



# Real Estate – New GST Rates and Challenges! CA Pritam Mahure

Guide on new GST rates on real estate in India!

## Real Estate – New GST Rates and Challenges

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## About the Author



- Pritam Mahure is a Chartered Accountant by profession and has been actively tracking and working on future tax and technology trends since more than a decade.
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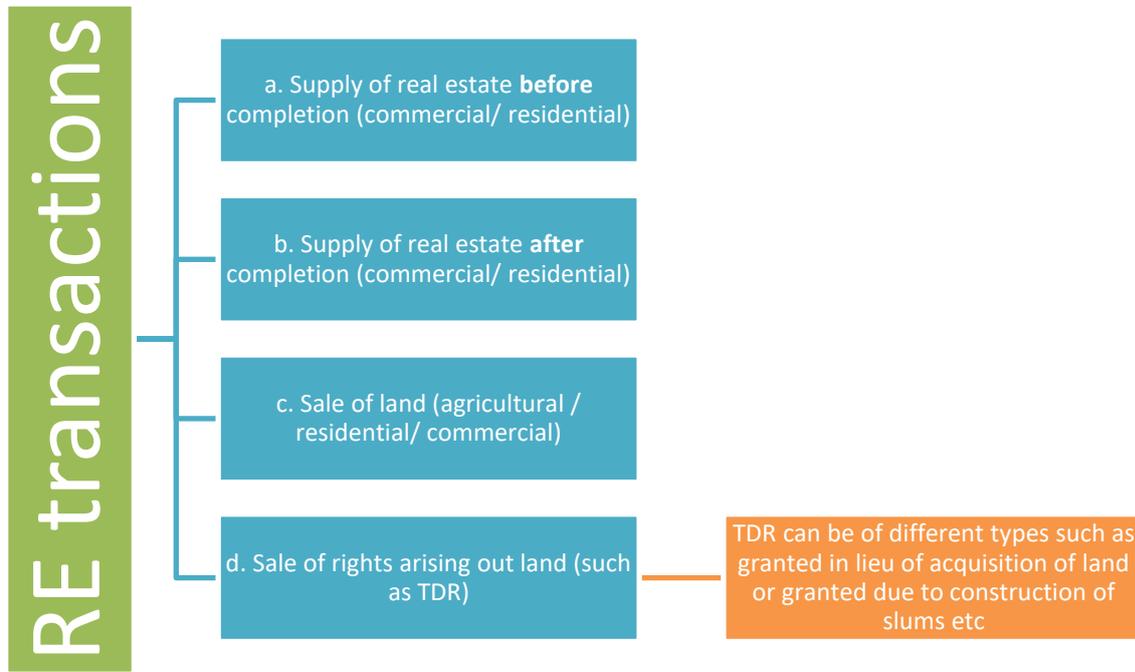
## Feedback

- The book would not have been possible without active support of team members like CA Vaishali Kharde, CA Jaishree Kaltari, CA Shruti Golecha, Sahil Tharani Lavesh Solanki, Bhargav Amuru, Gaurav Suryawanshi, Sajana Kumawat, Pooja Bora, Pooja Sharma and Nitu Mishra.
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## 1. Real Estate - Issues from 1<sup>st</sup> April 2019

### 1.1 Types of real estate transactions

Real estate sector will, typically, comprise of following transactions:



### 1.2 Rate of GST on real estate before 31<sup>st</sup> March 2019

Out of these aforesaid, upto 31<sup>st</sup> March 2019, GST at **12%** was leviable (after 1/3<sup>rd</sup> deduction towards land value) on 'supply of real estate before completion'. Concessional rate such as **8%** was applicable for units qualifying for Affordable Housing<sup>1</sup>.

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<sup>1</sup> Upto 31<sup>st</sup> March 2019, for affordable housing, the criteria, *inter-alia*, was that the unit should be less than 60 sq. mtr (without any monetary ceiling)

In comparison to erstwhile Service Tax (@ 4.50%) and State VAT (@ 1%) regime, GST rate of 12% was much higher (in spite of increased credit flow). Additionally, it is pertinent to note that real estate transactions are subject to **Stamp Duty**<sup>2</sup>. Stamp Duty also creates cascading impact on real estate sector.

Effectively, the Real Estate sector is burdened with **two taxes** GST plus Stamp Duty<sup>3</sup>.

Globally, there are different practices, for taxation of real estate, as few countries have property taxes (similar to stamp duty in India) whereas most others have included real estate under the ambit of GST / VAT.

### **1.3 Reconsideration of rates by 33<sup>rd</sup> and 34<sup>th</sup> GSTC meeting**

The 33<sup>rd</sup> and 34<sup>th</sup> GST Council meeting on 24<sup>th</sup> February 2019 and 19<sup>th</sup> March 2019, in its Press Release ('PR') recommended to

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<sup>2</sup> Rate of Stamp duty varies from State to State and is in the range of 3 per cent to 10 per cent. Further, Stamp duty does not have provision for claiming credit of stamp duty (say paid on purchase of land).

<sup>3</sup> If Stamp Duty of 6% is assumed, then effectively buyer of under-construction property cumulatively pays tax of more than 14% for affordable housing and more than 18% for others.

implement, from 1st April 2019, the revised rates for residential properties as under:

- a. GST @ 1% without ITC for affordable housing properties
- b. GST @ 5% without ITC for residential properties<sup>4</sup> other than affordable segment
- c. GST @ 12% with ITC for commercial properties (other than specified ones which will attract GST @ 5%)

#### **1.4 Deduction towards land / undivided share of land**

It may be noted that the its yet to specified whether the new rates are after abatement for land or whether additional deduction for land value will be available (for eg. effective rate for affordable housing, after land deduction of say 1/3<sup>rd</sup>, will be 0.6667%).

It appears that the proposed GST rates (i.e. 1% and 5%) will be the effective rates. So, the Government may propose GST rates of say 1.50% and 7.50% and then provide for land deduction of 1/3<sup>rd</sup> as under:

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<sup>4</sup> Including for commercial properties such as shops, offices etc. if commercial apartments are in a residential real estate project (RREP) in which the carpet area of commercial apartments is not more than 15% of total carpet area of all apartments

Particulars	Tax Rate	Abatement	Effective tax rate
31 <sup>st</sup> March 2019	18%	33%	12%
1 <sup>st</sup> April 2019 – Other than affordable	7.50%	33%	5%
1 <sup>st</sup> April 2019 – Affordable	1.50%	33%	1%

It may be recalled that though, at present, **deemed** deduction towards land / undivided share of land is provided for still whether it will be substitute for not providing actual deduction is a unanswered question.

In the case of **Suresh Kumar Bansal**<sup>5</sup> it was held that “*The abatement to the extent of 75% by a notification or a circular cannot substitute the lack of statutory machinery provisions to ascertain the value of services involved in a composite contract... Levying a tax on ... land would clearly intrude into the legislative field reserved for the*

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<sup>5</sup> 2016-TIOL-1077-HC-DEL-ST

*States under List II of the Seventh Schedule of the Constitution of India.”*

Given the fact that the aforesaid case is pending at the Apex Court, it will be interesting to see how the matter unfolds over the coming days.

### **1.5 Shifting of burden from consumer to developers**

At the outset, it may be noted that the aforesaid is not just a 'rate change' for developers but rather a 'business change' as its going to impact:

- a. Input tax credit ('ITC')
- b. Cost of existing and ongoing projects
- c. Cost of new projects
- d. Anti-profiteering computations
- e. Procurement contracts with vendors
- f. Contracts/ agreements with customers
- g. Spill over transactions
- h. IT/ERP systems etc.

This certainly is certainly a sudden change for developers **twenty-one months** after introduction of GST.

## 1.6 New rates - Option of compulsion?

It may be noted that the new rates will be an 'option' only for existing projects. As far as new projects are concerned, new proposed rates will be applicable thereon.

But the underlying question is what is the actual option available for existing projects? Is it that a developer should choose between existing 12% and 8% vis-à-vis 5% and 1% or he has choice to go for mixed option (like 12% and 1% or 8% and 5%)?

From the Press Release it appears that the option is to choose between 'old rates' and 'new rates' so option will be either to continue old rates (12% and 8%) or choose new rates (5% and 1%).

## 1.7 One-time option – Means?

It may be noted that the option, to continue with existing rates or opt for new rates, will be **one-time option**.

So, being a one-time option, once chosen, it appears that there is no possibility of going back on the decision.

Given the aforesaid, the Developers will need to carefully, after detailed cost-benefit and commercial analysis, choose between the options available.

### **1.8 Option – Building-wise or project wise?**

It may be noted that the option to choose the new rates can be either, flat-wise, floor-wise, wing-wise, building-wise, phase-wise, project-wise, State-wise or all India-wise.

From the Press Release dated 19<sup>th</sup> March 2019, at Para 2 refers to '*...ongoing projects (buildings where...)*'. Thus, it appears that the option will be building-wise. However, still many questions remains un-answered, such as, if a building is having multiple wings, then will it be treated as one building or multiple buildings?

Given the aforesaid, Developers will need to track the statutory notifications for the same.

### **1.9 Meaning of 'ongoing project'**

It may be noted that the option of continuing to pay GST at old rates is given to ongoing projects. As per Para 2 of the Press Release dated 19<sup>th</sup> March 2019, '*ongoing projects*' is defined as:

- a. Building where 'construction' started before 01.04.2019 and
- c. Building where actual 'booking' started before 01.04.2019 and
- c. Building which have not been completed by 31.03.2019

The aforesaid conditions appear to be cumulative. Thus, before a Developer can choose to continue levying old rates, Developer needs to ensure that the construction and booking of the building should be before 1<sup>st</sup> April 2019 as discussed in the following examples:

<b>Scenario</b>	<b>Construction before 1.4.2019</b>	<b>Booking before 1.4.2019</b>	<b>Completion by 31.3.2019</b>	<b>Option to continue old rates?</b>
I	Yes	Yes	No	Yes
II	Yes	No	No	No
III	No	Yes	No	No
IV	Yes	Yes	Yes	No
V	No	No	Yes	No

## 1.10 Meaning of 'construction' and 'booking'

It is pertinent to note that both the terms '**construction**' and '**booking**' are not defined and thus, there is likely dispute to their interpretation.

For example, whether construction will mean civil construction or even excavation or land levelling will be considered as 'construction'. Similarly, whether 'booking' will mean only registered agreements or even booking of flats (without registration) will be covered therein?

