GST for Real Estate
ITC Reversal and RCM
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ITC Reversal under Rule 42

Projects completed till 31st March 2019

- *Reversal applicable only in the year of completion or for full project period (meaning of tax period)*
- *Basis to calculate – value, area, any other method*
- *Will amended Rule apply to projects completed in FY 2018-19*

Projects completed on or after 1st April 2019

- *New formula to apply for projects completed after 31st March 2019 or to projects started from 1st April 2019*
- *New formula would apply to full credit or to credit taken on or after 1st April 2019 only*
- *Under new rule, ITC exclusive towards taxable is to be taken as zero, what happens to ITC relating to specific services to specific customers or units*

Common issues

- *Part OC*
- *Transitional credit*
- *Credit on goods and services received after OC*

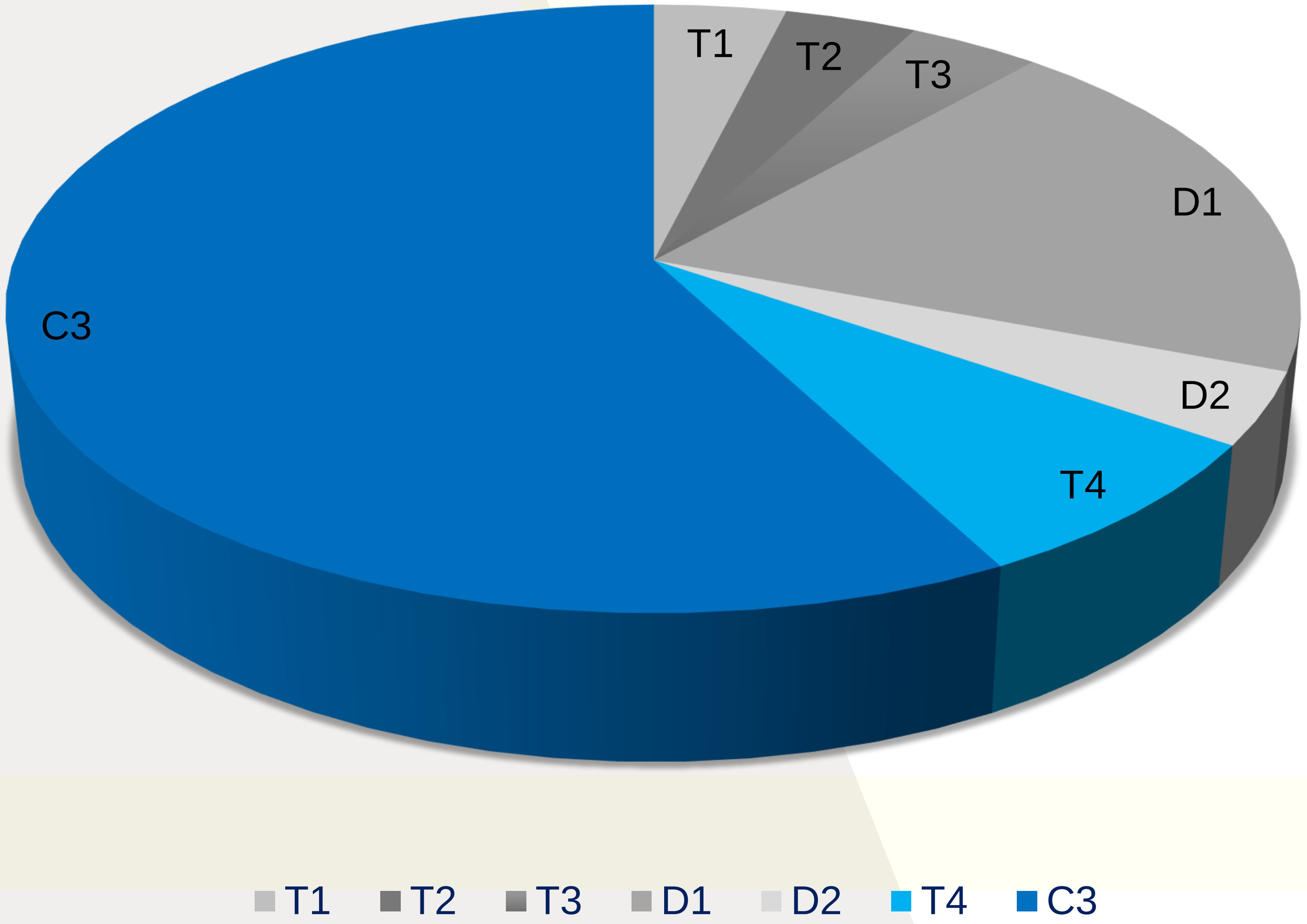
Case Study - 1

Seamless Credit Limited had started a project in April 2017. Project received Occupation Certificate (OC) in January 2019. ITC of INR 1 Cr and INR 0.5 Cr was availed by the Company during FY 2017-18 and FY 2018-19 respectively. Further, Company had transitional credit of INR 10 lakhs. Project was a single building having 60 units (all similar apartments of RERA carpet area 93.40 sq. mtrs.) of which 45 apartments were sold for INR 10.80 Cr as on date of OC. Demand of INR 6 Cr was raised in FY 2017-18 and INR 4.80 Cr was raised in FY 2018-19 (as per Time of Supply). Unsold inventory as per stamp duty rate was valued at INR 3.30 Cr. Out of the unsold inventory, Company was able to sell 10 units in FY 2018-19 for INR 2.5 Cr (all demands raised by March 2019).

Management always believed that under GST once a credit is availed towards a taxable activity, later it need not be reversed when the activity becomes exempted at a future date. Management was shocked when its Auditor asked them whether they have reversed any credit on account of units remaining un-sold as on date of OC.

It SEEMS LESS CREDIT is allowed to the Company and hence it wants your expert opinion on the same.

Rule 42 – upto 31/03/19



T1 – ITC exclusively for other than business

T2 – ITC exclusively for exempted supplies

T3 – ITC not available as per S 17(5)

T4 – ITC exclusively for taxable supplies

D1 – is derived as below:
1. ITC left after separating T1 to T4 from total credit ie C2
