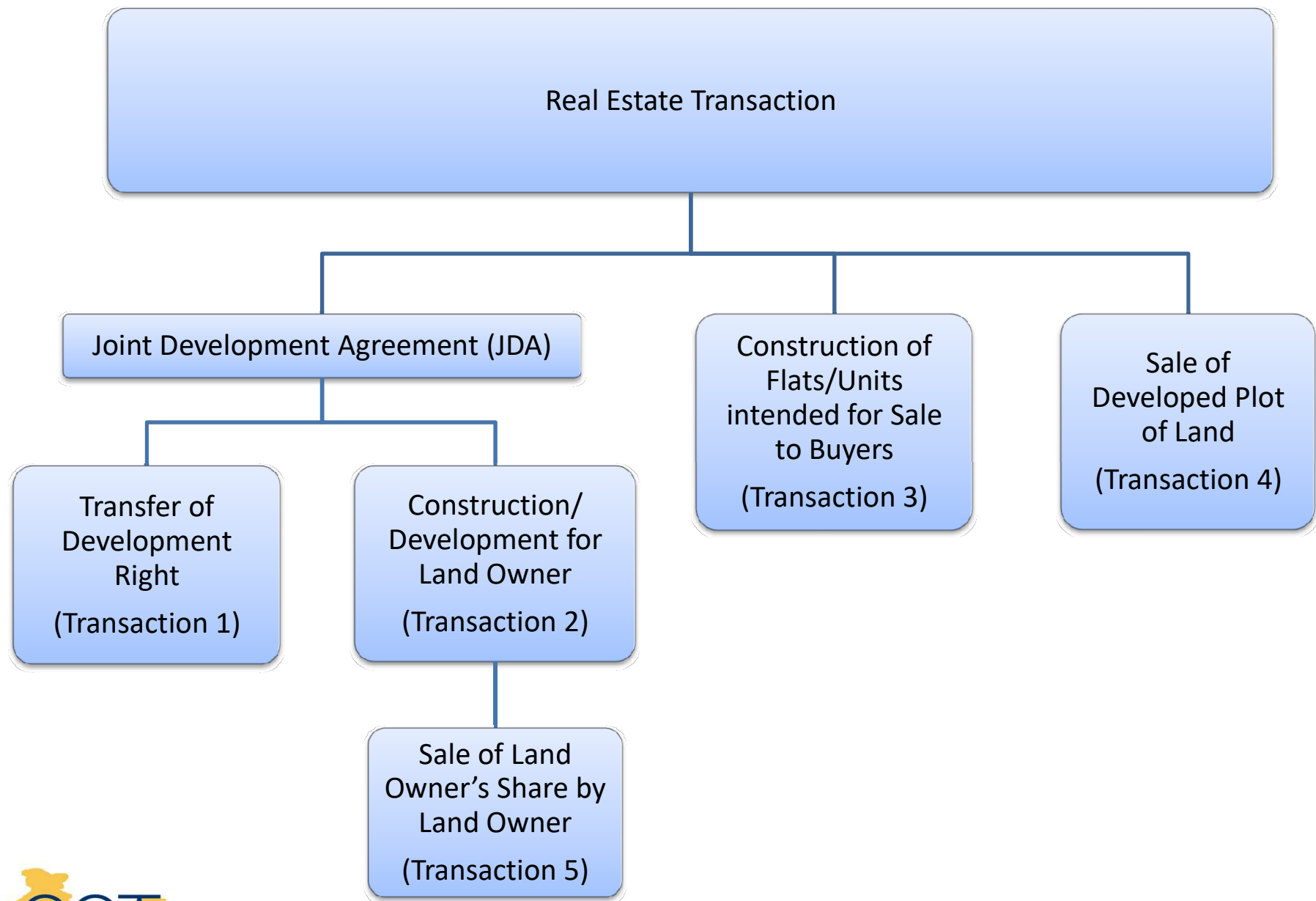


# *GST ASPECTS IN REAL ESTATE SECTOR*

*WEBINAR BY CHARTERPRENEURS FOUNDATION*

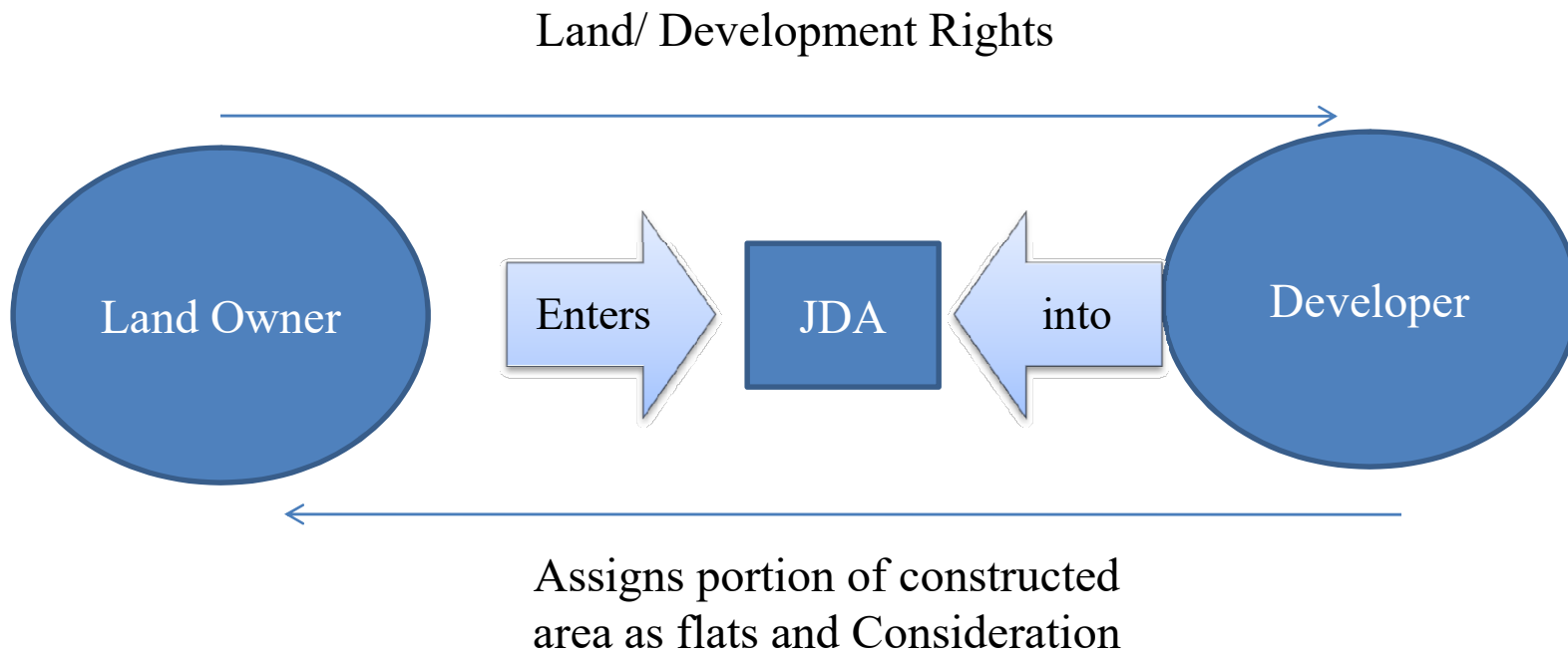
**15<sup>th</sup> April, 2020**

*By: Pawan Arora*  
*Joint Partner, ALA LEGAL*



# JOINT DEVELOPMENT AGREEMENT (JDA)

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# 1. Transfer of Development Rights

