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SESSION - 6

INPUT TAX CREDIT

By: Adv. (CA) Pawan Arora
Partner, Athena Law Associates

Reversal of CENVAT Credit on Units sold post CC

Position prior to 01.04.2016

1. Till the date of obtaining CC, all transaction of the Developer are taxable, therefore during the period of construction no reversal is required to be made. It is settled law that once credit is legally and validly availed, the same cannot be denied and/or recovered unless specific provisions exist for the same under the law.
2. Sale of flats after Completion Certificate being a non-service, is not included within the ambit of exempted service and therefore reversal under Rule 6 of CCR would not be attracted.
3. However, credit which has been availed **after** the date of obtaining CC, is required to be reversed in proportionate to unsold units based on some reasonable method e.g. area ratio or value formula. In this regard the Tribunal/ Courts have held that that once the assessee is engaged in provision of exempt goods/service, full cenvat credit cannot be taken of common inputs/ input services and some reasonable method has to be applied to avail the proportionate credit attributable to only taxable service.

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Position after 01.04.2016

1. Rule 6(1) was amended w.e.f 01.04.2016 wherein an explanation was inserted which clarified that for the purposes of Rule 6, exempted services as defined in clause (e) of rule 2 shall include an activity, which is not a service as defined in section 65B(44) of the Finance Act, 1994 provided that such activity has used inputs or input services.
2. Rule 6(3) of the CCR provides an option to a provider of output service who is providing both non-exempted services as well as exempted services for the procedure to be followed for reversal of Cenvat Credit.
3. Rule 6(3A)(b) provides that the provider of output service shall determine the credit required to be reversed out of the total credit of inputs and input services **taken during the month**, on provisional basis. **The reversal under Rule 6(3A)(b) is done on a provisional basis using values exempt and non-exempt services provided during the preceding financial year.**

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Position after 01.04.2016

4. Rule 6(3A)(c) provides that the reversal of Cenvat Credit attributable to provision of exempted services shall be determined for the **whole of the financial year**, using the figures for the entire Financial Year in the formula prescribed in Rule 6(3A)(c) which is almost similar to formula prescribed under Rule 6(3A)(b) and considers the Annual Figures of the credit and turnover of the current Financial Year .
5. Accordingly, on applying the formula prescribed under Rule 6(3A)(b) till the date of CC provisional reversal would come out to be zero in absence of any exempted turnover.
6. Further, as per formula prescribed under Rule 6(3A)(c) final reversal would come out to be zero in absence of any exempted turnover, till the end of financial year preceding the date of CC. It is to be further noted that, there is no other manner prescribed under the CCR where the credit availed during the previous Financial Years is required to be reversed on exemption of services in a particular Financial Year.
7. Thus, as per formula prescribed under Rule 6(3A), positive final reversal come out in the FY in which CC is received and subsequent FY.

Judicial Position

- **M/s Alembic Ltd. Shreno Ltd. Vs. C.C.E & S.T. Vadodara-I Appeal No. ST/11475,11476,10017,10018/2018-DB** wherein the Hon'ble CESTAT held as under:

6. We find some merit in the submission made by the Ld. Counsel for the Appellants that for the purpose of invoking provisions of Rule 6 of the Cenvat Credit Rules, 2004, in the present set of facts and circumstances, the output service must first be exempt service. That upon receipt of Completion Certificate for the projects, the output activity of sale of residential units becomes “non-service” as per provisions of Section 65B of the Finance Act, 1994 read with definition of the term “exempt service” under Rule 2(e) of the CCR, 04. This is further supported by specific amendment carried out in Rule 6(1) of the CCR, 04 whereby w.e.f. 1.4.16, Explanation 3 was inserted specifically dealing with a situation as in the present case, where a deeming fiction was created that for the purposes of Rule 6 of CCR, 04, exempted services as defined in clause (e) of rule 2 shall include an activity, which is not a ‘service’ as defined in section 65B(44) of the Finance Act, 1994 provided that such activity has used inputs or input services. That there was no such stipulation prior to 1.4.16 in law and prima facie such situation was not to be treated as exempt service and did not attract the mischief created under Rule 6 of the CCR, 04.