2. Exempted Supplies (for the tax period) ie E
3. Total Turnover in the state (for the tax period) ie F
D1 = C2 X E / F

D2 – 5% of the C2 (for usage towards business and non- business purpose)

C3 = Total Credit-T1-T2-T3-T4-D1-D2

Rule 42 – upto 31/03/19

- Tax period means
- Aggregate value of exempt supplies means
- Whether ITC includes Tran credit
- True up/ True down at the end of the financial year

Rule 42 – upto 31/03/19

- **"tax period"** means the period for which the return is required to be furnished

- **"return"** means any return prescribed or otherwise required to be furnished by or under this Act or the rules made thereunder

- **for determining the value of an exempt supply as referred to in sub-section (3) of section 17-**
  (a) the value of land and building shall be taken as the same as adopted for the purpose of paying stamp duty

- **"input tax" in relation to a registered person,** means the central tax, State tax, integrated tax or Union territory tax charged on any supply of goods or services or both made to him and includes,- …..

Case Study – 1 (Conclusion)

- ITC for FY 2018-19 is INR 0.50 Cr – C2

- Exempt Turnover for FY 2018-19 – INR 2.50 Cr (Sale value of after completion units on which stamp duty is paid) – E

- Taxable turnover for FY 2018-19 is INR 4.80 Cr

- Total Turnover would be Exempt + Taxable ie INR 7.30 Cr (considered for FY 2018-19 only) – F

- Reversal D1 = 0.50 x 2.50 / 7.30 ie INR 0.17 Cr

Other Aspects

No specific provisions for Reversal for Services provided under 5(b) of Sch II

All credits upto OC are towards directly taxable supplies

Alembic Ltd Case – the credit eligibility/ entitlement is to be tested at the time of availment still holds good

ITC for period post OC

Case Study - 2

Fast Construction Developers Limited started commercial project in April 2019 which had only 10 units (each having RERA carpet area of 185 sq mtr). Project received OC in January 2020. It had availed ITC of INR 45 lakhs till January 2020. Further the Company had credit accumulation of INR 12 lakhs in Feb 2020. Since one customer had asked for changes in the internal layout of his office, Company had to incur additional expense, ITC on which was INR 3 lakhs (which is already part of INR 45 lakhs credit availed till January 2020). Company wishes to understand how it needs to apply the amended Rule 42 for its project.

