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Taxation on WORKS CONTRACT

THE INSTITUTE OF COST ACCOUNTANTS OF INDIA
(Statutory body under an Act of Parliament)

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"The Institute of Cost Accountants of India would be the preferred source of resources and professionals for the financial leadership of enterprises globally."

Mission Statement

"The Cost and Management Accountant professionals would ethically drive enterprises globally by creating value to stakeholders in the socio-economic context through competencies drawn from the integration of strategy, management and accounting"

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1. Preparation of Suggestions and Analysis of various Tax matters for best Management Practices and for the professional development of the members of the Institute in the field of Taxation.
2. Conducting webinars, seminars and conferences etc. on various taxation related matters as per relevance to the profession and use by various stakeholders.
3. Submit representations to the Ministry from time to time for the betterment and financial inclusion of the Economy.
4. Evaluating opportunities for CMAs to make way for further development and sustenance of the opportunities.
5. Conducting and monitoring of Certificate Courses on Direct and Indirect Tax for members, practitioners, stakeholders and also Crash Courses on GST for Colleges and Universities.

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- **Direct Tax** – Certificate Course on TDS & Filing of Return
- Crash Course on GST for Colleges & Universities
- Various Publications in Direct Tax & Indirect Tax

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President's Message

This third Revision of the 'Handbook on Works Contract' is being published under the revised nomenclature as 'Taxation on Works Contract'. To start penning down this message, I would like to congratulate the Tax Research Department for their excellence in deliberations leading to this robust publication. As I have gone through the previous publications on Works Contract addresses the Indirect taxation front, specifically the impact of GST in Works Contract, this revised publication with extensive improvement with the all-round inclusion of all aspects of Taxation on Works Contract, like both Direct and Indirect taxation.

A Works Contract is a contract of service. It may include supply of goods in the execution of the Contract. From GST angle, it is a composite supply of both Goods and Services, wherein the service element plays a dominant role in the contract between the parties. From Direct taxation angle TDS in levied on Works Contract and there are specific rates for those. I am happy that this publication addresses the 360 degree aspects of taxation for Works Contract.

I would like to acknowledge the hard work of the selfless resource contributors and Team – Tax Research for their efforts and toil in releasing this publication.

I am very sure that that this publication will not only benefit the professionals and our practicing members but also various other stakeholders as well.

With warm regards,

CMA Balwinder Singh
President
August 14, 2020

CMA Biswarup Basu
Vice President

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Vice President's Message

It gives me great pleasure to know that the Tax Research Department has come up with the third revised edition of "Taxation on Works Contract". This can be treated as a new publication all together, since the previous publications touched upon the various aspects of GST, but this time it encompasses both the Direct and Indirect Taxation matters related to Works Contract.

We all know Works Contract is an agreement which involves a mixture of Service or labour and transfer of goods. Under this a contractor agrees to do a certain job in execution whereof, certain goods are transferred to the contractee and hence its tax implications are vast. I understand that this publication addresses all the Taxation areas under a works contract and would be beneficial to our Members of the Profession, Government Departments, Regulators, Industrial Houses, Banks and Financial Institutions and other stakeholders just like its previous editions.

I congratulate CMA Niranjan Mishra, Chairman of Indirect Taxation Committee and CMA Rakesh Bhalla, Chairman of Direct Taxation Committee of the Institute for bringing out the revised edition of "Taxation on Works Contract". I express my sincerely thank the Resource Contributors whose concepts and in depth knowledge has made this publication possible and Tax Research Department team for their solemn effort and support in bringing out this publication on time.

My best wishes to Tax Research Department of the Institute for its all future endeavours.

With warm regards,

Biswarup Basu

CMA Biswarup Basu
Vice-President
August 14, 2020

Chairman's Message

Works contract is a contract wherein the transfer of property in goods is involved in the execution of the contract. Building, Construction, Fabrication, Completion, Erection, Installation, Fitting out, Improvement, Modification, Repair, Maintenance, Renovation, Alteration or Commissioning of any immovable property may be cited as examples of a Works Contract. Since Works Contract encompasses so many activities, hence the levy and collection of tax is all pervasive in these activities and we are optimistic that this publication has successfully addressed the issues in Works Contract from both Direct and Indirect taxation front.

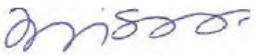
Before the implementation of GST, in a general sense, a Works Contract may relate to both movable and immovable property. For example if a Contractor, undertakes a contract for the construction of a building, it would be a works contract in relation to immovable property. Similarly, if there is a composite supply in relation to movable property such as fabrication/ painting/annual maintenance contracts etc. is undertaken, the same would come within the ambit of the broad definition of a works contract. But with the implementation of GST, the most significant change with regard to Works Contract is the meaning of "Work contract" which has been restricted to any work undertaken for an "Immovable Property". I am sure that these issues have been clarified in this book and many such issues relating to direct and Indirect Taxation has also been addressed.

I firmly believe that our members and stakeholders would enrich themselves by gaining knowledge from this publication and would be able to perform their duty with more precision. I express my sincere gratitude to the knowledge Contributors and congratulate Team – Tax Research of this success of theirs. Best of Luck.

Thank You

CMA Niranjan Mishra

Chairman – Indirect Taxation Committee



Date:14th August 2020

Chairman's Message

It makes me delighted to note that the Tax Research Department has come up with this revised publication on **"Taxation on Works Contract"**and would like to share the same with you the. I vouch that this ready knowledge resource would be beneficial for the professionals, industry and stakeholders in understanding and handling issues in Works Contract both in Direct and Indirect tax front which would further help them their day to day professional activities.

We all know both Direct and Indirect tax is levied on Works Contract. Direct Tax, as in Sec 194C of the Income Tax Act provides for deduction of tax from payment of works contract made to contractor or sub-contractor. Any person carrying out any work in pursuance of a contract between a specified person and the resident contractor is required to deduct tax at source. The section also states that, any person, other than an Individual or HUF, responsible for making payment to a resident contractor or sub-contractor for carrying out any work (including supply of labour) is liable to deduct tax at source under Section 194C.However, an Individual or HUF who is liable to tax audit during the financial year immediately preceding the financial year in which such sum is credited or paid, shall deduct tax under section 194C. There are many such minute details which need to be addressed and all of which has been discussed in here.

I am delighted to note that the revised booklet is comprehensive and encompasses both the aspects of Direct and Indirect tax which would help the stakeholders with very good knowledge and information. I am optimistic that sure passion and zeal of the department would surely bear fruitful results.

Thanks and Regards

CMA Rakesh Bhalla

Chairman, Direct Taxation Committee

Date: 14th August 2020

Preface

This is the second revised edition of our previous publications and is being published under the nomenclature of **'Taxation on Works Contract".** We, in our previous publications, have consolidated our knowledge towards the Indirect Taxation aspect but this time we have taken into consideration the Direct Taxation aspects as well. This revision is sincerely based on the wide appreciations received by our previous publications and the requests that we received from our learners and stakeholders to include Direct Tax, which would make the publication more beneficial to them.

We, Team – Tax Research are enlightened to work on this revised publication on **'Taxation on Works Contract'**. It was great learning and a motivating experience which we would be embedded in our hearts all our lives. **CMA Anil Sharma** has guided us on the GST aspect, **CMA Rakesh Sinha** on the Direct Tax aspect and last but not least we are thankful to **CMA Niranjan Swain** for guiding & reviewing this publication.

Tax Research Department
The Institute of Cost Accountants of India
15th August 2020

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IMPACT OF GST ON WORKS CONTRACT

UNDERSTANDING WORKS CONTRACT

1. Meaning of Works Contract

1.1 Work Contract in General

Simply put, aworks contract is essentially a contract of service which may also involve supply of goods in the execution of the said contract. It is basically acomposite supply of both services and goods, with the service element being dominant in the contract between the parties. In a general sense, a contract of works, may relate to both immovable and immovable property. E.g. if a sub-contractor, undertakes a sub-contract for the building work, it would be a works contract in relation to immovable property. Similarly, if a composite supply in relationto movable property such as fabrication/painting/annual maintenance contracts etc. is undertaken, the same would come with in the ambit of the broad definition of aworks contract.

1.2 What is Works Contract–the positionin Sales tax / VAT & Service Tax

A works contract has elements of both provision of services and sale of goods, and was therefore taxable under both laws.

1.2.1 Sales Tax / VAT Regime: Hon'ble Supreme Court of India in case of ***State of Madras* v. *Gannon Dunkerley & Co., (Madras) Ltd.* - AIR 1958 SC 560,** was held that incase of a works contract, the dominant intention of the contract is the execution of works, which is a service and there is no element of sale of goods (**as per Sale of Goods Act**). The contract being one indivisible contract, it cannot be broken up to levy VAT on sale of goods involved in the execution of works contract. This decision led the Government to amend the Constitution of India and insert Article 366(29A)(b) which enabled the State Governments to levy tax (VAT) on transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract.

The Constitutional Bench, in the case of ***State of Madras* v. *Gannon Dunkerley & Co.,* 2015 (330) E.L.T. 11 (S.C.)** held that the expression "sale' in *nomen juris* would only mean and include transfer of property in goods as "Chattle Qua Chattle" and would not cover within its ambit, sale of goods in an indivisible works contract. The Constitutional Bench clearly held that a divisible contract of sale and service can be taxed on the "sale" portion whereas an indivisible works contract cannot be taxed as "sale'. This necessitated the Forty-Six Constitutional Amendment wherein a new Clause (29A) was introduced to Article 366 of the Constitution.

The Constitutional Bench of the Hon'ble Supreme Court in the case of ***Kone Elevator India Private Limited* v. *State of Tamil Nadu* reported in 2014 (304) E.L.T. 161 (S.C.),**wherein held that if the terms of the contract disclose or lead to a definite conclusion that it is not a "**works contract**", but one of outright sale, the same will have to be declared as a '**sale**' attracting the provisions of the relevant sales tax enactment. Therefore, the manufacture, supply and installation of Lifts/Elevators comes under definition of "**sale**" and not "**works contract**" and accordingly overruled the earlier decision rendered in ***State of A.P.* v. *Kone Elevators* - 2005 (181) E.L.T. 156 (S.C.).**

1.2.2 Service Tax Regime: Works contract has been defined in section 65B of the Finance Act, 1994 as a contract where in transfer of property in goods involved in the execution of such contract is leviable to tax as sale of goods and such contract is for the purpose of carrying out construction, erection, commissioning, installation, completion, fitting out, repair, maintenance, renovation, alteration of any moveable or immoveable property or for carrying out any other similar activity or a part there of in relation to such property. By virtue of Section 66E of Finance Act, 1994, the service portion involved in the execution of works contract was a declared service. Hence Service Tax could be levied only on the service element of the works contract. The principles of segregation of the value of goods were provided in Rule 2A of the Service Tax (Determination of Value) Rules, 2006.

1.2.3 Works Contract under GST Laws: Under GST laws, the definition of "**Works Contract**" has been restricted to any work undertaken for an "**Immovable Property**" unlike the existing VAT and Service Tax

provisions where works contracts for movable properties were also considered.

Activities covered under ***Schedule II*** are to be treated as a **supply** of the nature described under **section 7(1A) of the GST Act. (Section 7(1A)** isinserted *by the* ***Central Goods and Services Tax (Amendment) Act 2018 (No. 31 of 2018) which is applicable w.e.f. 01.02.2019***

As per ***Para 6 (a) of Schedule II*** to the **CGST Act, 2017**, ***works contracts as defined in section 2(119) of the CGST Act, 2017 shall be treated as a supply of services.*** Thus, there is a clear demarcation of a works contract as a supply of service under GST Laws. Thus GST have removed the confusion regarding taxability of **work contract as service** and not as a supply of goods as it is no longer necessary to segregate the supply of goods in an indivisible composite contract for the purpose of taxation under GST regime. This means works contract shall always be treated as service and tax would be charged accordingly (not as goods or part goods/part services) on entire value chain which is the bundled supply of goods and services for execution of an indivisible **composite contract** for construction, erection, commissioning etc. of an immovable property.

Thus any **composite supply u**ndertaken on movable property such as fabrication or painting job done in automotive body shop or annual maintenance contracts will not be covered under works contract as defined in the GST Act. Such contracts shall now be separately dealt as composite supplies and not as Works Contracts for the purposes of GST.

Section 2(30) of CGST Act deals with concept of Composite Supply. *It 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.* Therefore the essential check for establishing composite supply would be to ascertain whether– two or more supplies are naturally bundled or not ,– provided in combination in the ordinary course of business,– Inseparable in nature.***Composite supply shall be treated as a supply of the principal supply and the rate of GST shall be the rate as applicable to such principal supply.***

1.2.4 Definition of Works Contract under GST Acts:

As per sec 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.

The expression **'works contract'** is limited to contracts to do with **immoveable property.** A contract will amount to a **'works contract'** only where there is a transfer of property in goods, while such a transfer may result in goods or anything else (i.e., immoveable property).Thus, from the above it can be seen that the term works contract has been restricted to contract for building construction, fabrication etc of any immovable property only.

As per the GST laws, construction of a complex, building, civil structure or a part thereof, including a complex or building (before issue of completion certificate) intended for sale to a buyer is a supply of service and not supply of goods and hence, is liable to the goods and services tax (GST). However, no GST is meant to be paid on ready to move in or completed property as per the CGST Act, 2017. The GST is payable only on the under-construction houses or complexes or apartments. All such services come under the category of "works contracts".

Any such composite supply undertaken on goods which are movable will not fall within the definition of term works contract per se under GST. Such contracts would continue to remain composite supplies, but will not be treated as a Works Contract for the purposes of GST.

1.2.5 Meaning of Immovable Property:

The term **"immovable property"** is not defined under GST Laws. For better understanding the following acts needs to be referred.

As per section 3(26) of the General Clauses Act 1897immovable property mean,

"immovable property shall include land, benefits to arise out of land and things attached to the earth, or permanently fastened to anything attached to the earth"

The term "attached to the earth" is not defined in the GST law, reference can be drawn to Section 3 of the Transfer of Property Act, 1882 which defines it as anything - Rooted to the earth, as in case of trees and shrubs;

- Imbedded in the earth, as in the case of walls and buildings
- Attached to what is so imbedded for the permanent beneficial enjoyment of that to which it is attached To ascertain whether the item is permanently attached to earth, English and Indian courts have consistently used two-fold tests – (i) the degree/ extent of annexation and (ii) the object of annexation.

Recently, the Appellate Authority of Advance Ruling (AAAR) in the case of **Wework India Management Private Ltd (Appellant)** has an occasion to deal with this issue where the AAAR set aside the AAR order and by applying the above principle allowed ITC on detachable sliding and stacking glass partitions.

According to the Section 2 (6) of the Registration Act, 1908 immovable property means –

"Immovable Property" includes land, buildings, hereditary allowances, rights to ways, lights, ferries, fisheries or any other benefit to arise out of land, and things attached to the earth, or permanently fastened to anything which is attached to the earth, but not standing timber, growing crops nor grass;"

According to interpretation clause under section 3 of the Transfer of Property Act

"immoveable property" does not include standing timber, growing crops or grass;"

Under the interpretation clause it is also interpreted for *"*attached to the earth*" "attached to the earth" means—*

(a) rooted in the earth, as in the case of trees and shrubs;

(b) imbedded in the earth, as in the case of walls or buildings; or

(c) attached to what is so imbedded for the permanent beneficial enjoyment of that to which it is attached;

On perusal of the definitions given for immovable property it has been noticed that prime property under the term of "**immovable property**" is land or earth. Further permanently fastened or attached to land or benefits to arise out of land are also treated as immovable properties.

A work shall be treated as Works Contract if that work is done for land or earth or for immovable property. Immovable property cannot be moved. It cannot be separated from the land or earth. If it is detached it shall have to destroy.

For example a building or bridge cannot be detached from the earth. Platform, constructed to fix plant and machinery, cannot be detached from the land. If the platform is detached that shall have to destroy.

The Authority in advance ruling M/S ABB India Ltd; AAR-West Bengal observed about immovable property is as under:

Para 4.4 – "*The essential character of immovable property is that it is attached to the earth, or permanently fastened to anything attached to the earth, or forming pan of the land and not agreed to be severed before supply or under a contract of supply.*"

Para 4.5 – "***In M/S Triveni N L Ltd [RN – 910, 911 & 912 of 2001 (All)] Allahabad High Court*** *observes that permanently fastened to anything attached to the earth has to be read in the context for the reason that nothing can be fastened to the earth permanently so that it can never be removed. If the article cannot be used without fastening or attaching it to the earth and is not removed under ordinary circumstances, it may be considered permanently fastened to anything attached to the earth.*

Furthermore, in the context of the GST Act, if the article attached to the earth is not agreed to be severed before supply or under a contract for

supply, it ceases to be goods and, for that matter, a moveable property."

In case of Sirpur Paper Mills Ltd v. Collector of Central Excise, Hyderabad (1998) 1 SCC 400 *it was held that - Excise duty on paper making machine – Attached to earth for operational efficiency – If the appellant wanted to sell the paper-making machine it could always remove it from its base and sell it – Held as movable.*

In the case of **Quality Steel Tubes Ltd. Vs. Collector 1995 (75) ELT 17 (SC)** where in the supreme court was called upon to decide whether a tube mill and welding head which were erected and installed by the appellant to form part of a tube mill were excisable. *It was held that the goods which are attached to the earth & thus become immovable do not called as goods as per the meaning under the act.*

The Bombay high court in **Shapoorji Pallonji & Co. Vs. UOI 2005 (192) ELT 92 (Bom)**, held that *trusses, columns and purlins made by cutting/drilling/welding steel channels, angles, plates, and erecting them on concrete columns with nuts and bolts whereby they became part of structure embedded to earth being immovable property would not excisable.*

In case of G. Industries Ltd. V. CCE, Raipur (2004) 167 ELT 501 (SC) it is held that - *Machinery was erected at the site on a specially made concrete platform at a level of 25 ft. height – Considering the weight and volume of the machine and the processes involved in its erection and installation – held as immovable property which could not be shifted without dismantling the same.*

In **Commissioner of Central Excise vs. Correct Egg. Works 2010 (252) ELT 481 (SC)** the Apex court while deciding whether setting up of an Asphalt Drum Mix Plant were immovable property or whether the assesse was engaged in making of components of such plant. Some of the components of such plants were embedded in the earth on a foundation of 1.5 dig deep. It was held that the plants were not per se immovable and they become immovable when embedded in the earth. The attachment of the plant with nuts and bolts intended to provide stability and prevent vibration is not covered as attached to earth. The

attachment can be easily detachable from the foundation and is not permanent. The plant moved after road construction or repair project is completed. The plants are not immovable property. Apex court also states that the machines which are permanently fixed to the structures which are embedded in the earth, the machine thus becoming a part of the structure and were no longer be movable goods. It was in those peculiar circumstances that the installation and erection of machines at site were held to be by this Court, to be immovable property that ceased to remain moveable as they were at the time of their purchase. Once such a machine is fixed, embedded in a permanent structure, the movable character of the machine becomes extinct.

M/S. T.T.G. Industries Ltd., Vs Collector Of Central Excise [2004(167) ELT 501 (SC)]. The contract here was for the design, supply, supervision of erection and commissioning of four sets of Hydraulic Mudguns and Tap Hole Drilling Machines required for blast furnace and the issue was whether the same is immoveable property. The Apex Court observed :-

" Keeping in view the principles laid down in the judgments noticed above, and having regard to the facts of this case, we have no doubt in our mind that the mudguns and the drilling machines erected at site by the appellant on a specially made concrete platform at a level of 25 feet above the ground on a base plate secured to the concrete platform, brought into existence not excisable goods but immovable property which could not be shifted without first dismantling it and then re-erecting it at another site. We have earlier noticed the processes involved and the manner in which the equipments were assembled and erected. We have also noticed the volume of the machines concerned and their weight. Taking all these facts into consideration and having regard to the nature of structure erected for basing these machines, we are satisfied that the judicial member of the CEGAT was right in reaching the conclusion that what ultimately emerged as a result of processes undertaken and erections done cannot be described as "goods" within the meaning of the Excise Act and exigible to excise duty"

In the above case, the Supreme Court took note of the fact that the

various components of the Mudguns and the Drilling machines are mounted piece by piece on a metal frame, and the components are lifted by a crane and landed on a cast house floor 25 feet high. The volume and weight of these machines are such that there is nothing like assembling them at ground level and then lifting them to a height of 25 feet for taking to the case house floor and the to the platform over which it is mounted and erected. It observed that the machines cannot be lifted in an assembled condition and after taking note of these facts, it concluded that the same is immoveable property. The Court further held that it cannot be disputed that such Drilling Machine and Mudguns are not equipment which are usually shifted one place to another nor it is practicable to shift them frequently. The court also referred to its own judgments in the case of **Quality Steel Tubes (P) Ltd. 75 ELT 17 (SC) and Mittal Engineering Works (P) Ltd. 1996 (88) ELT 622 (SC).**

Duncans Industries Ltd Vs State of U.P. &Ors on 3 December, 1999 where the SC had to decide whether the 'plant and machinery' in the fertilizer is goods' or 'immoveable property. The Apex Court held that the same is immovable property and observed :

"*The question whether a machinery which is embedded in the earth is movable property or an immovable property, depends upon the facts and circumstances of each case. Primarily, the court will have to take into consideration the intention of the parties when it decided to embed the machinery whether such embedment was intended to be temporary or permanent. A careful perusal of the agreement of sale and the conveyance deed along with the attendant circumstances and taking into consideration the nature of machineries involved clearly shows that the machineries which have been embedded in the earth to constitute a fertiliser plant in the instant case, are definitely embedded permanently with a view to utilise the same as a fertiliser plant. The description of the machines as seen in the Schedule attached to the deed of conveyance also shows without any doubt that they were set up permanently in the land in question with a view to operate a fertilizer plant and the same was not embedded to dismantle and remove the same for the purpose of sale as machinery at any point of time. The facts*

as could be found also show that the purpose for which these machines were embedded was to use the plant as a factory for the manufacture of fertiliser at various stages of its production. Hence, the contention that these machines should be treated as movables cannot be accepted."

Thus what can be seen from the above is that when machines are embedded with no visible intention to dismantle them and they are intended to be used for a fairly long period of time, they are 'Immoveable property'.

Following deciding factors may be taken to determine whether something is immovable or movable:

- *Degree of permanency of the attachment to the earth,*
- *Intent of the Use of the goods / property is essentially of Immovable nature,*
- *Cannot be detached from earth without causing substantial damage to it,*
- *Identity of the goods as such post removal is lost*

1.2.6 Turnkey Contract is a Works Contract

Definition of Turnkey contract:

GST Act does not define the term turnkey contract. As per general definition of the term, "turnkey, a turnkey project, or a turnkey operation is a type of project that is constructed so that it can be sold to any buyer as a completed product."

A turnkey project or contract as described by Duncan Wallace

" a contract where the essential design emanates from, or is supplied by, the Contractor and not the owner, so that the legal responsibility for the design, suitability and performance of the work after completion will be made to rest … with the contractor …. 'Turnkey' is treated as merely signifying the design responsibility as the contractor's."

Reference may be made to **Order No 58/1/2002 -CX Dt 15.1.2002) of the CBEC under Section 37B of Central Excise Act**, which gives directions as to what would be excisable goods and what are not (immoveable property). The clarification says in Para 5 (i) that ***'Turnkey projects like Steel plants, Cement Plants , Power plants etc involving supply of large number of components , machinery, equipment, pipes and tubes etc for their assembly / installation/ erection/ integration/ inter-connectivity on foundation/civil structure etc at site will not be considered as excisable goods for imposition of central excise duty - the components, however, would be dutiable in normal course."***

Hon'ble Supreme Court in case of **M/S. T.T.G. Industries Ltd., Vs Collector Of Central Excise [2004(167) ELT 501 (SC)] held as follows -**

In the present case the contract was for the design, supply, supervision of erection and commissioning of four sets of Hydraulic Mudguns and Tap Hole Drilling Machines required for blast furnace and the issue was whether the same is immoveable property. The Apex Court observed :-

"Keeping in view the principles laid down in the judgments noticed above, and having regard to the facts of this case, we have no doubt in our mind that the mudguns and the drilling machines erected at site by the appellant on a specially made concrete platform at a level of 25 feet above the ground on a base plate secured to the concrete platform, brought into existence not excisable goods but immovable property which could not be shifted without first dismantling it and then re-erecting it at another site. We have earlier noticed the processes involved and the manner in which the equipments were assembled and erected. We have also noticed the volume of the machines concerned and their weight. Taking all these facts into consideration and having regard to the nature of structure erected for basing these machines, we are satisfied that the judicial member of the CEGAT was right in reaching the conclusion that what ultimately emerged as a result of processes undertaken and erections done cannot be described as "goods" within the meaning of the Excise Act and exigible to excise duty."

Hon'ble Supreme Court took a note of the fact that the various components of the Mudguns and the Drilling machines are mounted piece by piece on a metal frame, and the components are lifted by a crane and landed on a cast house floor 25 feet high. The volume and weight of these machines are such that there is nothing like assembling them at ground level and then lifting them to a height of 25 feet for taking to the case house floor and the to the platform over which it is mounted and erected. It observed that the machines cannot be lifted in an assembled condition and after taking note of these facts, **it concluded that the same is immoveable property.** The Court further held that it cannot be disputed that such Drilling Machine and Mudguns are not equipment which are usually shifted one place to another nor it is practicable to shift them frequently. The court also referred to its own judgments in the case of **Quality Steel Tubes (P) Ltd. 75 ELT 17 (SC) and Mittal Engineering Works (P) Ltd. 1996 (88) ELT 622 (SC).**

In case of**Duncans Industries Ltd Vs State of U.P. & Others on 3 December, 1999 the issue before Hon'ble Apex Court** to decide whether the 'plant and machinery' in the fertilizer is goods' or **'immoveable property'**. The Apex Court held that the same is immovable property and observed:

"The question whether a machinery which is embedded in the earth is movable property or an immovable property, depends upon the facts and circumstances of each case. Primarily, the court will have to take into consideration ***the intention of the parties when it decided to embed the machinery whether such embedment was intended to be temporary or permanent****. A careful perusal of the agreement of sale and the conveyance deed along with the attendant circumstances and taking into consideration the nature of machineries involved clearly shows that* ***the machineries which have been embedded in the earth to constitute a fertiliser plant in the instant case, are definitely embedded permanently with a view to utilise the same as a fertiliser plant****. The description of the machines as seen in the Schedule attached to the deed of conveyance also shows without any doubt that they were set up permanently in the land in question with*

a view to operate a fertilizer plant and ***the same was not embedded to dismantle and remove the same for the purpose of sale as machinery at any point of time****. The facts as could be found also show that the purpose for which these machines were embedded was to use the plant as a factory for the manufacture of fertiliser at various stages of its production. Hence, the contention that these machines should be treated as movables cannot be accepted."*

Thus what can be seen from the above is that when machines are embedded with no visible intention to dismantle them and they are intended to be used for a fairly long period of time, they are 'Immoveable property'.

Authority of Advance Ruling in case of **Vihan Enterprises, 2020 (35) G.S.T.L. 241 (A.A.R. - GST - M.P.)** held as follows.

Applicant's role limited to construction of new 33/220 kV Pooling Sub-station at Badwar, REWA along with associated 220 kV DCDS Transmission line and associated feeder bay work on total Turnkey basis. Some of the supply is in the nature of a works contract relating to solar power. Solar Power Plants although included in the list given in Entry No. 234 of Schedule-I to Notification No. 1/2017-C.T. (Rate) as amended, goods supplied in the execution of works contract being not renewable energy devices or their parts, not covered in Entry No. 234 ibid. Applicant merely evacuates the electricity generated by the renewable energy plant by the infrastructure erected by them. Applicant neither engaged in construction of Power Plant nor in supplying any renewable energy devices and parts for their manufacture. Explanation to Entry No. 234 of Schedule-I to Notification No. 1/2017-C.T. (Rate) not applicable.

Contract although a single contract but activities clearly defined and segregated, with the values for each segregated supply being duly stated. Supply of goods under works contract included in the value of contract for supply of service only where transfer of property in goods involved in the execution of contract. ***Civil Works and Installation Services (installation, erection, testing and commissioning) part of the contract regarded as works contract as per the contract****. In*

the supply of equipment for sub-station and transmission line, transfer of property is not in the execution of a works contract. Consequently, in the supply of equipment for sub-station and transmission line, the supply is that of goods and accordingly the rates given in Notification No. 1/2017-C.T. (Rate) applicable. ***Further, in the case of erection, testing and commissioning, as well as in civil work for sub-station, the supply to be taxable as service and rates applicable to a works contract shall apply.***

On analysis of above it may be concluded that where supply of goods under a contract for building, construction, fabrication, completion, erection, installation, fitting out, improvement, modification, repair, maintenance, renovation, alteration or commissioning of any immovable property are included in the value of contract for supply of service only where the transfer of property in goods (whether as goods or in some other form) is involved in the execution of the contract. Goods supplied under a turnkey contract, where there are multiple independent contracts, of which some are not in the nature of works contract, shall not be included in the value of contract merely on account of the fact that goods are being supplied under Turnkey Contract, part of which is in the nature of a works contract, unless such supply of all such goods is a part of and made in the execution of a works contract.

The Appellate Authority of Advance Ruling in case of **M/s RFE Solar Pvt Ltd, 2019 (23) G.S.T.L. 378 (App. A. A. R. Rajasthan - GST)** held that

> *Single Contract is for supply of 'Solar Power Plant' including engineering, design, procurement, supply, development, testing and commissioning of plant. Contract fulfilling condition of composite supply that is supply of goods and services provided as package and different elements, integral to flow of supply. There are two taxable supplies, one of goods and other of services and both are naturally bundled which said composite supply falls within definition of works contract under Section 2(119) of Central Goods and Services Tax Act, 2017 (SAC 9954) - Section 2(30) of Central Goods Services Tax Act, 2017. In view of holding the transaction as*

a 'Works contract' and Para 6 of SCHEDULE II of CGST Act treating 'Works contracts' as supply of 'services', there arises no occasion to go into the issue of 'Principal supply'

Solar Power Generating System is an entire system comprising variety of different structures installed after a lot of prior work which involves detailed designing, ground work and soil survey. Moving such systems to new location to mean retrofitting the system on to property same not designed for. Project fulfils both conditions of immovable property .Mode of annexation shows that groundwork, being necessary foundation, is important part of project and object of annexation, cannot be to make it movable from one place to the other . Also, CBEC clarification holding that erection of plants as immovable property and not goods.

For deciding whether property, movable property, mode of necessary embedding in earth and object of embedding in earth to be examined.–

So, for deciding whether a property is movable property, it is to be seen what is the mode of necessary embedding in the earth and the object of embedding in the earth. If object is so embedded that it cannot be removed without causing damage to the land then it gives a reasonable ground for holding that it was intended to be embedded in perpetuity. Also whether the intention of the parties while erecting the system was that the plant has to be moved from place to place in the near future would also make a difference.

Therefore, from the above, it can be inferred that in case of a turnkey contract involving a works contract, it is not necessary that all the goods be transferred in pursuance of the works contract. The goods that are not transferred as the part of works contract are to be dealt with separately and as per the provisions of the GST Act.

Turnkey *refers* to something that is ready for immediate use, generally used in the sale or supply of goods or services. The word is a reference to the fact that the customer, upon receiving the product, just needs to turn the ignition key to make it operational, or that the key just needs to be turned over to the customer. ***Turnkey*** **is commonly used in the**

construction industry, for instance, in which it refers to bundling of materials and labour by the home-builder or general contractor to complete the home without owner involvement **Where the turnkey contract is in relation to immovable property, it appears from the above stated provisions of GST that the same is in the nature of works contract. Therefore, the provisions of works contract should be applicable in the case of turnkey contracts.**

1.2.7 Works Contract is a Supply of Services

Further, as per **Entry No. 6(a) of Schedule II to the CGST Act, 2017**, works contracts as defined in **Section 2(119) of the CGST Act, 2017** (composite supply of goods and services) shall be treated as a supply of services. This provision has been clarified in Section 7(1) of the CGST Act, 2017 (Scope of supply for levy of tax). GST law has clearly clarified the tax liability of works contract. Thereby, this implies works contract will be treated as service and tax would be charged accordingly.

WORKS CONTRACT – REAL ESTATE PROJECT

2.1. Real Estate Project is a Works Contract:

As per Entry No. 5(b) of Schedule II to the CGST Act, 2017, the following activities are supply of service under section 7 of CGST Act, 2017.

> "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"***.

Explanation.- For the purposes of this clause-

(1) the expression "competent authority" means the Government or any authority authorized to issue completion certificate under any law for the time being in force and in case of non-requirement of such certificate from such authority, from any of the following, namely - (i) an architect registered with the Council of Architecture constituted under the Architects Act, 1972; or (ii) a chartered engineer registered with the Institution of Engineers (India); or (iii) a licensed surveyor of the respective local body of the city or town or village or development or planning authority.

(2) the expression "construction" includes additions, alterations, replacements or remodeling of any existing civil structure.

Residential Complex: "Residential complex" means any complex comprising of a building or buildings, having more than one single residential unit - para 2 of Notification No. 12/2017-CT (Rate) and No. 9/2017-IT (Rate) both dated 28-6-2017, effective from 1-7-2017.

Single Residential Unit - "Single residential unit" means a self-contained residential unit which is designed for use, wholly or principally, for residential purposes for one family - para 2 of Notification No. 12/2017-CT (Rate) and No. 9/2017-IT (Rate) both dated 28-6-2017, effective from 1-7-2017.

Grant of Occupancy certificate: It is nothing but a completion certificate, The Authority of Advance Ruling, in case of **M/s Bindu Ventures, 2019 (20) G.S.T.L. 616 (A.A.R. Karnataka - GST)**held that, the date of Occupancy Certificate issued by the competent authority, i.e. Bruhat Bengaluru MahanagaraPalike should be treated as the date of completion of the construction.If any part of the consideration is received before such date of completion, then the transaction would be considered as the supply of services in terms of entry 5 of Schedule II to the GST Acts, and liable for GST.If the entire consideration is received after the date of completion, then the transaction would not be liable to GST.

As per FAQ (Part I) No. 29 issued by CBI&C *vide* circular F No. 354/32/2019-TRU dated 7-5-2019, 'first occupation' means 'first occupation' of the project in accordance with laws, rules and regulations of State/Central Government or any other authority. Thus, mere staying in the apartment before obtaining completion/ occupancy certificate will not be considered as 'first occupation'.

Thus, the FAQ (Part I) treats 'first occupation' as equivalent to completion/occupancy certificate. If so, the words '*or its first occupation whichever is earlier*' become redundant. It is well settled that an interpretation which treats some words as otiose or redundant should not be adopted.

Purchaser of apartment is not liable to tax even if he sales before occupation or completion - Thus it is ample clear that works contract in relation to civil construction of building, complex or any civil structure is treated as supply of service if it is sold before completion of construction. However, if entire consideration on works contract has been received after issuance of completion certificate issued by the competent authority or before its first occupation, whichever

is earlier then no GST is leviable on such supply as this become immovable property and GST can't be levied on sale of immovable property.

2.2 Valuation of apartments sold by promoter

The contract entered into by promoter / developer with customer contains terms and conditions related to charges in respect of various services offered by him to customer. **Charges of PLC, EDC , parking space charges etc. are part of 'construction service' -for valuation of apartment**

In view of clarification issued in **FAQ (Part II) No. 4 of circular F No. 354/32/2019-TRU dated 14-5-2019 issued by CBI & C** for determination of threshold limit of the gross amount of Rs.45 lakhsfor affordable residential apartments, all the charges or amounts charged by promotor from buyer of apartments shall form part of gross amount. Clause xvi, sub-clause (a)(ii)(C) of paragraph 4 of **notification No. 11/2017-CT(R) dated 28.06.2017,** reproduced below, refers.

> *C. Any other amount charged by the promoter from the buyer of the apartment including preferential location charges, development charges, parking charges, common facility charges etc.*

By following above clause of the notification, whena builder/ contractor charges separately for Preferential Location Charges (PLC), additional charges for modifications suggested by customers, maintenance during construction period, covered parking charges, EDC (External Development Charges), IDC (Internal Development Charges) etc are 'naturally bundled services which should get covered under 'construction of complex' and be eligible for abatement in valuation. However The Appellate Authority of Advance Ruling, West Bengal, in case of **M/s Bengal Peerless Housing Development Company Limited, 2019 (30) G.S.T.L. 652 (App. A.A.R. - GST)** held that

Car Parking Charges (CPC) cannot be called a part of composite supply of Construction services because it is not naturally bundled with main supply of construction inasmuch as it is attributable to

choice of purchaser based on location/direction/floor of flat and is not compulsory/uniform in every case. ***Case law at 2019 (25) G.S.T.L. 59 (Tri. - All.)*** *relied by assessee pertaining to post-negative list of Service Tax regime distinguishable as there was specific inclusion of PLC during this period for purpose of abatement for payment of Service Tax, even prior to negative list regime of Service Tax no abatement was available on PLC which was then covered under separate tax collection head under Builder's Special Services.Further, abatement under Construction service is allowed on account of value of land which is not leviable to GST whereas PLC in flats has no association with land. Under Notification No. 11/2017-C.T. (Rate), Construction service has been categorized under three heads and PLC is coming under Category No. 3(iii) of notification ibid on which no abatement has been allowed.Assessee himself has been paying GST without claiming any abatement on said charges. In view of above, no abatement is admissible on PLC.Similarly on Car Parking Charges also, no abatement is admissible*

It may be noted that in case of **M/s Logic Infrastructure Pvt Ltd, 2019 (25) G.S.T.L. 59 (Tri. - All.)**which is not accepted by Appellate Authority of Advance Ruling, it was held that

> *"the components such as preferred location charges, external development charges etc. are part and parcel and for various elements of the main service which is Residential Complex Service and therefore the entire consideration received by the appellants are eligible for abatement under said Notification No. 26/2012-S.T.*

However, the value shall not include stamp duty payable to the statutory authority, maintenance charges/ deposits for maintenance of apartment or maintenance of common infrastructure. Club membership fee cannot be part of construction service and should not get covered under 'naturally bundled service'. Similarly, maintenance service provided after construction is over is not part of 'construction service' and should not be eligible for abatement.

2.3 Rate of GST applicable from 1st April 2019 on various types of real estate projects and conditions for availing ITC are as follows.

(A) Construction of affordable residential apartments

(i) In respect of construction of affordable residential apartments, the GST rate is CGST 0.5% plus SGST/UTGST 0.5% (total 1%) or IGST 1% (without ITC), where supply of services involves transfer of land or undivided share of land - Sr No. 3(i) and 3(ic) of Notification No. 11/2017-CT (Rate) and 8/2017-IT (Rate) both dated 28-6-2017 as amended w.e.f. 1-4-2019.

(ii) The GST rate will be CGST 0.75% plus SGST/UTGST 0.75% (total 1.50%) or IGST 1.50% where supply of services ***does not*** involve transfer of land or undivided share of land.

(iii) Other points discussed below:

- This rate applies to Construction of affordable residential apartments by a promoter in **(a)** a Residential Real Estate Project (termed as RREP***) Sr No. 3(i) and (b) Real Estate Project (termed as REP) other than RREP Sr No. 3(ic).***
- This rate applies to RREP or REP commenced on or after 1-4-2019. This rate also applies to an ongoing RREP or REP in respect of which the promoter has not exercised option to pay central tax on construction of apartments at full rate (after availing ITC) as specified in item ***3(ie) or 3(if) of Notification No. 11/2017-CT (Rate) and 8/2017-IT (Rate) both dated 28-6-2017 as amended w.e.f. 1-4-2019.***
- In case of ongoing projects, this rate applies even in case of projects which were not coming under definition of affordable houses under earlier scheme - ***FAQ (Part II) No. 20 issued by CBI&C vide circular F No. 354/32/2019-TRU dated 14-5-2019***.
- No GST is payable 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***.
- In respect of new projects, the tax (CGST, SGST/UTGST or IGST as applicable) shall be paid in cash by debiting the electronic cash ledger only [without utilising Input Tax Credit].

- In respect of ongoing projects as on 31-3-2019, Input Tax Credit can be availed 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 to Notification No. 03/2019-CT (Rate) dated 29-3-2019.
- ***Input Tax Credit in re spect of ongoing projects where promoter shifts to new scheme on 1-4-2019*** - In respect of ongoing projects as on 1-4-2019, promoter can either continue under earlier scheme and continue to avail Input Tax Credit (ITC) or shift to new scheme of tax, where he is not entitled to ITC after 1-4-2019.
- In such cases, the promoter must have availed some ITC and paid tax (CGST and SGST/UTGST) on some supplies till 31-3-2019. In such case, there are two possibilities –
  (a) He has availed more ITC compared to the tax paid by him on his output supply [of which chances are high]. In such cases, he should reverse the excess ITC availed by him.
  (b) He has availed less ITC compared to the tax paid by him on his output supply [of which chances are low]. In such cases, he is entitled to get credit to the extent of less ITC availed by him.
- In such cases, the promoter is required to make project wise calculations of ITC availed and ITC eligible, as prescribed in ***Annexure I in the case of REP (other than RREP) and in Annexure II in the case of RREP to Notification No. 11/2017-CT (Rate) dated 28-6-2017.*** The Annexures give illustrations also.
- After such calculations, if it is found that the promoter has availed higher credit than eligible on supplies made upto 31-3-2019, he is required to refund that amount to Government. If such amount is huge, he can apply to Commissioner to pay the same in monthly instalments not exceeding 24. He should

apply in form GST DRC-20 and Commissioner can issue order in form GST DRC21 to allow time to make payments in up to 24 monthly instalments [interest will be payable though the circular is silent on it Interest is compensatory in nature].

- If it is found that he has taken less credit, he will be allowed to take and utilise that credit even after 1-4-2019, though the promoter is otherwise not eligible for ITC after 1-4-2019.
- Main distinction between Annexure I and Annexure II is that in case of RREP, the promoter is eligible for concessional rate of GST (5%) even on commercial portion after 1-4-2019, while in case of REP, the promoter is not eligible for concessional rate of GST after 1-4-2019 (as he has to pay GST @ 12%). Hence, he is entitled to carry forward entire accumulated ITC in respect of commercial portion of the project.
- ITC available does not seem to be of any use as the promoter is required to pay tax @ 1%/5% through electronic cash ledger only. The ITC may be used for discharging any other supply of service - **FAQ (Part II) No. 13 issued by CBI&C *vide* circular F No. 354/32/2019-TRU dated 14-5-2019**.
- Since registration is project wise, there seems no possibility of using such credit elsewhere.

(B) Construction of residential apartments (other than affordable residential apartments)

(i) In respect of construction of residential apartments (other than affordable residential apartments), the GST rate is CGST 2.5% plus SGST/UTGST 2.5% (total 5%) or IGST 5% (without ITC), where supply of services involves transfer of land or undivided share of land - ***Sr No. 3(ia) and 3(id) of Notification No. 11/2017-CT (Rate) and 8/2017-IT (Rate) both dated 28-6-2017 as amended w.e.f. 1-4-2019.***

(ii) The GST rate will be CGST 3.75% plus SGST/UTGST 3.75% (total 7.50%) or IGST 7.50% where supply of services ***does not*** involve transfer of land or undivided share of land.

(iii) Other points discussed below.

- This rate applies to Construction of residential apartments (other than affordable residential apartments) by a promoter in (a) a Residential Real Estate Project (termed as RREP) or (b) Real Estate Project (other than RREP).
- This rate applies to projects which commence on or after 1-4-2019. This rate also applies to an ongoing RREP and REP in respect of which the promoter has not exercised option to pay central tax on construction of apartments at full rate (after availing ITC) as specified in item ***3(ie) or 3(if) of Notification No. 11/2017-CT (Rate) and 8/2017-IT (Rate) both dated 28-6-2017 as amended w.e.f. 1-4-2019.***
- No GST is payable 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***.
- In respect of new projects, the tax (CGST, SGST/UTGST or IGST as applicable) shall be paid in cash by debiting the electronic cash ledger only [without utilising Input Tax Credit].
- In respect of ongoing projects as on 1-4-2019, Input Tax Credit can be availed 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 to Notification No. 03/2019-CT (Rate) dated 29-3-2019.
- ITC available does not seem to be of any use as the promoter is required to pay tax @ 1%/5% by cash only. The ITC may be used for discharging any other supply of service - ***FAQ (Part II) No. 13 issued by CBI&C vide circular F No. 354/32/2019-TRU dated 14-5-2019***. However as the registration is project wise, there seems no possibility of using such credit elsewhere.

(C) Construction of commercial apartments (shops, offices, godowns etc.)

(i) In case of commercial apartments constructed in RREP (Residential Real Estate Projects), where carpet area of

commercial apartments is not more than 15% of total carpet area of REP, the concessional rate of 5% applies (without ITC). In case of ongoing projects as on 1-4-2019, the promoter has option to pay tax at normal rate after availing Input Tax Credit (ITC).

(ii) In case of commercial apartments in REP (Real Estate Projects) other than RREP, there is no concession and GST rate of 12% applies (with ITC). The statutory provisions are as follows.

(a) In respect of construction of commercial apartments (shops, offices, godowns etc.) in RREP, the GST rate is CGST 2.5% plus SGST/UTGST 2.5% (total 5%) or IGST 5% (without ITC), where supply of services involves transfer of land or undivided share of land - Sr No. 3(ib) of Notification No. 11/2017-CT (Rate) and 8/2017-IT (Rate) both dated 28-6-2017 as amended w.e.f. 1-4-2019.

(b) The GST rate will be CGST 3.75% plus SGST/UTGST 3.75% (total 7.50%) or IGST 7.50% where supply of services ***does not*** involve transfer of land or undivided share of land.