- The above referred view of the CESTAT Ahmedabad has also been upheld by the Hon'ble High Court of Gujarat in its judgement dated 12.04.2019 in the appeal arising out of the said order.

Judicial Position

- The above referred judgement was followed by CESTAT Bangalore in the case of ***M/s. TPL Developers Versus Commissioner of Central Tax, Bangalore North ST/20074/2019-SM***
- The Hon'ble Supreme Court in ***Dai Ichi Karkaria Ltd. 1999 (112) E.L.T. 353 (S.C.)*** has held that Cenvat Credit is a vested right. Once it is legally and validly availed, the same cannot be denied and/or recovered unless specific provisions exist for the same.

Proportionate Reversal of Input Tax Credit – Rule 42

The input tax credit in respect of inputs or input services, which attract the provisions of sub-section (1) or sub-section (2) of section 17, being partly used for the purposes of business and partly for other purposes, or partly used for effecting taxable supplies including zero rated supplies and partly for effecting exempt supplies, shall be attributed to the purposes of business or for effecting taxable supplies in the following manner, namely,-

- (a) the total input tax involved on inputs and input services in a tax period, be denoted as 'T';*
- (b) the amount of input tax, out of 'T', attributable to inputs and input services intended to be used exclusively for the purposes other than business, be denoted as 'T1';*
- (c) the amount of input tax, out of 'T', attributable to inputs and input services intended to be used exclusively for effecting exempt supplies, be denoted as 'T2';*
- (d) the amount of input tax, out of 'T', in respect of inputs and input services on which credit is not available under sub-section (5) of section 17, be denoted as 'T3';*
- (e) the amount of input tax credit credited to the electronic credit ledger of registered person, be denoted as 'C1' and calculated as-*

$$C1 = T - (T1 + T2 + T3);$$

- (f) the amount of input tax credit attributable to inputs and input services intended to be used exclusively for effecting supplies other than exempted but including zero rated supplies, be denoted as 'T4';*

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[Explanation: For the purpose of this clause, it is hereby clarified that in case of supply of services covered by clause (b) of paragraph 5 of Schedule II of the said Act, value of **T4 shall be zero during the construction phase because inputs and input services will be commonly used for construction of apartments booked on or before the date of issuance of completion certificate** or first occupation of the project, whichever is earlier, **and those which are not booked by the said date.**]

(g) 'T1', 'T2', 'T3' and 'T4' shall be determined and declared by the registered person **at the invoice level** in FORM GSTR-2 [and at summary level in FORM GSTR-3B];

(h) input tax credit left after attribution of input tax credit under clause [(f)] shall be called common credit, be denoted as 'C2' and calculated as-

$$C2 = C1 - T4;$$

i) the amount of input tax credit attributable towards exempt supplies, be denoted as 'D1' and calculated as-

$$D1 = (E \div F) \times C2$$

where,

'E' is the aggregate value of exempt supplies during the tax period, and

'F' is the total turnover in the State of the registered person during the tax period:

[Provided that in case of supply of services covered by clause (b) of paragraph 5 of Schedule II of the Act, the value of **'E/F' for a tax period** shall be calculated **for each project separately**, taking value of E and F as under:-

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E= aggregate carpet area of the apartments, construction of which is exempt from tax plus aggregate carpet area of the apartments, construction of which is not exempt from tax, but are identified by the promoter to be sold after issue of completion certificate or first occupation, whichever is earlier;

F= aggregate carpet area of the apartments in the project;

- *Explanation 1: In the tax period in which the issuance of completion certificate or first occupation of the project takes place, value of E shall also include aggregate carpet area of the apartments, which have not been booked till the date of issuance of completion certificate or first occupation of the project, whichever is earlier;*
- *Explanation 2: Carpet area of apartments, tax on construction of which is paid or payable at the rates specified for items (i), (ia), (ib), (ic) or (id), against serial number 3 of the Table in the notification No. 11/2017-Central Tax (Rate), published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (i) dated 28th June, 2017 vide GSR number 690(E) dated 28th June, 2017, as amended, shall be taken into account for calculation of value of 'E' in view of Explanation (iv) in paragraph 4 of the notification No. 11/2017-Central Tax (Rate), published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (i) dated 28th June, 2017 vide GSR number 690(E) dated 28th June, 2017, as amended.]*

