All India Chartered Accountants Society

9th Intensive Workshop on GST

Saturday, 4th July, 2026

Presentation on

Real Estate & Works Contract Under GST

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Mandate for Deliberation

Issues in Real Estate & Works Contract Industry under GST

- Complex Tripartite Transactions (JV / Collaboration / Revenue Sharing / Area Sharing) – Taxability in hands of each counterparty, ITC Eligibility and Time of Supply Issues
- Taxation of land-linked transactions
- Taxability of Transferable Development Rights (TDRs)
- Valuation Disputes,
- The Commercial vs. Residential Bifurcation
- Valuation & Land Abatement Discrepancies
- RCM on Procurement from Unregistered Vendors
- Cancellations of Booking and reversal of GST on Time-Barred Outward Supply through Credit Note
- Input Tax Credit Restrictions and Reversals, Judicial Battles on Completeness
- Varying Departmental Positions across Jurisdictions.
- Important related Circulars, Notifications, AARs, High Court and Supreme Court Rulings

Applicability of GST on Real Estate Transaction and/ or Works Contract

- ***CHAPTER III of CGST Act, 2017***
- **LEVY AND COLLECTION OF TAX**
- **Scope of supply .**

S. 7(1) For the purposes of this Act, the expression "supply" includes—

(*a*) all forms of supply of goods or services or both such as sale, transfer, barter, exchange, licence, rental, lease or disposal made or agreed to be made for a consideration by a person in the course or furtherance of business;

[(1A) Where certain activities or transactions constitute a supply in accordance with the provisions of sub-section (1), they shall be treated either as supply of goods or supply of services as referred to in Schedule II.]

Article 366(29A)(b)

(29A) "tax on the sale or purchase of goods" includes--

(**b)a tax on the transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract;**

- A deemed sale of goods under Article 366(29A) of Constitution of India. [As inserted by 46th Amendment to Constitution in 1982].

Works Contract under GST

Section 2 (119) of CGST Act, 2017 :

- “works contract” **means** a contract for:
    1. building,
    2. construction,
    3. fabrication,
    4. completion,
    5. erection,
    6. installation,
    7. fitting out,
    8. improvement,
    9. modification,
    10. repair,
    11. maintenance,
    12. renovation,
    13. alteration or
    14. 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

What is 'works contract'

- Works contract is essentially and inherently a contract of service, irrespective of legal fiction created by Article 366(29A) of Constitution of India - *Larsen and Toubro Ltd.* v. *CST* (2015) 318 ELT 633 (CESTAT LB 3 v. 2 decision)

Immovable Property

- Not defined in CGST Act, 2017
- **General Clauses Act, 1897, Sec 2(26)** “immovable property” shall include:

- o land,
- o benefits to arise out of land, and
- o things attached to the earth, or permanently fastened to anything attached to the earth;

Entry No. 49 of List II of Seventh Schedule to Constitution, 'taxes on lands and buildings' is a State subject

What Activities /Transactions related to immovable property are not covered under GST

- SCHEDULE III of CGST Act, 2017
- [*See* section 7]
- ACTIVITIES OR TRANSACTIONS WHICH SHALL BE TREATED NEITHER AS A SUPPLY OF GOODS NOR A SUPPLY OF SERVICES

5. Sale of land and, subject to clause (*b*) of paragraph 5 of Schedule II, sale of building.

When Sale of Building is covered under GST

Schedule II clause 5(b) of CGST Act:

- **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.

Above activities are "Supply of Services" by virtue of S.7(1A) read with Clause 5 of Schedule II

“Competent Authority” & “Construction”

Explanation Schedule II clause 5(b) of CGST Act:

(1) “Competent Authority” means the Government or any authority authorised to issue completion certificate, or where such certificate not required:

   (1) An Architect
   (2) A Chartered Engineer
   (3) A Licensed Surveyor

(2) “Construction includes:

additions, alterations, replacements or remodeling of any existing structure

First Occupation

- 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'.

Real Estate v. Works Contract

- Real Estate Projects are basically a type of works contract.

- Hon'ble Supreme Court in L&T (LB) [2013]case has already held that whenever there is a sale/ booking of under construction complex or building intended for sale to a buyer, wholly or partly, except where the entire consideration has been received after completion of the complex, it is a works contract undertaken by builder/ developer for such intended buyers.

Real Estate Transaction/ Project or Works Contract is a Service under GST

- Clause 5(a) – Renting of Immovable Property
- Clause 5(b) – Construction of complex etc., &
- Clause 6(a) - Works Contract [Sec. 2(119)]

of **Schedule II of CGST Act, 2017** –

create a deeming fiction that,

these three are supply of service

“Works Contract” is a “Composite Supply” [Sch. II- Clause 6] shall be treated as Supply of Service

- As per Section 2(30) “Composite Supply” means
  - a supply made by a taxable person to a recipient
  - consisting of two or more taxable supplies of goods or services or both, or any combination thereof,
  - which are naturally bundled and
  - supplied in conjunction with each other in ordinary course of business,
  - one of which is a principal supply

Tax liability on Composite Supply

Section 8 (a) of CGST Act, 2017:

a composite supply

comprising two or more supplies, one of which is a principal supply,

shall be treated as a supply of such principal supply

Moveable vs. Immovable Property

- Mobility Test
- Marketability Test
- Functionality Test

Mobility Test

Movable Property:

- **Rule:** Can be freely transported from one location to another.
- **Applicability:** Items resting on the land by their own weight (without being anchored to confer a permanent benefit to the land) are typically movable.

