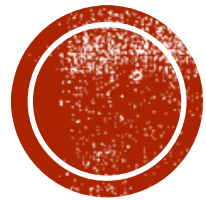


# **CONSTITUTIONAL VALIDITY OF RECENT AMENDMENTS IN REAL ESTATE & IMPLICATIONS ON JDA**

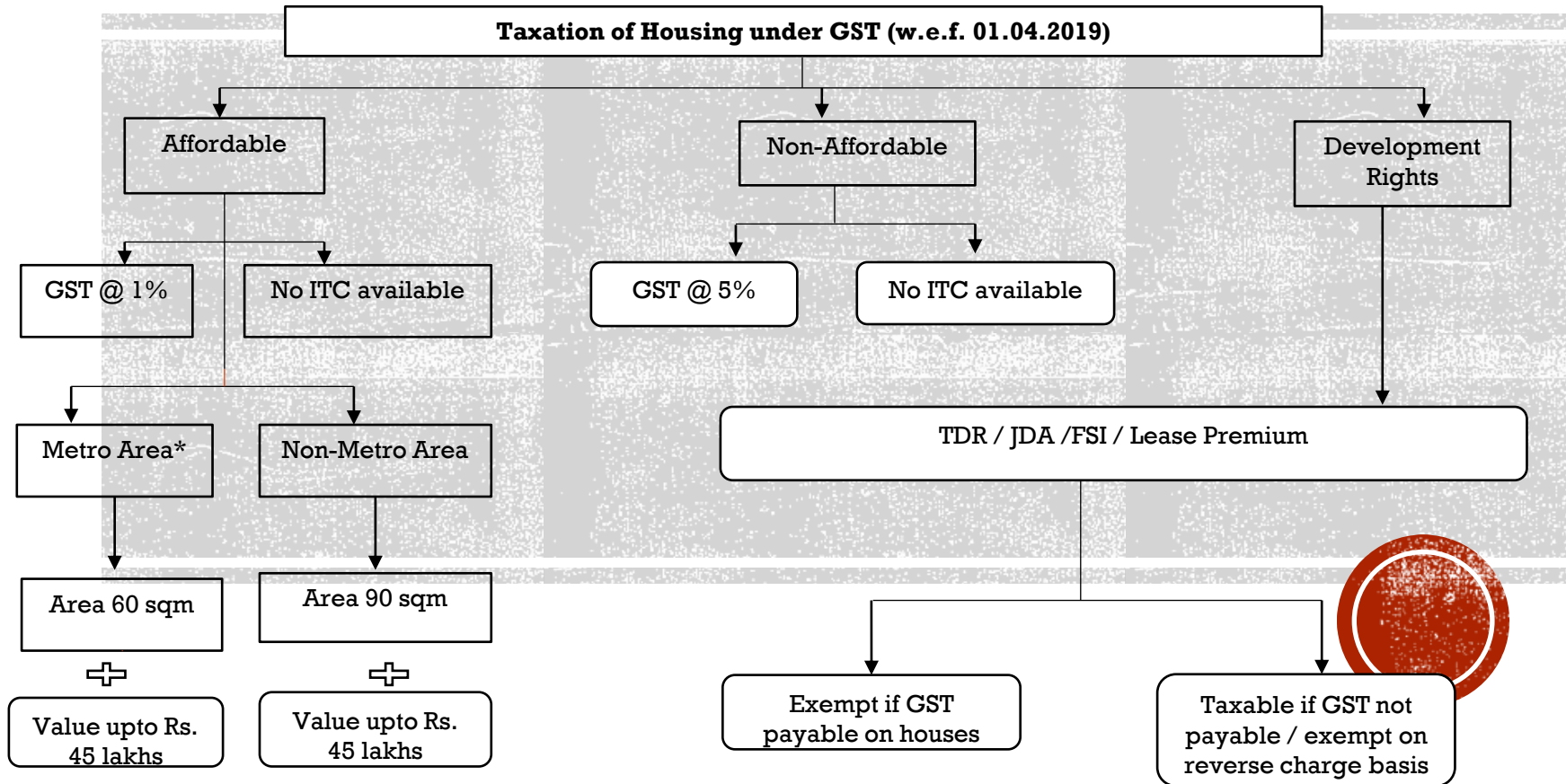


**CA V. RAGHURAMAN,  
ADVOCATE**



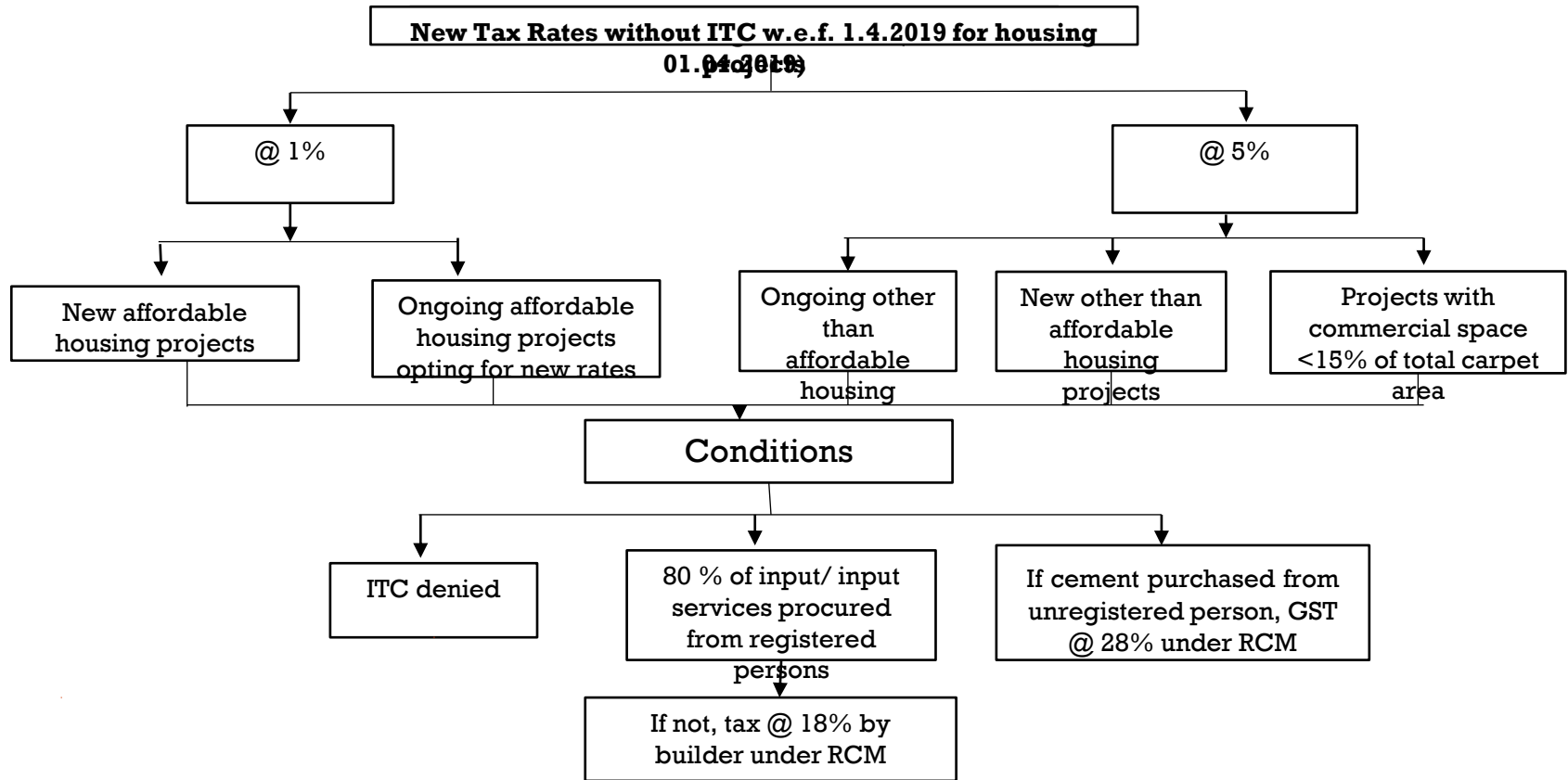
# **GST - CONSTRUCTION & WORKS CONTRACT**

## **DEFINITIONS**

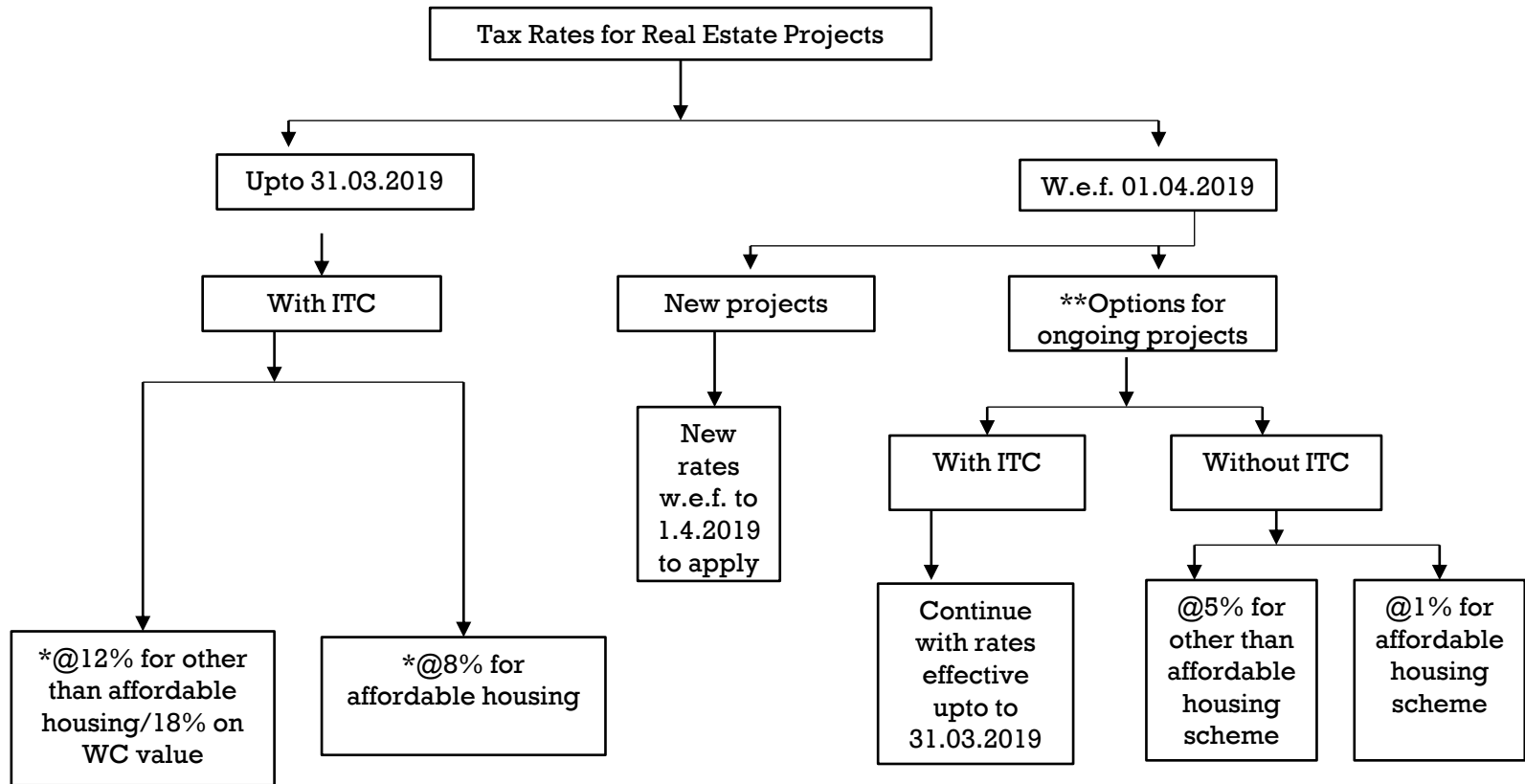


**\*Metropolitan Cities : Bengaluru, Chennai, Delhi National Capital Region (NCR) (limited to Delhi, Noida, Greater Noida, Ghaziabad, Gurgaon, Faridabad), Hyderabad, Kolkata and Mumbai (whole of Mumbai Metropolitan Region (MMR)).**

Input Tax Credit shall not be available.



