first occupation, whichever is earlier, falls. [Sr No. (d) of Notification No. 6/2019-CT (Rate) dated 29-3-2019 amended on 2-6-2021] Till 2-6-2021, the liability was arising on date of completion certificate of project or its first occupation, whichever is earlier.</p>	<p>when the developer, builder (now promoter) transfers possession or the right 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>Value of construction service when registered person transfers development rights to promoter against consideration of construction of apartments</p>	<p>Total amount charged for similar apartments nearest to date on which development rights are transferred 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>Total amount charged for similar apartments nearest to date on which development rights are transferred 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] [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]</p>

Description	Development rights/FSI transferred on or after 1-4-2019	Development rights/FSI transferred on or before 31-3-2019
<p>Value of service of transfer of development rights or FSI to promoter against consideration in form of residential or commercial apartments</p>	<p>Value of similar apartments charged by promoter from independent buyers nearest to the date on which development rights 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 section 15 of CGST Act, which is legally impermissible.</p>	<p>Even earlier, as per CBI&C Instruction No. 354/311/2015-TRU dated 20-1-2016, the value of similar flats was to be considered.</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>Value of portion of residential or commercial apartments remaining un-booked on date of issuance of completion certificate or first occupation</p>	<p>Value of similar apartments nearest to date of issuance of completion certificate 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>Not applicable 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>Time when liability of promoter to pay GST under reverse charge on transfer of development rights or FSI or long term lease relating to unsold residential apartments as on date of completion certificate</p>	<p>Date of completion certificate 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>Not applicable</p>

GST IMPLICATIONS ON 'SALE OF DEVELOPED PLOTS'

CA YASHWANT J. KASAR



Background:

- Schedule III of CGST Act/ State GST Act states that the sale of land and, subject to clause (b) of paragraph 5 of Schedule II, sale of building shall be treated neither as a supply of goods nor a supply of services and thereby GST is not leviable on the sale of land.
- GST law has got this issue in legacy from service tax regime about the Sale of land after the development of land* into plots / Sale of plotted land and has been debated a lot whether the development activities would be subject to GST or not in such a case.
- Development of land consists of leveling, road construction, drainage, electricity, water line, demarcation of plots, laying the underground cables, fencing etc.
- This issue was also debated before **Gujarat Authority for Advance Ruling** in the case of Shree Dipesh Anil Kumar Naik where it is held that sale of developed plot is not equivalent to sale of land a treated as construction services under para 5(b) of Schedule II of CGST Act/Gujarat GST Act.
- Post this advance ruling, the department aggressively started to issue the show cause notices in various corners of the country by alleging that the sale of the developed plot is subject to GST.
- GST Council took up this matter to provide the clarity that the sale of land after leveling, laying down of drainage lines etc. is the sale of land and does not attract GST.

CIRCULAR NO. 177/09/2022-TRU [CBIC-190354/176/2022-TRU], DATED 3-8-2022

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

- Representation has been received requesting for clarification regarding applicability of GST on sale of land after levelling, laying down of drainage lines etc.
- 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.
- 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.
- 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.

OBSERVATIONS

Policymakers are expected to clarify by bifurcating the subject matter for various types of models including **own project, JDA, and JV and Partnership models** separately.

It may be noted that the issue of sale of land after the development of land into plots / Sale of plotted land under JDA has been held chargeable for the construction services (based on the facts) by the **Karnataka Authority for Advance Ruling in the case of MaarqSpaces Pvt. Ltd. and Madhya Pradesh Authority for Advance Ruling in the case of Vidit Builders.**

IMPACT

- Those who have paid the GST on the said transaction will be entitled to get the refund u/s 54 of CGST Act/Respective State GST Act. In my view, the same shall not be treated as a payment of tax, and thereby the limitation period mentioned as 2 years from the relevant date for applying for the refund u/s 54(1) shall also not be applicable in such cases.
- This issue should be looked into as per the facts and nothing can be concluded blindly in this manner as if everything in the context of the sale of a developed plot is out of the net of GST.
- Needless to state the contractor charging for supplying the services (pure labour services/ works contract services, as the case may be) of the development of the land will be subject to GST and the person selling the developed plot shall not be entitled to ITC in such cases.
- Sale of the developed plot being kept aside from the purview of GST as per above will carry the implication for reversal of common credit as per section 17(2) and section 17(3) read with rule 42 and rule 43 for the registered person who is engaged in the taxable supply.

SOURCE CREDITS

- GST Department Website
- Taxmann Database
- Self Research Notes
- Social Media Interactions and Knowledge Sharing

THANK YOU !



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