Marketability Test

- **Rule:** To be considered "goods”, a product must be capable of being brought to the market and bought or sold.
- **Application:** If a machine or structure is erected on-site and cannot be dismantled and sold in the market in the same form, it is **immovable property**.
- **The Scrap Dilemma:** If dismantling an assembly reduces it to mere scrap metal or debris, it is considered immovable. If it can be cleanly dismantled and reassembled elsewhere as a functional machine, it remains **movable**

Functionality/ "Wobble-Free" Test

- **The Rule:** This looks at *why* the item was attached to the earth.
- **Application:** In the landmark *CCE v. Solid and Correct Engineering Works* case, the Supreme Court of India ruled that if heavy machinery is bolted or cemented to a foundation **solely to make it stable and prevent vibration (wobble-free operation)**, it is **movable property**. The attachment is for the benefit of the machine itself, not for the permanent enjoyment of the land

Movable vs. Immovable Property

In *Municipal Corporation of Greater Bombay* v. *Indian Oil Corporation* AIR 1991 SC 686 = 1991 Supp (2) SCC 18, it was held that

- if the chattel is movable to another place in the same position (condition?), it is movable property.
- If it has to be dismantled and re-erected at later place, it is attached to earth and is immovable property –

followed in *Triveni Engineering* v. *CCE* 2000 AIR SCW 3144 = 40 RLT 1 = 120 ELT 273 (SC), where it was observed,

- 'The marketability test requires that the goods as such should be in a position to be taken to market and sold. If they have to be separated, the test is not satisfied'.

Works Contract

- In *Precision Automation and Robotics India Ltd. In re* (2018) 69 GST 713 = 97 taxmann.com 319 (AAR-Maharashtra), it has been held that **supply and installation of 'car parking system' qualifies as immovable property and hence is works contract**, as the car parking system, once erected, cannot be removed without dismantling.

Works Contract

- Contract on turnkey basis for laying of Pipes is a works contract –

National Organic Chemicals Industries Ltd. v. *State of Maharashtra* (2012) 54 VST 271 (Bom HC DB).

Works Contract

- Erection of towers and testing and commissioning of transmission lines and setting up sub-station is a works contract - *EMC Ltd. In re* (2018) 67 GST 580 = 93 taxmann.com 200 (AAR - West Bengal).

- In *Skipper Ltd., In re* [2018] 100 taxmann.com 90 (AAR-West Bengal), it was held that **contract for manufacture, supply, erection and commissioning of transmission towers is works contract**. It cannot be split into contract of supply of material, transportation, insurance and supply of services

Indivisibility vis a vis Works Contract

- In *Eiffel Hills & Dales Developers (P.) Ltd., In re* [2018] 100 taxmann.com 314 (AAR - Maharashtra) also, it was held that **when all activities to be undertaken by applicant pursuant to agreement are integral parts of performance of contractual obligation by applicant, the Acts to be undertaken by applicant cannot be divided into two parts**, namely supply of goods and services which are in fact inseparable -

Erection, fitting and commissioning of data center

- - Erection, fitting and commissioning of data center is works contract and taxable @ 18% - *Hewlett Packard Enterprise India P Ltd* (2020) 77 GST 453 = 111 taxmann.com 456 (AAR-Karn).

CCTV based surveillance project

- \- Comprehensive CCTV based City Surveillance Project is a composite supply of works contract - *Allied Digital Services Ltd. In re* (2019) 72 GST 755 = 103 taxmann.com 123 (AAR-Maharashtra).

Conflicting View on Works Contract

- **supply, erection, installation and assembly of air conditioning plant is a composite supply liable to tax @ 28%** (as applicable to air conditioner), as **principal supply is air conditioner.** It is not 'works contract' service and hence not eligible for 18% GST.

[*Nikhil Comforts, In re* (2019) 75 GST 305 = 107 taxmann.com 233 (AAR-Maharashtra)]

Conflicting View on Works Contract

- **supply of submersible pump sets and installation, electrification and energisation of same** to Government bodies is composite supply. **Principal supply is supply of goods**. It is not a works contract as not related to immovable property and is not a works contract.

[In *United Engineering Works In re* (2019) 75 GST 756 = 108 taxmann.com 104 (AAR-Karnataka)]

GST Rate on Works Contract service of renewable energy plant and equipment

- **Renewable energy devises and parts for their manufacture falling under chapters 84, 85 or 94 are subject to GST @ 12%** [IGST 12% or CGST 6% + SGST/UTGST 6%] as per Sr No. 201A of Schedule II of Notification No. 1/2017-CT (Rate) and 1/2017-IT (Rate) both dated 28-7-2017 as inserted w.e.f. 1-10-2021.
- However, **if composite contract of supply of goods plus service of construction, installation, commissioning is executed, it becomes works contract and GST rate becomes 18% on whole contract**. Thus, basic purpose of promoting renewable energy sources gets defeated.
- **Hence, it is now provided w.e.f. 1-10-2021** that in case of such composite contract,
  - **value of goods will be taken as 70% (attracting 12% GST) and**
  - **value of services 30% (attracting 18% GST).**