Applicability of new tax rates :



\* Rates after land abatement of 1/3

\*\* Projects started before 01.04.2019, not completed by 31.03.2019



## **CONSTRUCTION – Para 5(b) of SCHEDULE II [Refer to Section 7(1A)]**

**(b) construction of a complex, building, civil structure or a part thereof, including a complex or building intended for sale to a buyer, wholly or partly, except where the entire consideration has been received after issuance of completion certificate, where required, by the competent authority or after its first occupation, whichever is earlier.**

Explanation. — For the purposes of this clause —

(1) the expression “competent authority” means Government or any authority authorised to issue completion certificate under any law for the time being in force and in case of non-requirement of such certificate from such authority, from any of the following, namely:

(i) an architect registered with the Council of Architecture constituted under the Architects Act, 1972; or

(ii) a chartered engineer registered with Institution of Engineers; or

(iii) a licensed surveyor of the respective local body of the city or town or village or development or planning authority;

**(2) the expression “construction” includes additions, alterations, replacements or remodelling of any existing civil structure;**

# WORKS CONTRACT - DEFINITION

## Section 2(119) of CGST Act,2017

*“**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;*



**NOTIFICATION NO.11/2017-CT(R) –EXTRACTS PRIOR TO 1.4.2019**

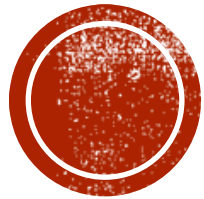
<b>Sl. No.</b>	<b>Chapter, Section or Heading</b>	<b>Description of Service</b>	<b>Rate (%)</b>
(1)	(2)	(3)	(4)
1	<b>Chapter 99</b>	<b>All Services</b>	
2	<b>Section 5</b>	<b>Construction Services</b>	
3	<b>Heading 9954</b> (Construction services)	(i) Construction of a complex, building, civil structure 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. (Provisions of paragraph 2 of this notification shall apply for valuation of this service)	9
		(ii) composite supply of works contract as defined in clause 119 of section 2 of Central Goods and Services Tax Act, 2017.	9



# **CONCESSIONAL RATE OF GST FOR AFFORDABLE HOUSING – W.E.F. 25.1.2018**

- Based on GST Council recommendations to lower GST rates for affordable housing schemes, Notification No. 1/2018-CT (R), dated 25-1-2018:
- ❑ Concessional GST rates was introduced for home purchases under the Credit-Linked Subsidy Scheme (CLSS) of the Pradhan Mantri Awas Yojana (PMAY).
- ❑ The concessional rate of GST is also extended on houses constructed/acquired under the CLSS for the economically weaker section (EWS), the lower-income group, the middle-income group-I (MIG-I) and the middle-income group-II (MIG-II).
- ❑ This concession has also been extended to apartments up to 60-square metre carpet area.





# **GST COUNCIL MEETINGS ON REAL ESTATE**

**33<sup>RD</sup> MEETING HELD ON 24.02.2019**

**34<sup>TH</sup> MEETING HELD ON 19.03.2019**

# RECOMMENDATION OF 33RD GST COUNCIL MEETING HELD ON 24TH FEB, 2019

## ■ **GST rate:**

- i. GST shall be levied at effective GST rate of 5% without ITC on residential properties outside affordable segment;
- ii. GST shall be levied at effective GST of 1% without ITC on affordable housing properties.
- **Effective date:** New rate shall become applicable from 1st of April, 2019.

## **GST exemption on TDR/ JDA, long term lease (premium), FSI:**

- Intermediate tax on development right, such as TDR, JDA, lease (premium), FSI shall be exempted only for such residential property on which GST is payable.



# RECOMMENDATION OF GST COUNCIL IN THE 34TH MEETING HELD ON 19<sup>TH</sup> MARCH, 2019

- **Option in respect of ongoing projects:** The promoters shall be given a one-time option to continue to pay tax at the old rates for ongoing projects (where construction and actual booking have both started before 01.04.2019) which have not been completed by 31.03.2019.
- **New tax rates:**
  - (i) New rate of 1% without input tax credit (ITC) on construction of affordable houses shall be available for,
    - (a) all houses which meet the definition of affordable houses as decided by GSTC (area 60 sqm in metros / 90 sqm in non-metros and value upto RS. 45 lakhs), and
    - (b) affordable houses being constructed in ongoing projects under the existing central and state housing schemes presently eligible for concessional rate of 8% GST (after 1/3rd land abatement).



# **RECOMMENDATION OF GST COUNCIL IN THE 34<sup>TH</sup> MEETING HELD ON 19<sup>TH</sup> MARCH, 2019**

**New Tax Rates:**

**(ii) New rate of 5% without input tax credit shall be applicable on construction of,-**

- (a) all houses other than affordable houses in ongoing projects whether booked prior to or after 01.04.2019. In case of houses booked prior to 01.04.2019, new rate shall be available on instalments payable on or after 01.04.2019.
- (b) all houses other than affordable houses in new projects.
- (c) commercial apartments such as shops, offices etc. in a residential real estate project (RREP) in which the carpet area of commercial apartments is not more than 15% of total carpet area of all apartments.



**AMENDMENTS VIDE  
NOTIFICATION NO. 3/2019-CT(R)  
DATED 29.03.2019**



**REAL ESTATE NOTIFICATIONS W.E.F., 1.4.2019**

# **AFFORDABLE HOUSING—CLAUSE (i) W.E.F. 1.4.2019**

- New GST rate of 1% is applicable only for Affordable housing scheme - [GST rate at 2/3<sup>rd</sup> of 1.5% (0.7%+0.5%)]
- Applicable for RREP wherein construction commenced on or after 1.4.2019 or ongoing RREP where option is not exercised as per clause (ie) and (if)
- Provisions of Para 2 of Notification shall apply – wherein value of ‘land’ shall be deemed to be 1/3<sup>rd</sup> of total amount including the amount charged for transfer of land.
- Payment of GST:
  - Shall be paid in cash only – i.e., by debiting electronic cash ledger only;
  - No credit of input tax charged on goods and services is taken – except as prescribed in Annexure I (REP) and Annexure II (RREP)

**Exception – no GST where entire consideration is received after completion certificate**



# “AFFORDABLE RESIDENTIAL APARTMENT”

## Para (xvi) of Notification:

(a) a residential apartment in a project which commences on or after 1st April, 2019, or in an ongoing project where promoter has not exercised option to pay central tax on construction of apartments at the rates as specified for item (ie) or (if):

- having carpet area not exceeding 60 sq mtr in metropolitan cities or 90 sq mtr in cities or towns other than metropolitan cities and
- for which gross amount charged is not more than Rs. 45 lakhs.

