

CONFERENCE ON REAL ESTATE

Western India Regional Conference

Institute of Chartered Accountant of India

Chah

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LEGAL FRAMEWORK



Legal Position

Term “Service” defined vide S. 65B (44) of the Act w.e.f. 01.07.2012

“Service” means:

Any activity

Carried out by a person for another person

For consideration

includes **declared service** (Section 66E of the Act)

construction of a complex, building, civil structure or a part thereof,

including a complex or building

intended for sale to a buyer, wholly or partly,

except where the entire consideration is received after issuance of completion-certificate by the

competent authority



Legal Position

does not include:

An activity which constitutes merely, a **transfer of title in goods or immovable property**, by way of sale, gift or in any other manner

Sale of under construction flats/units is **declared as Service** under Section 66E of the Act

Definition of Service specifically **excludes** transfer of title in immovable property

Whether builders / developers transfer title in immovable property to buyer and hence transaction is not that of Service - Larsen & Toubro decision of Supreme Court..



Impact of the New Definition

Services which may not be taxable earlier, are now taxable or would potentially have exposure in terms of the expanded definition.

Real Estate Developers - impact to be revisited

- MSEB Charges, Legal Charges, etc mentioned in the agreements or recovered separately
- Transfer Fees received on flat sale.
- Extra work done as per the requirements of the customer
- Joint Development agreements

Architect certificate shall not be considered for determining completion of unit. Occupancy Certificate is mandatory.



Impact of the New Definition

Amount collected from any person (whether a customer/supplier/employee) would be taxable if the amount is typically not towards sale of goods or immovable property.

Private roads are not exempt.

Construction Services provided to educational institutions/government office for business and commercial purposes. Charitable trust other than religious trust is now taxable.



Impact of the New Definition- Issues

Whether preferential location and floor rise charges are taxable at 12.36% or 3.09% ?

Whether sale of following are liable to Service tax:

- Development right
- FSI
- TDR

Whether completion certificate issued by an architect , Chartered engineer or license su
still a valid certificate post 01.07.2012?



Definition and application - Unincorporated association/association of person (AOP)



Unincorporated Association !!

sec. 65B (44) – “an unincorporated association or a body of persons, as the case may be, shall be treated as distinct persons”...

What is the meaning, intention and how has one to deal with this?



Concept of Joint Venture

Joint Venture is a contractual arrangement whereby two or more parties undertake an economic activity, which is subject to joint control i.e. an agreed sharing of control/ power to govern the financial and operating policies of an economic activity so as to obtain benefits for themselves.

Joint venturer is a party to a joint venture and has joint control over that joint venture.
Passive investor in a joint venture is a party to a joint venture and does not have joint control over that joint venture.

The following characteristics are common to all joint ventures: -

Two or more ventures are bound by a **contractual arrangement**; and

The contractual arrangement establishes **joint control**.



Types of Joint Venture

Joint Venture takes many forms and structures. We can identify three broad types of joint ventures based on form of joint control: -

- Jointly controlled operations,
- Jointly controlled assets,
- Jointly controlled entities.



Joint Venture (AOP) vis a vis a Partnership

Partnership is an association of persons competent to contract who join together to share the profits of a business carried on by all or any one of them acting for all. On a cursory appraisal, one may not notice the difference between an AOP and a partnership. However on deeper insight, some vital differences emerge.

An AOP can have a minor member whereas in a partnership a minor can only be admitted to the benefits of partnership. The principle of agency, which is an important feature of a partnership, is absent in an AOP. A partnership is essentially for carrying on business whereas an AOP may be formed for earning any type of income.

An ordinary AOP does not have separate legal existence unlike a partnership, which is recognised in law. An AOP cannot be sued independently; the suit has to be instituted against all individual members.



essential characteristics for an AOP as laid down by various laws

or more persons

tary combination

common purpose or common action with object to produce profit or gains.

ination in joint enterprise

kind of scheme for common management.