As regards, third condition (i.e. 'Building which have not been completed by 31.03.2019') does not appear to be relevant as after completion, anyways GST cannot be levied so there is no question of rate of GST. However, this condition can create challenges for building wherein partial-completion (say for few flats or floors) is obtained.

## 1.11 New rates – Default option

It may be noted that in case, a building, qualifies to continue old rates, then as per Para 2 of the Press Release, '*The option shall be **exercised** once **within** a prescribed **time frame** and where the option is not exercised within the prescribed time limit, new rates shall apply*'.

Thus, it appears that the new rates will be default option unless the Developer opts for continuation of the old rates i.e. the Developer will need to exercise the option. At present, its not specified:

- a. What will be the due date for exercising the option?
- b. Whether the process will be online or offline?

In case this exercising of option is going to be online process then it will be advisable that GSTN should make this facility available at the earliest and ensure that it runs glitch-free.

### **1.12 Can a developer opt for practical solution?**

It may be noted that while the Press Release discusses about two options for existing projects i.e. either to opt to continue old rates or levy GST at new rates, still, practically, there can be third option as well as discussed below.

The practical option is whether the Developer, for existing projects opt to continue old rates and pass on the credit to ensure that the final impact on the consumer is same as new rates. For example, on a flat price of 1 crore GST @ 12% will be 12 lacs. However, if the Developer chooses to recover from the property buyer 1.05 crore (i.e. 1.12 crore less Input tax credit rebate of Rs 7 lacs), then Developer

will be able to convince the customer (as the amount paid by the customer is not more than 5%).

Though the aforesaid appears to be a practical solution for the competition between old and new rates, still the Developer will have to refer to the statutory notification as well as compliance of all other legal provisions (including anti-profiteering provisions) before exploring this kind of unspecified option (as this option is not specifically mentioned).

### **1.13 Non-availability of ITC**

The reduction in GST rates is with a rider of non-availability of ITC. This non-availability of ITC will lead to an increase in the cost of construction for developers. Typically, the cost of construction ranges from INR 1,500 to INR 3,500 per sq. ft. At present, most inputs and input services attract GST at 18 % (except cement which attracts GST @ 28 %).

On an average, the GST on a cost of construction of say **INR 3,000** per sq. ft will be **INR 450** which comes to **15 %** of cost of construction.

Effectively, this means cost of construction for developers is expected to go up to this extent (as ITC will not be available from 1st April 2019 for new projects on which new rates are applicable).

Also, it may be noted that if the Developers can increase the basic prices (due to loss of ITC) then during transition to GST (i.e. 1<sup>st</sup> July 2017) the Developers were required to pass on the benefits on ITC to the customers. Thus, if, due to loss of ITC, if there is any increase on or after 1<sup>st</sup> April 2019, then similarly, on 1<sup>st</sup> July 2017, there should have been decrease in basic price of flats.

It may be noted that given this major transition from 1<sup>st</sup> April 2019, the GST Authorities will certainly monitor the prices of the project, pre-rate change and post-rate change.

Given this, the Developers should maintain appropriate documents to substantiate the price rise, if any, during transition.

#### **1.14 Will the basic property price increase?**

Given the increase in cost, if the supplier wants to maintain the margin, then, they will not have any option but to increase the basic sale price.

However, it may be noted that, in the current situation, whether the developer will be able to offload the entire ITC cost on the consumer is a question as it may negatively affect sales.

Also, before the developers will actually increase the prices, they would like to watch carefully how their competitors are treading this path and then will decide course of action to increase the base price (either partially or upto the extent of credit loss).

Also, Developers may need to consider whether near their own project whether any new projects are in the pipe-line (as new projects will levy new rates).

It may be noted that while Developers may find it beneficial to continue old rates, still they will need to convince the property buyers (as property buyers will always prefer lower tax amount on the invoice).

At a macro-level, it appears, for existing large projects, which will be sold over next 2/3 years, Developers may prefer to opt new rates whereas for existing projects with visibility/ certainty of sales in next

few months, Developers may opt to continue existing rates (subject to cost-benefit analysis).

### **1.15 Be ready for future surprises!**

While Developers may find it beneficial to continue old rates, based on current scenario, still Developers also take into account **likely** future developments!

It may be noted that the new rate of 5% without credit may again be re-considered by the GST Council and lower rate say 4% or 3% could be considered. In case the 5% is lowered say to 3% without credit, then 12% (i.e. if any project continues old GST rates), will be 4 times the new rate (of 3%), making it further difficult for the Developer to convince the customers.

Similarly, the monetary ceiling of Rs 45 lacs, as per the new definition of affordable housing, might be increased (say Rs 60 lacs for non-metro and Rs 75 lacs for metro). Again in such cases, rate of 8% (i.e. if any project continues old GST rates) will be 8 times of the new rate (i.e. 1%).

Further the Opposition parties have dragged GST in Election fray and are stating that if voted to power in the general election then they will bring simpler and new GST<sup>6</sup>.

Given the aforesaid, though GST appears to stabilise for real-estate sector from 1<sup>st</sup> April 2019, still practically it appears to remain in fluid stage.

Thus, before opting for old rates, Developers, should not only should factor the existing GST landscape but also likely future changes in GST.

### **1.16 New rate of 1% - Applicable to?**

Affordable Housing properties are expected to attract GST @ 1% (without ITC).

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<sup>6</sup> It may be noted that in Malaysia, the opposition party, won the election only on the point that if voted to power they will scrap Malaysian GST which was introduced in the year 2015. In 2018, after winning the elections, Malaysian GST was scrapped and earlier Sales and Service Tax laws were re-introduced.

However, India can't be compared to Malaysia, given the demographic and population differences. Further, GST being a economic policy, jointly implemented by Center and States, ideally, should not be made scapegoat during elections. Also, if Opposition parties actually had a better solution, for GST challenges, then they should have presented the same before GST Council than waiting for election time and make a rhetoric about the same.

As per Para 4 (i) of Press Release dated 19<sup>th</sup> March 2019, the rate of 1% will be applicable to:

- a. All houses which meet the definition of affordable houses as decided by GSTC (area 60 sqm in non- metros / 90 sqm in metros and value upto RS. 45 lakhs<sup>7</sup>) and*
- b. Affordable houses being constructed in ongoing projects under the existing Central and State Housing Schemes presently eligible for concessional rate of 8% GST (after 1/3rd land abatement)*

It may be noted that the new criteria for qualifying 'affordable housing' is with additional requirement of monetary ceiling limit of Rs 45 lacs.

Given the aforesaid, it appears that the existing units (which qualifies for affordable housing as per earlier criteria) may not be eligible for GST rate of 1% unless they either within the monetary ceiling of 45 lacs or part of existing Central / State Housing Schemes (such as PMAY or HFA).

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<sup>7</sup> There appears to be a typo-graphical error in the press release as 60 sq. mtr is for metro and 90 sq. mtr for non-metro

### **1.17 What the monetary ceiling of 45 lacs includes?**

As discussed aforesaid, the Affordable Housing properties are expected to attract GST @ 1% provided they meet the dual criteria of ceiling limit of area (60 sq. mtr./ 90 sq. mtr.) and monetary ceiling of Rs 45 lacs.

In case of Rs 45 monetary ceiling the question is whether amounts such as infrastructure charges, one-time compulsory deposit etc should also be included?

Clarity about such aspects, through a policy circular or statutory notification, will certainly help Developers.

### **1.18 New rate of 5% - Applicable to?**

Other than Affordable Housing properties, the rate of GST for **residential** properties will be 5% (without credit).

As per Para 4 (ii) of Press Release dated 19<sup>th</sup> March 2019, the rate of 5% will be applicable to:

*(a) all houses other than affordable houses in ongoing projects whether booked prior to or after 01.04.2019. In case of houses*

*booked prior to 01.04.2019, new rate shall be available on instalments payable on or after 01.04.2019.*

*(b) all houses other than affordable houses in new projects.*

*(c) commercial apartments such as shops, offices etc. in a residential real estate project (RREP) in which the carpet area of commercial apartments is not more than 15% of total carpet area of all apartments.*

### **1.19 5% on ongoing projects**

For the ongoing projects, the new rate of 5%, if chosen so by Developer, will be applicable irrespective of the fact whether, in the ongoing projects, booked is prior to or after 01.04.2019.

However, in case of houses booked prior to 01.04.2019, new rate shall be available on instalments payable on or after 01.04.2019.

### **1.20 5% on new projects**

For new projects, the default rate of GST for residential properties (other than affordable houses) will be 5% (without ITC).

Though, on the face of it, the 5% option appears to be lucrative, still given the non-availability of ITC, the actual impact will be more than 5%.

Given the aforesaid, home property buyers expect that the rate of 5% should be further brought down to say 3%. It may be noted that there is sound rational for further reducing the rates for real estate as, real estate are not a form of 'consumption' but rather an 'investment' avenue (like gold) and thus, it deserves special treatment/ rate.

### **1.21 5% for specified commercial properties**

GST @ 5% (without ITC) also appears to be applicable for 'commercial apartments such as shops, offices etc'. Surprisingly, the Press Release does not specify whether the rate of 5% will apply to ongoing projects or only to new projects. However, as there is no restriction, it appears that it will apply to ongoing as well as new projects.

While GST @ 5% will apply to shops/ offices etc in a Residential real estate project its not specified whether Developer can choose, for

commercial properties, the rate of 12% (with ITC) or rate 5% (without ITC) will be compulsory.

Also, its not specified in the Press Release whether the GST rate for commercial properties will be compulsory 5% (if carpet area is below 15%), if the Developer chooses to opt for 5% for existing residential properties in same building?

As regards the carpet area ceiling for commercial apartments (i.e. commercial area is not more than 15% of total carpet area of all apartments), its important to note that the ceiling of 15% will be in comparison with 'total carpet area of all apartments'. Thus, if the total construction is 1,00,000 sq. ft. then shops/ offices cannot be more than 15,000 sq. ft.

However, one of the underlying question is whether area of common amenities will be considered herein?

Also, after a building is completed, property buyers, may change the residential area to commercial area. Though this change will be post facto, the question is whether it will have impact on the GST rate and if yes, whether the impact will be restricted to said flat (which was

converted to commercial property) or it will impact all commercial properties?

Given the aforesaid un-answered questions, the Developers seek clarity on these issues.

### **1.22 12% for other than specified commercial properties**

From the Press Release it appears that the rate of 12% (with ITC) will be mandatorily applicable on:

- a. Standalone commercial properties (i.e. other than mixed projects)
- b. Commercial properties in residential real estate project wherein the commercial area is more than 15%

It may be noted that typically the prices of commercial properties which will be substantially higher than construction cost and thus, levying 12% will certainly continue to pinch the commercial property buyers.