Rule 42 – from 01/04/19

T1, T2 and T3 will remain same

T4 – ITC exclusively for taxable supplies will be zero for the construction phase

D1 – is derived as below:

1. ITC left after separating T1 to T4 from total credit ie C2
2. Total of carpet area of apartments which are exempt, subject to reduced effective rate (5%/1%) and unsold on the date of OC (for each project separately) ie E
3. Total carpet area of the project ie F

D1 = C2 X E / F

D2 – 5% of the C2 (for usage towards business and non- business purpose)

C3 = Total Credit – T1-T2-T3-T4-D1-D2

Rule 42 – from 01/04/19

True up/ True down:

- **Finally calculated for each ongoing project or project which commences on or after 1st April 2019, which did not undergo or did not require transition of ITC (under the revised scheme)**

- **Formula to apply for the entire period from the commencement of the project or 1st July 2017, whichever is later, upto the OC or 1st occupancy**

- **Effect of true up/ down be given as below:**
  - **Differential credit to be availed by the due date for furnishing of the return for the month of September following the end of financial year (in which OC is obtained)**
  - **Differential to be added as output liability in the month not later than September following the end of financial year**

Case Study - 3

Work-in-progress Limited had started a residential project in FY 2018-19. While transition to new scheme (wef from 1st April 2019), Company opted for old rates with ITC. The Project received OC in December 2019. Company wishes to know whether it has to reverse any ITC under Rule 42. If yes, then on ITC availed in FY 2019-20 only or ITC for the full project?

Removal of Difficulty Order – 04/2019

2. For the removal of difficulties, it is hereby clarified that in case of supply of services covered by clause (b) of paragraph 5 of Schedule II of the said Act, the amount of credit attributable to the taxable supplies including zero rated supplies and exempt supplies shall be determined on the basis of the area of the construction of the complex, building, civil structure or a part thereof, which is taxable and the area which is exempt.

3. This Order shall come into force with effect from the 1st day of April, 2019.

Retrospective Levy – Yes/ No?

Sushil More vs CC (2003-152-ELT-309)

- **Statute, prima facie, is prospective in nature, unless made to be retrospective or expressed to be so**

WNS Global vs CCEx (2008-10-STR-273)

- **Statute cannot be treated retrospective merely because it relates to past action - Statute which takes away or impairs vested rights acquired under existing laws or creates a new obligation or imposes a new duty, or attaches a new disability in respect of transactions already made alone is called a retrospective legislation - Position that a prospective benefit under a statutory provision is measured by or depends on antecedent facts does not make the provision retrospective**

CCEx vs Dai Ichi (SC-112-ELT-353)

- **Credit is a vested right. It is indefeasible.**

Case Study - 4

Towers Limited had started a Project comprising of three towers (each tower having identical units) in 2017-18. Company obtained part OC for 2 towers in June 2019 (where 80% units were sold on the date of Part OC) and full OC in January 2020 (90% of the units sold in 3rd tower on the date of Full OC). Company wishes to understand how Rule 42 will apply to its Project.

RCM for Real Estate

RCM on Development Rights/ Long Lease Premium/ TDR Scrips

- *Is RCM applicable on re-development of housing societies? Is it in the course or furtherance of business of the society?*
- *Will services by SRA/ Corporations qualify under Article 243W?*
- *Who qualifies as a Promoter required to pay tax under RCM?*
- *Is TDR Scrip subject to GST? If yes, who pays tax?*

RCM on procurements from URD (80:20 Rule)

- *What components form part of the calculation?*
- *How will the rule apply on procurements made after OC?*

Case Study - 5

Multi Development Limited is going to enter into following activities:

1. Re-development project, wherein the existing society will handover the development rights to the Company
2. Development project, wherein development rights are given by an agriculturist landowner against consideration to be paid in cash
3. SRA project, wherein the authorities are going to give development rights to the Company
4. Enter into Development agreement (for procurement of land) to build a Shopping Mall wherein the entire area would be rented out
5. To execute some of these projects, Company will have to buy additional FSI/ TDR from Corporation/ Town Planning Authorities
6. Buy TDR Scrip/ Certificate (generated from acquisition of land and traded in market). This could be further traded off or used in one of the projects as additional development potential

Company wishes to understand whether any RCM liabilities trigger in each of the above cases.