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Provided further]6 that where the registered person does not have any turnover during the said tax period or the aforesaid information is not available, the value of 'E/F' shall be calculated by taking values of 'E' and 'F' of the last tax period for which the details of such turnover are available, previous to the month during which the said value of 'E/F' is to be calculated;

Explanation: For the purposes of this clause, it is hereby clarified that the aggregate value of exempt supplies and the total turnover shall exclude the amount of any duty or tax levied under entry 84 1[and entry 92A]1 of List I of the Seventh Schedule to the Constitution and entry 51 and 54 of List II of the said Schedule;

(j) the amount of credit attributable to non-business purposes if common inputs and input services are used partly for business and partly for non-business purposes, be denoted as 'D2', and shall be equal to five per cent. of C2; and

(k) the remainder of the common credit shall be the eligible input tax credit attributed to the purposes of business and for effecting supplies other than exempted supplies but including zero rated supplies and shall be denoted as 'C3', where,-

$$C3 = C2 - (D1+D2);$$

[(l) the amount 'C3', 'D1' and 'D2' shall be computed separately for input tax credit of central tax, State tax, Union territory tax and integrated tax and declared in FORM GSTR-3B or through FORM GST DRC-03;]

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(m) the amount equal to aggregate of 'D1' and 'D2' shall be 8[reversed by the registered person in FORM GSTR-3B or through FORM GST DRC-03]8:

Provided that where the amount of input tax relating to inputs or input services used partly for the purposes other than business and partly for effecting exempt supplies has been identified and segregated at the invoice level by the registered person, the same shall be included in 'T1' and 'T2' respectively, and the remaining amount of credit on such inputs or input services shall be included in 'T4'.

(2) 9[Except in case of supply of services covered by clause (b) of paragraph 5 of the Schedule II of the Act, the input tax credit]9 determined under sub-rule (1) shall be calculated finally for the financial year before the due date for furnishing of the return for the month of September following the end of the financial year to which such credit relates, in the manner specified in the said sub-rule and-

- (a) where the aggregate of the amounts calculated finally in respect of 'D1' and 'D2' exceeds the aggregate of the amounts determined under sub-rule (1) in respect of 'D1' and 'D2', such excess shall be 10[reversed by the registered person in FORM GSTR-3B or through FORM GST DRC-03]10 in the month not later than the month of September following the end of the financial year to which such credit relates and the said person shall be liable to pay interest on the said excess amount at the rate specified in sub-section (1) of section 50 for the period starting from the first day of April of the succeeding financial year till the date of payment; or*
- (b) where the aggregate of the amounts determined under sub-rule (1) in respect of 'D1' and 'D2' exceeds the aggregate of the amounts calculated finally in respect of 'D1' and 'D2', such excess amount shall be claimed as credit by the registered person in his return for a month not later than the month of September following the end of the financial year to which such credit relates.*

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[(3) In case of supply of services covered by clause (b) of paragraph 5 of the Schedule II of the Act, the input tax determined under sub-rule (1) shall be calculated finally, for each ongoing project or project which commences on or after 1st April, 2019, which did not undergo or did not require transition of input tax credit consequent to change of rates of tax on 1st April, 2019 in accordance with notification No. 11/2017- Central Tax (Rate), dated the 28th June, 2017, published vide GSR No. 690(E) dated the 28th June, 2017, as amended for the entire period from the commencement of the project or 1st July, 2017, whichever is later, to the completion or first occupation of the project, whichever is earlier, before the due date for furnishing of the return for the month of September following the end of financial year in which the completion certificate is issued or first occupation takes place of the project, in the manner prescribed in the said sub-rule, with the modification that value of E/F shall be calculated taking value of E and F as under:

- E= aggregate carpet area of the apartments, construction of which is exempt from tax plus aggregate carpet area of the apartments, construction of which is not exempt from tax, but which have not been booked till the date of issuance of completion certificate or first occupation of the project, whichever is earlier;*
- F= aggregate carpet area of the apartments in the project;*
- and,-*

