

## Western India Regional Council of ICAI

- Subject** : Impact of recent amendments in GST in respect of Real Estate Sector
- Day & Date** : Friday, 5<sup>th</sup> April, 2019
- Venue** : ICAI Tower, Bandra Kurla Complex, Bandra (E), Mumbai – 400 051
- Presented by** : CA Naresh Sheth



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## Preamble

- GST Amendment Act, 2018 amended certain provisions retrospectively w.e.f. 1<sup>st</sup> February 2017 impacting Real Estate Sector
- GST Council, in its meeting held on **24<sup>th</sup> February 2019 and 19<sup>th</sup> March 2019, proposed far reaching amendments with** avowed objective to boost up the growth of residential segment of real estate sector
- Detailed minutes of aforesaid GST council meetings (33<sup>rd</sup> and 34<sup>th</sup>) are not yet in public domain
- Notifications (operationalizing new scheme of taxation) are released on 29<sup>th</sup> March 2019
- This presentation covers amendments impacting Real Estate Sector done through:
  - GST Amendment Act, 2018
  - Notifications issued on 29<sup>th</sup> March 2019 for operationalizing new scheme of taxation

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## Reasoning for amendments

- Effective tax rates in GST regime apparently higher than in earlier regime

Particulars	Service Tax (ITC of input services)	VAT (No ITC)	Total	GST (ITC- Input, input services & capital goods)
Sale of under- construction flats / units	4.50%	1%	5.50%	12% / 8%
Joint development – Owner’s Area	4.50% or 6%	Nil	4.50% or 6%	Construction: 12% / 8% or Works Contract: 18%
Redevelopment of society – Rehab flats	6%	Nil	6%	Works Contract: 18%

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## Reasoning for amendments

### Government’s perception

- Allowance of ITC will be equal to or higher than Increase in tax rates. Builders will pass on ITC to customers resulting into reduced tax incidence on customers
- Builders were not passing on ITC to customers resulting into high tax incidence on home buyers
- Home buyers are dissatisfied with apparent hike of 6.5% in tax rate
- ITC is always a disputed issue between:
- Builders and customers;
  - Builders and tax authorities

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## Scope of Presentation

- GST Amendment Act, 2018 and its impact on concept of deemed or declared supply
- Impact of following amendments carried out through notifications **dated 29<sup>th</sup> March 2019**:
  - Slashing down GST rates by 7% on sale of under construction residential flats
  - Discharge of output tax liability in cash for builders opting for New Scheme
  - One time option granted to builders to opt taxation scheme for ongoing projects
  - Non-availment of Input Tax Credit ('ITC') for builders going for New Scheme
  - Lapsing of accumulated ITC for builders opting for New Scheme
  - Mandatory procurement from registered suppliers
  - Extending scope of Reverse Charge for builders opting New Scheme
  - Exemption in respect of Development rights, TDR, FSI, leasehold premium, etc.
  - Change in definition of 'affordable house'



## GST Amendment Act, 2018

## Amendment in scope of “Supply”

- Scope of supply prior to amendment:
  - It included activities specified in Schedule II of the Act
  - Activities specified in Schedule II were **deemed to be supply**
- Following amendments introduced **retrospectively w.e.f. 01.07.2019** vide GST Amendment Act, 2018:
  - **Omission of clause (d) to Section 7(1):**  
~~*(d) the activities to be treated as supply of goods or supply of services as referred to in Schedule II.*~~
  - **Insertion of sub-section (1A) to section 7:**  
*(1A) Where certain activities or transactions constitute a supply in accordance with the provisions of sub-section (1), they shall be treated either as supply of goods or supply of service as referred to in Schedule II”*

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## Amendment in scope of “Supply”

- GST amendment Act retrospectively delinks Schedule II from scope of supply
- Schedule II no longer creates the charge by treating transaction as deemed supply
- It merely classifies transaction into “Good” or “Service”
- General belief that following transactions were deemed supply as covered under Schedule II:
  - **Entry 5(b)** – Sale of under-construction flats/units
  - **Entry 5(e)** – Agreeing to do an act, to tolerate an act or tolerate a situation (Hardship allowance, Rental allowance, corpus, shifting allowance, etc. paid under redevelopment projects)