Joint Support – Income tax

For more persons must 'associate' i.e. join in a common purpose or action with the object of deriving income, profits or gains - CIT V Indira Balkrishna 39 ITR 586

Whether joint possession and mgt. is essential? - CIT vP.G.Bhende 106 ITR 932 (Bom)

Whether 'common' purpose or action is essential? - N.V.Shanmugham & Co. v CIT 81 ITR 3

*Joint purchase and sale of land will not be make the purchasers / sellers an AOP - P & S v CIT 106 ITR 100 (SC)
Court in CIT V Har Prashad 178 ITR 591*

If the property is owned by co-owners in definite and ascertainable shares then income from the property shall be computed independently for each person in relation to his share. A common managing agent also shall not make any difference. - Mohammed Aslam V CIT 4 ITR 12 (AI)
RELEVANT EVEN FOR RENTING CASES UNDER SERVICE TAX)



al Support – Service Tax

ty done by each member of JV is not service to other members – Mundra Port and S
(2011) 33 STT 364

ng of Knowledge between JV parties cant be said to be services provided to the ot
bers - Nyco SA V CST (2009) 20 STT 113

done by a JV partner is in the nature of in house service and hence not taxable – C
aram Finance (2007) 9 STT 100 (cestat)

stituent members are independent of each other and do not share any
venue/profit/loss/liability while in the other the members join hands for mutuality
st and share common risk/profit together. Hence the principle of K Raheja is not
cable. – Morias Construction V CCE, Ranchi.



Autonomy in taxation under Service tax

Are there distinct persons to whom services are provided in a Joint development between members and the AOP?

Can a Joint development be regarded to remotely be compared to a Film Producer- distributor?

Should there be a tax in the hands of the AOP as well as the members? (*look at Income tax law – tax the AOP at maximum rate or the members – not both*)

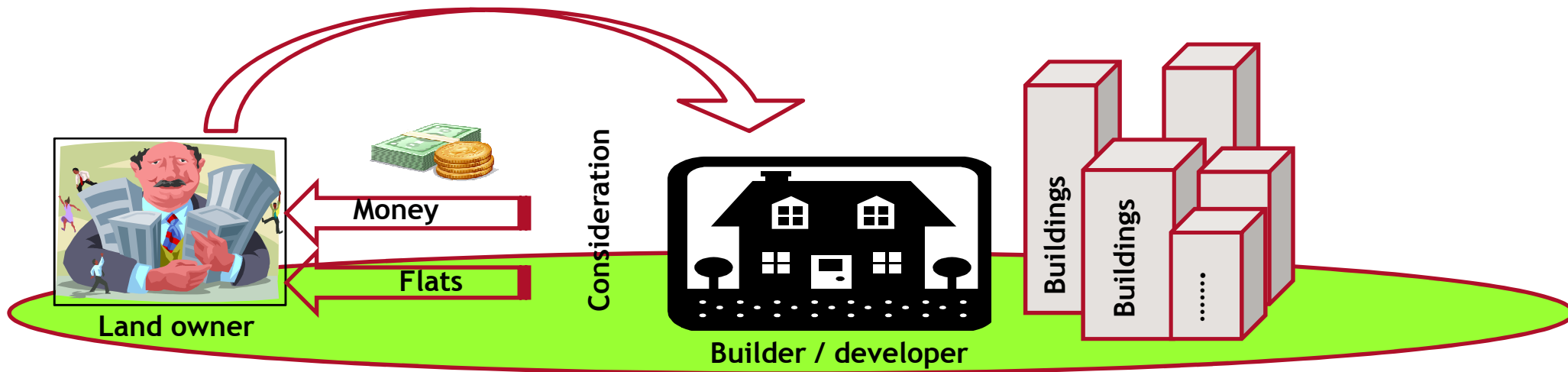
What is the real purpose of talking about an “Unincorporated association”?