GST Rates on Works Contract

S. No.	Works Contract Related To	Rate	Goods	Service
	General Rate	18%	NA	NA
(a)	*Bio-gas plant;*		70%	30%
(b)	*Solar power based devices;*		70%	30%
(c)	*Solar power generator;*		70%	30%
(d)	*Wind mills, Wind Operated Electricity Generator (WOEG);*		70%	30%
(e)	*Waste to energy plants/devices;*		70%	30%
(f)	*Solar lantern/solar lamp;*		70%	30%
(g)	*Ocean waves/tidal waves energy devices/plants;*		70%	30%
(h)	*Photo voltaic cells, whether or not assembled in modules or made up into panels.*		70%	30%
	Sr. No. 201A (a) to (h) of Schedule-II of NN-1/2017-CT(Rate) Rate: 12%			

Concessional Rate for Infrastructure related Works Contract

S.No.	Nature of Works Contract	Up to 18.07.2022	After 18.07.2022
1.	**historical monuments, canal, water supply to Government or local authority or Govt. Authority**	12	18
2.	**roads, bridges, certain housing projects, pollution control plant, structure for funeral or burial**	12	18
3.	**railways, low cost housing, single residential units, post harvest storage infrastructure**	12	18
4.	**oil and gas exploration and production (E&P)** in the offshore area beyond 12 nautical miles of appropriate base line	12	12
5.	**pure labour contracts** of construction, erection, commissioning, or installation of original works pertaining to a single residential unit otherwise than as a part of a residential complex	Exempt	Exempt
6.	**Pure labour contracts** of …. for All (Urban) Mission or Pradhan Mantri Awas Yojan	Exempt	Exempt

Blocked Credit Sec. 17(5)

S. 17(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:

(*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 and machinery*])** on his own account including when such goods or services or both are used in the course or furtherance of business.

Blocked Credit - Explanations

- *[Explanation 1.]*— **For the purposes of clauses (*c*) and (*d*)***,* the expression **"construction"** includes re-construction, renovation, additions or alterations or repairs, to the extent of capitalisation, to the said immovable property;
- [Explanation 2.— ***For the purposes of clause (*****d*****),*** *it is hereby clarified that notwithstanding anything to the contrary contained in any judgment, decree or order of any court, tribunal, or other authority, any reference to* ***"plant or machinery"*** *shall be construed and shall always be deemed to have been construed as a reference to* ***"plant and machinery"*****.]**

Explanation to Sec. 17

Explanation.— **For the purposes of this Chapter and Chapter VI**, 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.

HIGH COURT OF ORISSA
Safari Retreats (P.) Ltd. *v. CCCGST*
[2019] 105 taxmann.com 324 (Orissa)

- Petitioner had constructed a shopping mall in which huge quantities of materials were purchased and CGST and OGST was paid on such purchases –
- Petitioner let out different units of said mall to different persons on rental basis –
- Petitioner claimed benefit of input tax credit on tax paid by it on purchases of input materials and services which had been used in construction of shopping mall for set off, against GST payable on rent received from tenants –
- Authorities denied benefit of ITC in view of section 17(5)(d) –

Q. Whether since petitioner had not sold shops in mall but had let out same, petitioner was not liable to pay huge amount of GST on rent received and was entitled to utilise input credit tax charged on purchases made in construction –

Held, yes [Paras 20 and 21] [In favour of assessee]

SUPREME COURT OF INDIA
CCCGST *v.* Safari Retreats (P.) Ltd.
[2024] 167 taxmann.com 73 (SC)

Q 1. Input tax credit - Apportionment of credit and blocked credit - Constitutional validity of clauses (c) and (d) of section 17(5) - Reading down –

- Right of ITC is a creation of a statute, Legislature can always carve out exceptions to entitlement of ITC –
- No one can claim ITC as a matter of right unless it is expressly provided in statute –
- Immovable property for purpose of GST constitute a class by themselves –
- Clauses (c) and (d) of section 17(5) apply only to this class of cases –
- Clauses (c) and (d) of section 17(5) are constitutionally valid –
- Plain interpretation of these clauses does not lead to any ambiguity;

hence, question of reading down these provisions does not arise [Section 17 of Central Goods and Services Tax Act, 2017] [Paras 64, 65] [In favour of revenue]

SUPREME COURT OF INDIA
CCCGST *v.* Safari Retreats (P.) Ltd.
[2024] 167 taxmann.com 73 (SC)

Input tax credit - Apportionment of credit and blocked credit - Building vis-a-vis plant –

Q 2: whether a mall, warehouse or any building other than a hotel or a cinema theatre can be classified as a plant within meaning of expression 'plant or machinery' used in section 17(5)(d) is a factual question which has to be determined keeping in mind business of registered person and role that building plays in said business –

Held:

If construction of a building was essential for carrying out activity of supplying services, building could be held to be a plant and then, it is taken out of exception carved out by clause (d) of section 17(5) to sub-section (1) of section 16 –

Hence, **to decide** whether a building is a 'plant' for purposes of clause (d) of section 17(5) **functionality test will have to be applied in each case, on facts** [Section 17 of Central Goods and Services Tax Act, 2017] [Paras 64, 65 and 67] [**Matter remanded**]