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## Issues & FAQs

- What are tax implications of following transactions in view of delinking of Schedule II to definition of “supply”?
- Sale of under-construction flats
  - Hardship allowance, rental allowance, corpus, shifting allowance, etc. paid under redevelopment projects
  - Cancellation charges paid by the flat buyer to builder;

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Amendments  
through  
Notifications dated  
29<sup>th</sup> March, 2019

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## One time option for Builders

- Builders shall have **one-time option for ONGOING PROJECTS:**
  - To pay tax at **existing effective rates** i.e. 8% (affordable houses) or 12% (others) with Input tax credit ('ITC'); **or**
  - To pay tax at **new rate** i.e. 1% (affordable houses) or 5% (others) without ITC
- Ongoing project is a project satisfying stipulated conditions in notification
- Option to be exercised by filing notified form **on or before 10<sup>th</sup> May,2019**
- In case of failure to exercise option, new taxation scheme will apply
- Above option is **not available for projects:**
  - other than ongoing project
  - New Projects commencing **on or after 1<sup>st</sup> April,2019**



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## Tax implications of Ongoing Projects opting for Old Scheme

Particulars	Effective Tax Rate
Sale of under-construction residential affordable house	8% (with ITC)
Sale of under-construction residential units (other than affordable)	12% (with ITC)
Sale of under-construction commercial units	12% (with ITC)

- Accumulated ITC as on 31<sup>st</sup> March, 2019 remains intact
- Credit of tax paid for inputs, input services and capital goods procured on or after 1<sup>st</sup> 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 person of:
  - Cement
  - Capital Goods

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## Tax implications of 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 for paying at concessional rate**

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## Condition – Non availment of ITC

- Builder not entitled to ITC related to supply used in construction services taxed at 1% or 5%
- Builder to reverse the ITC availed from inception of project to the extent it relates to construction services to be taxed at 1% or 5%
- ITC not availed shall be reported every month by reporting the same as ineligible credit in GSTR-3B.

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## Condition – Procurement from Registered Suppliers

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

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

- **In case of shortfall of purchases of 80% from registered person:**

- On shortfall, tax shall be paid by builders **under Reverse Charge:**
  - 18% on purchases (other than Cement) from unregistered person
  - 28% on Cement purchased from unregistered person

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## Condition – Procurement from Registered Suppliers

- 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.
- Builder shall submit the above details in the prescribed form electronically on the common portal by end of the quarter (30<sup>th</sup> June) following the financial year.
- Tax liability on the shortfall of inward supplies from unregistered person to be added to output tax liability in the month of June following the end of the financial year.
- Mandatory payment of tax under RCM on cement procured from unregistered person irrespective of stipulated shortfall
- Monthly payment of tax under RCM on following procurement from unregistered persons:
  - Cement (at 28%);
  - Capital goods (at applicable rates)