(iii) Other Points discussed below:

- This rate applies to Construction of commercial apartments which commences on or after 1-4-2019. This rate also applies to an ongoing commercial project in RREP, in respect of which the promoter has not exercised option to pay central tax on construction of commercial apartments at full rate (after availing ITC) as specified in ***item 3(ie) or 3(if) of Notification No. 11/2017-CT (Rate) and 8/2017-IT (Rate) both dated 28-6-2017 as amended w.e.f. 1-4-2019.***
- No GST is payable 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***.
- In respect of new projects, the tax (CGST, SGST/UTGST or IGST as applicable) shall be paid in cash by debiting the electronic cash ledger only [without utilising Input Tax Credit].

- In respect of ongoing projects as on 1-4-2019, Input Tax Credit can be availed 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 to Notification No. 11/2017-CT (Rate) dated 28-6-2017.

***(D) Commercial apartments* in *REP* (*other than RREP*) –**

(i) In respect of construction of commercial apartments (shops, offices, godowns etc.) in REP (other than RREP), the GST rate is CGST 6% plus SGST/UTGST 6% (total 12%) or IGST 12% (with ITC), where supply of services involves transfer of land or undivided share of land - Sr No. 3(if)(*i*) of Notification No. 11/2017-CT (Rate) and 8/2017-IT (Rate) both dated 28-6-2017 as amended w.e.f. 1-4-2019.

(ii) The GST rate will be CGST 9% plus SGST/UTGST 9% (total 18%) or IGST 18% where supply of services ***does not*** involve transfer of land or undivided share of land.

(iii) Other Points discussed

- This rate applies to Construction of commercial apartments in REP (Other than RREP) which commences on or after 1-4-2019. This rate also applies to an ongoing commercial project in REP (other than RREP).
- No GST is payable 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.*
- Input Tax Credit is available.

Note: Pl refer the latest amended notification of rates

2.4 Concept of Input Tax Credit in Real Estate Industry:

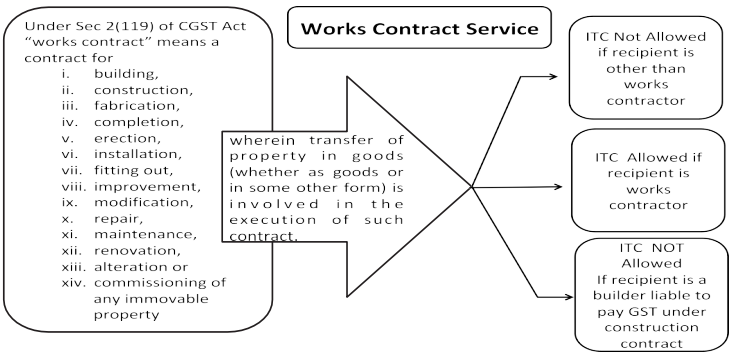
[Pl also read the Input Tax Credit – Works Contract Chapter - 3]

2.4.1 ITC Availability for Works Contract:

ITC is not available on works contract services when supplied for construction of an immovable property except plant and machinery.

However, ITC for works contract can be availed only by person who is in the same line of business and is using such services for further supply of works contract service.

For instance, a building developer may engage services of a sub-contractor for certain portion of the whole work. The sub-contractor will charge GST in the tax invoice raised on the main contractor. The main contractor will be entitled to take ITC on the tax invoice raised by sub-contractor as his output is works contract service. However, if the main contractor provides works contract services to a company engaged in the IT business, the ITC of GST paid on the invoice raised by the contractor will not be available to the IT Company.



This concept further elucidated in the following table:

Nature of service	ITC	Remarks
Cement is used for construction of administration building	not allowed	Building is not plant and machinery.
Cement is used for foundation of pillars supporting a boiler	allowed	As such structural support for plant and machinery is included indefinition of plant and machinery.
Works contract services is provided by sub-contractor to a contractor	allowed	Works contracts service is excluded except when used for providing work contract service

Steel and other structural supports are used for Land, building or any other civil structures; or setting up a telecommunication tower; or pipe lines laid out side the factory premises	not allowed	These are specifically excluded from the termplant and machinery. Note: Credit of tax paid on goods and services used for construction of immovable property including work contract service has been allowed only if such immovable property is in the nature of "plant and machinery".
GST paid on parts of tele communication towers or parts of pipelines.	not allowed	GST paid on any inputs or capital goods used for construction of tele communication towers, pipe line laid out side the factory, will not be available as input tax credit.

2.4.2 Eligible ITC Calculation For Real Estate Projects

Condition related to Input Tax Credit

Notification No. 03/2019 – Central Tax (Rate) dt. 29.03.2019 has substituted certain entries in the parent rate **notification No. 11/2017 – Central Tax (Rate) dt. 28.06.2017** dealing with the applicable rates on supply of various services. Against Sr. No. 3 of the said parent notification, entry no. (i), (ia), (ib), (ic) & (id) has been inserted which provides for the reduced effective rate of 1%/5% in case of residential apartments in any Real Estate Project ("REP") as well as commercial apartments in case of Residential Real Estate Project ("RREP"). Said lower rates shall be mandatory for any new project on or after 01.04.2019. For ongoing projects, an option has been granted to either continue to pay the tax under the old scheme or to shift to the new scheme w.e.f. 01.04.2019 and pay the tax at the lower rates (i.e. 1%/5%). Thus, if the promoter exercises the option to pay the tax as per the new scheme, then the conditions stipulated against the referred entries providing for the lower rates have to be abided. Two such conditions, dealing with ITC reads as under:

"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;

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;"

The first proviso referred above thus provides that the ITC in respect of goods and services used in supplying the services (taxed at the effective rates of 1%/5%) has not been taken except to the extent permissible. Hence the promoter shall be required to calculate the ITC which shall be permissible. Said permissible amount shall be calculated as per **Annexure I (in case of REP other than RREP) and Annexure II (in case of RREP).**

Second proviso referred above further provides that the amount of ITC attributable to construction in a project time of supply of which is on or after 1st April, 2019 (referred as ineligible ITC) shall also be calculated as per the referred Annexure's and the said amount needs to be debited in the electronic credit ledger (if credit is available to the said extent) or to electronic cash ledger (i.e. the balance amount to be paid by cash). It must also be noted that the calculations shall be done separately for each tax type (i.e. separate calculations for CGST, SGST & IGST). Further the working shall be done project-wise.

The calculation of ITC is provided at **Annexure-I & II of the Notification No. 03/2019 – Central Tax (Rate) dt. 29.03.2019**

ANNEXURE I: Said annexure applies to a Real Estate Project which is not a Residential Real Estate Project. As per clause (xix) of the NN 03/2019 – CT (R) a REP wherein the carpet area of the commercial apartments is not more than 15% of the total carpet area of all the apartments shall be construed as a RREP. **Annexure I** applies to only such projects which are not RREP. In other words, it applies to projects

wherein the carpet area of commercial apartments exceeds 15% of the total carpet area of all the apartments. Further the said annexure applies only in the context of the construction of residential portion in the said non-RREP project. Hence a fully commercial project shall not be covered by the said annexure. This is because such project shall be continue to be taxed as per the normal rates (i.e. 12%) with ITC **(subject to reversal as per Rule 42 & 43).**

ANNEXURE II: Methodology given under Annexure II shall apply in case of a Residential Real Estate Project. In case of RREP it may be noted that even the commercial apartments shall be taxed at 5%. Hence even ITC in respect of commercial apartments which have time of supply on or after 01st April, 2019 shall not be admissible. Hence as opposed to Annexure I wherein eligible ITC Te comprised of Tc (ITC attributable to commercial apartments irrespective of the time of supply) and Tr (ITC attributable to residential portion which has time of supply before 31st March, 2019), eligible ITC for RREP ("Te") as per Annexure II shall only comprise of the ITC attributable to commercial as well as residential portion which have time of supply on or before 31st March 2019. This is because any supply of service in respect of commercial as well as residential portion on or after 01st April, 2019 shall be taxable at the reduced effective rate of 1%/5%.

For detail method of calculation of ITC please refer the **Notification No. 03/2019 – Central Tax (Rate) dt. 29.03.2019** which is at **Annexure - A**

FAQs issued by TRU of Ministry of Finance, Govt. of India – Real estate Projects:

For reference of different aspect of real estate project the FAQ issued by Tax Research Unit, Ministry of Finance, Govt. of India and recommendation and decision of GST Council as follows may be referred.

(i) FAQ (Part I) vide Circular F No. 354/32/-TRU dated 7-5-2019 [Please refer to Annexure -1]

(ii) FAQ (Part II) vide Circular F. No. 354/32/2019-TRU dated 14-5-2019 [Please refer Annexure -II]

RATES OF GST FOR WORKS CONTRACT

3

[As per Notification No.11/2017-Central Tax (Rate) dated 28.06.2017 as amended by Notification No. 20/2017-Central Tax (Rate) dated 22.08.2017, Notification no. 24/2017-Central Tax (Rate) dated 21.09.2017 & Notification No. 01/2018-Central Tax (Rate)]

SL No.	Heading	Tax Rate
1	Construction of 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	18%
2	Composite supply of works contract	18%
3	Composite supply of Works contract to the Government, local authority or a governmental authority by way of construction, erection, commissioning, installation, completion, fitting out, repair, maintenance, renovation, or alteration of: Historical monument, archaeological site or remains of national importance Canal, dam or other irrigation works Pipeline conduit or plant for ❑ Water treatment ❑ Watersupply ❑ Sewerage treatment/disposal	12%

	a civil structure or any other original works meant predominantly for use other than for commerce, industry, or any other business or profession a structure meant predominantly for use as ❑ an educational ❑ a clinical ❑ an art or cultural establishment ❑ a residential complex predominantly meant for self-use or the use of theiremployees	
4	Composite supply of works contract supplied by way of construction, erection, commissioning, installation, completion, fitting out, repair, maintenance, renovation, or alteration of: • a road, bridge, tunnel, or terminal for road transportation for use by general public. • a civil structure or any other original works pertaining to a scheme under Jawaharlal Nehru NationalUrban Renewal Mission or Rajiv Awaas Yojana • a civil structure or any other original works pertaining to the "ln-situ redevelopment of existing slums using land as a resource, under the Housing for All (Urban) Mission/ Pradhan Mantri Awas Yojana (Urban); • a civil structure or any other original works pertaining to the "Beneficiary led individual house construction/ enhancement" under the Housing for All (Urban) Mission/Pradhan Mantri Awas Yojana	12%

	• a civil structure or any other original works pertaining to the "Economically Weaker Section (EWS) houses" constructed under the Affordable Housing in partnership by State or Union territory or local authority or urban development authority under the Housing for All(Urban)Mission/Pradhan Mantri Awas Yojana(Urban) • a civil structure or any other original works pertaining to the "houses constructed or acquired underthe Credit Linked Subsidy Scheme for Economically Weaker Section (EWS)/ Lower Income Group (LIG)/ Middle Income Group-1 (MlG-1)/ Middle Income Group-2 (MlG-2)" under the Housing for All (Urban) Mission/ Pradhan Mantri Awas Yojana (Urban) • a pollution control or effluent treatment plant, except located as a part of a factory • a structure meant for funeral, burial or cremation of deceased • a building owned by an entity registered under section 12AA of the Income Tax Act, 1961 (43 of 1961),which is used for carrying out the activities of providing, centralised cooking or distribution, for mid-day meals under the mid-day meal scheme sponsored by the Central Government, State Government, Union territory or localauthorities." • railways, excluding monorail and metro • a single residential unit otherwise than as a part of a residential complex	

	• low-cost houses up to a carpet area of 60 square metres per house in a housing project approved by competent authority empowered under the 'Scheme of Affordable Housing in Partnership' framed by the Ministry of Housing and Urban Poverty Alleviation, Government ofIndia • post-harvest storage infrastructure for agricultural produce including a cold storage for such purposes • mechanised food grain handling system, machinery or equipment for units processing agricultural produce as food stuff excluding alcoholicbeverages	
5	Services provided to the Central Government, State Government, Union Territory, a local authority or a governmental authority by way of construction, erection, commissioning, installation, completion, fitting out, repair, maintenance, renovation, or alteration of– (a) a civil structure or any other original works meant predominantly for use other than for commerce, industry, or any other business or profession; (b) a structure meant predominantly for useas (i) aneducational, (ii) a clinical,or (iii) an art or cultural establishment;or (c) a residential complex predominantly meant for self- use or the use of their employees or other persons specified in paragraph 3 of the Schedule III of the Central Goods and Services Tax Act,2017	12%

6	Composite supply of works contract as defined in clause (119) of section 2 of the Central Goods and Services Tax Act, 2017 provided by a sub-contractor to the main contractor providing services specified in item (iii) or item (vi) (constructions made under the government scheme of pradhan mantra awasyojna) to the Central Government, State Government, Union territory, a local authority, a Governmental Authority or a Government Entity. Provided that where the services are supplied to a Government Entity, they should have been procured by the said entity in relation to a work entrusted to it by the Central Government, State Government, Union territory or local authority, as the case may be.	12%
7	Composite supply of works contract as defined in clause (119) of section 2 of the Central Goods and Services Tax Act, 2017 provided by a sub-contractor to the main contractor providing services specified i.e. construction services other than above, to the Central Government, State Government, Union territory, a local authority, a Governmental Authority or a Government Entity. Provided that where the services are supplied to a Government Entity, they should have been procured by the said entity in relation to a work entrusted to it by the Central Government, State Government, Union territory or local authority, as the case may be.	5%

Note: The government has issued a series of notifications from Notification No. 3/2019-CT(R) to 9/2019-CT(R) all dated 29/3/2019 with an attempt to reduce the GST impact on the Real Estate Sector. By issue of Notification no 03/2019 (rate) dt 29.03.2019 [Please refer Annexure -III] and Notification no 04/2019 (rate) dt 29.03.2019 [Please refer Annexure -IV] made major over hauling to above notification no 11/2017 dt 28.06.2017. So Notification 11/2017 dt 28.06.2017 must be read with both the above said notifications dt 29.03.2019 which have amended entries at serial no. 3(i), 3(ii), 3(iv),3(v),3(vi), 3(xii), 16(ii) and 39 of original notification.

The Authority of Advance Ruling in case of **NBCC (India) Ltd.[2018] 98 taxmann.com 333 (AAR - New Delhi)/[2018] 70 GST 662 (AAR - New Delhi)/[2018] 18 GSTL 724 (AAR - New Delhi)** held that

Ministry of Housing and Urban Affairs (MoHUA), Government of India, under a memorandum of undertaking (MOU), has appointed applicant as executing agency for redevelopment of certain colonies in Delhi by constructing of dwelling units, commercial space and supporting infrastructure and maintaining thereof for thirty years. In terms of MOU dated 25-10-2016, applicant has announced sale of commercial super built up area on behalf of MoHUA and hence is covered under definition of 'agent' under section 2(5), 'supplier' under section 2(105) and 'taxable person' under section 2(107). [Para 133]

4.5.3. The Authority of Advance Ruling in case of **Madhya Pradesh Paschim Kshetra Vidyut Vitaran Company Ltd., *In re* [2018] 97 taxmann.com 586 (AAR - MADHYA PRADESH)/[2018] 17 GSTL 700 (AAR - MADHYA PRADESH)** held that

Applicant is a wholly owned subsidiary of M.P. Power Management Co. Ltd. engaged in construction of electricity distribution lines, sub-stations and other infrastructure for sale of electricity. It undertakes projects of Government relating to strengthening of power distribution network and rural electrification for public welfare, ADB funding project, scheme for strengthening of Transmission and Distribution systems projects, feeder separation project, etc. with help of contractor. Holding company of applicant is wholly owned by Government of M.P. and since Government of M.P. possess full control over applicant, applicant is covered under definition of Govt. entity. However, on perusal of Memorandum of Association it is observed that projects under various Government schemes are carried out for business purpose. Thus, applicant will not be entitled for benefit of concessional rate of GST at rate of 12 per cent for said projects in terms of Notification No. 24 of 2017-Central Tax (Rate), dated 21-9-2017 **read with Notification No. 31/2017-Central Tax (Rate), dated 13-10-2017.**

4.5.4. The Authority of Advance Ruling in case of **National Hydro Power Corporation Ltd [2018] 100 taxmann.com 16 (AAR - UTTARAKHAND)/[2019] 71 GST 202 (AAR - UTTARAKHAND)/ [2018] 19 GSTL 349 (AAR - UTTARAKHAND)** held that

NHPC has been entrusted with work of construction of road by Ministry of External Affairs, Govt. of India wherein funds will be provided by MEA to NHPC in form of grants. NHPC has sub-contracted said work to PWD. Applicant, being a Government company, has fulfilled all required criteria which leads their activity to exemption under Notification No. 12/2017 - Central Tax (Rate) dated 28-6-2017 and, accordingly supply of service by NHPC to MEA is an exempt service. Since original supply of service, i.e., work contract is exempted, sub-letting of same to PWD is also exempted. [Para 8]

4.5.5. The Authority of Advance Ruling in case of **Madhya Pradesh Madhya Kshetra Vidyut Vitaran Company Ltd., [2019] 101 taxmann.com 99 (AAR - MADHYA PRADESH)/[2019] 71 GST 605 (AAR - MADHYA PRADESH)/[2019] 20 GSTL 788 (AAR - MADHYA PRADESH)** held that

Applicant is engaged in electrification work in rural and urban areas. It is entrusted with various ambitious projects of Central and State Government relating to strengthening of power distribution network. Work has been carried out with help of contractor and work includes both supply of material and erection of same. Projects under schemes of Government are carried out for business purpose and, thus, benefit of concessional Rate of 12 per cent (6 per cent under Central tax and 6 per cent State tax) as per notification is not available to applicant on works pertaining to construction, erection, commissioning, repair or alteration, which are carried out in respect of said projects. Since applicant has awarded work to successful bidder for supply of materials and erection respectively, contract entered by applicant squarely falls under works contract and falls under Notification No. 11/2017 - Central Tax (Rate), dated 28-6-2017 **and applicable rate of tax is 18 per cent**

(9 per cent under Central tax and 9 per cent State tax).*[Paras 7 to 10]*

4.5.6. The Authority of Advance Ruling in case of **Madhya Pradesh Paschim Kshetra Vidyut Vitaran Company Ltd., *In re* [2018] 97 taxmann.com 586 (AAR - MADHYA PRADESH)/[2018] 17 GSTL 700 (AAR - MADHYA PRADESH)** held that

Applicant is a wholly owned subsidiary of M.P. Power Management Co. Ltd. engaged in construction of electricity distribution lines, sub-stations and other infrastructure for sale of electricity. It undertakes projects of Government relating to strengthening of power distribution network and rural electrification for public welfare, ADB funding project, scheme for strengthening of Transmission and Distribution systems projects, feeder separation project, etc. with help of contractor. Holding company of applicant is wholly owned by Government of M.P. and since Government of M.P. possess full control over applicant, applicant is covered under definition of Govt. entity. However, on perusal of Memorandum of Association it is observed that projects under various Government schemes are carried out for business purpose. Applicant will not be entitled for benefit of concessional rate of GST at rate of 12 per cent for said projects in terms of Notification No. 24 of 2017-Central Tax (Rate), dated 21-9-2017 **read with Notification No. 31/2017-Central Tax (***Rate), dated 13-10-2017 and said contract would qualify as 'works contract' taxable under Sr. No. 3 of Notification No. 11 of 2017 - Central Tax (Rate) dated 28-6-2017* **. [Paras 7 and 8]**

4.5.7. The Authority of Advance Ruling in case of **in case of GVS PROJECTS PVT. LTD. 2020 (32) G.S.T.L. 307 (A.A.R. - GST - A.P.)** held that,

"Supply to Government entity - Works contract - Electrification work of "System improvement project for erection of 2 Nos. 33/11 KV Indoor Sub-Stations and their connected lines on ***semi-turnkey basis under Integrated Power Development Scheme (IPDS)*** *to Government company Andhra Pradesh Southern Power*

Distribution Company Limited (APSPDCL) - Rates fixed inclusive of seigniorage charges as fixed by competent authority of State Government - Rate recovered from contract bills for remittance Government - Materials such as Power Transformers, 100 sqmm conductor and Station transformer to be supplied by Department - Contract with APSPDCL single composite contract for supply of said works on semi-turnkey basis under IPDS - Works undertaken by APSPDCL for business purpose - Benefit of concessional rate as per Notification No. 11/2017-C.T. (Rate) as amended by Notification No. 24/2017-C.T. (Rate) not available to applicant - Contract entered by applicant squarely fell under works contract and taxable in terms of Serial No. 3(ii) of said notification at 18% (9% CGST and 9% SGST) - Section 2(119) of Central Goods and Services Tax Act, 2017. [para 6]"

4.5.8. The Authority of Advance Ruling in case of **M/S KAILASH CHANDRA - Advance Ruling No. RAJ/AAR/2018-19/32, dated 31-1-2019, 2019 (21) G.S.T.L. 585 (A.A.R. - GST)** held that

"Works contract - Composite supply - Supply, design, installation, commissioning and testing of solar energy based water pumping systems and operation and maintenance work by applicant amounted to works contract of composite supply - Composite supply was mixed of goods and services and predominant supply was supply of services - Proposed supply to be undertaken for a Government Department - Rate of tax applicable on given service (as it is a Works Contract service) fell under Entry 3(iii) with HSN Code 99544 and be taxed @ 12% (CGST @ 6%, SGST @ 6%). [paras 5, 6]"

The Appellate Authority of Advance Ruling, in case of **M/S Siemens Ltd, 2020 (36) G.S.T.L. 467 (App. A.A.R. - GST - Maharastra.)** held that

Joint Venture responsible to ensure execution of all the six contracts to achieve successful completion notwithstanding the award of work under six separate contracts and notwithstanding the break-up of the Contract Price. Contract being, at all times,

covered by cross fall breach clause, i.e., any breach in any part of the Contract shall be treated as a breach of the entire contract, the two contracts for supply of goods and supply of services are inextricably linked together. From the terms of the contract it is crystal clear that contract of transportation of goods not to be considered in isolation but to be read along with the contract of supply of goods, performance of both of these contracts being interdependent and naturally bundled resulting into composite supply of goods and services under Section 2(30) of Central Goods and Services Tax Act, 2017 with single source responsibility. Contract envisages installation, which involves civil works to erect the structure for execution of the project in its entirety thereby resulting in immovable property. Hence the total project assigned to appellant is composite ***supply of works contract*** *as envisaged under Section 2(119) ibid and taxable @ 18% - Accordingly, transportation services provided by the appellant being part of the whole works contract will be taxable @ 18% as Works Contract services and will not be eligible for the exemption as provided in Serial No. 18 of Notification No. 12/2017-C.T. (Rate) and Notification No. 12/2017-State Tax (Rate).*

INPUT TAX CREDIT FOR WORKS CONTRACT SERVICES

As per 16. (1) of CGST Act, every registered person shall, subject to such conditions and restrictions as may be prescribed and in the manner specified in section 49, be entitled to take credit of input tax charged on any supply of goods or services or both to him which are used or intended to be used in the course or furtherance of his business and the said amount shall be credited to the electronic credit ledger of such person. So a works contractor shall be entitled to take input tax credit under section 16 on all input and input services used in supply of services of works contract – construction contract subject to the provisions of section 17(5). Section 17 (5) of CGST Act, 2017 prescribed provisions for blocking of Input Tax Credit under GST Laws. A registered person is not entitled to avail the full ITC against goods or services received by him under tax invoices, even if input tax credit has been duly credited to his credit ledger. Section 17 (5)(c) and 17 (5) (d) provides for blocking of input tax credit relating to supplies of Works Contracts and goods or services or both received for construction of an immovable property.

The relevant provisions of blockedcredit related to ' Works Contract Service' is reproduced below

Section 17(5) (c) the works contract services when supplied for construction of an immovable property (other than plant and machinery) except where it is an input service for further supply of works contract service.

(d) Goods or services or both received by a taxable person for construction of an immovable property (other than plant and machinery)on his own account including when such goods or services or both are used in the course of furtherance of business."

(6) xxxx

Explanation. — For the purposes of clauses (c) and (d), the expression "construction" includes re-construction, renovation, additions or alterations or repairs, to the extent of capitalisation, to the said immovable property;

The AAR, Karnataka in case of **M/s Embasy Industrial Park Pvt Ltd, 2019 (30) G.S.T.L. 548 (A.A.R. - GST)** while dealing with the ineligibility of ITC decided that

The term construction includes additions to the immovable property to the extent of capitalization. Nowhere is it said that the capitalized amount needs to be declared as in the books of account within the value of immovable property, i.e., buildings. The Accounting Standards which enumerate the classes of fixed assets being land and buildings, furniture and fixtures, etc. does not classify property as movable and immovable property and an asset classified as fixture could still be immovable property within its meaning. In case of any immovable property, if the asset qualifies to be an immovable property but shown as a discrete element in the books of account, it still remains an immovable property. Mere declaration of the same under a different class of fixed assets does not change its nature being an immovable property. The Accounting concepts prescribe for accounting of revenue expenses and capital expenses. If the expenses are in the nature of capital expenses and are related to the fixed assets, then they are capitalized. The definition of construction only states that it includes re-construction, renovation, additions, alterations or repairs to the said immovable property and it is only an inclusive definition and hence construction of an immovable property must be seen in that context.

Explanation.—For the purposes of this Chapter and Chapter VI, the expression "plant and machinery" means apparatus, equipment, and machinery fixed to earth by foundation or structural support that are used for making outward supply of goods or services or both and includes such foundation and structural supports but excludes—

(i) land, building or any other civil structures;

(ii) telecommunication towers; and

(iii) pipelines laid outside the factory premises.

Meaning of 'plant and machinery: For purpose of Chapter V of CGST Act (Input Tax Credit) and Chapter VI of CGST Act (Registration), expression **'plant and machinery'** is defined as follows [*Explanation* below section 17(6) of CGST Act].

"Plant and machinery" means apparatus, equipment, and machinery fixed to earth by foundation or structural support that are used for making outward supply of goods or services or both and includes such foundation and structural supports but excludes - (i) land, building or any other civil structures (ii) telecommunication towers; and (iii) pipelines laid outside the factory premises".

Shed to protect plant and machinery is civil structure and its ITC is not available - ***Maruti Ispat and Energy P Ltd. In re*** **(2018) 99 taxmann.com 103 (AAR-AP).**

Pipeline outside factory for carrying LPG not eligible - ITC of GST paid on goods and services used for construction of Tie-in pipeline, for delivery of re-gasified LNG from FSRU to National Grid is not eligible, as it does not fall within definition of ‹plant and machinery› - **Western Concessions (P.) Ltd.In re [2019] 106 taxmann.com 186 (AAR - Maharashtra).**

Can it be said that building is 'plant'? - Normally, ‹plant› can include ‹building›, as per following case law. However, in view of specific exclusion of building from definition of ‹plant›, it is doubtful if building can be held as ‹plant› for purpose of ITC in GST.

9.5-3 Ineligibility of ITC on pipelines and telecommunication tower

Credit of input tax in respect of pipelines laid outside the factory and telecommunication towers fixed to earth by foundation or structural support including foundation and structural support are not eligible for input tax credit - *Explanation* to section 17 of CGST Act.

Though telecommunication tower, being immovable property, is not eligible for ITC, the Input Tax Credit will be available in respect of other goods used to provide infrastructure (which are movable) and services used for providing infrastructure. These would cover pre-fabricated shelter made of insulating PUF material made of fibres, Electronic Panel, Base Transceiver Station (BTS) and other radio transmission and reception equipment, a diesel generator set, Six poles of 6 to 9 meters length each made of hollow steel galvanized pipes. These are easily removable and hence are 'goods' eligible for ITC.

The Authority of Advance Ruling, Uttarakhand, in case of **M/s *Vindhya Telelinks Ltd.* [2018] 97 taxmann.com 564 (AAR- Uttarakhand) / 2018 (17) G.S.T.L. 649 (A.A.R. Uttarakhand - GST)** has held that

> *the infrastructure provided by the applicant is different from "Telecommunication Tower" and accordingly applicant can avail ITC on GST paid on the goods (Goods and services used for erection of infrastructure for Telecom operators, Poles of heights varying from 7m to 9m erected by applicant used for stringing of fibre and do not contain antennas electronic communications equipment, No cell site where antennae and electronic communication equipment are placed. Infrastructure affixed to earth in such way that without any damage to entire infrastructure it can be moved to another place for use) & services in terms of Section 16(1) of CGST/SGST Act, 2017, consumed while providing the supply in question.*

Distinction between Section 17(5)(c) and Section 17(5)(d) of the CGST Act, 2017:

Section 17(5)(c), deals with works contract services i.e when such services are received under composite contracts and used for the purpose of construction of an immovable property (other than plant and machinery).

Section 17(5)(d), deals with situations when goods or services or both are received under different independent contracts i.e supply of goods and supply of services under separate contracts for the construction of an immovable property (other than plant and machinery).

On perusal of the above provisions it is cleared that

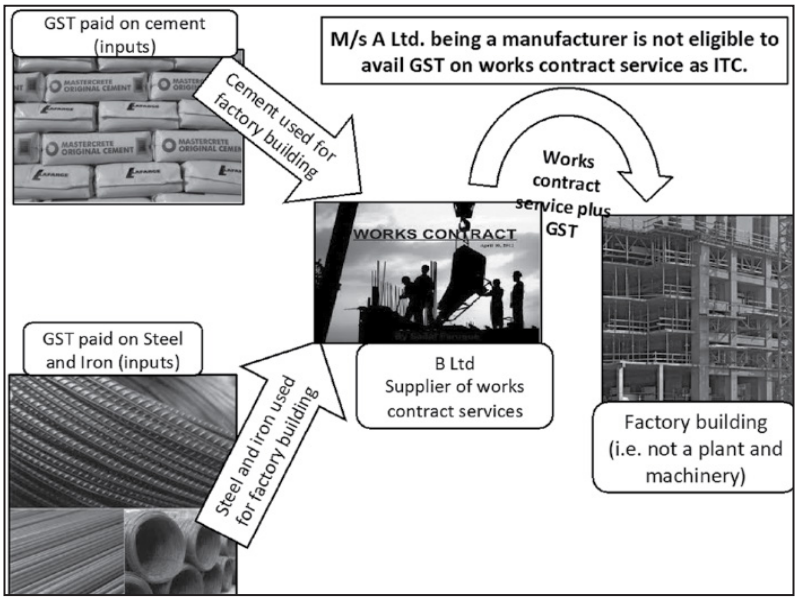
- ITC on Works Contract in relation to construction of immovable property is not available;
- ITC on Works Contract is not available if works contract service for immovable property is to be capitalized in the business;
- ITC is not available on such goods or services or both which are to be used for construction of immovable property;
- ITC on works contract is available if such service is to be used for plant and machinery;
- ITC on works contract is available if such service is to be further supplied by the recipient.

Example:

1. A factory owner gets construct factory shed for his business. Factory shed is an immovable property, therefore input tax paid to the contractor for supply of construction service for factory shed cannot be availed as input tax credit.
2. A building developer may engage services of a sub-contractor for certain portion of the whole work. The sub-contractor will charge GST in the tax invoice raised on the main contractor. The main contractor will be entitled to take ITC on the tax invoice raised by his sub-contractor as his output is works contract service. However, if the main contractor provides works contract service (other than for plant and machinery) to a company say in the IT business, the ITC of GST paid on the invoice raised by the works contractor will not be available to the IT Company.

3. Plant and Machinery in certain cases when affixed permanently to the earth would constitute immovable property. When a works contract is for the construction of plant and machinery, the ITC of the tax paid to the works contractor would be available to the recipient, whatever is the business of the recipient. This is because works contract in respect of plant and machinery comes within the exclusion clause of the negative list and ITC would be available when used in the course or furtherance of business.

Example M/s A Ltd. being a manufacturer of laptops registered under GST. Company appointed M/s B Ltd. for construction of factory building in the factory premises.



M/s A Ltd. being a manufacturer is not eligible to avail GST on works contract service as ITC.

Works contract service

M/s C Ltd.
Sub-contractor supplied works contract services

Works contract service

M/s B Ltd.
Works Contractor

Factory building (i.e. not a plant and machinery)

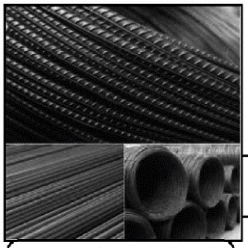
M/s B Ltd. being main contractor received works contract service from sub-contractor by paying GST which is allowed as ITC to the main contractor (i.e. works contractor)

M/s A Ltd. being a manufacturer is not eligible to avail GST on goods or services received for construction of an immovable property on his own account including when such goods or services or both are used in the course or furtherance of business

GST paid on cement (inputs)

Cement used for factory building

GST paid on input service (i.e. labour)



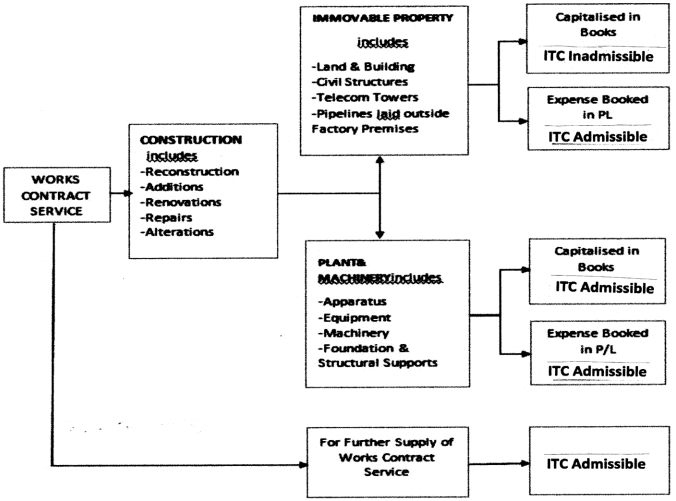
Steel and iron used for factory building

GST paid on Steel and Iron (inputs)

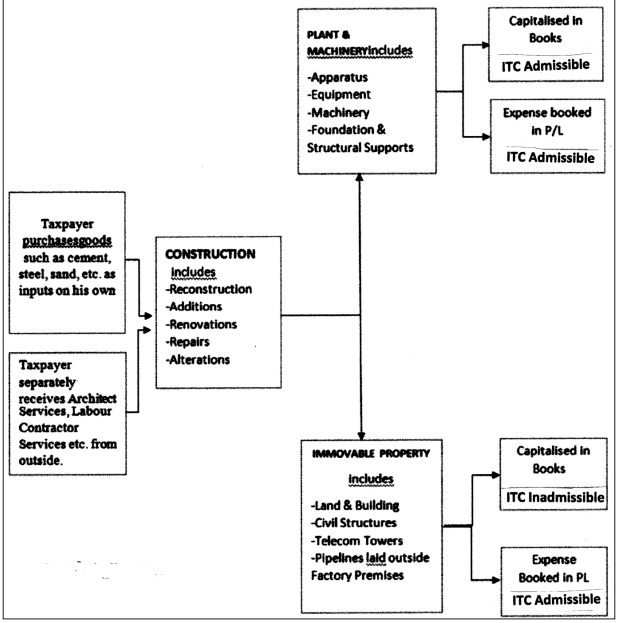
A Ltd.
Factory building
(i.e. not a plant and machinery)

To understand a summary of above sections with the help of two Charts are given below:

Situation -1: Where Works Contract Service is taken for construction of Immovable Property or Plant & Machinery in course or furtherance of business.



Situation – 2: Where the Taxpayer himself purchases the goods and services such as Labour Contract, Architect etc. from outside for construction of Immovable Property in course or furtherance of business.



Therefore, if the owner of the land wishes to construct a factory building on that piece of land, then he has to award works contract services for construction of immovable property i.e. building. In this case he would not be eligible for input tax credit qua the tax charged by the contractor on suchsupplies.

Whether the factory building is plant and machinery or not is another debatable issue. The State authorities have always treated the construction of factory building other than plant and machinery although in a given case it may be possible to argue that it is a part of plant and machinery because it is a place which houses the plant and machinery. Under GST, the factory building would be immovable property.

Another issue regarding factory shed, whether it is immovable property or not? The issue becomes more complex when such shed is not made of bricks and sand but under newer technology where it can be erected within a day's time by using materials or fabrications which are brought in CKD condition. Well such cases would be the grey area always under GST on account of change in technology. The settled law is that law must move withtimes.

Similarly if a taxable person purchases steel, cement, sand etc. and is charged the GST on invoices and if such goods are used for construction of the factory guest house, then he will not be allowed the input tax credit in terms of section17(5)(d).

From above it is clear that, ITC would not be available to aregistered person even if tax paid on goods and services used for the construction of immovable property. In other words, ITC is disallowed on works contract services or tax paid on goods or services used for the construction of immovable property. However, ITC is allowed on GST paid by sub-contractor services who provide input services to main contractor.

Works contract has been defined u/s 2(119) of CGST Act, 2017 which covers contract for 14 types of transactions where in transfer of property in goods or some other form is involved in the execution of such contracts. So, section 17(5) © & (d) restricts ITC of GST aid on

goods or services used for construction of immovable property other than plant and machinery. But there is no restriction on availament of ITC for goods or services used in post construction activities undertaken by the works contractor.So, in view of above ITC on works contract services used for the activities such as fitting out furniture, indoor & outdoor decorating activities, activities like, DG sets, Lifts, painting & polishing, are post construction activities to immovable property. It is advisable to have a separate contract of such services to immovable property to avid dispute on availment of ITC. It is also required to maintain proper books of accounts of expenditure on separate activities and GST paid there on to claim ITC. Thus,transactions of expenditures towards post construction activities reconstruction, renovation, additions, alterations or repairs if capitalized in the books of accounts ITC can not be denied to a registered person.

Relevant Judicial pronouncement/Advance Rulings by AAR/ AAAR under GST Regime produced below.

Hon'ble High Court of Odisha in case of**Safari Retreats Private Limited v. Chief Commissioner of CGST, 2019 (25) G.S.T.L. 341 (Ori.)** held that

> *The very purpose of the Act is to make the uniform provision for levy collection of tax, intra-State supply of goods and services both Central or State and to prevent multi taxation. Therefore, the contention which has been raised by the Learned Counsel for the petitioners keeping in mind the provisions of Section 16(1)(2) where restriction has been put forward by the legislation for claiming eligibility for input credit has been described in Section 16(1) and the benefit of apportionment is subject to Section 17(1) and (2). While considering the provisions of Section 17(5)(d), the narrow construction of interpretation put forward by the Department is frustrating the very objective of the Act, inasmuch as the petitioner in that case has to pay huge amount without any basis. Further, the petitioner would have paid GST if it disposed of the property after the completion certificate is granted and in case*

the property is sold prior to completion certificate, he would not be required to pay GST. But here he is retaining the property and is not using for his own purpose but he is letting out the property on which he is covered under the GST, but still he has to pay huge amount of GST, to which he is not liable. In that view of the matter, in our considered opinion the provision of Section 17(5)(d) is to be read down and the narrow restriction as imposed, reading of the provision by the Department, is not required to be accepted, inasmuch as keeping in mind the language used in (1999) 2 SCC 361, the very purpose of the credit is to give benefit to the assessee. In that view of the matter, if the assessee is required to pay GST on the rental income arising out of the investment on which he has paid GST, it is required to have the input credit on the GST, which is required to pay under Section 17(5)(d) of the Central Goods and Services Tax Act, 2017On a case to case basis, the High court has granted the credit. In as much as the said section is found to be valid by the Hon'ble High court, we do not find any reason to go beyond the Statutory Provisions.

However a SLP is filed by Revenue is pending at Hon'ble Supreme court of India

Authority of Advance Ruling, Maharastra, in case of **Nipro India Corporation Ltd, 2018 (18) G.S.T.L. 289 (A.A.R. Maharashtra - GST)** held that

The issue raised is related to admissibility of ITC. Costs for mechanical works and electrical works incurred in extension of assessee's manufacturing unit. Internal and domestic water distribution supply system installed in order to comply with mandatory requirements of Factories Act, 1948 and Maharashtra Factory Rules, 1963, not eligible as goods used for construction of immovable property not used for making outward supply of goods or services. External sewage system used partly for disposal of sewage generated during production process and Partly admissible. Internal sewerage and venting system used for disposal of sewage generated during production process, admissible - Gardening water supply system not used in furtherance of business and not

eligible - Internal fire hydrant system, Sprinkler works, Extinguishers, Fire documentation not being "plant and machinery", not eligible - Other works held admissible expect for civil constructions if any - Sections 16 and 17 of Central Goods and Services Tax Act, 2017. [paras 5, 7]

Authority of Advance Ruling, **Rajasthan, in case of Rambagh Palace Hotels Pvt Ltd. 2019 (24) G.S.T.L. 691 (A.A.R. Rjasthan - GST)** held taht

Applicant being a hotelier, said activity of repair and maintenance of Hotel is definitely in furtherance of business. However, ITC of GST paid on construction material, i.e., cement, concrete, bricks, paints, etc., purchased on own account and/or GST paid in engaging manpower for construction not available to extent of capitalization of said goods and/or services in terms of Section 17(5)(d) of Central Goods and Services Tax Act, 2017 read with its explanation. Similarly, if such repair and maintenance is carried out under composite works contract even then ITC shall not be admissible in terms of Section 17(5)(c) ibid read with explanation ibid - Sections 16 and 17 of Central Goods and Services Tax Act, 2017.

Installation of Electrical and Sanitary Fittings in Hotel amounting to emergence of immovable property. Hence, ITC of GST paid on such fittings purchased on own account and/or GST paid in engaging manpower for installation not available to extent of capitalization of said goods and services in terms of Section 17(5)(d) of Central Goods and Services Tax Act, 2017 read with its explanation. Similarly, if such installation is carried out under composite works contract even then ITC shall not be admissible in terms of Section 17(5)(c)

Fabrication and repair of Hotel Furniture and Fixtures / Purchase of new furniture are not immovable property in most cases. Therefore, ITC of GST paid on goods and/or manpower used either for fabrication of furniture or for repair of existing furniture is admissible. Similarly, ITC would also be admissible on acquiring new furniture for Hotel. However, in case of immovable furniture

or fixtures, it would be covered under works contract and ITC would not be available to extent of capitalization of these goods in the books of accounts.

Authority of Advance Ruling in case of **Nagpur Mukangarh Highways Pvt Ltd, 2018 (18) G.S.T.L. 652 (A.A.R. Rajasthan - GST)** held that

Construction of Road/bridges on Design, Build, Operate and Transfer (DBOT) basis in terms of provisions of GST law, is a composite supply of service and GST is liable to be paid on full value of construction during construction period, notwithstanding receipt of some consideration being spread to further period. As regards Input Tax Credit, since applicant is constructing road and bridges on behalf of Government and is not owning or capitalising immovable property so constructed, restrictions contained in Sections 17(5)(c) and 17(5)(d) of Central Goods and Services Tax Act, 2017, are not applicable. Thus, applicant entitled to full ITC during construction period - Sections 16 and 17 of Central Goods and Services Tax Act, 2017.

Applicant asserting that 50% of project cost received as annuity with interest during Operate and Maintain (O&M) period, is exempted service. Said contention of the applicant is not tenable because Entry No. 23A of Notification No. 12/2017-C.T. (Rate) does not pertain to Service Accounting Code 9954 applicable to aforesaid services - Hence GST is payable on entire cost of project during period of construction and in view of this, no question of apportionment of ITC and its reversal during O & M period arise as no exempted service supplied

Authority of Advance Ruling in case of **Dholera Industrial City Development Project Ltd, 2019 (29) G.S.T.L. 40 (A.A.R. – GST, Gujarat)** held as follows.

Input Tax Credit is admissible to Works Contract service only if it is an input service for further supply of output service of works contract. Thus, eligibility of credit has to be decided on case to case basis after ensuring that work of construction & erection,

maintenance, repair conducted by applicant is covered under works contract or not. No specific ruling given - Section 17(5) of Central Goods and Services Tax Act, 2017.

In case of M/s. Sree Varalakshmi Mahaal LLP (GST AAR Tamil Nadu) (03.01.20)

*It has been ruled that "No Input Tax Credit is available against any goods or services received by the applicant for construction of the Marriage Hall on his own account even if used in course or furtherance of his business of renting the place." Even though the taxpayer placed reliance on the Orissa Judgement, the same was not considered by the AAR authorities stating as follows at the end of the judgement," The applicant has further placed reliance on the judgment rendered by the Hon'ble High Court Orissa in the case of "**Safari Retreats Private Limited v Chief Commissioner of GST** ", It is seen that in the said case, the prayers are (a) eligibility to credit of input tax paid on goods/services used for construction which is rented for commercial purposes (b) to hold Section 17(5) (d) as ultra-vires. While the Hon'ble High court has granted the prayer at (a) has not accepted the prayer at (b) stating that they are not inclined to hold the provision ultra-vires. On a case to case basis, the High court has granted the credit. In as much as the said section is found to be valid by the Hon'ble High court, we do not find any reason to go beyond the Statutory Provisions.*

The Authority of Advance Ruling in case of M/s **KSR & Company (GST AAR Andhra Pradesh)Advance Ruling No. AAR 07/AP/GST/2019 Date of Judgement / Order: 14/02/2019** held that

"Input Tax Credit - Works Contract service provided by applicant for construction of road for the State of A.P. and not for himself - Applicant eligible for Input Tax Credit (ITC) in respect of GST paid on goods and services in execution of "Works Contracts" - Input Tax Credit restriction under Sections 17(5)(c) and 17(5)(d) of Central Goods and Services Tax Act, 2017 not applicable to applicant, his output being works contract services. [para 7]"

Appellate Authority of Advance Ruling in casse of **M/s Wework India Management Pvt Ltd, 2020 (37) G.S.T.L. 136 (App. A.A.R. - GST - Kar.)**

Assessee in business of supplying shared workspace/office space for various companies and individuals. Detachable glass partitions fixed to ground with help of nuts and bolts to create office space. Addition of glass partitions qualifies as 'construction' under Explanation to Section 17(5) of Central Goods and Services Tax Act, 2017. Such construction done by assessee on his own account. Glass partitions not permanent and not embedded to earth. Partitions can be dismantled and moved according to requirements of clients. Even though fixed to earth with nuts and bolts, partitions can be dismantled without demolishing civil structure. Detachable sliding and stackable glass partitions do not qualify as immovable property. Such glass partitions accounted in books of account as fixed assets under head "furniture and fixtures" and not capitalised as immovable property but rather as movable assets. Observation of lower Authority since there was certain degree of permanence in office space provided, partitions had to be considered as immovable property, not correct. ***Input tax credit*** *can be availed by assessee on detachable sliding and stackable glass partitions which are movable in*

In accordance with Section 17(5)(d) together with its explanation to triggering the restriction under this clause, certain criteria have to be satisfied viz : (a) The goods or services should be used for construction of immovable property, (b) The construction can be in the form of re-construction, renovation, additions or alterations or repairs to the immovable property, (c) The construction should be on his own account, (d) The goods or services received are capitalised in the books of account. Only when all the above criteria are satisfied can it be said that the credit is restricted and the goods and services are ineligible for input tax credit. To ascertain whether the item is permanently attached to earth, many Courts have consistently used two-fold tests - (i) the extent of annexation and (ii) the object of annexation. The extent of annexation means

annexing the fixture or object by which it ceases to be detachable. It would need to be demolished if one were to remove it. The object of annexation test lays down that where a movable property gets annexed with an immovable property, if the intent of annexation is of permanent beneficial enjoyment of the immovable property, then the fixture becomes an immovable property. If the intent of annexation is the beneficial enjoyment of the movable property, then the property still remains movable.