SOME SPECIFIC ISSUES IN REAL ESTATE INDUSTRY



Flats allotted to land owner in consideration of land



**Whether the flats allotted would be taxable under service tax?
If yes what would be the consideration?**



Flats allotted to land owner in consideration of land

Taxability

Period after 1st July 2010 - service tax leviable

Provided, even though part payment made or development rights transferred before issuance of completion certificate

Flats given to landowner is treated as consideration and will be liable to tax

Valuation - As

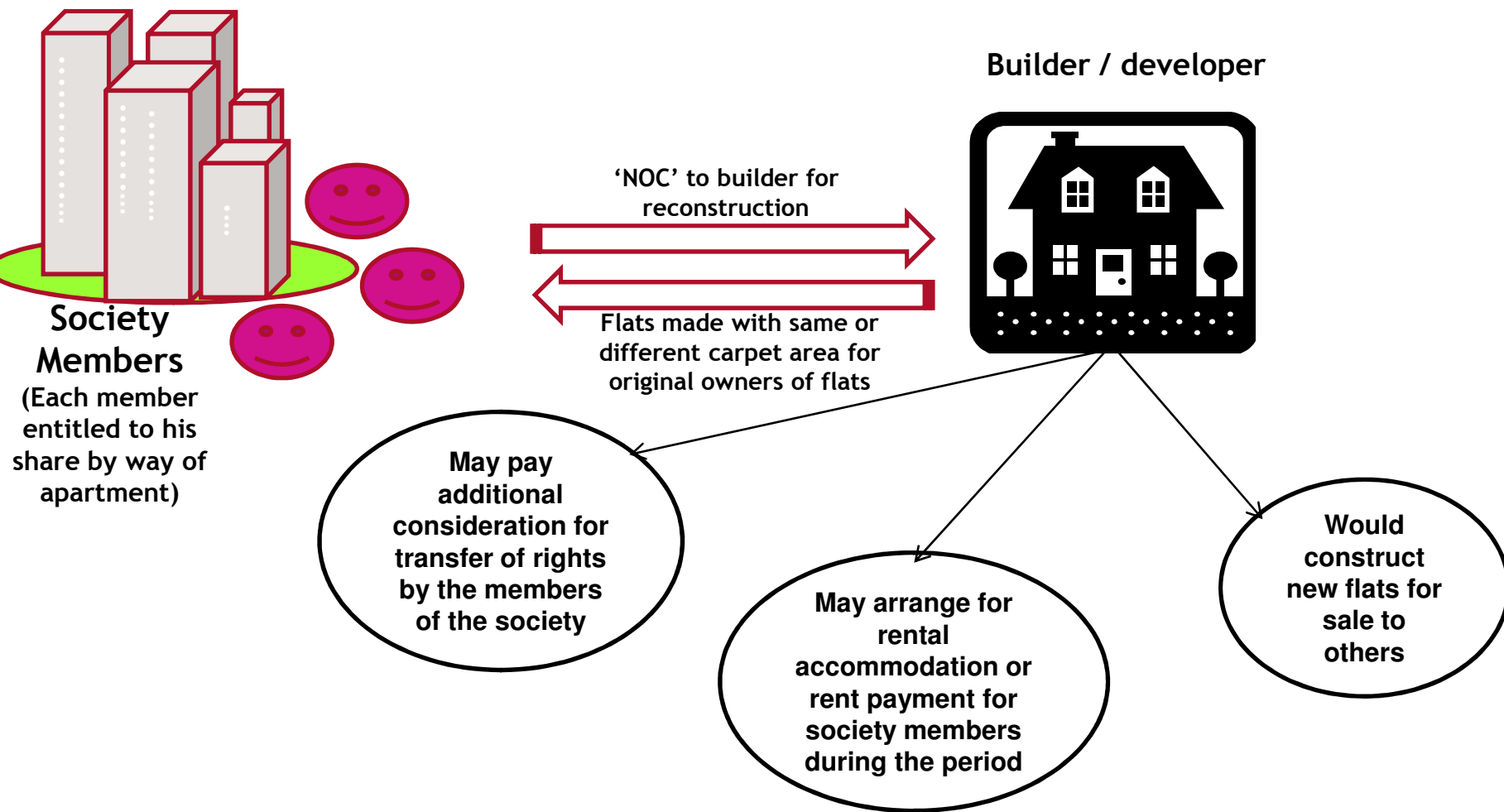
Flats given to landowner - value equivalent to similar flats sold to other customer -- **Would this be correct**
alternately the value of land as per Ready Reckoner for Stamp duty purpose be considered as the Fair value as on the date of transfer?