It may be noted that as stamp duty is already levied on land value, unless deduction for land value, based on **actual value** (than so called 1/3<sup>rd</sup> deduction), is introduced, the injustice of higher rate of GST (on an investment or livelihood avenue) cannot be undone.

### 1.23 New rates - Conditional apply!

As per Para 5 of Press Release, the new rates (1% and 5%) are subject to fulfilment of following two conditions:

(a) *Input tax credit **shall not** be available and*

(b) *80% of inputs and input services (other than capital goods, TDR/JDA, FSI, long term lease (premiums)) shall be purchased from registered persons. On shortfall of purchases from 80%, tax shall be paid by the builder @ 18% on RCM basis. However, Tax on cement purchased from unregistered person shall be paid @ 28% under RCM, and on capital goods under RCM at applicable rates.*

### 1.24 Condition of not availing ITC!

At the outset, it may be noted that as the exemption is a 'conditional' exemption (than an absolute exemption), one can contend that the even after 1<sup>st</sup> April 2019, the Developers can continue to pay GST @ 12% (even in respect of new projects)! This is because, section 11 of CGST Act provides<sup>8</sup> for compulsion for 'absolute' exemption than 'conditional' exemptions. Though this will certainly be subject matter

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<sup>8</sup> Explanation to Section 11 of CGST Act reads as '*For the purposes of this section, where **an exemption** in respect of any goods or services or both from the **whole or part** of the tax leviable thereon has been **granted absolutely**, the registered person supplying such goods or services or both **shall not collect the tax**, in excess of the effective rate, on such supply of goods or services or both.*'

of litigation and only higher Courts will be able to provide resolution to this issue.

Also, as the concessional rate (1% and 5%) are subject to condition, its not clear what will happen, if inadvertently, the Developer violates the condition say ITC is availed (say a meagre amount of Rs 1,000):

- a. Will the Developer be required to reverse the ITC with interest? or
- b. GST @ 12% will be applicable on entire project?

### **1.25 Condition of 80% procurement!**

If GST credits are not available to developers then the developer won't be incentivised (by way of credit) to procure from GST registered vendors or ensure their (vendor's) compliances.

Given the aforesaid, it appears that the concessional rate (1% or 5%) will be subject to condition of procurement (say 80%) from registered vendors.

As per Press Release, *'80% of inputs and input services (other than capital goods, TDR/ JDA, FSI, long term lease (premiums)) shall be purchased from registered persons.'* However, Press Release does not specify:

- a. Whether the 80% requirement is month-wise or year-wise or building-wise or Project-wise?
- b. Whether non-GST supplies (such as electricity, water) or depreciation, interest etc will be excluded/ included?
- c. Whether requirement is only to 'procure' from registered vendors or Developers also need to ensure that the vendors file their GST return and pay GST?
- d. Whether in cases where GST is paid under RCM (say legal services), will be counted as procurement from registered vendors (as supplier is un-registered and recipient pays GST under RCM)?

It may be noted that while the Government wants the Developers to compulsorily follow, for new projects, the new GST rates, which is actually detrimental for Developers (particularly for non-metro and non-premium projects), still the same is with a rider!

It may be noted that going forward, the computation of 80% (which is not one time but a continuous requirement) is certainly going to be a daunting task for Developers!

## **1.26 What happens if criteria of 80% is not met?**

As per the Press Release, if there is shortfall of purchases from 80%, then *'...tax shall be paid by the builder @ 18% on RCM basis. However, Tax on cement purchased from unregistered person shall be paid @ 28% under RCM, and on capital goods under RCM at applicable rates.'*

It may be noted that the Press Release does not specify whether the Developer will be required to pay RCM only to the extent of 80% or on entire procurements (i.e. if the procurement from registered vendors are 75% then whether RCM will apply on 5% or 25%).

Also, for a mixed projects, if a Developer is having commercial shops, lets say commercial area is more than 20%, wherein GST @ 12% is applicable, how the requirement of 80% will be fulfilled as most procurements will be common?

Further, while its specified that the rate of GST on cement purchased from unregistered person will be 28% and on capital goods at applicable rates, its not specified whether on all other procurements 18% will apply or rate will depend on product or services (as few might be subject to say 12% or 5%)?

Its apparent that this condition of 80% will be a nightmare for Developers and thus, appropriate policy clarification should be provided by the policy makers at the earliest.

### **1.27 Impact on developers having mix projects**

Certain commercial properties are expected to continue to attract GST @ 12% with input tax credit.

This means, if a developer is having both, residential and commercial projects (wherein the commercial properties are subject to GST @ 12%), then they will be required to maintain the records to claim credit pertaining to commercial properties and reverse credit pertaining to residential properties.

The aforesaid mechanism is certainly going to open up a Pandor's box for developers having mixed projects as it will be difficult to apportion credits (as roof, lift or infrastructure could be common).

### **1.28 Impact on transitional credits and other aspects**

With respect to transitional credits, the Press Release dated 19<sup>th</sup> March 2019 provides as under:

- '6.1. Ongoing projects (buildings where construction and booking both had started before 01.04.2019) and have not been completed by 31.03.2019 opting for new tax rates shall transition the ITC as per the prescribed method.
- 6.2 The transition formula approved by the GST Council, for residential projects (refer to para 4(ii)) **extrapolates** ITC taken for percentage completion of construction as on 01.04.2019 to arrive at ITC for the entire project. Then based on percentage booking of flats and percentage invoicing, ITC eligibility is determined. Thus, transition would thus be on pro-rata basis based on a simple formula such that credit in proportion to booking of the flat and invoicing done for the booked flat is available subject to a few safeguards.
- 6.3 For a mixed project transition shall also allow ITC on pro-rata basis in proportion to carpet area of the commercial portion in the ongoing projects (on which tax will be payable @ 12% with ITC even after 1.4.2019) to the total carpet area of the project.'

Now, it appears that the developers, will be allowed to continue to the carry forward the ITC credit (**subject to prescribed reversal**).

It appears that the formula prescribed will be pro-rata and based on on carpet area. This can be understood as a example:

### **Example**

Lets say a project has 100 flats scheme of 1,000 sq. ft each. 40% construction is complete and lets say 40% is already billed to customers. The ITC till now is say Rs 2 crore. From 1<sup>st</sup> April 2019, Developer has decided to opt for new rates 1% and 5%.

Based on the Press Release, it appears that the 2 crore needs to be extrapolated. Thus, if upto 40% construction, ITC is 2 crore then for 100%, total extrapolated ITC will be 5 crore. Then based on percentage booking of flats and percentage invoicing, ITC eligibility is determined. Thus, it appears that credit to the extent of 16% (*i.e. 40 flats \* 1,000 sq. ft \* 40% billed = 16,000*) will be available<sup>9</sup>.

However, once the credit is availed validly, can the Government, subsequently take back such credit. It is pertinent to note that respect to ITC, it may be recalled that the Apex Court in the case of Dai Ichi Karkaria Ltd [1999 (112) ELT 353 (SC)] held that '*...credit that has*

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<sup>9</sup> This example is an interpretation of Press Release and thus, we will have to wait for statutory notification for the formula

*been validly taken, and its benefit is available to the manufacturer without any limitation ... The credit is, therefore, indefeasible.'*

Similarly, was held in the case of Eicher Motors Ltd [1999 (106) ELT 3 (SC)].

### **1.29 Fate of development rights/ TDR/ JDA etc**

As per the Press Release dated 19<sup>th</sup> March 2019, it appears that a special treatment is accorded in respect of TDR/ FSI and long-term lease for projects **commencing after 01.04.2019**.

For ease of referral the para is reproduced below:

*'7. The following treatment shall apply to TDR/ FSI and Long term lease for projects commencing after 01.04.2019.*

It appears that the inter-mediate exemption in respect of TDR/ FSI and long-term lease premiums will be applicable in respect of project commencing from 1<sup>st</sup> April 2019.

If GST is already paid by the developer on TDR, on a project, which will be constructed say after 1st April 2019 then will the credit of this GST be available (assuming GST is payable @ 5% on this property).

What will be the fate of TDR agreements entered into March 2019 but

registered after April 2019? From such un-answered questions, it is apparent that levy of GST on TDR is going to stir up a hornet's nest.

### **1.30 Can GST be levied on development rights/ TDR**

At the outset it may be noted that the levy of GST on TDR, FSI, long term lease is itself questionable.

[Notification No. 4/2018](#) dated 25 January 2018 was issued to effectively demand GST on Development Rights<sup>10</sup> though its trite of law that notifications cannot override the statutory provisions (as Schedule III excludes sale of land and 'land' includes under its ambit benefits arising from land<sup>11</sup>).

Also, the Apex Court in the case of Safiya Bee<sup>12</sup> held that 'Land' includes rights in or over land, benefits to arise out of land.

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<sup>10</sup> The levy through Notification No. 4/2018-GST is itself questionable, as the Notification is issued under Section 148 of CGST Act, which deals with registration, payment and administrative aspect than 'levy' of GST

<sup>11</sup> There are judicial precedents wherein TDR was considered as equivalent to land and building (refer to Chheda Housing Development Corporation [2007 (3) MhLJ 402]). Even as per Section 3(a) of Land Acquisition Act, 1894, 'Land' includes benefits that arise out of land and things attached to earth or permanently fastened to anything attached to the earth

<sup>12</sup> (2011) 2 SCC 94

However, in GST regime, given the all-encompassing definition of 'service', another emerging view is that GST is leviable on TDR. In the Advance Ruling of Sri Patrick Bernardinz D'sa<sup>13</sup> it was held that GST is payable on the supply of development rights.

It may be noted that transfer of development rights are already subject to stamp duty (approx. @ 6%). Given this, typically, development rights should be equated to transaction in land/ building and thus, should be outside the ambit of GST.

Given the aforesaid, the GST Council's view (that TDR are leviable to GST) is surprising, as TDR are the rights attached to the land and building.

Given the magnitude of this issue an early clarification on this aspect will help the construction sector.

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<sup>13</sup> 2018-TIOL-292-AAR-GST

### **1.31 Exemption for TDR/FSI and long term lease?**

The Press Release states that:

*'7.1 Supply of TDR, FSI, long term lease (premium) of land by a landowner to a developer shall be exempted subject to the condition that the constructed flats are sold before issuance of completion certificate and tax is paid on them. Exemption of TDR, FSI, long term lease (premium) shall be withdrawn in case of flats sold after issue of completion certificate, but such withdrawal shall be limited to 1% of value in case of affordable houses and 5% of value in case of other than affordable houses. This will achieve a fair degree of taxation parity between under construction and ready to move property.'*

Its apparent that supply of TDR, FSI, long term lease (premium) of land by a landowner to a developer are expected to be exempted subject to the condition that the constructed flats are sold before issuance of completion certificate and tax is paid on them.

