

# CA Kush Vora



## GST Issues- Real Estate

October, 2024



# BASIC FRAMEWORK

## Pre GST era

MVAT- 1%  
(No ITC)

Ser Tax- 4.5%  
(Partial ITC)

Excise Duty-  
12.5%  
(No ITC)

## July 17 to March 19

GST- 12%

GST- 8%

Full ITC

## April 2019 onwards

GST- 5%  
(No ITC)

GST- 1%  
(No ITC)

GST- 12%  
(Prop ITC)

# IDT ON REAL ESTATE

The background features a grayscale image of a tax form on the left, two pencils at the top center, and a pen on the right. A large, semi-transparent brown rectangle is overlaid in the center, containing the title text.

# PROVISIONS UNDER GST LAW

## Sale of Land & Building

Schedule III



*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***

## Levy of GST on Real Estate

## Deemed Supply of service

Schedule II



*5(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.*

## Levy of GST on Real Estate

**Continuous supply of service**

*a supply of services which is provided, or agreed to be provided, continuously or on recurrent basis, under a contract, for a period exceeding three months with periodic payment obligations and includes supply of such services as the Government may, subject to such conditions, as it may, by notification, specify;*

**Tax Invoice**

*(a) where the due date of payment is ascertainable from the contract, the invoice shall be issued on or before the due date of payment*

*(c) where the payment is linked to the completion of an event, the invoice shall be issued on or before the date of completion of that event*

## Time of Supply on Real Estate



# OLD VS NEW SCHEME

## Old Scheme

- No concept of REP vs RREP
- GST rate 8% & 12% for affordable & normal residential house.
- Full ITC available
- No restriction of registered dealers purchase
- No separate GST rate for commercial units. Same as applicable to residential
- Applicable for all projects commenced before 01.04.2019 and which are ongoing till date.
- Need to file Annexure V if old scheme continued post 01.04.2019

## New Scheme

- Concept of REP & RREP as per RERA
- RREP- GST Rate 1% for affordable & 5% for normal house & even shops
- No ITC to be availed
- 80% purchase from registered dealers
- REP- 12% with ITC in case of commercial projects
- Applicable for all projects commencing after 01.04.2019.
- Ongoing projects automatically converted to New Scheme if Annexure V not filed

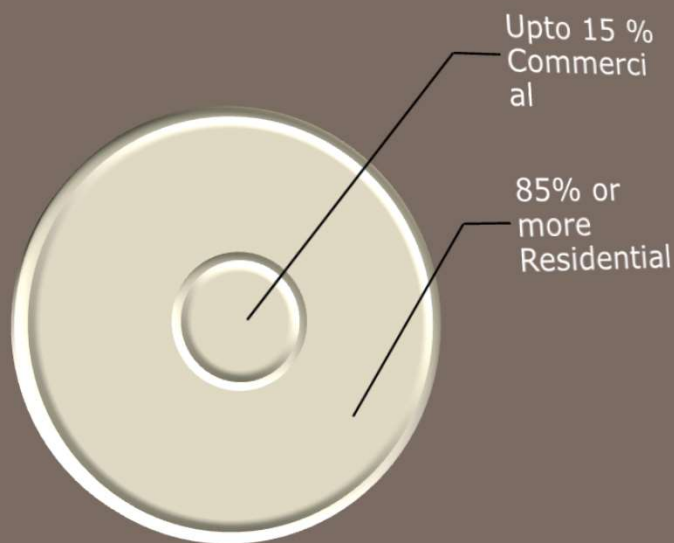
## New Scheme of Builders- Applicable Notifications

<b>Sr. No.</b>	<b>Rate Notification</b>	<b>Subject</b>
<b>1.</b>	NN 03/2019 dt. 29/03/2019	Amendment of Rate Notification (services)
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<b>5.</b>	NN 07/2019 dt. 29/03/2019	Addition of RCM services u/s 9(4)
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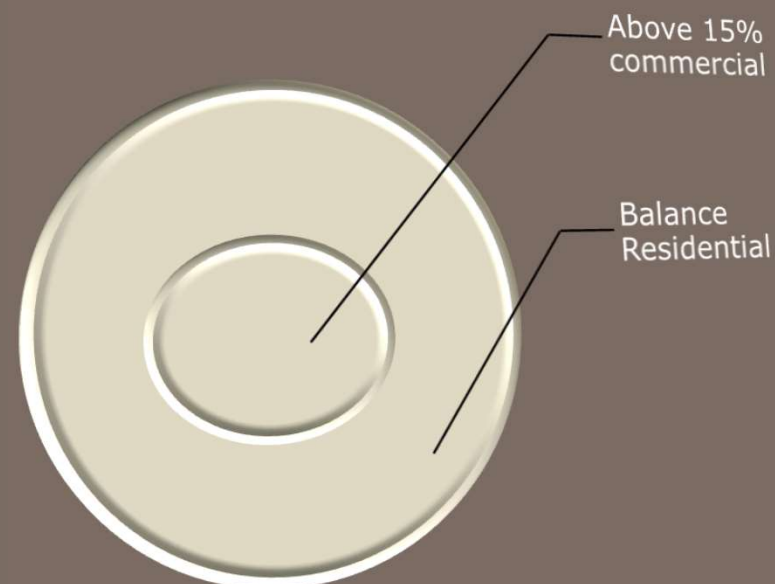


# CONCEPTS UNDER --- NEW SCHEME

## RREP



## REP



(xxix) "Residential apartment" shall mean an apartment intended for residential use as declared to the Real Estate Regulatory Authority or to competent authority

(xxx) "Commercial apartment" shall mean an apartment **other than a residential apartment**

## RREP vs REP

## “Other than residential”

Sr. No.	Category
1.	Club House
2.	Staircase & Lift area
3.	Parking Area
4.	Jogging track
5.	Gymnasium & Health Club
6.	Swimming Pool
7.	Badminton, Tennis, Volleyball courts
8.	Temple, Prayer Room

## RREP vs REP (Example)

Type	RERA Phase I	RERA Phase II	RERA Phase III	BMC Total Plan
<b>Residential</b>	97,500 Sq. Ft	84,000 Sq. Ft	-	1,81,500 Sq. Ft.
<b>Commercial &amp; Shops</b>	2,500 Sq. Ft.	16,000 Sq. Ft.	10,000 Sq. Ft.	28,500 Sq. Ft.
<b>Total Area</b>	<b>1,00,000/-</b>	<b>1,00,000/-</b>	<b>10,000/-</b>	<b>2,10,000/-</b>
<b>Percentage commercial area</b>	2.5%	16%	100%	13.5%

**(xix) Residential Real Estate Project**

*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*

**(xviii) Real Estate Project**

*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);*

**RERA- 2(zn) "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*

## RREP vs REP (Example)

Type	RERA Phase I	RERA Phase II	RERA Phase III	BMC Total Plan
<b>Residential</b>	97,500 Sq. Ft	84,000 Sq. Ft	-	1,81,500 Sq. Ft.
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<b>Total Area</b>	<b>1,00,000/-</b>	<b>1,00,000/-</b>	<b>10,000/-</b>	<b>2,10,000/-</b>
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**RREP**

**REP**

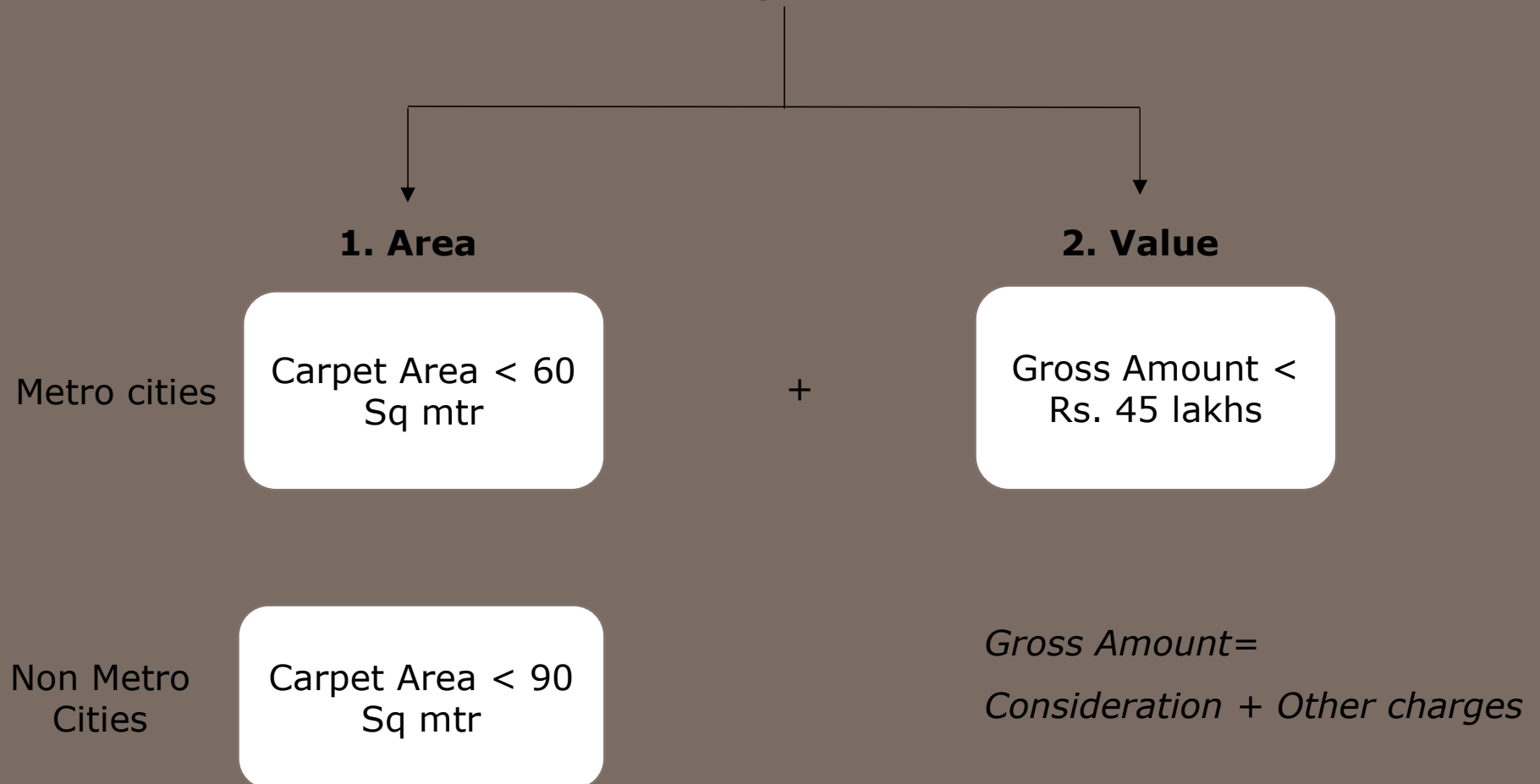
**REP**

**NO ITC**

**16% ITC**

**FULL ITC**

## Affordable Housing under New Scheme



## Affordable Residential Apartment [Explanation (xvi)]

## GST Rates under New Scheme

No.	Type	Type	GST Rate	Eff GST Rate	Conditions
<b>3(i)</b>	RREP	Affordable Residential Apartment	1.5%	1%	As per Annexure
<b>3(ia)</b>	RREP	Normal Residential Apartment	7.5%	5%	
<b>3(ib)</b>	RREP	Commercial Apartment	7.5%	5%	
<b>3(ic)</b>	REP	Affordable Residential Apartment	1.5%	1%	
<b>3(id)</b>	REP	Normal Residential Apartment	7.5%	5%	
<b>3(if)</b>	REP	Commercial Apartments	18%	12%	Full ITC