(b) an apartment being constructed in **an ongoing project under specified schemes** viz., PMAY, Affordable Housing Scheme, EWS, MIG etc [referred in item (iv) - sub-item (b), (c), (d), (da) and (db); item (v) - sub-item (b), (c), (d) and (da); Item (vi) - sub-item (c)]

Subject to the condition that the promoter has not exercised option to pay central tax under item (ie) or (if).






# **“AFFORDABLE RESIDENTIAL APARTMENT”**

**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 shall be the sum total of; -

- A.** Consideration charged for the services specified at item (i) and (ic) in column (3) against sl. No. 3 in the Table;
  - B.** 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
  - C.** 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.
- 

# **CONSTRUCTION OF RESIDENTIAL APARTMENT OTHER THAN AFFORDABLE HOUSING—CLAUSE (ia)W.E.F 1.4.2019**

- Construction of Residential apartment Other than Affordable Housing – New GST rate of 5% - [at 2/3<sup>rd</sup> of 7.5% (2.5%+2.5%)]
- Applicable for RREP wherein construction commenced on or after 1.4.2019 or ongoing RREP where option is not exercised as per clause (ie) and (if)
- Provisions of Para 2 of Notification shall apply – wherein value of 'land' shall be deemed to be 1/3<sup>rd</sup> of total amount including the amount charged for transfer of land.
- Payment of GST:
  - Shall be paid in cash only – i.e., by debiting electronic cash ledger only;
  - No input tax credit on goods and services is taken – except as prescribed in Annexure I (REP) and Annexure II (RREP)

Exception – no GST where entire consideration is received after completion certificate



# **CONSTRUCTION OF COMMERCIAL (SHOPS, OFFICES, GODOWNS) IN RREP – CLAUSE (ib) W.E.F 1.4.2019**

- Construction of COMMERCIAL apartment (Shops, office, Godown) in Residential Apartment project (RREP) – New GST rate of 5% - [at 2/3<sup>rd</sup> of 7.5% (2.5%+2.5%)]
- Applicable for RREP wherein construction commenced on or after 1.4.2019 or ongoing RREP where option is not exercised as per clause (ie) and (if)
- Provisions of Para 2 of Notification shall apply – wherein value of 'land' shall be deemed to be 1/3<sup>rd</sup> of total amount including the amount charged for transfer of land.
- Payment of GST:
  - Shall be paid in cash only – i.e., by debiting electronic cash ledger only;
  - No input tax credit on goods and services is taken – except as prescribed in Annexure I (REP) and Annexure II (RREP)

Exception – no GST where entire consideration is received after completion certificate



# CONSTRUCTION OF AFFORDABLE RESIDENTIAL APARTMENT IN REP OTHER THAN RREP – CLAUSE (ic) W.E.F. 1.4.2019

- Construction of Affordable Residential Apartments **in REP other than RREP** – GST rate of 1% - [at 2/3<sup>rd</sup> of 1.5% (0.5%+0.5%)]
- In REP other than RREP wherein construction commenced on or after 1.4.2019 or where option is not exercised as per clause (ie) and (if)
- Provisions of Para 2 of Notification shall apply – wherein value of 'land' shall be deemed to be 1/3<sup>rd</sup> of total amount including the amount charged for transfer of land.
- Payment of GST:
  - Shall be paid in cash only – i.e., by debiting electronic cash ledger only;
  - No input tax credit on goods and services is taken – except as prescribed in Annexure I (REP) and Annexure II (RREP)

Exception – no GST where entire consideration is received after completion certificate



# CONSTRUCTION OTHER THAN AFFORDABLE HOUSING—CLAUSE (id) W.E.F. 1.4.2019

- Construction of Residential apartment Other than Affordable apartments by a promoter **in a REP other than a RREP** – New GST rate of 5% - [at 2/3<sup>rd</sup> of 7.5% (2.5%+2.5%)]
- In REP other than RREP wherein construction commenced on or after 1.4.2019 or where option is not exercised as per clause (ie) and (if)
- Provisions of Para 2 of Notification shall apply – wherein value of 'land' shall be deemed to be 1/3<sup>rd</sup> of total amount including the amount charged for transfer of land.
- Payment of GST:
  - Shall be paid in cash only – i.e., by debiting electronic cash ledger only;
  - No input tax credit on goods and services is taken – except as prescribed in Annexure I (REP) and Annexure II (RREP)

Exception – no GST where entire consideration is received after completion certificate



# COMMON CONDITIONS-CLAUSE (i) TO (id) W.E.F., 1.4.2019

- Registered person to pay an amount equivalent to ITC attributable to construction in a project (REP & RREP) - which shall be calculated as prescribed in Annexure I (REP) and Annexure II (RREP).

[Note: ITC reversal is paid by debit to Electronic Credit Ledger or Electronic Cash Ledger.]

- **Transfer of Development rights or FSI:**

- (i) Developer-promoter shall pay GST on construction of landowner share of apartments.
- (ii) Landowner-promoter shall be eligible for credit of taxes charged by the Developer on the landowners share of apartments – subject to following:
  - (a) Landowner further supplies such apartments to his buyers before issuance of Completion certificate or first occupation whichever is earlier.
  - (b) Landowner pays tax on the said sale of apartments and such tax is not less than the amount of tax charged by the Developer.

# COMMON CONDITIONS-CLAUSE (i) TO (id) W.E.F, 1.4.2019

- Up to 80% of value of input and input services shall be purchased from registered supplier only.
- **The exception to the above condition are:**
  - Services by way development rights,
  - Long term lease of land (against upfront payment in form of premium, salami, development charges etc.)
  - FSI (including additional FSI)
  - Electricity, HSD, Motor spirit, natural gas

Inputs and input services on which tax is paid on RCM shall be deemed to have been purchased from registered person.

