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*By Adv. Pawan Arora*

(Partner at Athena Law Associates)



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## SESSION - 4

### JOINT DEVELOPMENT AGREEMENT *PART -2*

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# Valuation of Development rights provided by Landowner to Developer

# Valuation Notification

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# Notification 12/2017-CT(R) dt. 28.06.2017 as amended by N.No. 4/2019 CT(R) dated 29.03.2019

*1A. Value of supply of service by way of transfer of development rights or FSI by a person to the promoter against consideration **in the form of residential or commercial apartments** shall be deemed to be equal to the value of similar apartments charged by the promoter from the independent buyers nearest to the date on which such development rights or FSI is transferred to the promoter.*

*1B. Value of portion of residential or commercial apartments remaining un-booked on the date of issuance of completion certificate or first occupation, as the case may be, shall be deemed to be equal to the value of similar apartments charged by the promoter nearest to the date of issuance of completion certificate or first occupation, as the case may be.”*

*[Emphasis Supplied]*

# Area Sharing Model

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## Area Sharing Model:

- In this model, there can be two scenarios in which development rights are generally transferred:
  - 1.A. Where L Ltd transfers 100% of land development rights to developer D, in lieu of 30% of total constructed flats/apartments.
  - 1.B. Where L Ltd transfers development rights of 70% of land to developer D, in lieu of construction of superstructure on 30% undivided share of land for L Ltd.

## 1.A : Area Sharing Model - Presumptive Facts

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### 1.A. Where 100% of land development rights are transferred to developer D in lieu 30% residential Flats in the said Project

Particulars	Figures
Total flats to be constructed	100
Flats to be given to Land owner	30
Flats Sold before issue of CC or first occupation	63
Flats remaining unsold on issue of CC	7
Sale consideration of a flat nearest to the date when development right was transferred	80 lakhs
Sale consideration of a flat nearest to issue of CC	1 crore

# 1.A: Computation of Tax on DR on unsold Flats

In this case, the tax payable shall be **lower** of a. or b.

a.

GST Payable on TDR or FSI (including additional FSI) or both for construction of the residential apartments in the project (i.e. for which exemption was claimed)

$[80 \text{ lakhs} * 30 \text{ flats}] \# * 18\%$   
 $= 24 \text{ crore} * 18\%$   
 $= 4.32 \text{ crores}$

*#Refer para 1A of relevant notification.*

**= 30.24 lakhs**



Carpet Area of the residential apartment in the project which remain un-booked on the date of issuance of CC or First Occupation

7 Units

*Carpet Area of all Units assumed as equal*

Total Carpet Area of the residential apartment in the project

100 Units<sup>^</sup>

*^Refer next slide*

b.

5% on un-booked apartments

$(7 \text{ Flats} * 1 \text{ crore}) \# * 5\%$

*#Refer para 1B of relevant notification.*

**= 35 lakhs**

Contd...

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^ **Basis of Denominator**

100 Units are taken in denominator as in this case Development Rights of 100% Land is given and formula also provides that Total Carpet Area **in the Project** to be taken.

**Important Note**

- The valuation mechanism provided through Notification No. 4/2019-CT(R) dated 29.03.2020 amending Notification No. 12/2017-CT(R) dated 28.06.2017 may be challenged as prescribing valuation by way of Notifications is ultra vires the power of the Central Government / State Government. As per Section 15(5) of the CGST Act, the value of service can only be provided in prescribed manner, i.e. by way of rules [refer definition of prescribed in S. 2(87)]. Having statutorily fixed the valuation under the impugned notifications, the said impugned notifications are violative of Section 15 of the CGST Act / State GST Act, respectively.



## 1.B : Area Sharing Model - Presumptive Facts

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**1.B. Where development rights are transferred of 70% land to developer D in lieu of construction of flats on remaining 30% portion of land for L Ltd.**

Particulars	Figures
Total flats to be constructed	100
Developments rights given for construction of flats	70
Flats constructed for Land owner	30
Value of construction service assumed# <i>#Refer Valuation Rules in upcoming slide - Rule 27 read with Rule 30 of CGST Rules</i>	9 crore
Flats remaining unsold on issue of CC	7
Sale consideration of a flat nearest to issue of CC	1 crore

# 1.B: Computation of Tax on DR on unsold Flats

In this case, the tax payable shall be **lower** of a. or b.

a.

GST Payable on TDR or FSI (including additional FSI) or both for construction of the residential apartments in the project (i.e. for which exemption was claimed)

9 crore \* 18%  
= 1.62 crores

#Refer Valuation Rules in upcoming slides

= 16.2 lakhs



Carpet Area of the residential apartment in the project which remain un-booked on the date of issuance of CC or First Occupation

7 Units

*Carpet Area of all Units assumed to be equal*

Total Carpet Area of the residential apartment in the project

70 Units^

*^ Refer Next Slide*

b.