Section 67(1)(iii) read with Rule 3(a) of Service Tax (Determination of Value) Rules, 2006 will be applicable

The above rule would be applicable only if no consideration is determined. If cost of construction is defined it would become the Assessable Value.



Development including slum rehabilitation projects



Development including slum rehabilitation projects

Builder / Developer provides service to two categories of service recipient -

- members of society
- new purchasers of flats (if any)

Issues

When should service tax liability be attracted? and

What should be the value?

In case of transfer of TDR rights whether the same can be made taxable??

Clarification by CBEC (taxability)

Members of society:

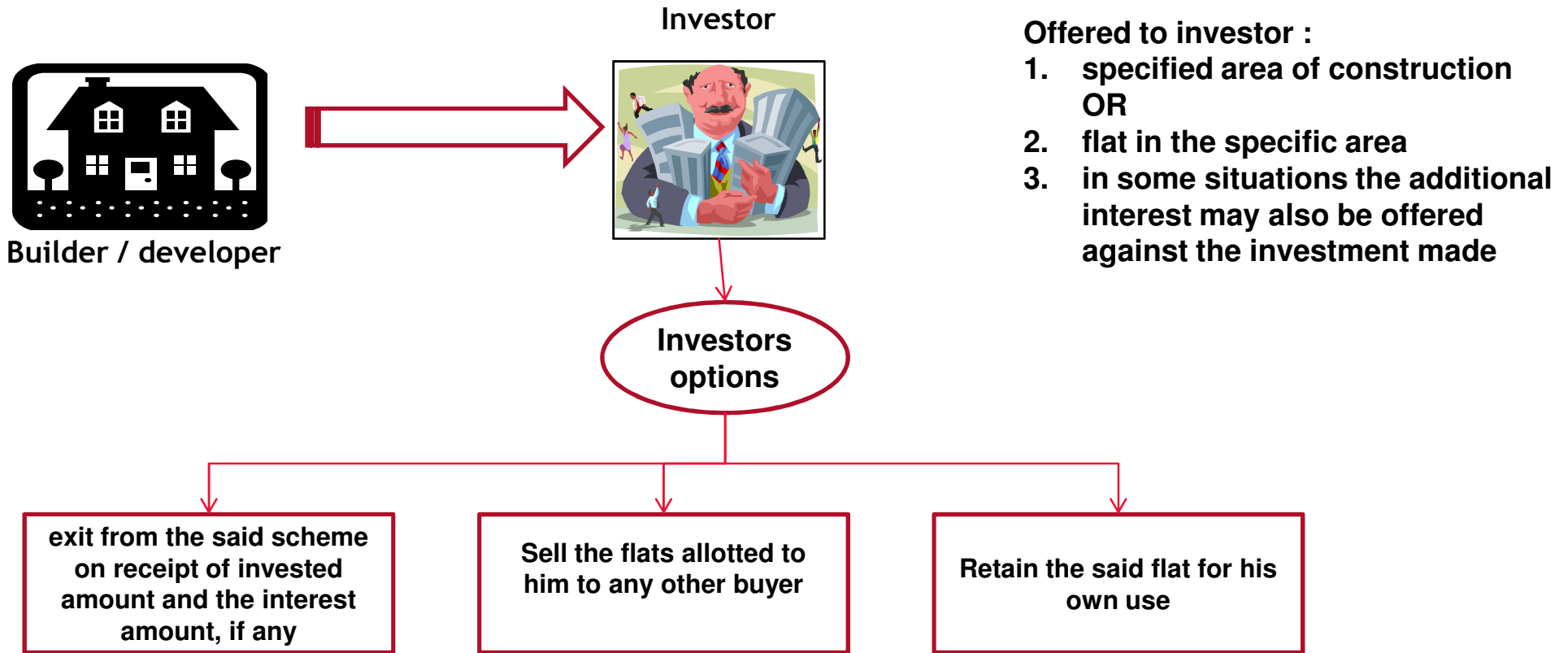
Not taxable as it is meant for personal use of the members/society. Post 1 July 2012, the same would be taxable if the condition of 'personal use' has been removed. Also clarified by Commissioner of Service Tax Mumbai vide order no. F. No. V/ST-I/Tech-II/463/11 dated 31 August 2012