Further, it appears that the exemption for TDR / FSI or lease premium is only in respect of residential projects. Procurement of TDR/FSI or lease premiums in case of commercial projects may not be entitled to this exemption.

### **1.32 What happens if flats are sold after completion?**

The Press Release states that '*Exemption of TDR, FSI, long term lease (premium) shall be withdrawn in case of flats sold after issue of completion certificate, but such withdrawal shall be limited to 1% of value in case of affordable houses and 5% of value in case of other than affordable houses.*'

Thus, it appears that exemption will be withdrawn if flats are sold after completion. However, herein the question is if, say only 2 units are unsold out of 100 units, how GST will be paid i.e. whether first GST amount should be computed on entire TDR value @ 18% but it will be restricted by 1% of value in case of affordable houses and 5% of value in case of other than affordable houses? Also, when the completed properties are not expected to attract GST, can indirectly, GST be levied thereon?

Alternatively it can be contended that when levy of GST on TDR itself is non-existent<sup>14</sup>, question of any exemption (as proposed from 1<sup>st</sup> April 2019) should not arise<sup>15</sup>.

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<sup>14</sup> Refer '[Can GST be levied on development rights/ TDR](#)'

<sup>15</sup> Larsen And Toubro Ltd 2015-TIOL-187-SC-ST

### **1.33 RCM on TDR/FSI and lease premiums**

As per Para 7.2 of Press Release *'The liability to pay tax on TDR, FSI, long term lease (premium) shall be shifted from land owner to builder under the reverse charge mechanism (RCM).'*

Given the aforesaid, instead of landowner / supplier, going forward the liability to pay GST will be on Developers. This, again will be an additional requirement, which Developers will be required to adhere to.

### **1.34 Time of Supply of TDR/FSI and lease premiums**

As per Para 7.3 of Press Release:

*'7.3 The date on which builder shall be liable to pay tax on TDR, FSI, long term lease (premium) of land under RCM in respect of flats sold after completion certificate is being shifted to date of issue of completion certificate.'*

As Developer will be required to pay GST under RCM, its provided that the time of supply is shifted to date of issue of completion certificate.

### **1.35 Time of supply for JDA**

As per Para 7.4 of Press Release:

*'7.4 The liability of builder to pay tax on construction of houses given to land owner in a JDA is also being shifted to the date of completion.'*

Its stated that the Developer will be required to pay GST in respect of flats allotted in Joint-Development Agreement at the time of date of completion.

Herein the un-answered question is whether this will apply for all the transaction of JDA undertaken in the past or only from 1<sup>st</sup> April 2019?

### **1.36 How to claim credit in mixed projects?**

As per Para 6.3 of Press Release, for a mixed project transition shall also allow ITC on pro-rata basis in proportion to carpet area of the commercial portion in the ongoing projects (on which tax will be payable @ 12% with ITC even after 1.4.2019) to the total carpet area of the project.

Thus, the Developers will be required to claim credit on pro-rata basis in proportion to carpet area of commercial portion which is subject to GST @ 12%.

### **1.37 How to claim credit in case of completed projects?**

*As per Para 8 of Press Release, 'ITC rules shall be amended to bring greater clarity on monthly and final determination of ITC and reversal thereof in real estate projects. The change would clearly provide procedure for availing input tax credit in relation to commercial units as such units would continue to be eligible for input tax credit in a mixed project.'*

Now, this change in methodology to avail credit is expected to be provided from 1<sup>st</sup> April 2019, thus the question is whether this new methodology apply for FY 1718 and FY 1819? Developers hope for appropriate clarification on this aspect.

## 2. Sale of under-construction flat – Is it liable to GST?

The GST payer has to cross following hurdles to classify a transaction:

- a. Is it only a goods<sup>16</sup> supply?
- b. Is it only a service<sup>17</sup> supply?
- c. Is it supply of both – If yes, is it a composite supply<sup>18</sup> or mixed supply<sup>19</sup>?

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<sup>16</sup> As per Section 2 (52) of CGST Act, “goods” means every kind of movable property other than money and securities but includes actionable claim, growing crops, grass and things attached to or forming part of the land which are agreed to be severed before supply or under a contract of supply;

<sup>17</sup> As per Section 2 (102) of CGST Act, “services” means anything other than goods, money and securities but includes activities relating to the use of money or its conversion by cash or by any other mode, from one form, currency or denomination, to another form, currency or denomination for which a separate consideration is charged

<sup>18</sup> As per Section 2 (30) of CGST Act, “**composite supply**” means 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;

<sup>19</sup> As per Section 2 (74) of CGST Act, “mixed supply” means two or more individual supplies of goods or services, or any combination thereof, made in conjunction with each other by a taxable person for a single price where such supply does not constitute a composite supply;

- d. Is it a works contract<sup>20</sup> or is it a job work<sup>21</sup> activity?
- e. What is the classification of goods (HSN) or services (SAC)?
- f. Is it an intra-State supply or inter-State supply?
- g. Whether Compensation Cess is applicable?

Its apparent that the aforesaid challenges owe its origin mainly to multiplicity of GST rates and separate Time of Supply and Place of Supply provisions for goods and services. This issue of classification gets aggravated further, as, suitable clarifications are missing in most cases, as discussed below.

In the aforesaid context, question can be raised whether sale of **under-construction flat** by developer is covered under the ambit of supply as its not supply of goods (flat is not 'goods') or supply of service (flat is not 'service' after amendment in Section 7 (1) (d)] also

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<sup>20</sup> As per Section 2 (119) of CGST Act, "works contract" means a contract for building, construction, fabrication, completion, erection, installation, fitting out, improvement, modification, repair, maintenance, renovation, alteration or commissioning **of any immovable property** wherein transfer of property in goods (whether as goods or in some other form) is involved in the execution of such contract;

<sup>21</sup> As per Section 2 (68) of CGST Act, 'job work' means any treatment or process undertaken by a person on goods belonging to another registered person and the expression "job worker" shall be construed accordingly;

its **not 'both'**<sup>22</sup> as in case of **under-construction flat** there are **three** things i.e. 'goods', 'service' and 'land' than two!

The Apex Court in the case of *Ellis Bridge Gymkhana*<sup>23</sup> held that '*The rule of construction of a charging section is that before taxing any person, it must be shown that he falls within the ambit of the charging section **by clear words** used in the section... **No one can be taxed by implication**. A charging section has to be construed **strictly**. If a person has not been brought within the ambit of the charging section by clear words, he cannot be taxed at all.*'

Further, in the case of *Partington v. A.G.*, (1869) LR 4 HL 100 at 122, Lord Cairns stated '*...if the Crown seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of law the case might otherwise appear to be.*'

Even from the definition of 'supply' it doesn't specifically recognise or cover 'works contracts'. It may be noted that 'works contract' are a

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<sup>22</sup> Its interesting to note that though the term 'both' is used in section 7 as well as section 9 still no specific definition of the same is provided for in the GST Act. Typically, in common parlance, both will mean 'two' things (and not three).

<sup>23</sup> 1997 (9) SC 24

separate species of contract as held in Gannon Dunkerley [1959 SCR 379].

It will also be noticed that there is no serious attempt to remove the non-service element i.e. actual land value from the value of under-construction flats except 1/3<sup>rd</sup> deduction from the value though ideally, no amount attributable to the non-taxable elements should enter into computation.

The Apex Court has consistently held that if the taxing statute fails to provide procedural machinery for assessment and levy of the tax the Courts would be justified in striking down the impugned statute as **un-Constitutional**.

Given this, one can contend that sale of under-construction flat, is neither supply of 'goods' or 'service' or 'both' and is thus, not covered under the ambit of 'supply'. This view will be a highly litigious.

### 3. More exclusions than inclusions in GST

Since introduction of GST, few of the products such as specified petroleum products, electricity etc are outside the ambit of GST, leading to scenario of tax cascading. After introduction of GST, India was expecting inclusion of all the sectors/ product under the ambit of GST to allow free flow of credits.

However, it can be observed that since last twenty-one months exactly opposite is happening as numerous products/ services are being exempted literally after each GST Council meeting.

Apart from product/ services, even few sectors are getting excluded, for instance, in November 2017, GST Council decided to levy GST @ 5% without ITC on restaurant sector. This change has adversely impacted the restaurant industry as they are unable to claim credit. Additionally, on a policy level, it's still questionable whether the move of reduction of GST rate coupled with disallowance of credit to restaurants has actually benefitted the consumers, because in many cases the menu prices of restaurant either remained same or rather increased (as ITC is not available).

Even further, an underlying question still remains un-answered is whether the GST rate (i.e. 5% without credit), as made applicable to restaurant sector, be applied to construction sector wherein almost all procurements attract GST? This question is of critical importance as it may be noted that when there is already Stamp Duty (ranging upto 6%) applicable on real estate transactions, is there a rational to collect 5% without credit? Won't it lead to an increased burden on the home buyers?

Further, the total denial of credit to residential sector appears to be a backward step as it may be recalled that in the erstwhile service tax regime, the credit on service tax paid was available to developers. Now, as the GST Council has proposed 5% without credit, this move will take the developers more backwards than the earlier Service Tax regime wherein atleast credit of Service Tax was available.

While, all are eagerly awaiting notification / circular providing detailed clarity on aforesaid aspects before new rates are introduced (i.e. before 1 April 2019), only time will tell whether the quick fixes (change in rates and disallowing ITC) will create more challenges or prove to be good step for GST regime in the long run.

## **4. Anti-profiteering provisions – Lack of computation mechanism**

On a positive note, effective rate of tax on most of the product is reduced to 18% as compared to earlier combined excise and State VAT of more than 35%.

For computation of anti-profiteering benefits, its pertinent to note that no specific guidance is made available by the Government except few Press Releases (PR) issued in FY 1718 by Central Board of Indirect Taxes and Customs ('CBIC').

The challenge with these PR is that whilst they highlight few benefits arising in GST regime, being just a one or two pager, they end up being high level analysis than reliable documents.

The inherent challenge is how to compute benefits from GST rate reduction, if any i.e. whether the benefit should be computed at product level or organization level. Should only the net benefits be passed on to the consumer or product-wise benefits should be passed (without netting off)?

For service providers, computation of anti-profiteering benefit is bigger challenge as for service industry difficult to determine service level benefits and pass on the same (as unlike products, prices of services may differ customer-wise).