- On shortfall of purchases from 80%, tax shall be paid by the Promoter @ 18% on RCM basis.
- However, Tax on cement purchased from unregistered person shall be paid @ 28% under RCM.





# **EXPLANATION-CLAUSE (i) TO (id) W.E.F., 1.4.2019**

- 1.** The promoter shall maintain project wise account of inward supplies from registered and unregistered supplier.
  - 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.
- 2.** Notwithstanding anything contained in Explanation 1 above, tax on cement received from unregistered person shall be paid in the month in which cement is received.
- 3.** Input Tax Credit not availed shall be reported every month by reporting the same as ineligible credit in GSTR-3B [Row No. 4 (D)(2)].





# CLAUSE (ie) — ONGOING PROJECTS UNDER SPECIFIED SCHEMES

- Jawaharlal Nehru National Urban Renewal Mission or Rajiv Awas Yojana;
- "Insitu redevelopment of existing slums using land as a resource, under the Housing for All (Urban) Mission/ PMAY (Urban);
- "Beneficiary led individual house construction/enhancement" under the Housing for All (Urban) Mission/PMA Yojana”;
- "Economically Weaker Section (EWS) houses" constructed under Affordable Housing in partnership by State or Union territory or local authority or urban development authority under the Housing for All (Urban) Mission/ PMAY (Urban);
- “Houses constructed or acquired under the Credit Linked Subsidy Scheme for Economically Weaker Section (EWS)/Lower Income Group (LIG)/ MIG-1/ MIG-2" under the Housing for All (Urban) Mission/PMAY (Urban); ]

# CLAUSE (ie) – ONGOING PROJECTS UNDER SPECIFIED SCHEMES

Construction of apartment in an ongoing project under any of the specified scheme – where the promoter has exercised option to pay GST at the rates specified therein (old rate).

GST rate of 8% - [at 2/3<sup>rd</sup> of 12% (6%+6%)],

## Specified Schemes:

- a single residential unit otherwise than as a part of a residential complex
- low-cost houses up to a carpet area of 60 square metres per house in a housing project approved by competent authority under the 'Scheme of Affordable Housing in Partnership' framed by the Ministry of Housing and Urban Poverty Alleviation, Govt of India



# **CLAUSE (ie) – ONGOING PROJECTS UNDER SPECIFIED SCHEMES**

- low cost houses up to a carpet area of 60 square metres per house in a housing project approved by the competent authority under –
  - "Affordable Housing in Partnership" component of the Housing for All (Urban) Mission/Pradhan Mantri Awas Yojana
  - any housing scheme of a State Government
- low-cost houses up to a carpet area of 60 square metres per house in an affordable housing project which has been given infrastructure status vide notification of Government of India, in Ministry of Finance;
- a residential complex predominantly meant for self-use or the use of their employees or other persons specified in Para 3 of the Schedule III of CGST Act, 2017



# **CLAUSE (ie) – ONGOING PROJECTS UNDER SPECIFIED SCHEMES**

- Concessional rate (old rates) is available subject to the condition that:
- Registered person shall exercise one time option to pay GST on construction of apartments at specified rate – by 10<sup>th</sup> May 2019
- Where option is not exercised by 10<sup>th</sup> May 2019 – option to pay tax at the rates specified in item (i) (ia) or (ib) or (ic) or (id) – shall be deemed to have been exercised.
- For supply of services during the period from 1<sup>st</sup> April 2019 to 10<sup>th</sup> May 2019 – invoices can be issued before exercising the option, but such invoices shall be in accordance with the option to be exercised.




# **CLAUSE (if) – CONSTRUCTION OF COMPLEX, BUILDING, CIVIL STRUCTURE OR A PART THEREOF**

- This entry covers construction of all complex, building, civil structure or part thereof:

- (i) Commercial apartments (shops, offices, godowns) in REP other than RREP
- (ii) Residential apartments in an ongoing projects, other than affordable residential apartments – for which promoter has opted to pay GST under this item.

But excludes all services covered in item (i), (ia), (ib), (ic), (id) and (ie).

- Registered person shall exercise one time option to pay GST on construction of apartments at specified rate – by 10<sup>th</sup> May 2019
  - If no option is exercised by 10<sup>th</sup> May 2019 – option under item (i) (ia) or (ib) or (ic) or (id) – shall be deemed to have been exercised.
- 

## **CLAUSE (if) – CONSTRUCTION OF COMPLEX, BUILDING, CIVIL STRUCTURE OR A PART THEREOF**

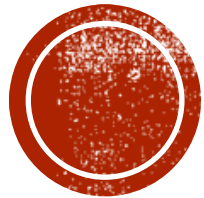
- Under this item - GST rate is 12% of total amount [2/3<sup>rd</sup> of 18% (9%+9%)]
- Provisions of Para 2 of Notification shall apply – wherein value of 'land' shall be deemed to be 1/3<sup>rd</sup> of total amount including the amount charged for transfer of land.
- Exception – no GST where entire consideration is received after completion certificate
- During the period from 1<sup>st</sup> April 2019 to 10<sup>th</sup> May 2019 – invoices can be issued before exercising the option, but such invoices shall be in accordance with the option to be exercised.

### **Explanation:**

Clarifies that supply of construction services covered at items (i), (ia), (ib), (ic), (id) and (ie) shall attract GST at prescribed rates and shall not be levied at the rate under this item i.e., (if).



- Entry in item (ii) of Notification stands omitted.



This results in denial of the option to pay GST at 18% on the 'Composite Supply of Works Contract' as per Section 2(119) of CGST Act, 2017.