New purchasers of flats:

Chargeable to service tax post 1st July 2010, if payment received prior to date of issuance of Completion Certificate



Investment Model



Investment Model

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Whether service tax is payable on flats offered to investor?

Clarification by CBEC

Amount invested shall be treated as consideration paid in advance and subjected to service tax after July 2010 only if the said investor decides to keep the flat for his own use.

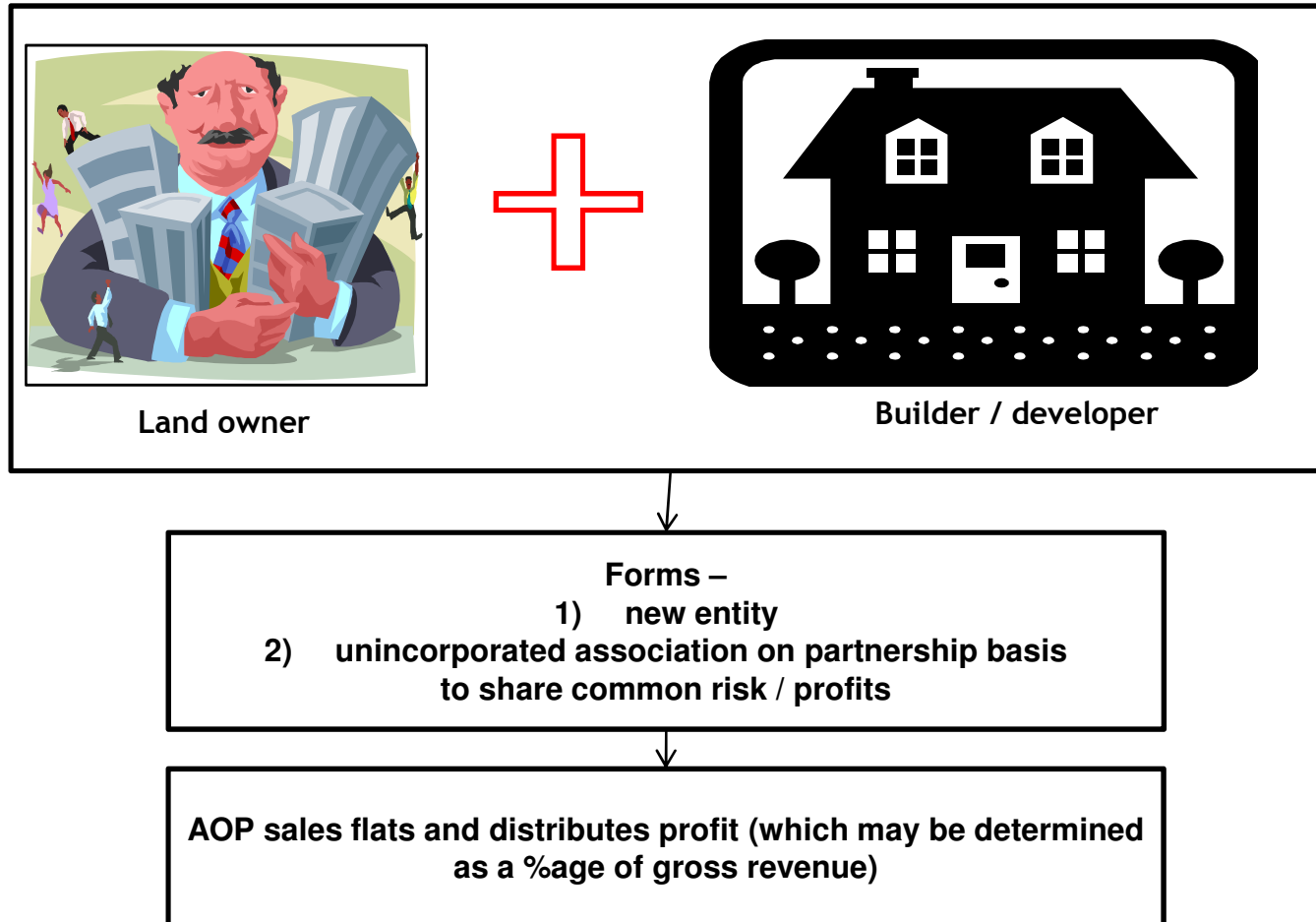
Exit from scheme either before or after issuance of completion certificate-