SUPREME COURT OF INDIA
CCCGST *v.* Safari Retreats (P.) Ltd.
[2024] 174 taxmann.com 894 (SC)- Review Petition

- Supreme Court vide impugned order held that question whether a mall, warehouse or any building other than a hotel or a cinema theatre can be classified as a plant within meaning of expression 'plant or machinery' used in section 17(5)(d) is a factual question which has to be determined keeping in mind business of registered person and role that building plays in said business –
- Further, If construction of a building was essential for carrying out activity of supplying services, building could be held to be a plant and then, it is taken out of exception carved out by clause (d) of section 17(5) to sub-section (1) of section 16 –
- Hence, to decide whether a building is a 'plant' for purposes of clause (d) of section 17(5) **functionality test** will have to be applied in each case, on facts –
- **Revenue filed instant review petition –**

HELD : There being no error apparent on record, review petition was to be dismissed [Section 17 of Central Goods and Services Tax Act, 2017/Odisha Goods and Services Tax Act, 2017] [Para 2] [In favour of assessee]

Types of contract under Real Estate/ Works Contract

- Construction Contract without material (not a WC)
- Construction Contract with material (WC)
- Construction Contracts for Government
- Development of Residential Real Estate Project
- Development of Real Estate Project
- Development of Commercial Complex
- Development of Residential cum Commercial Complex

Tax Rate on Real Estate/ Works Contract

- Tax Rates on Real Estate, Construction Service and Works Contract are given as per

Serial No. 3(i) to 3(xii) of Notification No. 11/2017 – Central tax (Rate)

Rate of Tax in RREP

S. No.	Nature of Supply	Old Rate	New rate
3(i)	Construction of **Affordable Residential Apartment in RREP** commences on or after 01.04.2019 or an ongoing project (not opted out)	12% With ITC	**1.5 %** **No ITC**
3(ia)	Construction of **Other Than affordable Residential Apartment in RREP** commences on or after 01.04.2019 or an ongoing project (not opted out)	18% With ITC	**7.5 %** **No ITC**
3(ib)	Construction of **Commercial Apartments (shops, offices godowns etc.) in RREP** commences on or after 01.04.2019 or an ongoing project (not opted out)	18% With ITC	**7.5 %** **No ITC**
Provisions of paragraph 2 of the notification shall apply for valuation of these services			

Rate of Tax in REP & Others

S. No.	Nature of Supply	Old Rate	New rate
3(ic)	Construction of **Affordable Residential Apartment in REP** commences on or after 01.04.2019 or an ongoing project (not opted out)	12% With ITC	**1.5 % No ITC**
3(id)	Construction of **Other Than affordable Residential Apartment in REP** commences on or after 01.04.2019 or an ongoing project (not opted out)	18% With ITC	**7.5 % No ITC**
3(ie)	Construction of an **Apartment in ongoing project under (iv)(b),(c),(d)(da)(db), (v)(b), (c),(d),(da) & (vi)(c) of Sr. No. 3 (where promoter exercised option**)	12% With ITC	**12% With ITC**
3(if)	Construction of Complex etc. including: **Commercial Apartments (shops, offices godowns etc.) in REP, or Residential Apartment in ongoing project** (where promoter exercised option)	18% With ITC	**18 % With ITC**

Provisions of paragraph 2 of the notification shall apply for valuation of these services

Project

- The term "project" shall mean a Real Estate Project or a Residential Real Estate Project [RERA] - clause (*xv*) 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.

Real Estate Project under RERA

- **"Real estate project"** means
  - the development of a building or a building consisting of apartments, or
  - converting an existing building or a part thereof into apartments, or
  - the development of land into plots or apartment, as the case may be,

  for the purpose of selling all or some of the said apartments or plots or building, as the case may be,

  and includes the common areas, the development works, all improvements and structures thereon, and all easement, rights and appurtenances belonging thereto;

Affordable Residential Apartment

"affordable residential apartment" shall mean, -

- (a) a residential apartment in a project which commences on or after 1st April, 2019, or in an ongoing project in respect of which the promoter has not exercised option in the prescribed form to pay central tax on construction of apartments at the rates as specified for item (ie) or (if) against serial number 3, as the case may be,
  - having carpet area not exceeding 60 square meter in metropolitan cities or
  - 90 square meter in cities or towns other than metropolitan cities and
  - the gross amount charged is not more than Rs. 45 Lakhs.

Affordable Residential Apartment

(b)an apartment being constructed in an ongoing project:

- under any of the schemes specified in sub-item (b), sub-item (c), sub-item (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 above,
- in respect of which the promoter has not exercised option to pay central tax on construction of apartments at the rates as specified for item (ie) or (if) against serial number 3, as the case may be.

Metropolitan Cities

Metropolitan cities are

- Bengaluru,
- Chennai,
- Delhi NCR (limited to Delhi, Noida, Greater Noida, Ghaziabad, Gurgaon, Faridabad),
- Hyderabad,
- Kolkata and
- Mumbai (whole of MMR)

with their respective geographical limits prescribed by an order issued by the Central or State Government in this regard;

Gross amount charged meaning

Gross amount shall be the sum total of; -

- Consideration charged for the services specified at item (i) and (ic) in column (3) against sl. No. 3 in the Table;
- Amount charged for the transfer of land or undivided share of land, as the case may be including by way of lease or sub lease; and
- Any other amount charged by the promoter from the buyer of the apartment including preferential location charges, development charges, parking charges, common facility charges etc.

