

Certificate GST Course for Real Estate Sector

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Experience of Advisory and Litigation of GST, VAT,  
& Service Tax to more than 25 Reputed Real Estate  
& Infrastructure Construction Companies.

*By Adv. Pawan Arora*

(Partner at Athena Law Associates)



**9+ Hours in 8 Sessions | Starting from 13th Feb 2021 - 5 PM (every saturday)**





## SESSION - 2

LEVY AND TAXABILITY ON OUTWARD SUPPLY  
&  
RCM ON PURCHASE FROM UNREGISTERED PERSON

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



# Coverage

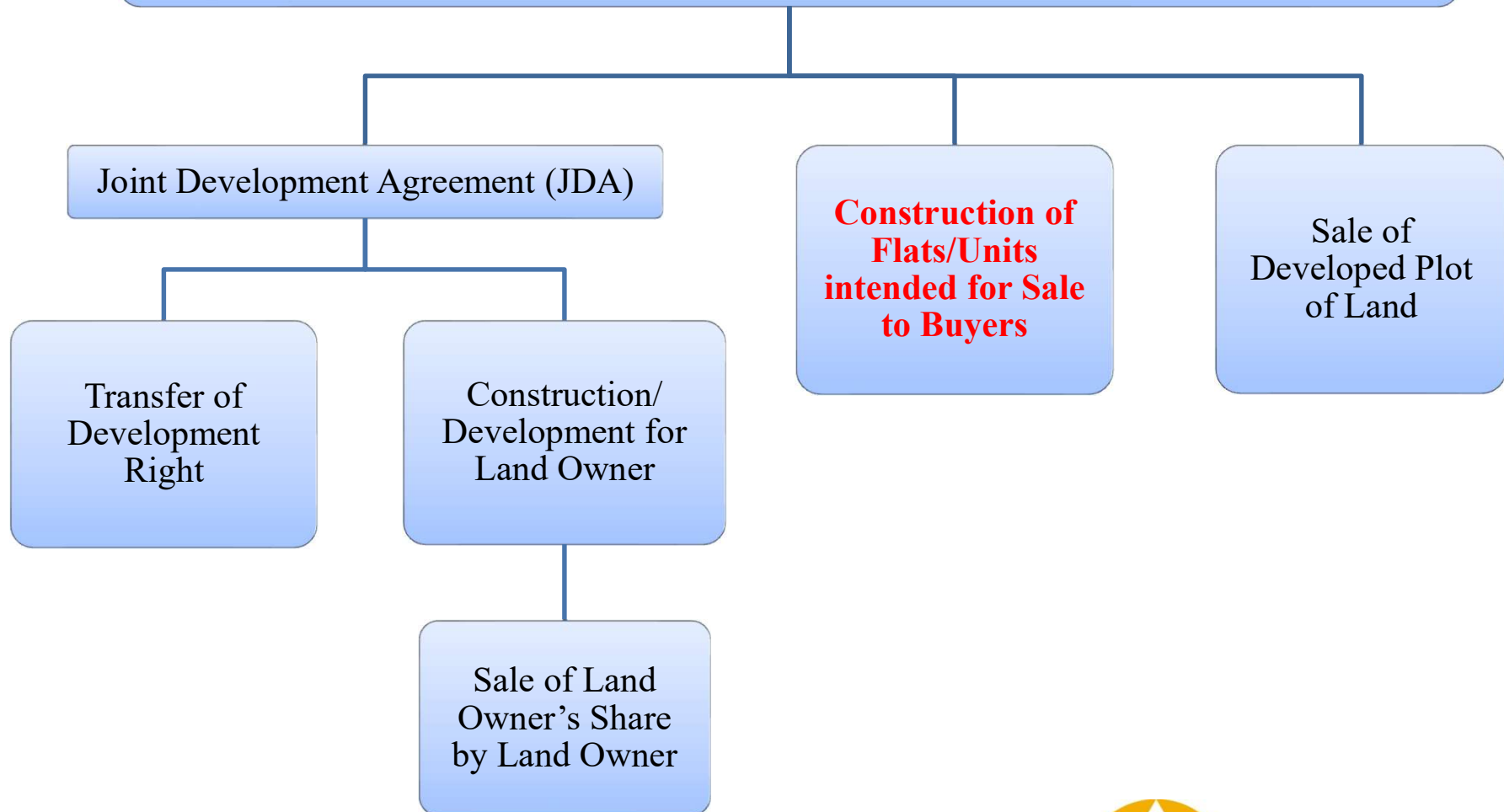
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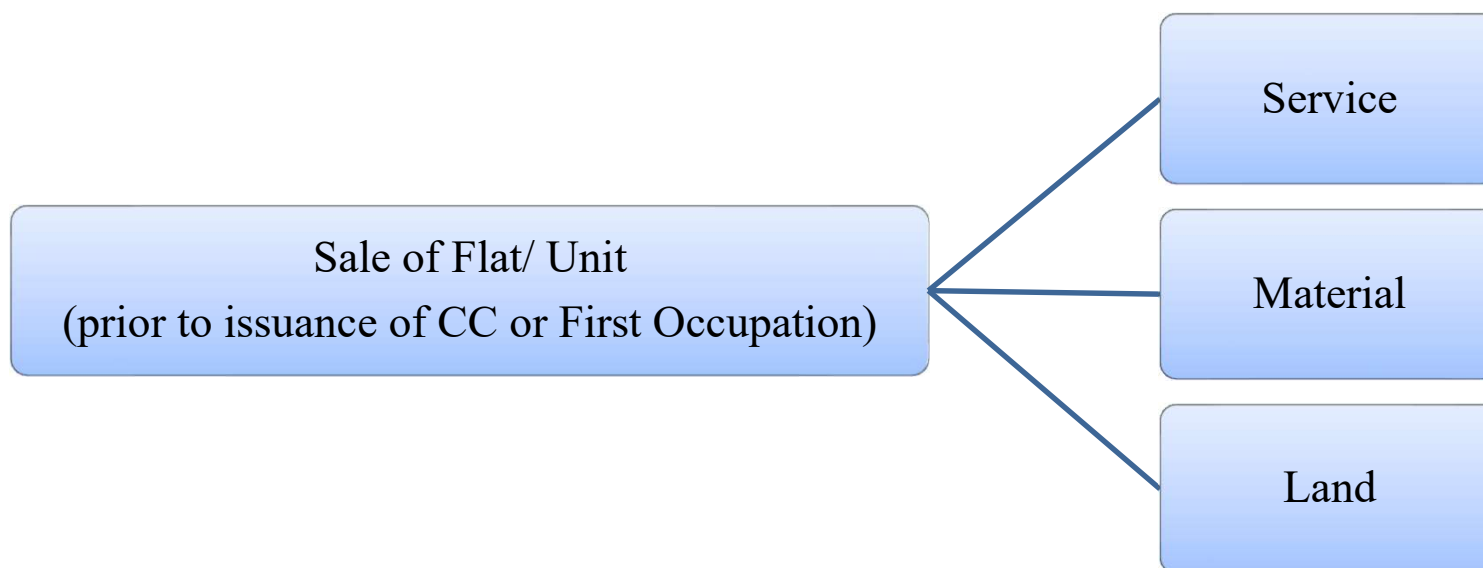
1. Construction and Sale of Residential Flats and Commercial Units
  - Upto 31.03.2019
  - New Tax Regime w.e.f. 01.04.2019
2. RCM on purchase from Unregistered Person
3. One-Third Deduction for Value of Land
4. Taxability on EDC/IDC, PLC, Parking Club Charges etc.
5. Transitional Issues – New Tax Regime w.e.f. 01.04.2019