(a) where the aggregate of the amounts calculated finally in respect of 'D1' and 'D2' exceeds the aggregate of the amounts determined under sub-rule (1) in respect of 'D1' and 'D2', such excess shall be reversed by the registered person in FORM GSTR-3B or through FORM GST DRC-03 in the month not later than the month of September following the end of the financial year in which the completion certificate is issued or first occupation of the project takes place and the said person shall be liable to pay interest on the said excess amount at the rate specified in sub-section (1) of section 50 for the period starting from the first day of April of the succeeding financial year till the date of payment; or

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(b) where the aggregate of the amounts determined under sub-rule (1) in respect of 'D1' and 'D2' exceeds the aggregate of the amounts calculated finally in respect of 'D1' and 'D2', such excess amount shall be claimed as credit by the registered person in his return for a month not later than the month of September following the end of the financial year in which the completion certificate is issued or first occupation takes place of the project.

(4) In case of supply of services covered by clause (b) of paragraph 5 of Schedule II of the Act, the input tax determined under sub-rule (1) shall be calculated finally, for commercial portion in each project, other than residential real estate project (RREP), which underwent transition of input tax credit consequent to change of rates of tax on the 1st April, 2019 in accordance with notification No. 11/2017- Central Tax (Rate), dated the 28th June, 2017, published vide GSR No. 690(E) dated the 28th June, 2017, as amended for the entire period from the commencement of the project or 1st July, 2017, whichever is later, to the completion or first occupation of the project, whichever is earlier, before the due date for furnishing of the return for the month of September following the end of financial year in which the completion certificate is issued or first occupation takes place of the project, in the following manner:

(a) The aggregate amount of common credit on commercial portion in the project (C3aggregate_comm) shall be calculated as under:

- $C3_{\text{aggregate_comm}} = [\text{aggregate of amounts of C3 determined under sub- rule (1) for the tax periods starting from 1st July, 2017 to 31st March, 2019,} \times (AC / AT)] + [\text{aggregate of amounts of C3 determined under sub- rule (1) for the tax periods starting from 1st April, 2019 to the date of completion or first occupation of the project, whichever is earlier}]$*

Where, -

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AC = total carpet area of the commercial apartments in the project AT = total carpet area of all apartments in the project.

(b) The amount of final eligible common credit on commercial portion in the project (C3final_comm) shall be calculated as under

$$C3final_comm = C3aggregate_comm \times (E / F)$$

Where, -

E = total carpet area of commercial apartments which have not been booked till the date of issuance of completion certificate or first occupation of the project, whichever is earlier.

F = AC = total carpet area of the commercial apartments in the project

(c) where, C3aggregate_comm exceeds C3final_comm, such excess shall be reversed by the registered person in FORM GSTR-3B or through FORM GST DRC-03 in the month not later than the month of September following the end of the financial year in which the completion certificate is issued or first occupation takes place of the project and the said person shall be liable to pay interest on the said excess amount at the rate specified in sub-section (1) of section 50 for the period starting from the first day of April of the succeeding financial year till the date of payment;

(d) where, C3final_comm exceeds C3aggregate_comm, such excess amount shall be claimed as credit by the registered person in his return for a month not later than the month of September following the end of the financial year in which the completion certificate is issued or first occupation takes place of the project.

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(5) Input tax determined under sub- rule (1) shall not be required to be calculated finally on completion or first occupation of an RREP which underwent transition of input tax credit consequent to change of rates of tax on 1st April, 2019 in accordance with notification No. 11/2017- Central Tax (Rate), dated the 28th June, 2017, published vide GSR No. 690(E) dated the 28th June, 2017, as amended.

(6) Where any input or input service are used for more than one project, input tax credit with respect to such input or input service shall be assigned to each project on a reasonable basis and credit reversal pertaining to each project shall be carried out as per sub-rule (3).]