- the Builder / Developer shall be entitled to adjust the same under rule 6(3) of Service Tax Rules, 1994 to the extent of original amount refunded

Builder / Developer resells before issuance of the completion certificate, the service tax will be leviable on the said flat.



Joint development agreement on sharing in AOP model



Joint development agreement on sharing in AOP model

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Whether construction service provided by new entity to landowner and Builder/Developer will be taxable?

Clarification by CBEC

This issue has been clarified earlier also in the Circular No. 148/17/2011-ST dated 13th December in specific paras 7, 8, & 9 of the said circular.

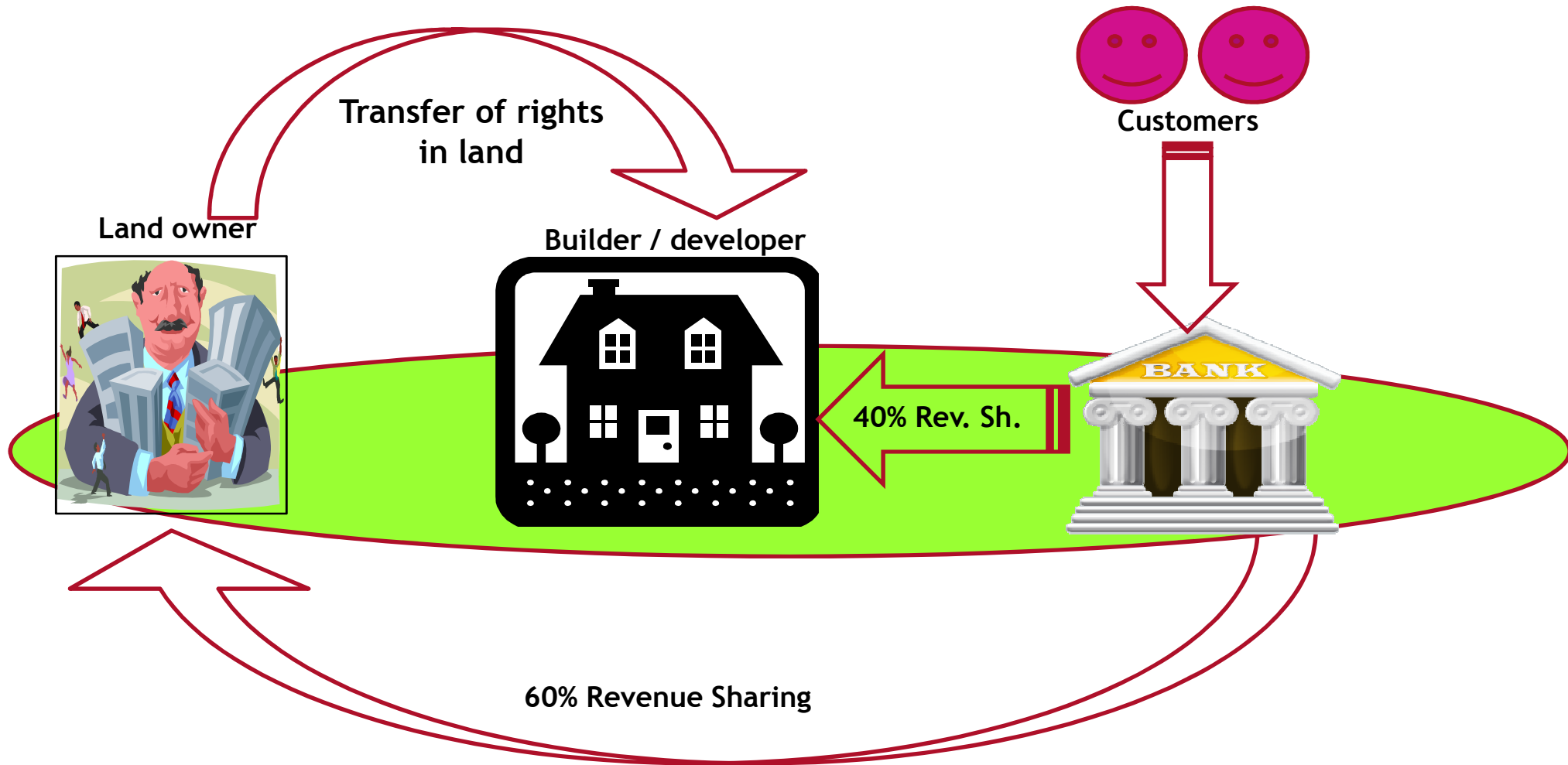
In the said circular it was clarified that, when the distinct entity whether incorporated or not is formed by the two different persons / association to share a profit or risks of particular transactions then the services provided by the said formed entity to its forming members is taxable.