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# 1. CONSTRUCTION OF FLATS/ UNIT INTENDED FOR SALE TO BUYERS

# Real Estate Transactions





**Sale of Land & Sale of Building**  
Entry 5 of Schedule –III and Entry 5(b) of Schedule-II of CGST/SGST Act

Entry 5 of Schedule –III

**Sale of Land**

**Sale of Building**  
[Subject to Entry 5(b) of Schedule-II]  
*(i.e. Sold after CC)*

**Entry 5(b) of Schedule-II**  
Treat (classify) as Supply of Service - Construction of Sale of Flat/Unit, Building etc. intended for sale to Buyer except where entire consideration is received after receipt of CC or First OC *(i.e. Sold before CC)*



# Tax Rate – Residential & Commercial upto 31.03.2019

- **Tax Rate = 18%** vide Notification No. 11/2017- CT (R) dated 28<sup>th</sup> June, 2017

Sl No.	Chapter, Section or Heading	Description of Service	Rate (per cent)
3	Heading 9954 (Construction services)	(i) Construction of a complex, building, civil structure or a part thereof, including a complex or building intended for sale to a buyer, wholly or partly, except where the entire consideration has been received after issuance of completion certificate, where required, by the competent authority or after its first occupation, whichever is earlier. (Provisions of paragraph 2 of this notification shall apply for valuation of this service)	9
		ii) composite supply of works contract as defined in clause 119 of section 2 of Central Goods and Services Tax Act, 2017.	9