### Explanation 2

1/3<sup>rd</sup> value to be deemed abatement for land portion

## GST RATES

**Conditions of  
New Scheme**

- 1 Tax to be paid compulsorily by Cash ledger**
- 2 ITC allowed only to the extent of commercial portion in REP**
- 3 Project wise accounts to be maintained and calculate tax payments**
- 4 80% Input & input services compulsorily from GST Registered persons**
- 5 RCM to be paid on shortfall below 80%.**
- 6 RCM to be paid on cement purchase from URD person**
- 7 ITC not availed to be disclosed as ineligible ITC in Row 4D(2) of GSTR-3B**

## Builder/ Developer ITC- Where to disclose?

Details	Integrated Tax	Central Tax	State/UT Tax	Cess
1	2	3	4	5
<b>(A) ITC Available (whether in full or part)</b>				
(1) Import of goods				
(2) Import of services				
(3) Inward supplies liable to reverse charge (other than 1 & 2 above)				
(4) Inward supplies from ISD				
(5) All other ITC	ITC as per 2B			
<b>(B) ITC Reversed</b>				
(1) As per rules 42 & 43 of CGST Rules	Permanent Reversal- R. 42/43/17(5)			
(2) Others	Temporary Reversal- 180 days/ invoice not received			
<b>(C) Net ITC Available (A) – (B)</b>				
<b>(D) Ineligible ITC</b>				
(1) As per section 17(5)	180 days + Late invoice			
(2) Others	16(4) late filing + Place of supply mismatch			

## Updated GSTR 3B -July 2022



# ISSUES UNDER REAL ESTATE

**Burning  
Issues in Real  
Estate**

**1 SOCIETY RE-DEVELOPMENT**

**2 GST ON OTHER CHARGES**

**3 80/20 CALCULATION**

**4 GOVERNMENT PAYMENTS**

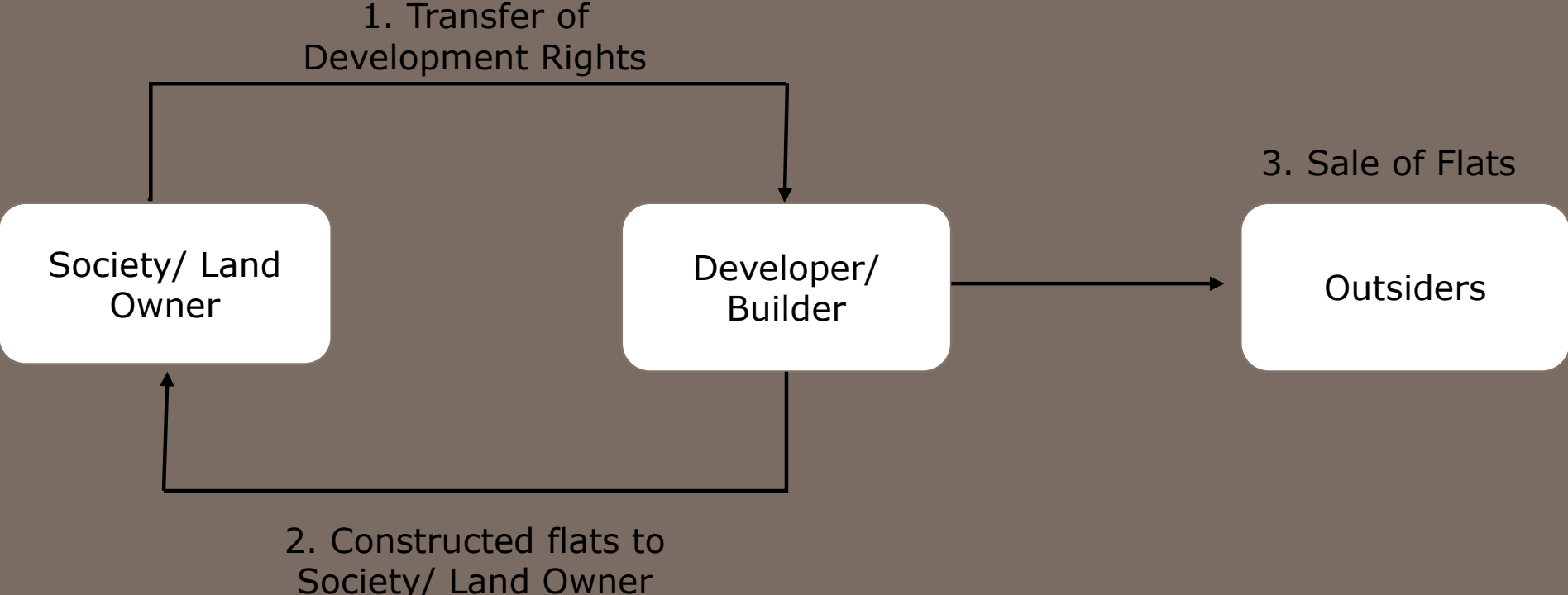
**5 LONG TERM LEASE OF LAND**

**6 OLD SCHEME- ITC REVERSAL**



# SOCIETY REDEVELOPMENT

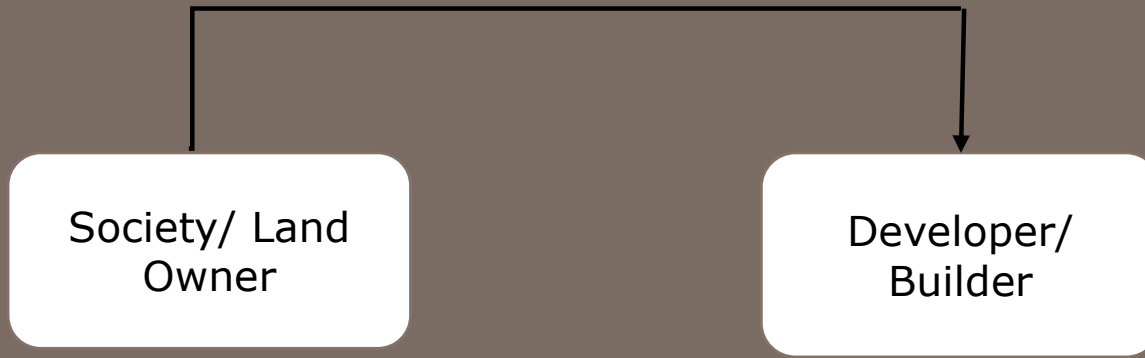
# Re-development Model





# 1. TRANSFER OF DEVELOPMENT RIGHTS

## 1. Transfer of Development Rights



## Issues

Levy

Time of Supply

Value

Exemption

# Transfer of Development Rights....

## Sale of Land & Building

Schedule III

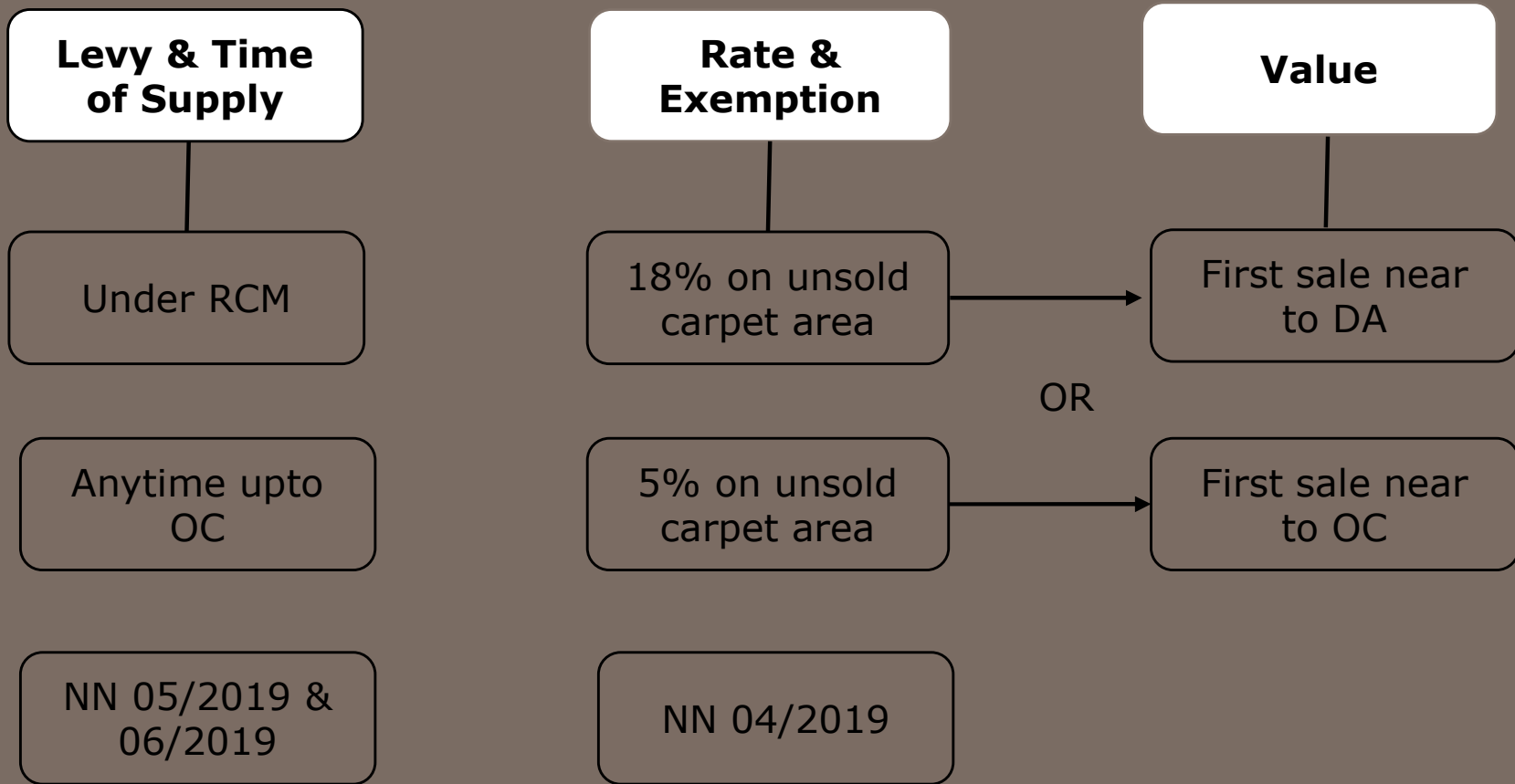


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*5. **Sale of land** and, subject to clause (b) of paragraph 5 of Schedule II, **sale of building***