The said entity has distinct characteristics and existence in the eyes of the law. Therefore, in the present case association formed by the builder/developer and landowner jointly is liable to service tax on services provided to said builder/developer and landowner.

Whether all these clarifications provided by the CBEC in its Feb 2012 circular are still valid and they really present a legal framework of taxes?



Joint development agreement on a principal to principal revenue sharing - model



Joint development agreement on a principal to principal revenue sharing - model

Clarification by CBEC as discussed earlier would apply only in case an “AC” comes into existence.

In case the agreement is merely to share revenue - the same is nothing but an agreement to pay the land lord variable consideration.

Accordingly entire liability to pay tax on the consideration would be on the Developer.



IVAT CREDIT



Amended CENVAT Credit Rules, 2004

The CENVAT Credit rules have been amended to make the availment more stringent and

the limit introduced for availment of CENVAT Credit of input/input service from 01 Sept

CENVAT Credit cannot be availed beyond the period of 6 months from the date of invoice/c

any in availment of CENVAT Credit would lapse the CENVAT Credit



Amended to CENVAT Credit Rules, 2004

CENVAT credit in relation to input services and capital goods shall be eligible for payment of taxes in relation to sale of flats/units since abatement option was preferred for payment of taxes.

Credit would be available for all services availed and utilised only after 01.07.2012.

The Following credit in relation to service tax would not be eligible:

- Employee or personal benefit
- Motor vehicle related.



ENVAT Credit Availment

Description	Point of availment (upto 10 July 2014)	Point of availment (from 11 July 2014)	Remarks
Reverse Charge	Date of payment of service tax along with value of invoice	Date of payment of service tax only	Payment of invoice not a condition no
General Reverse Charge	<ul style="list-style-type: none"> i) Service provider component: Date of payment of invoice value along with service tax mentioned there on. ii) Service Receiver Component: Date of payment of service tax under reverse charge. 	Date of payment of : <ul style="list-style-type: none"> i) invoice value along with service tax mentioned there on (Service provider component) ; and ii) Date of payment of service tax (service receiver component) 	Earlier there were different points of availment. However, post amendment there is only one amendme
Service provider charges on service tax	Date of invoice, subject to reversal in 3 months if invoice unpaid	No change	



CENVAT CREDIT- Issues

Impact of retention charges on availment of CENVAT credit

Partial reverse charge conditions mentions entire service tax as indicated in the invoice is paid

Hence in case of part payment or payment after retention , whether CENVAT credit to be availed in proportion to payment received or it will be disallowed in totality

Whether builder will have to reverse proportionate Cenvat relatable to sale of completed floor which no Service Tax is payable?

Definition of Service specifically excludes transfer of title in immovable property



Thank You