# Tax Rate – Residential & Commercial upto 31.03.2019

- **Tax Rate = 12%** vide Notification No. 11/2017- CT (R) dated 28<sup>th</sup> June, 2017

Sl No.	Chapter, Section or Heading	Description of Service	Rate (per cent)
3	Heading 9954 (Construction services)	<p>(iv) Composite supply of works contract as defined in clause (119) of section 2 of the Central Goods and Services Tax Act, 2017, supplied by way of construction, erection, commissioning, installation, completion, fitting out, repair, maintenance, renovation, or alteration of,-</p> <p><i>(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)</i></p> <p><i>(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</i></p> <p><i>(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)</i></p> <p><i>(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)</i></p>	6

# Tax Rate – Residential & Commercial upto 31.03.2019

- **Tax Rate = 12%** vide Notification No. 11/2017- CT (R) dated 28<sup>th</sup> June, 2017

Sl No.	Chapter, Section or Heading	Description of Service	Rate (per cent)
3	Heading 9954 (Construction services)	<p>(v) Composite supply of works contract as defined in clause (119) of section 2 of the Central Goods and Services Tax Act, 2017, supplied by way of construction, erection, commissioning, or installation of original works pertaining to,-</p> <p><i>(b) a single residential unit otherwise than as a part of a residential complex;</i></p> <p><i>(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;</i></p> <p><i>(d) low cost houses up to a carpet area of 60 square metres per house in a housing project approved by the competent authority under-</i></p> <p style="padding-left: 40px;"><i>(1) the "Affordable Housing in Partnership" component of the Housing for All (Urban) Mission/Pradhan Mantri Awas Yojana;</i></p> <p style="padding-left: 40px;"><i>(2) any housing scheme of a State Government;</i></p> <p><i>(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</i></p>	6

**PARADIGM SHIFT**  
**IN GST REGIME**  
**FOR REAL ESTATE SECTOR**  
**W.E.F. 01.04.2019**

# One Time Option - To Pay Tax at Exiting Rates

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**Conditions to Pay Tax at existing tax rates as specified under tax rate Entry 3(ie)/(if) in tax rate N.No 11/2017-CT(R) newly inserted vide N.No. 3/2019-CT(R) dt. 29.03.19**

## One Time Option:

- For ongoing projects, option shall be available to pay GST at existing tax rates with ITC [*Entry 3(ie)/(if) of tax rate N.No 11/2017-CT(R)*].

## Time Limit for Exercising the option:

- Option to be opted on or before 10<sup>th</sup> May 2019 by submitting a Form [*Form given at Annexure IV of N.No. 03/2019-CT(R)*].
- If not opted, option to pay tax at new rate shall deemed to have be exercised.

## Invoices till exercising the option:

- Invoices can be issued during 01<sup>st</sup> April of 2019 to 10<sup>th</sup> May of 2019 before exercising the option, but such invoices shall be in accordance with the option to be exercised

## Contd...

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- *Provided that in case of ongoing project, the registered person shall exercise one time option in the Form at Annexure IV to pay central tax on construction of apartments in a project at the rates as specified for item (ie) or (if), as the case may be, by the 10th of May, 2019;*
- *Provided also that where the option is not exercised in Form at annexure IV by the 10th of May, 2019, option to pay tax at the rates as applicable to item (i) or (ia) or (ib) or (ic) or (id) above, as the case may be, shall be deemed to have been exercised;*
- *Provided also that invoices for supply of the service can be issued during the period from 1st April 2019 to 10th May 2019 before exercising the option, but such invoices shall be in accordance with the option to be exercised.;*

# Definition of Ongoing Project

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- *“ongoing project” shall mean a project which meets all the following conditions, namely-*
  - (a).
    - *commencement certificate in respect of the project, where required to be issued by the competent authority, has been issued on or before 31st March, 2019, **and***
    - *it is certified by any of the following that construction of the project has started on or before 31st March, 2019:-*
      - (i) *an architect registered with the Council of Architecture constituted under the Architects Act, 1972 (20 of 1972); or*
      - (ii) *a chartered engineer registered with the Institution of Engineers (India); or*
      - (iii) *a licensed surveyor of the respective local body of the city or town or village or development or planning authority.*
  - (b) *where commencement certificate in respect of the project, is not required to be issued by the competent authority, it is certified by any of the authorities specified in sub- clause (a) above that construction of the project has started on or before the 31st March, 2019;*