RESTRICTION ON AVAILMENT OF ITC AND UTILIZATION OF ACCUMULATED ITC

Input Tax Credit w.e.f 01.04.2019

No Input Tax Credit (ITC)

- *Provided also that credit of input tax charged on goods and services used in supplying the service has not been taken except to the extent as prescribed in Annexure I in the case of REP other than RREP and in Annexure II in the case of RREP;*

Reversal of ITC attributable to construction in a project, time of supply of which is on or after 1st April, 2019

- *Provided also that the registered person shall pay, by debit in the electronic credit ledger or electronic cash ledger, an amount equivalent to the input tax credit attributable to construction in a project, time of supply of which is on or after 1st April, 2019, which shall be calculated in the manner as prescribed in the Annexure I in the case of REP other than RREP and in Annexure II in the case of RREP;*

What to do with ITC available with Developer after reversal of requisite ITC, for payment of tax on or after 31.03.2019 - ???

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Input tax credit in case of Joint Development Agreement (JDA)

- *Provided also that where a registered person (landowner- promoter) who transfers development right or FSI (including additional FSI) to a promoter (developer- promoter) against consideration, wholly or partly, in the form of construction of apartments,-*
 - (i) the developer- promoter shall pay tax on supply of construction of apartments to the landowner- promoter, and*
 - (ii) such landowner - promoter shall be eligible for credit of taxes charged from him by the developer promoter towards the supply of construction of apartments by developer- promoter to him, provided the landowner-promoter further supplies such apartments to his buyers before issuance of completion certificate or first occupation, whichever is earlier, and pays tax on the same which is not less than the amount of tax charged from him on construction of such apartments by the developer-promoter.*
- *Explanation:*
 - (i) "developer- promoter" is a promoter who constructs or converts a building into apartments or develops a plot for sale,*
 - (ii) "landowner- promoter" is a promoter who transfers the land or development rights or FSI to a developer- promoter for construction of apartments and receives constructed apartments against such transferred rights and sells such apartments to his buyers independently.*

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Reporting of Input Tax Credit in GSTR-3B

Input Tax Credit not availed shall be reported every month by reporting the same as ineligible credit in GSTR-3B [Row No. 4 (D)(2)]

Unutilised ITC and payment of tax using cash ledger

- 1.4.2019 onwards
- in residential projects:
 - Cannot avail ITC
 - Cannot utilise ITC
- Unutilised ITC available for previous periods is like cash stuck
- Section 16:
 - *Every registered person shall, subject to such conditions and restrictions as may be prescribed and in the manner specified in section 49, be entitled to take credit of input tax charged on any supply of goods or services or both to him which are used or intended to be used in the course or furtherance of his business and the said amount shall be credited to the electronic credit ledger of such person*

Unutilised ITC and payment of tax using cash ledger

Contd...

- **S. 17(5)**

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

.....

*(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;***

*(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.*

Unutilised ITC and payment of tax using cash ledger

Contd...

- **Notification 11/2017 – CT Rate (conditions)**
 - *Provided that the central tax at the rate specified in column (4) shall be paid in cash, that is, by debiting the electronic cash ledger only;*
 - *Provided also that credit of input tax charged on goods and services used in supplying the service has not been taken except to the extent as prescribed in Annexure I in the case of REP other than RREP and in Annexure II in the case of RREP;*

Unutilised ITC and payment of tax using cash ledger

Contd...

- Similar cases
- Indian Catering Association case (Del HC)
- **Way forward:**
 - *Challenge the notification*
 - *In the meanwhile take ITC and reverse*
 - *If notification quashed, the balance ITC and the ITC availed later would become available*

Transitional Issues

**CAPPING OF % INVOICING AND PROCUREMENT
OF INPUT & INPUT SERVICE ON OR BEFORE
31.03.2019**

Case Study -1

Capping in para 3(i): where percentage invoicing is more than the percentage completion

Residential Real Estate Project (RREP) having NOT more than 15% carpet area of Commercial Units