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- Levy of GST vis-à-vis Levy in Service Tax Regime
  - Development Rights transferred prior to 01.07.2017
- Tax Rate – 18%
  - While granting exemption, Government has classified under SAC 9972. Prima facie it does not fall under SAC 9972, but same rate of tax @ 18% under residual entry under SAC 9997
- Exemption
  - W.e.f. 01.04.2019 exempt for Construction of Residential Apartments
    - Exemption shall be withdrawn to the extent unsold inventory on issuance of CC or First Occupation
    - Development Rights Transferred prior to 01.04.2019 – No Exemption
  - No Exemption for Commercial Units in both REP and RREP
  - No Exemption for Residential Plots

# Contd...

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- Time of Supply
  - Upto 24.01.2018 – Section 13 of the CGST / SGST Act
  - From 25.01.2018 to 31.03.2019
    - Monetary Consideration – Section 13
    - Consideration in the form of Construction Service – N.No. 4/2018-dt. 25.01.2018 – When Transfers the possession or the rights in constructed complex by entering into conveyance deed or similar document (e.g. Allotment Letter)
  - W.e.f. 01.04.2019
    - TDR for residential Apartments - Consideration both in monetary form and in the form of Construction Service – N.No. 6/2019-dt. 29.03.2019 – on issuance of CC or First Occupation, whichever is earlier
    - TDR for Commercial Apartment
      - Monetary – Section 13
      - In the form of Construction Service – issuance of OC or First Occupation

# Contd...

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- Person Liable to Pay GST
  - Upto 31.03.2019 – Supplier of Service i.e. Landowner
  - W.e.f. 01.04.2019 – Developer being recipient of Service
- Valuation of Development Rights
  - Upto 31.03.2019 – Rule 27 of the CGST / SGST Rules
  - W.e.f. 01.04.2019 – Para 1A of N.No. 12/2017-CT(R) dated 28.06.2017 inserted through N.No. 4/2019-CT(R) dated 29.03.2019
    - 1A. Value of supply of service by way of transfer of development rights or FSI by a person to the promoter against consideration in the form of residential or commercial apartments shall be deemed to be equal to the value of similar apartments charged by the promoter from the independent buyers nearest to the date on which such development rights or FSI is transferred to the promoter.*

## 2. Construction for Landowner

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- Leviable of GST
- Tax Rate
  - Upto 31.03.2019 – Taxable @ 18% as “Works Contract”
  - W.e.f. 01.04.2019 – Tax Rate as applicable on Sale of Flat due to new Valuation Mechanism.
- Person Liable to Pay GST – Developer

# Contd...

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- Time of Supply
  - Upto 24.01.2018 – Section 13 of the CGST / SGST Act
  - From 25.01.2018 to 31.03.2019
    - Monetary Consideration – Section 13
    - Consideration in the form of Development Rights – N.No. 4/2018-dt. 25.01.2018 – When Transfers the possession or the rights in construed complex by entering into conveyance deed or similar document (e.g. Allotment Letter)
  - W.e.f. 01.04.2019
    - Monetary Consideration – Section 13
    - Consideration in the form of Development Rights – N.No. 6/2019-dt. 29.03.2019 – on issuance of CC or First Occupation, whichever is earlier
  - It may result into accumulation of ITC in the hands of Landowner

# Contd...

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- Valuation of Construction Service Provided to Land Owner in lieu of Development Rights
  - Upto 31.03.2019 – Rule 27 of the CGST . SGST Rules
  - W.e.f. 01.04.2019 – Para 2A of N.No. 11/2017-CT(R) dated 28.06.2017 inserted through N.No. 3/2019-CT(R) dated 29.03.2019

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

# RCM on TDR/FSI & Long Term Lease u/s 9(3)

- **Promoter is liable to pay Tax under RCM on:**
  - **Transfer of Development Rights or FSI**
  - **Long term lease for period of 30 years or more**