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*(c) completion certificate has not been issued or first occupation of the project has not taken place on or before the 31st March, 2019;*

*(d) apartments being constructed under the project have been, partly or wholly, booked on or before the 31st March, 2019.”*

**Explanation.-** *For the purpose of sub- clause (a) and (b) above , construction of a project shall be considered to have started on or before the 31st March, 2019, if the earthwork for site preparation for the project has been completed and excavation for foundation has started on or before the 31st March, 2019.*

**[Emphasis Supplied]**

**Note:**

- *(xiii) an apartment booked on or before the 31st March, 2019 shall mean an apartment which meets all the following three conditions, namely-*
  - (a) part of supply of construction of which has time of supply on or before the 31st March, 2019 and*
  - (b) at least one instalment has been credited to the bank account of the registered person on or before the 31st 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 31st March, 2019;*



# New Tax Rates for On-going projects

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- **Effective 1% [Rate 1.5% after 1/3<sup>rd</sup> deduction of Land]:**
  - Affordable residential housing properties (i.e. area 60 sqm. in metros / 90 sqm in non metros **and** value upto Rs 45 Lakhs)
  - Affordable Houses under existing Central & State Housing Schemes presently taxable at effective concessional rate of 8%.
- **Effective 5% [Rate 7.5% after 1/3<sup>rd</sup> deduction of Land]:**
  - Residential housing properties other than those covered in 1% rate.
  - Commercial apartments such as shops, offices - In a “Residential Real Estate Project” (RREP) having carpet area of commercial apartment not more than 15% of total carpet area of all apartments.

# Tax Rates for New projects

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- **Effective 1% [Rate 1.5% after 1/3<sup>rd</sup> deduction of Land]:**
  - Affordable residential housing properties (i.e. area 60 sqm. in metros / 90 sqm in non metros **and** value upto Rs 45 Lakhs)
- **Effective 5% [Rate 7.5% after 1/3<sup>rd</sup> deduction of Land]:**
  - Residential housing properties other than those covered in 1% rate.
  - Commercial apartments such as shops, offices - In a “Residential Real Estate Project” (RREP) having carpet area of commercial apartment not more than 15% of total carpet area of all apartments.

# Definition of Affordable Residential Apartment

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*(xvi) The term “affordable residential apartment” shall mean*

- *“a residential apartment in a project which commences on or after 1st April, 2019, or in an ongoing project in respect of which the promoter has not exercised option in the prescribed form to pay central tax on construction of apartments at the rates as specified for item (ie) or (if) against serial number 3, as the case may be, having carpet area not exceeding 60 square meter in metropolitan cities or 90 square meter in cities or towns other than metropolitan cities and for which the gross amount charged is not more than forty five lakhs rupees.*
- *For the purpose of this clause, -*
  - (i) Metropolitan cities are Bengaluru, Chennai, Delhi NCR (limited to Delhi, Noida, Greater Noida, Ghaziabad, Gurgaon, Faridabad), Hyderabad, Kolkata and Mumbai (whole of MMR) with their respective geographical limits prescribed by an order issued by the Central or State Government in this regard;*
  - (ii) Gross amount shall be the sum total of; -*
    - A. Consideration charged for the services specified at item (i) and (ic) in column (3) against sl. No. 3 in the Table;*
    - B. Amount charged for the transfer of land or undivided share of land, as the case may be including by way of lease or sub lease; and*
    - C. Any other amount charged by the promoter from the buyer of the apartment including preferential location charges, development charges, parking charges, common facility charges etc.*

# Contd....

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*(b) an apartment being constructed in an ongoing project under any of the schemes specified in sub-item (b), sub-item (c), sub-item (d), sub-item (da) and sub-item (db) of item (iv); sub-item (b), sub-item (c), sub-item (d) and sub-item (da) of item (v); and sub-item (c) of item (vi), against serial number 3 of the Table above, in respect of which the promoter has not exercised option to pay central tax on construction of apartments at the rates as specified for item (ie) or (if) against serial number 3, as the case may be.*

# CONDITIONS FOR NEW TAX RATES

# Conditions for New Tax Rates

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**(i) Payment of Tax in Cash**

- *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;*

**(ii) 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;*

**(iii) 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 - ???**

# Contd...

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## (iv) **Conditions 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.*