Even now, it's a mystery as to whether the taxpayer is required to compute the benefits available at the vendor level and then pass on the gross benefit (i.e. arising at the taxpayer level plus benefits passed on by the vendors) to the customer.

Further for FMCG and B2C sector, the challenge is, in case there is any price reduction in view of anti-profiteering provisions, how a manufacturer of say medicine could ensure that the prices of the medicines on the shelf of his distributor are actually sold at a reduced price to the consumer.

Additionally, clarity is still missing whether the benefit of anti-profiteering should be passed on in FY1819 as transition period of GST was FY 1718.

It can be observed that the anti-profiteering provision has failed short of explaining the methodology to compute the benefit, leaving

everything to the imagination of taxpayers/consultants and discretions of Authorities.

Thus, detailed guidelines on anti-profiteering will certainly enable industry self-assess whether they are anti-profiteering compliant or not.

## 5. Key PRs, Notifications and FAQs

### 5.1 Press Releases (PR)

#### 5.1.1 34<sup>th</sup> GSTC PR

#### **Decisions taken by the GST Council in the 34<sup>th</sup> meeting held on 19<sup>th</sup> March, 2019 regarding GST rate on real estate sector**

GST Council in the 34<sup>th</sup> meeting held on 19<sup>th</sup> March, 2019 at New Delhi discussed the operational details for implementation of the recommendations made by the council in its 33<sup>rd</sup> meeting for lower effective GST rate of 1% in case of affordable houses and 5% on construction of houses other than affordable house. The council decided the modalities of the transition as follows.

#### Option in respect of ongoing projects:

2. The promoters shall be given a one-time option to continue to pay tax at the old rates (effective rate of 8% or 12% with ITC) on ongoing projects (buildings where construction and actual booking have both started before 01.04.2019) which have not been completed by 31.03.2019.

3. The option shall be exercised once within a prescribed time frame and where the option is not exercised within the prescribed time limit, new rates shall apply.

New tax rates:

4. The new tax rates which shall be applicable to new projects or ongoing projects which have exercised the above option to pay tax in the new regime are as follows.

- (i) New rate of 1% without input tax credit (ITC) on construction of affordable houses shall be available for,
  - (a) all houses which meet the definition of affordable houses as decided by GSTC (area 60 sqm in non- metros / 90 sqm in metros and value upto RS. 45 lakhs), and
  - (b) affordable houses being constructed in ongoing projects under the existing central and state housing schemes presently eligible for concessional rate of 8% GST (after 1/3<sup>rd</sup> land abatement).
- (ii) New rate of 5% without input tax credit shall be applicable on construction of,-
  - (a) all houses other than affordable houses in ongoing projects whether booked prior to or after 01.04.2019. In case of

houses booked prior to 01.04.2019, new rate shall be available on instalments payable on or after 01.04.2019.

- (b) all houses other than affordable houses in new projects.
- (c) commercial apartments such as shops, offices etc. in a residential real estate project (RREP) in which the carpet area of commercial apartments is not more than 15% of total carpet area of all apartments.

Conditions for the new tax rates:

5. The new tax rates of 1% (on construction of affordable) and 5% (on other than affordable houses) shall be available subject to following conditions,-

- (a) Input tax credit shall not be available,
- (b) 80% of inputs and input services (other than capital goods, TDR/ JDA, FSI, long term lease (premiums)) shall be purchased from registered persons. On shortfall of purchases from 80%, tax shall be paid by the builder @ 18% on RCM basis. However, Tax on cement purchased from unregistered person shall be paid @ 28% under RCM, and on capital goods under RCM at applicable rates.

Transition for ongoing projects opting for the new tax rate:

- 6.1 Ongoing projects (buildings where construction and booking both had started before 01.04.2019) and have not been completed by 31.03.2019 opting for new tax rates shall transition the ITC as per the prescribed method.
- 6.2 The transition formula approved by the GST Council, for residential projects (refer to para 4(ii)) extrapolates ITC taken for percentage completion of construction as on 01.04.2019 to arrive at ITC for the entire project. Then based on percentage booking of flats and percentage invoicing, ITC eligibility is determined. Thus, transition would thus be on pro-rata basis based on a simple formula such that credit in proportion to booking of the flat and invoicing done for the booked flat is available subject to a few safeguards.
- 6.3 For a mixed project transition shall also allow ITC on pro-rata basis in proportion to carpet area of the commercial portion in the ongoing projects (on which tax will be payable @ 12% with ITC even after 1.4.2019) to the total carpet area of the project.

Treatment of TDR/ FSI and Long term lease for projects commencing after 01.04.2019

7. The following treatment shall apply to TDR/ FSI and Long term lease for projects commencing after 01.04.2019.

7.1 Supply of TDR, FSI, long term lease (premium) of land by a landowner to a developer shall be exempted subject to the condition that the constructed flats are sold before issuance of completion certificate and tax is paid on them. Exemption of TDR, FSI, long term lease (premium) shall be withdrawn in case of flats sold after issue of completion certificate, but such withdrawal shall be limited to 1% of value in case of affordable houses and 5% of value in case of other than affordable houses. This will achieve a fair degree of taxation parity between under construction and ready to move property.

7.2 The liability to pay tax on TDR, FSI, long term lease (premium) shall be shifted from land owner to builder under the reverse charge mechanism (RCM).

7.3 The date on which builder shall be liable to pay tax on TDR, FSI, long term lease (premium) of land under RCM in respect of flats sold after completion certificate is being shifted to date of issue of completion certificate.

7.4 The liability of builder to pay tax on construction of houses given to land owner in a JDA is also being shifted to the date of completion. Decisions from para 7.1 to 7.4 are expected to address the problem of cash flow in the sector.

Amendment to ITC rules:

8. ITC rules shall be amended to bring greater clarity on monthly and final determination of ITC and reversal thereof in real estate projects. The change would clearly provide procedure for availing input tax credit in relation to commercial units as such units would continue to be eligible for input tax credit in a mixed project.
9. The decisions of the GST Council have been presented in this note in simple language for easy understanding. The same would be given effect to through Gazette notifications/ circulars which alone shall have force of law.

## 5.1.2 33<sup>rd</sup> GSTC PR

### **Press note on recommendations of the 33<sup>rd</sup> GST Council meeting held on 24<sup>th</sup> February, 2019**

Real estate sector is one of the largest contributors to the national GDP and provides employment opportunity to large numbers of people. “Housing for All by 2022” envisions that every citizen would have a house and the urban areas would be free of slums. There are reports of slowdown in the sector and low off-take of under-construction houses which needs to be addressed. To boost the residential segment of the real estate sector, following recommendations were made by the GST Council in its 33<sup>rd</sup> meeting held today:

#### 2. **GST rate:**

- i. GST shall be levied at effective GST rate of 5% without ITC on residential properties outside affordable segment;
- ii. GST shall be levied at effective GST of 1% without ITC on affordable housing properties.

3. **Effective date:** The new rate shall become applicable from 1<sup>st</sup> of April, 2019.

**4. Definition of affordable housing shall be:-**

A residential house/flat of carpet area of upto 90 sqm in non-metropolitan cities/towns and 60 sqm in metropolitan cities having value upto Rs. 45 lacs (both for metropolitan and non-metropolitan cities).

Metropolitan Cities are Bengaluru, Chennai, Delhi NCR (limited to Delhi, Noida, Greater Noida, Ghaziabad, Gurgaon, Faridabad), Hyderabad, Kolkata and Mumbai (whole of MMR).

**5. GST exemption on TDR/ JDA, long term lease (premium),**

**FSI:**

Intermediate tax on development right, such as TDR, JDA, lease (premium), FSI shall be exempted only for such residential property on which GST is payable.

6. Details of the scheme shall be worked out by an officers committee and shall be approved by the GST Council in a meeting to be called specifically for this purpose.

## **7. Advantages of the recommendations made:**

The new tax rate in principle was approved by the Council taking into consideration the following advantages:-

- i. The buyer of house gets a fair price and affordable housing gets very attractive with GST @ 1%.
- ii. Interest of the buyer/consumer gets protected; ITC benefits not being passed to them shall become a non-issue.
- iii. Cash flow problem for the sector is addressed by exemption of GST on development rights, long term lease (premium), FSI etc.
- iv. Unutilized ITC, which used to become cost at the end of the project gets removed and should lead to better pricing.
- v. Tax structure and tax compliance becomes simpler for builders.

8. GST Council decided that the issue of tax rate on lottery needs further discussion in the GoM constituted in this regard.

The decisions of the GST Council have been presented in this note in simple language for easy understanding. The same would be given effect to through Gazette notifications/ circulars which alone shall have force of law.

### **5.1.3 25<sup>th</sup> GSTC PR**

#### **Recommendations made by the GST Council in its 25<sup>th</sup> Meeting held on 18<sup>th</sup> January, 2018 at Delhi for the housing sector**

In the meeting held on 18<sup>th</sup> January, 2018, the GST Council has made several important recommendations for the housing sector. The recommendations are expected to promote affordable housing for the masses in the country. The recommendations are discussed below.

One of the important recommendations is to extend the concessional rate of GST of 12% (effective rate of 8% after deducting one third of the amount charged for the house, flat etc. towards the cost of land or undivided share of land, as the case may be) in housing sector to construction of houses constructed/ acquired under the Credit Linked Subsidy Scheme for Economically Weaker Sections (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 AwasYojana (Urban). Credit Linked Subsidy Scheme is one of the components of Housing for All (Urban) Mission/Pradhan MantriAwasYojana (Urban).

Under this component, subsidy would be provided on home loans taken by eligible urban poor (EWS/LIG/ MIG-I/ MIGII) for acquisition, construction of house. Credit linked subsidy would also be available for housing loans availed for new construction and for addition of rooms, kitchen, toilet etc, to existing dwellings as incremental housing. The carpet area of houses constructed under this component of the mission would be upto 30 square meters for EWSA, 60 square meters FOR LIG, 120 sqm for MIG I and 150 sqm for MIG II. The benefit of Credit Linked Subsidy Scheme may be taken by the Economical Weaker sections or Low/Middle Income Groups for purchase of houses under any project. The maximum annual income for eligibility of beneficiaries under the scheme can be upto 18 lakhs. It covers a very large section of population which aspires to own a home.

