

WIRC of ICAI

GST SECTORIAL SERIES (VIRTUAL) – Part I

- Subject** : Real Estate Sector
- Day & Date** : Thursday, 23rd June 2022
- Presented by** : CA Naresh Sheth



Recent Judgements – Relevance & Significance

- Honorable Orissa High Court in case of **M/s Safari Retreats Pvt Ltd** [2019-TIOL-1088-HC-ORISSA-GST]
 - Developer has constructed a shopping mall for leasing or letting out various shops / commercial units
Whether developer is entitled to Input tax credit in respect of goods or services used for construction of said mall?

- Honorable Gujarat High in case of **M/s Munjaal Manishbhai Bhatt** [2022-TIOL-663-HC-AHM-GST]
 - Petitioner has entered into an agreement for purchase of land and construction of bungalow thereon. The agreement depicted consideration for land and construction services separately. Honorable Gujarat HC held that value of land cannot be included for arriving taxable value of construction services.
 - Discuss applicability of same to Sale of under-construction flats or units in Mumbai wherein construction is done on procurement of development rights or leasehold rights?



GST on or after 01.04.2019

***[Post Amendments
vide Notification 03
to 09 – Central Tax
(Rate) dated
29.03.2019]***

Tax Implications on or after 01.04.2019 – Ongoing Projects Opting for Old Scheme

Particulars	Effective Tax Rate
Sale of under-construction residential affordable house	8% (with ITC) or 12% (with ITC)?
Sale of under-construction residential units (other than affordable)	12% (with ITC)
Sale of under-construction commercial units	12% (with ITC)
Sale of Completed Flats/ units Post OC	Nil

- Accumulated ITC as on 31st March 2019 remains intact
- Credit of tax paid for inputs, input services and capital goods procured on or after 1st April,2019 can be availed
- Output tax liability can be discharged from ITC balance
- No stipulation as to procurement of 80% of input and input services from registered vendors
- No stipulation for payment under RCM on procurement from unregistered vendors

Tax Implications on or after 01.04.2019 – Ongoing Projects (Not Opting for Old Scheme) and New Projects

Particulars	Effective Tax Rate	Mode of payment
Sale of under-construction residential affordable house (Including houses under Specified Schemes)	1% (without ITC)	Cash
Sale of under-construction residential units (other than affordable)	5% (without ITC)	Cash
Sale of under-construction commercial units (in RREP i.e. upto 15% of total carpet area)	5% (without ITC)	Cash
Sale of under-construction commercial units (in REP)	12% (proportionate ITC)	Cash / Credit
Sale of under-construction commercial units (in exclusive commercial complex)	12% (with ITC)	Cash / Credit
Sale of completed flats / Units Post OC	Nil	NA

- Builder is not entitled to ITC in respect of services taxed at concessional rate
- Mandatory procurement to the extent of 80% from Registered Person and tax payable under RCM on shortfall

New Scheme of Taxation – Some Issues

- Is new scheme of taxation is optional or mandatory?
 - Whether ITC benefit granted by statute can be withdrawn through rate notification?
 - The concessional rate prescribed is subject to certain conditions. Whether non-compliance of such conditions give an opportunity to continue old scheme (with ITC) for ongoing as well as new project?
- Whether different options can be exercised in respect of different buildings in same plan layout?
- Whether JDA partners (land owner and developer) can opt for different options?
- Whether concessional rate apply to consideration received on or after 01.04.2019 against installments due on or before 31.03.2019?
- What will be the tax rate on advance received on or before 31.03.2019 against work done and demand raised on or after 01.04.2019?



Affordable Residential Apartment

23rd June 2022

CA Naresh Sheth

Affordable Residential Apartment

Particulars	Conditions
Metropolitan Cities*	House having carpet area upto 60 sq. mt. (approx. 644 sq. ft. – RERA Carpet) ; and having Gross amount upto Rs. 45 Lacs
Non-metropolitan cities/towns	House having carpet area upto 90 sq. mt. (approx. 968 sq. ft. – RERA Carpet) ; and having Gross amount upto Rs. 45 Lacs
An apartment in an ongoing project	Covered under specified schemes [Under Notification No. 11/2017-CT(R)] for which the promoter has not exercised option to pay tax under old scheme