## Contd...

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- (v) **80% of input (goods other than capital goods) and input services [except TDR, FSI, long term lease (upfront payment) , electricity, high speed diesel, motor spirit, natural gas] shall be purchased from registered persons.**
- *Provided also that eighty percent of value of input and input services, [other than services by way of grant of development rights, long term lease of land (against upfront payment in the form of premium, salami, development charges etc.) or FSI (including additional FSI), electricity, high speed diesel, motor spirit, natural gas], used in supplying the service shall be received from registered supplier only;*
  - *Provided also that inputs and input services on which tax is paid on reverse charge basis shall be deemed to have been purchased from registered person;*

## Contd...

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**(vi) On shortfall of purchases from 80% from registered person - Tax is to be paid under RCM @ of 18%**

*Provided also that where value of input and input services received from registered suppliers during the financial year (or part of the financial year till the date of issuance of completion certificate or first occupation of the project, whichever is earlier) falls short of the said threshold of 80 per cent., tax shall be paid by the promoter on value of input and input services comprising such shortfall at the rate of eighteen percent on reverse charge basis and all the provisions of the Central Goods and Services Tax Act, 2017 (12 of 2017) shall apply to him as if he is the person liable for paying the tax in relation to the supply of such goods or services or both;*

**(vii) 100% Cement Purchases from Registered Person. On purchase of Cement from unregistered person - Tax is to be paid under RCM @ of 28%**

- Provided also that notwithstanding anything contained herein above, where cement is received from an unregistered person, the promoter shall pay tax on supply of such cement at the applicable rates on reverse charge basis and all the provisions of the Central Goods and Services Tax Act, 2017 (12 of 2017), shall apply to him as if he is the person liable for paying the tax in relation to such supply of cement;*

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## 2. RCM ON PURCHASE FROM UNREGISTERED SUPPLIER



## Notified Goods and Services on which GST is payable under RCM on purchase from unregistered persons u/s 9(4) : N.No. 07/2019 CT(R)

Sl.No.	Category of supply of goods and services	Recipient of goods and services
1	<b><u>Any goods and services</u></b> or both [other than services TDR, long term lease or FSI] which constitute the shortfall from the minimum value of goods or services or both for construction of project, in a financial year (or part of the financial year till the date of issuance of completion certificate or first occupation, whichever is earlier) which is prescribed as condition for new tax rates.	Promoter
2	<b><u>Cement</u></b> Cement falling in chapter heading 2523 in the first schedule to the Customs Tariff Act, 1975 (51 of 1975 [ <b>amended w.e.f. 01.10.2019</b> ])	Promoter
3	<b><u>Capital goods</u></b> supplied to a promoter for construction of a project on which tax is payable or paid at new tax rates (i.e. 1% / 5%).	Promoter

# Illustration of RCM Liability in case of shortfall of 80% purchase from Registered Person

**No RCM, if 80% purchase from reg-person [and 100% purchase of cement from Reg-person]**

Sl. No	Name of Inputs and Input Services	Amount	%	Whether received from registered supplier	Tax Payable under RCM
1	Sand	1,00,00,000	10	Y	
2	Cement	1,50,00,000	15	Y	
3	Steel	2,00,00,000	20	Y	
4	Bricks	1,50,00,000	15	Y	
5	Flooring Tiles	1,00,00,000	10	Y	
6	Paints	50,00,000	5	N	
7	Architect/ designing/ CAD/ drawing etc.	1,00,00,000	10	Y	
8	Aluminum Windows, Ply, Commercial Wood	1,50,00,000	15	N	
	Total	10,00,00,000	80	From Reg-Supplier	-

Contd...

**RCM @ 28% on purchase of cement from Unreg-person**

Sl. No	Name of Inputs and Input Services	Amount	%	Whether received from registered supplier	Tax Payable under RCM
1	Sand	1,00,00,000	10	Y	
2	Cement	1,50,00,000	15	N	42,00,000
3	Steel	2,00,00,000	20	Y	
4	Bricks	1,50,00,000	15	Y	
5	Flooring Tiles	1,00,00,000	10	Y	
6	Paints	50,00,000	5	Y	
7	Architect/ designing/ CAD/ drawing etc.	1,00,00,000	10	Y	
8	Aluminum Windows, Ply, Commercial Wood	1,50,00,000	15	Y	
	Total	10,00,00,000	85	From Reg-Supplier	42,00,000

Contd...