<i>Sl.No.</i>	<i>Category of Supply of Services</i>	<i>Supplier of Service</i>	<i>Recipient of Service</i>
<i>5B</i>	<i>Services supplied by any person by way of transfer of development rights or Floor Space Index (FSI) (including additional FSI) for construction of a project by a promoter.</i>	<i>Any person</i>	<i>Promoter.</i>
<i>5C</i>	<i>Long term lease of land (30 years or more) by any person against consideration in the form of upfront amount (called as premium, salami, cost, price, development charges or by any other name) and/or periodic rent for construction of a project by a promoter.</i>	<i>Any person</i>	<i>Promoter</i>

**N.No. 05/2019 CT(R)** has amended N.No. 13/2017 CT(R) to insert the above services in the list of services on which GST is payable on RCM basis u/s 9(3)

# Time of Supply for Promoter in case of JDA & Long Term Lease liable to RCM

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Vide **Notification No. 06/2019 CT(R)** dated 29.03.2019

- Liability to pay tax in case of following classes of registered persons:
  - a. A promoter who receives TDR/FSI on or after 01.04.2019 for construction of a project against consideration payable or paid by him, wholly or partly, in the form of construction service of commercial or residential apartments in the project or in any other form including in cash;
  - b. A promoter who receives Long term lease of land on or after 1st April, 2019 for construction of residential apartments in a project against consideration payable or paid by him, in the form of upfront amount (called as premium, salami, cost, price, development charges or by any other name).

# Contd...

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- Liability to pay tax (time of supply) shall arise on the date of issuance of completion certificate or first occupation, whichever is earlier, for following liability:

## **For Tax payable as recipient of service**

- a) the consideration paid by him in the form of construction service of commercial or residential apartments in the project, for supply of development rights or FSI (including additional FSI);
- (b) the monetary consideration paid by him, for supply of development rights or FSI (including additional FSI) relatable to construction of residential apartments in project;
- (c) the upfront amount (called as premium, salami, cost, price, development charges or by any other name) paid by him for long term lease of land relatable to construction of residential apartments in the project; and

## **For Tax payable as supplier of service on construction service provided to landowner**

- (d) the supply of construction service by him against consideration in the form of development rights or FSI(including additional FSI)

# Exemption on TDR/FSI & Upfront amount of Long Term Lease Service

**N.No. 04/2019 CT(R)** has inserted the following services to the list of services exempt from levy of GST under N.No. 12/2017 CT(R) :

- Transfer of TDR/FSI on or after 01.04.2019: Service by way of transfer of development rights (herein refer TDR) or Floor Space Index (FSI) (including additional FSI) on or after 1st April, 2019 for construction of residential apartments by a promoter in a project, intended for sale to a buyer, wholly or partly, except where the entire consideration has been received after issuance of completion certificate.
- Long term lease for thirty or more on or after 01.04.2019 (only upfront amount):Upfront amount (called as premium, salami, cost, price, development charges or by any other name) payable in respect of service by way of granting of long term lease of thirty years, or more, on or after 01.04.2019, for construction of residential apartments by a promoter in a project, intended for sale to a buyer, wholly or partly, except where the entire consideration has been received after issuance of completion certificate.

1. Supply of service by transfer of development rights (TDR) or transfer of FSI or lease of land on or before 31.03.2019, but construction yet to be started - no exemption is provided.
2. Yearly lease rental/premium is not exempted as only upfront amount is exempted in above said entry.

# Calculation of Amount of Exemption

- Calculation of Amount of Exemption

$$\begin{array}{c} \text{Amount of} \\ \text{exemption} \end{array} = \begin{array}{c} \text{Amount of GST} \\ \text{payable on} \\ \text{TDR/FSI/Long} \\ \text{Term Lease} \end{array} \times \frac{\begin{array}{c} \text{Total Carpet Area of} \\ \text{Residential} \\ \text{Apartments in the} \\ \text{project} \end{array}}{\begin{array}{c} \text{Total Carpet Area} \\ \text{(Commercial +} \\ \text{Residential) of the} \\ \text{Project} \end{array}}$$

It is to be noted that as per above formula provided in exemption notification, the amount of exemption is restricted to the proportionate area of the residential apartments without any distinction of project in REP/RREP. Thus, TDR/FSI/Long term lease proportionate to commercial area in RREP are not subjected to exemption.