“Real Estate Project (REP)"

- **"Real Estate Project (REP)"** shall have the same meaning as assigned to it in in clause (*zn*) of section 2 of the Real Estate (Regulation and Development) Act, 2016 (16 of 2016);

- **"Residential Real Estate Project (RREP)"** shall mean a REP in which the carpet area of the commercial apartments is not more than 15 per cent of the total carpet area of all the apartments in the REP;

“Ongoing Project"

“ongoing project" shall mean a project which meets all the following conditions, namely-

- commencement certificate has been issued on or before 31st March, 2019,
- construction of the project has started on or before 31st March, 2019:—
- completion certificate has not been issued or first occupation of the project has not taken place on or before the 31st March, 2019;
- apartments being constructed under the project have been, partly or wholly, booked on or before the 31st March, 2019.

Meaning of Apartment Booked on or before 31.03.2019

- Part of supply of construction of which has time of supply on or before 31.03.2019

- At least one installment has been credited to the bank account on or before 31.03.2019

- An allotment letter or sale agreement or any other similar document evidencing booking of apartment has issued on or before 31.03.2019

Conditions for New GST Rates of 1.5% & 7.5% on Real Estate

- GST has to be paid in Cash.

- No ITC has been taken except as permitted as per Annexure I (REP) & Annexure II (RREP)

- Payment of ITC attributable to construction for which TOS is on or after 01.04.2019 through Electronic Credit or Cash ledger. [Calculated as per Annexure I (REP) & Annexure II (RREP)]

Conditions for New GST Rates of 1.5% & 7.5% on Real Estate

- 80% of value of Inputs & Input Services shall be received from registered supplier, excluding
  - Grant of development rights
  - Long term lease of land on upfront premium/salami
  - Grant of FSI
  - Electricity
  - High speed diesel, motor sprit, natural gas
- In case of short fall in 80% condition Tax under RCM shall be payable on short fall @ 18%, for the financial year.
- Cement if not receive from registered person tax shall be paid monthly under RCM @ rate applicable on cement.
- Project wise account of inward supplies from registered & unregistered supplier shall be maintained & reported
- ITC not availed shall be reported as ineligible in GSTR 3B

Valuation for Applying GST Rates

- When the total amount charged for sale of residential or commercial apartment includes value of land, the tax is payable on total amount charged less value of land.
- Value of land or undivided share of land shall be deemed to be 1/3rd of total amount charged.

[Para 2 of NN 11/2017-CT(Rate) dated 28.06.2017]

Validity of Deeming Value of Land

- No option to Promoter to deduct "actual value of land involved"

[FAQ (Part-I) No. 36 issued by CBI&C vide circular no. F No. 354/32/2019-TRU dated 07.05.2019]

- Two separate agreements one for sale of land and another for construction will not change the valuations.

[Kara Property Ventures LLP. In re (2019) 73 GST 289 = 103 taxmann.com 279 (AAR – TN)]

Deeming Land Value Only

- Land value as per deeming provision is required to be taken even if actual land value is available - *Karma Buildcon,* In re [2020] 119 taxmann.com 299 (AAR - Gujarat)- view upheld in *Karma Buildcon, In re* [2022] 133 taxmann.com 306 = 89 GST 400 (AAAR - Gujarat)..

Actual Land Value may be taken

- In *Avigna Properties* v. *State Tax Officer* (2023) 151 taxmann.com 422 = 101 GST 236 (Mad HC), it has been held that if assessee can supply actual amount of consideration received for construction services and value of land, valuation of service can be done on actual value basis after deducting actual value of land.

Mandatory Deemed Land Value is Ultra Vires to GST Acts.

- In *Munjaal Manishbhai Bhatt* v. *Union of India* [2022] 138 taxmann.com 117 (Gujarat HC DB), the Gujarat High Court has declared the mandatory fixed rate of deduction of 1/3rd of total consideration towards the value of land *ultra vires* the provisions of the GST Acts. It is also held that the application of such mandatory uniform rate of deduction is discriminatory, arbitrary and violative of Article 14 of the Constitution of India [Really, a very well reasoned judgment and worth reading in full].

Rate of GST on PLC/ EDC/ Parking Etc.

- Separate charge for:
  - PLC
  - Customized Modifications
  - Maintenance during construction
  - Parking Space
  - EDC / IDC

These are naturally bundled services and shall be eligible for 1/3rd rebate in valuation.

[FAQ (Part-II) No. 4 issued by CBI&C vide circular no. F No. 354/32/2019-TRU dated 14.05.2019]

- **Contrary decision in case PLC of AAAR –WB** – PLC is a separate supply of services charged at the option of customer and is taxable at 18%.