**RCM on Shortfall @18% and RCM @ 28% on purchase of cement from Unreg-person**

Sl. No	Name of Inputs and Input Services	Amount	%	Whether received from registered supplier	Tax Payable under RCM
1	Sand	1,00,00,000	10	N	
2	<b>Cement</b>	<b>1,50,00,000</b>	<b>15</b>	<b>N</b>	<b>42,00,000</b>
3	Steel	2,00,00,000	20	Y	
4	Bricks	1,50,00,000	15	Y	
5	Flooring Tiles	1,00,00,000	10	Y	
6	Paints	50,00,000	5	Y	
7	Architect/ designing/ CAD/ drawing etc.	1,00,00,000	10	N	
8	Aluminum Windows, Ply, Commercial Wood	1,50,00,000	15	N	
	<b>Reverse Charge Payable on balance 15% shortfall</b>		<b>15</b>		<b>27,00,000</b>
	Total	10,00,00,000	50	From Reg-Supplier	69,00,000



# Compliance requirement under New Regime

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- Maintain separate project wise account of inward supply from registered and unregistered supplier.
- Calculation of tax payment on shortfall and Reporting of the same on GSTN portal by 30<sup>th</sup> June of subsequent FY. Payment of shortfall tax by adding tax liability in the month not later than June of subsequent FY.
- Payment of tax on cement purchase from unreg-person in the month in which cement is received.
- Reporting of ITC not availed as ineligible credit in GSTR-3B [Row No. 4 (D)(2)].

## Explanation. -

*1. The promoter 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 and shall submit the same in the prescribed form electronically on the common portal by end of the quarter following the financial year. The tax liability on the shortfall of inward supplies from unregistered person so determined shall be added to his output tax liability in the month not later than the month of June following the end of the financial year.*

*2. Notwithstanding anything contained in Explanation 1 above, tax on cement received from unregistered person shall be paid in the month in which cement is received.*

*3. 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)]*

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## Yearly Compliance – in the Month of June 2020

- **RCM Liability in the month of June 2020**– on shortfall of 80% purchase of inputs & Inputs Service from registered supplier
- 80 % of inputs and input services shall be purchased from registered persons[*except TDR, FSI, long term lease (upfront payment), electricity, high speed diesel, motor spirit, natural gas*].
- In case, the above requirement falls short of 80%, promoter has to pay tax @ 18% on reverse charge basis on amount of shortfall.
- The promoter Developer shall be required to 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 and shall submit the same in the prescribed form electronically on GST portal by end of the quarter following the financial year. 30.06.2020 for FY 2019-2020. The tax liability on the shortfall of inward supplies from unregistered person so determined shall be added to his output tax liability in the month not later than the month of June following the end of the financial year.
- The Government vide ***Instruction No. 3/2/2020-GST dated 24.06.2020*** has prescribed that the abovesaid payment of shortfall from the threshold requirement of procuring 80% inputs and input service from registered persons shall be made through Form DRC-03 on the common portal within the prescribed period i.e. 30.06.2020 for FY 2019-20.

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## **Monthly Compliances**

- Tax on cement supplied by unregistered person – under RCM in the month in which cement is received.
- Tax on capital goods for construction of a project supplied by unregistered person – under RCM in the month in which Capital Goods is received.
- 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)]

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### 3. 1/3<sup>RD</sup> DEDUCTION FOR VALUE OF LAND



# Land Value – Deemed to be 1/3<sup>RD</sup>

- Para 2 of Notification No. 11/2017- CT (R) dated 28<sup>th</sup> June, 2017 provides that value of transfer of land or undivided share of land, as the case may be, in such supply shall be deemed to be one third of the total amount charged for such supply.

*2. In case of supply of service specified in column (3), in item (i); sub-item (b), sub-item (c), sub-item (d), sub-item (da) and sub-item (db) of item (iv); sub-item (b), sub-item (c), sub-item (d) and sub-item (da) of item (v); and sub-item (c) of item (vi), against serial number 3 of the Table above, involving transfer of land or undivided share of land, as the case may be, the value of such supply shall be equivalent to the total amount charged for such supply less the value of transfer of land or undivided share of land, as the case may be, and the value of such transfer of land or undivided share of land, as the case may be, in such supply shall be deemed to be one third of the total amount charged for such supply.*

*Explanation. -For the purposes of this paragraph, "total amount" means the sum total of,-*

*(a) consideration charged for aforesaid service; and*

*(b) amount charged for transfer of land or undivided share of land, as the case may be including by way of lease or sublease.*

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- Land value deemed as 1/3<sup>rd</sup> of sale price
  - *Kashmir to Kanyakumari*
  - *Goa, to Meghalaya to Mizoram, Arunachal Pradesh, Sikkim*
  - *Thar desert*
  - *Girnar*
  - *Jharkhand and Chhattisgarh*
  - *Forests, cities and villages*
- Remarkable equality
- But this equality is discriminatory
- Lack of classification creates discrimination and inequality
- Land, which is otherwise not taxable is taxed in this way