## Liability to Pay Tax on Exempted TDR/FSI & Long Term Lease On Un-booked Apartment on the Date of CC

- Where any residential apartments remain un-booked on the date of issuance of completion certificate, or first occupation of the project, Promoter shall be liable to pay tax on RCM basis, on such proportion of value of development rights, or FSI (including additional FSI), Upfront amount (called as premium, salami, cost, price, development charges or by any other name) payable in respect of service by way of granting of long term lease of thirty years, or more, or as is attributable to such residential apartments.
- GST payable under RCM in such cases shall be calculated in the following manner:

$$\begin{array}{c} \text{Amount of Tax} \end{array} = \begin{array}{c} \text{Amount of} \\ \text{exemption} \end{array} \times \frac{\begin{array}{c} \text{Total Carpet Area of} \\ \text{Residential Apartments in the} \\ \text{project remain un-booked on} \\ \text{Issuance of CC} \end{array}}{\begin{array}{c} \text{Total Carpet Area of} \\ \text{Residential Apartment} \\ \text{in the Project} \end{array}}$$

- Time of supply in such cases shall be the earlier of, date of completion or first occupation of the project.

# Upper Limit of Tax Liability

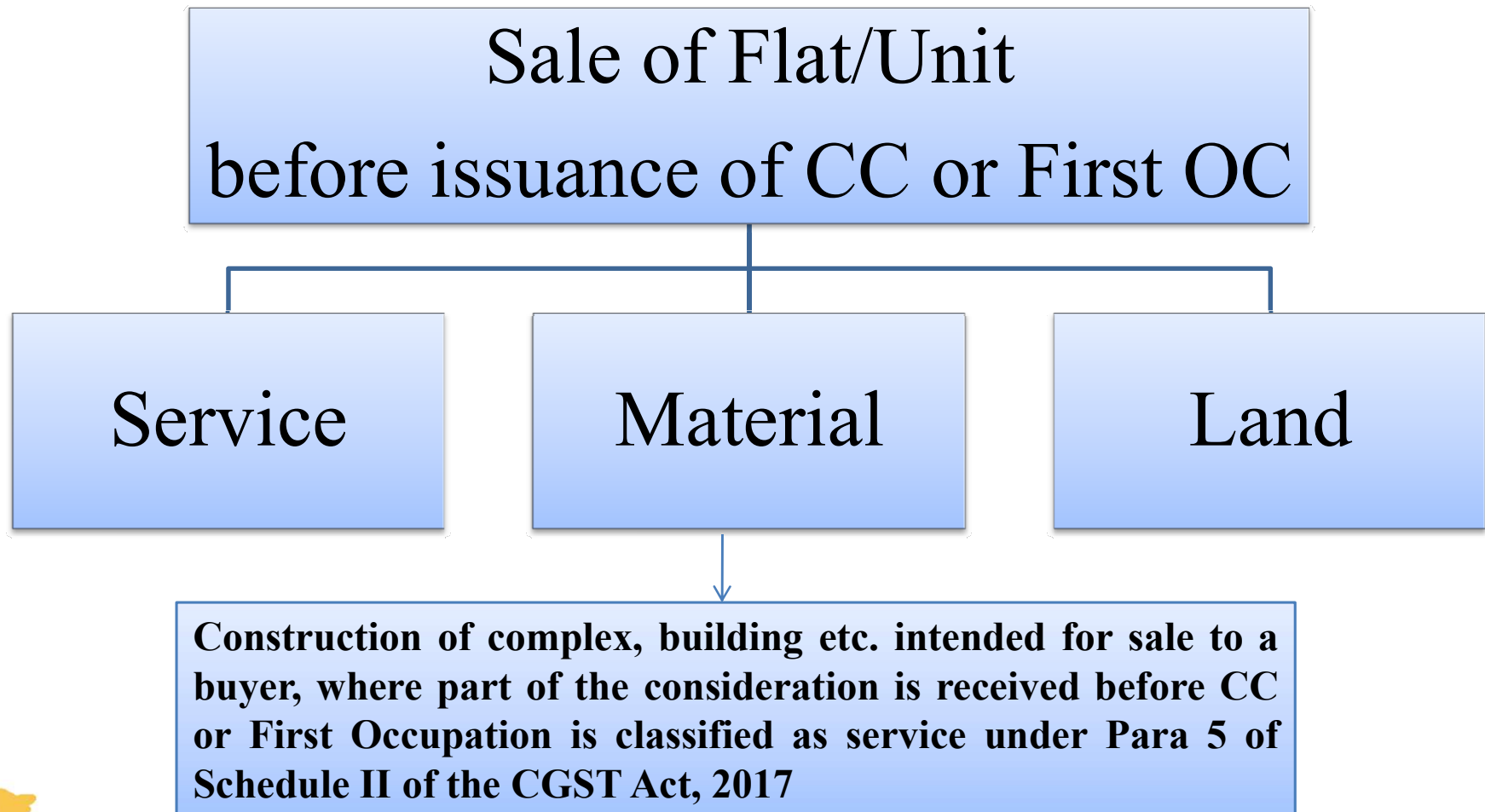
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- However, tax payable under RCM in such cases shall not exceed :
  - 1% of the value in case of affordable residential apartments and
  - 5% of the value in case of residential apartments other than affordable residential apartments