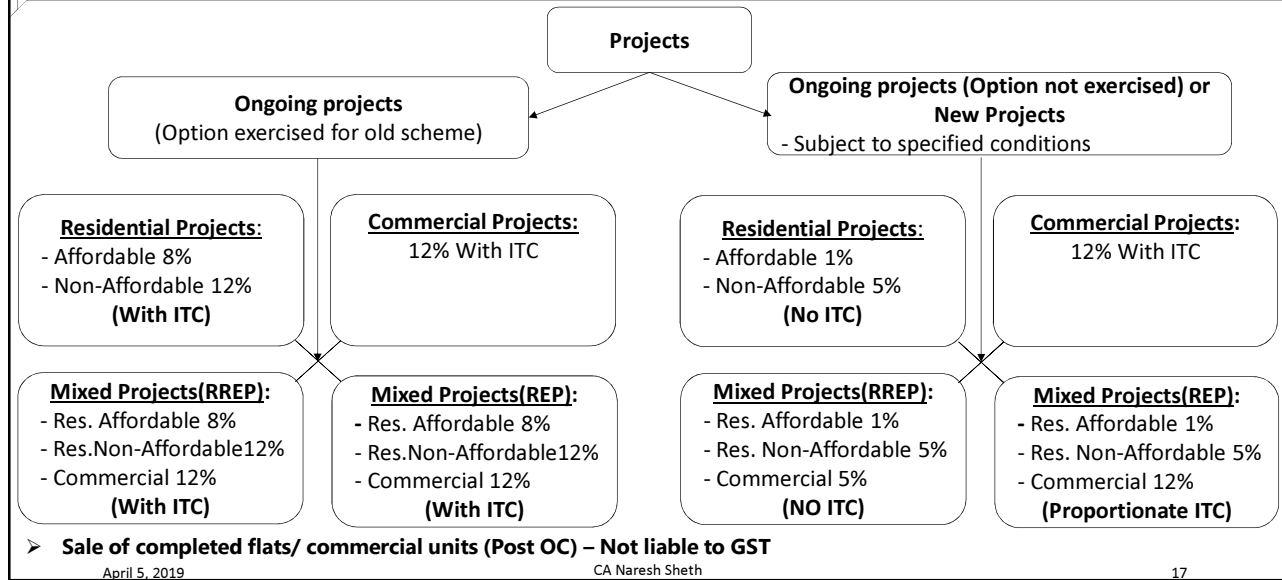
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## Amended Scheme of Taxation (in brief)



## Works Contract Service

* Particulars	Rate of Tax
Works Contract services provided for construction of commercial apartments	18%
Works contract service provided for construction of residential apartments	18%
Works contract service provided for construction of residential affordable apartments	12%*

\*Works contract service for construction of residential affordable apartments will be charged at 12% subject to fulfillment of condition that carpet area of affordable residential apartments in a project should be **50% or more than the total carpet area of the project**

## Factors to be considered for exercising the option

- Cost-benefit analysis and future projections for each project
- Accumulated ITC balance
- Marketability of unsold flats, if selling price is enhanced
- Developers capacity to absorb reversal of ITC
- Liquidity position
- Unsold inventory
- Implications of anti-profiteering

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## Details required for working out appropriate option

- Project wise total ITC availed (utilized or not) from July 17 till date
- Project wise bifurcation of credit taken through TRANS- 1
- Percentage of Work completed till 31<sup>st</sup> March, 2019
- Total carpet area of the project
- Bifurcation of carpet area into commercial, residential and others
- Percentage Booking of flats till 31<sup>st</sup> March, 2019
- Percentage invoicing till 31<sup>st</sup> March, 2019
- GST payable on balance consideration on flats booked
- Estimated area to be sold after OC
- Estimated ITC on material to be procured on or after 31<sup>st</sup> March, 2019

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## Issues & FAQs

- 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?
- What is the significance of term "One time option"?
  - Whether option once exercised, does it become irrevocable?
  - Can one amend option selected inadvertently? Does he have a choice atleast before 10<sup>th</sup> May 2019?
- Whether option is to be exercised qua:
  - Unit?
  - Financial Year?
  - Project?
  - Entity?

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## Issues & FAQs

- Whether different options can be exercised in respect of different buildings in same plan layout?
- Whether one can exercise different options in respect of flats sold before 31<sup>st</sup> March 2019 and flats to be sold thereafter?
- Whether two JDA partners can opt for different options?
- Even if builder opts for Old scheme, customer may not agree to pay tax @ 12% (or 8%) on or after 1st April 2019.

Builder charges tax @ 12% to customer for demands raised after 01.04.2019 in respect of ongoing project. He gives discount of 7% to customer (so effective tax rate remains 5%).

Whether this is consonance with law?

Does above comply with Anti-profiteering provisions?

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## Issues & FAQs

- Whether the selling price can be revised on account of foregoing of ITC claim?
- How to recover ITC benefits already passed on to customers?:
  - In case where agreement executed **on or after 01.07.2017**, probable ITC is factored in sales price
  - In respect of flats sold **before 01.07.2017**, benefit of ITC is passed on to customers in respect of instalments due on or after 01.07.2017
    - Entire credit due is passed on
    - Credit in respect of instalments received till date is passed on
    - Benefit is to be passed on at the time of possession
- 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**?