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- Wherever land value is high
- Builders are absorbing GST
- Then can be separated and should be accordingly taxed
- Challenge should be made to these notifications

### **Ex:**

- Flat 5 Cr – Output GST 25 lakh and No ITC to Developer
  
- Construction cost 75 Lakh. Tax construction @ 18% on 75 Lakh = 13.50 Lakh



# WRIT Petitions on Deemed Value of Land

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Writ Petitions Challenging deeming fiction in regard to value of Land

Sanjeev Sharma  
[Delhi HC against AAR Ruling]

Abhinav Mittal  
[P&H HC]

# Cause of action is *sin qua non* for filing Writ petition

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- The Karnataka HC in the case of *M/s Global Associates* [W.P. 56586-56588/ 2018 (T- TAR)] was dismissed. The issue was relating to correctness and legality of Entry 3(i) read with para 2 of the Notification No.11/2017-CT(R) dt. 28.06.2017 , held that:

*16. Enacting a legislation or issuing Notification/Circular could not confer a right to challenge unless the litigant is affected by the action initiated by the executive in furtherance of such legislation/administrative Circular/Notification more particularly, in taxing statutes. Cause of action is sine qua non for challenging such legislation/ Notification/Circular. The writ Court cannot adjudicate upon such matters in vacuum. Adjudication of such issues sans any cause of action would be merely academic, consuming public time de hors the litigants waiting in serpentine queue seeking justice before the courts for the relief/s sought for, arising out of the cause of action. The petitioner involved in construction activity or works contract would not be suffice to examine the constitutional vires of the Act and the related Notification/Circular unless the cause of action emerges.*

- Litigant must be affected
- Cause of action is sin qua non
- issues sans any cause of action would be merely academic

## Suresh Kumar Bansal [Delhi HC]

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- In this regard, the levy of service tax in case of composite works contract was challenged and the Delhi High Court in the case of **Suresh Kumar Bansal, W.P. (C) 2235 of 2011** ruled as follows:
  - The provisions of Rule 2A of the Service Tax (Determination of value) Rules, 2006, as it stood prior to 01.07.2012, did not provide for exclusion of the value of land and thus did not provide for complete machinery to tax composite works contract, in order to tax only the service portion.
  - Machinery provision for exclusion of all components other than service components was required to be provided by way of Act / Rules. The abatement notification providing for the same cannot substitute the lack of machinery provision to ascertain the value of services.

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## 4. TAXABILITY OF VARIOUS CHARGES CHARGED BY DEVELOPER FOR SALE OF FLAT

# Composite Supply

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- Section 2(30) of the CGST Act defines Composite Supply to mean a supply made by a taxable person to a recipient consisting of two or more taxable supplies of goods or services or both, or any combination thereof, which are naturally bundled and supplied in conjunction with each other in the ordinary course of business, one of which is a principal supply.
- The term principal supply has been defined under Section 2(90) of CGST Act to mean *the supply of goods or services which constitutes the predominant element of a composite supply and to which any other supply forming part of that composite supply is ancillary.*
- The term naturally bundled is not defined in GST Law. However, E-flier on Composite Supply and Mixed Supply issued by CBEC provides that *the concept of composite supply under GST is identical to the concept of naturally bundled services prevailing in the existing service tax regime.*

# CSETAT Judgements

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- The Hon'ble CESTAT of Allahabad in the matter of *Logix Infrastructure Pvt. Ltd. Versus Commissioner of Central Excise & ST, Noida, 2018(11) TMI 462 (Tri-Allahabad)*, has held that the preferred location charges, external development charges etc. are part and parcel of the main service and therefore the entire consideration received are eligible for abatement
- Similarly, the division bench of Allahabad Tribunal in the case of *M/s SJP Infracon Limited, 2018 (12) TMI 253* has held that construction of residential complex services includes many services/charges like External Development Charges, Club Building Charges, Fire Fighting Charges, Electrification Fitting Charges, Park Facing Preferential Location Charges, Electrical Sub Station Charges. Thus, same should be treated as single activity or transaction. under the Notification No. 26/2012-ST.

## Important Note:

- Although, the Hon'ble Allahabad Tribunal has held that **Club Building Charges** is essentially required to be bundled with the single service namely construction of residential complex service. But the department does not consider it as part of construction services and are of the view that developer is charging the same towards “**Membership**” of the Club. Thus, to mitigate risk, Developer may take appropriate steps before charging of 5% tax on club charges.