[Bengal Peerless Housing Development Company Ltd., In re [2019] 110 taxmann.com 34 (AAAR-WB)]

- Club Membership shall be treated as separate supply taxable at 18%

Sale of Developed Plots / Land

CIRCULAR NO. 177/09/2022-TRU [CBIC-190354/176/2022-TRU / 03.08.2022]

Sr. No.14. Whether sale of land after levelling, laying down of drainage lines etc., is taxable under GST

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

Development of land into Plots under JDA

- Activity of development of land into plots is a supply of service by developer to the landowner.

[Maarq Spaces (P.) Ltd., In re [2020] 116 taxmann.com 702 (AAR-Karnataka)]

Sale of Apartment before completion/ occupation by Purchaser

Not liable to GST because:

- Not supplying construction services
- Not in the business of sale of apartments

Partial Completion/ Occupancy Certificate

- First occupancy in such cases shall not be considered to have taken place
- If partial completion/ occupancy taken prior to 31.03.2019, the project will be treated as an ongoing project.
- Further bookings in projects with partial completion/ occupancy will attract GST untill full completion or occupancy certificate is received.

Refund of GST on Cancellation of Booking

- Promoter can issue Credit Note in terms of provisions of section 34 of CGST Act, 2017,
- Refund the Amount with Tax,
- Adjust the Tax amount so refunded with other GST Liability even arising @ 1%/ 5% .

[FAQ (Part I) No. 20 issued by CBI&C circular F. No. 354/32/2019-TRU dated 07.05.2019]

Rate of GST on Services of Contractor or Sub-contractor

Construction of	Rate of GST on Contractor/ Sub-contractor
Commercial Apartment	18%
Residential Apartment (other than affordable)	18%
Affordable Apartment	12%
[FAQ (Part I) No. 2 issued by CBI&C circular F. No. 354/32/2019-TRU dated 07.05.2019]	

TDR/ FSI & JDA/ Collaboration

Taxability under GST Laws

Transferable Development Rights (TDR)

'Transferable Development Rights' (TDR) means certificates issued in respect of category of land acquired for public purposes either by the CG/ SG in consideration of surrender of land by the owner without monetary compensation, which are transferable in part or whole –

para 2.1.46 of Consolidated FDI Policy Circular dated 28-8-2017.

Transferable Development Rights (TDR)

- TDR is granted by a local authority in pursuance of Development Control Regulations. Owner of land relinquishes or surrenders some area to local authority. In lieu of that area, Government allows construction of additional built-up area. The land owner can use extra built-up area either himself or transfer it to another for agreed some of consideration.
- Thus, TDR is right given by authority to construct/develop land upto certain permissible Floor Space Index (FSI) within permissible limits of Development Control Regulations.

Transferable Development Rights (TDR)

- Transferable Development Rights (TDR) allow the owner of TDR additional construction area [FSI].
- The owner of Transferable Development Rights is permitted to transfer these development rights to third person for consideration. The third person purchasing these transferable development rights (TDR) is allowed additional FSI to construct apartments using this TDR.
- In the notifications issued under GST, the term used is 'transfer of Floor Space Index (FSI) (including additional FSI)'. This is similar to transfer of Transferable Development Rights.
- Supply of TDR is not sale of land. It is also not actionable claim. Such supply of TDR is subject to GST.

TDR is different from Transfer of Development Rights

- In TDR, Government (local authority) gives an instrument to land owner (for surrender of his right) to either use it or sale it.
- In Transfer of Development Rights, the owner of land allows promoter to develop the land and construct apartments in his land. This is different from Transferable Development Rights.

TDR (Transferable Development Right) is subject to GST

Vilas Chandanmal Gandhi, In re [2020] 114 taxmann.com 239 (AAR - Maharashtra),

- GST is leviable on amount received on sale of Transferable Development Rights ('TDR')/Floor Space Index ('FSI') for surrendering joint rights in terms of Development Control Regulations granted.

TDR (Transferable Development Right) is subject to GST

- **affirmed** in *Vilas Chandanmal Gandhi,* In re [2020] 120 taxmann.com 83 (AAAR - Maharashtra)* *Maarq Spaces P Ltd.,* In re (2020) 78 GST 25 = 111 taxmann.com 368 (AAR - Karnataka). –
- **confirmed** in appeal in *Maarq Spaces P Ltd. In re* (2020) 81 GST 192 = 116 taxmann.com 702 (AAAR-Karnataka) * *Prahitha Construction (P.) Ltd.* v. *Union of India* [2024] 159 taxmann.com 437 = 83 GSTL 129 = 15 Centax 295 (Telangana HC DB).
- In *Prahitha Constructions (P.) Ltd. v. Union of India* [2024] 162 taxmann.com 640 (SC), **notice has been issued to Union of India, but no stay has been granted.**

Prahitha Constructions (P.) Ltd. v. Union of India [2024] 162 taxmann.com 640 (SC),

Transfer of development rights of land - Transfer by owners to developer

- Petitioner had agreed for development of property belonging to owners, by virtue of Joint Development Agreement by constructing three towers of annexed building in first phase with modern, common amenities and facilities –
- Petitioner filed a writ petition before High Court questioning
- whether transfer of development rights was in nature of transfer of immovable property or nature of services would fall within scope of GST? –
- Further, whether transfer of development rights could be safely brought within purview of an outright sale of land? –
- **High Court held that no right, title and ownership was created in favour of petitioner - Thus, transfer of development rights to petitioner was amenable to GST and could not be brought within purview of Entry No. 5 of Schedule-III of GST Act –**
- Further, High Court held that Notification No. 4 of 2018-Central Tax (Rate) imposing GST on transfer of development rights of land by land owners under a Joint Development Agreement **was not ultra vires –**
- Petitioner challenged aforesaid ruling before Supreme Court –