***Metropolitan cities include following:**

Bengaluru, Chennai, Delhi NCR (*limited to Delhi, Noida, Greater Noida, Ghaziabad, Gurgaon, Faridabad*), Hyderabad, Kolkata, Mumbai (*whole of Mumbai Metropolitan region (MMR) i.e. consists of 8 Municipal corporation and 9 Municipal councils around Mumbai*)

Value of Affordable Residential Apartment

➤ Determination of threshold value (i.e. Gross amount) of Rs. 45 lakhs:

- Consideration charged for services
- Amount charged for the transfer of land or undivided share of land, including by way of lease or sublease
- Following to be included for calculating threshold:

Development charges	Parking charges	Preferential Location Charges	Common Facility charges	Similar Charges
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➤ Whether following should be included for calculating threshold of Rs. 45 lakhs?

Infrastructure Charges	Extra amenities	Club House Charges	Furniture
Society formation charges	Share capital contribution	Advance maintenance	Legal charges

Affordable Residential Apartment – Issues

- Builder was selling affordable house and charging 8% tax till 31.03.2019. Due to cap of Rs.45 lakhs, the houses in the project does not fall in definition of 'Affordable Residential Apartment' on or after 01.04.2019. Can Builder opt for new scheme of taxation i.e. pay the tax @ 1%

- What will be the applicable tax rate for commercial apartment in affordable housing project:
 - Where commercial area is less than 15% of total carpet area of project (i.e. RREP)
 - Where commercial area is more than 15% of total carpet area of project (i.e. REP)

- What will be the tax rate applicable on or after 01.04.2019 for works contractor providing services in respect of above referred project?



Conditions for concessional rate of tax under new scheme of taxation

Non – Availment of ITC

- Builder not entitled to ITC related to supply used in construction services taxed at 1% or 5%
- Builder not entitled to utilize ITC for discharging tax liability
- ITC not availed shall be reported every month by reporting the same as **ineligible credit in GSTR-3B**
- Builder to reverse the ITC availed from 01.07.2017 (or from inception of project if started after 01.07.2017) till 31.03.2019 which is attributable to installments due on or after 1st April, 2019 (to be taxed at concessional rate)
As per formula given in Notification No. 03/2019- CT (R), transitional credit needs to be taken into account for above referred reversal
- Reversal to be worked out project wise as per formula provided in NN 3/2019 – CT (R) dated 29.03.2019`
 - How to allocate Transitional credit between the projects?
- Reversal to be done before due date for filing of return for September, 2019 (**i.e. 20th October, 2019**)
- Reversal can be done by utilizing ITC balance lying in the electronic credit ledger and/or by making cash payment

Non Availment of ITC- Issues

- Builder has reversed ITC of Rs. 1 crore before 31st March 2019 on account of non-payment to vendors within 180 days from the date of invoice [Proviso to Section 16(2) of the Act]. Builder was entitled to avail such credit back on payment to the vendors.

What will be fate of such availment if builder goes for new scheme of taxation?

- Builder has two projects i.e. one ongoing project and other new project. If he erroneously included nominal ITC pertaining to new project in his claim for ITC for ongoing project, whether SCN will be for:
 - Reversal of ITC erroneously availed along with interest; or
 - Differential Tax of 7% of total project receipts of Rs. 100 Crores (Tax rate of 12% minus tax paid at 5%)

Procurement from Registered Persons

- Eighty percent (80%) of value of **input** and **input services** used for supplying construction services [taxed at concessional rate] to be procured from registered persons
- For calculating shortfall, following procurement should be excluded:

Development rights	High speed diesel	Electricity	Long term lease of land (against upfront payment in the form of premium, salami, development charges etc.)
Motor spirit	Natural gas	FSI	

- GST to be paid under RCM at 18% on inputs (other than cement) and input services in case of shortfall of purchases of 80% from registered person (irrespective of applicable tax rates)
- Monthly payment of GST under RCM on procurement of following from unregistered persons (irrespective of stipulated shortfall):
 - Capital goods at **applicable rate** [Notification No. 7/2019 – CT (R)]
 - **28%** on Cement

Procurement from Registered Persons

- Builder shall maintain project wise account of inward supplies from registered and unregistered supplier and calculate tax payments on the shortfall at the end of the financial year (or up to date of completion of project)
- Builder shall submit the above details in the **prescribed form electronically** on the common portal by end of the quarter (30th June) following the financial year (*Form – not yet notified*)
- **Tax liability on the shortfall of inward supplies from unregistered person (except cement and capital goods) to be added to output tax liability in the month of June following the end of the financial year.**