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## Issues & FAQs

- In case of exclusive Affordable RREP, what will be the tax rate for commercial units?
- In case developer provides owner's flats/ rehab flats to landowner/ society in JDA/ Redevelopment project:
  - What will be the applicable tax rate? [Refer 4(i) proviso in Notification No. 03/2019- CT(R)]
  - Explanation 2A inserted in Rate Notification No. 11/2017 – CT(R) dated 28.06.2017 suggests that taxable value of such flats (allotted in lieu of development rights) should be value of similar apartment sold to independent buyer on date nearest to sale of development right.

Whether explanation changes the nature of supply from "works contract" to "sale of under-construction flat" resulting into higher tax liability?

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## Issues & FAQs

- Following is the break up of purchases:

Procurement details	Amount (Rs.)			
	From registered suppliers	75	80	75
Cement from Unregistered suppliers	Nil	10	25	20
Other items from Unregistered suppliers	25	10	Nil	25
<b>Total Procurement</b>	<b>100</b>	<b>100</b>	<b>100</b>	<b>100</b>

What will be tax payable under RCM in above cases?

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## Issues & FAQs

- Whether following exempt supplies need to be considered for determining shortfall of 20% in procurement of supply from registered persons:
- Interest on loans;
  - Interest free loans from related parties such as promoters, family members, associate concerns, etc.
  - Water, services of municipal corporation, etc.
  - Hardship allowance, compensation, shifting allowance, rent, corpus paid to society members in Redevelopment project
- Whether RCM U/S 9(4) will be payable in respect of above referred exempt supplies?
- Amount payable under RCM by builder is Rs. 1.22 lakhs. He discharged tax liability of Rs. 1.21 lakhs. Whether SCN will be for:
- Payment of shortfall of Rs. 1000 along with interest; or
  - Differential Tax of 13% of total project receipts of Rs. 100 Crores (Tax rate of 18% for services for which rate is not prescribed minus tax paid @ 5%)

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## Issues & FAQs

- Builder has two projects i.e. one ongoing project and other new project. If he takes credit of common input services or by mistake ITC in relation to new project is taken, whether SCN will be for:
  - Reversal of ITC wrongly taken along with interest; or
  - Differential Tax of 13% of total project receipts of Rs. 100 Crores (Tax rate of 18% for services for which rate is not prescribed minus tax paid @ 5%)
- There was no indication in Press release of 33rd and 34th GST Council Meetings as to discharge of concessional tax liability in cash. Whether in absence of recommendations by GST Council such amendment is legally valid?
- By putting a condition of tax payment in cash, credit is reduced effectively to nil value. Can this be done as credit is an indefeasible right?

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## Issues and FAQs

- 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 treatment of ITC when builder opted for Old scheme?
  - What will be fate of such availment if builder goes for new scheme of taxation?

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## Meaning of “Project”

- **“Project”** shall mean a Real Estate Project(**REP**) or Residential Real Estate Project (**RREP**)
- **“Real Estate Project”** is having same meaning as assigned under **RERA**;
  - 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
    - for the purpose of selling all or some of the said apartments; or plots or building; **and**
    - includes the common areas, the development works, all improvements and structures thereon, and all easement, rights and appurtenances belonging thereto;

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## Meaning of “Project”

- **“Residential Real Estate Project (RREP)”** means a project in which carpet area of the commercial apartments is **not more than 15 percentage of the total carpet area of all the apartments in the REP**
- **“Carpet Area”** shall have same meaning as defined under RERA
- **“Residential Apartment”** means an apartment intended for residential use as declared to Real Estate Regulatory Authority or to competent authority
- **“Commercial Apartment”** means an apartment other than a residential apartment
- **“Apartment”** means

<b>Block</b>	<b>Chamber</b>	<b>Dwelling Unit</b>	<b>Flat</b>	<b>Office</b>	<b>Showroom</b>
<b>Shop</b>	<b>Godown</b>	<b>Premises</b>	<b>Suit</b>	<b>Tenement</b>	<b>Unit</b>

used or intended to be used **for any residential or commercial use** such as residence, office, shop, showroom or godown or for carrying on any business, occupation, profession or trade, or for any other type of use ancillary to above