Authority of Advance Ruling in case of **Keshav Cement and Infra Limited, 2019 (31) G.S.T.L. 628 (A.A.R. - GST)** held that

ITC on inputs is admissible only if these have not been capitalized. From list of goods submitted by applicant, it cannot be inferred as to whether these have been capitalized or not. Accordingly, no specific ruling can be given on these items. As regards credit on Plant and Machinery, only those apparatus, equipment, and machinery which are fixed to earth by foundation or structural support alone are entitled to qualify as plant and machinery for admissibility of credit, otherwise not.

Authority of Advance Ruling in case of **Las Palmas Co-operative Housing Society Limited, 2020 (34) G.S.T.L. 293 (A.A.R. - GST - Mah.)**

GST is paid on replacement of existing lift / elevator to registered vendor by Co-operative Housing Society Lift, after erection and installation becomes an immovable property and considered as integral part of building itself. Manufacture, Supply, Installation and Commissioning of lifts/elevators in nature of works contract activity which results in creation of immovable property. Society not entitled to take credit of such tax for payment of GST on maintenance charges collected from its members - Section 17 of Central Goods and Services Tax Act, 2017.

Authority of Advance Ruling in case of **M/s Jabalpur Entertainment Complexes P. Ltd. 2018 (17) G.S.T.L. 690 (A.A.R. - GST) / 97 taxmann.com 587 (AAR-MP)**

We hold that the ITC of GST paid on goods purchased for the purpose of maintenance of Mall such as Vitrified Tiles, Marble, Granite, ACP Sheets, Steel Plates, TMT Tor (Saria), Bricks, Cement, Paint, Chemicals, Sanitary Items like wash basin, urinal pots and toilet accessories shall not be admissible to the Applicant in terms of clause (c) of Section 17(5) of the GST Act, 2017;

We hold that the ITC of GST paid on Works Contract Service received by the Applicant for maintenance contract of building shall not be available to them in terms of clause (d) of Section 17(5) of the GST Act, 2017.

Authority of Advance Ruling in case of **M/S Tewari Warehousing Co Pvt Ltd, 2019 (22) G.S.T.L. 156 (A.A.R. WB - GST)/ [2019] 102 taxmann.com 295 (AAR-WB)** it is held that

Applicant pleading that construction of warehouse using pre-fabricated technology on concrete floor not leading to emergence of immovable property because said pre-fabricated structure capable of being dismantled and moved. Said plea not acceptable .Undisputedly, applicant is constructing said warehouse for long term in as much lease of land is for 30 years extendable further. Thus complete warehouse is not for temporary enjoyment but a permanent facility for storage. Pre-fabricated detachable material used to construct warehouse on load bearing ACC floor is not an end product in itself. With advancement of technology, method of construction may change but that does not mean that emergent product, embedded to earth, is not immovable. Construction of load bearing ACC floor, where warehoused goods would be kept, indicates its criticality in entire construction and enjoyment of warehouse. Resultant product being immovable, ITC credit of pre-fabricated material used in its construction, not admissible - Section 17(5) of Central Goods and Services Tax Act, 2017.

The AAR, Karnataka in case of **M/s Embasy Industrial Park Pvt Ltd,2019 (30) G.S.T.L. 548 (A.A.R. - GST)** while dealing with the ineligibility of ITC decided that

Assessee engaged in building and managing industrial warehouse spaces for consumers and industrial centres. Assessee procuring various goods and services from various contractors for fitting out of warehouse spaces and providing subject space with all facilities and infrastructure facility on rent to various industrial consumers and manufacturers. Assessee in business of providing rental commercial space and goods or services or both obtained by assessee in course or furtherance of business. Admission by assessee that works of electrical, structural, lighting, physical security and fire-fighting works are in nature of Works Contract services. Nature of supplies made to assessee under a Works Contract service and outcome of contract was to be immovable property. Assessee's argument that Input Tax Credit must not be disallowed as it was not capitalized as immovable property in its books of account. Merely accounting of immovable property as movable property in books of account not to divest exact nature of item and when what is procured is an immovable property, it remains immovable property, no matter how it is accounted. Input being Works Contract service as admitted by assessee itself and a composite supply involving both goods and services with outcome being an immovable property. Items are fixed to earth by foundation or structural support and are intended to be used "for" making an outward supply of provision of rental services. Items do not have independent existence and are part and parcel of entire building, a building with infrastructure. Intention of assessee to give on rent, space with all infrastructure and once these immovable properties come into existence, they get merged into common "building space with modern infrastructure and facilities" and hence excluded from the definition of "plant and machinery". Input GST credit cannot be availed by assessee on inputs, i.e., Electrical Works, Pumps, Pumping systems and tanks, Lighting system, Physical security system and Fire System.

In case of M/s Palmas Co-Operative Housing Society Limited (GST AARMaharashtra)-AdvanceRulingNo.No.GST-ARA-31/2019-20/B-13 – Order dated.22.01.2020, **2020-VIL-37-AAR GST – The** Applicant

plans to replace the existing **Lift/Elevator in their society building**, along with its supporting structures – whether the applicant is entitled to claim Input Tax Credit of GST paid on replacement of existing lift/ elevator. It is held thatafter being erected and installed the lift would become an immovable property as it is attached to the building itself. Manufacture, Supply, Installation and Commissioning of Lifts/ Elevators is in the nature of Works Contract activity which results in creation of an immovable property. Hence in view of Explanation to Section 17 of the CGST Act, **the applicant is not entitled to Input Tax Credit of GST paid on replacement of existing Lift/Elevator, in its premises**

It may be noted that, – Apex Court incase of Sirpur Paper Mills upheld the view that where plant & Machinery are capable of being dismantled and sold without being destroyed and are only embedded to the earth because of operational efficiency, it is not an immovable property

The Appellate Authority of Advance Ruling in case of , M/s NMDC Ltd, 2020-VIL-29-AAAR – GST – Chhattisgarh while answering the question that is**,** whether input tax credit can be availed on signaling & telecommunication system, mechanical and structural works in relation to Railway Siding; and whether input tax credit can be availed on execution of P-Way, Civil, overhead electrification, general electrical and signaling & telecommunication works for the proposed block station yard in relation to private Railway Siding – Civil structure/ immovable property or "plant and machinery" held that

> *"the instant contract consists of transfer of property in goods, coupled with supply of services which leads to the inevitable conclusion that this is a case of Works contract, covered under the definition of Works Contract as defined under section 2(119) of the CGST Act, 2017 – the said project of Private Railway siding awarded to the Contractor by the Appellant is not as simple or movable. The work consists of an entire system comprising of a variety of different structures which are installed after a lot of prior work which involves Civil work, Civil engineering, Ground work, supply, Foundation work, Fabrication, Erection of Building Steel Structures,*

sheds, Block cabin, Railway allied works, Signaling & telecommunication works, Construction of Railway Staff quarters, Station building etc. The magnitude of project covers a large area, tailored specifically to fit the dimensions and orientation of the needs of the project. The said project of private Railway siding, consists of civil structures with foundations are immovable in nature. Thus, the project of construction of Private Railway siding fulfils the conditions of it being an immovable property. ***To apply the term "used for" in the definition for plant and machinery, there should be a nexus between the impugned items on which ITC is being claimed and "outward supply".*** *In the present case the project of private Railway siding, consists of civil structures with foundations etc. will render such nexus tenuous – Input* ***Tax Credit will not be available as railway siding*** *is not plant and machinery as defined in Section 17 of CGST Act, 2017 – there is no merit in the appeal filed by the Appellant and the same is rejected.*

Note: *Till 31st March, 2019 the* ***input tax credit (ITC)*** *was available to supplier of construction services. But* ***notification no. 3/2019, CT(Rate) dt. 29.3.2019*** *has put certain conditions for Input Tax Credit 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. However, there is no bar in taking ITC for the supply of construction services mentioned against entries No. 3(ie), (if) and for residual entry at S. No.3 (xii). Assesse can avail ITC for these entries.* ***Reverse Charge Mechanism:*** *RCM is applicable as per* ***Notification No. 3/2019-Central Tax (Rate) dated. 29.03.2019 . For input Tax Credit in respect of Real Estate Project, pl refer to the Chapter.***

PLACE OF SUPPLY AND TIME OF SUPPLY IN RESPECT OF WORKS CONTRACT

5.1 Place of Supply in respect of Works Contract

In terms of section 12(3) of IGST Act, 2017 the place of supply of services, directly in relation to an immovable property, including services provided by architects, interior decorators, surveyors, engineers and other related experts or estate agents, any service provided by way of grant of rights to use immovable propertyor for carrying out co-ordination of construction services and any services ancillary to the services referred to hereinabove shall **be the location at which immovable property is located or intendedto belocated.** The phrase 'intended to be located' is important for pre-construction services.

In terms of section 7(3) of IGST Act, 2017, supply of services, where the location of the supplier and the place of supply are in

(a) Two different States;

(b) Two different Union Territories;or

(c) A State and a UnionTerritory,

shall be treated as supply of services in the course of inter-State trade or commerce.

For example, if a contractor in Maharashtra is given a contract to construct a commercial building in Andhra Pradesh (AP), then all the supplies by the supplier who is in Maharashtra (unless he is registered in AP) would be subject toIGST.

The question therefore can be whether it is advisable for a contract or to register its site as a registered place in a State where he is not other wise registered.

It is possible to argue that such person can register as casual taxable person. But this provision of casual taxable person is meant for specific situation. A construction contract which normally takes more than 3 months or almost a year to complete the services, cannot be registered

as a casual taxable person. Ideally, therefore, if the contract in the other State is likely to continue for longer, it would be wiser to take registration under the main section 22 rather than a casual taxable person.

Term casual taxable person is defined in section 2(20) which read as follows:

"Casual taxable person means a person who occasionally undertakes transactions involving supply of goods or services or both in the course of furtherance of business whether as principal, agent or in any other capacity in a State or a Union Territory where he has no fixed place of business.

Section 27 refers to specific provision related to casual taxable person or a non-resident taxable person.

A non-resident taxable person is defined in section 2(77) to mean any person who occasionally undertake transactions involving supply of goods or services or both, whether as principal or agent or in any other capacity, but who has no fixed place of business or residence in India."

There are specific provisions for a casual taxable person; he has to deposit the estimated liability in advance. The registration shall be valid for 90 days and such person can make taxable supplies only after issuance of certificate of registration. In case of an extension of time beyond 90 days he shall be called upon to deposit additional amount of tax equivalent to estimated tax liability during the extensionperiod.

Therefore taking registration as casual taxable person would not be advisable. While taking the decision for separate registration for the construction site, one must consider the cost-benefit ratio, specifically the administrative cost benefits of Input Tax Credit.

At times maintaining a separate office especially with the present GST regime requiring lot of procedural formalities and also have financial impact. One must think twice before while establishing a additional office in a separate State. As you are aware, in terms of section 25(4) of CGST Act, 2017, a person who has obtained or is required to obtain more than one registration whether in one State or Union Territory or more than one State or Union Territory shall, in respect of each such registration, be treated as distinct person for the purpose of this Act. Therefore, if a small works contract is to be undertaken in another State, like fixing of grills windows etc., which would not take more

than a month's time to complete the works contract, it would be ideal to collect IGST and pay.

5.2 Time of supply in respect of works contract – Taxable Event

Let us go to the provisions relating to time of supply of service. Section 13(2) of the CGST Act lays down the various possibilities as follows:

Time of Supply of Services – Section 13	
Description of Event	**Time of Supply**
Normal Case–Thumb rule	Earlier of the following: 1. Date of Issue of Invoice (if Invoice issued within 30 days of supply of services)
	2. Date of Receipt of Payment or Date of Provision of Service (if Invoice not issued within 30 days)
	3. The date on which recipient shows receipt of service in his book
Liability under Reverse Charge basis	1. Date of payment entered into books of account of Recipients or payment debited in bank account
	2. Date immediately following 60 days from date of Issue of Invoice or any other documents
In any other case	Date of receipt of service in the books of account of the Recipient

The works contract in relation to immovable property would also include construction of properties or any thing attached to ground which need not to be a building, for example plant and machinery, platforms etc. One can refer to the case laws in relation to immovable property under the sales tax / VAT laws or central excise laws/income tax laws and even under GST Laws to determine whether the contract is for movable or immovable property. The test is the contract must result into immovable property or should be for immovableproperty.

The works contracts of immovable property are normally completed over the months or may be years. There is a specific provision for continuous supply of goods and continuous supply ofservices.

Section 2(33) of CGST Act, 2017 provides that **"Continuous supply of services"** means a supply of services which is provided, or agreed to be provided, continuously or on recurrent basis, under a contract, for a period exceeding three months with periodic payment obligations

and includes supply of such services as the Government may, subject to such conditions, as it may, by notification, specify.

The construction contract would be perse continuous supply because the contract normally continues over a period of time, at least for more than 3 months and there is normally condition to make periodic payment.

The time of supply provision u/s section 13(2) refers to the period for raising of invoices. Section 31(2) makes it mandatory for the registered person supplying taxable service to issue a tax invoice before or after the service but within a prescribed period. The time prescribed for raising of invoice in terms of Rule 47 is 30 days from the date of supply of service. Therefore, all the contracts of immovable property should ideally fix the time for raising the invoice. For example, in the contract for sale of under-construction flats, one would normally find the stages at which the payment has to be made by the buyer of the flat like completion of first slab, second slab, etc. therefore, no sooner as the work of the first slab is completed and is certified as completed by the architect the developer must send a notice to the persons from whom he has to recover the installment.

Section 31(5) reads as follows:

"Subject to the provisions of clause (d) of sub-section (3), in case of continuous supply of services,— (a) where the due date of payment is ascertainable from the contract, the invoice shall be issued on or before the due date of payment; (b) where the due date of payment is not as certainable from the contract, the invoice shall be issued before or at the time when the supplier of service receives the payment; (c) where the payment is linked to the completion of an event, the invoice shall be issued on or before the date of completion of thatevent".

The above provision makes it clear that it would be wise to define the due date of payment in the contract to avoid any litigation.

In case of the composite supply of goods and services, the time of supply is determined in terms of section 13. Normally, the contracts which are not in relation to immovable property are completed within 3 months and therefore such contract would fit in section 13(2). However, there may be contracts of repair of heavy machinery where the goods are sent for repairs and the repairs takes more than 3 months. In that case, such contract would also be continuous supply of service. However, an area of doubt can be whether such contract can be stated to be provided continuously or on are current basis under a contract. Normally, in case of repair contracts the time period is not fixed. There is no provision for periodic payment obligations. Section 2(33) also refers to the notifications by the Central Government.

VALUATION OF WORKS CONTRACT

6.1 Valuation of Works Contract

6.1.1 Consideration:

Section 2(31) of CGST Act, 2017 defines 'consideration' comprehensively to include any payment made or to be made, whether in money or otherwise, in respect of, in response to, or for the inducement of, the supply of goods or services or both, whether by the recipient or by any other person but shall not include any subsidy given by the Central Government or a State Government.

Valuation of a works contract service is dependent upon whether the contract includes transfer of property in land as a part of the works contract. In case of supply of service, involving transfer of property in land or undivided share of land, as the case may be, the value of supply of service and goods portion in such supply shall be equivalent to the total amount charged for such supply less the value of land or undivided share of land, as the case may be, and the value 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 above purpose, "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

6.1.2 When contract includes transfer of property in land as a part of the works contract:

The purpose of valuation of construction contract one must refer to Note 2 given under Notification 11/2017 – Central Tax (Rate) dated 28th June, 2017 providing deduction of land cost recovery asfollows:

"2. Incase of supply of service specified in column (3) of the entry at item (i) against Serial No. 3 of the Table above, involving transfer of property in land or undivided share of land, as the case may be, the value of supply of service and goods portion in such supply shall be equivalent to the total amount charged for such supply less the value of land or undivided share of land, as the case may be, and the value 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 paragraph 2, "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."*

Thus clear 33.33% deduction is allowed towards cost of land. This is deeming price. No scope for proving actual land cost. This probably explains the enhancement of rate from the promised rate of 12% to 18%. This note needs corresponding amendment after amendment to this entry on 22-8-2017.

FAQ 26 - FAQs (Part II) on real estate issued vide F.No. 354/32/2019-TRU Government of India Ministry of Finance Department of Revenue dated the 14th May, 2019, New Delhi

Question: How to determine value of construction services provided by the promoter to land owner in lieu of transfer of development rights, when land owner is not registered?

Answer: Value of construction services provided by the promoter to land owner in such cases shall be determined based on the total amount charged by the promoter for similar apartments in the project from independent buyers, other than the land owner, nearest to the date on which such development right etc. is transferred to the promoter, less the value of transfer of land, if any, as prescribed in paragraph 2 of **Notification No. 11/2017-CT(R) dated 28.06.2017**.

The Authority of Advance Ruling, **Tamilinadu in case of M/s Kara Property Ventures LLP, 2019 (23) G.S.T.L. 287 (A.A.R. Tamilnadu-GST)** held that

The value of supply of services provided by the Applicant in the project 'One Crest' in Chennai, wherein the Applicant has entered into two separate agreements, viz., one for 'Sale of undivided share of land' and the other for 'Construction' with the customers, the measure of levy of GST on the supply of service of 'Construction' shall be 2/3rd of the total value charged for construction service and amount charged for transfer of undivided share of land, as per Entry No. 3(i) of Notification No. 11/2017-C.T. (Rate), dated 28-6-2017 as amended and No. II(2)/ CTR/532(d-14)/2017 vide G.O. (Ms) No. 72, dated 29-6-2017 as amended.

6.1.3 When contract does not include transfer of property in land as a part of the works contract:

In case of Works Contracts where **transfer of land is not involved**, in that case Value for the purpose of charging GST shall normally be taken as Transaction Value which shall be consideration charged for the said service. As per Section 15(1) of the CGST Act, 2017 the Valuation method can be summarized in the following way:

<table>
<tr><td>Where the supplier and the recipient of the supply are not related</td><td colspan="2">Where the supplier and the recipient of the supply are related</td></tr>
<tr><td rowspan="4">Value shall be the transaction value (open market value), which is the price actually paid or payable for the said supply of goods or services or both</td><td>As per this rule 28 of CGST</td><td></td></tr>
<tr><td>a. if open market value of such supply is available</td><td>Open Market Value</td></tr>
<tr><td>b. if open market value of such supply is not available</td><td>like kind and quality</td></tr>
<tr><td>If price cannot determined as per (a) or (b) above</td><td>one hundred and ten percent of the cost of production or manufacture or the cost of acquisition of such goods or the cost of provision of such service</td></tr>
</table>

Issue: Case-1

(a) In case of work contract say for construction of Building wherein say Total contract value is ₹ 25 Crores. Contractee has agreed to supply free issue of material say cement and steel worth Rs. 5 Crores. What would be the taxability under GST if said value is not a part of contract?

Case (b) Will the answer differs is said value is a part of the contract?

Case (c) what would be the input tax credit implication case (1)?

Answer to Case (a): Yes, such value needs to be included in the valuation of Supplier by virtue of Section 15(2) (b) of CGST Act. The contract value being ₹ 25 Crores, the contractor would charge GST on whole contract value at the prescribed rate.

15(2)(b) the value of supply shall include *any amount that the supplier is liable to pay in relation to such supply but which has been incurred by the recipient of the supply and not included in the price actually paid or payable for the goods or services or both;*

Answer to Case (b) in such case, the contract value would be Rs. 20 Crores and accordingly chargeable to GST by contactor.

Answer to Case (c) Input would not be available to Contractee as specifically given under the negative list prescribed under Section 17(5).

As the construction contract would be composite contract of services, the rate as prescribed and amended herein above would apply. We would come little later on about the transitional position. As regards the works contract in relation to these notified services in Notification ***No. 11/2017- Central Tax(Rate) dated 28th June, 2017*** as amended from time to time, rate as prescribed would apply subject to conditions, if any, specified therein. As the contracts in relation to movable properties would be a composite supply in terms of section 8(A), a composite supply comprising two or more supplies, one of which is principal supply, shall be treated as supply of such principal supply. For example, in case of repair of a car, the same should fall under

maintenance repair and installation service (except construction services at Sr. No. 25 under Heading 9987).

Authority of Advance Ruling in case of **Dholera Industrial City Development Project Ltd, 2019 (29) G.S.T.L. 40 (A.A.R. – GST, Gujarat)** held as follows.

Compensation for breach of Contract: *Compensation on breach of contract being a part of consideration is liable for GST. Further, toleration of any act or situation is statutorily deemed supply of service. Applicant liable to GST - Para 5 of Schedule-II of Central Goods and Services Tax Act, 2017.*

Liquidated damages *– LD for non-fulfilment of Targets by contractors, charges being a part of consideration is liable for GST. Further, toleration of any act or situation is statutorily deemed supply of service - Applicant liable to GST - Para 5 of Schedule-II of Central Goods and Services Tax Act, 2017.*

Interest *- Deferment of liquidated damages is taxable, since liquidated damages are liable to GST. Interest on its deferment is also taxable same being a part of such damages under Para 5 of Schedule-II of Central Goods and Services Tax Act, 2017.*

6.2 GST on free supplies made by Owner/Contractee to Contractor for execution in Works Contract:

It is common practice prevailing in many industries/Government Department that certain materials are provided by the owner/ contractee to the works contractor for utilization in execution of works contract. Supply of materials may arise in two situations

(i) This is done for various business or economic reasons including to maintain quality of materials and use of the same in works contract. In such situation the cost of materials supplied by the owner is not part of contract price/consideration.

(ii) In few cases when the contractor could not supply the materials as per scope of work (material cost is part of contract price/ consideration) may be due to non-availability and the owner/ contractee supplies such materials to execute the works contract by the contractor to complete in contractual time.

Let us say, the contract price for the building construction is ₹20 crores wherein the contractor has to incur all the cost including materials. Instead of this, it may be agreed that the cement & steel are to be supplied by the owner and the contractor would execute the work using the same along with other materials thereby bringing down the contract price to ₹15 crores.

The subject matter of discussion is to examine whether the free supply of materials to contractor for execution of works contract in above 2nd situation is includible in the value for levy of goods and service tax or not.

6.2.1 Position during Pre-GST regime:

Before the implementation of GST Regime, the tax was levied on the free supply of goods and services are described below:-

- Under the Central Goods and Services Tax (CGST) Act, the tax was levied on the supply of goods and services from customer to the manufacturer. This was mentioned and explained under 1 to Rule 6 of the Valuation Rules.
- Under the Customs Duty Act, the customs duty was applicable on the imports of free supply of goods to the importer. The rules determined under Rule 10(1) of Customs Valuation Rules.
- Under Finance Act 1994, the service tax was imposed on the free supply of goods to the receiver. This mentioned under notification 11/2012 – ST dated 17.03.2012 in respect of Works Contract Services as defined in the Act. However, the applicability may differ (either time or law) as there were several disputes, amendments and court decisions on this subject from very long time (Refer decision of Apex Court in case of **CST v. Bhayana Builders Pvt. Ltd. [2018 (10) G.S.T.L. 118 (S.C.)].**

6.2.2 Free supply of materials to works contractor and taxability under GST laws:

GST is levied at a specified rate on the value determined under section 15 of **CGST Act, 2017** (similar provisions are existed in all state SGST

laws and made applicable for IGST). To determine whether either of the situation, free supplies are to be includible in the taxable value or not, the primary question to be answered is whether price agreed in the contract (wherein the price of free supplies is not factored) would constitute the ***'consideration'*** at first instance and thereby to construe the same as ***'sole consideration'*** and accordingly the provisions of section 15, *ibid qua* Transaction value can be adopted.

Section 2(31) defines consideration which reads as follows:

"consideration" in relation to the supply of goods or services or both includes–

1. *any payment made or to be made, whether in money or otherwise, in respect of, in response to, or for the inducement of, the supply of goods or services or both, whether by the recipient or by any other person but shall not include any subsidy given by the Central Government or a State Government;*
2. *the monetary value of any act or forbearance, in respect of, in response to, or for the inducement of, the supply of goods or services or both, whether by the recipient or by any other person but shall not include any subsidy given by the Central Government or a State Government:*

Provided that a deposit given in respect of the supply of goods or services or both shall not be considered as payment made for such supply unless the supplier applies such deposit as consideration for the said supply."

It is observed that, the expression **"consideration"** only gives the inclusive definition. So it is pertinent to know what is meant by the said expression. In the case of **Ku. Sonia Bhatia vs. State of U.P. and Others AIR 1981 SC 1274** wherein after considering the expression in the Contract Act and referring to Black's Law Dictionary, other dictionaries, English judgments and Corpus Juris Secundum, the Hon'ble Supreme Court held that *"inescapable conclusion that follows is that consideration means a reasonable equivalent for other valuable benefit passed on by the promisor to the promisee or by the transfer of to the transferee.".* The rationale of this decision was discussed &

applied even in the context of service tax in case **of Bhayana Builders Pvt. Ltd. v. Commissioner , (2013) 32 S.T.R. 49 (Tribunal-LB).** A similar view was expressed under Central Excise law by the Hon'ble Supreme court in case of **Commissioner v. Fiat India Pvt. Ltd. (2012) 283 E.L.T. 161 (S.C.) (Para 58).** Thus, any consideration whether monetary or otherwise should have flown or should flow from the Owner to Works Contractor is accrued to the benefit of the later.

The above theory remains unchanged and does not get affected even after applying the inclusive part of the 'consideration' definition as it attempts to cover the payments / acts done in response to the supply but nowhere overrides the above-stated principle that such payment/ act should accrue to the benefit of the supplier. Going by this analogy, it can be said that "free supplies" would not constitute a consideration remitted by the recipient to the supplier, **more so when the no part of the free supplies accrues to or is retained by the supplier.**

Further, the provisions of valuation of supply as provided in section 15 of CGST Act, 2017 is relates to the transaction value of supply. **Section 15(2)(b)** of CGST Act 2017 provides that the amount that the supplier is liable to pay but which has been incurred by the recipient, this amount will be added only if there is a contractual liability on the supplier to make those supplies and in other words it is included in the contract price / consideration. The wordings of section 15(2)(b) of CGST Act, 2017 also does not make the 'free supplies' as taxable value as it mandates the liability of the supplier at first instance i.e say contractual obligation (say to procure cement & steels etc).

So in a case wherein it was initially agreed that supplier would incur the entire cost (example: cost of cement and steel which is included in contract price) but the same was actually incurred by the recipient / owner and adjusted in the payment, the value of 'free supplies' may have to be includible as part of transaction value and liable for GST. This situation may arise, where the recipient / owner supplied the material or provided services due to failure on the part of the contractor / supplier or at the request of the contractor etc.

6.2.3 Recent clarification from Government:

The Circular issued by the CBIC vide **no. 47/21/2018 – GST dated 08.06.2018** clarifying that the value of free supplies need not be added to the value of supply which also support the detail discussion made as above. The relevant extract reads as follows:

S. No	Issue	Clarification
1	Whether moulds and dies owned by Original Equipment Manufacturers (OEM) that are sent free of cost (FOC) to a component manufacturer is leviable to tax and whether OEMs are required to reverse input tax credit in this case?	1.1 Moulds and dies owned by the original equipment manufacturer (OEM) which are provided to a component manufacturer (the two not being related persons or distinct persons) on FOC basis does not constitute a supply as there is no consideration involved. Further, since the moulds and dies are provided on FOC basis by the OEM to the component manufacturer in the course or furtherance of his business, there is no requirement for reversal of input tax credit availed on such moulds and dies by the OEM. 1.2 **It is further clarified that while calculating the value of the supply made by the component manu-facturer, the value of moulds and dies provided by the OEM to the component manufacturer on FOC basis shall not be added to the value of such supply because the cost of moulds/dies was not to be incurred by the component manufacturer and thus, does not merit inclusion in the value of supply in terms of section 15(2) (b) of the Central Goods and Services Tax Act, 2017 (CGST Act for short).**

		1.3 However, if the contract between OEM and component manufacturer was for supply of components made by using the moulds / dies belonging to the component manufacturer, but the same have been supplied by the OEM to the component manufacturer on FOC basis, the amortised cost of such moulds /dies shall be added to the value of the components. In such cases, the OEM will be required to reverse the credit availed on such moulds / dies, as the same will not be considered to be provided by OEM to the component manufacturer in the course or furtherance of the former's business.

The principle based upon which the above circular issued is also equally applicable in the case of materials supplied by the owner at free of cost (without recovery of the same from consideration) to the contractor who used it in execution of works contract and hence the said cost is not to be included in the transaction value which is liable to GST. That means the GST law does not lay down any situation where the value of free supply of goods/services to the recipient in the course or in furtherance of business, can be taxed.

Remarks: With above back ground of detail discussions, it may be concluded that

(i) Where the cost of materials supplied free of cost by the owner/ contractee to the Contractor for execution of works contract which is not part of the contract price / consideration, the same shall not be includible as transaction value, hence not liable to GST.

(ii) Where the contractor could not supplies the materials as per scope of work (material cost is part of contract price/ consideration), may be due to non-availability or supplied at the request of the contractor and the cost of such materials is adjusted to contract price shall be part of transaction value in lieu of section 15(2)(b) of CGST Act, 2017 and liable to GST.

MISCELLANEOUS TOPICS UNDER WORKS CONTRACT

7

7.1 Works Contract for Immovable Property only

Under the GST regime the scope of works contract has been restricted to any activity under taken in relation to Immovable property only, unlike the previous regime where works contract for movable properties was also considered.

For example: Any composite supply of goods and services will not fall with in the definition of works contract perse under GST. Such contracts would continue to remain composite supplies and will not be treated as a Works Contract for the purposes of GST.

7.2 Decentralised Service Registration

Registration under GST is State centric. As per Sec 22(1), every supplier shall be liable to be registered under GST, in the State or Union territory, from where he makes taxable supply of goods or services or both, if his aggregate turnover in a financial year exceeds threshold limit. In case of inter-state supply of goods, registration is mandatory irrespective of threshold limit, where as in case of inter-state supply of services, registration is mandatory if the turnover in a Financial year exceeds Rs.20 lakhs (Rs. 10 lakhs in case of special category states). It is pertinent to mention that registration is required 'in' the State 'from which' taxable supplies are made.

Therefore, for the purposes of obtaining registration, it is important to identify the 'origin' of supply even though GST is a 'destination' based tax. Tax goes to the destination State but registration is required in the origin-State. In case of "works contract" service which is immovable in nature, place of supply is where the immovable property

is located. Place of Supply (as determined from IGST Act) provides the 'destination' and this is not relevant for registration. The location of Supplier is relevant for registration. Therefore, a taxable person who is providing works contract service shall be required to obtain registration in the state from where he is providing services.

As per Sec 2(71) "location of the supplier of services" means,

(a) where a supply is made from a place of business for which the registration has been obtained, the location of such place of business;

(b) where a supply is made from a place other than the place of business for which registration has been obtained (a fixed establishment elsewhere), the location of such fixed establishment;

(c) where a supply is made from more than one establishment, whether the place of business or fixed establishment, the location of the establishment most directly concerned with theprovisions of the supply; and(d) in absence of such places, the location of the usual place of residence of the supplier;

As per Sec 2(50), "fixed establishment" means a place (other than the registered place of business) which is characterized by a sufficient degree of permanence and suitable structure in terms of human and technical resources to supply services, or to receive and use services for its own needs.

Example: M/s ABC Ltd (contractee), having its corporate office in Mumbai awarded a contract for to M/s GBK Ltd, Hyderbad (contractor) for construction of a Dam in the state of Odisha. M/s GBK Ltd is registered under GST in the state of Telangana. The duration of the contract is 3 years. Where is the M/s GBK Ltd (contractor) is required to obtain registration under GST Laws?

Answer: As per Sec 22(1) of CGST Act, registration under GST is required 'in' the State 'from which' taxable supplies are made. Construction of Dam is "works contract" service being immovable in

nature and place of supply is State of Odisha where the immovable property is located. For the purpose of construction of Dam, huge qty of Steel, Cement, sand, aggregates, other construction materials & engineer, technician, labour are required. The nature of supply is such that, it cannot be supplied from Hyderbad, Telangana. So, a fixed establishment is required in the state of Odisha, where the work is being carried out. Therefore, registration under GST is mandatory for M/s GBK Ltd, in the state of Odisha.

So every state where a works contractor has a project office, he will need to obtain a registration if the threshold limit crosses.

The Authority of Advance Ruling in case of **T & D Electricals, 2020 (36) G.S.T.L. 239 (A.A.R. - GST - Kar.)** held that

Applicant intends to supply goods or services or both from their principal place of business, i.e., Rajasthan - Applicant having only one principal place of business, for which registration already obtained and not having any other fixed establishment other than the principal place of business - Accordingly, location of supplier is the principal place of business which is in Rajasthan - Separate registration in Karnataka not required for execution of contract - However, they are at liberty to obtain the said registration, if they are able and intend to have a fixed establishment at the project site in Karnataka - Sections 2(71) and 22 of Central Goods and Services Tax Act, 2017.

7.3 Composition Scheme

Composition scheme is not available to works contractors as it is treated as service under GST.Composition scheme is only available to suppliers of goods and the restaurant industry (not serving alcohol). He will have to register as a normal supplier on crossing the 20 Lakh threshold.

7.4 Abatement

No abatement has been prescribed for works contract under the GST law.

7.5 Maintenance of records for works contract

In addition to normal course of maintaining of accounts by a Works Contractor, further being a registered person executing works contract shall have to maintain/keep additional accounts as per rule 56 (14) of CGST Rules, 2017showing –

(a) The names and addresses of the persons on whose behalf the works contract isexecuted;

(b) Description, value and quantity (wherever applicable) of goods or services received for the execution of workscontract;

(c) Description, value and quantity (wherever applicable) of goods or services utilized in the execution of works contract;

(d) The details of payment received in respect of each works contract;and

(e) The names and addresses of suppliers from whom he received goods orservices.

PART OF SCHEDULES OF CGST ACTS, 2017

Serial No. 5 of Schedule II CGST Act, 2017 – **Supply of Services**

The following shall be treated as supply of services, namely:—

(a) renting of immovable property;

(b) 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.

Explanation. — For the purposes of this clause—

(1) the expression "competent authority" means the Government or any authority authorised to issue completion certificate under any law for the time being in force and in case of non-requirement of such certificate from such authority, from any of the following, namely:—

  (i) an architect registered with the Council of Architecture constituted under the Architects Act, 1972;or

  (ii) a chartered engineer registered with the Institution of Engineers (India);or

  (iii) a licensed surveyor of the respective local body of the city or town or village or development or planning authority;

(2) the expression "construction" includes additions, alterations, replacements or remodelling of any existing civil structure.

(c) temporary transfer or permitting the use or enjoyment of any intellectual propertyright;

(d) development, design, programming, customisation, adaptation, upgradation, enhancement, implementa-tion of information technology software;

(e) agreeing to the obligation to refrain from an act, or to tolerate an act or situation, or to do an act; and

(f) transfer of the right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration.

Serial No. 6 of Schedule II CGST Act, 2017 - Composite supply

The following composite supplies shall be treated as a supply of services, namely:—

(a) **works contract as defined in clause (119) of section 2;and**

(b) supply, by way of or as part of any service or in any other manner whatsoever, of goods, being food or any other article for human consumption or any drink (other than alcoholic liquor forhuman consumption), where such supply or service is for cash, deferred payment or other valuable consideration.

TDS IN RELATION TO WORKS CONTRACT UNDER GST

A. Who could be liable to deduct TDS under GST law?

- A department or an establishment of the Central Government or State Government; or
- Local authority; or
- Governmental agencies; or
- Such persons or category of persons as may be notified by the Government.
- As per the latest Notification dated 13th September 2018, the following entities also need to deduct TDS-
- An authority or a board or any other body which has been set up by Parliament or a State Legislature or by a government, with 51% equity (control) owned by thegovernment.
- A society established by the Central or any State Government or a Local Authority and the society is registered under the Societies Registration Act,1860.
- Public sector undertakings.

B. When will the liability to deduct TDS be attracted? What is the rate of TDS?

TDS is to be deducted at the rate of 2 percent on payments made to the supplier of taxable goods and/or services, where the total value of such supply, under an individual contract, exceeds ₹2,50,000. No deduction of Tax is required when the location of supplier and place of supply is different from the State of the registration of therecipient.

C. What are the registration requirements for TDS deductor?

A person who is liable to deduct TDS has to compulsorily register and there is no threshold limit for this. The registration under GST can be obtained without PAN and by using the existing Tax Deduction and Collection Account Number (TAN) issued under the Income Tax Act. Thus it can be said having TAN is mandatory.

D. Time limit for payment of TDS?

The deduct or would be liable to make the payment of TDS by the10th day of the next month.

E. Impact of TDS on Government civil contractors

The Indian government, on an average, gives out more than 10,000 civil contracts every year throughout the country. The contract for constructing/repairing of the national highways average more than ₹100 crores. These contracts are acquired by big construction companies and then sub-contracted to smaller firms and then again further sub-contracted to another small firm. This loop will face problems due to GST and in particular due to the TDS liability.

The government would need to deduct TDS from the contractor which would ensure tax compliance by the contractors and all the other sub-contractors. Currently, many small civil/labour contractors do not fulfill tax compliance. Under GST it will be imperative for them to get registered and fulfill taxcompliance.

For example: ABC got a contract for repair work on an 800-meter road by the government for ₹10 lakhs. ABC out sources work to XYZ and then XYZ further outsources it to a small civil/labour contractor DEF.

Earlier, DEF would not have registered under service tax/VAT but now he would need to register under GST for claiming the ITC credit. The purpose of inserting the TDS clause under GST is to ensure tax compliance from the unorganized construction sector.

TRANSITION PROVISION FOR WORK CONTRACT

Both service tax and VAT applied to works contract because a works contract incorporates both goods (iron bars, cement) and services (labourers, engineers).

ITC was available on the proportion of supply on which VAT or service tax has been paid before GST implementation date but the supply is made after the appointed day.

The taxpayer must submit a declaration electronically in FORM GST TRAN-1 furnishing the details within a period of ninety days of the appointed day.

Government Works Contracts executed before GST and continued Post GST.

This is one of the biggest challenges and a grey area under the transitional provisions. You would appreciate that the Government contracts although continue over a period of time, the taxation aspect would not be allowed to alter by the employer i.e. the Government, be it Central Government or State Government. The major issue was sorted out by the State of Maharashtra for at least the Government contracts. On 19th August, 2017 the State of Maharashtra has issued an internal circular as regards how to deal with the Government contract and applicability of the GST there on. The directions given the reinclarify all issues of ongoing workscontracts.

(i) The contracts awarded after 1st July, 2017 would be taxed as per GST provisions. (Kindly refer to the latest amendment of 22nd August given in the beginning of thisarticle)

(ii) The tender of works contract accepted prior to 22nd August,

2017 but work order not given – presuming that such tenders would not have considered the GST applicability, all the tenders would be cancelled and a short tender notice would be given for fresh tenders. The contracts requiring immediate order like repairing of road etc., would be given priority and the GST provisions would be taken care of.

(iii) The tender accepted prior to 1st July, 2017 but work order given after 1st July, 2017. The work order would not be cancelled but the necessary amendment in the price of the works contract, as an impact of GST, should be considered.

(iv) Tender issued between 1st July, 2017 and 21st August 2017 – if work order is not given the procedure as per (ii) should be followed.

(v) Work order issued prior to 1st July, 2017 and the work commenced prior to 1st July, 2017and to be continued after 1st July, 2017(on- going contract) –

(a) For the work completed prior to 1st July, 2017 and bill received prior to 1st July, 2017, the tax applicable as per VAT should bepaid.

(b) The work completed prior to 1st July 2017, and the bill issued after 1st July, 2017, tax to be paid as per VAT provisions.

(c) Part of the work done after 1st July, 2017, tax to be paidas per GST. The Law and Judiciary Dept. should look into the amendment required in futurebills.

Construction contracts executed before GST and continued Post GST

The State of Maharashtra has made an amendment to the composition scheme adopted by the builders/developers. In terms of the original composition scheme under the MVAT Act announced in 2010 the builders/developers selling under-construction flats along with the interest in the land were allowed to pay 1% composition towards VAT

on the total consideration for sale of flats. The time for collection ofthis 1% composition was fixed as at the time of registration of agreements to sell flat. Normally such registrations were made on receiving about 20% of the consideration and for majority of the under-construction

buildings the MVAT was paid at 1%. By an amendment made on 30th May, 2017 the provision is made to the effect that, irrespective of the Notification of 2010 and irrespective of the payment made by the developers at 1% on the total consideration, any amount received for such registered document after 1st June, 2017 composition at 1% would again be payable. For any payment towards consideration received by the developer after 1st July, 2017, the applicable GST should be paid. The only solution given was, that the developers would be allowed to carry forward the credit of tax paid at 1% at the time of registration. The developers in Maharashtra therefore will have to claim the credit for such 1% paid prior to 1st July, 2017 and for the said contracts part of the consideration would be received after 1st July, 2017. Such credits will have to be taken in the last return to be filed under the MVAT Act i.e. for the month of June,2017.

Q. What happens to the service tax paid in pre GST regime and refunded on cancellation Post GST?

Under the service tax regime, the input tax credit was required to be revered when an assessee does not make payment within 90 Days from the date of invoice and the assessee was entitled to reclaim the credit when the payment was made.

Instance where reversal of the credit was not on or before 30thJune, 2017 and the payment to the vendors are made on or after 1st July, 2017. So, where such payment is made within three months from the appointed day i.e. by 30th Sept, 2017, the assessee would get credit under section140(9)

If the builder has not paid to the contractors for more than 90 days as on 30th June, 2017 and if he has reversed the ITC credit thereof and payment due to the vendor is not paid till 30th September, 2017 than entire ITC will belost.

Another instance is that the customer might have booked the flatin Pre GST regime, he must have paid service tax there on and the builder has paid service tax to the Govt. and if the flat gets cancelled in post GST and the advance paid by the customer along the service tax is repaid to the customer. Whether Builder will be eligible to adjust this against GST Liability?

Ans. No. there is no provision for such adjustment in GST Sec 142(5).

Real Estate Related – Section 142(11)(C)

Scenario 1: Agreement registered before 01/06/2017

Value of Flat- ₹ 5,00,00,000.00

Demand raised and received till 30/06/2017- ₹ 2,00,00,000.00

Amount payable after 30/06/2017- ₹ 3,00,00,000.00

VAT Paid ₹ 5 Lakhs (1% on ₹ 5 Crores)

ST paid on ₹ 9 Lakhs (4.5% on ₹ 2Crores)

What would be the liability in respect of ₹ 3 Crores received by the builder.

View 1	CGST	SGST	TOTAL
Tax payable on 5 Crore	30,00,000	30,00,000	60,00,000
Less: Credit on Tax paid	9,00,000	5,00,000	14,00,000
Net Tax Payable	**21,00,000**	**25,00,000**	**46,00,000**

View 2	CGST	SGST	TOTAL
Tax payable on 3 Crore	18,00,000	-	18,00,000
Less: Credit on Tax paid	-	-	-
Net Tax Payable	18,00,000	-	18,00,000

View 3	CGST	SGST	TOTAL
Tax payable on 3/5 Crore	18,00,000	30,00,000	48,00,000
Less: Credit on Tax paid		5,00,000	5,00,000
Net Tax Payable	**18,00,000**	**25,00,000**	**43,00,000**

View 4	CGST	SGST	TOTAL
Tax payable on 3 Crore	18,00,000	18,00,000	36,00,000
Less: Credit on Tax paid		3,00,000	3,00,000
Net Tax Payable	**18,00,000**	**15,00,000**	**33,00,000**

₹2,00,00,000 received and taxes paid on the amount in Pre GST regime, and

₹3,00,00,000 will be taken in post GST and GST @ 12% is to be paid on ₹3,00,00,000.

Option: 4 Seems to be better.

Scenario 2: Agreement NOT registered before 01/06/2017

Value of Flat- ₹5,00,00,000.00

Demand raised and received till 30/06/2017- ₹2,00,00,000.00

Amount payable after 30/06/2017- ₹3,00,00,000.00

VAT Paid ₹2 Lakhs (1% on ₹2 Crores)

ST paid on ₹9 Lakhs (4.5% on ₹2 Crores)

What would be the liability in respect of ₹3 Crores received by the builder.

View 1	CGST	SGST	TOTAL
Tax payable on 5 Crore	30,00,000	30,00,000	60,00,000
Less: Credit on Tax paid	9,00,000	2,00,000	11,00,000
Net Tax Payable	**21,00,000**	**28,00,000**	**49,00,000**

View 2	CGST	SGST	TOTAL
Tax payable on 3/5 Crore	18,00,000	30,00,000	48,00,000
Less: Credit on Tax paid	-	2,00,000	2,00,000
Net Tax Payable	**18,00,000**	**28,00,000**	**46,00,000**

View 3	CGST	SGST	TOTAL
Tax payable on 3 Crore	18,00,000	18,00,000	36,00,000
Less: Credit on Tax paid	-	-	-
Net Tax Payable	**18,00,000**	**18,00,000**	**36,00,000**

View 3 seems better.