# **OMISSION OF ITEM (ii) WORKS CONTRACT ENTRY**

- Omission of item (ii) removes the option of the assessee to pay GST only service component in Construction sector.
- There are other entries in Notification covering 'Composite Supply of Works Contract' viz.
  - item (iii) – Supplies to Government
  - item (iv) – Infrastructure work & specified scheme
  - item (v) – Railways and low cost housing
  - item (vi) – Supplies to Government – educational, medical etc.
  - item (vii) – Predominantly Earthwork
  - item (viii) – oil and gas exploration
  - item (ix) – Sub-contractor to main contractor in item (iii) & (iv)
  - item (ix) – Sub-contractor to main contractor item (vii) above
- Omission of 'Works Contract' entry mandates the assessee to pay GST on total value including value of land.
- Results in denial of option to pay GST only service component only





## **NEW CLAUSE (va) INSERTED – WORKS CONTRACT FOR AFFORDABLE RESIDENTIAL APARTMENTS**

- Covers ‘Composite Supply of Works Contract’ as per S. 2(119) supplied by way of construction, erection, commissioning, installation, completion, fitting out, repair, maintenance, renovation or alteration of ‘Affordable Residential Apartments’.
- This entry applies to construction services OTHER THAN items (i), (ia), (ib), (ic), (id), (ie) and (if).
- This entry gives option of paying GST only service component under ‘Works Contract’ entry – however restricted to Affordable Housing only.
- As item (ii) stands omitted, no similar option to pay GST on service component for residential projects other than Affordable Housing.



# RESIDUAL ENTRY – (xii) AMENDED

- Clause (xii) amended to cover ‘Construction Services other than items (i), (ia), (ib), (ic), (id), (ie), (if), (iii), (iv), (v), (va), (vi), (vii), (viii), (ix), (x) and (xi) above
- Hence, residual entry covers only ‘Construction services’.
- Omission of ‘Works Contract’ entry in item (ii) results in redundancy of Section 2(119) in general.
- Can new projects launched after 1.4.2019 take benefit of this entry?



# **INSERTION OF ENTRY 39 – SUPPLY OF SERVICES OTHER THAN DEVELOPMENT RIGHTS ETC**

- Entry 39 covers all services other than the following:
  - grant of development rights,
  - long term lease of land (against premium, salami etc)
  - FSI including additional FSI
- Provided by ‘unregistered person’ to promoter for construction of project where ‘recipient’ is liable to pay GST under RCM as per Notification No. 7/2019-CT(R) dated 29.03.2019.
- Explanation –
- Clarified that this entry is to be taken to apply to all services which satisfy the conditions prescribed, even though they may be covered by more specific chapter, section or heading elsewhere in this notification.



# **NEW PARA 2A – VALUATION OF DEVELOPMENT RIGHTS OR FSI**

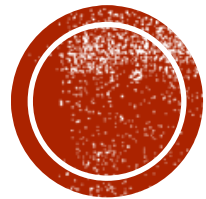
## **VALUATION OF LAND OWNERS SHARE IN JDA:**

- 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:

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.





# **EXEMPTION FROM GST**

**NOTIFICATION NO. 4/2019-CT(R)  
DATED 29.03.2019**

# EXEMPTION TO DEVELOPMENT RIGHTS AND LONG TERM LEASE – ONLY FOR RESIDENTIAL APARTMENTS

## EXEMPTION TO TDR & FSI :

- SL. NO. 41A - Service of transfer of development rights or FSI W.E.F., 1.4.2019 provided for **construction of residential apartments**, intended for sale to buyer.
- However, if apartment is sold after completion certificate, no exemption would be available.
- GST exemption available for construction of residential apartments in the project under this notification shall be calculated as under:
- GST payable on TDR or FSI (including additional FSI) or both for construction of the project] **X**

Carpet area of the residential apartments in the project ÷

Total carpet area of the residential and commercial apartments in the project

# EXEMPTION TO DEVELOPMENT RIGHTS AND LONG TERM LEASE – ONLY FOR RESIDENTIAL APARTMENTS

EXEMPTION TO UPFRONT FEE FOR LONG TERM LEASE FOR 30 YEARS OR MORE:

- SL. NO. 41B - Service of Upfront fee for long term lease of 30 years or more W.E.F., 1.4.2019 provided for **construction of residential apartments**, intended for sale to buyer.
- However, if apartment is sold after completion certificate, no exemption would be available.
- GST exemption available for construction of residential apartments in the project under this notification shall be calculated as under:
- GST payable on upfront amount payable for long term lease of land for construction of the project **X**

Carpet area of residential apartments in the project  $\div$

Total carpet area of residential & commercial apartments in the project

# VALUATION OF TDR / FSI

- 1A - Value of supply of service by way of transfer of development rights or FSI by a person to the promoter against consideration in the form of residential or commercial apartments shall be deemed to be equal to:
  - **value of similar apartments**
  - **charged by the promoter from the independent buyers**
  - **nearest to the date on which such TDR or FSI is transferred to the promoter.**
- 1B. Value of portion of residential or commercial apartments remaining un-booked on the date of issuance of completion certificate or first occupation, as the case may be, shall be deemed to be equal to:
  - **the value of similar apartments**
  - **charged by the promoter nearest to the date of issuance of completion certificate or first occupation, as the case may be.**





# **REVERSE CHARGE – TDR/FSI & LONG TERM LEASE**

- Notification No. 5/2019-CT(R) issued u/s 9(3) – amends Notification No. 13/2017-CT(R) to notify following services for RCM:
- Services supplied by any person by way of TDR or FSI for construction of a project by a promoter.
- Long term lease of land (30 years or more) by any person against consideration of upfront amount fees and/or periodic rent for construction of a project by a promoter.



# CLASS OF REGISTERED PERSONS NOTIFIED

- **Notification No. 6/2019-CT(R) notifies following persons:**
- (i) a promoter who receives TDR or FSI on or after 1st April, 2019 for construction of a project against consideration payable or paid by him, wholly or partly, in the form of construction service of commercial or residential apartments in the project or in any other form including in cash;
- (ii) a promoter, who receives long term lease of land on or after 1st April, 2019 for construction of residential apartments in a project against consideration payable or paid by him, in the form of upfront amount (called as premium, salami, cost, price, development charges or by any other name)



# **NOTIFIED REGISTERED PERSONS – TIME OF SUPPLY**


## **Notification No. 6/2019-CT(R):**

Where registered persons is liable to pay central tax on-

- (a) the consideration paid by him in the form of construction service of commercial or residential apartments in the project, for supply of development rights or FSI (including additional FSI);
- (b) the monetary consideration paid by him, for supply of development rights or FSI (including additional FSI) relatable to construction of residential apartments in project;
- (c) the upfront amount (premium, salami, cost, price, development charges or any other name) paid by him for long term lease of land relatable to construction of residential apartments in the project; and
- (d) the supply of construction service by him against consideration in the form of development rights or FSI(including additional FSI), -