## Levy of GST on Real Estate

<p>7. In the formula prescribed under first proviso to Entry 41A of the Notification 12/2017- CT (R), as amended by Notification 4/2019 CT (R), what rate shall be taken to determine the value to be ascribed to the “GST Payable on TDR or FSI or both for construction of the residential apartments in the project but for exemption contained therein” as no specific rate has been prescribed in Notification 11/2017 CT-Rate or any other notification?</p> <p>What is the rate applicable to output supply of TDR or FSI?</p> <p>Whether the quantum of TDR or</p>	<p>The GST on transfer of development rights or FSI (including additional FSI) is payable at the rate of 18% (9% + 9%) with ITC under Sl. No. 16, item (iii) of Notification No. 11/2017 - Central Tax (Rate) dated 28-06-2017 (heading 9972).</p> <p>There is no exemption on TDR or FSI (Addl. FSI) for construction of commercial apartments. Therefore, GST shall be payable on TDR or FSI (including additional FSI) or both used in respect of</p> <ul style="list-style-type: none"><li>(i) carpet area of commercial apartment and</li><li>(ii) un-booked residential apartments as on the date of issuance of Completion Certificate or first occupation of the project for the purpose of formula.</li></ul>
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## ...Transfer of Development Rights

## Example- Redevelopment of Residential Project (Transfer of Dev Rights)

A society has transferred development rights of 3 lakh Sq Ft to a builder. Builder will construct 1.25 Lakh Sq Ft for existing members of society and balance available potential will be sold to outsiders.

The builder began and completed construction within a period of 3 years. As on date of OC, area of 10,000 Sq Ft is still unsold.

The prevailing market rate per sq ft for 3 years was as under:

- 1 <sup>st</sup> year (year of DA)	- Rs. 20,000
- 2 <sup>nd</sup> Year	- Rs. 25,000
- 3 <sup>rd</sup> year (year of OC)	- Rs. 30,000

<b>Option</b>	<b>Tax on Dev Rights (Residential)</b>	<b>Formula</b>
<b>Option 1</b>	18% x Dev Rights area x First sale near to DA x unsold area	18% x 3L x Rs. 20,000 x unsold area
<b>Option 2</b>	5% x unsold area X first sale near to OC	5% x unsold area x Rs. 30,000

### *Market Rates*

*1<sup>st</sup> year (year of DA) - Rs. 20,000*

*2<sup>nd</sup> Year - Rs. 25,000*

*3<sup>rd</sup> year (year of OC) - Rs. 30,000*



# SOCIETY FREE FLATS

Society/ Land  
Owner

Developer/  
Builder



**2. Constructed flats to  
Society/ Land Owner**

**Issues**

Levy

Time of  
Supply

Value

Exemption

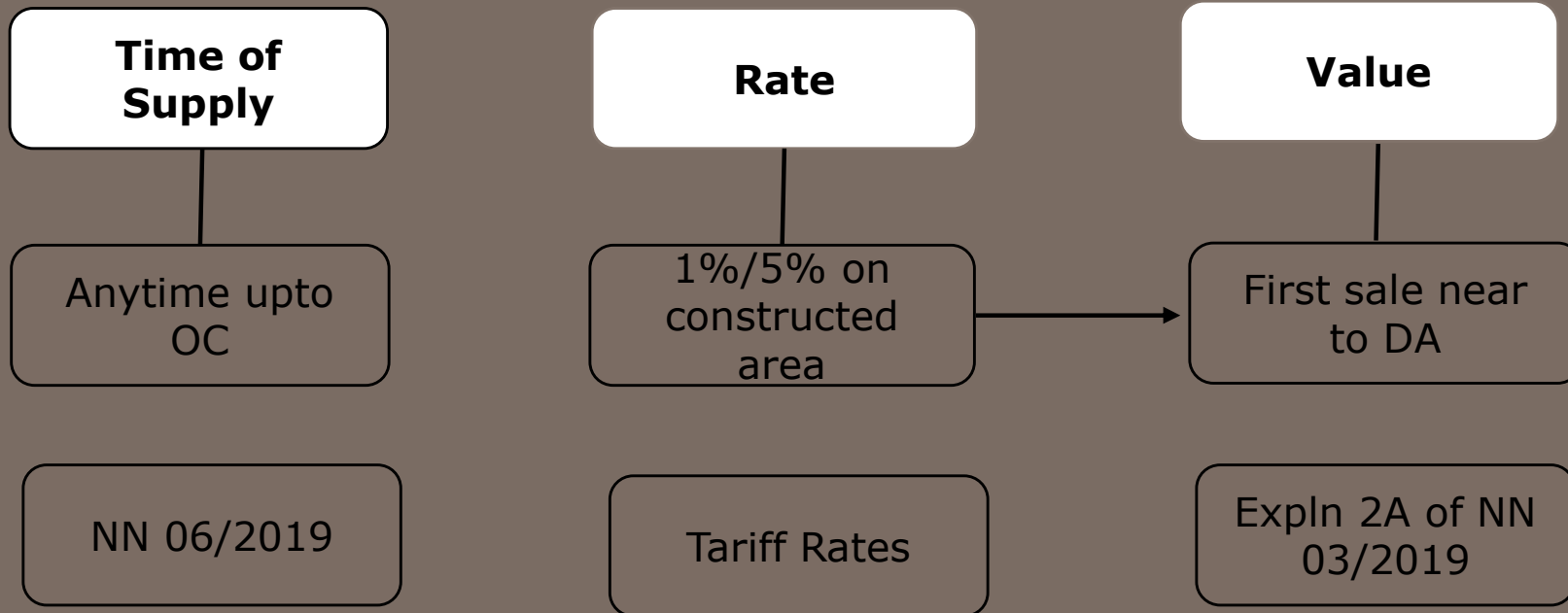
**Free Flats constructed for Society...**

## FAQ (PART II) dt. 14/05/2019

8.	<p>In case of Redevelopment, Slum Rehabilitation or similar arrangements, the Developer will be constructing two types of units i.e. one which is allotted to existing occupiers for no monetary consideration and second which is sold in the market to outside buyer. Price at which the unit is being sold to the outsider is determined in a manner to factor cost of construction of both type of units so that the unit to existing occupiers may be allotted free of monetary consideration. It may be clarified whether the Input Tax Credit in relation to construction of units to be allotted to existing occupiers, in case of residential project opted for old rates or commercial projects, shall be allowed to the</p>	<p>The apartments given to the original inhabitants or the slum dwellers in redevelopment project or slum rehabilitation project are given by the promoter against consideration received by them in the form of TDR/ FSI/ monetary consideration from the original inhabitants in case of redevelopment projects and from the Government in case of slum rehabilitation projects. <b>The supply of service by way of construction of such apartments against construction wholly or partly in the form of TDR/FSI is a taxable supply subject to GST.</b></p> <p>Wherever tax is paid on construction of such apartments at the effective rates of GST of 8%/ 12% with ITC, the promoters shall be eligible for ITC, including ITC in relation to construction of units to be allotted to the existing occupiers even though there may not be a monetary consideration but the consideration is in the form of grant of TDR/FSI.</p>
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## FAQ (PART II) dt. 14/05/2019

9.	<p>In case of redevelopment or slum rehabilitation project, (new or an existing project) whether the constructed units supplied to existing occupiers by the developer free of monetary consideration are taxable?</p> <p>In case of ongoing project in respect of which the promoter has opted for new rates of 1% / 5%, it may be clarified whether</p>	<p>Yes, units supplied free of cost also attract GST as their consideration is not money but TDR/ FSI or rights relatable to land on which construction takes place.</p> <p>In such an ongoing project, the units sold in open market would be eligible for GST rate of 1% (without ITC), if such units are covered under Credit Linked Subsidy Scheme, as provided in the definition of “affordable residential apartments” given in notification no 11/ 2017- CTR dated 28.06.2017 as amended by notification No. 3/2019- CTR dated 29.03.2019 .</p>
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**...Free Flats constructed for Society**

## Example- Redevelopment of Residential Project (Construction of Free Flats)

A society has transferred development rights of 3 lakh Sq Ft to a builder. Builder will construct 1.25 Lakh Sq Ft for existing members of society and balance available potential will be sold to outsiders.

The builder began and completed construction within a period of 3 years. As on date of OC, area of 10,000 Sq Ft is still unsold.

The prevailing market rate per sq ft for 3 years was as under:

- |                                     |              |
|-------------------------------------|--------------|
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| - 2 <sup>nd</sup> Year              | - Rs. 25,000 |
| - 3 <sup>rd</sup> year (year of OC) | - Rs. 30,000 |

Option	Tax on Free Flat Constructed	Ex mem Area	Rate	GST
<b>Option 1</b>	5% x Free Flats x First sale near to DA	1,25,000	20,000	12.50 Cr