WORKS CONTRACT UNDER GST IN PRACTICAL SCENARIO

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1. I am a civil work contractor. I work for contractee. If I purchase concrete, bricks, cement or other items to complete the construction against tax invoice. Can I claim ITC for those purchases and what restriction of section 17(5).

   Ans. Input Tax Credit is NOT available Issue for contractor to determine whether supply made by him is a "Works Contract" or a "Composite Contract (other than works contract)"?

2. Whether the following will be works contractor composite supply (other than works contract)

1	Plumbing Contract	If the plumbing becomes part of an immovable property which cannot be removed without damaging to that particular goods or without damaging to the particular property, may be regarded as works contract.
2	Electrical Installation	If the installation of Electrical items becomes part of an immovable property which can not be removed without damaging to that particular goods or without damaging to the particular property, may be regarded as works contract.

3	Supply and installation of doors at site	GST Rate for the door is 28%. If fixing the doors is treated as a works contract the GST Rate becomes 18%. So is it a supply of door and fixing is incidental or is it a fixing of the door to the immovable property. The decision is a controversial matter.
4	Lift/elevator installation	It is a contract in relation to immovable property. Hence it would come under the works contract.
5	Installation of Air handling units	Installation of Centralized air conditioning units in an immovable property comes under Works Contract
6	Installation of fire fighting equipment	Installation of fire fighting equipment will be treated as a works contract if it is installed in an immovable property.
7	Painting contract	Painting contract in an immovable property is treated as a works contract.
8	Repairs of Car	Not a works contract
9	AMC Contracts	Not a works contract

3. A building contractor may engage in services of a sub-contractor for a portion of the whole work, then the sub-contractor will charge GST in the tax invoice raised to the main contractor. The main contractor will be entitled to take ITC on the tax invoice raised by his sub-contractor as his output is works contract service. However if the main contractor provides works contract service (other than for plant and tools) to a company say in the IT business, the ITC of GST paid on the invoice raised by the works contractor will not be available to the IT Company.

   Plant and Machinery, incertain cases, when affixed permanently to the earth would constitute immovable property. When a works contract is for the construction of plant and machinery, the ITC of the tax paid to the works contractor would be available to the recipient, whatever is the business of the recipient. This is because works contract in respect of plant and machinery comes within the exclusion clause of the negative list and ITC would be available when used in the course or furtherance of business.

4. Impact of GST on Real Estate, Works contract and Civil Construction.

   Case 1: If any civil construction is sold by the builder before its completion i.e. before getting the Completion Certificate by the competent authority, then such construction will come under the purview of Works Contract and GST shall be applicable on transfer ofproperty.

   Case 2: Civil Construction sold after getting the Completion

   Certificate will not attract GST.

   - No ITC on construction on his own account
   - Contractor/ Builder will not enjoy any ITC on input services if he constructs building.
   - But he will enjoy ITC on input services for further supply of works contract services.
   - ITC available to builder while constructing plant and machine
   - No composition scheme in case of supply of services

5. How will Long Term Construction/Works Contracts be affected?

   The goods/services **supplied after the appointed day** in pursuance of a works contract **entered into before to the appointed day** shall be liable to GST.

Case 1

Mr. B has entered into a contract with Pegasus Constructions Ltd. to build an office building on 1st, May 2017. Pegasus Constructions has supplied materials and services on 20th June 2017 for which the payment was received on 25th June2017.

No GST will apply on materials supplied on 20th June 2017 as it was before GST implementation.

Case 2

Pegasus Constructions Ltd. supplies goods on 15th July 2017. Will GST apply?

GST will apply on this as supply was after GST rollout, even though the contract was signed before GST.

Case 3

Pegasus Constructions has supplied materials and services on 14th June 2017 and issued an invoice for it on 14th June. Payment is made on 27th July 2017. Will GST apply in this case?

GST will not apply as the supply was made before GST implementation. Also, the time of supply is 20th June (date of issue of invoice) which is before GST implementation.

Case Laws:

GST on work contracts for which agreements executed before July 1, 2017

Since CGST Act, 2017 came inforce with effect from1-7-2017, contract work for which agreements were executed prior to 1-7-2017, GST would not be imposed on same and 2 per cent VAT alone wasapplicable

Coimbatore Corporation Contractors Welfare Association v. State of Tamil Nadu (Madras High Court)

Since CGST Act, 2017 came in force with effect from 1-7-2017, contract work for which agreements were executed prior to 1-7-2017, GST would not be imposed on same and 2 per cent VAT alone was applicable.

Prayer: Petition filed under Article 226 of the Constitution of India for issuance of Writ of Mandamus, directing the1st respondent to consider and pass orders on the representation of the petitioner dated 05.07.2017 10.07.2017, 11.07.2017 and 11.09.2017 by paying the payment of 12% GST in addition to the value of work done for all works contracts Viz

(i) for the contract work for which agreements were executed prior to 01.07.2017 and the work is in under progress,

(ii) for the tenders called and agreements executed after 01.07.2017 without any GST Provisions in the estimate and tender,

(iii) the levy of 12% GST provisions has to be included in the estimates itself for further tenders and has to be paid in addition to the value of workd one for all works contracts as in the case of Southern Railways.

DETAILED ORDER

1. The petitioner is an association registered under the provisions of the Tamil Nadu Societies Act bearing Registration No.81/2012. The Association was formed for the Welfare of the members of the Road Contractors, who have been carrying on works for the National Highways and Highways department and other Governmentalorganisation.

2. The contractors used to remit 2% tax on value for the works executed by them towards the Works Contract Tax under the Tamil Nadu Value Added Tax, 2006 [HEREIN AFTER CALLED AS THE TNVAT] in terms of Section 6 of the TNVAT Act.

3. After the enactment of the **Central Goods and Services Tax Act, 2017** with effect from 01.07.2017, certain problems have arisen, which has compelled the petitioner to submit representations to the respondent.

4. The petitioner would state that on 22.08.2017, the Central Government issued notification notifying that 6% of the tax is leviable by the Central Government towards WorksContract.

5. The State Government is empowered to levy towards works contract tax in addition to the works contract tax imposed by the Central Government. Therefore, the contractor would be liable to pay 12% of tax towards works contract.

6. Therefore, the petitioner/association made representations on 05.07.2017 10.07.2017, 11.07.2017 and 11.09.2017 to the respondents stating that the contract works for which the agreements were executed prior to 01.07.2017 GST cannot be imposed and 2% VAT alone isapplicable.

7. Alternatively the association stated that if the petitioners are compelled to pay anything over and above 2%, the respondent in addition to the value of the workdone, has to remit the GST as per the notification, since the representations submitted by the petitioner/association have not been considered and no orders were passed.

8. When the case came up for hearing on 18.09.2017, the petitioner was directed to implead the Secretary to Government, Commercial Taxes Department and the Commissioner of Commercial Taxes. Accordingly, an application was filed to implead and the same was ordered by order dated 20.09.2017.

9. Mr. K.Venkatesh, learned Government Advocate [TAXES] accepted notices for the newly impleaded respondents and it appears that he had personally spoken to the Commissioner of Commercial Taxes, from which, it is seen that the Government also is in the process of discussing as to how the modality has to be worked out and what is the relief petitioner/ association entitled to.

10. In any event, since the petitioner's representations are pending, it is appropriate for the respondent to respond to the same by giving them a reply. The appropriate person who would be in a position to give reply is that the Commissioner of Commercial Taxes shall give a reply. Because all other authorities are the department of High ways and National Highways etc., who would not be in a position to specifically address the issue pointed out by the petitioner.

11. The learned Government Advocate has drawn the attention of this Court to G.O. Ms.No.264, Finance [SALARIES] Department, dated 15.09.2017. The operative portion of the Government Order reads as follows:—

    "5. Under the new tax regime, GST (comprising CGST, SGST and IGST) on works contracts for Government work was intially notified at 18 percent. This had resulted in representations

from contractors of ongoing works for compensation by procuring entity for increased tax liability over and above the contracted value of work. The difficulties arising out of increased GST on works contracts for Government work was deliberated in the GST Council Meetings held on 20th August 2017 and 9th September 2017. Consequently, the GST on works contracts for Government work is being reduced to 12 percent. This move more or less balances the taxes on works contracts in the pre GST and post GST regime.

6. Pending notification of guidelines in the matter, the Government now direct that all departments and procuring entitles shall made 'on account' payment of bills presented by contractors, restricting the payments to the value due as per existing contract agreements. Any difference on account of final payment due based on the guidelines to be issued and the 'on account' payment made as above may be adjusted from out of the 5 percent amount retained with procuring entity. The payment of final bill in cases where on account payments have been made shall be made only after the notification of the guidelines."

12. In the light of the stand taken by the respective parties there will be a direction to the Commissioner of Commercial Taxes to consider the representation given by the petitioner/ association and pass orders on merits and in accordance with law, within a period of four weeks from the date of receipt of a copy of this order.

13. The authorised representative of the petitioner/ association may be afforded an opportunity of personal hearing by the Commissioner. The petitioner/ association is directed to communicate the copies of the representation along with a copy of this order to the Commissioner of Commercial Taxes for due and effective compliance of the abovedirections.

Issues under GST for builders and real estate developers:

1. Cases where builders are liable to pay GST and where they are exempted from paying GST. Cases where builders are exempted from GST:- Sale of land does not attract GST Sale of building after getting completion certificate or 1st Occupancy whichever is earlier Apart from above cases GST is applicable for builders and real estate developers.

2. GST in case of builders acquired land on lease by the Government? Govt has clarified by notifying that land given on lease to the builders will also be excluded from GST.

3. Basic sale price declared by the builders for selling flat, for e.g. ₹10,000/ sq. ft and preferential location charges are taken by the builders in addition to basic sale price.

   Preferential location charges are not included for determining the valuation of building/ flat and for calculating the deduction of 33.33% (land value). Hence there is no abatement for Preferential Location Charges.

4. Interest on delayed payment by the buyer of building? GST is applicable on interest of delayed payment only at the time when interest is paid by the buyer to the builder.

PASSING OF BENEFITS OF INPUT TAX BY THE CONSTRUCTION COMPANY TO ITS BUYERS

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GST will be charged by the developers from the customers on the basis of on total outstanding amount as on July 1,2017.

This can be different for different customers in the same project. It is, therefore, possible that different customers in the same project with different amounts payable to the builder and different customers in different projects with the same amount payable to the builder may end up getting a different input set off benefit.

Analysis: Passing the ITC Benefits to Customers (₹)

Price of the Housing Unit	80,00,000	80,00,000
Cost of Construction @ 50%	40,00,000	40,00,000
Developer already spent before 01.07.2017	30,00,000	30,00,000
GST applicable to Developer @18% *(Input Tax)*	1,80,000	1,80,000
	Scenario -I	**Scenario -II**
Amount paid by buyer before GST	70,00,000	20,00,000
Outstanding with Buyer	10,00,000	60,00,000
GST Payable on outstanding amount @ 12% *(Output Tax)*	1,20,000	7,20,000

Spent by developer after 01.07.2017	10,00,000	10,00,000
Passable Benefits	1,20,000	1,80,000
ITC Benefit to Buyer	Full	Partial

Let's assume that cost of construction for a housing unit worth ₹80 Lakhs is 50% i.e. ₹ 40 lakh and of which, developer has so far spent ₹30 lakh. Under GST regime, the builder will have to pay the remaining ₹10 lakh after July, 2017 to get input tax credit from the vendors. Let's assume that GST applicable to the builder is 18%, then the builder will pay a GST tax of ₹1.8 lakh (100000 × 18%) to the vendor.

Now, for a customer who may have already paid ₹70 Lakh (possible under down payment plan) and has only ₹10 lakh as outstanding post July 1, will have to pay ₹1.2 lakh (@12%) as GST meaning that the builder can technically pass on the full input tax credit benefit of ₹1.2 lakh to this buyer

As for a different customer, who has an outstanding amount of ₹60 Lakh (possible under subvention schemes) as on July 1, the amount due from him will be ₹60 lakh plus 12% GST which is ₹7.2 Lakh. Out of this, a developer may be able to pass on an input tax credit limited to ₹1.8 Lakh only. Further the troubling part for developers is that, they themselves are left in the quandary to ascertain regarding the ITC benefits they would be getting from their vendors. That again is also dependent on whether the turnover of the vendor is less than ₹20 lakh or over ₹20 lakh.

Anti-profiteering Provisions in GST Law :

CBES Directive	• Section 171 of the Central GST Act provides that any reduction in rate of tax on any supply of goods or services or the benefit of input tax credit will be passed on to the recipient by way of commensurate reduction in prices
Typical Procedure	• As per the structure, the complaints of profiteering would first come to the Standing Committee comprising tax officials from states and the Centre
	• It would forward the complaint to the Directorate of Safeguards (DGS) for investigation, which is likely to take about 2-3 months to complete theinquiry
	• On completion of investigation, the report would be submitted to the anti-profiteering authority which would decide on the penalty. Where the consumer cannot be identified, the recovered amount shall be deposited in the Consumer Welfare Fund as provided under Section 57 of the Central GST (CGST) and State GST (SGST) Acts, • A period of 8-11 months has been provided for the whole process involving screening of the complaint and subsequent investigation and action, if any, by the anti-profiteering authority.

Anti profiteering Authority Set-up	• A 5 member anti-profiteering authority will be set up to decide on levying penalty if businesses do not pass on the benefit of price reduction to consumers under GST. • The authority, to be headed by a retired secretary-level officer, can take suo motu action, besides acting on complaints of profiteering
Time Frame	• The Anti-profiteering provision will have a sunset date of 2 Years

Besides the aforesaid guidelines, there is no concrete mechanism to compel developers to pass the benefits.

ADVANCE RULING

What is Advance Ruling?

Any advance tax ruling is a written interpretation of tax laws. It is issued by tax authorities to corporations and individuals who request for clarification of certain tax matters. An advance ruling is of ten requested when the tax payer is confused and uncertain about certain provisions. Advance tax ruling is applied for, before starting the proposed activity.

Section 95(A) of CGST Act, 2017 - 'Advance Ruling' means a decision provided by the Authority for Advance Ruling (herein after referred to as 'Authority') or the Appellate Authority for Advance Ruling (hereinafter referred to as 'Appellate Authority') to an applicant in written form on matters or on questions specified in relation to the supply of goods and/or services proposed to be undertaken or being undertaken by theapplicant.

The Authority/Appellate Authority is State/Union Territory specific.

Objective of having a mechanism of Advance Ruling

- Provide certainty for tax liability in advance in relation to a future activity to be undertaken by the applicant.
- Attract Foreign Direct Investment (FDI)
- Reduce litigation and costly legal disputes
- Give decisions in a timely, transparent and inexpensive manner

Matter or Question for which Advance Ruling under GST can be sought:

As per Section 97 (2) of the Goods and Service Tax Act, 2017 Advance Ruling can be sought on following questions:

- Classification of any goods or services or both;
- Applicability of a notification issued under the provisions of this Act;
- Determination of time and value of supply of goods or services orboth;
- Admissibility of input tax credit of tax paid or deemed to have been paid;
- Determination of the liability to pay tax on any goods or services orboth;
- Whether applicant is required to be registered;
- Whether any particular thing done by the applicant with respect to any goods or services or both amounts to or results in a supply of goods or services or both, within the meaning of thatterm.

Procedure on receipt of application

On receipt of an application, a copy will be forwarded to the prescribed officer and he will furnish the necessary relevant records.

Process of Advance Ruling under GST

Anadvance ruling is first sent to Authority for Advance Ruling (Authority). Any person unhappy with the advance ruling can appeal to the Appellate Authority for Advance Ruling (Appellate Authority).

Advance Ruling Authority → Appellate Authority for Advance Ruling

Process of Advance Ruling under GST Forms

Application for Advance ruling has to be made in FORM GST ARA- 01 along with ₹ 5,000 for CGST & SGST each.

Decision of the Authority

The Authority can by order, either admit or reject the application.

Will all applications be allowed?

The Authority will NOT admit the application when-

(b) The same matter has already been decided in an earlier case for the applicant

(c) The same matter is already pending in any proceedings for the applicant

Basically, Advance Ruling will not be possible in any pending case or any decision already given.

Applications will be rejected only after giving an opportunity of being heard. Reasons for rejection shall be given in writing.

When will the authority give their decision?

Advance ruling decision will be given within 90 days from application.

If the members of the Authority differ in opinion on any point, they will refer the point to the Appellate Authority.

Advance Ruling will have prospective effect only.

On whom will the advance ruling apply? The advance ruling will be binding only -

(a) On theapplicant

(b) On the jurisdictional tax authorities in respect of the applicant.

If the law, facts of the original advance ruling change then the advance ruling will not apply.

Appeal to the Appellate Authority

If the applicant aggrieved by the advance ruling he can appeal to the *Appellate Authority*.

1. Cases under Advance Ruling in relation to WorksContract

The AAR ruling came in response to an application by **M/s Giriraj Renewables Private Ltd**. who is an EPC contractor and has entered into agreement with various developers who desire to set up and operate solar photovoltaic plants for supply of generated power. The contracts are for supply of goods as well as services. The applicant has contended that:

- The agreement is construed as a composite supply; the principal supply would be the supply of PV Modules which a gain a reliable to tax @ 5%.
- He is engaged in the business of supply of 'solar power generating system' and the same should be liable to tax at 5%.
- The proposed agreement with its customers should be taxable @5% GST, and the same should be applicable to subcontractors as well.

Karnataka Authority of Advanced Ruling (AAR)

- The major component (PV Module) said to have constituted 70% of the whole project procured by the owner himself. Therefore, the same cannot be construed as a principal supply by the applicant and hence, it cannot be construed to be a principal supply of the project and there by cannot be acomposite supply.
- EPC contract for the construction of solar power project in which both goods and services are supplied cannot be interpreted as a composite (a mix of components, which makeup a solar project) supply contract. Therefore, the supply of each component in a 'Solar Power Generating System' cannot have a flat tax rate of 5 percent GST.
- Further, the authority clarified that the rate of GST will depend on the supply type as the sub-contractor is an individual supplier and cannot avail any GST at concessional rate.

Maharashtra State Authority of Advanced Ruling (AAR)

Has, in response to an application by Giriraj Renewables Pvt. Ltd., clarified that irrespective of the fact that there are separate contracts for supply of goods and services for a solar power plant, the entire project of setting up and operation of a solar photovoltaic plant shall qualify as a works contract and shall be taxable at 18%.

Conclusion:

Two separate Authorities for Advance Rulings (AAR) on the GST rate applicable on installation of solar plants have thrown the solar

industry intoconfusion. The industry has knocked at the doors of the government seeking clarity on thematter.

Two rulings, from the Maharashtra AAR, have favoured a GST rate of 18%, treating installation as a whole works contract. The Karnataka AAR, however, has ruled to treat installation at the concessional rate of 5% applicable on equipment. The challenge for the applicant is as he has to maintain it differently in both the states as one has given it at 5% and another at 18%.

To avoid such confusion, it may be proposed to have a central body for advance ruling so that the trade and industry can really benefit from the same. The current mechanism does not have any representation from the Judiciary and for this a petitionis already filed in the High Court of Gujarat and it posted for hearing on 2nd July 2018. Keeping in view of all the above, the advance ruling mechanism should be revisited in GST else it will defeat the objective of having such amechanism.

2. West Bengal Authority for Advance Ruling Goods and Service Tax Applicant: EMC Ltd

Order No. & date: 04/WBAAR/2018-19 dated 11/05/2018

The Applicant is stated to be a supplier of materials and allied services for erection of towers, testing and commissioning of transmission lines and setting up sub-stations collectively called the Tower Package.

His question is related to contracts obtained mainly from M/s Power Grid Corporation of India (herein after the contractee). The contractee awards the Applicant contracts for supply of Tower Packages splitup into two separate sets of contracts–one for supply of materials at ex factory price (hereinafter the First Contract), and the other for supply of allied services like survey and erection of towers, testing and commissioning of transmission lines etc (Second Contract), which also includes inland/local transportation, in-transit insurance, loading/unloading for delivery of materials and storage of them at the contractee's site. The contractee agrees to reimburse the actual GST payable, except on the price component for inland/local transportation, in-transit insurance and loading/unloading. The applicant raises

separate freight bills on the contractee as per the rate schedule annexed to the Second Contract.

The Applicant wants a Ruling on whether he is liable to pay tax on such freight bills.

An Advance Ruling is admissible on this question under Section 97(2) (a) & (e) of the CGST/WBGST Act, 2017 (hereinafter "the GSTAct"). The Applicant also declares that the issue raised in the application is not pending or decided in any proceedings under any provisions of the GST Act. The concerned officer has raised no objection to admissibility of the application.The application is admitted.

The Applicant is not a goods transport agency (hereinafter the GTA) or engaged in insurance business. He will, according to the application, arrange such services and pay the GST as applicable on the consideration paid to the suppliers of such services. His service to the contractee for inland/local transportation, the applicant argues, is exempt under the GST Act. He refers to Notification No. 9/2017 – IT (Rate) dated 28/06/2017, which, according to him, grants exemption on transportation service provided by an entity other than GTA. As the applicant is not a GTA, his supply of transportation service, he claims, is exempt vide the above notification.

Before dealing with the above argument, it needs to be clarified that reference to a notification under the IGST Act should be contract specific, where an inter-state supply is taking place. In this application general nature of a supply is being dealt with rather than the place of any particular supply. Moreover, West Bengal Authority for Advance Ruling has no mandate to deal with questions involving inter-state supply Referenceis, therefore, being made to analogous Notifications under the GST Acts, viz Notification No. 12/2017- Central Tax (Rate) dated 28/06/2017 (1136-FT dated 28/06/2017 under State tax) (hereinafter "the Exemption Notification").

Serial no. 18 of the Exemption Notification exempts services by way of transportation of goods by road, except the services of a GTA. In his written submission the Applicant admits that he is not Page 2 of 3 transporting the goods, but hiring the service of a transport agency. Similarly, the Applicant is not providing the insurance service, but

buying such services from an insurance service provider. The Applicant is, therefore, the recipient of such services and not a supplier thereof. The question of the Applicant providing transportation service, therefore, does notarise.

Before deciding the issue of taxability of the consideration payable undertheSecondContractforinland/localtransportationandancillary services like in-transit insurance, which are included in the freight bills the contracts referred to above need to beexamined.

The First Contract includes ex-works supply of all equipment and materials. The scope of the work includes testing and supply of transmission line towers, spares and accessories thereof, and all other materials required for successful commissioning of the transmission line.

The Second Contract includes all other activities required to be performed for complete execution of the tower package. The scope of the work includes transportation, in-transit insurance, loading/ unloading and delivery of the goods to the contractee's site; detailed survey including route alignment, profiling etc; classification of foundations for the towers and casing of foundations based on the drawing supplied by the contractee; erection of the towers; dismantling of the existing 400kv transmission line; stringing of power line crossing section under live line condition; painting of the towers; testing and commissioning of the transmission lines etc.

It is immediately apparent that the First Contract cannot be executed independent of the Second Contract. There cannot be any „supply of goods' without a place of supply. As the goods to be supplied under the First Contract involve movement and/or installation at the site, the place of supply shall be the location of the goods at the time when movement of the goods terminates for delivery to the recipient, or moved to the site for assembly or installation [refer to Section 10(1)(a) & (d) of the IGST Act, 2017]. The First Contract, however, does not include the provision and cost of such transportation and delivery. It, therefore, does not amount to a contract for „supply of goods' unless tied up with the Second Contract. In other words, the First Contract has "no leg' unless supported by the Second Contract. It is no contract at all unless tied up with the Second Contract.

The contractee is aware of such inter-dependence of the two contracts. Although awarded under two separate contract agreements, clauses under both of them make it abundantly clear that notwithstanding the break-up of the contract price, the contract shall, at all times, be construed as a single source responsibility contract and the Applicant shall remain responsible to ensure execution of both the contracts to achieve successful completion and taking over of the facilities. Any breach in any part of the First Contract shall be treated as a breach of the Second Contract, and vise versa. It is expressly understood that any default or breach under the "Second Contract shall automatically be deemed as a default or breach of this "First Contract also and vice-versa, and any such default or breach or occurrence giving the contractee a right to terminate the" Second Contract, either in full or in part, and/or recover damages thereunder.

The two contracts are, therefore, linked by a cross fall breach clause that specifies that breach of one contract will be deemed to be a breach of the other contract, and thereby turn them into a single source responsibility contract. Black's Law Dictionary defines that "a severable contract, also termed as divisible contract, is a contract that includes two or more promises each of which can be enforced separately, so that failure to perform one of the promises does not necessarily put the promises in breach of the entire contract". In terms of this definition, the cross fall breach clause, in the present context, settles unambiguously that supply of goods, their transportation to the contrctee's site, delivery and installation, erection of towers and testing and commissioning transmission lines and related services are not separate contracts, but form only parts of an indivisible composite works contract supply, as defined under Section 2(119) of the GST Act, with single source responsibility.

Composite nature of the contract is clear from the clause that defines satisfactory performance of the First Contract (supply of goods) as the time when the goods so supplied are installed and finally commissioned in terms of the Second Contract. In other words, the First Contract cannot be performed satisfactorily unless the goods have been transported and delivered to the contractees site, applied for erection of towers, the transmission lines laid, tested and commissioned in

terms of the Second Contract. The two promises – supply of the goods and the allied services – are not separately enforceable in the present context. The recipient has not contracted for ex-factory supply of materials, but for the composite supply, namely works contract service for construction of the Tower Package.

The price components of both the First and the Second Contracts, including that for transportation, in-transit insurance etc are to be clubbed together to arrive at the value of the composite supply of works contract service as discussed above, and taxed at 18% in terms of Serial no. 3 (ii) of Notification No. 11/2017– Central Tax (Rate) dated 28/06/2017 (1135 – FT dated 28/06/2017 under the State Tax).

In view of the foregoing the rule is as under

RULING

The applicant supplies works contract service, of which freight and transportation is merely a component and not a separate and independent identity, and GST is to be paid at 18% on the entire value of the composite supply, including supply of materials, freight and transportation, erection, commissioning etc.

This ruling is valid subject to the provisions under Section 103 until and unless declared void under Section 104(1) of the GST Ac

3. GST Rate on Work Contract Services pertaining to railways by sub- contractor GST Aar Maharashtra – Shree Constructions

Under section 98 of the Central Goods and Services Tax Act, 2017 and the Maharashtra Goods and Services Tax Act, 2017

The present application has been filed under section 97 of the Central Goods and Services Tax Act, 2017 and the Maharashtra Goods and Services Tax Act, 2017 [hereinafter referred to as "the CGST Act and MGST Act"] by SHREE CONSTRUCTION, the applicant, seeking an advance ruling in respect of the following questions :

1. What Tax rate to be charged by the sub-contractor to main contractor on Works Contract Services WCS) pertaining to railways original works contract?

2. Whether to charge tax rate of 12% GST or 18%GST?

   At the outset, we would like to make it clear that the provisions of both the CGST Act and the MGST Act are the same except for certain provisions. Therefore, unless a mention is specifically made to such dissimilar provisions, a reference to the CGST Act would also mean a reference to the same provision under the MGST Act. Further to the earlier, henceforth for the purposes of this Advance Ruling, a reference to such a similar provision under the CGST Act / MGST Act would be mentioned as being under the "GST Act".

Facts and Contention – as per the Applicant

The submissions, **as reproduced verbatim**, could be seen thus-

Statement of relevant facts having a bearing on the question(s) raised

1. We are providing works contract service as sub-contractor to main contractor for original contract work pertaining to railways.

2. As per **Notification No-20/2017- Central Tax (Rate) dated 22-08-2017** the rate 'TGS' is 12% for composite supply of works contract supplied by way of construction, erection, commission or installation of original works pertaining to railways.

3. As per SR.No-12 in press release of 25th meeting of GST council held at New Delhi on 18-01-2018, the rate of GST applicable to main contractor should be levied bysub-contractor.

4. As per **Notification No-01/2018- Central Tax(Rate) dated 25-01- 2018** the service provided by sub-contractor to main contractor for railway original works contract services is not specified in the notification.

Statement containing the applicant's interpretation of law and/ or facts, as the case may be, in respect of the afore said question(s)

(i.e. applicant's view point and submissions on issues on which the advance ruling is sought)

1. As per our view point even though we are sub-contractor providing service to main contractor for original contract work pertaining to railways, we should charge 12% GST only and not 18% as applicable in othercases.
2. The contract for original works pertaining to railways remains the same workscontract.
3. As there is difference of opinion after reading of press release of 25th meeting of GST council dated 18-01-2018 and **notification No 1/ 2018 dated 25-01-2018**, we are not in position to levy correct rate of GST on original sub-contracting work pertaining to railways carried on by us for our maincontractor.
4. This advance ruling is sought clarification for rate of tax to be levied by the sub-contractor to main contractor for original contract work pertaining torailways.

Further submissions, as reproduced verbatim, could be seen thus-

Our Submission is in Part 1 and Part 2 hereunder –

1. Part 1 – The Issue put before yourhonour.
2. Part 2 – The submission and explanation in support of ourissue.

Part 1: Issue

a. We are a WorksContractor.

b. We execute and undertake composite supply of works contract as defined in clause (119) of section 2 of the Central Goods and Services Tax Act, 2017.

c. We have been awarded a subcontract by another works contractor to execute the original work of civil construction for Railways.

d. As per the schedule of GST rate for a service under GST, the composite value of works contract is classified along with rates of tax ashereunder.

AC Code	Description of Services	Rate in %
9954	(v) Composite supply of works contract as defined in clause (119) of section 2 of the Central Goods and Services Tax Act, 2017, supplied by way of construction, erection, commissioning, or installation of original works pertaining to,- (a) railways, excluding (including substituted from 25/01/2018) monorail and metro; (b) a single residential unit otherwise than as apart of a residential complex; (c) low-cost houses upto a carpet area of 60 square metres per house in a housing project approved by competent authority empowered under the Scheme of Affordable Housing in Partnership' framed by the Ministry of Housing and Urban Poverty Alleviation, Government of India;	12
	(d) low cost houses up to a carpet area of 60 square metres per house in a housing project approved by the competent authority under- (1) the Affordable Housing in Partnership component of the Housing for All (Urban) Mission/ Pradhan Mantri Awas Yojana; (2) any housing scheme of a State Government; (e) post-harvest storage infrastructure for agricultural produce including a cold storage for such purposes; or (f) mechanised food grain handling system, machinery or equipment for units processing agricultural produce as food stuff excluding alcoholic beverages,	

The sub-contractor providing services to main contractor is further classified only under two categories as under

SAC Code	Description of Services	Rate in %
9954	(ix) Composite supply of works contract asdefined in clause (119) of section 2 of the Central Goods and Services Tax Act, 2017 provided by a sub- contractor to the main contractor providing services specified in item (iii) or item (vi) above to the Central Government, State Government, Union territory, a local authority; a Governmental Authority or a Government Entity. Provided that where the services are supplied to a Government Entity, they should have been procured by the said entity in relation to a work entrusted to it by the Central Government, State Government, Union territory or local authority, as the case may be.	12
	(x) Composite supply of works contract as defined in clause (119) of section 2 of the Central Goods and Services Tax Act, 2017 provided by a sub-contractor to the main contractor providing services specified in item	12
	(vi) above to the Central Government; State Government, Union territory, a local authority, a Governmental Authority or a Government Entity. Provided that where the services are supplied to a Government Entity, they should have been procured by the said entity in relation to a work entrusted to it by the Central Government; State Government, Union territory or local authority, as the case maybe.	12

Even though, we being subcontractor providing civil construction services to main contractor effecting original works contract for Railways which is not covered in 9954 (ix) and 9954 (x), we believe that the rate applicable to us. is 12% only which is the rate applicable for Composite supply of works contract as defined in clause (119) of section 2 of the Central Goods and Services Tax Act, 2017, supplied by way of construction, erection, commissioning, or installation of original works pertaining to,-

(a) railways excluding (including substituted from 25/01/2018) monorail and metro;,

Thus, to have certainty in the tax liability in relation to an activity provided by us, our application for Advance Ruling is sought for

1. At what rate of tax the liability should be determined on services provided by us to main contractor effecting civil construction work for railways?
2. Under which head we should classify our Services to execute civil construction contract for railways?

Part 2: Our Submission and Explanation

In support of our charging tax @ 12%, we submit our submission as under –

1. As per the section 2 (119) of the CGST Act, 2017 "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;
2. As per Section 2 (5) of CGST Act, 2017 "agent" means a person, including a factor, broker, commission agent, arhatia, del credere agent, an auctioneer or any other mercantile agent; by whatever name called, who carries on the business of supply or receipt of goods or services or both on behalf of another;
3. Contractor and sub-contractor are not defined under the CGST Act, 2017 but as per the generaldefinition
    a. Contractor means a person or firm that undertakes a contract from the employer to provide materials or labour to perform a service or do a job at a specified price.
    b. A sub contractor means a person who is hired by a general contractor (or prime contractor, or main contractor) to perform a specific task as part of the overall project or the total project at a specified price for services provided to the project by the originating employer.
4. When the contractor awards either wholly or partially, the contractual obligation to a sub-contractor the contracts remains the same and the identity of the contract doesn't change.

5. When the contractor a wards either wholly or partially, the work to the sub contractor, the work to be performed by the contractor as well as subcontractor remains same and identical to what is specify in the contract between the main contractor and the employer.
6. It can also be seen from the definition quoted above that subcontractor is not doing anything other but only what is specified in the contract between the main contractor and the employer.
7. As per the definition of agent above a agent is a person who carries on the same business of supply and / or receipt of goods or services or both on behalf of another. Thus we can call a subcontractor as an agent also who is undertaking the same supply of service for main contractor.
8. It can also be said that, the sub-contractor is only an agent of the contractor and the works job undertaken by him passes directly from the sub-contractor to the employer.
9. As the work get transferred directly to the employer by the sub contractor the works contract remains the same and therefore leads to the conclusion that there is only one contract which is undertaken by the contractor as well as sub contractor.
10. In our case, it is the transaction of a works contract, where the property in goods passes directly to the employer as and when we as a subcontractor have transferred and put our material and services for of execution of civil work carried for railways. The main contractor cannot take out our executed job and cannot treat it separately. Thus it cannot be said at any point of time, that the property in the works job passes to the contractor where the work is executed by us a sub contractor.
11. As we *have* already noticed, we are only an agent of the contractor and the property in goods passes directly from us being subcontractor to the employer which leads us to the conclusion that there is only one contract that is between railways and contractor as well as sub contractor. And we are doing the job forrailways.
12. We would also like to highlight the intent of the Government is to bring the rates of main contractor and sub contractor at par while

they are providing their services to Central Government, State Government, Union territory, a local authority, a Governmental Authority or a Government Entity.

13. Railways being a Governmental Authority/Entity is already covered under clause (x) of heading 9954 of section 5 of classification of services even though not specified separately.

14. Thus the rate applicable for civil works contract carried out for railways in para (v) of heading 9954 of section 5 of classification of services should be applicable to sub contractor also.

3. Contention – as per the Concerned Officer

As directed the application has been examined with reference to provisions of Chapter XVII of CGST Act, 2017 and it is submitted that–

(i) Prima facie it appears that the question on which the advance ruling is sought under CGST Act doesn't fall under any of the category mentioned in sub section (2) of Section 97 of the Act as the question, put forth by the Applicant is only relating to charging of rate of tax on the Works Contract Services (WCS) by the sub contractor to n contractor in respect of railways original works contract.

(ii) On examinationof the Notification No.20/ 2017-Central Tax (Rate) dated 22.08.2017 it appears that in terms of serial number

(v) of Table, Composite supply of works contract as defined in clause (119) of Section 2 of CGST Act, 2017, supplied by way of construction, erection, commissioning or installation of original works pertaining to – (a) railways, excluding monorail and metro; fate of tax is prescribed as 12%. Other than these services, rate of tax is prescribed at the rate of 18% as shown in serial number (vi). There is no Specific inclusion of WCS services provided by sub contractor to main contractor. Therefore, it appears from the said Notification No. 20/2017 Central Tax (Rate) dated 22.08.17 that the category of WCS services provided by sub-contractor to main contractor are not covered by the said notification.

(iv) As per amending **Notification No.01 /2018-Central Tax (Rate) dated 25.01.2018**, inpara (C)it is substituted that in serial

number (ix) and (x) that for Composite supply of WCS provided by sub contractor to main contractor specified in item (iii) or item (iv) to the Government Entity, rate of tax prescribed is 12%. However, for construction services other than (v), rate of tax is prescribed as 18%. Therefore, **Notification No.01/2018-Central Tax(Rate) dated 25.01.2018**, the services provided by sub contractor to main contractor for railway original works contract services are excluded from the main entry (ix) and (x) of the said notification. All other construction services other than specified services are therefore attractrate of 18% tax which includes services provided by sub contractor to main contractor for railway original works contract.

(v) The contention of the Applicant, that their services are covered by the original works contract specified in para (ix) and (x) of amended **Notfn. No. 01/2018-CT (Rate) dated 25.01.2018**, is not correct in as much as the said Notification has classified all other Works Contracts relating to Construction services in head (xii) prescrib in grate of 18%. The minutes of meeting dated 18.01.2018 para-12 quoted by the Applicant has mention of Government Entity but doesn't specifically include WCS provided by sub contractor to main contractor in relation to Railways.

In view of above, the question before the Advance Ruling Authority may be disposed off as per above provisions of law for the time being in force without accepting the interpretative views of the Applicant based on the minutes of meeting dated 18.01.2018 quoted by them.

4. Hearing

The preliminary Hearing was held on 12.06.2018. Shri Deepak Chandok, Chartered Accountant, duly authorized along with Ms Veena Chandok, CA., appeared and requested for admission of application as per details in ARA. No jurisdictional officer from the side of the department was present.

The application was admitted and Final Hearing in the matter was held on 03.07.2018. Shri Deepak Chandok, Chartered Accountant, along with Shri Vasant Hidakar, Partner appeared and made or a land further written submissions which were taken on record. The

jurisdictional officer, Sh. Devender Bakliwal, Supdt., Division-I, Pune-I Commissionerate appeared and made written submissions which were taken on record.

5. Observations

We have gone through the facts of the case, submissions made by the applicant and the department and documents on record.

The applicant has submitted that they are supplying Works Contract Services (WCS), as a subcontractor, to the main contractor who in turn are supplying WCS for original work pertaining to the Railways. They have made further submissions that when a contractor awards either wholly or partially, the work to a sub-contractor, then the work to be performed by both of them remains the same and identical to what is specified in the contract between the main contractor and the employer, in this case, the Railways and as per **Notification No-20/2017- Central Tax (Rate) dated 22-08-2017** the rate of GST is 12% for composite supply of works contract supplied by way of construction, erection, commission or installation of original works pertaining to railways. They are claiming that since the tax rate is 12% for the main contractor, the same rate should be applicable to the mtoo. They have also submitted that **Notification No-01/2018-Central Tax (Rate) dated 25-01-2018** has made certain amendments to the earlier **Notification No. 20/2017**, but has not provided clarification with respect to services provided by sub- contractor to main contractor for railway original works contract services. They have also cited SR. No-12 in press release of 25th meeting of GST council held at New Delhi on 18-01-2018, and stated that the rate of GST applicable to main contractor should be levied bysub-contractor.

We find that **Notification No. 11/2017-Central Tax (Rate) dated 28.06.2017**, has specified the rate of central tax to be levied on Intra State supply of services of description specified in Column 3 of the Table in the said Notfn, falling under scheme of classification of services mentioned therein. The relevant clauses (v) as mentioned by the applicant in their favour, of the said Notfn, as amended by **Notfn No. 20/2017-Central Tax (Rate) dated 22.10.2017** is reproduced below:-

S1 No.	Chapter, Sectionor Heading	Description of Service	Rate (per cent)	Cond-ition
3	Heading 9954 (Construction services)	(v) Composite supply of works contract as defined in clause (119) of section 2 of the Central Goods and Services Tax Act, 2017, supplied by way of construction, erection, commissioning, or installation of original works pertaining to,- (a) railways, excluding monorail and metro; (b) ; (c) ; (d) ; (e) ; or (f) ……..	6	-]

A plain reading of Sr. No. 3, clause (v) reveals that 'composite supply of WCS supplied by way of construction, erection, commissioning, or installation of original works **pertaining to,-**

(a) Railways

Attracts a tax rate of 6% each of CGST and SGST.

Here we may mention that the applicant has submitted that they have been sub-contracted by the main contractor to supply WCS and in turn the main contractor is supplying WCS to the Railways. From the submissions made by the applicant it appears that the WCS provided by them is the same or a part of the main contract entered into between the main contractor and the Railways. It also appears that works contract service is civil works performed by the sub-contractor

for the Railways and the property in goods (materials used in the supply of Works Contract Service) also gets transferred to the Railways directly. In such a case as per the above mentioned clause (v) of **Notfn No. 20/2017-Central Tax (Rate) dated 22.10.2017**, the works contract **service provided by the sub-contractor to the main contractor would be supply of** Works Contract *pertaining to Railways* and therefore chargeable to tax @ 12% (6% of CGST and SGST each). However, the benefit of 12% tax rate would be available to the applicant only if the Works

Contract Services provided by them are Composite supply of works contract as defined in clause (119) of section 2 of the Central Goods and Services Tax Act, 2017, supplied by way of construction, erection, commissioning, or installation of original works pertaining to railways.

Thus in respect of Sr. No. 3 of Notification No. 11/2017 dated 28.06. 2017 as amended up till today, event he sub-contractor providing services of composite supply of works contract in respect of original works pertaining to railways would be covered for concessional rate of GST @ 12% as given under Sr. No. 3 of Notification No. 11/2017 as amended referred above.

06. In view of the deliberations as held herein above, we pass an order as follows:

ORDER

(under section 98 of the Central Goods and Services Tax Act, 2017 and the Maharashtra Goods and Services Tax Act, 2017)

NO.GST-ARA- 09/2018-19/B-65 Mumbai, dt. 11/07/2018

For reasons as discussed in the body of the order, the question is answered thus –

Q. No. 1: What Tax rate to be charged by the sub contractor to main contractor on Works Contract Services (WCS) pertaining to railways original works contract?

Answer: The tax rate to be charged by the sub-contractor to the main contractor would be @ 6% of CGST and SCSI each, in the present case.

Q. No. 2: Whether to charge tax rate of 12% GST or 18% GST?

Answer : The tax rate to be charged would be 12% in the present cas.

Some of the Advance Rulings :

Authority of Advance Ruling in case of **Skipper Ltd., [2018] 100 taxmann.com 90 (AAR - WEST BENGAL)**

Facts: The applicant-company is engaged in the manufacturing, installation and other ancillary services of integrated transmission towers. It has executed a contract with PGCIL for construction and commissioning of Tower Package. It submits that as the contract with PGCIL has been split up into two separate parts one for ex-factory supply of materials and the other for supply of allied services like erection of towers, testing and commissioning of transmission lines etc. which also includes inland / local transportation, insurance, delivery of materials and storage of them at the contractee PGCIL's site, the execution of the Towers cannot come under "works contract service", since it does not involve the supply of any immovable property and has sought a Ruling on the applicability of Notification No. 12/2017-Central Tax (Rate) dated 28/06/2017

The AAR held that GST being a tax on the supply of both goods and services, it is no longer necessary to segregate the supply of goods in an indivisible composite contract for the purpose of taxation. GST can be levied on the entire value chain, which is the bundled supply of goods and services for execution of an indivisible composite contract for construction, erection, commissioning etc. of an immovable property. The applicant is executing an indivisible composite contract for construction, erection and commissioning of an immovable property, namely, the Tower Package, execution of which involves bundled supply of both goods and services and it is, therefore, works contract. The contract for the Tower Package being works contract is service in terms of paragraph 6(a) to Schedule II to the GST Act.

Activities covered under Schedule II are to be treated as a supply of the nature described under section 7(1)(d) of the GST Act. Thus, GST is to be paid on the entire value of the works contract, including the supply of materials, transportation, in transit insurance, erection, commissioning etc. The exemption under serial no. 18 of Notification No. 12/2017-Central Tax (Rate) dated 28/06/2017 is, therefore, not applicable in the present context.

Authority of Advance Ruling, West Bengal in case of **EMC Ltd., [2018] 93 taxmann.com 200 (AAR-WEST BENGAL), CASE NO. 07 OF 2018 -MAY 11, 2018**

Where applicant who is a supplier of materials and allied services for erection of towers, testing and commissioning of transmission lines and setting up sub-stations collectively called Tower Package entered into two contracts for supply of materials at ex-factory price, and for supply of allied services like survey and erection of towers, testing and commissioning of transmission lines etc. and wants a ruling on whether he is liable to pay tax on freight bills, it is held that applicant supplies works contract service, of which freight and transportation is merely a component and not a separate and independent identity, and GST is to be paid at 18 per cent on entire value of composite supply, including supply of materials, freight and transportation, erection, commissioning etc.

Case-3

Case Name : ABB India Ltd.,

Appeal Number :01/2020

Date of Judgement/Order :47/WBAAR/2019 Dated 20.03.2020

Courts : AAR West Bengal (57) **Advance Rulings** (1287)

Order: 12% GST on Composite Supply of Works Contract for Metro & MonorailRead more at: https://www.taxscan.in/12-gst-composite-supply-work-contract-metro-monorail-aar/53496/

ANNEXURE

Annexure - I

F No.-354/32/2019-TRU
Government of India
Ministry of Finance
Department of Revenue
(Tax Research Unit)

Dated the 7th May, 2019, New Delhi

Subject: FAQs on real estate-reg.