2. So far, houses acquired under CLSS attracted effective GST rate of 18% (effective GST rate of 12% after deducting value of land). The concessional rate of 12% was applicable only on houses constructed under the other three components of the Housing for All (Urban) Mission/Pradhan Mantri AwasYojana (Urban), namely (i) In-situ redevelopment of existing slums using land as a resource component; (ii) Affordable Housing in

partnership and (iii) Beneficiary led individual house construction / enhancement. The exemption has now been recommended for houses acquired under the CLSS component also. Therefore, the buyers would be entitled to interest subsidy under the scheme as well to a lower concessional rate of GST of 8% (effective rate after deducting value of land).

3. The Council has also recommended that the benefit of concessional rate of GST of 12% (effective GST rate of 8% after deducting value of land) applicable to houses supplied to existing slum dwellers under the in-situ redevelopment of existing slums using land as a resource component of PMAY may be extended to houses purchased by persons other than existing slum dwellers also. This would make the in-situ redevelopment of existing slums using land as a resource component of PMAY more attractive to builders as well as buyers.
4. The third recommendation of the Council is to include houses constructed for "Economically Weaker Section (EWS)" under the Affordable Housing in partnership (PMAY) under the concessional rate of GST of 8% (effective rate after deducting value of land). This will support construction of houses upto 30 sqm carpet area.

5. The fourth recommendation of the Council is to extend the concessional rate of 12% to services by way of construction of low cost houses upto a carpet area of 60 sqm in a housing project which has been given infrastructure status under notification No. 13/06/2009 dated 30<sup>th</sup> March, 2009. The said notification of Department of Economic Affairs provides infrastructure status to Affordable Housing. Affordable Housing has been defined in the said notification as a housing project using at least 50% of the FAR/FSI for dwelling units with carpet area of not more than 60 sqm. The recommendation of the Council would extend the concessional rate of 8% GST (after deducting value of land) to construction of flats/ houses of less than 60 sqm in projects other than the projects covered by any scheme of the Central or State Government also.
6. In addition to the above, in order to provide a fillip to the housing and construction sector, GST Council has decided to give exemption to leasing of land by government to governmental authority or government entity. [Government entity is defined to mean an authority or board or any other body including a society, trust, corporation, (i) set up by an Act of Parliament or State Legislature; or (ii) established by any Government, with 90% or more participation by way of equity

or control, to carry out any function entrusted by the Central Government, State Government, UT or a local authority]. Also, any sale/lease/sub-lease of land as a part of the composite sale of flats has also been exempted from GST. Therefore, in effect, the government does not levy GST on supply of land whether by way of sale or lease or sublease to the buyer of flats and in fact, gives a deduction on account of the value of land included in the value of flats and only the value of flat is subjected to GST.

7. It may be recalled that all inputs used in and capital goods deployed for construction of flats, houses, etc attract GST of 18% or 28%. As against this, most of the housing projects in the affordable segment in the country would now attract GST of 8% (after deducting value of land). As a result, the builder or developer will not be required to pay GST on the construction service of flats etc. in cash but would have enough ITC (input tax credits) in his books to pay the output GST, in which case, he should not recover any GST payable on the flats from the buyers. He can recover GST from the buyers of flats only if he recalibrates the cost of the flat after factoring in the full ITC available in the GST regime and reduces the ex-GST price of flats.

8. The builders/developers are expected to follow the principles laid down under section 171 of the GST Act scrupulously.
9. The above changes shall come into force with effect from 25 January 2018.

## 5.1.4 PR dated 8<sup>th</sup> December 2018

### **Effective tax rate on complex, building, flat etc.**

It is brought to the notice of buyers of constructed property that there is no GST on sale of complex/ building and ready to move-in flats where sale takes place after issue of completion certificate by the competent authority. GST is applicable on sale of under construction property or ready to move-in flats where completion certificate has not been issued at the time of sale.

2. Effective rate of tax and credit available to the builders for payment of tax are summarized in the table for pre-GST and GST regime.

<b>Period</b>	<b>Output Tax Rate</b>	<b>Input Tax Credit details</b>		<b>Effective Rate of Tax</b>
Pre-GST	Service Tax: 4.5% VAT: 1% to 5% (composition scheme)	Central Excise on most of the construction materials: 12.5% VAT: 12.5 to 14.5%	No input tax credit (ITC) of VAT and Central Excise duty paid on inputs was available to the builder for	Effective pre-GST tax incidence: 15- 18%

		Entry Tax: Yes	<p>payment of output tax, hence it got embedded in the value of properties.</p> <p>Considering that goods constitute approximately 45% of the value, embedded ITC was approximately 10-12%.</p>	
GST	<p>Affordable housing segment: 8%,</p> <p>Other segment: 12% after 1/3<sup>rd</sup></p>	<p>Major construction materials, capital goods and input services used for construction of flats, houses, etc. attract GST</p>	<p>ITC available and weighted average of ITC incidence is approximately 8 to 10%.</p>	<p>Effective GST incidence, for affordable segment and for other segment</p>

	abatement of value of land	of 18% or more.		has not increased as compared to pre- GST regime.
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3. Housing projects in the affordable segment such as Jawaharlal Nehru National Urban Renewal Mission, Rajiv Awas Yojana, Pradhan Mantri Awas Yojana or any other housing scheme of State Government etc., attract GST of 8%. For such projects, after offsetting input tax credit, the builder or developer in most cases will not be required to pay GST in cash as the builder would have enough ITC in his books of account to pay the output GST.
4. For projects other than affordable segment, it is expected that the cost of the complex/ buildings/ flats would not have gone up due to implementation of GST. Builders are also required to pass on the benefits of lower tax burden to the buyers of property by way of reduced prices/ installments, where effective tax rate has been down.

## 5.1.5 PR dated 15<sup>th</sup> June 2017

**F. No.296/07/2017-CX.9**

**Govt. of India**

**Ministry of Finance**

**Department of Revenue**

**(Central Board of Excise and Customs)**

New Delhi, the 15<sup>th</sup> June, 2017

### **OFFICE MEMORANDUM**

Please find enclosed a press release issued by Central Board of Excise and

Customs w.r.t. "*Reduced Liability of Tax on complex, building, flat etc. under GST*", for taking necessary action at your end.

**Encls:** As above

### **PRESS RELEASE**

The CBEC and States have received several complaints that in view of the works contract service tax rate under GST at 12% in respect of under construction flats, complex etc, the people

who have booked flats and made part payment are being asked to make entire payment before 1<sup>st</sup> July 2017 or to face higher tax incidence for payment made after 1<sup>st</sup> July 2017. This is against the GST law. The issue is clarified as below:-

- 1.** Construction of flats, complex, buildings will have a lower incidence of GST as compared to a plethora of central and state indirect taxes suffered by them under the existing regime.
- 2.** Central Excise duty is payable on most construction material @12.5%. It is higher in case of cement. In addition, VAT is also payable on construction material @12.5% to 14.5% in most of the States. In addition, construction material also presently suffer Entry Tax levied by the States. Input Tax Credit of the above taxes is not currently allowed for payment of Service Tax. Credit of these taxes is also not available for payment of VAT on construction of flats etc. under composition scheme. Thus, there is cascading of input taxes on constructed flats, etc.
- 3.** As a result, incidence of Central Excise duty, VAT, Entry Tax, etc. on construction material is also currently borne by the builders, which they pass on to the customers as part

of the price charged from them. This is not visible to the customer as it forms a part of the cost of the flat.

- 4.** The current headline rate of service tax on construction of flats, residences, offices etc. is 4.5%. Over and above this, VAT @1% under composition scheme is also charged. The buyer only looks at the headline rate of 5.5%. In other cities/states, where VAT is levied under the composition scheme @2% or above, the headline rate visible to the customer is above 6.5%. What the customer does not see is the embedded taxes on account of cascading and sticking of input taxes in the cost of the flat, etc.
- 5.** This will change under GST. Under GST, full input credit would be available for offsetting the headline rate of 12%. As a result, the input taxes embedded in the flat will not (& should not) form a part of the cost of the flat. The input credits should take care of the headline rate of 12% and it is for this reason that refund of overflow of input tax credits to the builder has been disallowed.
- 6.** The builders are expected to pass on the benefits of lower tax burden under the GST regime to the buyers of property by way of reduced prices/ installments. It is, therefore, advised to all builders / construction companies that in the

flats under construction, they should not ask customers to pay higher tax rate on instalments to be received after imposition of GST.

- 7.** Despite this clarity on law position, if any builder resorts to such practice, the same can **be deemed to be profiteering under section 171 of GST law.**

## 5.2 Notifications

### 5.2.1 11/2017-CT (R) – Rate for supply of constructed units and WCS

#### Notification No. 11/2017-Central Tax (Rate)

New Delhi, the 28<sup>th</sup> June, 2017

G.S.R.....(E).- In exercise of the powers conferred by sub-section (1) of section 9, subsection (1) of section 11, sub-section (5) of section 15 and sub-section (1) of section 16 of the Central Goods and Services Tax Act, 2017 (12 of 2017), the Central Government, on the recommendations of the Council, and on being satisfied that it is necessary in the public interest so to do, hereby notifies that the central tax, on the intra-State supply of services of description as specified in column (3) of the Table below, falling under Chapter, Section or Heading of scheme of classification of services as specified in column (2), shall be levied at the rate as specified in the corresponding entry in column (4), subject to the conditions as specified in the corresponding entry in column (5) of the said Table:-

**Table**

SI No.	Chapter, Section or Heading	Description of Service	Rate (per cent.)	Condition
(1)	(2)	(3)	(4)	(5)
1	<b>Chapter 99</b>	<b>All Services</b>		
2	<b>Section 5</b>	<b>Construction Services</b>		
3	<b>Heading 9954</b> (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	-
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...

[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.]<sup>24</sup>

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<sup>24</sup> Substituted vide notification No. 1/2018- Central Tax- (Rate) dt 25.01.2018

## **5.2.2 4/2018-CT (R) – GST on TDR**

Government of India  
Ministry of Finance  
(Department of Revenue)

### **Notification No. 4/2018-Central Tax (Rate)**

New Delhi, the 25<sup>th</sup> January, 2018

G.S.R.....(E).- In exercise of the powers conferred by section 148 of the Central Goods and Services Tax Act, 2017 (12 of 2017), the Central Government, on the recommendations of the Council, hereby notifies the following classes of registered persons, namely :-

- (a) registered persons who supply development rights to a developer, builder, construction company or any other registered person against consideration, wholly or partly, in the form of construction service of complex, building or civil structure; and
- (b) registered persons who supply construction service of complex, building or civil structure to supplier of development rights against consideration, wholly or partly, in the form of transfer of development rights, as the registered persons in whose case

the liability to pay central tax on supply of the said services, on the consideration received in the form of construction service referred to in clause (a) above and in the form of development rights referred to in clause (b) above, shall arise at the time when the said developer, builder, construction company or any other registered person, as the case may be, transfers possession or the right in the constructed complex, building or civil structure, to the person supplying the development rights by entering into a conveyance deed or similar instrument (for example allotment letter).