Main Scheme		
S.No.	Particulars	Amount
a	Total ITC taken for Project till 31.3.2019 (T)	1,00,00,000
b	% Carpet Area of Residential Apartment In the Project (F1)	100.00%
c	Percentage completion of Project as on 01.04.2019 (F4)	20.00%
d	Percentage booking of Residential Apartments as on 31.03.2019 (F2)	60.00%
e	Percentage Invoicing of Residential Apartments as on 31.03.2019 (F3)	30.00%
f	ITC attributable to Residential Apartments for construction in a project, time of supply of which is on or before 31 st March, 2019($Tr = a*b*d*e/c$)	90,00,000
g	ITC attributable to Commercial Apartments (on which tax is payable at existing tax rates) for construction in a project, time of supply of which is on or before 31 st March, 2019 (Tc)	-
h	Reversal of ITC attributable to construction in a project, time of supply of which is on or after 1st April, 2019, (a-f) ($Tx = T-Tc-Tr$)	10,00,000

T is the total ITC availed (utilized or not) on inputs and input services used in construction of the REP from 1st July, 2017 to 31st March, 2019 including transitional credit taken on 1st July, 2017

Contd...

- 3. Notwithstanding anything contained in paragraph 1 or paragraph 2 above, Te shall be determined in the following situations as under:
- (i) **where percentage invoicing is more than the percentage completion** and the difference between percentage invoicing (per cent. points) and the percentage completion (per cent. points) of construction is more than 25 per cent. points; the value of percentage invoicing shall be deemed to be percentage completion plus 25 percent. points;

Percentage Invoicing	30.00%
Percentage Completion	20.00%
F3= Percentage Completion + 25%	25%
Eligible ITC for Residential (Tr)	75,00,000
Eligible ITC without capping	90,00,000
Eexcess reversal due to capping	15,00,000

Case Study -2

Capping in para 3(ii): where percentage invoicing is more than the percentage completion

Residential Real Estate Project (RREP) having NOT more than 15% carpet area of Commercial Units

Main Scheme		
S.No.	Particulars	Amount
a	Total ITC taken for Project till 31.3.2019 (T)	1,00,00,000
b	% Carpet Area of Residential Apartment In the Project (F1)	100.00%
c	Percentage completion of Project as on 01.04.2019 (F4)	20.00%
d	Percentage booking of Residential Apartments as on 31.03.2019 (F2)	60.00%
e	Percentage Invoicing of Residential Apartments as on 31.03.2019 (F3)	30.00%
f	ITC attributable to Residential Apartments for construction in a project, time of supply of which is on or before 31 st March, 2019($Tr = a * b * d * e / c$)	90,00,000
g	ITC attributable to Commercial Apartments (on which tax is payable at existing tax rates) for construction in a project, time of supply of which is on or before 31 st March, 2019 (Tc)	-
h	Reversal of ITC attributable to construction in a project, time of supply of which is on or after 1st April, 2019, (a-f) ($Tx = T - Tc - Tr$)	10,00,000

T is the total ITC availed (utilized or not) on inputs and input services used in construction of the REP from 1st July, 2017 to 31st March, 2019 including transitional credit taken on 1st July, 2017

Contd...

- (ii) where the value of invoices issued on or prior to 31st March, 2019 exceeds the consideration actually received on or prior to 31st March, 2019 by more than 25 per cent. of consideration actually received; the value of such invoices for the purpose of determination of percentage invoicing shall be deemed to be actual consideration received plus 25 percent. of the actual consideration received; and

% of invoicing after application of cap	30%
Value of Booked Residential Apartments	80,00,00,000
Value of Invoicing of booked apartments (80 Crores*30%)	24,00,00,000
Consideration Received upto 31.03.2019	8,00,00,000
125% of Consideration Received	10,00,00,000
Deemed Value of Invoicing	10,00,00,000
% Invoicing (F3)	12.50%
Eligible ITC for Residential (Tr)	37,50,000
Eligible ITC without capping	90,00,000
Excess reversal due to Capping	52,50,000

Capping in para 3(iii)

- *(iii) where, the value of procurement of inputs and input services prior to 1st April, 2019 exceeds the value of actual consumption of the inputs and input services used in the percentage of construction completed as on 31st March, 2019 by more than 25 percent. of value of actual consumption of inputs and input services, the jurisdictional commissioner or any other officer authorized in this regard may fix the Te based on actual per unit consumption of inputs and input services based on the documents duly certified by a chartered accountant or cost accountant submitted by the promoter in this regard, applying the accepted principles of accounting.*

THANK YOU

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