Procurement from Registered Person- Issues

- Whether following need to be considered for determining shortfall of 20% in procurement of supply from registered persons and RCM u/s 9(4) will be payable in respect of :
 - Salary and wages paid to the employees
 - Procurement of water or other goods leviable to NIL rate of tax
 - Interest on loans
 - Interest free loans from related parties such as promoters, family members, associate concerns, etc.
 - Hardship allowance, compensation, shifting allowance, rent, corpus paid to society members or property owner
 - Statutory payments made to MCGM
- Amount payable under RCM is Rs. 1.22 lakhs, but builder has paid Rs. 1.21 lakhs. Whether SCN will be for:
 - Payment of shortfall of Rs. 1000 along with interest; or
 - Differential Tax of 7% of total project receipts of Rs. 100 Crores (Tax rate of 12% minus tax paid at 5%)



Input Tax Credit reversal u/s 17(2) read with Rule 42

Sale of Completed Flats – Reversal of ITC

- Section 17(3) specifically includes sale of building and sale of land (post issuance of completion certificate) as exempt supply
- Mechanism for reversal of ITC u/s 17(2) of CGST Act is provided under Rules 42 of CGST Rules, 2017
- Rule 42 provides for reversal of common ITC in respect of inputs and input services which are used for effecting exempt as well as taxable supplies
- **Upto 31.03.2019**, Rule 42 of CGST Rules provided for proportionate reversal of ITC based on turnover of exempt supply to the total supply
- **On or after 01.04.2019, Rule 42 will be relevant only in respect of ongoing residential project (opting for old scheme) or commercial projects**

ITC Reversal under Rule 42

- **Rule 42 is amended w.e.f. 01.04.2019**
- Reversal u/R 42 (as amended) is to be done on the basis of ratio of carpet area of exempt apartments to carpet area of total apartment
- ITC to be reversed = Common ITC * (Exempt Carpet Area / Total Carpet Area) **[Final reversal]**
- Exempt Carpet area :

Particulars	Carpet Area
Aggregate carpet area of the apartments taxed at concessional rate	XXX
Add: Aggregate carpet area of apartment which is unsold on the date of issue of completion of the project	XXX
Total Exempt Carpet Area for the purpose of final reversal	XXX

ITC Reversal - Issues

- Authorities in service tax as well as GST regime (pre-amended regime) were insisting on reversal of ITC as under:
 - ITC for entire project period to be considered for reversal;
 - ITC reversal to be calculated in proportion of unsold area on the date of OC to the total project area; and
 - ITC to be reversed on date of OC itself
- Whether authority is justified in demanding reversal of Input tax credit as above?
- Project is completed in the month of December 2018. Final ITC reversal pertaining to unsold apartment in respect of said project is to be done on or before September'2019.
 - Whether final reversal of ITC to be done as per amended Rule 42 i.e. area-based reversal?
 - Whether one is justified to reverse ITC based on pre-amended Rule 42 i.e. turnover-based reversal?



Taxability of Development Rights and Lease rights

Transfer of DR/TDR/FSI/Lease on or after 01.04.2019 for Construction of Residential apartments

<p>Taxability [Notification No. 4/2019 – CT (R)]</p>	<ul style="list-style-type: none"> • Transfer of DR / TDR / FSI / Lease used for sale of under construction residential units is exempt • Taxable to the extent of unsold residential flats on the date of issuance of completion certificate or first occupation, whichever is earlier
<p>Payment of Tax - In area sharing, revenue sharing or outright purchase of DR/TDR/FSI/Lease</p>	<p>Not later than tax period in which Completion certificate is issued or First occupation in the project whichever is earlier [Notification No. 6/2019 – CT (R) amended by Notification No. 03/2021 – CT (R) dated 02.06.2021]</p>
<p>Person liable to pay Tax under RCM</p>	<p>Promoter – Developer [Notification No. 5/2019 – CT (R)]</p>
<p>Credit of tax paid under RCM by Developer on or after 01.04.2019 23rd June 2022</p>	<p>New Scheme – ITC not eligible; Old Scheme – ITC eligible CA Naresh Sheth</p>

Transfer of DR/TDR/FSI/Lease on or after 01.04.2019 for Construction of Residential apartments