### *Market Rates*

*1<sup>st</sup> year (year of DA) - Rs. 20,000*

*2<sup>nd</sup> Year - Rs. 25,000*

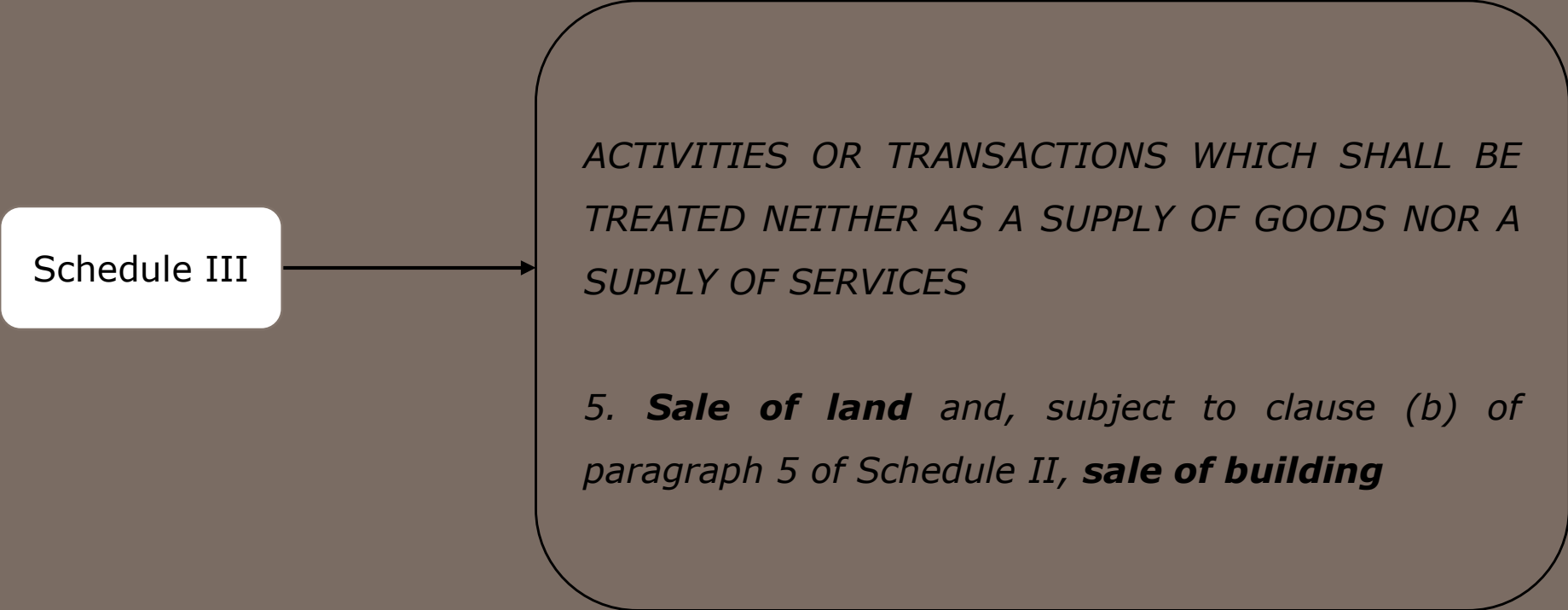
*3<sup>rd</sup> year (year of OC) - Rs. 30,000*



# ARGUMENTS BEFORE HIGH COURT

## Sale of Land & Building

Schedule III



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## Levy of GST on Real Estate

**Section 2(6) of the Registration Act 1880:**

*immovable Property includes land, buildings, hereditary allowances, rights to ways, lights, ferries, fisheries or any other benefit to arise out of land...*

**Section 3(26) of the General Clauses Act 1897**

*immovable property shall include land, benefits to arise out of land.....*

**Section 2(z) of RERA**

*immovable property includes land, buildings, rights of ways, lights or any other benefit arising out of land.....*

**Section 269UA(d) of the Income tax Act, 1961**

*immovable property means—*

- (i) any land or any building or part of a building*
- (ii) any rights in or with respect to any land or any building or a part of a building  
.....(whether by way of becoming a member of.....or by way of any agreement or any arrangement of whatever nature), not being a transaction by way of sale*

## **Notifications do not have statutory force**

- Larsen & Toubro Ltd. and Anr. v. State of Karnataka and Anr. (2014) 1 SCC 708
- Sant Lal Gupta vs. Modern Co-Operative Group Housing Society Ltd. [2010 (262) ELT 6 (SC)].
- Rajasthan Industrial Development and Investment Corporation reported at [(2013) 5 SCC 4271]
- Jindal Stainless Limited [ILR (2011) V1 DELHI 373J]

## New Scheme of Builders- Applicable Notifications

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1. No service supplied by builder to Society members.
2. Society and Builder are co-promoters/ joint developers- as per RERA circulars.
3. What is provided to members is immovable property and hence Immovable property cannot be taxed.
4. Anomaly in valuation and hence levy fails.
5. Powers granted to delegated legislation and are ultra vires the constitutional provisions Article 246 & Article 246A (Power to make laws), Article 19 (Right to carry business)
6. Construction services provided are for own captive consumption in order to meet its overall obligation of re-development

## **For Construction of Free Flats**

## Service Tax Judgements

1. Vasantha Greens Projects vs. CCT, Rangareddy GST 2019 (020) GSTL 0568- (Tri-Hyd)
2. Commissioner of CGST & C. Ex. Thane Vs. Ethics infra Development Pvt. Ltd. TS-599-CESTAT-2021 (Mum)-ST
3. Om Sree Builders and Developers, GK Developers & Others. vs. Commissioner of Customs, Central Excise & Service Tax [GST - 2018 (9) TMI 916 – CESTAT Hyderabad]
4. PNR Infra India Pvt. Ltd. vs. CCE, Hyderabad – IV 2018 (12) TMI 1243 – CESTAT Hyderabad

## For Construction of Free Flats



# NEGATIVE COURT RULINGS

## **Prahita Construction [TS-60-HC(TEL)-2024-GST]**

- Transfer of development rights (TDR) "is a service" under GST Law which the landowner is offering to Developer and that too for a consideration.
- Same is not an outright sale of an immovable property under Entry 5 of Schedule III
- Sale of land/transfer of land or undivided share of land would get executed only after issuance of completion certificate (CC) of the project, itself would give a clear indication that the services rendered by Assessee in execution of JDA was supplied prior to CC issuance and would thus be amenable to GST
- Assessee's contention that the JDA eventually results in sale of land to the Assessee as incorrect and misleading
- Supreme Court has refused to stay this judgement. Matter now listed on 09/09/2024

## **Transfer of Development Rights**

## **Vilas Gandhi [(2020) 120 taxmann.com 83 (AAR Maharashtra)]**

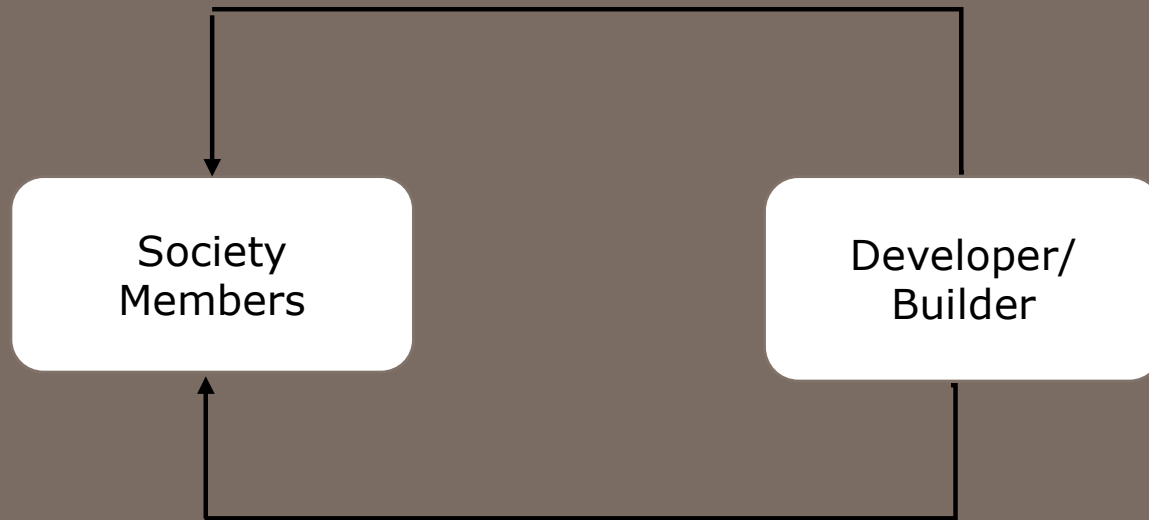
- Whether transfer of TDR made for consideration in course of business is supply of service under section 7 - Held, yes
- Whether sale of TDR/FSI would be leviable to GST under Heading 9972, at rate of 18 per cent- Held, Yes

## **Transfer of Development Rights**



# IMPLICATIONS ON SOCIETY MEMBERS

## 1. Hardship allowance



## 2. New Constructed flats

# Society members

## Hardship Allowance/ Alternate Accommodation Expenses

- *S. 2(102) "services" means anything other than goods, money and securities but includes activities relating to the use of money or its conversion by cash or by any other mode, from one form, currency or denomination, to another form, currency or denomination for which a separate consideration is charged*
- *Schedule II- Activities to be treated as Supply of Goods or Supply of Services*

*Deemed Service:*

*(e) agreeing to the obligation to refrain from an act, or **to tolerate an act** or a situation, or to do an act;*

## Hardship Allowance

- **Zaver Shankarlal Bhanushali [(2018) Taxmann 3 (AAR- Maharashtra)]**

*Amount received by tenant towards alternate accommodation or delayed possession of new premises would be receipt of amounts for doing an act i.e. vacating premises for redevelopment as well as tolerating construction cum redevelopment work till possession of new redeveloped premises and further for tolerating an act of not having completed redevelopment period within time, same would be a 'supply' and therefore, GST to be levied on such amount*

- **Chennai Metro Rail Ltd [(2021) 125 taxmann.com 352 (AAAR – Tamil Nadu)]**

*Activity of agreeing to grant rights for shared access of pathway is an act of agreeing to tolerate an act and is classifiable under SAC 999794 under other miscellaneous services/Agreeing to tolerate an act and taxable at 18 per cent GST*

## **Hardship Allowance**

- ***Victorian Chambers - Victorian Chamber of manufacturers v. Commonwealth (of Australia) (1943) 67 CLR 335, 346 per Williams J.***  
"Any" typically implies an absence of limitations or qualifications. It should be interpreted broadly, encompassing all possibilities within its context. "Any goods" includes all goods unless subject matter and context of a statute specify otherwise.
- ***Barron vs Littman - (1952) 2 All ER. 548***  
The word 'any' in the context can mean 'all' but also mean 'some'
- ***Sahyadri SSK Ltd vs CCE, Pune 2003(153) ELT 18 (S.C.)***  
The word has a diversity of meanings and may be employed to indicate "all" or "every" as well as "some" or "one" and its meaning in a given statute depends upon the context and the subject-matter of the statute.