A number of issues have been raised regarding the new GST rate structure notified for real estate sector effective from 01-04-2019. A compilation of Frequently Asked Questions (FAQs) is presented below. The answers to the FAQs have been given in simple language for guidance and easy understanding of all stakeholders in the real estate sector. They do not have force of law. In case of conflict, the gazette notifications, which have legal force, shall have precedence.

<table>
<tr><th>S. No.</th><th>Question</th><th>Answer</th></tr>
<tr><td>1.</td><td>What are the rates of GST applicable on construction of residential apartments?</td><td>With effect from 01-04-2019, effective rate of GST applicable on construction of residential apartments by promoters in a real estate project are as under:
<table>
<tr><td>Description</td><td>Effective rate of GST (after deduction of value of land)</td></tr>
<tr><td>Construction of affordable residential apartments</td><td>1% without ITC on total consideration.</td></tr>
<tr><td>Construction of residential apartments other than affordable residential apartments</td><td>5% without ITC on total consideration.</td></tr>
</table>
</td></tr>
</table>

		The above rates are effective from 01-04-2019 and are applicable to construction of residential apartments in a project which commences on or after 01-04-2019 as well as in on-going projects. However, in case of on-going project, the promoter has an option to pay GST at the old rates, i.e. at the effective rate of 8% on affordable residential apartments and effective rate of 12% on other than affordable residential apartments and, consequently, to avail permissible credit of inputs taxes; in such cases the promoter is also expected to pass the benefit of the credit availed by him to the buyers.
2.	What is an affordable residential apartment?	Affordable residential apartment is a residential apartment in a project which commences on or after 01-04-2019, or in an ongoing project in respect of which the promoter has opted for new rate of 1% (effective from 01-04-2019) having carpet area upto 60 square meter in metropolitan cities and 90 square meter in cities or towns other than metropolitan cities and the gross amount charged for which, by the builder is not more than forty five lakhs rupees. [Cities or towns in the notification shall include all areas other than metropolitan city as defined, such as villages.] In an ongoing project in respect of which the promoter has opted for new rates, the term also includes apartments being constructed under the specified housing schemes of Central or State Governments. [Metropolitan cities are Bengaluru, Chennai, Delhi NCR (limited to Delhi, Noida, Greater Noida, Ghaziabad, Gurgaon, Faridabad), Hyderabad, Kolkata and Mumbai (whole of MMR) with their geographical limits prescribed by Government.]

3.	What is an on-going project?	A project which meets the following conditions shall be considered as an ongoing project. (a) Commencement certificate for the project, where required, has been issued by the competent authority on or before 31st March, 2019, and it is certified by a registered architect, chartered engineer or a licensed surveyor that construction of the project has started (i.e. earthwork for site preparation for the project has been completed and excavation for foundation has started) on or before 31st March, 2019. (b) Where commencement certificate in respect of the project, is not required to be issued by the competent authority, it is to be certified by any of the authorities specified in (a) above that construction of theproject has started on or before the 31st March, 2019. (c) Completion certificate has not been issued or first occupation of the project has not taken place on or before the 31st March, 2019. (d) Apartments of the project have been, partly or wholly, booked on or before 31st March, 2019.
4.	Does a promoter or a builder has option to pay tax at old rates of 8% & 12% with ITC?	Yes, but such an option is available in the case of an ongoing project. In case of such a project, thepromoter or builder has option to pay GST at old effectiverate of 8% and 12% with ITC. To continue with the old rates, the promoter/ builder has to exercise one time option in the prescribed form and submit the same manually to the jurisdictional Commissioner by the 10th of May, 2019.

<table>
<tr><td></td><td></td><td>However, in case where a promoter or builder does not exercise option in the prescribed form, it shall be deemed that he has opted for new rates in respect of ongoing projects and accordingly new rate of GST i.e. 5% / 1% shall be applicable and all the provisions of new scheme including transitional provisions shall be applied.

There is no such option available in case of projects which commence on or after 01.04.2019. Construction of residential apartments in projects commencing on or after 01.04.2019 shall compulsorily attract new rate of GST @ 1% or 5% without ITC.</td></tr>
<tr><td>5.</td><td>What is the rate of GST applicable on construction of commercial apartments [shops, godowns, offices etc.] in a real estate project?</td><td>With effect from 01-04-2019, effective rate of GST, after deduction of value of land or undivided share of land, on construction of commercial apartments [shops, godowns, offices etc.] by promoter in real estate project are as under:
<table>
<tr><td>Description Construction of commercial apartments in a Residential Real Estate Project (RREP), as explained in question no. 6 below, which commences on or after 01-04-2019 or in an ongoing project in respect of which the promoter has opted for new rates effective from 01-04-2019</td><td>Effective rate of GST (after deduction of value of land) 5% without ITC on total consideration.</td></tr>
<tr><td>Construction of commercial apartments in a Real Estate Project (REP) other than Residential Real Estate Project (RREP) or in an ongoing project in respect of which the promoter has opted for old rates</td><td>12% with ITC on total consideration.</td></tr>
</table></td></tr>
</table>

6.	What is a Residential Real Estate Project?	A "Residential Real Estate Project" means a "Real Estate Project" in which the carpet area of the commercial apartments is not more than 15 per cent. of the total carpet area of all the apartments in the project.
7.	What is the criteria to be used by an architect, a chartered engineer or a licensed surveyor for certifying that construction of the project has started by 31st March, 2019	Construction of a project shall be considered to have been started on or before 31stMarch, 2019, ifthe earthwork for site preparation for the project has been completed, and excavation for foundation has started on or before the 31st March, 2019.
8.	Does a promoter/ builder have to all purchase goods and services from registered suppliers only?	A promoter shall purchase at leasteighty percent. of the value of inputand input services, from registered suppliers. For calculating this threshold, the value of services by way of grant of development rights, long term lease ofland, floor space index, or the value of electricity, high speeddiesel, motor spirit and natural gas used in construction of residential apartments in a project shall be excluded.
9.	If value of purchases as prescribed above from registered supplier is less than 80%, what would be the applicable GST rate on such purchases?	Promoter has to pay GST @ 18% on reverse charge basis on all such inward supplies (to the extent short of 80% of inward supplies from registered supplier) except cement on which tax has to be paid (by the promoter on reverse charge basis) at the applicable rate, which at present is 28% (CGST 14% + SGST 14%)

10.	In case of new rate of 5%/1%, whether the conditions of payment of tax through Cash Ledger, payment of tax under RCM subject to 80% limit, non- availing of Input Tax Credit, reversal of credit, maintenance of project wise account, reporting of ITC not availed in corresponding GSTR-3B etc. are required to be complied mandatorily by the Developer ?	Yes. All the specified conditions against clause (i) to (id) of Sl. No 3 of Notification No. 11/2017- CTR are mandatory.
11.	What is the rate of GST applicable on transfer of development rights, FSI and long term lease of land?	Supply of TDR or FSI or long term lease of land used for the construction of residential apartments in a project that are booked before issue of completion certificate or first occupation is exempt. Supply of TDR or FSI or long term lease of land, on such value which is proportionate to construction of residential apartments that remain un-booked on the date of issue of completion certificate or first occupation, would attract GST at the rate of 18%, but the amount of tax shall be limited to1% or 5%of value of apartment depending upon whether the residential apartments for which such TDR or FSI is used, in the affordable residential apartment category or in other than affordable residential apartment. TDR or FSI or long term lease of landused for construction of commercial apartments shall attract GST of 18%.

		The above shall be applicable to supply of TDR or FSI or long term lease of land used in the new projects where new rate of 1% or 5% is applicable.
12.	Who is liable to pay GST on TDR and floor space index?	The promoter is liable to pay GST on TDR or floor space index supplied on or after 01-04-2019 on reverse charge basis.
13.	At what point of time, the promoter should discharge its tax liability on TDR.	The liability to pay GST on development rights shall arise on the date of completion or first occupation of the project, whichever is earlier. Therefore, promoter shall be liable to pay tax on reverse charge basis, onsupply of TDR on or after 01-04-2019, which is attributable to the residential apartments that remain un-booked onthe date of issuance of completion certificate, or first occupation of the project.
14.	At what point of time, the promoter should discharge its tax liability on FSI (including additional FSI).	On FSI received on or after 1.4.2019, the promoter should discharge his tax liability on FSI as under: (i) In case of supply of FSI wherein consideration is in form of construction of commercial or residential apartments, liability to pay tax shall arise on date of issuance of Completion Certificate. (ii) In case of supply of FSI wherein monetary consideration is paid by promoter, liability to pay tax shall arise on date of issuance of Completion Certificate only if such FSI is relatable to construction of residential apartments. However, liability to pay tax shall arise immediately if such FSI is relatable to construction of commercial apartments.
15.	At what point of time, the promoter should discharge its tax liability on supply of long term lease.	On long term lease received on or after 1.4.2019, the promoter should discharge his tax liability on long term lease as under:

		In case of supply of long term lease of land for construction of commercial apartments, tax shall be paid by the promoter immediately. However, for construction of residential apartment, liability to pay tax onthe upfront amount payable for long term lease shall arise on the date of issuance of Completion Certificate.
16.	Land development corporation of Orissa has provided land on long term lease for 99 years, for construction of a real estate project. As per the lease agreement, promoter has to pay an upfront amount of ₹10 Crore and annual/ monthly licence fee of 5 lakhs. Does the promoter has to pay GST on these amounts?	The liability to pay tax on Long term lease of land (30 years or more) received against consideration in the form of upfront amount and periodic licence fee is on the promoter. The promoter has to discharge tax liability on the same on RCM basis. However, the upfront amount payable for the long term lease (known as premium, salami, cost, price, development charges etc.) is exempt to the extent it is used for construction of residential apartments that are booked before issuance of completion certificate or first occupation. Annual/ monthly rent or licence fee payable for long term lease is taxable under GST.
17.	Someone booked a flat from XYZ Developers in June, 2018. As of 31-03-2019, he had paid 40% of the value of the flat. What shall be the GST rate applicable on the remaining portion of value of the flat?	GST on the remaining portion of the value of flat payable to the promoter on or after 01-04-2019 as per the contract between the promoter and buyer shall be payable at effective rate of 1% or 5%, subject to the condition that the builder has not exercised the option to pay tax on construction of apartments at the old rates of 12% or 18%. If the XYZ developer exercises option to continue to pay tax at old effectiverate of 8% or 12% by 10th May, 2019, then GST has to be paid @ 8% or 12% on remaining portion of the value of the flat; in such cases, the promoter would be entitled to permissible credit of input taxes and, as such, the price that he charges from the buyer should appropriately reflect this credit.

18.	I am a beneficiary of PMAY-CLSS and carpet area of my house being constructed in an ongoing project is 150 sqm. Am I eligible for new rate of 1% on same?	You are eligible for new GST rate of 1%, subject to the condition that the developer-promoterwith whom you have booked the house has not exercised option to pay tax on construction of apartments at the old rate of 8%.
19.	I am planning to purchase an apartment in a newly launched project. The project has been launched after 31.03.2019 by XYZ Developers at Noida. Price of the apartment having carpet area of 80 sqm is 48 lakhs. What is the rate of GST applicable on construction of this apartment?	The tax rate applicable on construction of the apartments in a project that commences on or after 01.04.2019 would be 5%.
20.	I have already paid tax of 12% (effective) on instalments paid before 01.04.2019. I wish to get the benefit of new rate of 1% or 5%. Whether it is the builder or the buyer who has the option to pay tax at the new or old rates?	The buyer cannot exercise option to pay tax at the new or old rates. It is the builder,who has to exercise the option to pay tax on construction of apartments at the old rate of 12% latest by 10th May, 2019. If the builder doesn't exercises his option to continue to pay tax at the old rate by the said date, then the effective GST rate applicable on all your instalments payable to the builder on or after 01.04.2019 as per the contract shall be either 1% or 5%, depending on whether the apartment is an affordable or other than affordable residential apartment.

21.	In respect of supply made in an ongoing Project covered by clauses (ie) and (if) of Entry 3 of Notification No. 3/2019, CT (R), an option is required to be exercised by the Promoter in Annexure IV by 10th May 2019. At the same time, it is permissible for him to issue invoices between 1st April 2019 to 9th May 2019 which shall, however, be in conformity with the option to be exercised. Whether it is permissible for the Promoter to revise the invoice as provided in Section 34 of CGST Act, 2017, including by way of issuance of Credit/Debit Notes so as to bring the transaction in conformity with the option exercised by the Promoter ultimately by 10th May 2019?	Where the GST rate at which tax has been charged in the invoices issued by the promoter prior to 10th May, 2019 are not in accordance with the option required to be exercised by him on or before 10th May, 2019 to pay GST on construction of apartments in an ongoing project at either the new or old rates, the promoter may issue debit or credit notes in accordance with Section 34 of CGST Act, 2017.

22.	How to compute adjust-ment of tax in a Credit Note to be issued u/s 34 by Real Estate Developer in case unit was booked prior to 1st April, 2019 on which GST was paid on part consideration received at the time of booking, but cancelled after 1st April, 2019.	Developer shall be able to issue a Credit Note to the buyer as per provisions of section 34 in case of change in price or cancellation of booking provided that the amount received in excess if any, consequent to issuance of Credit Note, is refunded to the Buyer by the Developer before September following the end of the financial year. Developer shall be able to take adjustment of tax paid in respect of the amount of such Credit Note. For example, a Developer who paid GST of ₹1,20,000 at the rate of 12% (effectively) in respect of a gross amount of booking of ₹10,00,000 before 1st April, 2019 shall be entitled to take adjustment of tax of ₹1,20,000 upon cancellation of the said booking on or after 1st April, 2019 against other liability of GST including liability arising at the rate of 5% / 1% provided that the entire amount received from the buyer is refunded by the Developer. Further, in case apartments booked prior to 1.04.2019 on which GST has been paid till 31.03.2019 at the old rates of 8%/ 12% with ITC, are cancelled and rebooked at the new rates of 1%/ 5% without ITC or sold after issuance of completion certificate, the credit taken in respect of such apartments for supply of service till 31.03.2019 on which tax was paid @ 8%/ 12% with ITC shall be required to be reversed.
23.	Whether the option to pay tax at the applicable effective rate of 12% or 8% (with ITC) is available to the Promoter in respect of the New Project, which has been commenced on or after 1st April 2019?	No, there is no option to pay tax at the effective rate of 12% or 8% with ITC on construction of residential apartments in projects which commences on or after 01-04-2019.

24.	From the plain reading of the provisions and the definitions of the various terms as defined in the Notification No. 3/2019-CT(R), it appears that the one- time option is required to be exercised for the entire REP or RREP. Does this mean that a Promoter can opt for old rates or new rates, as the case may be, for different projects being undertaken by him under the same entity?	Yes. The option to pay tax on construction of apartments in the ongoing projects at the effective old rates of 8% and 12% with ITC has to be exercised for each ongoing project separately. As per RERA, 2016, project wise registration is allowed. So, the promoter may exercise different options for different ongoing projects being undertaken by him.
25.	In respect of the construction and supply of premises under specific schemes like PMAY, Housing for All (Urban), RAY etc. as mentioned in sub items (b), (c), (d), (da), (db) of item (iv) and sub items (c), (d), (da) of item (v) of Entry 3 of Notification 11/2017 – CT (R), whether the pre-existing effective rate of 8%, with ITC benefit continues to be available in case of any New Project that has commenced under any such scheme after 1/4/2019?	No. The rate of 8% and 12% with ITC is not available for construction of apartments in a project that commences on or after 01-04-2019. It makes no difference whether or not the apartments are being constructed under PMAY or any other housing schemes of the Central or State Government.

26.	In respect of any ongoing project undertaken under the specific schemes like PMAY, Housing for All(Urban), RAY etc. as mentioned in items (iv) and (v) of Entry 3 of Notification 11/2017- CT (R), prior to 31/3/2019, whether an option is available to the Promoter to pay the tax at the new rates of 1% or 5% (without ITC) or at the existing rates of 8% (with ITC)?	Yes. The promoter has the option to pay tax either at the old rate of 8% (with ITC) or at 1% (without ITC) on construction of residential apartments in ongoing projects being constructed under PMAY and other specified housing schemes of the Central or State Governments in items (iv) and (v) of Entry 3 of Notification 11/2017- Central Tax (Rate) dated 28-06-2017. The option to pay tax on construction of apartments in the ongoing projects at the old rates of 8% with ITC has to be exercised by the promoter for ongoing project.
27.	In case where the Development rights are supplied by the Landowner to the Promoter, under an area sharing arrangement between 1st July 2017 and 31/3/19, but the allotment of constructed area in an ongoing project is made by the Promoter to the Landowner on or after 1/4/2019, whether the tax liability, if any, is required to be discharged in terms of the Notification No. 4/2018 – CT (R)?	Yes. Tax liability on service by way of transfer of development rights prior to 01-04-2019 is required to be discharged in terms of Notification No. 4/2018 - Central Tax (Rate) dated 25.01.2018.

28.	Whether the GST is leviable on the output supply of Transferrable Development rights by a developer (usually evidenced by TDR Certificate issued by the authorities). If yes, under which entry and at what rate?	Yes, GST is payable on transfer of development rights by a developer to another developer or promoter or to any other person under reverse charge mechanism @ 18% with ITC under Sl. No. 16, item (iii) of Notification No. 11/2017 - Central Tax (Rate) dated 28-06-2017 (heading 9972).
29.	What is the meaning of the term "first occupation" referred to in clauses (i) to (id) of Entry 3 of Notification No. 3/2019? Whether, in case of an ongoing project, where part occupation certificate has been received in respect of some of the premises comprised in the ongoing project, the Promoter is entitled to exercise the option of 1% / 5% (without ITC)or @ 8%/12% (with ITC) available in terms of Notification No. 3/2019 CT (R), in respect of the balance ongoing project?	The term "first occupation" appearing in Schedule II para 5 (b) and in notification No. 11/2017 – Central Tax (Rate) dated 29-03-2019 means the first occupation of the project in accordance with the laws, rules and regulations laid down by the Central Government, State Government or any other authority in this regard. Where occupation certificate has been issued for part (s) of the project but not for the entire project by 31-03-2019, the first occupation of the project shall not be considered to have taken place on or before 31-03- 2019 and the project shall be considered ongoing project provided it satisfies the other requirements of the definition of the term ongoing project. Promoter shall be entitled to exercise option to pay tax @ 1%/5% (without ITC) or @ 8%/12% (with ITC) on construction of apartments in such project.

30.	(a) In case of a single building registered as 2 (two) separate projects under the provisions of RERA viz. 1st to 10th floor as one Project and 11th to 20th floor as another project, whether the Developer can consider the entire building as single ongoing project, since all the three conditions to be complied with for classifying a project as an ongoing project can be satisfied only if the entire building is considered as a single project? (b) Furthermore, if different towers in a single layout are registered as separate projects under the provisions of RERA but where the approvals are common for all the towers, whether the Developer can consider entire layout as a single Ongoing project?	(a) Both the projects registered as separate projects under RERA, 2016 shall be treated as distinct projects for the purpose of Notification No. 11/2017-Central Tax (Rate) dated 28-06-2017 as amended by Notification No. 3/2019-Central Tax (Rate) dated 29-03-2019. Both the projects will have to independently satisfy the requirements of the definition of ongoing projects. (b) No. All the towers registered as different projects under RERA shall be treated as distinct projects. Only such towers registered as distinct projects for which commencement certificate has been issued on or before 31-03-2019, construction has started on or before 31-03-2019 and for which apartments have been booked on or before 31-03-2019 but completion certificate has not been issued or first occupation has not taken place by the said date shall be treated as ongoing projects.

31.	Whether TDR purchased on or after 1.4.2019 to be consumed by a developer-promoter in an ongoing project, in respect of which the promoter has opted for the new rate of tax, shall be liable to be taxed at the applicable rate, but limited to 1% or 5%, as the case may be, of the unsold area at the time of issuance of completion certificate?	Yes. Portion of such TDR transferred on or after 01-04-2019 which is used in an ongoing project in respect of which the promoter has opted for new rate of tax on construction of apartment @ 1% or 5% without ITC which remained un-booked on the date of issuance of completion certificate or first occupation of the project shall be liable to tax at the applicable rate not exceeding 1% of the value in case of affordable residential apartments and 5% of the value in case of other than affordable residential apartments.
32.	What shall be the classification of and rate of tax applicable to works contract service provided by a contractor to a developer or promoter under the new dispensation effective from 01-04-2019 for (a) New project after 1.4.2019 and ongoing projects where option has been exercised for new rate and	The rate of tax applicable on the work contract service provided by a contractor to a promoter for construction of a real estate project shall be 12% or 18% depending upon whether such work contract service is provided for construction of affordable residential apartments or residential apartments other than affordable residential apartments. Rate of tax applicable on such work contract service provided by a contractor to a promoter on construction of commercial apartments shall be 18% (irrespective of option exercised by developer- promoter).The relevant entries of the notification are at items (iv), (v), (va) and (vi) against sl. no. 3 of the table in Notification No. 11/2017-Cenral Tax (rate) dated 28-06-2017 prescribing rate of 12% for works contract services of construction of affordable apartments/ apartments being constructed under schemes specified therein. In case of

	(b) Ongoing projects where option has not been exercised for new rate?	works contract services for construction of other apartments, rate of 18% as prescribed in item (xii) against sl. no. 3 of the table in Notification No. 11/2017-Cenral Tax (rate) dated 28-06-2017 shall be applicable.
33.	A registered project has three Blocks and Completion Certificate has been received for one block prior to 1st April, 2019 and for two blocks will be received after that date. Will such a project for which multiple completion certi-ficates are received partly before 1st April, 2019 and partly after that date, constitute an ongoing project?	Where more than one completion certificate is issued for one project, for the purpose of definition of ongoing project as defined in the clause (xx) in the paragraph 4 of the notification No. 11/ 2017- CTR, dated 28.06.2017, completion certi-ficate issued for part of the project shall not be considered to have been issued for the project on or before 31-03-2019 unless completion certificate(s) have been issued for the entire project. Therefore, if completion certificate has not been issued for part of the project on or before 31-03-2019, the project shall still be considered as ongoing project provided other conditions of the definition of 'ongoing project' are met.
34.	It is a prevalent practice that more than one commence-ment certificate is issued by competent authority for single project. For example, in case of a single tower comprising of 50 floors and registered as single project, separate commencement certificates may be issued by the	Where commencement certi-ficate has been issued even for part of the project on or before 31-03-2019, it shall be treated as an ongoing project provided other requirements of the definition of ongoing project are met.

	competent authority for (i) basement and parking which is common to entire building (ii) first twenty floors (iii) next thirty floors. If one or two commencement certificates are received by the Developer prior to 1st April, 2019 and remaining on or after that date, will such a project be considered as an ongoing project?	
35.	There are many projects of redevelopment/slum rehabilitation in pipeline as on 1st April, 2019. It is possible that in such projects the development rights have been conferred upon the developer and pursuant to which the development process has been initiated such as receipt of commencement certificate, excavation for foundation etc., but booking against units for sale has not been received prior to 1st April, 2019.	In case of redevelopment or slum rehabilitation projects, the original inhabitants or the slum dwellers are not required to pay any monetary consideration to the promoter for the residential apartments allotted to them. Therefore, the residential apartments allotted to the original inhabitants in case of redevelopment project or slum dwellers in case of slum rehabilitation or redevelopment project, the requirement that at least one instalment has been credited to the bank account of the promoter shall not be required to be met for such apartments to be considered as having been booked on or before 31-03-2019 provided other requirements for considering an apartment booked on or before 31.03.2019 have been met. The consideration for such apartments is receipt in the form of transfer of development rights from the original inhabitants in case of redevelopment projects or the government in case of slum rehabilitation projects. Hence, the condition

	However, allotment of units to the existing dwellers (in respect of free supply units) which will yield no monetary consideration has been done. Clause (xiii) of Para 4 of Notification No. 11/2017-CTR as amended by Notification No. 3/2019-CTR requires credit of at least one instalment in the bank account prior to 1st April, 2019 for a project to be considered as ongoing project. It may please be clarified whether in such cases, apartments being constructed in the project shall be deemed to have been booked prior to 1st April, 2019 in case development agreement is executed prior to that date and whether accordingly such projects shall be considered as an ongoing project?	relating to credit of at least one instalment in the bank account of the promoter for the apartments being constructed in a slum redevelopment project to have been partly or wholly booked shall be deemed to have been satisfied in order to consider the project as an ongoing project, provided all other conditions for considering an apartment as booked are met in case of apartments allotted to slum dwellers; as there is no cash payment to be made by the slum dwellers.

36.	Can a developer take deduction of actual value of Land involved in sale of unit instead of taking deduction of deemed value of Land as per Paragraph 2 to Notification No. 11/2017-CTR ?	No. Valuation mechanism prescribed in paragraph 2 of the notification No. 11/2017-CTR dated 28.06.2017 clearly prescribes one-third abatement towards value of land.
37.	Para 3 of Annexure I and II to Notification No. 3/2019-CTR dated 29.03.02019, stipulate three different conditions. Clause (i) and (ii) of the said Para 3 are relating to percentage of invoicing. It is requested to clarify as to how and where the percentage of invoicing is to be taken into consideration while determining quantum of ITC reversal.	The illustrations given in the said annexure clearly explain how the provisions given in the clause (i) and (ii) of para 3 of the said annexure relating to percentage of invoicing shall operate. The same may be referred to.
38.	It may be clarified whether exemption granted on transfer of development right or FSI for residential construction and reverse charge mechanism prescribed for payment of tax on TDR, FSI or long term lease (premium) in the new	The new dispensation has been prescribed for real estate sector vide notifications issued on 29.03.2019. The same are effective prospectively from 01.04.2019. They shall apply only to development rights or FSI transferred on or after 01.04.2019. They shall not apply to development rights transferred by way of an agreement prior to 01.04.2019 even if the consideration for the same, in cash or kind, is paid in part or full on or after 01.04.2019.

	dispensation is applicable where development rights were transferred by way of an agreement executed prior to 1st April, 2019 but consideration, whether in cash or other form, flowed to the land owner, in full or part, on or after 1st April, 2019.	
39.	Land Owner being an individual is not engaged in the business of land relating activities and thus whether the transfer of development rights by an individual to a promoter is liable for GST and whether the same will fall within the scope of 'Supply' as defined in Section 7 of CGST / SGST Act, 2017? Position of such a transaction may be clarified in light of amendments recently made.	The term business has been assigned a very wide meaning in the CGST Act and it includes any trade, commerce, manufacture, profession, vacation, adventure, or any other similar activity whether or not it is for a pecuniary benefit irrespective of the volume, frequency, continuity or regularity of such activity or transaction. Therefore, the activity of transfer of development rights by a land owner, whether an individual or not, to a promoter is a supply of service subject to GST.

40.	In certain projects, developers have started construction on or before 31-03-2019. However, bookings in the project have not started. One of the conditions prescribed for a project to qualify as an ongoing project is that apartments being constructed should have been partly or wholly booked. Whether such project where bookings have not started but construction has started, would be eligible for the new rates of 1% or 5% without ITC?	As per explanation in clause (xxviii) of para 4 of the notification No. 11/2017- CTR dated 28.06.2017, "project which commences on or after 01.04.2019" shall mean a project other than an ongoing project. A project, in which bookings for the apartments have not started, would not be covered under definition of "ongoing project". The same would accordingly be treated as a project which commences on or after 01.04.2019 subject to the new rates of 1% or 5% without ITC, as the case may be.
41.	Whether the Form as per Annexure IV of the Notification No. 3/2019-CTR is to be filed with both the jurisdictional commissioner i.e. Central Tax, State Tax. Whether modification / amendments in such Form are allowed subsequent to filing of the form, after 10th May, 2019?	No. The Form shall be filed manually with the office of the Commissioner in whose jurisdiction the egistration of the promoter is assigned. No modification / amendment of the option is allowed in the Form once submitted.

F. No. 354/32/2019-TRU

Annexure - II

F.No. 354/32/2019-TRU
Government of India Ministry of Finance
Department of Revenue
(Tax Research Unit)
Dated the 14th May, 2019, New Delhi

Subject: FAQs (Part II) on real estate- reg.

A number of issues have been raised regarding the new GST rate structure notified for real estate sector effective from 01-04-2019. A **compilation of Frequently Asked Questions (FAQs) containing 41 questions** was issued on 7th May, 2019. Part II of the FAQ is presented below. The answers to the FAQs have been given in simple language for guidance and easy understanding of all stakeholders in the real estate sector. They do not have force of law. In case of conflict, the gazette notifications, which have legal force, shall have precedence.

Sl. No.	Question	Answer
1.	In case of an area sharing arrangement between a Landowner-Promoter and a Developer-Promoter, where the Project qualifies to be considered an "Ongoing Project", whether an option of 1% or 5% (without ITC) vis-avis 8% or 12% (with ITC) as prescribed in **Notification No. 3/2019** can be exercised by the Developer-Promoter and Landowner-Promoter independently?	The legal and operational harmony necessitates that both the Landowner-Promoter and the Developer-Promoter exercise identical option for a project.

2.	In case of an area sharing arrangement between a Landowner-Promoter and a Developer-Promoter in a New Project undertaken on or after 1/4/2019, whether the new rate of 1% or 5% is applicable in case of the Landowner-Promoter who sells the under-construction premises before completion of the project? Will the Landowner-Promoter be entitled to ITC in respect of tax charged to him by the Developer-Promoter on such supply? Whether the Landowner-Promoter shall be entitled to avail ITC on any other services or goods used by him in furtherance of his business (such **as** brokerage on sales etc.)?	The new effective rates of 1% and 5% without ITC are applicable to the apartments booked by the land owner promoter in an ongoing project as well as a new project which commences on or after 01-04-2019. The land owner promoter shall be entitled to ITC in respect of tax charged to him by the developer promoter on construction of such taxguru.in apartments. However, the land owner promoter shall not be entitled to avail ITC on any other services or goods used by him.
3.	Residential Real Estate Project (RREP) shall mean a REP in which the carpet area of thecommercial apartments is not more than 15% of the total carpet area of all the apartments in the REP (Clause xix). "Carpet area" shall have the same meaning as assigned to it in clause (k) of Section 2 of the RERA, 2016. Whether non-saleable **areas** such **as** society office, club house, etc., are to be taken into consideration for determining 15% for deciding whether the project is RREP or not?	The term "Residential Real Estate Project (RREP) has been defined in the notification to mean a REP in which the carpet area of the commercial apartments is not more than 15 per cent. of the total carpet area of all the apartments in the REP. Apartments shall be taken **as** commercial or residential apartments as declared to RERA authority.

4.	For the purpose of determining the threshold of ₹45 lakhs in case of "affordable residential apartment", whether the following charges generally recovered by the developer from the buyer shall be included? • Amenity Charges • Society formation charges • Advance maintenance • Legal Charges	For the purpose of determining the threshold of the gross amount of ₹45.00 lakh for affordable residential apartments, all the chargac or amounts charged by the promoter from the buyer of the apartments shall form part of the gross amount charged. Clause xvi, sub-clause (a)(ii)(C) of paragraph 4 of **notification No. 11/2017-CT(R) dated 28.06.2017,** reproduced below, refers. C. Any other amount charged by the promoter from the buyer of the apartment including preferential location charges, development charges, parking charges, common facility charges etc. However the value shall not include stamp duty payable to the statutory authority, maintenance charges / deposits for maintenance of apartment or maintenance of common infrastructure.
5.	In case of a Real Estate Project, comprising of Residential as well as Commercial portion (more than 15%), how is the minimum procurement limit of 80% to be tested, evaluated and complied with where the Project has single RERA Registration and a single GST Registration and it is not practically feasible to get separate registrations due to peculiar nature of building(s)?	The promoter shall apportion and account for the procurements for residential and commercial portion on the taxguru.in basis of the ratio of the carpet area of the residential and commercial apartments in the project.

6.	In an area sharing model, a promoter has to handover constructed flats/apartments to the land owner who supplied TDR for the project. Value of TDR at the time when the landowner transferred it to the promoter is not known. How would the promoter determine GST on TDR?	Value of TDR, shall be equal to the amount charged by the promoter for similar apartments from the independent buyers booked on the date that is nearest to the date on which such development rights or FSI is transferred by the land owner to the promoter.
7.	In the formula prescribed under first proviso to Entry 41A of the **Notification 12/2017-CT (R)**, as amended by **Notification 4/2019 CT (R)**, what rate shall be taken to determine the value to be ascribed to the "GST Payable on TDR or FSI or both for construction of the residential apartments in the project but for exemption contained therein" as no specific rate has been prescribed in **Notification 11/2017 CT-Rate** or any other notification? What is the rate applicable to output supply of TDR or FSI? Whether the quantum of TDR or FSI (including additional FSI) or both shall be taken only in respect of un-booked apartments as on the date of issuance of Completion Certificate or first occupation of the project for the purpose of formula?	The GST on transfer of development rights or FSI (including additional FSI) is payable at the rate of 18% (9% + 9%) with ITC under SI. No. 16, item (iii) of **Notification No. 11/2017 – Central Tax (Rate) dated 28-06-2017** (heading 9972). There is no exemption on TDR or FSI (Addl. FSI) for construction of commercial apartments. Therefore, GST shall be payable on TDR or FSI (including additional FSI) or both used in respect of (i) carpet area of commercial apartment and (ii) un-booked residential apartments as on the date of issuance of Completion Certificate or first occupation of the project for the purpose of formula.

8.	In case of Redevelopment, Slum Rehabilitation or similar arrangements, the Developer will be constructing two types of units i.e. one which is allotted toexisting occupiers for no monetary consideration andsecond which is sold in the market to outside buyer. Price at which the unit is being sold to the outsider is determined in a manner to factor cost of construction of both type of units so that the unit to existing occupiers may be allotted free of monetary consideration. It may be clarified whether the Input Tax Credit in relation to construction of units to be allotted to existing occupiers, in case of residential project opted for old rates or commercial projects, shall be allowed to the Developer.	The apartments given to the original inhabitants or the slum dwellers in redevelopment project or slum rehabilitation project are given by the promoter against consideration received by them in the form of TDR/ FSI/ monetary consideration from the original inhabitants in case of redevelopment projects and from the Government in case of slum rehabilitation projects. The supply of service by way of construction of such apartments against construction wholly or partly in the form of TDR/FSI is a taxable supply subject to GST. Wherever tax is paid on construction of such apartments at the effective rates of GST of 8%/12% with ITC, the promoters shall be eligible for ITC, including ITC in relation to construction of units to be allotted to the existing occupiers even though there may not be a monetary consideration but the consideration is in the form of grant of TDR/FSI.
9.	In case of redevelopment or slum rehabilitation project, (new or an existing project) whether the constructed units supplied to existing occupiers by the developer free of monetary consideration are taxable? In case of ongoing project in respect of which the promoter has opted for new rates of 1%/5%, it may be clarified whether the units being supplied	Yes, units supplied free of cost also attract GST as their consideration is not money but TDR/ FSI or rights relatable to land on which construction takes place. In such an ongoing project, the units sold in open market would be eligible for GST rate of 1% (without ITC), if such units are covered under Credit Linked Subsidy Scheme, as provided in the definition of "affordable residential apartments" given in **notification no 11/2017- CTR dated 28.06.2017** as amended by **notification No. 3/2019-CTR dated 29.03.2019**.

	free of monetary consideration to existing dwellers will fall within the definition of affordable housing when certain units being sold in the open market are eligible for concessional rates under the category of Credit Linked Subsidy Scheme i.e. sub- item (da) of item (iv) of SI. No. 3 of **notification No. 1 1/2017- CTR**?	The apartments being constructed in such ongoing project, for existing slum dweller occupiers shall be eligible for 1% rate if they meet the definition of affordable residential apartment, as under- (a) They have carpet area of less than 60 sqm in specified metropolitan cities or 90 sqm in places other than the specified metropolitan cities and the gross amount charged for similar apartments from independent buyers is not more than rupees 45 lakhs. (Please refer to para 2A of **notification No. 11/2017- CTR dated 28.06.2019** as amended vide **notification No. 3/2019- CTR dated 29.03.2019)**, or (b) They are being constructed under any of the schemes specified in sub-item (b), sub-item (c), sub-item (d), sub-item (da) and sub-item (db) of item (iv); sub-item (b), sub-item (c), sub-item (d) and sub item (da) of item (v); and sub-item (c) of item (vi), against serial number 3 of the said notification.
10.	What shall be the rate of GST applicable on projects in respect of which OC has been issued prior to 01.04.2019, but the balance demands are pending? Such projects are neither projects which commence on or after 01.04. 2019 nor ongoing projects.	Time of supply of the service by way of construction of apartments in such projects falls prior to 01.04.2019 and accordingly the rates as existed prior to 01.04.2019 would apply to such balance demands.

11.	The affordable residential apartment should not have a carpet area exceeding 60 sqm in metropolitan cities and 90 sqm in other places. Will the internal walls of the apartment, balcony or veran-dah be included 60/90 sq meter?	"Carpet area" is defined in clause (k) of section 2 of the RERA, 2016 and the same has been adopted in the notification.
12.	If an un-registered person transfers development right to adeveloper-promoter, then it is apparently not covered by the fourth proviso applicable to clause (i) to clause (id) of serial 3 of **Notification No. 11/2017** (as amended). Will the promoter be liable to pay GST on TDR received from an un-registered land owner?	Promoter shall be liable to pay GST on TDR transferred by any person whether registered or not on RCM basis.
13.	Whether the ITC availed as per the second proviso applicable to clause (i) to clause (id) of serial 3 of **Notification No. 11/2017** (as amended) can be adjusted against the output liability of 5% / 1%?	No. GST on services of construction of an apartment by a promoter at the rate of 1%/ 5% is to be discharged in cash only. ITC, if any, may be used for discharging any other supply of service.
14.	If a developer-promoter opts to pay tax for the on-going project of affordable residential apartment at the new rate, can he use the ITC available to him under the second proviso applicable to clause (i) to clause (id) of serial 3 of **Notification No. 11/2017** (as amended) for payment of tax at 1%/5%?	Reply as in Q. No. 13 above.

15.	The condition in **Notification No. 3/2019** specifies that 80% of inputs and input services should be procured from registered person. What about expendituresuch as salaries, wages, etc. These are not supplies underGST [SI. 1 of Schedule III]. Now, my question is, whether such services will be included under input services for considering 80% criteria?	Services by an employee to the employer in the course of or in relation to his employment are neither a goods nor a service as per clause 1 of the Schedule III of CGST Act, 2017. Therefore, salaries and wages paid by promoter to his employees will not be relevant for the minimum purchase requirement of 80% .
16.	A buyer has booked an apartment prior to 1st April, 2019 and paid part consideration to the developer. The developer decides to opt for the new scheme for this ongoing project. Will the buyer be required to pay any additional tax for such payment he has made prior to 31st march, 2019?	No. For the past payments made before the transition date (01.04.2019), no additional GST is required to be paid.
17.	Whether the condition of receiving 80% of inputs and input services from the registered person shall be applicable if the developer opts to continue to pay tax at the old rates of 12%/8% in respect of an ongoing project?	No, if the developer opts to continue to pay tax at the old rates of 12%/8% in respect of an ongoing project, the condition of receiving 80% of inputs and input services from the registered person doesn't apply.

18.	Whether the inward supplies of exempted goods/services shall be included in the value of supplies from unregistered persons while calculating 80% threshold?	Yes. Inward supplies of exempted goods/ services shall be included in the value of supplies from unregistered persons while calculating 80% threshold.
19.	Whether the purchase of Land from an unregistered person shall be required to be included in the value of Input and Input Services for the purpose of calculation of 80% threshold?	No. As per Schedule III, Entry No 5, of CGST Act, sale of land is not a supply. In addition, as per 5th proviso to entries at SI. No. (i), (ia), (ib), (ic) and (id) against Serial No 3 in the **Notification No. 11 / 2017-CTR dated 28.06.2017** as amended by **Notification No. 3 / 2019-CTR dated 30/03/2019**, transactions by way of grant of development rights, long term lease, FSI etc. are not required to be included in the value of Input and Input Services for evaluation of criteria of 80% from registered persons.
20.	When a developer prefers the option of paying tax at 1%/ 5%, without ITC, for an ongoing project, whether the apartments which were not considered as affordable in the earlier scheme (though certain apartments in such project were considered as affordable in the earlier scheme) will be considered as affordable after 1st April, 2019, if such apartments fit the definition of affordable residential apartments as provided in **notification No. 3/2019- CT(R) dated 29.03.2019?**	Yes, in case of an ongoing project in respect of which the promoter has not opted to pay GST at the old rate, he shall pay tax at the effective rate of 1% without ITC on apartments which meet the new definition of affordable residential apartment.

21.	Whether the amended rule 42 shall apply to all RREPs including ongoing projects?	In case of an ongoing RREP, in respect of which promoter opts for the new rates of 1% / 5% and which underwent transition of ITC consequent to change of rates of tax on 01.04.2019, ITC determined under sub- rule (1) of rule 42 shall not be required to be calculated finally on the completion or first occupation of the RREP.
22.	Whether separate Form (Annexure IV) shall be filed by the Developer in respect of each of the Ongoing Projects?	Yes. The promoter has to exercise the option for payment of tax at the old rates of 8%/ 12% with ITC for each of the ongoing projects separately.
23.	On what basis a Contractor /Sub- contractor executing a composite supply of works contract in terms of clause (va) i.e. 12% for affordable residential apartments, shall satisfy himself as regards condition of 50% of the total carpet area?	The contractor may charge tax on the works contract service provided by him to a promoter at the concessional rate of 12% under **notification No. 11/2017- CTR dated 28.06.2019**, S. No. 3, entry (va) on the basis of a declaration by the promoter to the contractor that the project meets the conditions prescribed for concessional rate of GST on works contract service prescribed under the said entry.
24.	Whether the condition to make payment within 180 days by Land Owner – Promoter to Developer – Promoter as provided in second proviso to section 16 (2), shall be applicable for reversal of input tax credit ?	The apartments given to the Land Owner – Promoter are given by the Developer – Promoter against consideration received by him in the form of TDR from the Land Owner – Promoter. Therefore, the payment by Land Owner –Promoter for service of construction of apartments received from the Developer – Promoter is made even before the service is provided.

		Therefore, Land Owner – Promoter shall not be required to reverse input tax credit of tax charged from him by the Developer – Promoter on the ground that he has not made payment for the service received from the Developer – Promoter.
25.	Whether the exemption given by way of Entry 41A / 41B of **Notification No. 12/2017-CTR** shall be available in respect of development rights etc. transferred to a person other than promoter? Please clarify whether sub- clause (v) in clause (zk) in section 2 in RERA Act, 2016 covers a person who purchases TDR as developer?	The exemption is available only on TDR/ FSI transferred on or after 1st April, 2019 for construction of residential apartments by a promoter in areal estate project.
26.	How to determine value of construction services provided by the promoter to land owner in lieu of transfer of development rights, when land owner is not registered?	Value of construction services provided by the promoter to land owner in such cases shall be determined based on the total amount charged by the promoter for similar apartments in the project from independent buyers, other than the land owner, nearest to the date on which such development right etc. is transferred to the promoter, less the value of transfer of land, if any, as prescribed in paragraph 2 of **Notification No. 11/2017-CT(R) dated 28.06.2017**.

27.	In case of a project, where completion certificate has been received prior to 31-03-2019 but some part of the consideration in relation to the apartment is due after 31-03-2019, it appears that such project will not qualify as ongoing project. What will be the applicable tax rate on such amount received on or after 01.04.2019 – old rate or new rate?	Time of supply of service of construction of such apartments is prior to 01.04.2019 and the same shall be subject to tax at the old rates of 12%/8%.

F. No. 354/32/2019-TRU

Annexure - III

[TO BE PUBLISHED IN THE GAZZETE OF INDIA, EXTRAORDINARY, PART II, SECTION 3, SUB-SECTION (i)]

Government of India Ministry of Finance (Department of Revenue)

Notification No. 03/2019-Central Tax (Rate)

New Delhi, the 29th March, 2019

G.S.R.....(E).- In exercise of the powers conferred by sub-sections (1), (3) and (4) of section 9, sub-section (1) of section 11, sub-section (5) of section 15, sub-section (1) of section 16 and section 148 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 makes the following further amendments in the notification of the Government of India, in the Ministry of Finance (Department of Revenue) No.11/2017- Central Tax (Rate), dated the 28thJune, 2017, published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (i), *vide* number G.S.R. 690(E), dated the 28thJune, 2017, namely:-

In the said notification, -

(i) in the opening paragraph,

(a) after the word, brackets and figures "conferred by sub-section (1),", the word, brackets and figures "sub-section (3) and sub-section (4)" shall respectively be inserted;

(b) the word "and" after the words and figures "sub-section (5) of section 15" shall be substituted by the symbol ",";

(c) after the word, brackets and figures "section (16)", the words and figure "and section 148" shall be inserted;

(ii) in the Table, -

(a) against serial number 3, for item (i), and the entries relating thereto in column (3), (4) and (5), the following items and entries shall be substituted, namely, -

Table

(3)	(4)	(5)
"(i) Construction of affordable residential apartments by a promoter in a Residential Real Estate Project (herein after referred to as RREP) which commences on or after 1st April, 2019 or in an ongoing RREP in respect of which the promoter has not exercised option to pay central tax on construction of apartments at the rates as specified for item (ie) or (if) below, as the case may be, in the manner prescribed therein, intended for sale to a buyer, wholly or partly, except where the entire consideration has been received after issuance of completion certificate, where required, by the competent authority or after its first occupation, whichever is earlier. (Provisions of paragraph 2 of this notification shall apply for valuation of this service)	0.75	Provided that the central tax at the rate specified in column (4) shall be paid in cash, that is, by debiting the electronic cash ledger only; Provided also that credit of input tax charged on goods and services used in supplying the service hasnot 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; 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;

(ia) Construction of residential apartments other than affordable residential apartments by a promoter in an RREP which commences on or after 1st April, 2019 or in an ongoing RREP in respect of which the promoter has not exercised option to pay central tax on construction of apartments at the rates as specified for item (ie) or (if) below, as the case may be, in the manner prescribed therein, intended for sale to a buyer, wholly or partly, except where the entire consideration has been received after issuance of completion certificate, where required, by the competent authority or after its first occupation, whichever is earlier. (Provisions of paragraph 2 of this notification shall apply for valuation of this service)	3.75	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.
(ib) Construction of commercial apartments (shops, offices, godowns etc.) by a promoter in an RREP which commences on or after 1st April, 2019 or in an ongoing RREP in respect of which the promoter has not exercised option to pay central tax on construction of apartments at the rates as specified for item (ie) or (if) below, as the case may be, in the manner prescribed therein, intended for sale to a buyer, wholly or partly, except where the entire consideration has been received after issuance of completion certificate, where required, by the competent		

authority or after its first occupation, whichever is earlier. (Provisions of paragraph 2 of this notification shall apply for valuation of this service)		Explanation. - (i) "developer- promoter" is a promoter who constructs or converts a building into apart-ments or develops a plot for sale,
(ic) Construction of affordable residential apartments by a promoter **in a Real Estate Project (herein after referred to as REP) other than RREP,** which commences on or after 1st April, 2019 or in an ongoing REP other than RREP in respect of which the promoter has not exercised option to pay central tax on construction of apartments at the rates as specified for item (ie) or (if) below, as the case may be, in the manner prescribed therein, intended for sale to a buyer, wholly or partly, except where the entire consideration has been received after issuance of completion certificate, where required, by the competent authority or after its first occupation, whichever is earlier. (Provisions of paragraph 2 of this notification shall apply for valuation of this service)	0.75	(ii) "landowner-promoter" is a promoter who transfers the land or development rights or FSI to a developer-promoter for construction of apart-ments and receives constructed apartments against such transferred rights and sells such apartments to his buyers independently. 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;

(id) Construction of residential apartments other than affordable residential apartments by a promoter **in a REP other than a RREP** which commences on or after 1st April, 2019 or in an ongoing REP other than RREP in respect of which the promoter has not exercised option to pay central tax on construction of apartments at the rates as specified for item (ie) or (if) below, as the case may be, in the manner prescribed therein, intended for sale to a buyer, wholly or partly, except where the entire consideration has been received after issuance of completion certificate, where required, by the competent authority or after its first occupation, whichever is earlier. (Provisions of paragraph 2 of this notification shall apply for valuation of this service)	3.75	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; 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; 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; (Please refer to the illustrations in annexure III) 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)].