Tax on transfer of DR/ TDR/ FSI/Lease pertaining to unsold flats on completion of project

Lower of: [Notification No. 4/2019 – CT (R)]

- 18% on Value of DR/TDR/FSI* in proportion to carpet area of such unsold flats to total carpet area of residential flats; or
- 1% / 5% of Value of such unsold flats**

* Valuation of DR/TDR/FSI/Lease

- ✓ **Outright purchase:** value of monetary consideration paid for outright purchase
- ✓ **Area sharing:** value of similar apartments charged by promoter from independent buyers nearest to the date of transfer of DR/TDR/FSI;
- ✓ **Revenue sharing:** monetary consideration paid to the Landowner as revenue share;

****Value of unsold flats** is deemed as equal to value of similar apartments charged by the promoter nearest to the **date of completion certificate or first occupation**, whichever is earlier

Transfer of DR/TDR/FSI/Lease on or after 01.04.2019 for Construction of Commercial apartments

Taxability	Taxable
Time of Supply / Time of payment of Tax	<p>Outright purchase: Date of transfer of DR/TDR/FSI/Lease</p> <p>Area Sharing: Not later than the tax period in which:</p> <ul style="list-style-type: none"> • Completion certificate is issued; or • First occupation of project. <p>Whichever is earlier</p> <p>Revenue Sharing:</p> <ul style="list-style-type: none"> • JDA projects → Date of transfer of DR / FSI; or Payment of revenue share
Person liable to pay Tax	Promoter – Developer (to be paid under RCM)
ITC Availability 23rd June 2022	Available to the extent of units sold under-construction CA Naresh Sheth

Development Rights/ TDR / Additional FSI- Issues

- What is the tax implications of developer selling TDR to trader?
- What is the tax implications of trader selling this TDR to the developer?
- Whether developer is liable to discharge GST under reverse charge on premium paid to Municipal Corporation for additional FSI or incentive FSI?
- What are the GST implications when balance leasehold rights are assigned to buyer of an immovable property on leasehold land?



**Implications of
free flats allotted
to landowner in
JDA on or after
01.04.2019**

Tax implications – Free Flats / Units Allotted to Landowner on or after 01.04.2019

➤ **Taxability** [*Notification no. 3/2019 – CT(R) dated 29.03.2019*]:

- Whether construction of owner's apartments is a supply of service liable to GST?
- Implications of decision of Hyderabad CESTAT in case of Vasantha Green Projects

➤ **Payment of Tax** [*Notification no. 6/2019 – CT(R) dated 29.03.2019*]:

- Tax on owner's area to be paid not later than the tax period in which completion certificate is issued or first occupation in the project, whichever is earlier
- Does this mean that time of supply itself is deferred?

➤ **Valuation** [*Notification no. 3/2019 – CT(R) dated 29.03.2019*]:

- GST to be paid on the value of total amount charged for similar apartments in the project to independent buyers **nearest to the date of transfer of development rights**

Tax implications – Free Flats Allotted to Landowner on or after 01.04.2019

- Landowner shall be entitled to claim Input tax credit of tax charged by developer promoter when he further supplies such apartments allotted to him and pays tax which is not less than the amount of tax charged from him on construction of such apartments by the developer
- Issue in respect of Area Sharing:
 - GST is payable on units handed over to land-owner is at the end of the project. However, the land-owner (for re-sale of its units) is required to pay GST as regular TOS. How will the land-owner get credit of the GST which will be charged by the Developer at the end of the project? Does this lead to cascading of tax?
 - This issue is resolved by Notification No. 02/2021-Central Tax (Rate) and 03/2021-Central Tax (Rate) dated 02.06.2021 (as discussed in earlier slide)

Society Redevelopment - Issues

- Whether society / developer is liable to discharge tax on development rights in pre-amended or amended scheme of taxation?
- Whether house rent allowance, corpus, shifting allowance, etc. paid to members liable to GST?
- Whether the amended scheme of taxation as notified by NN 3/2019 – CT (R) applies to society redevelopment?
- Whether explanation put in Rate Notification can change the nature of supply from “works contract” to “sale of under-construction flat” resulting into higher tax liability?

Word of Caution

- Views expressed are the personal views of faculty based on his interpretation of law
- Presentation needs to be revised and revisited on future amendments in GST Law
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Any Questions ?

THANK YOU

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