## Interpretation of 'Anything other than goods'

## **Business Definition**

*"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*
- (d) ....*
- (e) ....*

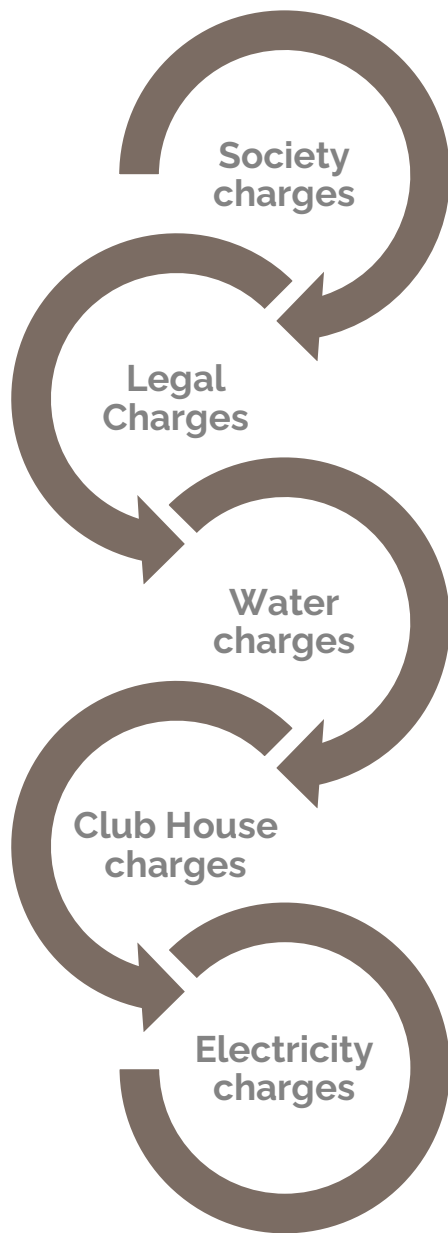
## **Hardship Allowance**



# OTHER CHARGES

## OTHER CHARGES

Agreement Value	Other Charges																
1. Flat Cost- Rs. 3.5 Crore + Stamp Duty + GST	<table><tbody><tr><td>1. Electricity charges</td><td>: Rs. 25,000/-</td></tr><tr><td>2. Maintenance</td><td>: Rs. 75,000/-</td></tr><tr><td>3. Club House Charges</td><td>: Rs. 75,000/-</td></tr><tr><td>4. Water connection charges</td><td>: Rs. 10,000/-</td></tr><tr><td>5. Development charges</td><td>: Rs. 25,000/-</td></tr><tr><td>6. Society formation charges</td><td>: Rs. 10,000/-</td></tr><tr><td>7. Corpus</td><td>: Rs. 90,000/-</td></tr><tr><td>8. Share Application Money</td><td>: Rs. 5,000/-</td></tr></tbody></table>	1. Electricity charges	: Rs. 25,000/-	2. Maintenance	: Rs. 75,000/-	3. Club House Charges	: Rs. 75,000/-	4. Water connection charges	: Rs. 10,000/-	5. Development charges	: Rs. 25,000/-	6. Society formation charges	: Rs. 10,000/-	7. Corpus	: Rs. 90,000/-	8. Share Application Money	: Rs. 5,000/-
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## Composite Supply

- *S. 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 the ordinary course of business, one of which is a principal supply;*
- *S. 8. Tax liability on composite and mixed supplies.— The tax liability on a composite or a mixed supply shall be determined in the following manner, namely:—*
  - (a) 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; and*

**PURANIK BUILDERS**  
**MAHARASHTRA AAR**  
**30/03/2023**

**Facts of the case:**

- Applicant is a builder/ developer and paying GST @ 12% on under –construction flats, as construction services. The applicant is also providing certain additional services, the charges for which are collected separately under respective heads.
- The list of such charges include electric meter installation, water connection charges, advance maintenance, club house maintenance, development charges, share money, application money, infrastructure charges, society formation charges, municipal taxes, legal charges, etc
- The Maharashtra AAR had rejected the applicants application and had upheld that other charges would be taxed at an individual rate of 18% and not 12%.



## Ruling by AAAR:

- Some of the other charges collected by the builder are inextricably linked with construction services, while some other services are independently provided to the customer.
- The following category of services are naturally bundled and shall bear the same rate of tax as that of principal services of construction services i.e. 12%

*Water connection charges | electric meter installation | development charges | Legal Fees*

- The following services are independently supplies and will bear GST rate as independent services

*Club house maintenance | advance society maintenance | municipal taxes | society formation charges | legal charges | infrastructure charges*

## Conclusion

### Naturally bundled

- Water connection charges
- Electric meter installation
- Development charges
- Legal Fees

### Independent supplies

- Club House Maintenance
- Society Maintenance
- Society Formation Charges
- Legal charges
- Infrastructure charges
- Electricity charges

### Deposits

- Share Application Money
- Corpus

## OTHER CHARGES COLLECTED BY BUILDER

## OTHER CHARGES- GST RATE

<b>Sr. No</b>	<b>Other Charges</b>	<b>Amount</b>	<b>GST Rate</b>
1.	Electricity charges	: Rs. 25,000/-	18%
2.	Maintenance	: Rs. 75,000/-	18%
3.	Club House Charges	: Rs. 75,000/-	18%
4.	Water connection charges	: Rs. 10,000/-	5%
5.	Development charges	: Rs. 25,000/-	5%
6.	Society formation charges	: Rs. 10,000/-	18%
7.	Corpus	: Rs. 90,000/-	NIL
8.	Share Application Money	: Rs. 5,000/-	NIL



# 80:20 RESTRICTION

**1.** Maintain project wise account of inward supplies:  
Registered & unregistered supplier.

**2.** 80% of the value of **input and input services** :  
GST registered suppliers.

**3.** Shortfall of registered purchases below 80%:  
GST under RCM @ 18%.

**4.** Purchase of cement from URD: 28% GST under  
RCM basis

## 80/20 Restriction

## What are 'Inputs & Input Services'

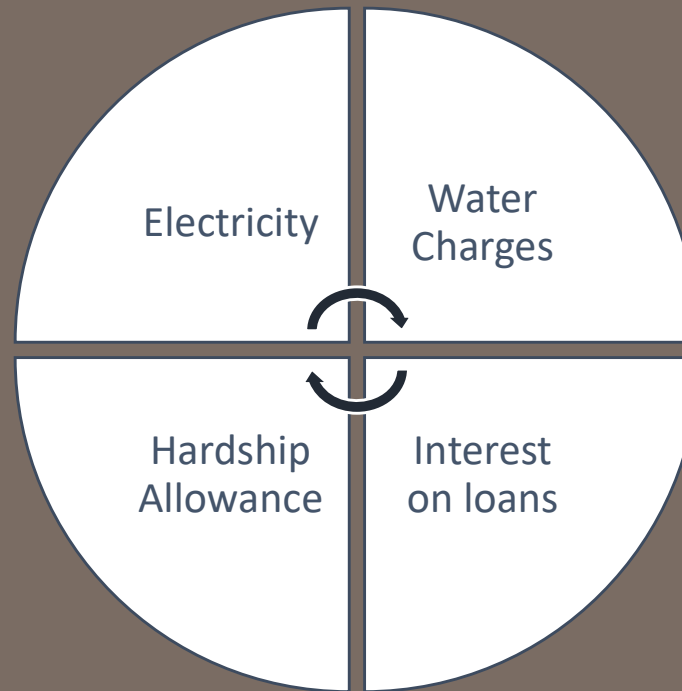
- (59) "input" means **any goods** other than capital goods used or intended to be used by a supplier in the course or furtherance of business;
- (60) "input service" means **any service** used or intended to be used by a supplier in the course or furtherance of business;

### Exclusions :

- Non GST Supply- Petrol/ Diesel
- Salary, Depreciation, Bad Debts, etc
- **Exempted services??**

## Judicial Jurisprudence

## EXEMPTED SERVICES



### FAQ No. 18 dated 14.05.2019

18	<i>Whether the inward supplies of exempted goods / services shall be included in the value of supplies from unregistered persons while calculating 80% threshold?</i>	<i>Yes. Inward supplies of exempted goods / services shall be included in the value of supplies from unregistered persons while calculating 80% threshold.</i>
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## Hardship Allowance/ Alternate Accommodation Expenses

- *S. 2(102) "services" means anything other than goods, money and securities but includes activities relating to the use of money or its conversion by cash or by any other mode, from one form, currency or denomination, to another form, currency or denomination for which a separate consideration is charged*
- *Schedule II- Activities to be treated as Supply of Goods or Supply of Services*

*Deemed Service:*

*(e) agreeing to the obligation to refrain from an act, or **to tolerate an act** or a situation, or to do an act;*

## Hardship Allowance

- **Zaver Shankarlal Bhanushali [(2018) Taxmann 3 (AAR- Maharashtra)]**

*Amount received by tenant towards alternate accommodation or delayed possession of new premises would be receipt of amounts for doing an act i.e. vacating premises for redevelopment as well as tolerating construction cum redevelopment work till possession of new redeveloped premises and further for tolerating an act of not having completed redevelopment period within time, same would be a 'supply' and therefore, GST to be levied on such amount*

- **Chennai Metro Rail Ltd [(2021) 125 taxmann.com 352 (AAAR – Tamil Nadu)]**

*Activity of agreeing to grant rights for shared access of pathway is an act of agreeing to tolerate an act and is classifiable under SAC 999794 under other miscellaneous services/Agreeing to tolerate an act and taxable at 18 per cent GST*

## **Hardship Allowance**

- ***Victorian Chambers - Victorian Chamber of manufacturers v. Commonwealth (of Australia) (1943) 67 CLR 335, 346 per Williams J.***  
"Any" typically implies an absence of limitations or qualifications. It should be interpreted broadly, encompassing all possibilities within its context. "Any goods" includes all goods unless subject matter and context of a statute specify otherwise.
- ***Barron vs Littman - (1952) 2 All ER. 548***  
The word 'any' in the context can mean 'all' but also mean 'some'
- ***Sahyadri SSK Ltd vs CCE, Pune 2003(153) ELT 18 (S.C.)***  
The word has a diversity of meanings and may be employed to indicate "all" or "every" as well as "some" or "one" and its meaning in a given statute depends upon the context and the subject-matter of the statute.