(ie) Construction of an apartment in an ongoing project under any of the schemes specified in sub-item (b), sub-item (c), sub- item (d), sub-item (da) and sub-item (db) of item (iv); sub-item (b), sub-item (c), sub-item (d) and sub-item (da) of item (v); and sub-item (c) of item (vi), against serial number 3 of the Table, in respect of which the promoter has exercised option to pay central tax on construction of apartments at the rates as specified for this item. (Provisions of paragraph 2 of this notification shall apply for valuation of this service)	6	Provided that in case of ongoing project, the registered person shall exercise one time option in the Form at Annexure IV to pay central tax on construction of apartments in a project at the rates as specified for item (ie) or (if), as the case may be, by the 10th of May, 2019; Provided also that where the option is not exercised in Form at annexure IV by the 10th of May, 2019, option to pay tax at the rates as applicable to item (i) or (ia) or (ib) or (ic) or (id) above, as the case may be, shall be deemed to have been exercised; Provided also that invoices for supply of the service can be issued during the period from 1st April 2019 to 10th May 2019 before exercising the option, but such invoices shall be in accordance with the option to be exercised.;
(if) Construction of a complex, building, civil structure or a part thereof, including,- (i) commercial apartments (shops, offices, godowns etc.) by a promoter **in a REP other than RREP**, (ii) residential apartments in an ongoing project, other than affordable residential apart-ments, in respect of which the promoter has exercised option to pay central tax on construction of apartments at the rates as specified for this item in the manner prescribed herein,		

but excluding supply by way of services specified at items (i), (ia), (ib), (ic), (id) and (ie) above 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. Explanation. -For the removal of doubt, it is hereby clarified that, supply by way of services specified at items (i), (ia), (ib), (ic), (id) and (ie) in column (3) shall attract central tax prescribed against them in column (4) subject to conditions specified against them in column (5) and shall not be levied at the rate as specified under this entry. (Provisions of paragraph 2 of this notification shall apply for valuation of this service	9	

(b) against serial number 3, -

a. item (ii) and the entries relating thereto in columns (3), (4) and (5) shall be omitted;

b. in item (iv) in column (3), -

(1) after the figures "2017", the words, brackets, figures and letters "other than that covered by items (i), (ia), (ib), (ic), (id), (ie) and (if) above" shall be inserted;

c. in item (v) in column (3), -

(1) after the figures "2017", the words, brackets, figures and letters "other than that covered by items (i), (ia), (ib), (ic), (id), (ie) and (if) above" shall be inserted;

d. after item (v) and entries relating thereto in column (3), (4) and (5), the following items and entries shall be inserted, namely, -

(3)	(4)	(5)
(va) Composite supply of works contract as defined in clause (119) of section 2 of the Central Goods and Services Tax Act, 2017, other than that covered by items (i), (ia), (ib), (ic), (id), (ie) and (if) above, supplied by way of construction, erection, commissioning, ins-tallation, completion, fitting out, repair, maintenance, reno-vation, or alteration of affordable residential apart-ments covered by sub- clause (a) of clause (xvi) of paragraph 4 below, in a project which commences on or after 1st April, 2019, or in an ongoing project in respect of which the promoter has not exercised option to pay central tax on construction of apartments at the rates as specified for item (ie) or (if), as the case may be, in the manner prescribed therein,	6	Provided that carpet area of the af-fordable residential apartments as specified in the entry in column (3) relating to this item, is not less than 50 per cent. of the total carpet area of all the apartments in the project; Provided also that for the purpose of determining whether the apart-ments at the time of supply of the service are affordable residential apartments covered by sub- clause (a) of clause (xvi) of paragraph 4 be-low or not, value of the apartments shall be the value of similar apart-ments booked nearest to the date of signing of the contract for supply of the service specified in the entry in column (3) relating to this item; Provided also that in case it finally turns out that the carpet area of the affordable residential apartments booked or sold before or after completion, for which gross amount actually charged was forty five lakhs rupees or less and the actual carpet area was within the limits prescribed in sub- clause (a) of clause (xvi) of paragraph 4 below, was less than 50 per cent. of the total carpet area of all the apartments in the project, the recipient of the service, that is, the

		promoter shall be liable to pay such amount of tax on reverse charge basis as is equal to the difference between the tax payable on the service at the applicable rate but for the rate prescribed herein and the tax actually paid at the rate prescribed herein";

e. in item (vi) in column (3), after the figures "2017", the words, brackets, and figures "other than that covered by items (i), (ia), (ib), (ic), (id), (ie) and (if) above" shall be inserted';

f. in item (xii) in column (3), for the entry, the following entry shall be substituted, namely: -

"(xii) Construction services other than (i), (ia), (ib), (ic), (id), (ie), (if), (iii), (iv), (v), (va), (vi), (vii), (viii), (ix), (x) and (xi) above.

Explanation. - For the removal of doubt, it is hereby clarified that, supply by way of services specified at items (i), (ia), (ib), (ic), (id), (ie) and (if) in column (3) shall attract central tax prescribed against them in column (4) subject to conditions specified against them in column (5) and shall not be levied at the rate as specified under this entry.";

(c) against serial number 16,in item (ii) in column (3), for the word, brackets and letters "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)", the word, brackets figures and letters " (i) (ia), (ib), (ic), (id), (ie) and (if)" shall be substituted;

(d) after serial number 38 in column (1) and the entries relating thereto in column (2), (3), (4) and (5) the following serial number and entries shall be inserted, namely: -

(1)	(2)	(3)	(4)	(5)
"39.	Chapter 99	Supply of 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) by an unregistered person to a promoter for construction of a project on which tax is payable by the recipient of the services under sub- section 4 of section 9 of the Central Goods and Services Tax Act, 2017 (12 of 2017), as prescribed in notification No. 07 / 2019- Central Tax (Rate), dated 29th March, 2019, published in Gazette of India vide G.S.R. No. _, dated 29th March, 2019. Explanation. - This entry is to be taken to apply to all services which satisfy the conditions prescribed herein, even though they may be covered by a more specific chapter, section or heading elsewhere in this notification.	9	-";

(iii) in paragraph 2,-

(a) for the words, brackets, letters and figures "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)," the word, brackets, letters and figures " (i) (ia), (ib), (ic), (id), (ie) and (if)" shall be substituted;

(b) in the *Explanation,* after the words "this paragraph" the words "and paragraph 2A below" shall be inserted;

(iv) after paragraph 2, the following paragraph shall be inserted, namely, -

"2A. Where a registered 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."

(v) in paragraph 4 relating to Explanation, after clause (xii), the following clauses shall be inserted, namely: -

"(xiii) an apartment booked on or before the 31st March, 2019 shall mean an apartment which meets all the following three conditions, namely- (a) part of supply of construction of which has time of supply on or before the 31st March, 2019 and (b) at least one instalment has been credited to the bank account of the registered person on or before the 31st March, 2019 and (c) an allotment letter or sale agreement or any other similar document evidencing booking of the apartment has been issued on or before the 31st March, 2019;

(xiv) the term "apartment" shall have the same meaning as assigned to it in clause (e) of section 2 of the Real Estate (Regulation and Development) Act, 2016 (16 of 2016);

(xv) the term "project" shall mean a Real Estate Project or a Residential Real Estate Project; (xvi) the term "affordable residential apartment" shall mean, -

(a) a residential apartment in a project which commences on or after 1st April, 2019, or in an ongoing project in respect of which the promoter has not exercised option in the prescribed form to pay central tax on construction of apartments at the rates as specified for item (ie) or (if) against serial number 3, as the case may be, having carpet area not exceeding 60 square meter in metropolitan cities or

90 square meter in cities or towns other than metropolitan cities and for which the gross amount charged is not more than forty five lakhs rupees.

For the purpose of this clause, -

(i) Metropolitan cities are Bengaluru, Chennai, Delhi NCR (limited to Delhi, Noida, Greater Noida, Ghaziabad, Gurgaon, Faridabad), Hyderabad, Kolkata and Mumbai (whole of MMR) with their respective geographical limits prescribed by an order issued by the Central or State Government in this regard;

(ii) Gross amount shall be the sum total of; -

A. Consideration charged for the services specified at item (i) and (ic) in column (3) against sl. No. 3 in the Table;

B. Amount charged for the transfer of land or undivided share of land, as the case may be including by way of lease or sub lease; and

C. Any other amount charged by the promoter from the buyer of the apartment including preferential location charges, development charges, parking charges, common facility charges etc.

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

(xvii) the term "promoter" shall have the same meaning as assigned to it in in clause (zk) of section 2 of the Real Estate (Regulation and Development) Act, 2016 (16 of 2016);

(xviii) the term "Real Estate Project (REP)" shall have the same meaning as assigned to it in in clause (zn) of section 2 of the Real Estate (Regulation and Development) Act, 2016 (16 of 2016);

(xix) the term "Residential Real Estate Project (RREP)" shall mean a REP in which the carpet area of the commercial apartments is not more than 15 per cent. of the total carpet area of all the apartments in the REP;

(xx) the term "ongoing project" shall mean a project which meets all the following conditions, namely-

(a) commencement certificate in respect of the project, where required to be issued by the competent authority, has been issued on or before 31st March, 2019, and it is certified by any of the following that construction of the project has started on or before 31st March, 2019:-

(i) an architect registered with the Council of Architecture constituted under the Architects Act, 1972 (20 of 1972); or

(ii) a chartered engineer registered with the Institution of Engineers (India); or

(iii) a licensed surveyor of the respective local body of the city or town or village or development or planning authority.

(b) where commencement certificate in respect of the project, is not required to be issued by the competent authority, it is certified by any of the authorities specified in sub- clause (a) above that construction of the project has started on or before the 31st March, 2019;

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

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

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

(xxi) "commencement certificate" means the commencement certificate or the building permit or the construction permit, by whatever name called issued by the competent authority to allow or permit the promoter to begin development works on an immovable property, as per the sanctioned plan;

(xxii) "development works" means the external development works and internal development works on immovable property;

(xxiii) "external development works" includes roads and road systems landscaping, water supply, seweage and drainage systems, electricity supply transformer, sub-station, solid waste management and disposal or any other work which may have to be executed in the periphery of, or outside, a project for its benefit, as may be provided under the local laws;

(xxiv) "internal development works" means roads, footpaths, water supply, sewers, drains, parks, tree planting, street lighting, provision for community buildings and for treatment and disposal of sewage and sullage water, solid waste management and disposal, water conservation, energy management, fire protection and fire safety requirements, social infrastructure such as educational health and other public amenities or any other work in a project for its benefit, as per sanctioned plans;

(xxv) the term "competent authority" as mentioned in definition of "commencement certificate" and "residential apartment" , means the local authority or any authority created or established under any law for the time being in force by the Central Government or State Government or Union Territory Government, which exercises authority over land under its jurisdiction, and has powers to give permission for development of such immovable property;

(xxvi) The term "carpet area" shall have the same meaning assigned to it in in clause (k) of section 2 of the Real Estate (Regulation and Development) Act, 2016 (16 of 2016);

(xxvii) the term "Real Estate Regulatory Authority" shall mean the Authority established under sub- section (1) of section 20 (1) of the Real Estate (Regulation and Development) Act, 2016 (No. 16 of 2016) by the Central Government or State Government;

(xxviii) "project which commences on or after 1st April, 2019" shall mean a project other than an ongoing project;

(xxix) "Residential apartment" shall mean an apartment intended for residential use as declared to the Real Estate Regulatory Authority or to competent authority;

(xxx) "Commercial apartment" shall mean an apartment other than a residential apartment;

(xxxi) "floor space index (FSI)" shall mean the ratio of a building's total floor area (gross floor area) to the size of the piece of land upon which it is built.".

2. This notification shall come into force with effect from the 1st day of April, 2019.

[F. No.354/32/2019-TRU] (Pramod Kumar)

Deputy Secretary to the Government of India

Note: -The principal notification No. 11/2017 - Central Tax (Rate), dated the 28thJune, 2017 was published in the Gazette of India, Extraordinary, *vide* number G.S.R. 690 (E), dated the 28th June, 2017 and was last amended by notification No. 30/2018-Central Tax (Rate), dated the 31st December, 2018 *vide* number G.S.R. 1271 (E), dated the 31st December, 2018.

(A)

Real estate project (REP) other than Residential Real estate project (RREP)

Input tax credit attributable to construction of residential portion in a real estate project (REP) other than residential real estate project (RREP), which has time of supply on or after 1st April, 2019, shall be calculated project wise for all projects which commence on or after 1st April, 2019 or ongoing projects in respect of which the promoter has not exercised option to pay central tax on construction of apartments at the rates as specified for item (ie) or (if) against serial number 3, as the case may be, in the prescribed manner, before the due date for furnishing of the return for the month of September following the end of financial year 2018-19, in the following manner:

1. Where % completion as on 31st March, 2019 is not zero or where there is inventory in stock

(a) Input tax credit on inputs and input services attributable to construction of residential portion in a REP, which has time of supply on or after 1st April, 2019, may be denoted as Tx. Tx shall be calculated as under:

Tx = T-Te

Where,

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

(ii) Te is the eligible ITC attributable to (a) construction of commercial portion and (b) construction of residential portion, in the REP which has time of supply on or before 31st March, 2019;

(b) Te shall be calculated as under:

Te = Tc + Tr

Where, -

Tc is the ITC attributable to construction of commercial portion in the REP, calculated as under:

Tc =T * (carpet area of commercial apartments in the REP/ total carpet area of commercial and residential apartments in the REP) and

Tr is the ITC attributable to construction of residential portion in the REP which has time of supply on or before 31st March, 2019 and which shall be calculated as under,

$$Tr = T^* F1 * F2 * F3^* F4$$

Where, -

$$F_1 = \frac{\text{Carpet area of residential apartments in REP}}{\text{Total carpet area of commercial and residential apartments in the REP}}$$

$$F_2 = \frac{\text{Total carpet area of residential apartment booked on or before 31st March, 2019}}{\text{Total carpet area of the residential apartment in REP}}$$

$$F_3 = \frac{\text{Such Value of supply of construction of residential apartments booked on or before 31st March, 2019 which has time of supply on or before 31st March, 2019}}{\text{Total value of supply of construction of residential apartments booked on or before 31st March, 2019}}$$

(F_3 is to account for percentage invoicing of booked residential apartments)

$$F_4 = \frac{1}{\text{\% Completion of construction as on 31st March, 2019}}$$

Illustration: Where one- fifth (twenty percent) of the construction has been completed, F_4 shall be 100 ÷ 20 = 5.

Explanation: "% Completion of construction as on 31st March, 2019" shall be the same as declared to the Real Estate Regulatory Authority in terms of section 4 and section 11 of Real Estate (Regulation and Development) Act, 2016 (16 of 2016) and where the same is not required to be declared to the Real Estate Regulatory Authority, it shall be got determined and certified by an architect registered with the Council of Architecture constituted under the Architects Act, 1972 (20 of 1972) or a chartered engineer registered with the Institution of Engineers (India).

(c) A registered person shall have the option to calculate 'Te' in the manner prescribed below instead of the manner prescribed in (b) above,-

Te shall be calculated as under:

Te = Tc + T1 + Tr

Where, -

Tc is the ITC attributable to construction of commercial portion in the REP, calculated as under:

Tc =T3 * (carpet area of commercial apartments in the REP/ total carpet area of commercial and residential apartments in the REP);

Wherein

T3 = T- (T1 + T2)

T1 = ITC attributable exclusively to construction of commercial portion in the REP T2 = ITC attributable exclusively to construction of residential portion in the REP

and

Tr is the ITC attributable to construction of residential portion in the REP which has time of supply on or before 31.03.2019 and which shall be calculated as under,

Tr = (T3 + T2)* F1 * F2 * F3* F4

or

Tr = (T- T1)* F1 * F2 * F3* F4

(d) The amounts 'Tx' and 'Te' shall be computed separately for input tax credit of central tax, State tax, Union territory tax and integrated tax.

(e) Where, Tx is positive, i.e. Te<T, the registered person shall pay, by debit in the electronic credit ledger or electronic cash ledger, an amount equal to the difference between T and Te. Such amount shall form part of the output tax liability of the registered person and the amount shall be furnished in FORM GST ITC- 03.

Explanation: The registered person may file an application in FORM GST DRC- 20, seeking extension of time for the payment of taxes or any amount due or for allowing payment of such taxes or amount in installments in accordance with the provisions of section 80. The commissioner may issue an order in FORM GST DRC- 21 allowing the taxable person further time to make payment and/or to pay the amount in such monthly installments, not exceeding twenty-four, as he may deem fit.

(f) Where Tx is negative, i.e. Te>T, the registered person shall be eligible to take ITC on goods and services received on or after 1st April, 2019 for construction of residential portion in the REP, for which he shall not otherwise be eligible, to the extent of difference between Te and T.

(g) The registered person may calculate Tc and utilize credit to the extent of Tc for payment of tax on commercial apartments, till the complete accounting of Tx is carried out and submitted.

(h) Where percentage completion is zero but ITC has been availed on goods and services received for the project on or prior to 31st March, 2019, input tax credit attributable to construction of residential portion which has time of supply on or after 1st April, 2019, shall be calculated and the amount equal to Tx shall be paid or taken credit of, as the case calculation of F4 shall be

taken as the percentage completion which, as certified by an architect registered with the Council of Architecture constituted under the Architects Act, 1972 (20 of 1972) or a chartered engineer registered with the Institution of Engineers (India), can be achieved with the input services received and inputs in stock as on 31st March, 2019.

2. Where % completion as on 31st March, 2019 is zero but invoicing has been done having time of supply before 31st March, 2019, and no input services or inputs have been received as on 31st March, 2019, "T e" sh all b e calculated as follows: -

(a) Input tax credit on inputs and input services attributable to construction of residential portion in a REP, which has time of supply on or before 31st March, 2019 may be denoted as Te which shall be calculated as under,

Te = Tc + Tr

Where, -

Tc is the ITC attributable to construction of commercial portion in the REP, calculated as under:

Tc = Tn* (carpet area of commercial apartments in the REP/ total carpet area of commercial and residential apartments in the REP) and

Tr is the ITC attributable to construction of residential portion in the REP which has time of supply on or before 31st March, 2019 and which shall be calculated as under,

Tr = Tn* F1 * F2 * F3

Where, -

Tn = Tax paid on such inputs and input services on which ITC is available under the CGST Act, received in 2019-20 for construction of REP

F1, F2 and F3 shall be the same as in para 1 above

(b) The registered person shall be eligible to take ITC on goods and services received on or after 1st April, 2019 for construction of residential portion in the REP, for which he shall not otherwise be eligible, to the extent of the amount of Te.

(c) The amount 'Te' shall be computed separately for input tax credit of central tax, State tax, Union territory tax and integrated tax.

3. Notwithstanding anything contained in paragraph 1 or paragraph 2 above, Te shall be determined in the following situations as under:

(i) where percentage invoicing is more than the percentage completion and the difference between percentage invoicing (per cent. points) and the percentage completion (per cent. points) of construction is more than 25 per cent. points; the percent. points;

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

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

Illustration 1:

Sl. No	Details of a REP (Res + Com)			
	A	B	C	D
1	No. of apartments in the project		100	units
2	No. of residential apartments in the project		75	units
3	Carpet area of the residential apartment		70	sqm
4	Total carpet area of the residential apartments	C2 * C3	5250	sqm
5	value of each residential apartment		0.60	crore
6	Total value of the residential apartments	C2 * C5	45.00	crore
7	No. of commercial apartments in the project		25	units
8	Carpet area of the commercial apartment		30	sqm
9	Total carpet area of the commercial apartments	C7 * C8	750	sqm
10	Total carpet area of the project (Resi + Com)	C4 + C9	6000	sqm
11	Percentage completion as on 31.03.2019 [as declared to RERA or determined by chertered engineer]		20%	
12	No of residential apartments booked before transition		40	units
13	Total carpet area of the residential apartments booked before transition	C12 * C3	2800	sqm
14	Value of booked residential apartments	C5 * C12	24	crore
15	Percentage invoicing of booked residential apartments on or before 31.03.2019		20%	
16	Total value of supply of residential apartments having t.o.s. prior to transition	C14 * C15	4.8	crore
17	ITC to be reversed on transition, Tx= T-Te			
18	Eligible ITC (Te) = Tc + Tr			
19	T (*see notes below)		1	crore
20	Tc= T x (carpet area of commercial apartments in the REP/ total carpet area of commercial and residential apartments in the REP)	C19 * (C9/ C10)	0.125	crore
21	Tr= T x F1 x F2 x F3 x F4			

22	F1	C4 / C10	0.875	
23	F2	C13 / C4	0.533	
24	F3	C16 / C14	0.200	
25	F4	1/ C11	5	
26	Tr= T x F1 x F2 x F3 x F4	C19 * C22 * C23 * C24 * C25	0.467	crore
27	Eligible ITC (Te)=Tc + Tr	C26 + C20	0.592	crore
28	ITC to be reversed on transition, Tx= T-Te	C19 - C27	0.408	crore

* Note:-

1. The value of T at C19 has been estimated for illustration based on weighted average tax on inputs.
2. In actual practice, the registered person shall take 'aggregate of ITC taken as declared in GSTR-3B of tax periods from 1.7.2017 or commencemnt of project which is later and transitional credit taken under section 140 of CGST Act' as value of T.

Illustration 2:

Sl. No	DetaUs of a REP (Res+ Com)			
	A	B	C	D
1	No. of apartments in the project		100	units
2	No. of residential apartments in the project		75	units
3	Carpet area of the residential apartment		70	sqm
4	Total carpet area of the residential apartments	C2 *C3	5250	sqm
5	value of each residential apartment		0.60	crore
6	Total value of the residential apartments	C2 *C5	45.00	crore
7	No. of commercial apartments in the project		25	units
8	Carpet area of the commercial apartment		30	sqm
9	Total carpet area of the commercial apartments	C7 *C8	750	sqm
10	Total carpet area of the project (Resi + Com)	C4+ C9	6000	sqm
11	Percentage completion (Pc) as on 31.03.2019 [as declared to RERAor determined by chertered engineerl		20%	
12	No of residential ap_artments booked before transition		40	units
13	Total carpet area of the residential apartments booked before transition	C12 * C3	2800	sqm
14	Value ofbookedresidential apartments	C5 * C12	24	crore
15	Percentage invoicing of booked residential apartments on or before 31.03 .2019		60%	

16	Total value of supply of residential apartments having t.o.s. prior to transition	C14 * C15	14.4	crore
17	ITC to be reversed on transition, Tx = T- Te			
18	Eligible ITC (Te) = Tc + Tr			
19	T (*see notes below)		1	crore
20	Tc = Tx (carpet area of commercial apartments in the REP/ total carpet area of commercial and residential apartments in the REP)	C19 * (C9/ C10)	0.125	crore
21	Tr = T×F1×F2×F3×F4			
22	F1	C4 IC10	0.875	
23	F2	C13 I C4	0.533	
24	F3	C16 /C14	0.600	
25	F4	11 C11	5	
26	Tr = T × F1 × F2 × F3 × F4	C19 * C22 * C23 * C24 * C25	1.400	crore
27	Eligible ITC (Te) = Tc + Tr	C26+ C20	1.525	crore
28	ITC to be reversed/ taken on transition, Tx = T- Te	C19- C27	-0.525	crore
29	Tx after application of cap on% invoicing vis-a-vis Pc			
30	%completion		20%	
31	%invoicing		60%	
32	%invoicing after application of cap (Pc+25%)	C11+25%	45%	
33	Total value of suppl y of residential apartments having t.o.s. prior to transition	C14*C32	10.80	crore
34	F3 after application of cap	C33/C14	0.45	
35	Tr = Tx F1 x F2 x F3 x F4 (after application of cap)	C19 * C22 *C23 *C34 * C25	1.05	crore
36	Eligible ITC (Te) = Tc+Tr (after awlication of cap)	C20+ C35	1.18	crore
37	ITC to be reversed/ taken on transition, Tx = T-Te (after application of cap)	C19- C36	-0.18	crore
38	Tx after application of cap on% invoicing vis-a-vis Pc and payment realisation			
39	%invoicing after application of cap(Pc + 25%)		45%	
40	Total value ofsuwl yofresidential apartments having t.o.s. prior to transi tion	C33	10.80	crore
41	Consideration received		8.00	crore

42	Total value ofsuwl yofresidential apartments having t.o.s. prior to transition after application of cap vis-a-vis consideration received	8 cr + 25% of 8 Cr	10.00	crore
43	F3 after application of both the caps	C42 / C14	0.42	
44	Tr = Tx F1x F2 x F3 x F4 (after appli cation of both the caps)	C19 * C22 * C23 * C43 * C25	0.97	
45	Eligible ITC (Te) = Tc+Tr (after application of both the caps)	C20 + C44	1.10	
46	ITC to be reversedItaken on transition, Tx = T-Te (after application of both the caps)	C19 - C45	-0.10	crore

***Note:-**

1. The value ofT at C19 has been estimated for illustration based on weighted average tax on inputs.
2. In actual practice, the registered person shall take 'aggregate ofiTC taken as declared in GSTR-3B of tax periods from 1.7.2017 or commencernnt of project which i s later and transitional credit taken under section 140 of CGST Act' as value of T.

[F. **No.354/32/2019-TRU]**

(Pramod Kumar)

(B)

Residential Real estate project (RREP)

Input tax credit attributable to construction of residential and commercial portion in a Residential Real estate project (RREP), which has time of supply on or after 1st April, 2019, shall be calculated project wise for all projects which commence on or after 1st April, 2019 or ongoing projects in respect of which the promoter has not exercised option to pay central tax on construction of apartments at the rates as specified for item (ie) or (if) against serial number 3, as the case may be, in the prescribed manner, before the due date for furnishing of the return for the month of September following the end of financial year 2018-19, in the following manner:

1. Where % completion as on 31st March, 2019 is not zero or where there is inventory in stock

(a) Input tax credit on inputs and input services attributable to construction of residential and commercial portion in an RREP, which has time of supply on or after 1st April, 2019, may be denoted as Tx. Tx shall be calculated as under:

Tx = T-Te

Where,

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

(ii) Te is the eligible ITC attributable to construction of commercial portion and construction of residential portion, in the RREP which has time of supply on or before 31st March, 2019;

(b) Te shall be calculated as under: Te= T* F1 * F2 * F3* F4

Where, -

$$F_1 = \frac{\text{Carpet area of residential and commercial apartments in the RREP}}{\text{Total carpet areaofapartments in the RREP}}$$

(In case of a Residential Real Estate Project, value of "F1" shall be 1.)

$$F_2 = \frac{\text{Total carpet area of residential and commercial apartment booked on or before 31st March, 2019}}{\text{Total carpet area of the residential and commercial apartment in the RREP}}$$

$$F_3 = \frac{\text{Such value of supply of construction of residential and commercial apartments booked on or before 31st March, 2019 which has time of supply on or before 31st March, 2019}}{\text{Total value of supply of construction of residential and commercial apartments booked on or before 31st March, 2019}}$$

(F3 is to account for percentage invoicing of booked residential apartments)

$$F_4 = \frac{1}{\text{\% Completion of construction as on 31st March, 2019}}$$

Illustration: where one- fifth (twenty percent) of the construction has been completed, F4 shall be 100 ÷ 20 = 5.

Explanation: "% Completion of construction as on 31st March, 2019" shall be the same as declared to the Real Estate Regulatory Authority in terms of section 4 and section 11 of Real Estate (Regulation and Development) Act, 2016 and where the same is not required to be declared to the Real Estate Regulatory Authority, it shall be got determined and certified by an architect registered with the Council of Architecture constituted under the Architects Act, 1972 (20 of 1972) or a chartered engineer registered with the Institution of Engineers (India).

(c) The amounts 'Tx' and 'Te' shall be computed separately for input tax credit of central tax, State tax, Union territory tax and integrated tax.

(d) Where, Tx is positive, i.e. Te < T, the registered person shall pay, by debit in the electronic credit ledger or electronic cash ledger, an amount equal to the difference between T and Te. Such amount shall form part of the output tax liability of the registered person and the amount shall be furnished in FORM GST ITC- 03.

Explanation: The registered person may file an application in FORM GST DRC- 20, seeking extension of time for the payment of taxes or any amount due or for allowing payment of such taxes or amount in installments in accordance with the provisions of section 80. The commissioner may issue an order in FORM GST DRC- 21 allowing the taxable person further time to make payment and/or to pay the amount in such monthly installments, not exceeding twenty-four, as he may deem fit.

(e) Where, Tx is negative, i.e. Te>T, the registered person shall be eligible to take ITC on goods and services received on or after 1st April, 2019 for construction of the RREP, for which he shall not otherwise be eligible, to the extent of difference between Te and T.

(f) Where percentage completion is zero but ITC has been availed on goods and services received for the project on or prior to 31st March, 2019, input tax credit attributable to construction of residential and commercial portion which has time of supply on or after 1st April, 2019, shall be calculated and the amount equal to Tx shall be paid or taken credit of, as the case may be, as prescribed above, with the modification that percentage completion for calculation of F4 shall be taken as the percentage completion which, as certified by an architect registered with the Council of Architecture constituted under the Architects Act, 1972 (20 of 1972) or a chartered engineer registered with the Institution of Engineers (India), can be achieved with the input services received and inputs in stock as on 31st March, 2019.

2. Where % completion as on 31st March, 2019 is zero but invoicing has been done having time of supply before 31st March, 2019, and no input services or inputs have been received as on 31st March, 2019, "T e" sh all b e calcul ated as f oll ow s: -

(a) Input tax credit on inputs and input services attributable to construction of residential and commercial portion in an RREP, which has time of supply on or before 31st March, 2019 may be denoted as Te which shall be calculated as under,

Te = Tn* F1 * F2 * F3

Where, -

Tn = Tax paid on such inputs and input services on which ITC is available under the CGST Act, received in 2019-20 for construction of residential and commercial apartments in the RREP.

F1, F2 and F3 shall be the same as in para 1 above

(b) The registered person shall be eligible to take ITC on goods and services received on or after 1st April, 2019 for construction of residential or commercial portion in the RREP, for which he shall not otherwise be eligible, to the extent of the amount of Te.

(c) The amount 'Te' shall be computed separately for input tax credit of central tax, State tax, Union territory tax and integrated tax.

3. Notwithstanding anything contained in paragraph 1 or paragraph 2 above, Te shall be determined in the following situations as under:

(i) where percentage invoicing is more than the percentage completion and the difference between percentage invoicing (per cent. points) and the percentage completion (per cent. points) of construction is more than 25 per cent. points; the value of percentage invoicing shall be deemed to be percentage completion plus 25 percent. points;

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

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

Illustration 1:

SI No	Details of a residential real estate project (RREP)			
	A	B	C	D
1	No. ofaparbnents in the project		100	units
2	No. of residential aparbnents in the project		100	units
3	Carpet area of the residential aparbnent		70	sqm
4	Total carpet area of the residential aparbnents	C2 * C3	7000	sqm
5	value of each residential aparbnent		0.60	crore
6	Percentage completion as on 31.03.2019 [as declared to RERA or determined by chertered engineerJ		20%	
7	No ofaparbnents booked before transition		80	units
8	Total carpet area of the residential aparbnent booked before transition	C3 * C7	5600	sqm
9	Value ofbooked residential aparbnents	C5 * C7	48	crore
10	Percentage invoicing of booked residential aparbnents on or before 31.03.2019		20%	
11	Total value of supply of residential aparbnents having t.o.s. prior to transition	C9*C10	9.6	crore
12	ITC to be reversed on transition, T= T- Te			
13	Eligible ITC (Te) = T x F1 x F2 x F3 x F4)			
14	T (*see notes below)		1	crore
15	Fl		1	
16	F2	C8 I C4	0.8	
17	F3	Cll I C9	0.2	
18	F4	11C6	5	
19	Eligible ITC (Te) =T x Fl x F2 x F3 x F4)	Cl4 *Cl5 *Cl6 *Cl7 *Cl8	0.8	crore
20	ITC to be reversed on transition, T= T- Te	C14-C19	0.2	crore

*Note:-

1. The value ofT at C14 has been estimated for illustration based on weighted average tax on inputs.

2. In actual practice, the registered person shall take 'aggregate of ITC taken as declared in GSTR-3B of tax periods from 1.7.2017 or commencemnt of project which is later and transitional credit taken under section 140 ofCGST Act' as value of T.

Illustration 2:

SI No	Detail's of a residential real estate project (RREP)			
	A	B	C	D
1	No. of apartments in the project		100	units
2	No. of residential apartments in the project		100	units
3	Carpet area of the residential apartment		70	sqm
4	Total carpet area of the residential apartments	C2 * C3	7000	sqm
5	value of each residential apartment		0.60	crore
6	Percentage completion as on 31.03.2019 [as declared to RERA or determined by chertered engineer]		20%	
7	No of apartments booked before transition		80	units
8	Total carpet area of the residential apartment booked before transition	C3 * C7	5600	sqm
9	Value ofbookedresidential apartments	C5 * C7	48	crore
10	Percentage invoicing ofbooked residential apartments on or before 31.03.2019		60%	
11	Total value of supply of residential apartments having t.o.s. prior to transition	C9 * ClO	28.8	crore
12	ITC to be reversed on transition, Tx = T- Te			
13	Eligible ITC (Te) =Tx Fl x F2 x F3 x F4)			
14	T (*see notes below)		1	crore
15	Fl		1	
16	F2	C8 I C4	0.8	
17	F3	Cll I C9	0.6	
18	F4	1/C6	5	
19	Eligible ITC (Te)=Tx Fl x F2 x F3 x F4)	Cl4 *Cl5 *Cl6 *Cl7 *Cl8	2.4	crore
20	ITC to be reversed on transition,_Tx= T- Te	Cl4- Cl9	-1.4	crore
21	Tx after application of cap on % invoicing vis-a-vis Pc			

22	% completion		20%	
23	% invoicing		60%	
24	% invoicing after application of cap (Pc+25%)	C6 + 25 %	45%	
25	Total value of supply of residential apartments having t.o.s. prior to transition	C9 * C24	21.60	crore
26	F3 after application of cap	C25/C9	0.45	
27	Te= Tx Fl x F2 x F3 x F4 (after application of cap)	C l 4 * C l 5 * C l 6 * C26 * C l 8	1.80	crore
28	ITC to be reversed Itaken on transition, Tx= T- Te (after application of cap)	Cl 4 - C27	-0.80	crore
29	Tx after application of cap on % invoicing vis-a-vis Pc and payment realisation			
30	% invoicing after application of cap(Pc + 25%)		45%	
31	Total value of supply of residential apartments having t.o.s. prior to transition	C25	21.60	crore
32	consideration received		16.00	crore
33	Total value of supply of residential apartments having t.o.s. prior to transition after application of cap vis-a-vis consideration received	16 cr + 25% of 16 Cr	20.00	crore
34	F3 after application of both the caps	C33/C9	0.42	
35	Te= Tx Fl x F2 x F3 x F4 (after application of both the caps)	C l 4 * C l 5 * C34 * C26 * C l8	1.67	
36	ITC to be reversed Itaken on transition, Tx= T- Te (after application of both the caps)	Cl 4 - C35	-0.67	crore

*Note:-

1. The value of T at Cl4 has been estimated for illustration based on weighted average tax on inputs.
2. In actual practice, the registered person shall take 'aggregate of ITC taken as declared in GSTR-3B of tax periods from 1.7.2017 or commencemnt of project which is later and transitional credit taken under section 140 ofCGST Act' as value of T.

[F. No.354/32/2019-TRU]

(Pramod Kumar)

Illustration 1:

A promoter has procured following goods and services [other than capital goods and services by way of grant of development rights, long term lease of land or FSI] for construction of a residential real estate project during a financial year.

Sl. No.	Name of input goods and services	Percentage of input goods and services received during the financial year	Whether inputs received from registered supplier? (Y/ N)
1	Sand	10	Y
2	**Cement**	**15**	**N**
3	Steel	20	Y
4	Bricks	15	Y
5	Flooring tiles	10	Y
6	Paints	5	Y
7	Architect/ designing/ CAD drawing etc.	10	Y
8	Aluminium windows, Ply, commercial wood	15	Y

In this example, the promoter has procured 80 per cent. of goods and 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], from a GST registered person. However, he has procured cement from an unregistered supplier. Hence at the end of financial year, the promoter has to pay GST on cement at the applicable rates on reverse charge basis.

Illustration 2:

A promoter has procured following goods and 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], for construction of a residential real estate project during a financial year.

Sl. No.	Name of input goods and services	Percentage of input goods and services received during the financial year	Whether inputs received from registered supplier? (Y/ N)
1	Sand	10	Y
2	Cement	15	Y
3	Steel	20	Y
4	Bricks	15	Y
5	Flooring tiles	10	Y
6	**Paints**	**5**	**N**
7	Architect/designing/ CAD drawing etc.	10	Y
8	**Aluminium windows, Ply, commercial wood**	**15**	**N**

In this example, the promoter has procured 80 per cent. of goods and services including cement from a GST registered person. However, he has procured paints, aluminum windows, ply and commercial wood etc. from an unregistered supplier. Hence at the end of financial year, the promoterisnotrequired to pay GST on inputs on reverse charge basis.

Illustration 3:

A promoter has procured following goods and 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], for construction of a residential real estate project during a financial year.

Sl. No.	Name of input goods and services	Percentage of input goods and services received during the financial year	Whether inputs procured from registered supplier? (Y/ N)
1	**Sand**	**10**	**N**
2	**Cement**	**15**	**N**
3	Steel	15	Y
4	Bricks	10	Y
5	Flooring tiles	10	Y
6	Paints	5	Y
7	Architect/designing/CAD drawing etc.	10	Y
8	**Aluminium windows**	**15**	**N**
9	**Ply, commercial wood**	**10**	**N**

In this example, the promoter has procured 50 per cent. of goods and services from a GST registered person. However, he has procured sand, cement and aluminum windows, ply and commercial wood etc. from an unregistered supplier. Thus, value of goods and services procured from registered suppliers during a financial year falls short of threshold limit of 80 per cent. To fulfill his tax liability on the shortfall of 30 per cent. from mandatory purchase, the promoter has to pay GST on cement at the applicable rate on reverse charge basis. After payment of GST on cement, on the remaining shortfall of 15 per cent., the promoter shall pay tax @ 18 per cent. under RCM.

[F. No.354/32/2019-TRU]

(Pramod Kumar)

FORM

(Form for exercising one time option to pay tax on construction of apartments in a project by the promoters at the rate as specified for item (ie) or (if), against serial number 3 in the Table in this notification, as the case may be, by the 10th of May, 2019)

Reference No. _____ Date _____

To _____

_____

_____

(To be addressed to the jurisdictional Commissioner)

1. GSTIN:
2. RERA registration Number of the Project:
3. Name of the project, if any:
4. The location details of the project, with clear demarcation of land dedicated for the project along with its boundaries including the longitude and latitude of the end points of the project:
5. The number, type and the carpet area of apartments for booking or sale in the project:
6. Date of receipt of commencement certificate:

Declaration

1. I hereby exercise the option to pay tax on construction of apartments in the above mentioned project as under :

I shall pay tax on construction of the apartments: (put (√) in appropriate box)	**At the rate as specified for item (ie) or (if), against serial number 3 in the Table in this notification, as the case may be**	**At the rate as specified for item (i) or (ia) or (ib) or (ic) or (id), against serial number 3 in the Table in this notification, as the case may be**

2. I understand that this is a onetime option, which once exercised, shall not be allowed to be changed.

3. I also understand that invoices for supply of the service can be issued during the period from 1st April 2019 to 10th May 2019 before exercising the option, but such invoices shall be in accordance with the option being exercised herein.

Signature _____

Name _____

Designation _____

Place _____

Date _____

Annexure - IV

[TO BE PUBLISHED IN THE GAZZETE OF INDIA, EXTRAORDINARY, PART II, SECTION 3, SUB-SECTION (i)]

Government of India Ministry of Finance

(Department of Revenue)

Notification No. 04/2019- Central Tax (Rate)

New Delhi, the 29th March, 2019

G.S.R.....(E).- In exercise of the powers conferred by sub-section (1) of section 11 of the Central Goods and Services Tax Act, 2017 (12 of 2017), the Central Government, on being satisfied that it is necessary in the public interest so to do, on the recommendations of the Council, hereby makes the following further amendments in the notification of the Government of India, in the Ministry of Finance (Department of Revenue), No.12/2017- Central Tax (Rate), dated the 28th June, 2017, published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (i), *vide* number G.S.R. 691(E), dated the 28th June, 2017, namely:-

In the said notification, -

(i) in the opening paragraph, for the word, brackets and figures "sub-section (1) of section 11" the word, brackets and figures ", sub-section (3) and sub-section (4) of section 9, sub-section (1) of section 11,sub-section (5) of section 15 and section 148," shall be substituted;

(ii) in the Table, -

(a) after serial number 41 and the entries relating thereto, the following serial numbers and entries shall be inserted, namely: -

(1)	(2)	(3)	(4)	(5)
"41A	Heading 9972	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, where required, by the competent authority or after its first occupation, whichever is earlier. The amount of GST exemption available for construction of residential apartments in the project under this notification shall be calculated as under: [GST payable on TDR or FSI (including additional FSI) or both for construction of the project] **x** (carpet area of the residential apartments in the project ÷ Total carpet area of the residential and commercial apartments in the project)	Nil	Provided that the promoter shall be liable to pay tax at the applicable rate, on reverse charge basis, on such proportion of value of development rights, or FSI (including additional FSI), or both, as is attributable to the residential apartments, which remain un- booked on the date of issuance of completion certificate, or first occupation of the project, as the case may be, in the following manner - [GST payable on TDR or FSI (including additional FSI) or both for construction of the residential apartments in the project but for the exemption contained herein] x (carpet area of the residential apartments in the project which remain un- booked on the date of issuance of completion certificate or first occupation ÷ Total carpet area of the residential apartments in the project)

				Provided further that tax payable in terms of the first proviso hereinabove shall not exceed 0.5 per cent. of the value in case of affordable residential apartments and 2.5 per cent. 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 The liability to pay central tax on the said portion of the development rights or FSI, or both, calculated as above, shall arise on the date of completion or first occupation of the project, as the case may be, whichever is earlier.
41B	Heading 9972	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,	Nil	Provided that the promoter shall be liable to pay tax at the applicable rate, on reverse charge basis, on such proportion of upfront amount (called as premium, salami, cost, price, development charges or by any other name) paid for long term lease of land, as is attributable to the residential apartments, which remain un- booked on the date of issuance of completion certificate, or first occupation of the project, as the case may be, in the following manner -

		after issuance of completion certificate, where required, by the competent authority or after its first occupation wichever is earlier. The amount of GST exemption available for construction of residential apartments in the project under this notification shall be calculated as under: [GST payable on upfront amount (called as premium, salami, cost, price, development charges or by any other name) payable for long term lease of land for construction of the project] **x** (carpet area of the residential apartments in the project ÷ Total carpet area of the residential and commercial apartments in the project).		[GST payable on upfront amount (called as premium, salami, cost, price, development charges or by any other name) payable for long term lease of land for construction of the residential apartments in the project but for the exemption contained herein] **x** (carpet area of the residential apartments in the project which remain un- booked on the date of issuance of completion certificate or first occupation ÷ Total carpet area of the residential apartments in the project); Provided further that the tax payable in terms of the first proviso shall not exceed 0.5 per cent. of the value in case of affordable residential apartments and 2.5 per cent. 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. The liability to pay central tax on the said proportion of upfront amount (called as premium, salami, cost, price, development charges or by any other name) paid for long term lease of land, calculated as above, shall arise on the date of issue of completion certificate or first occupation of the project, as the case may be.