Various Aspects

- **Is transfer of development rights subject to GST?**
- **"business" includes .-**

  (a) any trade, commerce, manufacture, profession, vocation, adventure, wager or any other similar activity, whether or not it is for a pecuniary benefit;

  (b) any activity or transaction in connection with or incidental or ancillary to sub-clause (a);

  (c) any activity or transaction in the nature of sub-clause (a), whether or not there is volume, frequency, continuity or regularity of such transaction;

  (e) provision by a club, association, society, or any such body (for a subscription or any other consideration) of the facilities or benefits to its members;

- **Purchase of jewellery from URD – Press Release issued in July 2017**

- **Business definition has wide meaning and hence will include services by Landowner - FAQ issued in May 2019**

Activities under 243W

Activities by Municipality under Article 243W are neither supply of goods nor supply of services

- **The functions entrusted to a municipality under the Twelfth Schedule to Article 243W of the Constitution are as under:**

  (a) Urban planning including town planning.

  (b) Regulation of land-use and construction of buildings.

  (c) Planning for economic and social development.

  …

  (j) Slum improvement and upgradation.

  …

Promoter as per RERA

RCM is payable on transfer of development rights under Notification 5/2019 by a Promoter (as defined under RERA)

Section 2(zk) of the RERA defines a Promoter as follows:

i. **a person who constructs or causes to be constructed an independent building or a building consisting of apartments, or converts an existing building or a part thereof into apartments, for the purpose of selling all or some of the apartments to other persons and includes his assignees; or**

ii. **…**

Primary condition in all sub bullets is - for the purpose of sale

TDR Scrip

If TDR Scrip is traded, will it attract forward charge?

If TDR Scrip is used for additional construction, will it attract reverse charge?

Will this result into cascading of taxes?

TDR Certificate is subject to GST @ 18% - FAQ issued in May 2019

Case Study - 6

RD-URD Infratech Limited started a residential project in May 2019. During FY 2019-20, Company incurred following expenses:

Sr No	Nature	RD	URD	Total
1	Taxable Goods	35	10	45
2	Taxable Services	10	5	15
3	Exempted Goods	5	5	10
4	Exempted Services	5	5	10
5	Salaries and Wages		5	5
6	Cement	5	5	10
7	Capital Goods	5	5	10
8	Deemed Interest (Loan from relative)		10	10
	Total	65	50	115

Company wants to understand the applicability of RCM on above expenses.

Further, the Company received OC in May 2020 and wishes to understand whether URD expenses incurred after receipt of OC would also be subject to RCM.

Various Aspects

- Sch III – Activities neither supply of goods nor services
  1. Services by an employee to the employer in the course of or in relation to his employment.

- Sch I – Activities as supply even of made without consideration
  2. Supply of goods or services or both between related persons or between distinct persons as specified in section 25, when made in the course or furtherance of business

- RCM on Cement and Capital Goods is applicable on monthly basis

- RCM on shortfall will apply only on taxable goods/ services:
  - Exclude full exempt 1st
  - Exclude full taxable 1st
  - Allocation based on ratio

- Shortfall tax is to be paid by adding as output liability in the month not later than the month of June following the end of the financial year

Case Study – 6 (Conclusion for 80:20)

Sr No	Nature	RD	URD	Total	Include in Calculation	Reasoning
1	Taxable Goods	35	10	45	Yes	Inputs
2	Taxable Services	10	5	15	Yes	Input Services
3	Exempted Goods	5	5	10	Yes	Inputs
4	Exempted Services	5	5	10	Yes	Input Services
5	Salaries and Wages		5	5	No	No Supply – Sch III
6	Cement	10	0	10	Yes	Inputs – shifted to RD, RCM paid monthly
7	Capital Goods	5	5	10	No	80:20 only on input and input services
8	Deemed Interest (Loan from relative)		10	10	Yes	Input Services – Sch I
	Total (only Yes)	65	35	100	Shortfall of 15 but no RCM as URD includes exempt of 20	

Thank you

Disclaimer:

- Our comments are based on GST Act assented on 12th April 2017 and various updates (available in public domain)
- This publication contains information in summary form and is therefore intended for general guidance only. It is not intended to be a substitute for detailed research or the exercise of professional judgment. On any specific matter, reference should be made to our appropriate advisor.
- This presentation is prepared for CTC Webinar dated 24th June 2020 only