5% on un-booked apartments

(7 Flats \* 1 crore) \* 5%

= 35 lakhs

## ^ Basis of Denominator

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- In our view, here Carpet Area of 70% of the land should be taken as the Developer receives Development Right of 70% Land. However, the formula provides that Total Carpet Area **in the Project** is to be taken. Therefore, one may take a view that here 100% Carpet Area can be taken. But it would be then contrary to stand taken by us that only 70% Development Rights are transferred.

## # Valuation Rules - Where Consideration is in Kind

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- In case where consideration for transfer of development rights is not **in form of “residential or commercial apartments”**, but in the form of construction service provided by the builder on the portion of land belonging to Land owner, there shall be no application of the Para 1A of the Notification No. 12/2017-CT(R) dated 28.06.2017.
- In this case, since there is no “price available”, consideration being in non-monetary form, Rule 27 of the Central Goods and Services Tax Rules, 2017 Rules would apply. To quote:

27. Value of supply of goods or services where the consideration is not wholly in money.-  
*Where the supply of goods or services is for a consideration not wholly in money, the value of the supply shall,-*

  - (a) be the open market value of such supply;*
  - (b) if the open market value is not available under clause (a), be the sum total of consideration in money and any such further amount in money as is equivalent to the consideration not in money, if such amount is known at the time of supply;*
  - (c) if the value of supply is not determinable under clause (a) or clause (b), be the value of supply of goods or services or both of like kind and quality;*
  - (d) if the value is not determinable under clause (a) or clause (b) or clause (c), be the sum total of consideration in money and such further amount in money that is equivalent to consideration not in money as determined by the application of rule 30 or rule 31 in that order.*

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*Illustration:*

(1) *Where a new phone is supplied for twenty thousand rupees along with the exchange of an old phone and if the price of the new phone without exchange is twenty four thousand rupees, the open market value of the new phone is twenty four thousand rupees.*

(2) *Where a laptop is supplied for forty thousand rupees along with the barter of a printer that is manufactured by the recipient and the value of the printer known at the time of supply is four thousand rupees but the open market value of the laptop is not known, the value of the supply of the laptop is forty four thousand rupees.*

- Open market value has been defined below Rule 35, for the purposes of Rule 27. To quote:  
*Explanation.- For the purposes of the provisions of this Chapter, the expressions-*  
(a) *"open market value" of a supply of goods or services or both means the full value in money, excluding the integrated tax, central tax, State tax, Union territory tax and the cess payable by a person in a transaction, where the supplier and the recipient of the supply are not related and the price is the sole consideration, to obtain such supply at the same time when the supply being valued is made;*

## Contd...

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- Thus, following is the sequence to be followed for determining the open market value:
  - c. open market value of the development rights, or*
  - d. if the open market value is not available under clause (a), amount in money as is equivalent to the value of the construction activity, if such amount is known at the time of supply*
- In our view, the open market value of development rights i.e. 70% sale rights in land with right to construct, etc. may not be available in the ordinary course especially at the same time when the supply is being obtained. Whereas, value of the type of construction which the builder is obliged to carry out, in terms of the agreement is quite easy. Any project consulting company or architect or civil engineers may certify the rate/ value of the construction activity of the said 30% area (owner's allocation in our illustration). In our view, that would be the value for the development rights.

## 2: Revenue Sharing Model - Presumptive Facts

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### Revenue Sharing Model:

- Below are the presumptive facts for ease of understanding GST liability:

Particulars	Figures
Share of Land owner in total revenue	30%
Total residential flats to be constructed	100
Flats Sold before issue of CC or first occupation	90
Total sale consideration of 90 flats	80 crores
Flats remaining unsold on issue of CC	10
Sale consideration of flat nearest to the date of CC	1 crore

- Total monetary consideration (Actual for 90 units + Valued# for 10 units) payable to land owner for development rights = (80 crores + 10 crores) \* 30% = 27crores**

*#Applied reasonable method by using the manner of Valuation given in Rule 27 of the CGST Rules and also manner given in para 1B N.No. 12/2017-CT(R) dt. 28.06.2017.*

## 2: Computation of tax on DR on unsold Flats

In this case, the tax payable shall be **lower** of a. or b.

a.