## **TIME OF SUPPLY**

**Shall arise on the date of issuance of completion certificate for the project, where required, by the competent authority or on its first occupation, whichever is earlier.**



## **REVERSE CHARGE U/S 9(4) – NOTIFICATION NO. 7/2019-CT(R)**

- Promoter is liable to GST on RCM when goods or services are purchased from 'unregistered supplier' for items (i), (ia), (ib), (ic) and (id) of Notification No. 11/2017-CT(R):

**When there is shortfall from the minimum prescribed value of goods or services (80%) for the following:**

- Supply of such goods and services or both [other than TDR, long term lease of land (against upfront payment in the form of premium, salami, development charges etc.) or FSI (including additional FSI)]
- Cement falling in chapter heading 2523 in the first schedule to the Customs Tariff Act, 1975 (51 of 1975)

**Capital goods:** Entire value of Capital goods falling under any chapter in the first schedule to the Customs Tariff Act, 1975 (51 of 1975)

(Capital goods not considered for computation of shortfall above)



# **NOTIFICATION NO. 8/2019-CT(R): RCM FOR GOODS OTHER THAN CAPITAL GOODS & CEMENT**

- 9% GST Rate fixed for all purchase of 'goods' other than capital goods and cement
- When purchased from unregistered supplier,
- By the promoter for construction of project where promoter is liable to pay tax on RCM as Notification no. 7/2019-CT(R)
- This entry is to be taken to apply to all goods which satisfy the conditions prescribed herein, even though they may be covered by a more specific chapter/ heading/ sub heading or tariff item elsewhere in this notification.



**CONSTITUTIONAL  
VALIDITY —**



**CHALLENGING REAL  
ESTATE NOTIFICATIONS**

# CONSTITUTIONAL VALIDITY

- Can a conditional notification be made compulsory?
- Notifications fixing conditions which cannot be complied with by the builder developer – what happens if he cannot comply with the said conditions?
- Is Explanation found below entry 3(if) unconstitutional as it takes away the option proposed by the Council?



# OMISSION OF CLAUSE (ii) — WORKS CONTRACT

- Omission of Clause (ii) – Composite supply of works contract u/s 2(119) is unreasonable and arbitrary hence violative of Article 14 & 19:
- Arbitrarily denies the option of paying GST on ‘works contract’ entry at 18% of the value excluding land.
- Omission makes it mandatory for choose other entries where valuation of total amount has compulsorily included ‘value of land’.
- *Prior to omission, Developer / Promoter was eligible to opt for clause (ii) of Sl. No. 3 of Notification No. 11/2017-CT (Rate) and pay GST at 18% on Construction agreements.*
- *Supreme Court in Larsen & Toubro Ltd. Vs. State Of Karnataka, 2014 (303) E.L.T. 3 (S.C.) held that the construction agreement entered by builders / developers with end customers will clearly get covered under the definition of ‘works contract’.*






# CHALLENGING GST ON IMMOVABLE PROPERTY

- **GST on immovable property transactions being unconstitutional lacking legislative competence:**
- All items (i), (ia), (ib), (ic), (id), (ie) and (if) of Notification No. 11/2017-CT(R) - Provisions of Para 2 is made applicable— wherein value of 'land' shall be deemed to be  $\frac{1}{3}$ <sup>rd</sup> of total amount including the amount charged for transfer of land.
- Hence, value of land is included in the total amount and only  $\frac{1}{3}$ <sup>rd</sup> is deducted towards 'value of land' – which results in levy of GST on land value over and above  $\frac{1}{3}$ <sup>rd</sup>.
- There is no legislative competence to levy tax on immovable property transactions under Article 246A. Hence, all new entries w.e.f., 1.4.2019 resulting in levy of GST on immovable property or transactions relating to immovable property - would be violative of Article 265 of the Constitution
- Construction Service vide Entry 5(b) of Schedule II to the CGST Act, 2017 could be challenged as being unconstitutional lacking legislative competence and violative of Article 246A and 265 of the Constitution.

# NEW ENTRIES IN SL.NO. 3 IS VIOLATIVE CONSTITUTIONAL PROVISIONS

- All items inserted in Sl. NO. 3 of Notification no. 11/2017-CT(R) dt. 28.06.2017 fails to arrive at true value of supply of goods and service or both and Para 2 is applicable mandatorily and indirectly tax immovable property along with goods & services.
- New amended entries read with Para 2 is arbitrary and unreasonable as it presumes the value of land to be one-third of the total amount charged i.e. construction + undivided share of land without any basis
- These amended entries will lead to taxing the value of immovable property being land which is not be the intention of the legislature. Refer Larsen and Toubro Limited v. State of Karnataka — 2014 (34) S.T.R. 481 (S.C.) Para 100.
- Hence, Entry 3 (i), (ia), (ib), (ic), (id), (ie) and (if) read with para 2 of the Notification no. 11/2017-CT(R) dt. 28.06.2017 could be challenged as unconstitutional being violative of Article 14, 19(1)(g), 246A, 265, 366(12A) and 366(29A) of the Constitution. 

# CHALLENGE CONSTRUCTION ENTRY 5(b) OF SCHEDULE II

- The taxability of 'Construction Service' as per Entry 5(b) of Schedule II to the CGST Act, 2017 could be challenged as unconstitutional being violative of Article 366(29A) of the Constitution.
- The Construction service referred to in entry 5(b) would be in the nature of works contract.
- Supreme Court in ***Larsen and Turbo Ltd. Vs State of Karnataka 2014 (34) STR 481 (SC)*** held that activity of construction is covered by the term 'works contract' and the activity of construction has all the characteristics or elements of works contract.
- Hence, Entry 5(b) treats the entire activity of construction as 'services' is ultravires and contradictory to Article 366(29A)(b) which bifurcates the transfer of goods portion from the composite contract and treats the same as deemed sale.