Held: Supreme Court had not stayed operation of impugned judgment/order - Therefore, taxes would have to be paid - Further, notice was issued [Section 7 and section 9 of Central Goods and Services Tax Act, 2017/Telangana Goods and Services Tax Act, 2017] [Paras 1-3] [In favour of assessee]

Shyamaraju and Co (India) (P.) Ltd. *v.* Deputy CCT(Audit) Bangalore*

- Once on basis of real estate joint development agreement, **tax was collected from developer on entire property including shares of both landowner and developer, tax could not again be demanded from landowner** taking plea that joint development agreement was unregistered and hence, same could not be made basis to exempt land owner from payment of GST

[2025] 177 taxmann.com 128 (Karnataka)/[2025] 101 GSTL 244 (Karnataka)[18-07-2025]

Important Provisions

- **NN-11/2017-CT(R) Sr. No. 16(*ii*):** Supply of land or undivided share of land by way of lease or sub-lease where such supply is a part of composite supply of construction of flats, etc. specified in the entry in column (3), against serial number 3, at items (*i*), [4][(*ia*), (*ib*), (*ic*), (*id*), (*ie*) and (*if*)] : GST @NIL

- **NN-11/2017-CT(R) Sr. No. 16 (*iii*):** Real estate services other than (*i*) and (*ii*) above: *GST@ 18%*

Important Provision

NN-11/2017-CT(R) Sr. No. 39:

- Supply of 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)
- by an unregistered person
- to a promoter for construction of a project
- on which tax is payable by the recipient of the services under sub-section (4) of section 9 of the Central Goods and Services Tax Act, 2017 [i.e. RCM]:
- GST@9%

Developer to pay tax on Construction Service to Registered Landlord
Area Sharing Arrangement

NN-11/2017-CT(R) Sr. No. 3(i)(ia)(ib)(ic)(id) – Proviso 4:

- where a registered person (landowner - promoter) who transfers development right or FSI (including additional FSI) to a promoter (developer-promoter) against consideration, wholly or partly, in the form of construction of apartments,—
- (*i*) the developer - promoter shall pay tax on supply of construction of apartments to the landowner-promoter, and
- (*ii*) such landowner- promoter shall be eligible for credit of taxes charged from him by the developer promoter towards the supply of construction of apartments by developer-promoter to him, provided the landowner-promoter further supplies such apartments to his buyers before issuance of completion certificate or first occupation, whichever is earlier, and pays tax on the same which is not less than the amount of tax charged from him on construction of such apartments by the developer-promoter.

NN-12/2017-CT(R) Sr. No. 41A:

Exemption

- **Service by way of transfer of development rights (herein refer TDR) or Floor Space Index (FSI) (including additional FSI)** on or after 1st April, 2019 for construction of residential apartments by a promoter in a project, 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.

Condition

- **Provided** that the promoter shall be liable to pay tax at the applicable rate, on reverse charge basis, on such proportion of value of development rights, or FSI (including additional FSI), or both, as is attributable to the residential apartments, which remain un-booked on the date of issuance of completion certificate, or first occupation of the project
- on the date of completion or first occupation of the project, as the case may be, whichever is earlier.

NN-12/2017-CT(R) Sr. No. 41B:

Exemption

- Upfront amount (called as premium, salami, cost, price, development charges or by any other name) payable in respect of service by way of granting of long term lease of thirty years, or more, on or after 1-4-2019, for construction of residential apartments by a promoter in a project, intended for sale to a buyer, wholly or partly,.....

Condition

- **Provided** that the promoter shall be liable to pay tax at the applicable rate, on reverse charge basis, on such proportion of upfront amount (called as premium, salami, cost, price, development charges or by any other name) paid for long term lease of land, as is attributable to the residential apartments, which remain un- booked on the date of issuance of completion certificate, or first occupation

Exemption in respect of residential apartments

In respect TDR/FSI or Upfront amount for Long Term Lease:

- exemption has been granted only to be extent of services of transfer of development rights or FSI or payment of long term lease amounts, relating to residential apartments, where sale is made before completion or occupation (as in that case, GST is payable @ 1%/5% without ITC).

NN-13/2017-CT(R) Sr. No. 5B & 5C

5B: TDR/ FSI

- 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.
- **RCM by Promoter**

5C: Long term lease of land

- 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.
- **RCM by Promoter**

Flow of Services under TDR/FSI Cases

Service	Supplier	Recipient	Tax Liability On	Condition
Transfer of TDR/ FSI	Landlord	Developer	Developer under RCM	If Developer's Portion remain Un-booked
Works Contract (Construction Services)	Landlord	Buyer	Landlord	If booked before completion
Works Contract (Construction Services)	Developer	Buyer	Developer	If booked before completion
Works Contract (Construction Services)	Developer	Landlord	Developer	NIL