GST Payable on TDR or FSI (including additional FSI) or both for construction of the residential apartments in the project (i.e. for which exemption was claimed)

27 crores \* 18%  
= 4.86 crores

*27 crores is the consideration paid to land owner for TDR on which exemption was claimed for being residential apartment (calculated in previous slide)*

**= 48.6 lakhs**

Carpet Area of the residential apartment in the project which remain un-booked on the date of issuance of CC or First Occupation

10 Units  
*Carpet Area of all Units assumed as equal*

Total Carpet Area of the residential apartment in the project

100 Units



b

5% on un-booked apartments

(10 Flats \* 1 crore)# \* 5% tax

*#Refer para 1B of relevant notification 12/2017-CT(R)*

**= 50 lakhs**



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# Valuation of Construction Service by Developer to land owner

## Area Sharing Model – Tax Liability on Construction Service

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**Development rights are transferred for 1/4<sup>th</sup> share in land in lieu of construction of flats on remaining 3/4<sup>th</sup> portion of land for Land Owner.**

Particulars	Figures
Land owner's Share	3 Floors
Sale consideration of a floor nearest to the date when development right was transferred	4.75 crores
Rate of Tax on Sale of Flat before CC ( <i>as per Department's View – in general</i> )	7.5%
<b>Tax Liability on construction service</b> [ (4.75 crores x 3 floors) x 2/3 * 7.5%]  <i>#Refer para 2A of N.No. 11/2017-CT(R) in next slide</i> <i>## Refer upcoming slide for Tax Rate</i> <i>###Refer Important Note in upcoming slide</i>	<b>71.25 Lakhs<sup>^</sup></b>  <sup>^</sup> Land Owner is eligible for ITC of GST to be charged by Developer. Refer upcoming slide for manner of availing ITC.

## # Valuation of Construction Service Provided to Landowner

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**Notification 11/2017-CT(R) dt. 28.06.2017 as amended by N.No. 3/2019 CT(R) dated 29.03.2019**

*2. In case of supply of service specified in column (3), in item (i); (i) (ia), (ib), (ic), (id), (ie) and (if), 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 and paragraph 2A below, "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.*

*2A. Where a person transfers development right or FSI (including additional FSI) to a promoter against consideration, wholly or partly, in the form of construction of apartments, the value of construction service in respect of such apartments shall be deemed to be equal to the Total Amount charged for similar apartments in the project from the independent buyers, other than the person transferring the development right or FSI (including additional FSI), nearest to the date on which such development right or FSI (including additional FSI) is transferred to the promoter, less the value of transfer of land, if any, as prescribed in paragraph 2 above.*

## ## Tax Rate for Construction Service

- **S.No. 3: Heading 9954 (Construction services) of Notification 11/2017-CT(R) dt. 28.06.2017**

Particulars	Figures
<i>S.No. 3: Heading 9954 (Construction services)</i>	
<i>(ia) Construction of residential apartments other than affordable residential apartments by a promoter in an RREP which commences on or after 1st April, 2019 or in an ongoing RREP 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) below, as the case may be, in the manner prescribed therein, 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)</i>	7.5%  Subject to conditions specified in Notification
<i>(xii) Construction services other than (i), (ia), (ib), (ic), (id), (ie), (if), (iii), (iv), (v), (va), (vi), (vii), (viii), (ix), (x) and (xi) above. Explanation. - For the removal of doubt, it is hereby clarified that, supply by way of services specified at items (i), (ia), (ib), (ic), (id), (ie) and (if) in column (3) shall attract central tax prescribed against them in column (4) subject to conditions specified against them in column (5) and shall not be levied at the rate as specified under this entry.</i>	18%

## ### Important Note

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- The valuation mechanism provided through *Notification No. 3/2019-CT(R) dated 29.03.2020 amending Notification No. 11/2017-CT(R) dated 28.06.2017* may be challenged as prescribing valuation by way of Notifications is ultra vires the power of the Central Government / State Government. As per Section 15(5) of the CGST Act, the value of service can only be provided in prescribed manner, i.e. by way of rules [refer definition of prescribed in S. 2(87)]. Having statutorily fixed the valuation under the impugned notifications, the said impugned notifications are violative of Section 15 of the CGST Act / State GST Act, respectively.
- Further, when a Developer constructs for the Land Owner, such flat are not for sale by the Developer. He is merely a contractor incurring construction expenses. Thus, by taking the value of flat as the base for valuation, an element (Land) which is not a part of his supply, which is first being included and then notionally excluded 1/3<sup>rd</sup>. In our view, it goes beyond the basic concept of supply and valuation. Para 2A of the Notification is amenable to challenge on this ground as well.
- **In any case it may be also argued that construction by the Developer for the Owner is not falling in 3(ia) because such units are not meant for sale to buyer by the Developer. Thus, such construction should fall in S.No. 3(xii), attracting tax @18% with no condition of non-availment of ITC and utilization of ITC for payment of tax.**
- Developer constructing for owner's share is not other than contractor's activity and his valuation should have been done on that basis only i.e. under Section 15 of the CGST Act read with Rule 27 of the CGST Rules.

## ^ ITC of GST charged by Developer

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- One of the Condition of New Tax Rate w.e.f. 01.04.2019 – ITC of GST Charged by the Developer shall be allowed to the Land Owner subject to the amount of tax paid by the Land Owner on sale of said Flats/ Units. Thus, L Ltd. can avail the ITC subject to maximum amount of tax paid by it on sale of said Units before CC.

### **(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.

# THANK YOU

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