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## Meaning of “Ongoing Project”

- **“Ongoing project”** would mean a project complying with all following conditions:
  - a) Commencement certificate is issued by the competent authority on or before 31st March, 2019; **and**
  - b) Any of the following authorities certifies that **construction has started** on or before 31st March, 2019; **and**
    - Registered Architect
    - Registered Chartered Engineer
    - Licensed surveyor of local body
  - c) Completion certificate has not been issued or first occupation of the project has not taken place on or before the 31st March, 2019; **and**
  - d) Apartments have been, partly or wholly, booked on or before the 31st March, 2019.
- Where commencement certificate not required from competent authority, any of the authorities specified in (b) above shall certify that construction of the project started on or before the 31st March, 2019 and conditions (c) and (d) needs to be complied with

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## Meaning of “Ongoing Project”

- **“An apartment booked on or before 31<sup>st</sup> March, 2019”** shall mean an apartment which meets **all** the following **three** conditions:
  - a) part of supply of construction of which has time of supply on or before the 31st March, 2019;
  - b) at least one instalment has been credited to the bank account of the registered person on or before 31<sup>st</sup> March, 2019; **and**
  - c) an allotment letter or sale agreement or any other similar document evidencing booking of the apartment has been issued on or before the 31<sup>st</sup> March, 2019
- **Construction shall be considered to have started on or before 31<sup>st</sup> March, 2019 if:**
  - Earthwork for site preparation is completed; **and**
  - Excavation of foundation has started

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## Issues & FAQs

- Building where part OC is received on or before 31<sup>st</sup> March 2019:
  - Whether portion for which part OC has come can be regarded as Ongoing Project; or
  - Entire building is Ongoing Project?
- Commencement certificate is received for a project. The physical construction is yet to start. The project is RERA registered and the booking has started before 31<sup>st</sup> March 2019. Whether this project is an "Ongoing Project"?
- A project consists of 5 buildings. The plinth construction for all buildings has started. The booking is done only in respect of 2 flats in one building before 31<sup>st</sup> March 2019. Whether this project can be regarded as "Ongoing Project"?

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## Issues & FAQs

- In society redevelopment project or joint development project, the commencement certificate is obtained and construction has started before 31<sup>st</sup> March, 2019. Allotment of rehab flats / owner's flats is done before 31<sup>st</sup> March, 2019. No booking for saleable flats is done before 31<sup>st</sup> March 2019. Whether this can be regarded as "Ongoing Project"?
- Whether following are Ongoing Projects where allotment letter issued before 31<sup>st</sup> March 2019:
  - Booking amount received in cash and kept as cash on hand?
  - Booking amount received in cash and deposited in bank before 31<sup>st</sup> March 2019
  - Booking amount received by cheque but could not be deposited in bank before 31<sup>st</sup> March 2019
  - Booking amount received by cheque and deposited in bank before 31<sup>st</sup> March 2019, however, cheque is cleared on 3<sup>rd</sup> April 2019
  - Flat allotted to vendor against his dues on or before 31<sup>st</sup> March, 2019

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## Issues & FAQs

- A builder has got permission to construct a building upto 10 floors and major construction work is over in respect of such building before 31st March 2019. Due to change in DC Rules after 01.04.2019, builder is entitled to further construction of 5 floors for which he has received commencement certificate on 4th April 2019. Whether construction of 5 additional floors will be regarded as New Project of Ongoing Project?
- Whether following area is to be taken into consideration for determining **% of commercial area to total area** for deciding whether project is RREP:
  - Society Office
  - club house;
  - Temple;
  - Security cabin;

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Affordable House

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## Affordable Residential Apartment – Definition

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

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## Metropolitan Cities

### Metropolitan cities will include the 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)

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## Specified Schemes covered under Notification 11/2017 – CT(R)