# Position

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- When a developer develops a complex or flats, it constitutes of the entire facilities such as the Gas Pipe Line, Club membership, Power back-up, Sewerage facilities, Electricity meters etc.
- All these are integral part of the complex which the Developer constructs and when he advertises sale of the units in the complex, all these are clearly indicated as part and parcel of the complex.
- Further there is no option for a flat buyer not to pay any of these Special Charges. The price he pays might specify the elements of all these Special Charges separately nonetheless, these are all part of the overall infrastructure which is called a project/complex in which the Buyer buys the flat.
- These facilities are covered within the expression of “construction of complex” and the charges for the same are nothing but consideration for said service provided by the Developer to the buyer.

# EDC/IDC – at Actual

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- GST is payable on supply of goods and services at the value determined as per section 15 of Central Goods and Services Tax Act, 2017.
- Section 15(2) provides the inclusions which are to be added in the value of supply. Section 15(2)(a) provides that any fees and charges levied under any law shall be included in the value of supply of goods and services, if charged separately by the supplier.
- Thus, under GST regime External Development Charges and Internal Development Charges collected from the Customers shall form a part of the value of taxable supply and GST would be leviable on the same.
- Taxable @ 12% / 1.5% (Affordable Flats) or 18%/ 7.5%, subject to 1/3<sup>rd</sup> Deduction for land value
- Thus, effective tax rate @ 8% / 1%/ (Affordable) or 12%/ 5%



# Club Membership

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- Leviable to GST
- It is part and parcel of Construction of Flat therefore should be considered as part of total amount charged for construction of complex service
- Right transferred in the Club to Flat Buyer and drafted clauses of the agreement would play an important role
- But department consider it to be “**Membership**” Charges and ask for full rate of tax



# Preferential Location Charges (PLC)

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- Preferential Location Charges (PLC) – Say Rs. 1,000/- per sq. feet for Park Facing Flat and Rs. 500/- per sq. feet for Flat at 3<sup>rd</sup> Floor
  - In our view, it is part and parcel of Construction of Flat therefore should be considered as part of total amount charged for construction of complex service
  - However, department considers it as different supply and issuing SCN for service tax demand on PLC for differential tax.
  - Better to offer, agree and charge differential prices for different Flats. For example in present case Rs. 13,500/- per sq. feet for park facing flat at 3<sup>rd</sup> Floor



# Car Parking

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Open Car Parking



Car Parking in Basement

- Parking which is sold **along with the Flat** to customers becomes part and parcel of the construction service.
- Thus, leviable to tax @ effective rate of 12%/ 5%.

# Stamp Duty and other Registration Expenses

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- Registration Fee and Stamp Duty – At Actual
  - Advisable to charge it as “Reimbursement of Expenses” or Direct Payment by Buyer
  - Not leviable to tax subject to satisfaction of conditions of Rule 33 [Valuation in case supply as Pure gent]
- Legal Charges
  - Generally it is charged for documentation done during registration of Flat
  - Taxable @ 18%

# Tax Liability on Other Charges

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## Part of Construction Service

- *Power back up installation cost (6 KVA)*
- *Fire Fighting Charges @ Rs. 60.- per sqft*
- *External Electrification charges @60/- per sqft*
- *Proportionate Water connection charges*
- *Charges for IGL connection*
- *Rain water Harvesting*
- *Resurfacing*
- *Sewer charges*



## Separate Service

- *12 Month advance maintenance @2.5/- psqft/month*
- *R.O in kitchen*
- *Golf Cart*
- *Communication System*
- *Bank Charges/ Loan processing fee/ Administrative charges*
- *Misc. Charges towards connection & co-ordination for storage/utility space*



**5. TRANSITIONAL ISSUES – FOR NEW TAX REGIME  
W.E.F. 01.04.2019**

**3A. 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 <sup>st</sup> 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 <sup>st</sup> 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
<b>Excess reversal due to capping</b>	<b>15,00,000</b>

## 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 <sup>st</sup> 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 <sup>st</sup> 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
<b>Excess reversal due to Caping</b>	<b>52,50,000</b>

## Capping in para 3(iii)

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- *(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.*

**3B. RESTRICTION ON AVAILMENT OF ITC  
AND  
UTILIZATION OF ACCUMULATED ITC**

# Unutilised ITC and payment of tax using cash ledger

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- 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...

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- **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...

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- 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*

# THANK YOU

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