(iii) after paragraph 1, the following paragraphs shall be inserted, namely, -

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

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

(iv) in paragraph 3 relating to Explanation, after clause (iv), the following clause shall be inserted, namely: -

"(v) The term "apartment" shall have the same meaning as assigned to it in clause (e) under section 2 of the Real Estate (Regulation and Development) Act, 2016 (16 of 2017).

(vi) The term "affordable residential apartment" shall have the same meaning as assigned to it in the notification No. 11/2017-Central Tax (Rate), published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (i) dated 28th June, 2017 vide GSR number 690(E) dated 28th June, 2017, as amended.

(vii) The term "promoter" shall have the same meaning as assigned to it in clause (zk) under section 2 of the Real Estate (Regulation and Development) Act, 2016 (16 of 2017).

(viii) The term "project" shall mean a Real Estate Project or a Residential Real Estate Project. (ix) the term "Real Estate Project (REP)" shall have the same meaning as assigned to it in clause (zn) under section 2 of the Real Estate (Regulation and Development) Act, 2016 (16 of 2017).

(x) The term "Residential Real Estate Project (RREP)" shall mean a REP in which the carpet area of the commercial apartments

is not more than 15 per cent. of the total carpet area of all the apartments in the REP;

(xi) The term "carpet area" shall have the same meaning as assigned to it clause (k) under section 2 of the Real Estate (Regulation and Development) Act, 2016 (16 of 2017).

(xii) "an apartment booked on or before the date of issuance of completion certificate or first occupation of the project" shall mean an apartment which meets all the following three conditions, namely-

(a) part of supply of construction of the apartment service has time of supply on or before the said date; and

(b) consideration equal to at least one instalment has been credited to the bank account of the registered person on or before the said date; and

(c) an allotment letter or sale agreement or any other similar document evidencing booking of the apartment has been issued on or before the said date.

(xiii) "floor space index (FSI)" shall mean the ratio of a building's total floor area (gross floor area) to the size of the piece of land upon which it is built.".

2. This notification shall come into force with effect from the 1st day of April, 2019.

[F. No.354/32/2019 -TRU]

(Pramod Kumar)

Deputy Secretary to the Government of India

Note:- The principal notification No. 12/2017 - Central Tax (Rate), dated the 28thJune, 2017 was published in the Gazette of India, Extraordinary, *vide* number G.S.R. 691 (E), dated the 28th June, 2017 and was last amended by notification No. 28/2018 - Central Tax (Rate), dated the 31st December, 2018 *vide* number G.S.R. 1272 (E), dated the 31st December, 2018.

Annexure - V

Ministry of Finance

Recommendations of the 33rd GST Council meeting
(Extract only)

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 are as 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 33rd 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 1st of April, 2019.

4. Definition of affordable housing shall be:-

A residential house/flat of carpet area of up to 90 sqm in non-metropolitan cities/towns and 60 sq min metropolitan cities having value up to ₹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 anon-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.

DSM/RM/KMN

Decisions taken by the GST Council in the 34th meeting held on 19th March, 2019 regarding GST rate on real estate sector

(Extract only)

(Notification No 3/2019 to 9/2019 Central Tax Rate)

GST Council in the 34th meeting held on 19th March, 2019 at New Delhi discussed the operational details for implementation of the recommendations made by the council in its 33rd 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 sq min non-metros/90 sq min metros and value upto ₹ 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 1/3rd 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 installments 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 followingc onditions,-

(a) Input tax credit shall not beavailable,

(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:

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.

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 safe guards.

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.

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.

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

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.

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.

Ministry of Finance

Recommendations of the 35th GST Council meeting

(Extract only)

PRESS RELEASE

(Law and Procedure related changes)

The GST Council, in its 35th meeting held today at New Delhi, recommended the following:

1. In order to give ample opportunity to taxpayers as well as the system to adapt, the new return system to be introduced in a

phased manner, as described below: Refer to 37th Meeting of the GST Council, Goa 20 September, 2019

2.

i. Between July, 2019 to September, 2019, the new return system (FORM GST ANX-1&FORM GST ANX-2 only) to be available for trial for taxpayers. Taxpayers to continue to file FORM GSTR-1&FORM GSTR-3B as at present;

ii. From October, 2019 onwards, FORM GST ANX-1 to be made compulsory. Large taxpayers (having aggregate turnover of more than Rs. 5 crores in previous year) to file FORM GST ANX-1 on monthly basis whereas small taxpayers to file first FORM GST ANX-1 for the quarter October, 2019 to December, 2019 in January, 2020;

iii. For October and November, 2019, large taxpayers to continue to file FORM GSTR-3B on monthly basis and will file first FORM GST RET-01 for December, 2019 in January, 2020. It may be noted that invoices etc. can be uploaded in FORM GST ANX-1 on a continuous basis both by large and small taxpayers from October, 2019 onwards. FORM GST ANX- 2 may be viewed simultaneously during this period but no action shall be allowed on such FORM GST ANX-2;

iv. From October, 2019, small taxpayers to stop filing FORM GSTR-3B and to start filing FORM GST PMT-08. They will file their first FORM GST- RET-01 for the quarter October, 2019 to December, 2019 in January, 2020;

v. From January, 2020 onwards, FORM GSTR-3B to be completely phased out

3. On account of difficulties being faced by taxpayers in furnishing the annual returns in FORM GSTR-9, FORM GSTR-9A and reconciliation statement in FORM GSTR-9C, the due date for furnishing these returns/reconciliation statements to be extended till 31.08.2019. (56/2019-Central Tax, dt. 14-11-2019)

4. To provide sufficient time to the trade and industry to furnish the declaration in FORM GST ITC-04, relating to job work, the due date for furnishing the said form for the period July, 2017 to June, 2019 to be extended till 31.08.2019 (32/2019-Central Tax ,dt. 28-06-2019) and 38/2019-Central Tax ,dt. 31-08-2019.

5. Certain amendments to be carried out in the GST laws to implement the decisions of the GST Council taken in earlier meetings.

6. Rule 138E of the CGST rules, pertaining to blocking of e-way bills on non-filing of returns for two consecutive tax periods, to be brought into effect from 21.08.2019, instead of the earlier notified date of 21.06.2019

6. Last date for filing of intimation, in FORM GST CMP-02, for availing the option of payment of tax under notification No. 2/2019-Central Tax (Rate) dated 07.03.2019, to be extended from 30.04.2019 to 31.07.2019

   (Note: The recommendations of the GST Council have been presented in this release in simple language for information of all stakeholders. The same would be given effect through relevant Circulars/Notifications which alone shall have the

36th GST Council Meeting, New Delhi

27th July, 2019

PRESS RELEASE

The Council had recommended :-

A. Reduction in the GST rate on supply of goods and services: (Notification No- 12/2019 on 31-07-2019)

   (1) The GST rate on all electric vehicles be reduced from 12% to 5%.

(2) The GST rate on charger or charging stations for Electric vehicles be reduced from 18% to 5%.

(3) Hiring of electric buses (of carrying capacity of more than 12 passengers) bylocal authorities be exempted from GST.

(4) These changes shall become effective from 1st August, 2019.

B. Changes in GST law:

(1) Last date for filing of intimation, in FORM GST CMP- 02, for availing the option of payment of tax under notification No. 02/2019-Central Tax (Rate) dated 07.03.2019 (by exclusive supplier of services), to be extended from 31.07.2019 to 30.09.2019.

(2) The last date for furnishing statement containing the details of the self-assessed tax in FORM GST CMP-08 for the quarter April, 2019 to June, 2019 (by taxpayers under composition scheme), to be extended from 31.07.2019 to31.08.2019. (35/2019-Central Tax, dt. 29-07-2019)

(Note: The recommendations of the GST Council have been presented in this release in simple language for information of all stakeholders. The same would be given effect through relevant Circulars/Notifications which alone shall have the force of law.)

Changes in GST as per recommendations in 37th GST Council

Ref:http://gstcouncil.gov.in/sites/default/

files/news-latter/Newsletter-October%20-2019.pdf

Changes in filing of Return

Form GSTR-3B return for each month from October, 2019 to March, 2020 shall be required to be filed on or before the 20th day of the succeeding month.

Notification No. 44/2019 – Central Tax, dated 09/10/2019

- Time limit for filing quarterly returns in Form GSTR-1 by registered persons having aggregate turnover upto1.5crorerupees for the quarter October-December 2019 and January-March 2020 shall be 31st January, 2020 and 30th April, 2020, respectively.

  Notification No. 45/2019 – Central Tax, dated 09/10/2019

- Time limit for filing monthly returns in Form GSTR-1 by registered persons having aggregate turnover of more than 1.5 crore rupees for each month from October, 2019 to March, 2020 shall be the eleventh day of the succeeding month. Notification No. 46/2019 – Central Tax, dated 09/10/2019

- Option has been provided for furnishing annual return of FY 2017-18 and 2018-19 for the taxpayers having aggregate income less than 2 crore rupees.

  Notification No. 47/2019 – Central Tax, dated 09/10/2019

- Form GST CMP-08 for the quarter July, 2019 to September, 2019 or part thereof, shall be required to be furnished by 22nd October, 2019.

  Notification No. 50/2019 – Central Tax, dated 24/10/2019

  Changes in GST Rules

- Various rules regarding due dates of filing returns have been changed for registered taxpayers in Jammu and Kashmir.

  Notification No. 48/2019 – Central Tax, dated 09/10/2019

- Changes in Rules, including inter alia the restriction of 20% of the eligible credit out of the invoice or debit notes not uploaded by the supplier.

  Notification No. 49/2019 – Central Tax, dated 09/10/2019. The notification is very important as it limits the availment and utilization if ITC

Important Changes brought in by the 37th GST Council meeting
New GST return filing system to be introduced from April 2020

The GST council has again accepted the demand of the industry and postponed the new system of filing of GST return I the mid of the year. Hope fully this will be implemented from April 2020.

Optional filing of GSTR 9 and waiver from filing of GSTR 9A

Considering the problems being faced by MSME sector, GST specific annual Returns and Composition tax payers are not required to file GSTR 9A and for other organisations including MSMEs having aggregate turnover upto Rs two crores , filing of GSTR 9 has been made optional.

Filing of Appeals

Extension of Date was recommended by the council for filing of appeals against orders of appellate authorities before GST Appellate tribunal

Restriction on availment of ITC in case returns have not been filed by suppliers

Restriction on availment of Input Tax Credit has been imposed where the GSTR 2A does not contain the data with regard to availment of ITC.

The new provision ie rule 36(4) of CGST Rules reads as follows "Input tax credit to be availed by a registered person in respect of invoices or debit notes, the details of which have not been uploaded by the suppliers under sub-section (1) of section 37, shall not exceed 20 per cent of the eligible credit available in respect of invoices or debit notes, the details of which have been uploaded by the suppliers under sub-section (1) of section 37." However, the same has been challenged in the court of law and notices have been issued to State and Central Government on 15th Nov 2019. The case is pending with Gujarat High Court.

Refund to be disbursed by single authority

The taxpayer were facing lots of issues in getting the refunds because of multiplicity of authorities, now the GST council decided to launch an Integrated refund system with disbursal by single authority which has been introduced from 24th September, 2019.

Linking of Aadhaar with GSTIN nos

To prevent the misuse of GST mechanism, GSTINs may be linked with Aadhaar numbers.

37th Meeting of the GST Council, Goa

20 September, 2019

PRESS RELEASE

(Law and Procedure related changes)

The GST Council, in its 37th meeting held today at Goa, recommended the following:

1. Relaxation in filing of annual returns for MSMEs for FY 2017-18 and FY 2018-19 as under:
    a. waiver of the requirement of filing FORM GSTR-9A for Composition Taxpayers for the said tax periods; and
    b. filing of FORM GSTR-9 for those taxpayers who (are required to file the said return but) have aggregate turnover up to ₹ 2 crores made optional for the said tax periods.
2. A Committee of Officers to be constituted to examine the simplification of Forms for Annual Return and reconciliation statement.
3. Extension of last date for filing of appeals against orders of Appellate Authority before the GST Appellate Tribunal as the Appellate Tribunals are yet not functional.

4. In order to nudge taxpayers to timely file their statement of outward supplies, imposition of restrictions on availment of input tax credit by the recipients in cases where details of outward supplies are not furnished by the suppliers in the statement under section 37 of the CGST Act, 2017.

5. New return system now to be introduced from April, 2020 (earlier proposed from October, 2019), in order to give ample opportunity to taxpayers as well as the system to adapt and accordingly specifying the due date for furnishing of return in FORM GSTR-3B and details of outward supplies in FORM GSTR-1 for the period October, 2019 - March, 2020.

6. Issuance of circulars for uniformity in application of law across all jurisdictions:

    a. procedure to claim refund in FORM GST RFD-01A subsequent to favourable order in appeal or any other forum;

    b. eligibility to file a refund application in FORM GST RFD-01A for a period and category under which a NIL refund application has already been filed; and enabled Services (ITeS services) (in supersession of Circular No. 107/26/2019-GST dated 18.07.2019) being made on own account or as intermediary.

7. Rescinding of Circular No.105/24/2019-GST dated 28.06.2019, ab-initio, which was issued in respect of post-sales discount.

8. Suitable amendments in CGST Act, UTGST Act, and the corresponding SGST Acts in view of creation of UTs of Jammu & Kashmir and Ladakh.

9. Integrated refund system with disbursal by single authority to be introduced from 24th September, 2019.

10. In principle decision to link Aadhar with registration of taxpayers under GST and examine the possibility of making Aadhar mandatory for claiming refunds.

11. In order to tackle the menace of fake invoices and fraudulent refunds, in principle decision to prescribe reasonable restrictions on passing of credit by risky taxpayers including risky new taxpayers.

Note: The recommendations of the GST Council have been presented in this release in simple language only for immediate information of all stakeholders. The same would be given effect through relevant Circulars/Notifications which alone shall have the force of law.

PART

IMPACT OF INCOME TAX ON WORKS CONTRACT

WORKS CONTRACT UNDER INCOME TAX LAWS

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1. WHAT IS WORKS CONTRACT

There is no specific definition of **"Works Contract"** under Income Tax Act. In absence of such definition, following relevant points discussed below may be referred to understand the meaning of works contract and so as to its tax impact on Works Contractor and Owner/Contractee related to compliances under provisions of Income Tax Laws.

1.1. Works Contract In General: The term **"Works Contract"** is a term of English literature over a period of time. When the said term is used in reference to taxation laws has attended a special meaning. Hon'ble Supreme Court of India in case of **Associated Cement Company Limited v. Commissioner of Income Tax, Bihar/Patana & Another reported in (1993) 201 ITR 435 (SC)** while dealing with a matter pertaining to tax deduction at source under section 194C of the Income Tax Act, 1961 observed the term

*" **'Any Work'** means any work and not a **'Works Contract'** which has a special connotation in the tax law".*

The word used is **"Works Contract"** and not the "**Works Contract**". "Works" has a defined and accepted legal meaning. As per **Black's Law Dictionary** '**works**' **means** 'buildings or structures on land'. Therefore, contracts which do not pertain to building or structures on land would be out of the ambit of **works contracts**. As per **"US Legal.Com",** a works contract is an agreement which is a mixture of service or labour and transfer of goods. Under a works contract the contractor agrees to do certain job in execution whereof, certain goods are transferred to the contractee. Thus, an agreement of building construction, manufacture, processing, fabrication, erection,

installation, repair or commissioning of any movable or immovable property, is a works contract. In relation to a works contract only that part of consideration which represents transfer of property in the goods involved in execution of the works contract, shall be taxable under VAT / GST Laws.

The term "Works Contract" has not been defined in the Constitution of India. So the common understanding of the term is actually more relevant, than definition under any tax law.

1.2. Works Contract under Finance Act 2012: According to section 65 (54), as inserted by the Finance Act, 2012, "**works contract**" means a contract wherein transfer of property in goods involved in the execution of such contract is leviable to tax as sale of goods and such contract is for the purpose of carrying out construction, erection, commissioning, installation, completion, fitting out, repair, maintenance, renovation, alteration of any movable or immovable property or for carrying out any other similar activity or a part thereof in relation to such property. Contract has been defined in section 65B of the Act as a contract wherein transfer of property in goods involved in the execution of such contract is leviable to tax as sale of goods and such contract is for the purpose of carrying out construction, erection, commissioning, installation, completion, fitting out, repair, maintenance, renovation, alteration of any movable or immovable property or for carrying out any other similar activity or a part thereof in relation to such property.

Typically, every works contract involves an element of sale of goods and provision of service. In terms of Article 366 (29A) of the Constitution of India transfer of property in goods involved in execution of works contract is deemed to be a sale of such goods. It is a well settled position of law, declared by the Supreme Court in ***BSNL's case [2006 (3) TMI 1 (SC)]***, that a works contract can be segregated into a contract of sale of goods and contract of provision of service. This declared list entry has been incorporated to capture this position of law in simple terms. Labour contracts do not fall in the definition of works contract. It is necessary that there should be transfer of

property in goods involved in the execution of such contract which is leviable to tax as sale of goods. Pure labour contracts are therefore not **"works contracts"** and would be leviable to service tax like any other service and on full value.

1.3. Works Contract under Central Sales Tax Act: The term 'works contract' is defined in **section 2(ja)** of the Central Sales Tax Act. Accordingly, **'works contract'** means a contract for carrying out any work which includes assembling, construction, building, altering, manufacturing, processing, fabricating, erection, installation, fitting out, improvement, repair or commissioning of any movable or immovable property.

1.4. Works Contract under CGST Act, 2017: 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. In simple terms, a works contract is essentially a contract of service which may also involve the supply of goods in the execution of the contract. It is basically a composite supply of both services and goods, with the service element being dominant in the contract between parties.

1.5. Definition under Income Tax Act: From the above detail discussion, it is clear that, like GST and other Laws, 'works contract' is not defined in Income Tax Act. So a universal legal definition in vogue may be considered in income tax act. The legal definition is **"a works contract is an agreement which is a mixture of goods and services and there is a transfer of goods".** The Indian Contract Act, 1872 defines the term Contract under its section 2 (h) as "an agreement enforceable by a law". The definition has two major elements, viz- 'Agreement' and 'Enforceable' by law. Again the Indian Contract Act, 1872 define the term agreement "as every promise and every set of promises forming the consideration for each other". For

a valid contact there must be a consent between two or more person about the accepting the promise and must be legally defined or enforceable by any law. Unlike the previous indirect tax laws (service tax, central sales tax, VAT etc), where works contracts were linked to activities related to both movable and immovable properties; the GST laws have restricted the scope of works contract to activities related to immovable properties only. So in absence of any definition under income tax act, it may be presumed that " works contract which is a composite contract for services and goods and transfer of goods and linked to both movable and immovable property. The taxation impacts on works contracts are discussed below.

COMPUTATION OF INCOME IN HANDS OF WORKS CONTRACT

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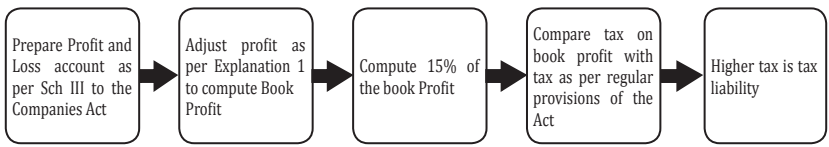
Taxation of works contract covers (i) Computation of Income from Business of Works Contracts (ii) Tax Compliances related to Works Contracts:

(A) Computation of Income from Business of Works Contract:

Works contractor being an assessee is liable to pay income tax on its taxable income. Taxable income is the total of all sources of income. A works contract assessee may have income from busines from only works contracts or works contract and other business. Works Contractor as a business assessee required to compute income under normal provisions of income tax act and pay income tax under normal computation subject applicability of **MAT u/s 115JB or AMT u/s 115JC to 115JF**.

MAT is calculated on Book Profit and incase of assessee which is subject to MAT is liable to pay income tax as shown below:

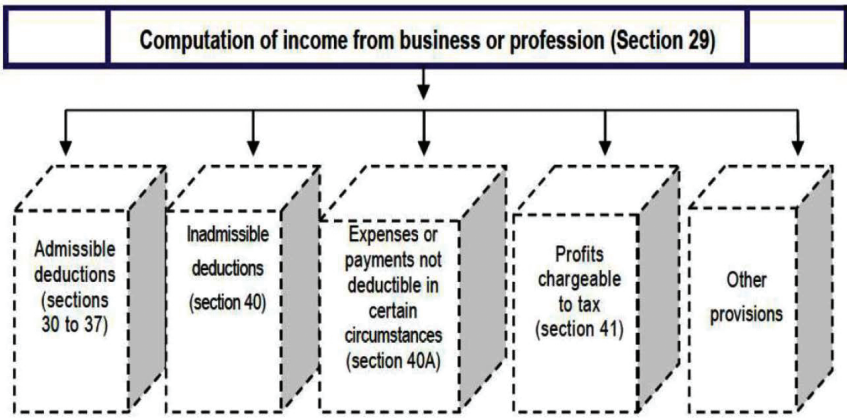


Same principle also applied for the assessee (other than company) to whom Alternate Minimum Tax applicable.

(a) Under normal Provisions of Income Tax Act:

Section 2(13) defined the term 'business' as "Business includes any trade, commerce or manufacture or any adventure or concern in

the nature of trade, commerce or manufacture". Sec. 28 enlists the incomes, which are taxable under the head 'Profits & gains of business or profession'. Any income from business or profession including income from speculative transaction shall be taxable under this head. An income tax assessee is a person who pays tax or any sum of money under the provisions of the Income Tax Act, 1961. The term 'assessee' covers everyone who has been assessed for his income, the income of another person for which he is assessable, or the profit and loss he has sustained. Works contract is a business and any income that arises in the hands of the Works Contractor is taxable under the head **"Profits and Gains from Business or Profession".** An assessee may have business of works contract only or may also have other business in addition to works contract business. Taxable income is computed by taking profits / loss of all the business. The net profit thatarrived from Statement of Profit and Loss is taken as the base and adjustment are to be carried on by way of addition or deduction to net profit as per allowability or disallowability of expenses as provided under section 30 to 37 subject compliances as per provisions of section 40, 40A, 41 and other related provisions**.** As per sec. 29, income under this head will be computed considering the provisions of sec. 30 to 43DB, which decides the admissibility of expenditures for computing income under this head.



Under normal provisions of income tax act, total Income is the income on which tax liability is determined. It is necessary to compute total

income to ascertain tax liability. The assessee, engaged in the business of works contract can take deduction under Chapter – VIA(80C to 80U) which provides certain deductions from Gross Total Income (GTI). After claiming these deductions from GTI, the income remaining is called as Total Income. In other words, GTI less Deductions (under section 80C to 80U) = Total Income (TI). Total income can also be understood as taxable income.

After ascertaining the total income, i.e., income liable to tax, the next step is to compute the tax liability for the year. Tax liability is to be computed by applying the rates prescribed in this regard in the Finance Act of the relevant assessment year. Following table will help in understanding the manner of computation of the total tax liability of the taxpayer.

Computation of total income and tax liability for the year

Particulars	**Amount**
Income from salary (A business assessee may also have salary income)	XXXXX
Income from house property	XXXXX
Profits and gains of business or profession	XXXXX
Capital gains	XXXXX
Income from other sources	XXXXX
Total of (head wise) income	XXXXX
Set off of Losses (This loss usually adjusted in respective sources of income instead deduction from total head of income. For understanding it is shown here)	XXXXX
Gross Total Income	**XXXXX**
Less: Deductions under Chapter VI-A (i.e., under section 80C to 80U))	(XXXXX)
Total Income (i.e., taxable income)	**XXXXX**
Tax on Total Income to be computed at the applicable rates (for rates of tax, refer "Tax Rate" section/Finance Act relevant year)	XXXXX

Less : Rebate under section 87A if any	(XXXXX)
Tax Liability After Rebate	XXXXX
Add: Surcharge (as applicable)	XXXXX
Tax Liability after Surcharge	XXXXX
Add: Health & Education cess @ 4% on tax liability after surcharge	XXXXX
Tax liability before rebate under sections 86, section 89, sections 90, 90A and 91 (if any) (*)	XXXXX
Less : Rebate under sections 86, section 89, sections 90, 90A and 91(if any) (*)	(XXXXX)
Tax liability for the year before pre-paid taxes	XXXXX
Less: Prepaid taxes in the form of TDS, TCS, advance tax, self-assessment tax if any paid	(XXXXX)
Tax payable/refundable	XXXXX

(*) Rebate under section 86 is available to a member of association of persons (AOP) or body of individuals (BOI) in respect of income received by such member from the AOP/BOI.

Rebate (i.e., relief) under section 89 is available to a salaried employee in respect of sum received towards arrears of salary, gratuity, etc.

Rebate under sections 90, 90A and 91 is available to a taxpayer in respect of double taxed income, i.e., income which is taxed in India as well as abroad.

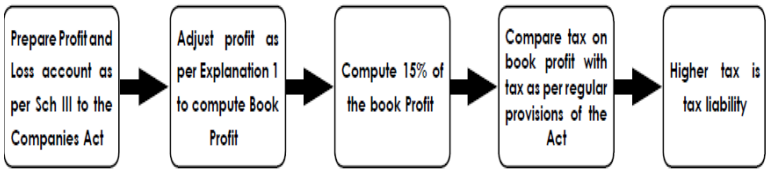
Note:

(i) Inter source losses, inter head losses, brought forward losses, unabsorbed depreciation, etc., (if any) will have to be adjusted (as per the Income-tax Law) while computing the gross total income.

(ii) If the eligible assessee has opted for concessional tax regime under section 115BAA, 115BAB, 115BAC and 115C to 115JC, the total income of assessee is computed without claiming specified exemptions or deductions:

(iii) **Minimum Alternate Tax (MAT)** in case of corporate taxpayers and **Alternate Minimum Tax (AMT)** in case of non-corporate taxpayers is also to be computed and higher of the income tax computed under normal provisions of Income Tax Act or "MAT/ AMT" as computed whichever is higher is payable. (Pl refer section 115JB and 115JC to 115JF)

Tax payable by a company engaged in the works contract is shown below (tax on income computed under normal provisions of IT Act or MAT whichever is higher).



Similarly non corporate **tax payer will pay tax on income computed under normal provisions of IT Act or AAT whichever is higher.**

As per section 288A, total income computed in accordance with the provisions of the Income-tax Law, shall be rounded off to the nearest multiple of ten. Following points should be kept in mind while rounding off the total income: First any part of rupee consisting of any paisa should be ignored. After ignoring paisa, if such amount is not in multiples of ten, and last figure in that amount is five or more, the amount shall be increased to the next higher amount which is in multiple of ten and if the last figure is less than five, the amount shall be reduced to the next lower amount which is in multiple of ten and the amount so rounded off shall be deemed to be the total income of the taxpayer.

(b) Presumptive Tax Provisions Applicable to Works Contractor/ Civil Contractor.

As per sections 44AA of the Income-tax Act, 1961, a person engaged in business or profession is required to maintain regular books of account under certain circumstances. To give relief to small taxpayers from this tedious work, the Income-tax Act has framed the presumptive

taxation scheme under section 44AD, sections 44ADA, sections 44AE., section 44BB and section 44BBB. A person adopting the presumptive taxation scheme can declare income at a prescribed rate and, in turn, is relieved from tedious job of maintenance of books of account. ***Following two provisions are dealt with works contract assessee may opt to compute its taxable income and pay income tax under presumptive taxation scheme.***

(i) Section 44AD: Computation of income on estimated basis in the case of taxpayers [being a resident individual, resident Hindu undivided family or resident partnership firm (not being a limited liability firm] engaged in certain business (it includes civil construction) subject to certain conditions.

Computation of Business Profit on Presumptive Basis [Sec. 44AD]

Applicability: A resident individual, resident Hindu undivided family or a resident partnership firm Note: The provision is not applicable in case of the following:

- Limited liability partnership firm
- A person carrying on profession as referred to u/s 44AA
- A person earning income in the nature of commission or brokerage; or
- A person carrying on any agency business
- A person carrying on the business of plying, hiring or leasing goods carriages referred to in sec. 44AE

However, this provision is applicable assessee engaged in Civil Construction business.

Conditions to be fulfilled:

Eligible Business: Assessee must be engaged in any business other than the business referred above

Maximum Turnover: Total turnover or gross receipts in the previous year of eligible business should not exceed ₹ 2 crore.

Restriction on claiming deductions: The assessee has not claimed any deduction u/s 10AA or 80HH to 80RRB in the relevant assessment year.

Estimated income:

Where amount of turnover or gross receipts is received by an account payee cheque or account payee bank draft or use of ECS or through other prescribed electronic modes during the previous year or before the due date of filing return of income	6% of such turnover or receipts
In any other case	8% of such turnover or receipts
However, a taxpayer can voluntarily declare a higher income in his return.	

Notes:

No Deduction in respect of expenses: The estimated income is comprehensive and no further deductions relating to expenses shall be allowed.

Depreciation: Depreciation is deemed to have been already allowed. The written down value of asset will be calculated, as if depreciation has been allowed.

Deductions: The above estimated income is aggregated with other income of the assessee, from any other business or under any other heads of income. Further deduction under chapter VIA (other than those mentioned above) shall be available to the assessee as usual.

Brought forward loss: Brought forward loss (if any) shall be subtracted from such estimated income as per provisions of this Act.

Provision is not applicable [Sec. 44AD(4)]: Where an eligible assessee:

- declares profit for any previous year in accordance with the provisions of this section (i.e., specified percentage of the turnover); &

- declares lower profit (i.e., less than specified percentage of the turnover) for any of the 5 assessment years relevant to the previous year succeeding aforesaid previous,

then, he shall not be eligible to claim the benefit of the provisions of this section for 5 assessment years subsequent to the assessment year relevant to the previous year in which he has declared lower profit.

E.g. an assessee claims to be taxed on presumptive basis u/s 44AD for A.Y. 2019-20. For A.Y. 2020-21 and 2021- 22, he offers income on the basis of presumptive taxation scheme. However, for A.Y. 2022-23, he did not opt for presumptive taxation Scheme. In this case, he will not be eligible to claim benefit of presumptive taxation scheme for next 5 A.Y.s, i.e. from A.Y. 2023-24 to 2027-28.

Effect on the assessee if sec. 44AD(4) is applicable: An assessee to whom provision of sec. 44AD(4) is applicable and whose total income exceeds the maximum amount which is not chargeable to tax (i.e., basic exemption limit), he shall be required:

- To maintain books of account and other documents as required u/s 44AA; and
- To get his accounts audited and furnish a report of such audit as prescribed u/s 44AB

Frequent Asked Questions:

Q. 1 Who is eligible to take advantage of the presumptive taxation scheme of section 44AD who engaged in works contract business?

Ans: The presumptive taxation scheme of section 44AD can be adopted by following persons who are engaged in works contract business:

- Resident Individual
- Resident Hindu Undivided Family
- Resident Partnership Firm (not Limited Liability Partnership Firm)

In other words, the scheme cannot be adopted by a non-resident and by any person other than an individual, a HUF or a partnership firm (not Limited Liability Partnership Firm).

Further, this Scheme cannot be adopted by a person who has made any claim towards deductions under section 10A/10AA/10B/10BA or under sections 80HH to 80RRB in the relevant year.

Q. 2 Which businesses are not eligible for presumptive taxation scheme?

Ans: The scheme of section 44AD is designed to give relief to small taxpayers engaged in any business, except the following businesses:

- Business of plying, hiring or leasing goods carriages referred to in sections 44AE.
- A person who is carrying on any agency business.
- A person who is earning income in the nature of commission or brokerage
- Any business whose total turnover or gross receipts exceeds two crore rupees.

Apart from above discussed businesses, a person carrying on profession as referred to in section 44AA(1) is not eligible for presumptive taxation scheme under section 44AD.

So above assessee (Refer FAQ -1) engaged in Civil Construction busines (which is the works contract) is eligible for presumptive taxation.

Q. 3 Can a person whose total turnover or gross receipts from civil construction / works contract for the year exceed ₹ 2,00,00,000 adopt the presumptive taxation scheme of section 44AD?

Ans: The presumptive taxation scheme of section 44AD can be opted by the eligible persons if the total turnover or gross receipts from the business do not exceed the limit prescribed under section 44AB (i.e., ₹2,00,00,000). In other words, if the total turnover or gross receipt of the business exceeds ₹2,00,00,000 then the scheme of section 44AD cannot be adopted.

Q. 4 What is the manner of computation of taxable business income under the normal provisions of the Income-tax Law, i.e.,

in case of a person not adopting the presumptive taxation scheme of section 44AD?

Ans: Generally, as per the Income-tax Law, the taxable business income of every person is computed as follows :

Particulars	Amount
Turnover or gross receipts from the business / works contract	XXXXX
Less : Expenses incurred in relation to earning of the income	(XXXXX)
Taxable Business Income	XXXXX

For the purpose of computing taxable business income in the above manner, the taxpayers have to maintain books of account of the business and income will be computed on the basis of the information revealed in the books of account.

Q. 5 What is the manner of computation of taxable business income from civil contract / works contract in case of a person adopting the presumptive taxation scheme of section 44AD?

Ans: In case of a person adopting the provisions of section 44AD, income will be computed on presumptive basis, i.e., @ 8% of the turnover or gross receipts of the eligible business for the year.

Income shall be calculated at rate of 6% in respect of total turnover or gross receipts which is received by an account payee cheque or draft or use of electronic clearing system or through such other electronic mode as may be prescribed.

In other words, in case of a person adopting the provisions of section 44AD, income will not be computed in normal manner as discussed in previous FAQ (i.e., Turnover less Expense) but will be computed @ 8%/6% of the turnover.

Income at higher rate, i.e., higher than 8% can be declared if the actual income is higher than 8%.

Q. 6 As per the presumptive taxation scheme of section 44AD, income of a taxpayer will be computed @ 8%/6% of the turnover or gross receipt and from such income can the taxpayer claim any further deductions?

Ans: Under the normal provisions of the Income-tax Law, taxable business income will be computed after allowing deduction in respect of expenses which are deductible as per the Income-tax Act and after disallowing expenses which are not deductible as per the Income-tax Act.

In case of a person who is opting for the presumptive taxation scheme of section 44AD, the provisions of allowance/disallowances as provided under the Income-tax Law will not apply and income computed at the presumptive rate of 8%/6% will be the final taxable income of the business covered under the presumptive taxation scheme and no further expenses will be allowed or disallowed. However, the assessee can claim deduction under chapter VI-A.

While computing income as per the provisions of section 44AD, separate deduction on account of depreciation is not available, however, the written down value of any asset used in such business shall be calculated as if depreciation as per section 32 is claimed and has been actually allowed.

Q.7 If a person adopts the presumptive taxation scheme of section 44AD for the income business of civil construction/ works contract, then is he required to maintain books of account as per section 44AA?

Ans: Section 44AA deals with provisions relating to maintenance of books of account by a person engaged in business/profession. Thus, a person engaged in business/profession has to maintain books of account of his business/profession according to the provisions of section 44AA.

In case of a person engaged in a business and opting for the presumptive taxation scheme of section 44AD, the provisions of section 44AA relating to maintenance of books of account will not apply. In other words, if a person adopts the provisions of section 44AD and declares income @ 8%/6% of the turnover, then he is not required to maintain the books of account as provided under section 44AA in respect of business covered under the presumptive taxation scheme of section 44AD.

Q.8 If a person adopts the presumptive taxation scheme of section 44AD, then is he liable to pay advance tax in respect of income from business covered under section 44AD?

Ans: Any person opting for the presumptive taxation scheme under section 44AD is liable to pay whole amount of advance tax on or before 15th March of the previous year. If he fails to pay the advance tax by 15th march of previous year, he shall be liable to pay interest as per section 234B and section 234C.

Note: *Any amount paid by way of advance tax on or before 31st day of March shall also be treated as advance tax paid during the financial year ending on that day.*

Q.9 If a person adopts the presumptive taxation scheme but he opts out from the scheme in any of the subsequent five years, then what are the consequences?

Ans: If a person opts for presumptive taxation scheme then he is also required to follow the same scheme for next 5 years. If he failed to do so, then presumptive taxation scheme will not be available for him for next 5 years. [For example, an assessee claims to be taxed on presumptive basis under Section 44AD for AY 2019-20. For AY 2020-21 and 2021-22 also he offers income on basis of presumptive taxation scheme. However, for AY 2022-23, he did not opt for presumptive taxation Scheme. In this case, he will not be eligible to claim benefit of presumptive taxation scheme for next five AYs, i.e. from AY 2023-24 to 2027-28.]

He is required to keep and maintain books of account and he is also liable for tax audit as per section 44AB from the AY in which he opts out from the presumptive taxation scheme. [If his total income exceeds maximum amount not chargeable to tax]

Relevant case Laws:

[2016] 71 taxmann.com 184 (Bangalore - Trib.) / [2016] 159 ITD 749 (Bangalore - Trib.)

Section 44AD, read with section 144 of the Income-tax Act, 1961 - ***Civil construction business (Estimation of net profit)*** - Assessment

year 2008-09 - Assessing Officer estimated 8 per cent net profit though total receipt was ₹65.29 lakh, i.e., above ₹40 lakh, on ground that books of account were not produced while assessee contended that books were audited and audit report was filed - It was found that in preceding two assessment years assessee had shown net profit of 1.7 per cent and 2.21 per cent which were accepted by Assessing Authority as well - Whether estimation of net profit of 8 per cent was not justified; average of preceding two years was to be taken as GP rate - Held, yes [Para 28][In favour of assessee]

Amarjit Singh *v.* Income-tax Officer, Ward-1, Phagwara,[2017] 81 taxmann.com 444 (Amritsar - Trib.)/[2016] 48 ITR(T) 622 (Amritsar - Trib.)

Section 44AD of the Income-tax Act, 1961 - **Civil construction business** (Scope of provision) - Assessment year 2008-09 - Where assessee, a civil sub-contractor, produced his books of account before Assessing Officer in course of assessment proceedings and Assessing Officer did not reject them, estimation of assessee›s income under section 44AD was not valid

Shashi Builders India (P.) Ltd. *v.* Income-tax Officer, Ward-2 (1), Muzaffarpur, [2016] 65 taxmann.com 19 (Patna - Trib.)

Merely because, assessee's income from civil construction work had been accepted at six per cent of contract receipt in earlier year, it could not be ground to claim that for relevant year also, assessee's income was to be assessed at six per cent of contract receipt

Section 44AD, read with section 145, of the Income-tax Act, 1961 - Civil construction business - Assessment years 2005-06 & 2006-07 - Assessee was deriving income from civil construction work - Assessing Officer assessed assessee's income at 8 per cent of contract receipt by invoking section 145(3) - Assessee contended that its income for assessment year 2003-04 had been accepted by Tribunal at 6 per cent of contract receipt and, accordingly, same be followed for current year as well so as to maintain consistency - Whether principle of res judicata is not applicable to proceedings under Act and, therefore,

no assistance could be drawn from manner in which assessment for assessment year 2003-04 had been framed or came to be finalized - Held, yes - Whether however, if projects on which profit stood assessed for assessment year 2003-04 were same for which it was for current year, assessee was entitled to claim a review of its profit in light of its assessment for that year and in that case it would have to prove that work-in-progress for current year was in continuation of WIP of that year - Held, yes [Para 4] [Matter remanded]

Ravi Dubey *v.* Commissioner of Income-tax, [2016] 66 taxmann.com 359 (Allahabad)/[2015] 375 ITR 469 (Allahabad)(Mag.)

The assessee was a proprietor of the business of sub-contractor for road construction. The assessee had shown the net profit rate at 3.18 per cent. But the books of account were rejected by the Assessing Officer and the profit was estimated at 8 per cent. The Tribunal upheld estimation of profit at 8 per cent.

Held that the raw material belongs to the main contractor and not to the assessee and so profit rate should have been estimated with reference to net payment after excluding such cost of materials. Thus, there is a contradiction about the facts and same was not discussed in the Tribunal's order. Accordingly, matter was to be remanded back to the Tribunal.

The assessee was a proprietor of the business of sub-contractor for road construction. The Assessing Officer made the disallowance pertaining to the rent and labour, rent of machinery under section 40(*a*)(*ia*) by observing that no TDS had been deducted.

Held that the assessee was a sub-contractor, as per the agreement he was responsible for mixing of the material in given portion of the proposed road. He was supposed to perform the following arrangements: (*i*) Arrangement for enough labour, (*ii*) Arrangement for labour camp at site, (*iii*) Transportation of material from GIL Camp to site and (*iv*) Arranging machineries for laying and compacting GSB and WMM mixture. From the above, it appears that the assessee was not responsible to purchase the raw materials like sand, gitti, etc., and

it was purchased by the main contractor. Therefore, *prima facie* the assessee was not responsible for deducting TDS.

Commissioner of Income-tax *v.* Jogendra Singh & Co. [2014] 42 taxmann.com 544 (Allahabad)/[2014] 222 Taxman 113 (Allahabad)/[2014] 361 ITR 78 (Allahabad)

Where in case of assessee, engaged in civil construction business, Tribunal applied a net profit rate of 7 per cent keeping in view previous history, local knowledge and circumstances pertaining to assessee, said order of Tribunal did not require any interference

Where Assessing Officer made certain addition to assessee's income under section 68, in view of fact that amount in question represented outstanding liability towards suppliers of building material which was duly confirmed, impugned addition was to be set aside.

Sahu Construction *v.* Assistant Commissioner of Income-tax, Circle - 1(1) [2014] 41 taxmann.com 299 (Cuttack - Trib.)

Section 44AD of the Income-tax Act, 1961 - Civil construction business - [Depreciation] - Assessment year 2009-10 - Whether while computing income as per provisions of section 44AD, deduction of depreciation can be allowed separately-Held, no [Para 10.1]

Touch Home Builders & Realtors (P.) Ltd. *v.* Deputy Commissioner of Income-tax, Central Circle, Trivandrum, [2014] 42 taxmann.com 436 (Kerala)) / [2014] 222 Taxman 165 (Kerala)(MAG)

Section 44AD, read with section 144, of the Income-tax Act, 1961 - Civil construction business (Conditions precedent) - Assessment year 2002-03 - Assessee-company was engaged in business of construction and sale of residential apartment - In search, it was found that no return came to be filed by assessee - Thereafter, proceeding under section 144 was initiated and income was proposed at 20 per cent of gross receipt - Case of assessee was that activities carried out by assessee resulted into loss on account of lack of experience and same was also revealed in audited accounts and, thus, assessment ought to have been done under section 44AD taking 8 per cent as gross

receipt - Whether where work carried out by assessee was not as a civil contractor but as a builder, income earned by company would be more than income earned by civil contractor and, hence, provision of section 44AD could not be warranted to estimate gross profit at 8 per cent - Held, yes - Whether, receipts during relevant period plus non filing of returns and disclosure of receipts in search and seizure would clearly show that there was no bona fide act on part of assessee in not filing return, and thus estimation of 20 per cent from receipt of income was justified - Held, yes [Paras 3 & 5][In favour of revenue]

Ecoasfalt SA v. Additional Director of Income-tax, International Taxation, Range-3, New Delhi, [2012] 24 taxmann.com 349 (Delhi)/[2012] 54 SOT 465 (Delhi)

In absence of conlusive evidence on record that assessee contractor had itself executed contract for strengthening and resurfacing of roads, its taxable income was to be estimated under section 44AD by applying net profit rate on total trunover.

(ii) Section – 44BBB: Special provision for computing profits and gains of foreign companies engaged in the business of civil construction, etc., in certain turnkey power projects

Section 44BBB. (1) Notwithstanding anything to the contrary contained in sections 28 to 44AA, in the case of an assessee, being a foreign company, engaged in the business of **civil construction or the business of erection of plant or machinery or testing or commissioning thereof, in connection with a turnkey power project** approved by the Central Government in this behalf, a sum equal to ten per cent of the amount paid or payable (whether in or out of India) to the said assessee or to any person on his behalf on account of such civil construction, erection, testing or commissioning shall be deemed to be the profits and gains of such business chargeable to tax under the head "Profits and gains of business or profession".

(2) Notwithstanding anything contained in sub-section (1), an assessee may claim lower profits and gains than the profits and gains specified in that sub-section, if he keeps and maintains such books

of account and other documents as required under sub-section (2) of section 44AA and gets his accounts audited and furnishes a report of such audit as required under section 44AB, and thereupon the Assessing Officer shall proceed to make an assessment of the total income or loss of the assessee under sub-section (3) of section 143 and determine the sum payable by, or refundable to, the assessee.

Following important Points may be noted

Civil construction falls in the category of civil engineering which is all about designing, constructing and maintaining the physical and naturally built environment. Civil construction is the art of building bridges, dams, roads, airports, canals, and buildings.

Applicable to: Foreign Company

Condition: Assessee must be engaged in the business of -

- Civil construction; or
- Erection of plant or machinery or testing or commissioning thereof,

in connection with a turnkey power project approved by the Central Government in this behalf. Approval issued by the Department of Power in the Ministry of Energy shall be deemed to be the approval of the Central Government for this section.

Estimated Income: Income of such business shall be estimated at 10% of the amount paid or payable (whether in or out of India) to the said assessee (or to any person on his behalf) on account of such civil construction, erection, testing or commissioning.

Assessee may claim lower Profit: An assessee may claim lower profits and gains if he keeps and maintain books of account as per sec. 44AA and gets his accounts audited and furnishes the report u/s 44AB and thereupon the Assessing Officer shall proceed to make an assessment of the total income of the assessee u/s 143(3) and determine the sum payable by, or refundable to, the assessee.

Relevant case Laws:

Deputy Commissioner of Income-tax (Intl. Taxation), Mumbai *v.* Whessoe Oil & Gas Ltd. [2017] 87 taxmann.com 342 (Mumbai - Trib.)