## Interpretation of 'Anything other than goods'

## **Business Definition**

*"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*
- (d) ....*
- (e) ....*

## **Hardship Allowance**

Excluded from 80/20

**Not goods/ service:**

- Loss sale of FA
- Dividends
- Salary
- Depreciation
- Bad Debts
- MCGM Payments
- Hardship allowance

**Non GST Supply:**

- Petrol/ Diesel

Registered (80%)

**RD Purchase:**

- Material bills
- Labour charges
- Interest on loans

**RCM payments:**

- GTA
- Lawyers
- Security services
- URD Cement

Unregistered (20%)

**URD purchase:**

- Labour charges
- Material Bills

**URD Exempt:**

- Interest on loans
- Water

**BREAK UP OF EXPENSES**

## P&L Extract

P&L A/c  
Rs. 1 Cr

WIP A/c  
Rs. 15 Cr

### Break up

1. Salary & Wages	: Rs. 0.5 Cr/-
2. Dividends	: Rs. 0.5 Cr/-
3. Depreciation	: Rs. 1.0 Cr/-
4. Hardship Allowance	: Rs. 1.0 Cr/-
5. Bad Debts	: Rs. 1.0 Cr/-
6. Professional Fees (RD)	: Rs. 1.0 Cr/-
7. Labour charges (RD)	: Rs. 1.5 Cr/-
8. Labour charges (URD)	: Rs. 0.5Cr
9. Construction Cost (RD)	: Rs. 2.0 Cr/-
10. Sub- contractor charges (RD)	: Rs. 2.0 Cr/-
10. Interest on unsecured loan	: Rs. 5.0 Cr/-

Excluded from 80/20

- Salary & Wages
- Dividends
- Depreciation
- **Hardship Allowance**
- Bad Debts

Registered (80%)

- Professional Fees-  
Rs. 1 Cr
- Construction Cost  
- Rs. 1 Cr
- Sub- contractor  
charges - Rs. 2 Cr.
- Labour Charges-  
Rs. 1.5 Cr

**Total- 5.5 Crore**

Unregistered (20%)

- Labour charges-  
Rs. 0.5 Cr
- **Interest on  
unsecured loan-  
Rs. 5 Cr**

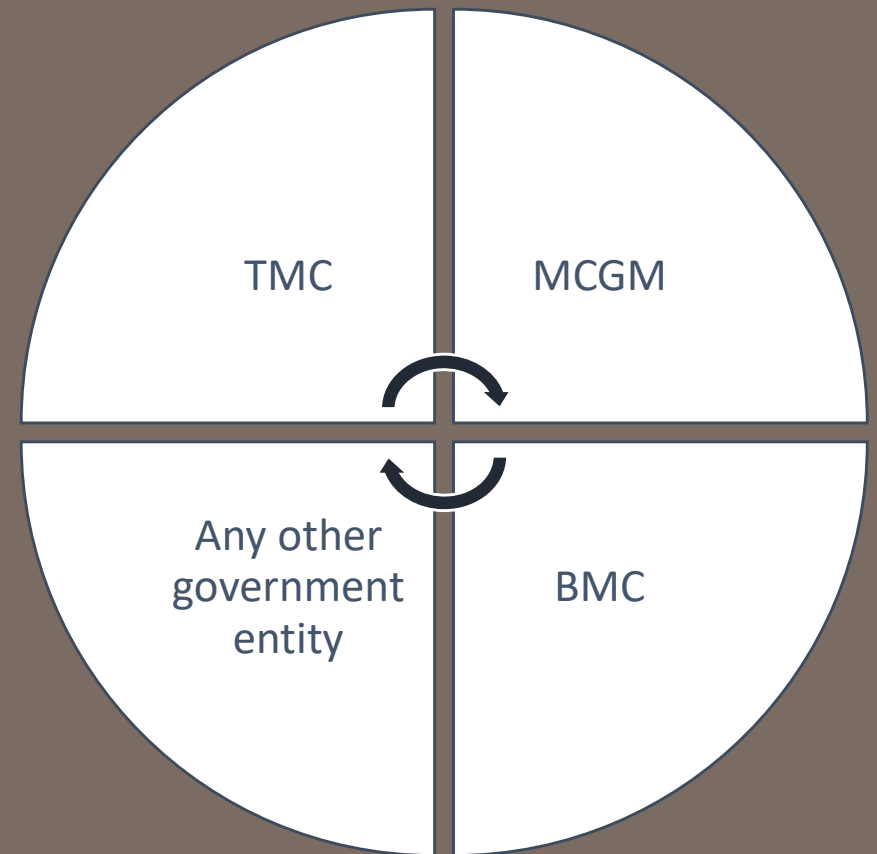
**Total- 5.5 Crore**

**EXAMPLES...**



# GOVERNMENT PAYMENTS

- ❖ Basic FSI
- ❖ Additional FSI
- ❖ Staircase & Lift Premium
- ❖ Pest Control
- ❖ Scrutiny Fees
- ❖ Water Deposit
- ❖ Labour Cess Tax
- ❖ Property Tax
- ❖ Security Deposit



# RCM Notification

<b>SI No.</b>	<b>Category of Supply of Services</b>	<b>Supplier of Service</b>	<b>Recipient of service</b>
5	Services supplied by the Central Government, State Government, Union territory or local authority to a business entity excluding....	Central Government, State Government, Union territory or local authority	Any business entity located in the taxable territory

# Exemption Notification

**NN 14/2017 dt. 28.06.17, r.w. NN 16/2018- Central tax (Rate) dt. 26.07.2018**

*"In exercise of the powers conferred by sub-section (2) of section 7 of the Central Goods and Services Tax Act, 2017 (12 of 2017), the Central Government, on the recommendations of the Council hereby notifies that the following **activities or transactions** undertaken by the Central Government or State Government or Union territory or **any local authority** in which they are engaged as public authority, **shall be treated neither as a supply of goods nor a supply of service, namely:***

***"Services by way of any activity in relation to a function entrusted to a Panchayat under article 243G of the Constitution or to a Municipality under article 243W of the Constitution."***

## **S. 2(69)- Local Authority**

- a) a "Panchayat" as defined in clause (d) of article 243 of the Constitution;
- b) a "Municipality" as defined in clause (e) of article 243P of the Constitution;**
- c) a Municipal Committee, a Zilla Parishad, a District Board, and any other authority legally entitled to, or entrusted by the Central Government or any State Government with the control or management of a municipal or local fund;
- d) a Cantonment Board as defined in section 3 of the Cantonments Act, 2006;
- e) a Regional Council or a District Council constituted under the Sixth Schedule to the Constitution;
- f) a Development Board constituted under article 371 and article 371J of the Constitution; or
- g) a Regional Council constituted under article 371A of the Constitution

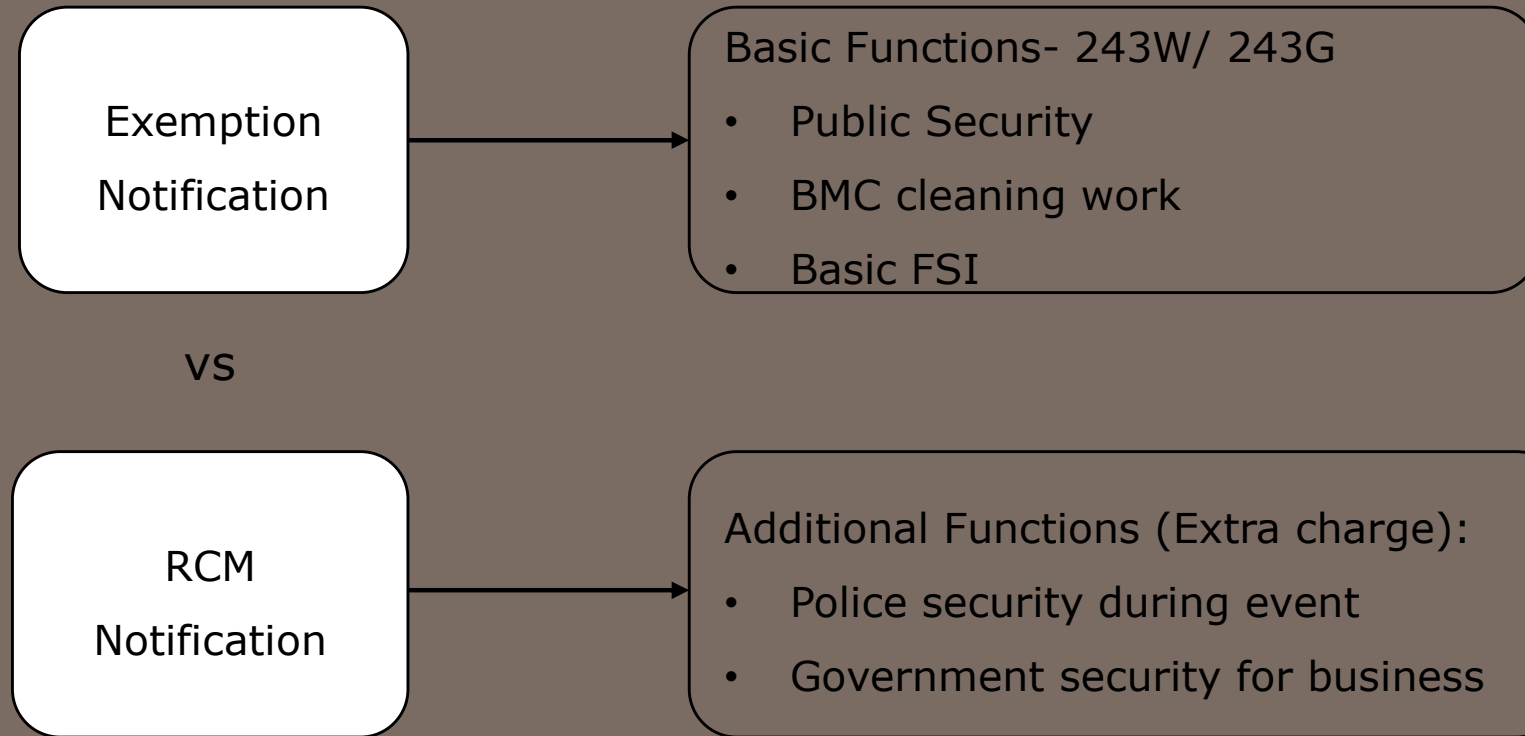
## Article 243W

- a) **Urban planning including town planning**
- b) **Regulation of land-use and construction of buildings.**
- c) Planning for economic and social development
- d) Roads and bridges.
- e) Water supply for domestic, industrial and commercial purposes.
- f) Public health, sanitation conservancy and solid waste management.
- g) Fire services
- h) Urban forestry, protection of the environment and promotion of ecological aspects.
- i) Safeguarding the interests of weaker sections of society, including the handicapped and mentally retarded.
- j) Slum improvement and upgradation.
- k) Urban poverty alleviation.
- l) Provision of urban amenities and facilities such as parks, gardens, playgrounds.
- m) Promotion of cultural, educational and aesthetic aspects.
- n) Burials and burial grounds; cremations, cremation grounds; and electric crematorium
- o) Cattle pounds; prevention of cruelty to animals.
- p) Vital statistics including registration of births and deaths.
- q) Public amenities including street lighting, parking lots, bus stops and public conveniences.
- r) Regulation of slaughter houses and tanneries.

## Article 243G

- a) Agriculture, including agricultural extension.
- b) **Land improvement, implementation of land reforms, land consolidation and soil conservation.**
- c) Minor irrigation, water management and watershed development.
- d) Animal husbandry, dairying and poultry.
- e) Fisheries.
- f) Social forestry and farm forestry
- g) Minor forest produce.
- h) Small scale industries, including food processing industries.
- i) Khadi, village and cottage industries.
- j) Rural housing
- k) Drinking water
- l) Fuel and fodder.
- m) Roads, culverts, bridges, ferries, waterways and other means of communication.
- n) Rural electrification, including distribution of electricity.
- o) Non-conventional energy sources.
- p) Poverty alleviation programme.
- q) Education, including primary and secondary schools
- r) Technical training and vocational education.
- s) Adult and non-formal education.
- t) Libraries
- u) Cultural activities.
- v) Markets and fairs.
- w) Health and sanitation, including hospitals, primary health centres and dispensaries.
- x) Family welfare.
- y) Women and child development
- z) Social welfare, including welfare of the handicapped and mentally retarded.
- aa) Welfare of the weaker sections, and in particular, of the Scheduled Castes and the Scheduled Tribes
- bb) Public distribution system.
- cc) Maintenance of community assets.