GST under Transfer of TDR/FSI

	Case1	Tax On WC to Buyer	Tax on TDR-FSI	Tax on WC to Landlord	RCM NN-13/5B
Flat 1- Developer	Booked	Yes	Exempt	NA	NA
Flat 2- Developer	Booked	Yes	Exempt	NA	NA
Flat 3- Landlord	Booked	Yes – ITC	NA	Yes	NA
Flat 4- Landlord	Booked	Yes – ITC	NA	Yes	NA
Net Impact: Tax is payable on Total Built Up Area [4 Units] - Subject to Valuation					

GST under Transfer of TDR/FSI

	Case-2	Tax On WC to Buyer	Tax on TDR-FSI NN-12/5B	Tax on WC to Landlord	RCM NN-13/5B
Flat 1-Developer	Booked	**Yes**	Exempt	NA	NA
Flat 2-Developer	Un-Booked	NA	**Yes**	NA	Applicable
Flat 3- Landlord	Booked	**Yes – ITC**	NA	**Yes**	NA
Flat 4- Landlord	Un-Booked	NA	NA	**Yes**	NA
Net Impact: Tax is payable on Total Built Up Area [4 Units] - Subject to Valuation					

GST under Transfer of TDR/FSI

	Case-3	Tax On WC to Buyer	Tax on TDR-FSI NN-12/5B	Tax on WC to Landlord	RCM NN-13/5B
Flat 1-Developer	Un-Booked	NA	**Yes**	NA	Applicable
Flat 2-Developer	Un-Booked	NA	**Yes**	NA	Applicable
Flat 3-Landlord	Un-booked	NA	NA	**Yes**	NA
Flat 4-Landlord	Un-Booked	NA	NA	**Yes**	NA
Net Impact: Tax is payable on Total Built Up Area [4 Units] - Subject to Valuation					

Value of Construction Service from Developer to Landlord

NN-11/2017-CT(R) dated 28.06.2017 as amended.

[**2A.** Where a [2][***] 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 above.]

Time of Supply under TDR/FSI Cases

Service	Supplier	Recipient	Time of Supply	Relevant Provision
Transfer of TDR/ FSI	Landlord	Developer	Date of Completion Certificate	Sr. No. 41A & 41B -NN 12/2017
Works Contract (Construction Services)	Landlord	Buyer	On receipt of payment / Invoice	
Works Contract (Construction Services)	Developer	Buyer	On receipt of payment / Invoice	
Works Contract (Construction Services)	Developer	Landlord	Not later than the year of Completion/ Occupancy Certificate	NN 6/2019-CT (Rate) dated 29-3-2019 w.e.f. 2-6-2021

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.

Tripartite JDA-Area Sharing

Particulars	Landowner	Developer	Contractor
Activity/ Service	TDR/ FSI	Investment & Planning Etc.	Works Contract
Sharing	½ Area	½ Area	Cash Consideration
Taxability	on Pre-Booked Area- YES	On Pre-Booked Area -YES	On Works Contract 1.5/ 7.5 %
Taxability	On Un- booked Area - NO	On Un- booked Area - NO	NO
Taxability 2	TDR/ FSI- NO	On TDR/FSI- On Un-booked Area under RCM	NO
ITC	Yes for Tax Paid on WC Services	No	NO
NOTE: For Residential Apartments. No Separate Entity – Principal to Principal Basis			
Disclaimer / Red Flag: Certain issues and modalities are not captured here. Thoroughly Examine the Joint Development Agreement before taking Final Decision			

Tripartite JDA-Area Sharing

Particulars	Landowner	Developer	Contractor
Activity/ Service	TDR/ FSI	Investment & Planning Etc.	Works Contract
Sharing	1/3rd Area	1/3rd Area	1/3rd Area
Taxability 1	on Pre-Booked Area- YES	On Pre-Booked Area -YES	on Pre-Booked Area- YES
Taxability 2	-	-	On Works Contract 1.5/ 7.5 %
Taxability 3	On Un- booked Area - NO	On Un- booked Area - NO	On Un- booked Area - NO
Taxability 4	TDR/ FSI- NO	On TDR/FSI- On Un-booked Area under RCM- YES	On TDR/FSI- On Un-booked Area under RCM- YES
ITC	Yes for Tax Paid on WC Services	NO	NO
NOTE: For Residential Apartments . NOTE: For Residential Apartments. No Separate Entity – Principal to Principal Basis Disclaimer/ Red Flag is Applicable			

Tripartite JDA- Revenue Sharing

Particulars	Landowner	Developer	Contractor
Activity/ Service	TDR/ FSI	Investment & Planning Etc. 100% Sale by Developer	Works Contract
Sharing	$1/3^{rd}$ Revenue	$1/3^{rd}$ Revenue	$1/3^{rd}$ Revenue
Taxability	On Pre- Booked Area - No	On Pre-Booked Area -YES	On Works Contract 1.5/ 7.5 %
Taxability	On Un- booked Area - NO	On Un- booked Area - NO	On Un- booked Area - NO
Taxability 2	TDR/ FSI- NO	On TDR/FSI- On Un-booked Area under RCM- YES	On TDR/FSI- NO
ITC	NO	NO	NO
NOTE: For Residential Apartments. No Separate Entity – Principal to Principal Basis Disclaimer / Red Flag Applicable			

THANK YOU
FOR BEING WITH ME

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