[F. No.354/13/2018 -TRU]

(Ruchi Bisht)

Under Secretary to the Government of India

## 5.3 Specific FAQs for RE

### 5.3.1 FAQ on Time of Supply

**6. Builder is demanding balance money due to tax rate changed under GST. Do we have to pay service tax on entire amount of registration under GST, also if abatement provided before GST is available or not?**

GST is operational from 01.07.2017. Only on the balance amount GST will be applicable on future payments. For tax paid under the earlier law, section 142(11) of the CGST Act, 2017 may be referred to.

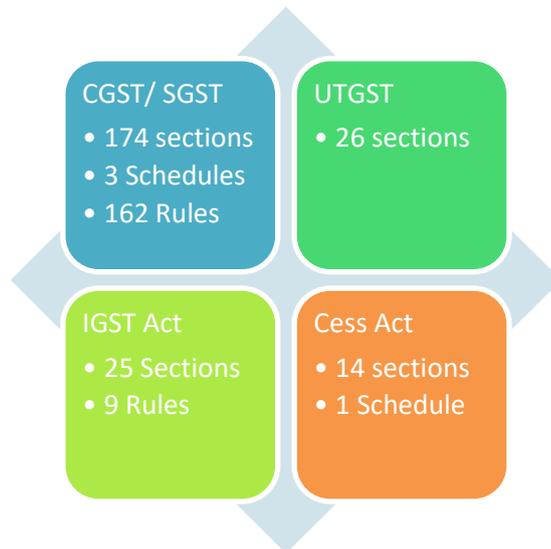
Source - <https://cbec-gst.gov.in/sectoral-faq.html>

## 6. GST Legislation – Basics and Overview

### 6.1 Legislative framework

What	CGST	SGST	IGST	UTGST	Cess
Tax on	Supply	Supply	Supply	Supply	Supply
Legislation	CGST Act	31 SGST Acts	IGST Act	UTGST Act	Cess Act
Extends	India	States	India	5 UTs	India
Administration	Central Authorities	State Authorities	Central Authorities	Administrator	Central Authorities

### Acts and Sections therein



## 6.2 Overview of Rules – CGST Rules

Name and Definition (1 and 2)	Composition (3 to 7)	Registration (8 to 26)	Valuation (27 to 35)
ITC (36 to 46)	Tax invoice, Debit and credit notes (47 to 55)	Accounts and records (56 to 58)	Returns (59 to 84)
Payment of tax (85 to 88)	Refund (89 to 97)	Assessment and audit (98 to 102)	Advance Ruling (103 to 107)
Appeals and revision (108 to 116)	Transitional provisions (117 to 121)	Anti-Profitteering (122 to 137)	E-way Bills (138)
Inspection, Search and Seizure (139 to 141)	Demand and recovery (142 to 161)	Offenses and Penalties (162)	

## IGST Rules

Title and Commencement (1 )	Application of CGST Rules (2)	Rules to determine proportionate value attributable to States or Union territories in certain scenario (3 to 9)
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## 6.3 Notifications and Circulars issued

Particulars	CGST	IGST	UTGST	Cess	Total
Notification- Rate related	78	83	88	9	<b>258</b>
Notification - Others	162	19	33	2	<b>216</b>
Circulars	88	4	-	1	<b>93</b>
Orders	16	-	1	-	<b>17</b>
<b>Total</b>	<b>344</b>	<b>106</b>	<b>122</b>	<b>12</b>	<b>584</b>

## 6.4 Things you must know about GST

### 1. GST is payable on supply

All forms of 'supply' such as sale, transfer, barter, lease, import of services etc. of goods and/ or services **made or agreed to be made for a consideration** attracts CGST (levied by Centre) and SGST (levied by State).

Further, certain supplies (specified in Schedule I), even if made **without consideration**, such as permanent transfer of business assets on which credit is availed, transaction with related or distinct persons, transactions with agent etc. attracts GST.

In Schedule I of the CGST Act, it is provided that **gifts**<sup>25</sup> not exceeding INR 50,000/- in value in a Financial Year by an **employer to an employee** are not be treated as supply of goods or services or both.

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<sup>25</sup> Given the terminology used, its debatable whether free canteen facilities, travel arrangements for employees, will qualify as 'gifts'.

## 2. Liability to pay GST

Typically, the GST liability is to be discharged by the supplier of goods/ service or both. However, in specific cases, the liability to pay tax is cast on the recipient of the supply instead of the supplier. This is known as Reverse Charge Mechanism (RCM).

GST Law prescribes RCM on specified goods (such as tobacco leaves, silk yarn etc) as well as services discussed below.

There are two types of RCM in GST law:

- a. Section 9 (3) of the CGST Act - RCM is applicable in respect of specified services (12 services including transportation of goods by road (GTA), advocate services, sponsorship, director etc)
- b. Section 9 (4) of the CGST Act – Domestic RCM (i.e. supplies by un-registered dealer) is deferred till 30.09.2019. Also, amendment is made in section 9 (4) of CGST Act to restrict the applicability of the provision to a notified class of registered persons and not to all registered persons.

RCM leads to increase in the compliance burden for the recipient [as receiver has to pay GST under RCM, reflect the same in returns, prepare invoice as well as payment voucher].

### 3. GST is payable as per time of supply

The liability to pay CGST / SGST arises at the time of supply as determined for goods and services. In this regard, separate provisions prescribe what is time of supply for goods and services.

The provisions prescribe payment of GST on supply of goods or services at the earliest of date of issuance of invoice or prescribed last day by which invoice is required to be issued or date of receipt of payment.

Given that there could be **multiple parameters** in determining 'time' of supply, maintaining reconciliation between revenue as per financials and as per GST is a major challenge to meet for businesses.

By way of Notification No. 66/2017-CT, all supplier of goods (and not services) can pay GST on raising of invoices<sup>26</sup>. Hence, from 15<sup>th</sup>

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<sup>26</sup> Earlier, relief was only provided to small suppliers vide Notification No. 40/2017-CT.

November 2017, GST is not payable at the time of receipt of advance on supply of goods. However, in case of advance received for supply of services, GST is payable.

#### 4. Determining Place of Supply is key

An intra-State supply of goods attracts Central GST and State GST whereas an inter-State supply attracts IGST. Thus, it is crucial to determine whether a transaction is an 'intra-State' or 'inter-State' as taxes are applicable accordingly.

In this regard, the GST law provides separate provisions which help an assessee determine the place of supply for goods and services. Typically, for 'goods' the place of supply is location where the good are **delivered**. Whereas for 'services', the place of supply is **location of recipient**.

However, the IGST Act prescribes multiple scenarios (at section 10, 11, 12, 13, 14 and 16) such as supply of services in relation to immovable property, services to and by SEZ etc. wherein this generic principle is not applicable and specific provisions to determine the place of supply prevail. Thus, businesses need to scroll through all the place of supply provisions before determining the place of supply.

A specific provision in the GST Law, in cases of wrong payment of GST, for automatic inter-Governmental adjustment, would be welcome.

## 5. Valuation in GST

GST is payable on the 'transaction value'. Transaction value is the **price actually paid or payable** for the said supply of goods and/or services between un-related parties and price is the sole consideration.

The transaction value is also said to include all expenses in relation to sale such as packing, commission etc. Even **subsidies linked** to supply, excluding Government subsidies is includable.

However, discounts/ incentives given **before or at the time** of supply are permissible as deduction from transaction value. As regards discounts given after supply is made, the same is permissible as deduction subject to fulfilment of prescribed conditions.

It is pertinent to note that Rule 27 to 35 of CGST Rules deal with Valuation.

## 6. Input tax credit in GST

Section 16 and 17 of CGST Act and Rule 36 to 45 of CGST Rules deal with Input Tax Credit. Typically, credit of input tax charged to registered person.

Section 16 (2) of the Act, prescribes following four conditions to claim credit:

- (a) he is in **possession** of a tax invoice or debit note issued by a supplier registered under this Act, or such other tax paying documents as may be prescribed
- (b) he has **received** the goods or services or both
- (c) subject to the provisions of section 41 or section 43A, the tax charged in respect of such supply has been **actually paid** to the Government, either in cash or through utilisation of input tax credit admissible in respect of the said supply; and
- (d) he has furnished the **return** under section 39:

Out of the four aforesaid conditions, two conditions i.e. (c) and (d) appear to be un-justified as the recipient gets burdened with the responsibility of ensuring whether GST has been paid to the Government or not.

Further, to continue to claim the input tax credit the buyer needs to ensure that he pays the supplier within 180 days from date of invoice<sup>27</sup>. If payment to vendor is not made within 180 days, then proportionate input tax credit will have to be reversed and availed again on payment to vendor.

Section 17 (5) provides that input tax credit will not be available on following:



## 7. GST legislation

In GST regime, there is one CGST Act and 31 SGST Act (one for each of the States including two Union Territories), one UTGST Act (for 5 UTs) and one IGST Act governing inter-State supplies of goods and services. Also, there is a separate Compensation Act for cess.

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<sup>27</sup> As per Proviso to Rule 37 (1) of CGST Rules the condition of 180 days is not applicable for supplies made without consideration as specified in Schedule I as well as amounts added in accordance with section 15 (2) (b) of CGST Act

## 8. Anti-profiteering provisions

Through section 171 of CGST Act, India introduced anti-profiteering measure to ensure that the benefits arising out of the GST regime are passed on to consumers. In this regard, Rule 122 to 137 of CGST Rules deal with Anti-profiteering.

However, neither CGST Act and nor CGST Rules lay down method to compute anti-profiteering benefits.

## 9. Key procedural provisions

The CGST Rules were notified Vide. Not. No. 3/2017-CT<sup>28</sup> (from 22<sup>nd</sup> June 2017) and 10/2017-CT (from 1<sup>st</sup> July 2017) and over the period of time have been amended more than 25 times.

## 10. Time limit for adjudication

Time limit for adjudication of generic cases (i.e. other than fraud, suppression etc.) is **three years** and in fraud, suppression etc. cases is **five** years.

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<sup>28</sup> Amended vide 7/2017-CT

## **11. Continuation of few earlier provisions**

Most of the current provisions such as reverse charge, tax deduction, pre-deposit, prosecution, arrest etc. are continuing in the GST law.