Entry Number	Particulars
3 (iv) (b)	A civil structure or any other original works pertaining to a scheme under Jawaharlal Nehru National Urban Renewal Mission or Rajiv Awaas Yojana;
3 (iv) (c)	A civil structure or any other original works pertaining to the “In-situ redevelopment of existing slums using land as a resource, under the Housing for All (Urban) Mission/ Pradhan Mantri Awas Yojana (Urban);
3 (iv) (d)	A civil structure or any other original works pertaining to the “Beneficiary led individual house construction / enhancement” under the Housing for All (Urban) Mission/Pradhan Mantri Awas Yojana;
3 (iv) (da)	A civil structure or any other original works pertaining to the “Economically Weaker Section (EWS) houses” constructed under the Affordable Housing in partnership by State or Union territory or local authority or urban development authority under the Housing for All (Urban) Mission/ Pradhan Mantri Awas Yojana (Urban);

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## Specified Schemes covered under Notification 11/2017 – CT(R)

Entry Number	Particulars
3 (iv) (db)	A civil structure or any other original works pertaining to the “houses constructed or acquired under the Credit Linked Subsidy Scheme for Economically Weaker Section (EWS)/ Lower Income Group (LIG)/ Middle Income Group-1 (MIG-1)/ Middle Income Group-2 (MIG-2) under the Housing for All (Urban) Mission/ Pradhan Mantri Awas Yojana (Urban);
3 (v) (b)	A single residential unit otherwise than as a part of a residential complex;
3 (v) (c)	Low-cost houses up to a carpet area of 60 square metres per house in a housing project approved by competent authority empowered under the Scheme of Affordable Housing in Partnership framed by the Ministry of Housing and Urban Poverty Alleviation, Government of India;

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## Specified Schemes covered under Notification 11/2017 – CT(R)

Entry Number	Particulars
3 (v) (d)	Low cost houses up to a carpet area of 60 square metres per house in a housing project approved 6 - 3 by the competent authority under- 1) the “Affordable Housing in Partnership” component of the Housing for All (Urban) Mission/Pradhan Mantri Awas Yojana; 2) any housing scheme of a State Government
3 (v) (da)	Low-cost houses up to a carpet area of 60 square metres per house in an affordable housing project which has been given infrastructure status vide notification of Government of India, in Ministry of Finance, Department of Economic Affairs vide F. No. 13/6/2009-INF, dated the 30th March,2017;
3 (vi) (c)	A residential complex predominantly meant for self-use or the use of their employees or other persons specified in paragraph 3 of the Schedule III of the Central Goods and Services Tax Act, 2017.

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## 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

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## Affordable Residential Apartment – Summarized position

Particulars	Opted for Old scheme	Opted for New Scheme
House having carpet area upto 60 sq. mt. (Metropolitan cities) having value <b>more or less than</b> Rs. 45 Lacs (falling under 3(v)(da) of Notification No. 11/2017 dated 28.06.2017)	8% (with ITC)	1% (without ITC)
House having carpet area upto 90 sq. mt. (Non-Metropolitan cities) having value <b>less than</b> Rs. 45 Lacs	12% (with ITC)	1% (without ITC)
Houses in specified schemes listed in Notification No. 11/2017 – CT(R) dated 28.06.2017	8% (with ITC)	1% (without ITC)

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## Issues & FAQs

- 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. Builder intends to opt for old scheme of taxation as there is huge ITC accumulation for this project.
  - Can he opt for Old Scheme?
  - If yes, what will be applicable rate?
- In case builder does not opt for old scheme, what will be tax rate applicable to erstwhile affordable houses?

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## Transition of ITC for ongoing projects under New Scheme

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## Transition of ITC for ongoing projects under New Scheme

- Accumulated ITC as on 31<sup>st</sup> March, 2019 attributable to installments due on or after 1<sup>st</sup> April, 2019 (to be taxed at concessional rate) to be reversed
- Reversal to be worked out project wise
- Reversal to be done before due date for filing of return for September, 2019 (**i.e. 20<sup>th</sup> October, 2019**)
- Reversal to be done by utilizing ITC balance lying in the electronic credit ledger and/or by making cash payment
- Application can be made in in Form GST DRC – 20 to Commissioner for seeking extension of time and instalments for payment
- The Commissioner has discretionary power to permit extension of time for period not exceeding 24 months
- Interest payable @ 18% p.a. from 20<sup>th</sup> October 2019 till date of payment in instalments