# Arguments by Department



## RCM Notification vs Exemption Notification

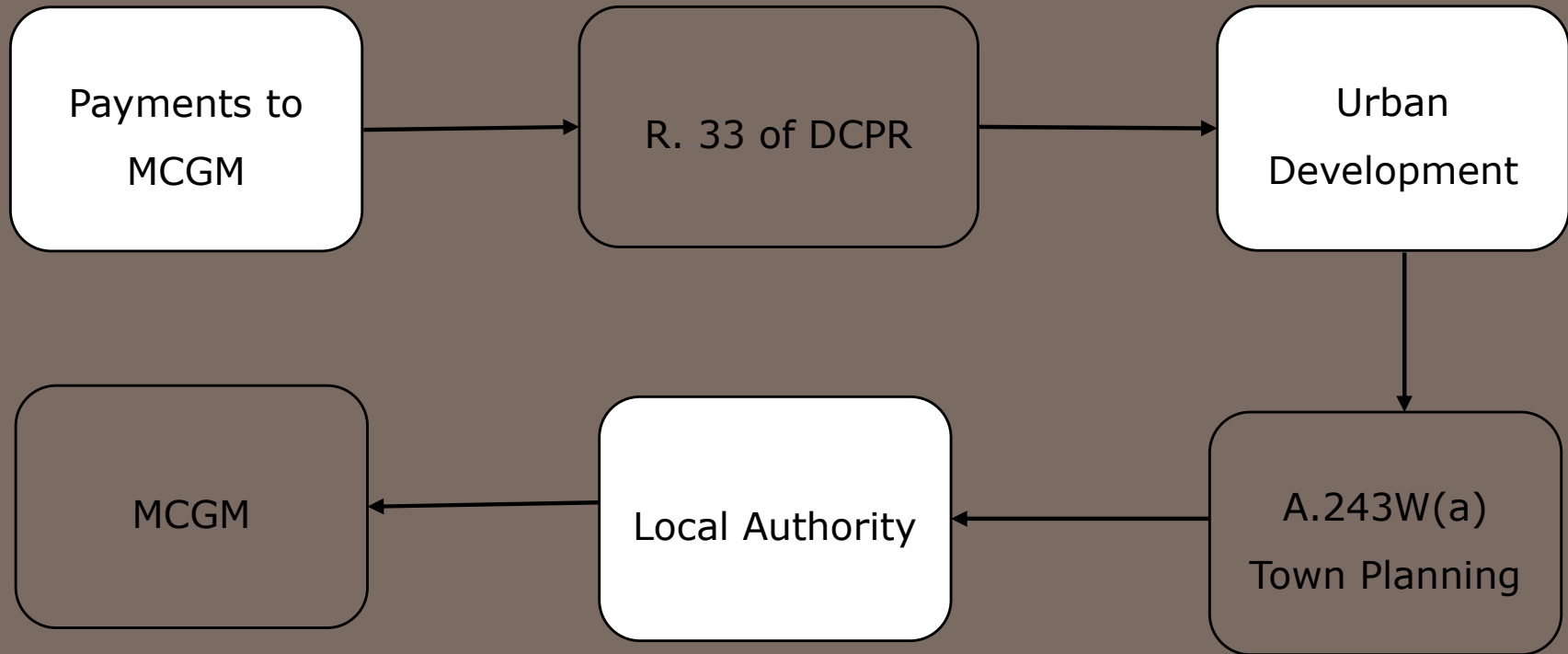
## Arguments by Department

<b>Sr. No</b>	<b>Other Charges</b>	<b>GST Rate</b>	<b>Reason</b>
1.	Basic FSI	NIL	Basic Function
2.	Additional FSI	18%	Additional Function
3.	Staircase & Lift Premium	18%	Additional Function
4.	Pest Control	18%	Additional Function
5.	Scrutiny Fees	18%	Additional Function
6.	Water Deposit	NIL	No tax on Deposit
7.	Labour Cess Tax	NIL	No tax on tax
8.	Property Tax	NIL	No tax on tax
9	Security Deposit	NIL	No tax on Deposit

# Development Control & Promotion Regulation for Greater Mumbai ('DCPR')

- Urban Development Department of Maharashtra vide Notification No TPB 4317/629/CR-118/2017/DP/UD-11 dated 08/05/2018 issued DCPR 2034
- Regulation 30- Floor Space Index (FSI)
- Regulation 32- Transfer of Development Rights (TDR)
- Regulation 33- Additional Floor Space Index (Additional FSI)

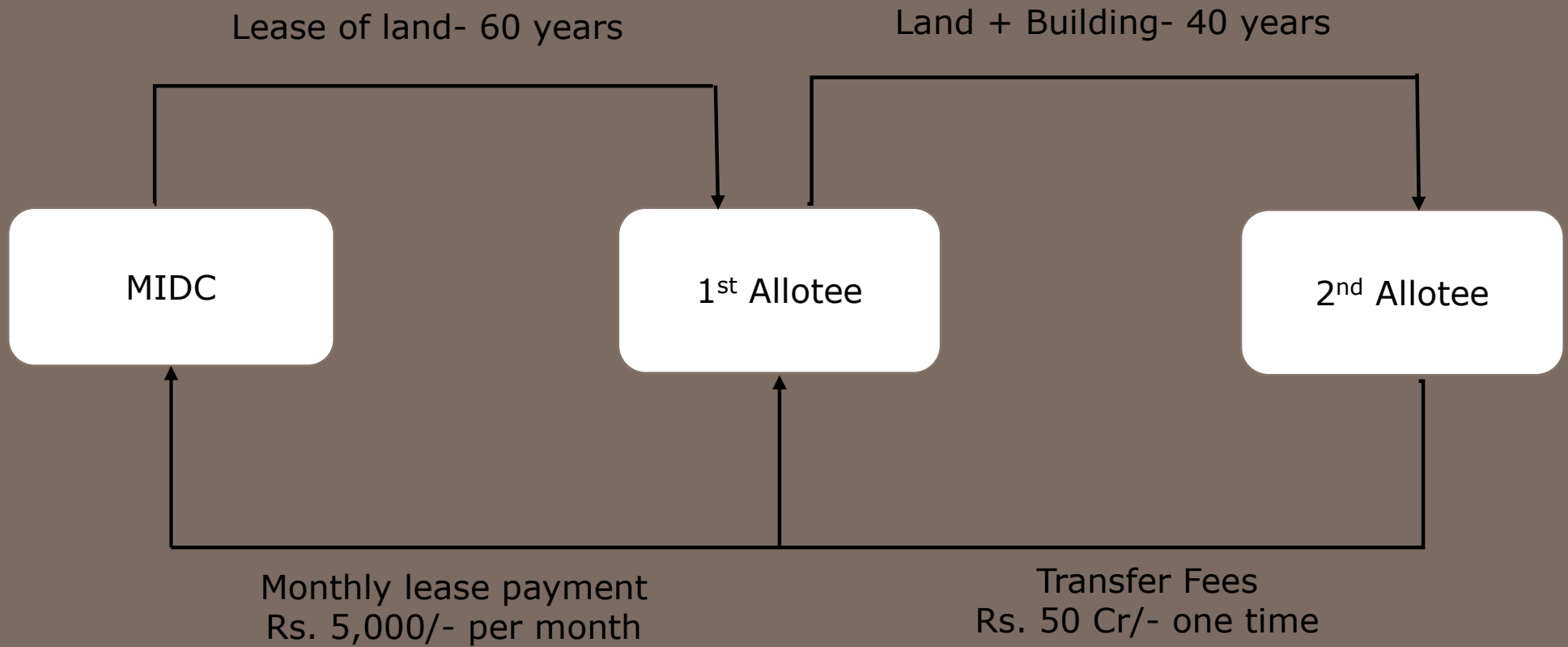
# Arguments by Tax Payer





# LONG TERM LEASE OF LAND

# Transfer of Lease hold rights



## Issues under consideration

- Whether transfer of leasehold rights & building to 2<sup>nd</sup> allottee attracts GST?
- If yes, whether 2<sup>nd</sup> allottee is entitled to ITC?
- Whether implications will change if separate price is charged for lease and building?
- Whether RCM is payable on lease payments made to MIDC

## ISSUES

- ***Bombay High Court- Builders Association of Navi Mumbai [2018 (12) G.S.T.L. 232]***  
GST applicbale on leasing as renting of premises  
Challenged before Supreme Court- stay not granted
- ***Suyog Dye Chemie Pvt Ltd (Guj HC)***  
Writ admitted – Lease of land is equivalent to sale of land. Stay granted
- ***Rajasthan AAR- Greentech Mega Food Park Pvt Ltd [RAJ/AAR/2019-20/10]***  
Long term lease is supply of services and hence liable to 18% GST
- ***Greentech Mega Food Park [2019 (27) G.S.T.L. 143 (A.A.R. - GST)]***  
Mere long period of lease does not make it a sale transaction. Liable to GST
- ***Goa Tourism Development Corporation [2018 (19) G.S.T.L. 700 (A.A.R. - GST)]***  
Consideration received against services to be provided for next 60 years, i.e., the supply of service in the nature of continuous supply of service

## Judicial Jurisprudence

### **S. 17(5)**

Notwithstanding anything contained in sub-section (1) of section 16 and sub-section (1) of section 18, input tax credit shall not be available in respect of the following, namely:-

### **S. 17(5)(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

### **S. 17(5)(d)**

goods or services or both received by a taxable person for construction of an immovable property (other than plant or machinery) on his own account including when such goods or services or both are used in the course or furtherance of business.