## 6.5 Key Amendments in GST Act

Various critical amendment in CGST Act, IGST Act and Compensation to States Act is effective from 1st February 2019. Few amendments are procedural in nature, few have far reaching impact and few others are tax-friendly measures (don't forget that elections are approaching fast!). Lets decode these amendments.

### 1. Supply – Critical amendment

As per section 7 of CGST Act, 'supply' includes the activities to be treated as supply of goods or supply of services as referred to in Schedule II. This inclusive clause was leading to an interpretation that where an activity listed in Schedule II would be deemed to be a supply even if it does not constitute a supply as per section 7 (1) (a) or (b) or (c) of CGST Act.

Now, through a new sub-clause (1A) to section 7 of CGST Act, its provided that certain activities or transactions, when constituting a supply in accordance with the provisions of sub-section (1), shall be treated either as supply of goods or supply of services as referred to in Schedule II.

## **2. Import by 'person' made liable!**

At present, import of services by 'taxable person' from a related person is liable for GST (sr. no. 4 of Schedule I of CGST Act). Thus, in case an entity was un-registered then GST liability may not have triggered. Given this, the term 'taxable person' is substituted by 'person' to ensure that GST liability is triggered in these cases.

## **3. No GST on 'out of scope' supplies!**

Clarity was alluding for out of scope supplies i.e. cases where a person in India procures goods (say from China) and supplies the same directly (say to USA).

Recently, in the advance ruling of BASF India Ltd (2018-TIOL-82-AAR-GST) the Advance Ruling Authority stated that these transaction will not attract IGST, however, it was also stated that no credit of GST paid will be available as these transactions will qualify as 'exempt supplies'.

Now, 'out of scope' supply (i.e. (supply from non-taxable territory to another non-taxable territory) is sought to be excluded from the GST net (by including it in Schedule III of CGST Act). Further, availment

of ITC is allowed in case of out of scope supplies. This amendment is certainly welcome and is in line with VAT provision across the world.

#### **4. No dual levy of GST on high seas sale!**

In case of supply of goods as high seas sales and sale of warehoused goods, before being cleared for home consumption, IGST was being levied twice, once at the time of import and second time, on clearance for home consumption. Through a Circular clarity was provided that dual levy will not be applicable in such cases. Now, this ambiguity is set to rest by covering the same in Schedule III of CGST Act.

#### **5. Ambit of URD RCM curtailed!**

One of the highly debated provision in GST regime was domestic reverse charge mechanism (RCM) in case of supplies by un-registered vendor to registered vendors. Since 13th October 2017, this domestic RCM provision is suspended till 30th September 2019.

Now, it appears that this RCM will be made applicable only for a certain notified class of registered persons (and not all registered persons). This amendment will be welcomed by lucky taxpayers, who would be excluded from the clutches of this RCM.

However, the un-lucky ones will still bear the brunt of this provision and its compliance. Certainly, this amendment proves the proverb that all taxpayers are equal in the eyes of law and others are more equal!

## 6. ITC denied/ allowed!

Input tax credit is not available in respect of food and beverages, health services, travel benefits to employees etc. Now, in cases where it is **obligatory** under any law for an employer to provide these facilities to its employees, it is provided that the input tax credit in such cases shall be available. This is a welcome amendment and will bring relief to factories, IT, BPO sector etc.

Additionally, the credit on motor vehicles above capacity of 13 passengers would be available i.e. credit on bus, van etc will be available. Also, amendment specifically states in cases where input tax credit of procured motor vehicles, vessels and aircraft is not available then input tax credit will also not be available in respect of general insurance, servicing, repair and maintenance of them.

## **7. SEZ can claim credit / refund of GST paid!**

At present, in cases of supply of goods/ services by a vendor to SEZ, refund is permissible to such vendor. Now, input tax credit is also available SEZ developer or SEZ unit.

## **8. Consolidated DN/CN is permissible!**

At present, a credit/debit note which is issued by the registered person is required to be issued invoice-wise. Now, taxpayer can issue consolidated credit/debit in respect of multiple invoices issued in a financial year.

## **9. Returns process revamped!**

GST return filing process will be revamped from 1st April 2019 (initially on trial basis). Thus, to enable and provide a specific provision, a new section is being introduced (section 43A) to provide for new mechanism / procedure for furnishing details of tax invoices, for availing of input tax credit by the recipient, its verification etc.

## **10. Appeal pre-deposit amount capped!**

Presently, the appellant is required to pay a sum equal to 10 per cent of the tax in dispute and 20 per cent (in addition to the amount paid), before the Appellate Authority and Appellate Tribunal respectively.

This section is being amended to provide a ceiling for CGST amount of INR 25 crore and 50 crores respectively.

## **6.6 Five key aspects GST payers should not miss!**

The experience of approx. nineteen months, since introduction of Goods and Services Tax (GST) in India, asserts that GST is constantly evolving in India. It was challenging in the initial days of GST, as everyone was learning and there was scarcity of available precedence.

Given the aforesaid, the taxpayers needs to introspect the approach for meeting GST obligations and gear-up for future GST developments. Lets discuss about five key aspects which should be on the top of the mind of the GST payer.

### **6.6.1 Seek clarifications**

GST regime, being self-assessment regimes, entails the taxpayer to take tax positions on day to day business transactions such as whether GST is applicable on supplies, whether the transaction is intra-State or inter-State, whether the transaction will qualify for zero rating, whether reverse charge mechanism is applicable etc.

Given the numerous business transactions, taxpayers need to take tax positions at drop of the hat. The matter gets complicated if

taxpayer needs to discuss the tax position with their customer or vendor, as in such cases, the tax position could be adopted on commercial rational than legal rational. Over a period of time, such decisions gets accumulated and the cumulative risk of adopted tax positions may turn out to be substantial.

Fortunately, the option of seeking clarifications, through a mechanism called as 'Advance Ruling' is available. Thus, to minimize the risk exposure its advisable for taxpayers to identify the big-ticket items at the earliest and seek clarifications. In the long run, this step of seeking clarifications will certainly prove to be a step in the right direction and save the organization from penal consequence.

### **6.6.2 Optimise GST credits**

Tax invoices are the documents based on which a buyer can to claim input tax credit. Tax invoices are issued by vendors and thus, its not uncommon to observe in-complete tax invoices or tax invoices with incorrect details (such as missing name or registration number, incorrect address etc). Credit availability on invoices with incomplete contents is always disputable.

Additionally, credit availability on employee-related expenses such as car for employees, foreign trips, medical insurance could be subject matter of scrutiny by authorities.

Further, in case the vendors are not uploading the invoices then without invoice matching the credit is likely to be denied. Proactively tracking the credits on real-time basis could be preferable.

Alternatively, taxpayer may inadvertently sometime miss on claiming eligible GST credit.

Claiming ineligible credits leads to risk of denial of credit alongwith imposition of interest and penalty whereas not claiming eligible credit leads to unnecessary cost for the organization.

Thus, it is important for taxpayers to run a sanity check for GST credit to ensure that in-eligible credits are not claimed and eligible credits are not missed.

### **6.6.3 Review ERP systems**

The data for preparing GST returns are expected to be generated from the ERP or accounting system. If the ERP system is able to generate

the requisite details for GST returns then the risk of incorrect GST returns reduces.

However, though it's been more than nineteen months since GST has been implemented, still quite a few organisation's ERP or accounting systems are yet to be configured and thus, requisite GST reports or details are not available easily.

In many instances, taxpayers compile the details for GST returns on manual basis in spite of having an ERP system. However, the risk of missing crucial ledgers or numbers is high in case of manual preparation of details for GST returns.

Therefore, it is crucial to assess the current ERP system to evaluate and ensure that the requisite reports, as required for preparation of GST returns are generated from the ERP system itself.

#### **6.6.4 Gear up for GST assessments**

Taxpayers in India have moved from Phase I (pre-GST) to Phase II (GST initial returns), to now, Phase III i.e. regular GST compliance and GST return filing. It is pertinent to note that the thrust of this

Phase III should be on documentation and maintaining prescribed GST records.

Documentation and maintaining prescribed GST records is critical as in days to come, taxpayers may face GST assessments/ audits.

Similar to the erstwhile VAT / tax audits, GST regime also prescribes audit by professionals. Thus, going a step ahead of audit and documentation, taxpayers could consider preparing customised GST manual for their own business which should contain all the tax positions adopted, processes followed and the basis of preparation for GST returns.

The GST manual will be handy during audit and could also be used for GST training for new employees in the organization.

#### **6.6.5 Track GST developments**

GST is constantly evolving. Further, with an endeavor to simplify GST and address specific issues, Central Board of Indirect Taxes (CBIC) as well as State Governments have issued numerous notifications, press releases, FAQs, guides and flyers.

These legal documents are quite detailed and thus, taxpayers need to peruse the same to decode whether the same are relevant for their business operations and if yes, then what are the appropriate steps to be taken.

Given this, the taxpayers should pro-actively track GST legal updates, decode them and take requisite actions.

### **6.7 New GST return mechanism – Challenging for taxpayers?**

In new proposed new return mechanism (applicable from April 2019), the taxpayer would be able to upload the invoices continuously (anytime during the month). Further, such uploaded invoice shall be continuously visible to the recipient.

Due to this new system, all the buyers are expected to request their respective vendors to upload invoices immediate basis to enable them check the same online.

This effectively mean that all the GST registered buyers will be required to check whether their vendors are uploading the invoices

(on daily basis!) and whether the said vendors are paying taxes and filing returns (on monthly basis!).

The buyer can '**lock**' the invoices uploaded by the supplier. This process will entail that GST payers will have to continuously monitor and 'lock' invoices on real time basis. How a GST payer, say having more than 1,000 vendors and more than 5,000 invoices per month, will be able to 'lock' thousands of invoices on real time basis, every day, is a big question!

Questions are being raised on this proposed GST return system, as at present, GST payer cannot even revise GSTR-3B, how will he be able to revise the incorrectly locked invoices?

Also, aforesaid process may send shivers down the spine of large GST payers who have already experienced sleepless nights due to non-responsive GST network portal.

Further, given that GST portal is an interface, if the same is simpler then its easier to use/understand. Further, GST portal should be responsive even in case of heavy traffic to the portal and glitch-free.

To improve the user interface, simple data validation controls should be placed (along with pop-ups to enable the GST payer understand the error and how to correct it).

Also, before the new return system goes live, it should be ensured that appropriate testing should be carried out and GST portal is designed for peak traffic to make it robust / crash-proof.

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***Yesterday I was clever, so I wanted to change the world.***

***Today I am wise, so I am changing myself.***

***Rumi***