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## Transition of ITC for ongoing projects under New Scheme

Builders & Developers opting New Scheme for ongoing projects shall transition the ITC in following manner:

- Computation of eligible ITC to be done **Project wise**
- ITC **availed on Input and input services** during 1<sup>st</sup> July 2017 to 31<sup>st</sup> March 2019 is to be considered
- Transitional credit as on 1<sup>st</sup> July 2017 is to be considered
- In other words, credit balance as on 31<sup>st</sup> March 2019 **plus** ITC utilized will be considered

**Residential Projects (RREP)-** (Refer Annexure II of Notification No. 03/2019 –CT(R) dated 29.03.2019):

- Total ITC (as aforesaid) availed for the project till 31.03.2019
- Total ITC (till 31.03.2019) to be extrapolated for completion of entire project
- Eligible ITC to be retained shall be based on percentage of booking of flats and percentage invoicing done as on 31.03.2019

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## Transition of ITC for ongoing projects under New Scheme

### ➤ Facts Matrix:

ITC availed for entire project till 31.03.19	(A)	Rs. 5 Crores
ITC balance as on 31.03.2019		Rs. 3 Crores
Work completed as on 31.03.2019	(B)	20%
% of Flats sold to total flats (Booking done)	(C)	30%
Demand raised / billing done till 31.03.19	(D)	25%

- ITC to be retained:
  - Formula = A \* (1/B) \* C \* D → 5 Crores \* (100/20) \* (30/100) \* (25/100) = **Rs. 1.875 Crores**
- ITC to be reversed = ITC availed – ITC to be retained = Rs. 5 Crores – Rs. 1.875 Crores = **Rs. 3.125 Crores**
- ITC balance as on 31.03.2019 is to be nullified and balance of **0.125 Crores** is to be paid

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## Transition of ITC for ongoing projects under New Scheme

- In case % Invoicing (demand raised) exceeds % of completion by 25%, % invoicing shall be **deemed to be % completion plus 25%**.
- In case value of invoices (demand raised) exceeds consideration received by 25%, then value of invoicing shall be **deemed to be % consideration plus 25%**
- Where ITC to be retained **exceeds** Total ITC availed in the project, such excess can be availed on goods and services **received on or after 01.04.2019**.
- Whether such availment can be utilised for discharging payment of output tax liability of 1% or 5%?
- If not, whether such availment can be utilised for discharging following tax liabilities:
  - On other revenue stream of builder
  - On Commercial units of other projects
- The formula is prescribed also for the mixed project wherein ITC pertaining to commercial portion is allowed to be retained

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Treatment of  
Development  
Rights, TDR / FSI  
and Long term  
lease (premium)

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## Treatment of TDR / FSI and Long term lease (premium)

- Exemption granted for supply of TDR, FSI, long term lease (upfront premium for Lease period of 30 years or more) on or after 01.04.2019 **provided** it is used for construction of:
  - residential flats which are sold before issuance of completion certificate; **and**
  - such service is liable to GST
- Exemption to apply to transfer of development rights **pursuant to** Joint Development Agreement (whether area share or revenue share) for residential complex for sale
- Development rights, TDR, FSI, Leasehold land used for following will still be **liable to GST @18%**:
  - Construction of commercial premises
  - Construction of factory, corporate house, malls, commercial complex for letting out (for own use)
  - Construction of Residential Complex intended for sale after completion



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## Treatment of TDR / FSI and Long term lease (premium)

- Exemption will be withdrawn **in respect of unsold flats** as on the **date of completion**
- Builders will be liable to pay tax under **RCM** (on such TDR, FSI, etc.) **in cash** at the rate of 18% on value of TDR/FSI/DR/Lease premium attributable to unsold flat subject to cap of:
  - 1% of value of affordable residential apartments remaining un-booked and
  - 5% of value of Non-affordable residential apartments remaining un-booked
- Date for payment of such liability is shifted to **date of completion certificate or first occupation, whichever is earlier**
- TDR Sale by SRA developers / land owner **to the trader** will be liable to **GST @ 18%**.
- In JDA/Redevelopment Agreement, transfer of development right by land owner/society is exempt but Rehab construction services provided by developers to Land owner/Society/SRA will still be taxable at 12% or 18%