## **S. 17(5) of CGST Act**

- **Bayer Vapi Pvt Ltd [2023 9 TMI 165 AAR Gujarat]**

*VEL has entered into a 99 year lease agreement with GIDC for setting up an industrial plant and for setting up/expanding manufacturing facility- applicant has entered into an MoU with VEL to transfer leasehold rights in Industrial plot- applicant is not entitled to take ITC of CGST and SGST paid by them on services received from VEL in form of transfer of its rights in leasehold land owned by GIDC.*

- **Daicle Chiral Technologies [2020 8 TMI 103 Hyderabad AAR]**

*"Lease premium charges", "annual lease rentals" and "maintenance charges" paid by applicant to the lessor towards lease of land - Applicant acquired land on lease for the purpose of construction of a building where their own laboratory would be accommodated - 'Building' constructed by applicant unquestionably falls within the ambit of 'immovable property (other than plant & machinery)' - Thus, it is established that such services received by the applicant for the purpose of construction of immovable property on their own account and covered under the exclusion clause (d) of Section 17(5) of Central Goods and Services Tax Act, 2017 and hence ineligible to ITC.*

- **GACL Nalco Alkalies & chemical Pvt Ltd [2021 12 TMI 36 AAR Gujarat]**

*AAR determines that as the Applicant wishes to use the service of grant of leasehold rights to set up a new manufacturing unit, it is hit by Section 17(5)(d) which bars ITC received for construction of an immovable property on its own account therefore, the ITC of the Applicant stands blocked*

- **Enfield Apparels Ltd [2020 40 GSTL 230 AAR WB]- Distinguished**

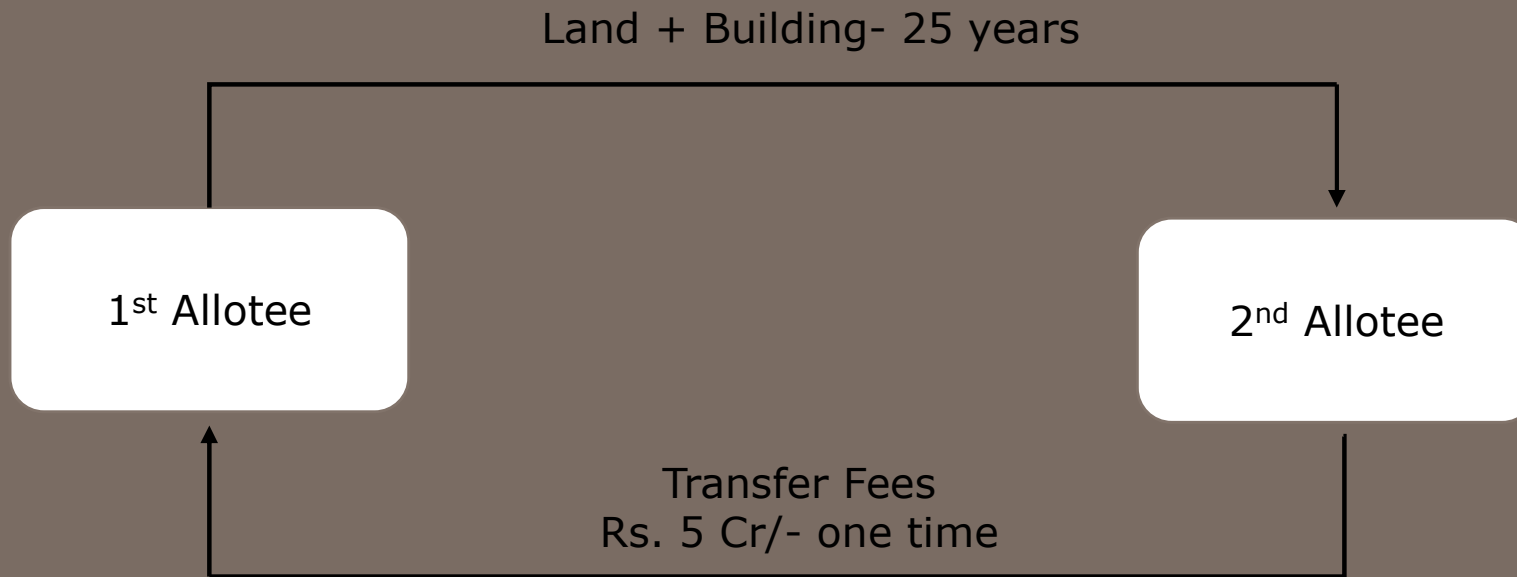
*the transfer fee charged by the Sub-lessor is in the nature of a consideration for tolerating an act that the applicant is otherwise refrained from doing in terms of clause 12.28 of the Deed. It is also a service classifiable under 'Other miscellaneous service' (SAC 999794) and taxable @ 18% under Sl. No. 35 of the Rate Notification. .... The GST to be paid on such transfer fee is, therefore, admissible as input tax credit.*

- **Kamarajar Port Ltd., [2022] 142 taxmann.com 19 (AAR TN)- Distinguished**

*The lease allotment letter do not spell of lease for any construction activity on the closed space leased for business purposes. Hence, the upfront premium made is the lease rentals as per the allotment order/letter or Chennai Port Trusts and it is nothing but lease rentals paid for the services of "Renting of Immovable property" for business purpose.*

## Positive AAR's

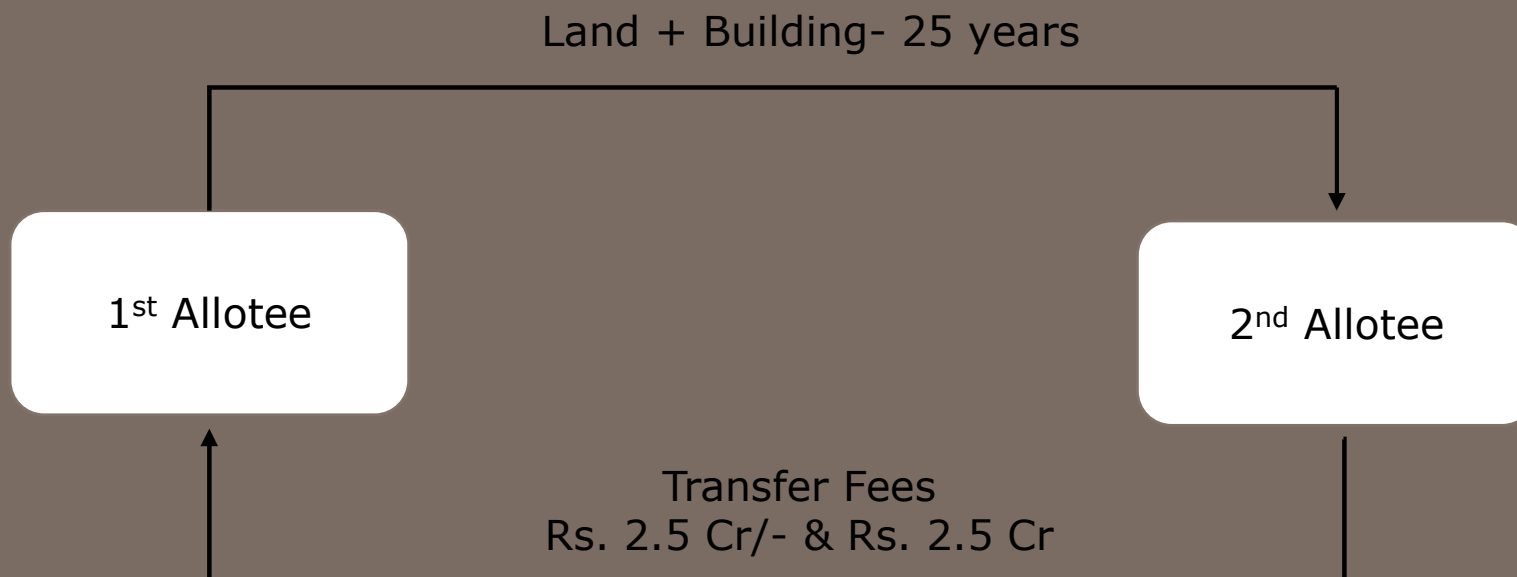
# Single Price



- GST Applicable as deemed service
- ITC not available since immovable property

## GST IMPLICATIONS

# Separate Price



- GST Applicable on sale of lease land as deemed service
- ITC not available since immovable property
- GST not applicable on sale of building since sold post OC

## GST IMPLICATIONS



# BUILDER OLD SCHEME OC REVERSAL

## **Rule 42 of CGST Rules- Synopsis**

- Rule 17(1)- Proportionate reversal of ITC in case of non business supply
- Rule 17(2)- Proportionate reversal of ITC in case of exempt supply
- Rule 42- Formula for Reversal of ITC pertaining to exempt supplies
- W.e.f. 01.04.2019, separate rules for reversal in case of Real Estate Projects
- For Real Estate, reversal to be done to the extent of unsold carpet area as on date of OC

## **Rule 42**

# Applicability of Rule 42

1. Old Scheme

**All ongoing projects as on  
01.04.2019**

2. New Scheme

**REP i.e. project with > 15%  
commercial**

# FORMULA OF GST RULES

Upto 31/03/2019	Wef 01/04/2019
<ul style="list-style-type: none"> <li>Reversal in below ratio:</li> </ul> $\frac{\text{Exempt Supply}}{\text{Total Turnover}} \times \text{ITC}$	<ul style="list-style-type: none"> <li>Reversal specific for real estate in below ratio</li> </ul> $\frac{\text{Unsold Carpet Area}}{\text{Total Carpet Area}} \times \text{ITC}$

# Erstwhile Rule 42 Reversal- Turnover Criteria

<b>Year</b>	<b>Turnover</b>	<b>ITC</b>
Year 1	Rs. 5 Crore	Rs. 5 Lakhs
Year 2	Rs. 10 Crore	Rs. 10 Lakhs
Year 3	Rs. 15 Crore	Rs. 15 Lakhs
Year 4: Before OC	Rs. 5 Crore	Rs. 5 Lakhs
Year 4: After OC	Rs. 15 Crore	Rs. 15 Lakhs
Year 5	Rs. 25 Crore	Rs. 25 Lakhs

# New Rule 42 Reversal- Area Criteria

<b>Year</b>	<b>Turnover</b>	<b>ITC</b>
Year 1	Rs. 5 Crore	Rs. 5 Lakhs
Year 2	Rs. 10 Crore	Rs. 10 Lakhs
Year 3	Rs. 15 Crore	Rs. 15 Lakhs
Year 4: Before OC	Rs. 5 Crore	Rs. 5 Lakhs
Year 4: After OC	Rs. 15 Crore	Rs. 15 Lakhs
Year 5	Rs. 25 Crore	Rs. 25 Lakhs

<b>Area Sold before OC</b>	<b>1,00,000 Sq Ft</b>	
<b>Area unsold</b>	<b>5,000 Sq. Ft.</b>	<b>5%</b>



## FAQ's

- ***Which all ITC to be considered for reversal?***

*ITC availed from 01.07.2017 upto date of completion of project*

- ***How the reversal amount is to be calculated?***

*ITC reversal in proportion of carpet area sold before OC and carpet area sold post OC*

- ***When is the ITC liable to be reversed?***

*In September month GSTR 3B following the end of financial year in which OC is received*

- ***Is interest payable on such reversal?***

*Yes, interest is payable from the first day of April of succeeding year in which OC is received till date of reversal*



# THANK YOU

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