remaining un- booked on the date of issuance of completion certificate or first occupation

### 3. Construction of Flats/ Unit intended for Sale

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# Tax Rate – Residential & Commercial upto 31.03.2019

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

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

# LAND VALUE – DEEMED TO BE 1/3<sup>RD</sup>

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

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

*Explanation. -For the purposes of this paragraph, "total amount" means the sum total of,-  
(a) consideration charged for aforesaid service; and  
(b) amount charged for transfer of land or undivided share of land, as the case may be including by way of lease or sublease.*

# New Tax Rates for On-going projects w.e.f. 01.04.2019

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

# Tax Rates for New projects

## w.e.f. 01.04.2019

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

# Conditions for New Tax Rates

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

- *Provided that the central tax at the rate specified in column (4) shall be paid in cash, that is, by debiting the electronic cash ledger only;*

## **(ii) No Input Tax Credit (ITC)**

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

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

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

# Contd...

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## (iv) **Conditions in case of Joint Development Agreement (JDA)**

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

# Contd...

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

# Contd...

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

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

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

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

# Contd...

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## **Compliance requirement**

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

### Explanation. -

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

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

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

## 4. Sale of Developed Plots

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- Sale of Land is neither Supply of Goods nor Supply of Service as per Schedule – III of CGST Act. Therefore not leviable to GST.
- In service tax regime department has raised a dispute that development of Plots is a separate transaction from sale of Land and issued SCNs to Developers. Thus, this issue is under litigation.
- If we consider the entire value of land as exempted being sale of Developed Land – ITC on goods or service procured for development of land shall not be allowed.

### **Efficient Model under GST for Sale of Plot (Tax Efficient and Free from Litigation)**

- Segregate the value of land and development activities.
- Development charges become leviable to GST. No Exposure on development activity as Company will pay taxes on it.
- ITC on goods or services procured for development of land shall be allowed and net tax cost impact will be on value addition only.

## 5. Sale of Flats/Units by Land Owner

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- Same Tax Structure as discussed earlier on Sale of Flats/ Units by Developer.
- One of the Condition of New Tax Rate w.e.f. 01.04.2019 – ITC of GST Charged by the Developer shall be allowed to the Land Owner subject to the amount of tax paid by the Land Owner on sale of Flats/ Units

### (iv) **Conditions in case of Joint Development Agreement (JDA)**

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

# THANK YOU

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