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## Treatment of TDR / FSI and Long term lease (premium)

- In case of JDA, builder shall pay tax on owner's (landlord) area:
  - At the time of completion certificate or first occupation, whichever is earlier
  - On the value of total amount charged for similar apartments in the project to independent buyers nearest to the date of transfer of development right [Para iv of Notification No. 3/2019 – CT(R)]
- Landowner shall be eligible for credit of taxes charged by builder against land owner selling under-construction flats/ units provided output tax is not less than such input tax credit
- Notification No. 05/2019-CT(R) mandates payment by builder/ promoter under RCM for acquisition of Development Rights, FSI, Long term lease (30 years or more), wherever taxable. This would mean that acquisition for construction of commercial units will be covered under RCM (Whether builder has opted for Old scheme or New Scheme)

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## Issues and FAQs

- There was no indication in Press release of 33rd and 34th GST Council Meetings as to exemption will be available only in respect of upfront premium for long-term lease of 30 years or more. Whether in absence of recommendations by GST Council such amendments are legally valid?
- Does exemption granted for development rights implies that development rights are otherwise taxable?  
Whether one can still contest that:
  - Development rights for commercial projects is not liable to GST;
  - RCM liability should not arise on development rights pertaining to Post OC sales
- Many developers have taken a view that transfer of development rights in case of JDA (On Revenue Share basis) is a continuous supply of service. Time of supply arises when the revenue share due to land owner. The development agreement is already executed on or before 31.03.2019. whether revenue share received by land owner on or after 01.04.2019 is exempt under Notification No. 04/2019-CT(R) dated 29.03.2019

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## Issues and FAQs

- The development rights were acquired in December 2018 for a plot where FSI of 50,000 Sq.ft. was available. Builder has already paid GST on such development rights. He further acquired TDR of 50,000 Sq. ft. in April 2019 without payment of GST.
- The project will be completed in December 2020. Builder intends to sell 40% flats after OC. How to work out development rights/ TDR attributable to flats to be sold after OC for working out RCM liability? Whether construction of post OC flats is out of:
  - Development rights acquired in December 2018? Or
  - TDR acquired in April 2019? Or
  - Proportionately?

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## Issues and FAQs

- Notification casts the obligation on builder to discharge liability under RCM on development rights/ TDR/ leasehold premium attributable to residential flats remained unsold on date of OC on the date of completion of project. However, notification does not specify when to discharge such liability in following cases of subsequent change of plan as under:
  - Exclusive residential project plan is changed to Mixed Project having Commercial portion exceeding 15%.
  - Exclusive commercial project plan is changed to mixed project having substantial residential portion?

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## Amendment in ITC Rule

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## Amendment in Rule 42

- Rule 42 provides for reversal of common input tax credit in respect of exempt supplies and taxable supplies
- All supplies for project will be treated as common input and input services
- Reversal is to be worked out project wise
- For calculating reversal, ITC of entire project is to be considered
- Reversal in respect of unsold area is to be done on the area basis
- This is sharp departure from earlier Rule 42 which stipulated reversal as under:
  - Reversal was to be done in respect of common inputs and common input services of tax period
  - Reversal was based on value of exempt supply (sale of flats after O.C.) / value of total supply (exempt supply + taxable supply).
- This amendment overturns decision of Ahmedabad CESTAT in case of Alembic Ltd.

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## Issues & FAQs

- Notification no. 16/2019-CT dated 29.03.2019 amended Rule 42 w.e.f. 01.04.2019. whether reversal to be done on area basis applies to:
  - ITC for FY 2018-19 or
  - ITC for FY 2019-20 and onwards
- Can a Removal of Difficulty Order u/s 172 can prescribe reversal based on 'area' which was mentioned in GST law earlier. Will it be considered as invalid being inconsistent with GST Act?

## Words of Caution

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- 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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