# **GST LEVY ON CONSTRUCTION & SALE OF APARTMENT - AGREEMENTS WITH CUSTOMER – FOR SALE OF IMMOVABLE PROPERTY**

- The transaction of entering into ‘Agreement of Sale’ and ‘Construction Agreement’ with customers by the promoters is a contract to sell and purchase immovable property and no element of service is involved.
- As there is no supply of goods or services or both and accordingly the activity is outside the scope of Entry 5(b) of Schedule II read with NEW AMENDED Entries in Sl. No. 3 of Notification no. 11/2017-ST(R) dt. 28.06.2017
- *Magus Construction Pvt. Ltd. Vs. UOI 2008 (11) STR 225 (Gau)*



# **PARA 2 OF NOTIFICATION NO. 11/2017-CT(R) TO THE EXTENT IS MADE APPLICABLE TO NEW ENTRIES IN SL.NO. 3 IS ILLEGAL & ULTRA VIRES S.15**

- **Paragraph 2 of the Notification deeming the value of land at one-third of the total amount charged is ultra-vires the provisions of Section 15 of CGST Act.**
- Hence, Para 2 read with new amended items under Sl. No. 3 as being illegal and ultra vires the provisions of Section 15 of CGST Act, 2017; Therefore should be struck down entirely
- **Alternatively, Paragraph 2 should be read down so as to allow valuation of land on the basis of actual amount received and not at deemed value of one-third of total amount charged.**
- Hence, Para 2 to be 'read down' as not being mandatory and the petitioner is allowed to value the land on the basis of actual amounts received towards the transfer of land / undivided share in the land.
- Wipro Ltd. Vs. Asst Collector of Cus & ors 2015 (319) E.L.T. 177 (S.C.)



# JDA – GST IMPLICATIONS

- **GST implications on Developer/Promoter – JDA: validity of taxation under ‘Construction service’ to be challenged on following grounds:**
- Construction and handing over of specified number of flats in lieu of developmental rights as LAND OWNERS SHARE:
- The transaction under JDA is in the nature of exchange of immovable property and hence does not qualify to be Construction service.
- Construction of Land owners share under JDA – As there is no purchaser during construction, Supreme court in L&T case held that the activity of construction of apartment where there is no purchaser during construction stage would not be a works contract and hence does not qualify to be a service under Para 5(b) of Schedule II.
- 5(b) would also be not applicable as the building given to owners is not a sale, which is essential for applicability of said clause(b). Further, the consideration for such transfer, i.e. transfer of ownership in land would be made only after completion of construction.



# JDA – NATURE OF EXCHANGE OF IMMOVABLE PROPERTY:

- JDA is only in the nature of 'immovable property' and mere exchange of immovable properties cannot be termed as 'Construction Service' as per Para 5(b) of Schedule II;
- Bombay High Court in Chheda Housing Development ... vs Bibijan Shaikh Farid And Ors. 2007 (3) MhLj 402 wherein High Court examined the question as to whether F.S.I / TDR could be termed as a benefit arising from the land.
- Chaturbhuj Dwarkadas Kapadia Vs. Commissioner of Income Tax [2003] 260 ITR 491 (Bom).



# JDA – LANDOWNERS

- **GST implications on Landowners– JDA: validity of taxation under ‘Construction service’ to be challenged on following grounds:**
- The transfer of developmental rights are in the nature of immovable property and hence does not qualify to be supply.
- The grant of developmental right to the developer and permitting the developer to enter / possession of immovable property would not be liable to GST levy under Para 2(a) of Schedule II.
- Hence, Amending entries in Sl. No. 3 requiring Developer/ Promoter to pay tax on supply of construction of apartment is unreasonable and without jurisdiction.





# **VALIDITY OF NOTIFICATION NO. 6/2019-CT(R) DT. 29.03.2019**

- Notification No.6/2019-CT(R) provides that where land owner offers developmental right to the developer in lieu of construction of the building, the liability to pay GST on the services of (a) grant of developmental rights to the developer (b) construction services against the consideration of receipt of developmental rights from the land owner, would be on the date of allotment of the flats or portion of the building to the land owner.
- JDA transactions cannot be subjected to GST through Notification No. 6/2019-CT(R) when validity of levy on 'construction service' could be challenged in terms of Para 5(b) and similarly validity of transfer of development rights & FSI to be challenged as per Para 2(a).



# **PARA 2A – INSERTED W.E.F, 1.4.2019: VALUATION OF CONSTRUCTION OF LAND OWNERS SHARE**

- Para 2A provides that value of construction shall be deemed to be equal to Total amount charged for similar apartments in the project from independent buyers (other than land owner),
- Nearest to the date on which such development right or FSI is transferred to promoter,
- LESS the value of value of land transferred as prescribed in Para 2 above.

Firstly, the 'land owners share' under JDA, there is no specific or express provision under CGST Act, 2017 and therefore it is legally impermissible to impose levy of tax on Land owner's share in the hands of the Developer. In view of the absence of statutory provisions of for levy of GST on the land owners share, valuation prescribed in Para 2A could be challenged.

Valuation provision could be challenged on the basis that as there is no service element in JDA between the developer and the land owners, no question of applying valuation provision.

Supreme Court in CCE vs. Acer India Ltd. 2004 (172) ELT 289 (SC)



# **PARA 2A – INSERTED W.E.F, 1.4.2019: VALUATION OF CONSTRUCTION OF LAND OWNERS SHARE**

- Notification inserting Para 2A for valuation of construction of land owners share.
- Valuation of landowners share provided in Circular No.151/2/2012-ST dated 10.02.2012 has been incorporated 'verbatim' in Para 2A
- Validity of provisions of Para 2A (based on Circular No. 151/2/2012-ST) could be challenged as being ultra vires and beyond scope of statutory provisions of Section 15 of CGST Act, as well as being arbitrary and unreasonable as regards valuation of land owners share.



# PARA 2A – INSERTED W.E.F, 1.4.2019: VALUATION OF CONSTRUCTION OF LAND OWNERS SHARE

- Para 2A: Valuation of landowners share: Equal to Total Amount charged for similar apartments sold to independent buyers, nearest to date on which development right or FSI is transferred to the promoter, LESS the value of transfer of land as per Para 2.
- It is impossible to obtain value of similar apartments (sold to independent buyers) nearest to date on which development right / FSI was transferred to promoter under JDA – since development rights were transferred at the time of entering JDA, whereas apartments (sold to independent buyers) are constructed after many years.
- It is also a well settled principle of law that the law does not compel a man to do that which he cannot possibly do and the said principle is well expressed in legal maxim “*lex non cogit ad impossibilia*” which is squarely attracted to the facts and circumstances of the present case.



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**THANK YOU**

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