Section 44BBB of the Income-tax Act, 1961 - Foreign companies, **civil construction** business in certain turnkey projects (Offshore supply) - Assessment year 2008-09 - Assessee, a UK company, and PLI had entered into a JV - They were awarded a contract by RGPPL, an Indian company on EPC basis - Assessee offered its income from engineering services and purchases within India for tax under section 44BBB but did not offer income arising out of procurement of offshore equipments for taxation - Assessing Officer held that provisions of section 44BBB were applicable to assessee on amount of offshore procurement as well, as it was part of same EPC contract - Contract entered into with RPPGL, in its consideration clause, had separately identified aggregate consideration payable in respect of different components of contract, namely, design and engineering services (onshore/offshore), import of equipment/material as well as equipment/material to be procured from within India - Whether, thus, entire contractual revenue on account of offshore procurement could not be brought to tax under section 44BBB as consideration received by assessee for offshore supply of equipment was not chargeable to tax in India - Held, yes [Para 5]

Assistant Director of Income-tax (International Taxation), Ahmedabad *v.* Shandong Tiejun Electric Power Engineering Co. Ltd. [2017] 77 taxmann.com 266 (Ahmedabad - Trib.)/[2017] 163 ITD 94 (Ahmedabad - Trib.)/[2018] 193 TTJ 483 (Ahmedabad - Trib.)

Section 145, read with section 44BBB, of the Income-tax Act, 1961 read with AS- 7 - Method of accounting - Rejection of books of account - Assessment year 2009-10 - Whether in terms of provisions of Companies Act, 1956, AS-7 is applicable to a foreign company which has established place of business in India - Held, yes - Assessee, a foreign company engaged in erection, testing and commissioning of power

plants, had project office in India - In impugned year assessee had been executing two projects on fixed price contract basis - It followed Accounting Standard-7, (AS-7), namely ‹Construction Contracts› and in pursuance thereto, recognized revenue and expenses by following ‹percentage of project completion› method - It duly maintained books of account as per section 44AA(2), got them audited as per provisions of section 44AB and duly offered its taxable income in conformity with provisions of section 44BBB(2) - Assessing Officer rejected assessee›s books of account holding that AS-7 was not applicable to assessee and it ought to have followed another method of accounting, i.e., stage of completion of project method - Assessing Officer invoked section 44BBB(1) and determined income at presumptive rate of 10 per cent - Whether since assessee fulfilled all conditions prescribed under section 44BBB(2) and had also followed one of recognized methods prescribed for determination of stage of completion of contract as prescribed in para 29 of Accounting Standard-7, Assessing Officer's action of rejecting books of account in terms of section 145(3) and assessing income under section 44BBB(1) on presumptive basis was not justified particularly when, Assessing Officer's proposition would have led to lesser revenue being recognized during impugned year - Held, yes [Para 6]

Toshiba Plant Systems & Services Corpn., In re, [2011] 9 taxmann.com 326 (AAR)/[2011] 198 Taxman 26 (AAR)/[2011] 332 ITR 456 (AAR)/[2011] 239 CTR 163 (AAR)

Section 44BBB of the Income-tax Act, 1961 - Foreign companies, civil construction business, in case of - Applicant, a Japanese company, is an engineering, procurement and construction company and has been active in development of power projects on an international basis for last sixty six years - It has been awarded a contract by CGPL, an Indian company, for erection of steam turbines, turbo generators and auxiliary equipments/heaters for power project in India - Applicant would initially depute certain expats to project office set up in India for provision of services and further, in order to meet project schedule, it would, in course of execution of contract, deploy additional expats and workforce, if required - It is contemplated to engage services

of a related party/third party for supply of labour for executing work under contract with CGPL - Whether, on facts, section 44BBB would apply and, therefore, consideration received by applicant for aforesaid project would be eligible for presumptive rate of taxation under section 44BBB - Held, yes

Director of Income-tax *v.* DSD NoellGMBH[2011] 11 taxmann. com 212 (Delhi)/[2011] 199 Taxman 329 (Delhi)(Mag.)/[2011] 333 ITR 304 (Delhi)

Section 44BBB of the Income-tax Act, 1961 - Foreign companies, civil construction business in case of - Assessment years 2004-05 and 2005-06 - Whether where assessee, a German company, had set up a project office in India for providing engineering and technical services for various projects and it fulfilled all conditions stipulated in section 44BBB(1), profits and gains of assessee were to be computed at 10 per cent in accordance with said provision - Held, yes - Whether provision made in sub-section (2) of section 44BBB is for benefit of assessee under which assessee, on basis of books maintained by it, is given a chance to demonstrate and prove before Assessing Officer that actual profits earned by assessee were less than 10 per cent; on basis of this provision, revenue cannot plead or make out a case that profits earned by assessee are more than 10 per cent - Held, yes.

INCOME COMPUTATION AND DISCLOSURE STANDARD – III RELATED TO CONSTRUCTION CONTRACTS

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3.1. Income Computation and Disclosure Standards (ICDS) are guidelines used by the taxpayers and the Income Tax Department for computation of taxable income in a financial year. The ICDS were framed by the Government of India with the objective of inculcating uniformity in accounting policies. The purpose of the ICDS is to govern the computation of income in accordance with the pertinent tax provisions. ICDS has been framed using Generally Accepted Accounting Principles (GAAPs). It has been in existence from the financial year of 2015-16. ICDS is applicable to the taxpayers who are recipients of income under the head "**Profits and Gains of Business or Profession**" or "Income from other sources", irrespective of the accounting standards followed by the company. The provisions of ICDS will also be applicable to the persons computing income under the relevant **presumptive taxation scheme**. The provisions of ICDS are generally applicable to all taxpayers irrespective of their turnover or quantum of income, except for the Individuals or Hindu Undivided Family who are not covered under the provisions of Tax Audit. ICDS will not be considered for the computation of Minimum Alternate Tax (MAT). In this backdrop, a **Works Contractor being a business assessee is required to comply with the ICDS – III – Construction Contracts**

3.2. Preamble

This Income Computation and Disclosure Standard is applicable for computation of income chargeable under the head "Profits and gains of business or profession" or "Income from other sources" and not for the purpose of maintenance of books of accounts.

In the case of conflict between the provisions of the Income-tax Act, 1961 ('the Act') and this Income Computation and Disclosure Standard, the provisions of the Act shall prevail to that extent.

3.3. Scope

This Income Computation and Disclosure Standard should be applied in determination of income for a construction contract of a contractor (Works Contractor).

3.3.1 Applicability to BOT Projects, real Estate Developers and Leases

FAQ No. 12 of CBDT's Circular No. 10/2017 dated 23-3-2017 clarifies as under :

Question 12: Since there is no specific scope exclusion for Real Estate Developers and Build-Operate-Transfer (BOT) projects from ICDS-IV on Revenue Recognition, please clarify whether ICDS-III and ICDS-IV should be applied by Real Estate Developers and BOT operators. Also, whether ICDS is applicable for Leases.

Answer: At present there is no specific ICDS notified for real estate developers, BOT projects and leases. Therefore, relevant provisions of the Act and ICDS shall apply to these transactions as may be applicable.

3.4. Definitions

Clause 2(1) The following terms are used in this Income Computation and Disclosure Standard with the meanings specified:

(a) **"Construction contract"** is a contract specifically negotiated for the construction of an asset or a combination of assets that are closely interrelated or interdependent in terms of their design, technology and function or their ultimate purpose or use and includes:

(i) contract for the rendering of services which are directly related to the construction of the asset, for example, those for the services of project managers and architects;

(ii) contract for destruction or restoration of assets, and the restoration of the environment following the demolition ofassets.

(b) **"Fixed price contract"** is a construction contract in which the contractor agrees to a fixed contract price, or a fixed rate per unit of output, which may be subject to cost escalation clauses.

(c) **"Cost plus contract"** is a construction contract in which the contractor is reimbursed for allowable or otherwise defined costs, plus a markup on these costs or a fixed fee**.**

(d) **"Retentions"** are amounts of progress billings which are not paid until the satisfaction of conditions specified in the contract for the payment of such amounts or until defects have been rectified.

(e) **"Progress billings"** are amounts billed for work performed on a contract whether or not they have been paid by the customer.

(f) **Advances"** are amounts received by the contractor before the related work is performed.

Words and expressions used and not defined in this Income Computation and Disclosure Standard but defined in the Act shall have the meaning respectively assigned to them in the Act.

3.5. Combining and Segmenting Construction Contracts

A construction contract may be negotiated for the construction of a single asset. A construction contract may also deal with the construction of a number of assets which are closely interrelated or interdependent in terms of their design, technology and function or their ultimate purpose oruse.

Construction contracts are formulated in a number of ways which, for the purposes of this Income Computation and Disclosure Standard, are classified as fixed price contracts and cost plus contracts. Some construction contracts may contain characteristics of both a fixed price contract and a cost-plus contract, for example, in the case of a cost plus contract with an agreed maximum price.

Where a contract covers a number of assets, the construction of each asset should be treated as a separate construction contract when:

(a) separate proposals have been submitted for eachasset;

(b) each asset has been subject to separate negotiation and the contractor and customer have been able to accept or reject that part of the contract relating to each asset; and

(c) the costs and revenues of each asset can be identified.

A group of contracts, whether with a single customer or with several customers, should be treated as a single construction contract when:

(a) the group of contracts is negotiated as a single package;

(b) the contracts are so closely interrelated that they are, in effect, part of a single project with an overall profit margin; and

(c) the contracts are performed concurrently or in a continuous sequence.

Where a contract provides for the construction of an additional asset at the option of the customer or is amended to include the construction of an additional asset, the construction of the additional asset should be treated as a separate construction contract when:

(a) the asset differs significantly in design, technology or function from the asset or assets covered by the original contract; or

(b) the price of the asset is negotiated without having regard to the original contract price.

3.6. Contract Revenue

Revenue shall be recognised when there is reasonable certainty of its ultimate collection. Contract revenue shall comprise of:

(a) the initial amount of revenue agreed in the contract, including retentions; and

(b) a variations in contract work, claims and incentive payments:

  (i) to the extent that it is probable that they will result in revenue; and

  (ii) they are capable of being reliably measured.

Where contract revenue already recognised as income is subsequently written off in the books of accounts as uncollectible, the same shall be

recognised as an expense and not as an adjustment of the amount of contract revenue.

In ***Chamber of Tax Consultants*** **v.** ***Union of India*** **[2017] 87 taxmann.com 92**, the Delhi High Court held that the treatment to retention money under Paragraph 10(*a*) in ICDS-III will have to be determined on a case to case basis by applying settled principles of accrual of income. By deploying ICDS-III in a manner that seeks to bring to tax the retention money, the receipt of which is uncertain/ conditional, at the earliest possible stage, irrespective of the facts, the Respondents would be acting contrary to the settled position in law as explained in the decisions ***CIT*** **v.** ***Simplex Concrete Piles India (P.) Ltd.*** **(1988) 179 ITR 8 (*ii*)** ***CIT*** **v.** ***P & C Constructions (P.) Ltd.*** **(2009) 318 ITR 113 (*iii*)** ***Amarshiv Construction (P.) Ltd.*** **v.** ***DCIT*** **(2014) 367 ITR 659 and (*iv*)** ***DIT*** **v.** ***Ballast Nedam International*** **(2013) 355 ITR 300 which followed the decision in** ***Anup Engineering Limited*** **v.** ***CIT*** **(2000) 247 ITR 114** and to that extent para 10(*a*) of ICDS III would be rendered *ultra vires.*

To eliminate conflict between ICDS-III and the precedents in ***CIT*** **v.** ***Simplex Concrete Piles India (P.) Ltd.*** **(1988) 179 ITR 8 (*ii*)** ***CIT*** **v.** ***P & C Constructions (P.) Ltd.*** **(2009) 318 ITR 113 (*iii*)** ***Amarshiv Construction (P.) Ltd.*** **v.** ***DCIT*** **(2014) 367 ITR 659 and (*iv*)** ***DIT*** **v.** ***Ballast Nedam International*** **(2013) 355 ITR 300** which followed the decision in ***Anup Engineering Limited*** **v.** ***CIT*** **(2000) 247 ITR 114,** the Finance Act, 2018 has inserted new section 43CB w.r.e.f. AY 2017-18 to overcome the aforesaid precedents. Section 43CB(2)(*a*) provides that contract revenue shall include retention money in all cases.

Provisions related to section 43CB is produced below.

Section 43CB *of income tax act as amended in Finance Act 2018 provides as follows.*

Computation of income from construction and service contracts.

43CB. (1) The profits and gains arising from a construction contract or a contract for providing services shall be determined on the basis of percentage of completion method in accordance with the income

computation and disclosure standards notified under sub-section (2) of section 145.

Provided that profits and gains arising from a contract for providing services,—

(i) with duration of not more than ninety days shall be determined on the basis of project completion method;

(ii) involving indeterminate number of acts over a specific period of time shall be determined on the basis of straight line method.

(2) For the purposes of percentage of completion method, project completion method or straight line method referred to in sub-section (1)—

(i) the contract revenue shall include retention money;

(ii) the contract costs shall not be reduced by any incidental income in the nature of interest, dividends or capital gains.]

FAQ No. 11 of CBDT's Circular No. 10/2017, dated 23-3-2017 clarifies as under:

Question 11: Whether the recognition of retention money, receipt of which is contingent on the satisfaction of certain performance criterion is to be recognized as revenue on billing?

Answer: Retention money, being part of overall contract revenue, shall be recognised as revenue subject to reasonable certainty of its ultimate collection condition contained in para 9 of ICDS-III on Construction contracts.

Where contract revenue already recognised as income ***is subsequently written off in the books of account*** as uncollectible, the same shall be recognised as an expense and not as an adjustment of the amount of contract revenue. [Para 11 of ICDS-III (New)]

The second proviso to section 36(1)(vii) provides that :

where the amount of such debt or part thereof has been taken to account in computing the income of the assessee of the previous year in which the amount of such debt or part thereof becomes

irrecoverable or of an earlier previous year on the basis of income computation and disclosure standards notified under sub-section (2) of section 145 without recording the same in the accounts.

then, such debt or part thereof shall be allowed in the previous year in which such debt or part thereof becomes irrecoverable and it ***shall be deemed that such debt or part thereof has been written off as irrecoverable in the accounts for the purposes of this clause.***

3.7. Contract Costs

Contract costs shall comprise of:

(a) costs that relate directly to the specificcontract;

(b) costs that are attributable to contract activity in general and can be allocated to thecontract;

(c) such other costs as are specifically chargeable to the customer under the terms of the contract;and

(d) allocated borrowing costs in accordance with the Income Computation and Disclosure Standard on BorrowingCosts.

These costs shall be reduced by any incidental income, not being in the nature of interest, dividends or capital gains, that is not included in contract revenue.

Costs that cannot be attributed to any contract activity or cannot be allocated to a contract shall be excluded from the costs of a construction contract.

Contract costs include the costs attributable to a contract for the period from the date of securing the contract to the final completion of the contract. Costs that are incurred in securing the contract are also included as part of the contract costs, provided

(i) they can be separately identified; and

(ii) it is probable that the contract shall be obtained.

When costs incurred in securing a contract are recognised as an expense in the period in which they are incurred, they are not included in contract costs when the contract is obtained in a subsequent period.

Contract costs that relate to future activity on the contract are recognised as an asset. Such costs represent an amount due from the customer and are classified as contract work inprogress.

3.8. Recognition of Contract Revenue and Expenses

3.8.1. Contract revenue and contract costs associated with the construction contract should be recognised as revenue and expenses respectively by reference to the stage of completion of the contract activity at the reportingdate. [Para 16 of ICDS-III (New)]

The recognition of revenue and expenses by reference to the stage of completion of a contract is referred to as the percentage of completion method. Under this method, contract revenue is matched with the contract costs incurred in reaching the stage of completion, resulting in the reporting of revenue, expenses and profit which can be attributed to the proportion of workcompleted.[Para 17 of ICDS-III (New)].

3.8.2. Determination of stage of completion

The stage of completion of a contract shall be determined with reference to:

(a) the proportion that contract costs incurred for work performed upto the reporting date bear to the estimated total contract costs; or

(b) surveys of work performed;or

(c) completion of a physical proportion of the contract work.

Progress payments and advances received from customers are not determinative of the stage of completion of a contract.

When the stage of completion is determined by reference to the contract costs incurred up to the reporting date, only those contract costs that reflect work performed are included in costs incurred up to the reporting date. Contract costs which are excludedare:

a. contract costs that relate to future activity on the contract; and

b. payments made to subcontractors in advance of work performed under the subcontract.

During the early stages of a contract, where the outcome of the contract cannot be estimated reliably contract revenue is recognised only to the extent of costs incurred. The early stage of a contract shall not extend beyond 25 % of the stage of completion.

3.8.3. Determination of stage of completion of foreign projects - The purpose of determination of stage of completion is to determine reliably the stage of completion and not reporting *per se*. Therefore, AS 11/ICDS-VI (New) which prescribes reporting requirements for foreign operations would not govern the determination of stage of completion. ICDS-III (New)/AS 7 also does not provide explicit guidance as to which currency should be used for computing project cost estimates/revised cost estimates and actual cost incurred to determine the stage of completion of the project when costs and revenues are denominated in different foreign currencies. However, ICDS-III (New)/AS 7 prescribes various methods for determining stage of completion including survey of work performed and completion of a physical proportion of the contract work and requires to use that method which measures the stage of physical completion of work reliably.

Where stage of completion is determined by reference to contract costs incurred up to the reporting date, only those costs are included which reflect the work performed. Accordingly, since the effect of foreign exchange fluctuations in themselves do not reflect the performance of contract activity, *i.e.,* the work performed, the same should be ignored while determining the stage of completion In order to ignore the effect of foreign exchange fluctuations and to reflect only the level/extent of work performed, only one currency and one fixed exchange rate(s) should be used for computing the actual cost incurred and the total estimated costs in the determination of the stage of completion of a contract in a particular country. The effect of foreign exchange fluctuation on the stage of completion can be

explained with the help of following illustration: It is presumed for the sake of convenience that salary is the only component of cost, which is expected to be incurred on the foreign project at USD 10, when the exchange rate was USD 1= ₹40. The actual cost (salary) incurred as on the reporting date is USD 5 Exchange rate on the date of transaction is ₹ 50 per USD Exchange rate at the end of reporting year is ₹ 60 per USD. Thus, it can be seen from the above that if the effect of exchange rate is ignored, the stage of completion would be 50%. On the other hand, if the effect of foreign exchange fluctuations is included, the stage of completion would be determined as follows: Actual cost incurred = ₹ 50 × 5 = ₹ 250 Total estimated cost = Actual cost incurred + Remaining expected cost at the end of reporting year = ₹ 250 + ₹ (5 × 60) = ₹ 550. Thus, %age of completion = 250/550 × 100 = 45.45%. In the above example, percentage of completion should be taken as 50% (by ignoring exchange rate fluctuations) and not as 45.45%. [Opinion of Expert Advisory Committee of ICAI in response to Query No. 35-ICAI's website]

3.9. Changes in Estimates

The percentage of completion method is applied on a cumulative basis in each previous year to the current estimates of contract revenue and contract costs. Where there is change in estimates, the changed estimates shall be used in determination of the amount of revenue and expenses in the period in which the change is made and in subsequent periods.

3.10. Transitional Provisions

Contract revenue and contract costs associated with the construction contract, which commenced on or before the 31stday of March, 2015 but not completed by the said date, shall be recognised as revenue and costs respectively in accordance with the provisions of this standard. The amount of contract revenue, contract costs or expected loss, if any, recognised for the said contract for any previous year commencing on or before the 1st day of April, 2014 shall be taken into account for recognising revenue and costs of the said contract for the previous year commencing on the 1st day of April, 2015 and subsequent previous years.

3.11. Disclosure

A person shalldisclose:

a. the amount of contract revenue recognised as revenue in the period; and

b. the methods used to determine the stage of completion of contracts in progress.

A person shall disclose the following for contracts in progress at the reporting date, namely:—

a. amount of costs incurred and recognised profits (less recognised losses) upto the reporting date;

b. the amount of advances received; and

c. the amount of retentions.

Tax Audit Report Notification No. S.O. 3080(E), dated 29-9-2016 which amends clause No. 13 of Form No. 3CD clarifies that these disclosures are to be made ICDS-wise against new item No. (f) of clause 13 of Form No. 3CD as under:

(f) Disclosure as per ICDS:

(*i*)	ICDS I-Accounting Policies
(*ii*)	ICDS II-Valuation of Inventories
(*iii*)	ICDS III-Construction Contracts
(*iv*)	ICDS IV-Revenue Recognition
(*v*)	ICDS V-Tangible Fixed Assets
(*vi*)	ICDS VII-Governments Grants
(*vii*)	ICDS IX Borrowing Costs
(*viii*)	ICDS X-Provisions, Contingent Liabilities and Contingent Assets.

The disclosures as per paras 23 and 24 of ICDS-III (New) as above are to be made against Item No. f(*iii*) of clause 13 of Form No. 3CD. Further, the following disclosures are required against item Nos. (*d*) and (*e*) of clause 13 of Form No. 3CD if there are deviations from ICDS-III (New)

(*d*)	Whether any adjustment is required to be made to the profits or loss for complying with the provisions of income computation and disclosure standards notified under section 145(2)
(*e*)	If answer to (*d*) above is in the affirmative, give details of such adjustments:

		Increase in profit (₹)	*Decrease in profit (₹)*	*Net effect (₹)*
ICDS I	Accounting Policies			
ICDS II	Valuation of Inventories			
ICDS III	Construction Contracts			
ICDS IV	Revenue Recognition			
ICDS V	Tangible Fixed Assets			
ICDS VI	Changes in Foreign Exchange Rates			
ICDS VII	Governments Grants			
ICDS VIII	Securities			
ICDS IX	Borrowing Costs			
ICDS X	Provisions, Contingent Liabilities and Contingent Assets			
Total				

If escalation claims accepted during previous year are not accounted as 'contract revenue', the same will have to be disclosed against Item (*c*) of clause 16 of Form No. 3CD.

3.12. ICDS III and its impact on settled principles of law

3.12.1. Recognition of 'retention money' as revenue: Prior to ICDS III, predominant judicial view has been that retention money accrues to the taxpayer only when the related performance conditions are fulfilled by the contractor/ taxpayer. In fact, in a host of judicial rulings, retention money was held to be not taxable in absence of satisfaction of related performance conditions despite the same being recognised in books of accounts (Refer: **CIT v. Ignified Boilers (2006) 283 ITR 295 (Mad), CIT v. P&C Constructions (P) Ltd. (2009) 318 ITR 113 (Mad), CIT vs India Fruits Ltd. (2014) 369 ITR 0586 (AP), ACIT vs B.G.R. Energy Systems Ltd (2014) 47 taxmann.com 266 (HydTrib), KEC International Limited vs. ITO (ITA No. 2939/Bom/85), ADIT v. Ballast Nedam Dredging (154 TTJ (Mumbai) 280), Amarshiv Construction Pvt. Ltd vs. DCIT(2014) 45 taxmann.com 429 (Guj)). Incidentally, in the recent ruling of Kolkata Tribunal in the case of Mcnally Bharat Engineering Co. Ltd v. DCIT (TS-80-ITAT-2017)(KolTrib),** it was held that since retention money does not fall within the scope of charging provisions of s.4 & 5, the same is not liable to MAT even if credited to P&L. As per the ICDS Committee report, the judicial pronouncements had given 'unintended meaning' to retention money in light of AS-7 being silent about treatment of accrual of income in respect of the retention money. Hence, ICDS III provides that retention money shall form part of contract revenue and therefore, needs to be recognised as income as per POCM, even if related performance conditions are yet to be satisfied. To illustrate, if total contract revenue is ₹ 10 Cr and retention money is ₹ 1 Cr payable after one year from completion of contract on satisfactory performance of the asset, the retention money should be included in 'total revenue' while computing revenue, costs and profit on POCM basis. If 50% of the contract is complete, revenue should be taken at ₹ 5 Cr and not ₹ 4.50 Cr. This will have direct effect of increasing taxable income by ₹ 0.50 Cr. The Circular reiterates that retention money, being part of overall contract revenue, shall be recognised as revenue subject to reasonable certainty of its ultimate collection. While one may consider condition of reasonable certainty of ultimate collection for accounting purposes, what is relevant for tax purposes is the 'accrual' of income i.e. perfected entitlement or legal right to

receive such income as per section 4 and section 5 of the Income Tax Act. The Circular is adverse to that extent and hence, may not have a binding force on taxpayer. Also, ICDS being a method of computation of income cannot enlarge or curtail scope and ambit of 'total income' as per charging provisions of section 4 and section 5. Thus, taxpayer may be able to take a view that retention money does not become 'due' for tax purposes pending satisfaction of performance criterion which is also supported by the ICAI GN. However, since litigation is likely to arise in light of specific provision in ICDS and reiteration in the Circular, taxpayer may adopt the aforesaid view after weighing the litigation costs

3.12.2. Provision for foreseeable/ anticipated losses: Under AS-7, if it is probable that total contract costs will exceed total contract revenue, the expected loss is recognised as an expense immediately. Prior to ICDS, in absence of any specific provision in the Income Tax Act, judicial precedents permitted recognition of foreseeable loss on the basis of AS-7 (**Refer: CIT vs Triveni Engineering & Industries Ltd [336 ITR 374 (Del)], CIT vs Advance Construction Co. (P) Ltd [275 ITR 30 (Guj)], Jacobs Engineering India (P) Ltd vs ACIT [30 DTR 614 (Mum Trib)]).**

As per the ICDS Committee, the above led to differential tax treatment of recognition of income and losses. Hence, ICDS III provides that expected losses shall also be allowed only in proportion to the stage of completion, unlike AS-7 which permits entirety of foreseeable losses. **Supreme Court (SC) in CIT vs Woodward Governor India (P) Ltd [(2009) 312 ITR 254 (SC)]** held that principles of commercial accounting can be modified or superseded by legislative enactment and this is where s. 145(2) comes into play. Accordingly, since deduction for foreseeable losses was governed by accounting treatment in absence of specific provision under the ITA, the same can be modified by ICDS notified u/s 145(2). One will need to make a distinction between incurred loss and expected loss since ICDS prohibits allowability of expected loss and not an incurred loss. Further, differential treatment of foreseeable losses in books of accounts and for tax purposes is likely to cause MAT mismatch due to initial / upfront recognition of foreseeable loss in the books of accounts.

TAX DEDUCTION AT SOURCE –WORKS CONTRACTS

As discussed above the works contractor is a business assessee and compliances under provisions of TDS / TSC of income tax act is applicable as a deductor for deduction of tax at source and deductee where the payer will deduct tax act source.

4.1. Deduction of Income Tax at Source:

Chapter XVII- of the Income Tax Act 1961, provides provisions for collection and recovery of tax by TaxDeduction at Source / Tax Collection at Source. Sec 194C, 194M provides for deduction of tax from payment for works contract / civil construction made by contractor or sub-contractor. Any person carrying out any work in pursuance of a contract between a specified person and the resident contractor is required to deduct tax at source. Similarly, any payment made to a Non-Resident contractor for carrying out any works contract in pursuance of a contract between specified person and non-resident is required to deduct tax at source. The person who is making payment shall be responsible to deduct tax at source as per the provision under chapter XVII, hereinafter, referred as Deductor and the person to whom payment is made shall be referred as Deductee.

The relevant provisions which are related to works contract / civil construction are discussed below in brief.

4.2. TDS from Payment to Contractors[Section 194C]: Sec 194C provides for deduction of tax from payment to contractor or subcontractor which includes payment for works contract to contractor or sub-contractor. Any person carrying out any work in pursuance of a contract between a specified person and the resident contractor is required to deduct tax at source.

4.2.1 Who is liable to deduct tax?

Any person, other than an Individual or HUF, responsible for making payment to a resident contractor or sub-contractor for carrying out any work (including supply of labour) is liable to deduct tax at source under Section 194C. However, an Individual or HUF who is liable to tax audit during the financial year immediately preceding the financial year in which such sum is credited or paid, shall deduct tax under section 194C.

Any works also includes works contract.

Any person means all person as define u/s 2(31) and includes- an individual, a Hindu undivided family, a company, a firm, an association of persons or a body of individuals, whether incorporated or not, a local authority, and every artificial judicial person, not falling within any of the preceding sub-clauses.

Section 194C is applicable only in the case when payment is made to a resident contractor.

4.2.2 Meaning of 'Specified Person': Means

i) Central Government or State Government,

ii) Any Local authority,

iii) Any Corporation established under Central, State or Provincial Act,

iv) Any Company,

v) Any Co-operative Society,

vi) Any authority constituted in India under any law, engaged either for the purpose of dealing with and satisfying the need for housing accommodation or for the purpose of planning, development or improvement of cities, towns and villages, or for both; i.e DDA, HUDA,etc.,

vii) Any society registered under the Societies Registration Act, 1860 (21 of 1860) or under any law corresponding to that Act in force in any part of India;

viii) any trust;

ix) any university established, incorporated by or under a Central, State or Provincial Act and an institution declared to be a university under section 3 of the University Grants Commission Act, 1956 (3 of 1956);

x) any Government of a foreign State or a foreign enterprise or any association or body established outside India,

xi) any firm;

xii) An Individual, or a HUF or an AOP or a BOI, if turnover or gross receipt from business or profession during the preceding financial year, exceeds the threshold limit as prescribed under section 44AB to get the accounts audited.

Note: *(i) Audit under section 44AB is applicable if his total sales, turnover or gross receipts exceed or exceeds ₹ 100 lakhs or person carrying on profession, if his gross receipts from profession exceed ₹ 50 lakhs.*

(ii) However, no individual or a HUF shall be liable to deduct income-tax where amount is credited or paid exclusively for personal purposes of such individual or any member of HUF except u/s 194M which is produced in this chapter.

4.2.3 Who will be Deductee: Tax is required to be deducted under this section only when if sum is payable to a resident contractor.

The expression **"work"** in this section would include—

(a) advertising;

(b) broadcasting and telecasting including production of programmes for such broadcasting or telecasting;

(c) carriage of goods and passengers by any mode of transportation, other than railways;

(d) catering;

(e) Manufacturing or supplying of a product according to the requirement or specification of a customer by using the materials purchased from such customer, but does not include manufacturing or supplying of a product according to the

requirements or specifications of a customer by using the materials purchased from a person, other than such a customer.

A ***"Contractor"*** for the purpose of the provisions of ***Sec. 194C*** would be any person who enters into a contract with the Central Government or any State Government, any local authority, any corporation established by or under a Central, State or Provincial Act, any company or any co-operative society for carrying out any work including the supply of labour for carrying out any work. A"sub-contractor" would mean any person who enters into a contract with the contractor for carrying out, or for the supply of labour for carrying out the whole or part of the work undertaken by the contractor under a contract with any of the authorities or for supply of, whether wholly or partly, any labour which the contractor has undertaken to supply in terms of his contract with any of the authorities mentioned under *Sec. 194C*.

The ***Encyclopaedia Law Dictionary*** defines contractor as under: "Contractor in relation to an establishment means a person who undertakes to produce a given result for the establishment, other than mere supply of goods or articles or manufacture to such establishment."

According to ***Black's Law Dictionary***, the contractor means 'any person who enters into a contract, but is commonly reserved to designate one who for a fixed price undertakes to procure works or services on a large scale or the furnishing of goods in large quantities, whether for the public or a company or individual. Such persons are generally classified as general contractors (responsible for entire job) and sub-contractors (responsible for only portion of job).

4.2.4 Applicability of Sec. 194C:

Provisions of ***Sec. 194C*** are applicable only in relation to **'works contracts'** and **'labour contracts'** but do not cover 'contract for sale or mere supply of goods'. Neither Income Tax Act nor Income Tax Rules specifies the difference between the contract for sale and works contract; So there is no standard criteria to determine whether a contract is of contract for sale or a contract for work and labour? One of the criteria to differentiate between 'contract for sale' and 'work

contract' is to determine the ownership regarding goods in question. In case of works contract, even though a part or whole of the materials used belongs to the contractor, yet the property in the thing produced will be the performance whereas in the case of contract for sale the things produced generally are the sole property of the party who has performed the work before its delivery and such person and the property therein passes only under the contract relating thereto to other party for price. Mere transfer of property in goods used in the performance of a contract is not sufficient. To constitute a sale there must be an agreement expressed or implied relating to sale of goods and completion of the agreement by passing of title in the very goods constructed to be sold.

Under ***Sec. 194C***, deduction of tax at source is required to be made from payments of any sums to resident contractors or sub-contractors. Thus, following two situations are covered under ***Sec. 194C***:

(i) Deduction of tax at source from payment to resident-contractors;

(ii) Deduction of tax at source from payment to resident-sub-contractors

Deduction of income tax at source from payment made to non-resident contractors will be governed by section 195.

Any work is a subject-matter of interpretation as not specifically defined under act.

Hon'ble Supreme Court in case of ***Associated Cement Co. Ltd.*** **v.** ***CIT*** **[1993] 67 Taxman 346**, *has held that 'any work' does not necessarily mean 'works contract' only and that the 'work' envisaged in section 194C(1) has a wide import and covers any work which one or the other of the organisations specified in the sub-section can get carried out through a contractor under a contract, and would thus include a labour contract also.*

CBDT issued a Circular No. 681, dated 8-3-1994 provides that the provisions of section 194C shall apply to all types of Contract for carrying out any work. Finance Act, 1995 inserted a specific Explanation III in section 194C

Meaning of "Contractor" and "Sub-Contractor". [ITO v. Rama Nand & Co. {1987} 163 ITR 702(HP)]: A 'contractor' for the purpose of section 194C would be any person who enters into a contract with the Central or State Govt., any Local authority, any Corporation established by or under a Central, State or Provincial Act, any Company or any Co-operative Society, for carrying out any work including the supply of labour for carrying out any work. A 'Sub-Contractor' would mean any person who enters into a contract with the contractor for carrying out or for the supply of labour for carrying out the whole or part of the work undertaken by the contractor under a contract with any of the authorities named above or for the supply whether wholly or partly any labour which the contractor has undertaken to supply in terms of his contract with any of the aforesaid authorities.

4.2.5 Time of Deduction: The tax is deducted at the time of payment or at the time of credit of sum, whichever is earlier. The tax shall be deducted even if the sum is credited to any account, whether called 'Interest payable account' or 'Suspense account'.

4.2.6 Threshold limit: Tax is required to be deducted under this section only if the amount paid or credited in single payment exceeds ₹30,000 or ₹100,000 in aggregate during the financial year.

4.2.6.1 How to determine monetary limit for deduction

Tax is required to be deductible at source on any sum credited or paid, or likely to be credited or paid, to the account of, or to, the contractor-payee/sub contractor payee, if such sum exceed prescribed monetary limits. The monetary limit is ₹30,000 for each payment and ₹1,00,000 *payments in aggregate during the financial year*. Monetary limit for deduction of tax at source under section 194C (5) is calculated as follows.

Once any single payment exceeds the applicable monetary limit of ₹30,000, tax must be deducted on the whole amount (not on excess of such monetary limit only).

Example: *If any payment made on 30th June 2020 is ₹40,000 tax must be deducted on ₹40,000 and not on ₹10,000 (being the amount in excess of ₹30,000).*

Similarly following same principle as above, where the aggregate payment to the same payee during the financial year at any stage exceeds the applicable monetary limit, tax must be deducted on the amount of aggregate payment and not on, the amount in excess of the monetary limit.

Example: *If the aggregate amount of payments to the same payee during the financial year 2019-20 reaches ₹1,20,000 on 31ST Dec 2019, tax must be deducted on ₹1,20,000 and not on ₹20,000 (being the amount in excess of ₹1,00,000).*

Where any sum is paid or credited for carrying out any work mentioned in (*e*), tax shall be deducted at source:

(i) on the invoice value excluding the value of material, if such value is mentioned separately in the invoice; or

(ii) on the whole of the invoice value, if the value of material is not mentioned separately in the invoice.

Section 194C is applicable and can be invoked where aggregate of payment to a particular contractor in an assessment year exceeds ₹50,000 (now ₹1,00,000) and it is not necessary that any single payment has to be in excess of ₹50,000 (now ₹1,00,000). ***CIT v. Maruti Subray Patil [2015] 63 taxmann.com 28/235 Taxman 147 (Kar.)***
Even if aggregate payment by assessee car-dealer to parties did not exceed ₹50,000 (now ₹1,00,000) in a financial year, but onetime payment exceeded ₹20,000 (now ₹30,000), tax deduction at source is applicable under section 194C. ***Shimla Automobiles (P.) Ltd. v. ITO [2017] 80 taxmann.com 76/164 ITD 9 (Chd. - Trib.).***

4.2.7 When tax to be deducted at source:-

The person responsible for making payment to resident contractor/ sub-contractor should deduct tax at source either at the time of crediting such sum to the account to the payee or at the time of payment thereof in cash or by issue of a cheque or by any other mode, whichever is earlier.

4.2.7.1 Amount credited to suspense account

According to *Explanation* II to Sec. 194C, where any sum referred to in section194C(1) or 194C(2) is credited to any account, whether called 'Suspense account' or by any other name, in the books of account of the person liable to pay such income, such crediting shall be deemed to be credit of such income to the account of the payee and the provisions of sec. 194C shall apply accordingly.

Thus, tax has to be deducted even if amount payable to resident contractor/sub contractoris transferred to "suspense account" by the prayer in his books of account.

4.2.8 Rate of Deduction:

Tax shall be deducted @ 1% if the person to whom payment is made is an Individual or HUF.

Tax shall be deducted @ 2% if the person to whom payment is made is any other person other than Individual or HUF These rates shall not be further increased by Surcharge and Health and education cess.

If deductee does not provide PAN to the deductor, the tax shall be deducted at the rate of 20% in accordance with the section 206AA.

Exemption/CBDT guidelines: In the following cases an exemption is available under this section to do not deduct tax.

- **Payment to Government, RBI, etc.:** By virtue of section 196, no tax shall be deducted under this section from any sum payable to Govt., RBI, Mutual Fund or any Corporation established under the Act which is exempt from tax.
- **Payment for material:-**If any sum is paid or payable for carrying out any work relating to manufacturing or supply of product according to the requirement or specification of a customer by using material supplied by such material, tax shall be deducted (a) On the invoice value excluding the value of material, if value of material is mentioned separately in the invoice. (b) On the total value of invoice, if value of material is not mentioned separately in the invoice.

- **Goods carriage:-** No tax shall be deducted if sum has been paid or credited to a contractor carrying on the business of plying, hiring or leasing of goods carriage and he does not own more than 10 goods carriage at any time during the year. The contractor needs to submit a declaration along with his PAN to avail this benefit. Deductor has to furnish the details of such non-deduction of tax along with PAN of payee in Form 26Q.
- **Personal purpose**:- An Individual or HUF shallnot be liable to deduct tax on the sum paid or credited to a contractor if such sum is credited or paid exclusively for personal purposes of such individualor any member of HUF.
- **Besides above few other cases which are not related to works contract are also out of scope of TDS u/s 194C**

4.3. TDS from Payment by Certain Individual/HUF to Contractors or Professionals [Section 194M]w.e.f 01-09-2019

4.3.1 Who will Deductor:- Every Individual or HUF, who are **not required to deduct tax under section 194C,** section 194H and section 194J, shall be required to deduct tax at source under this provision.

In other words, following persons are required to deduct tax in accordance with this section

(a) An Individual or HUF whose gross receipts or turnover in the financial year immediately preceding the financial year, in which amount is paid or credited, does not exceed the monetary limit as specified under section 44AB, or

(b) An Individual or HUF making payment to a **contractor**, commission agent or professional for personal use.

Tax shall be deducted in accordance to this provision even if individual is not engaged in any business or profession or if he is just earning salary or any other income.

4.3.2 Who will Deductee: Tax under this section shall be deducted only when a sum is paid or payable to a person who is resident in India.

4.3.3 Types of Payment: Tax shall be deducted under this section in respect of the following:

(i) Any sum paid or payable in pursuance of a ***contract or sub-contract for carrying out any work including supply of labour for carrying out any work.*** The work shall include:

Advertising, Broadcasting or telecasting including production of programs for such broadcasting or telecasting, Carriage of goods or passengers by any mode of transport other than by railways, Catering, Manufacturing or supplying a product as per requirement or specification of a customer by using material purchased from such customer i.e. job work. It does not include manufacturing or supplying a product according to the requirement or specification of a customer by using material purchased from a person, other than such customer, Supply of labour for carrying out any work.

(ii) Any sum paid or payable by way of commission (not being insurance commission) or brokerage.

(iii) Any sum paid or payable by way of fee for professional services.

4.3.4 Rate of TDS: Tax shall be deducted at the rate of 5%. The rates shall not be further increased by Surcharge and Health and Education cess.

If deductee does not provide PAN to the deductor, the tax shall be deducted at the rate of 20% in accordance with the section 206AA.

4.3.5 Time of Deduction: The tax is deducted at the time of payment or at the time of credit of sum, whichever is earlier.

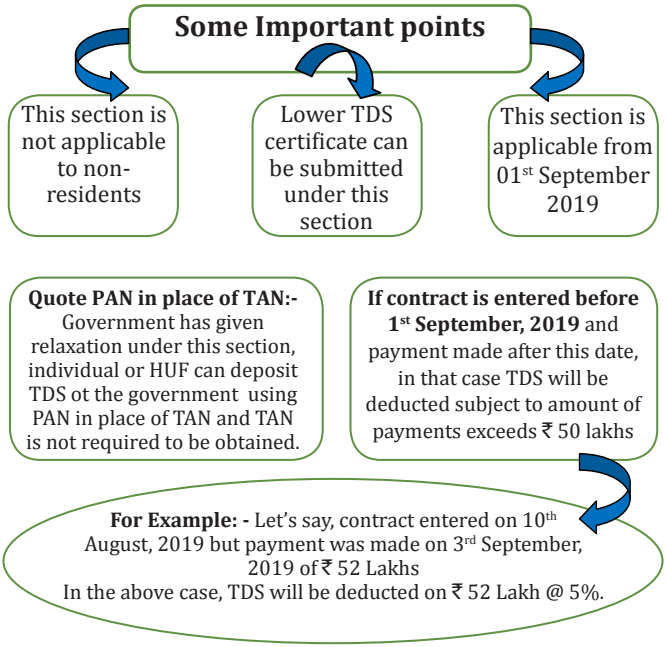
4.3.6 Threshold Limit: Tax is required to be deducted only if amount of payment exceeds ₹ 50 lakhs during the financial year.

4.3.7 No requirement of TAN: There is no requirement to apply or obtain tax deduction or collection account number (TAN) for deducting tax under this section. Hence, a deductor can use his PAN in place of TAN.

Exemption: Payment to Government, RBI, etc.**:** By virtue of section 196, no tax shall be deducted under this section from any sum payable

to Govt., RBI, Mutual Fund or any Corporation established under the Act which is exempt from tax.

4.3.8 Some important points related to section 194M



4.4 TDS From Other Sum Paid To A Non-Resident [Section 195].

4.4.1 When payment is made to a non-resident contractor or a foreign company for any work under works contract, tax shall be deducted under section 195. Nonresident Contractor may also includes works contractor who undertakes works contract in India.

4.4.2 Who will be Deductor: Any person, whether resident or non-resident, shall be responsible for deduction of tax at source under this section from payment of any interest or any sum which is chargeable to tax.

4.4.3 Who will be Deductee: ax shall be deducted, If recipient is a non-resident or a foreign company and the sum received is chargeable to tax in India by virtue of Income Tax Act or Double Taxation Avoidance Agreements [DTAA]

4.4.4 Rate of Deduction: Relevant rate in force as per chapter XVIIB. Incase payee not having valid PAN, then TDS rate as per rate prescribed chapter XVIIB or 20% whichever is higher will apply. While calculating TDS rates we need to consider the provisions under Double Taxation Avoidance Agreement (DTAA) for the relevant country if any. In case payee fulfilling all the conditions as prescribed in the DTAA then rates as per DTAA will apply. Generally, rates under DTAA will be lower than normal TDS rates.

Applicable rate: Department's Circular no. 728 dated 30-5-1995 clarifies rates in force. If the sum is payable by the resident is taxable income in the hands of the non-resident recipient, then tax has to be deducted on the gross amount. Section 195(2) prescribes that tax can be deducted at a lower rate in cases where the payer to a non-resident considers that the whole of such would not be income chargeable to tax in the hands of the recipient, and then he can approach the appropriate income tax authority to determine the tax payable by the recipient. The payer can make the application any time before making payment.

4.4.5 Time of Deduction: The tax is deducted at the time of payment or at the time of credit of sum, whichever is earlier.

4.4.6 Threshold Limit: There is no threshold limit is prescribed under this provision, hence even if a single rupees is paid to a non-resident contractor, tax shall be deducted under this section.

Exemption: *while applying the provision of section 195 for deduction of tax from the taxable income, it is important to consider, section4, section5,section9, section10, section90, section 90A, section 91 and provisions of the DTAA. If non-resident is found not to be taxable in India, no tax shall be deducted therefrom under this section. In case tax is deducted under other provisions no tax is deductible under section 195 from interest or any other sum if tax is deductible from such sum under any other section i.e. sections 192, 194LB, 194LC etc.*

4.5 Tax Deduction from payment made by Works Contractor:

4.5.1 Works Contractor being a Business Assessee while making different payments also required deduct the tax at source at the time of credit of the sum to payee account or at the of payment whichever

is earlier. (Pl refer to section 192 to 196 regarding applicability of relevant provisions)

Sl No	Section	Heads of Income/Payment from which TDS to be made.
1	192	Salary
2	192A	Payment of accumulated balance in EPF due to an Em- ployee
3	193	Interest on Securities
4	194	Dividend
5	194A	Payment of Interest other than Interest on securities
6	194B	Winning from Lottery or crossword puzzle
7	194BB	Winning from horse races
8	194C	Payments or credit to a resident contractor/Sub con- tractor Contractors
9	194D	Insurance commission
10	194DA	Payment in respect of life insurance policy
11	194E	Payment to nonresident sports men and sports associations
12	194EE	Payment in respect of deposit under National Saving Scheme 1987
13	194F	Payment on account of repurchase of units of MF or UTI
14	194G	Commission on sale of lottery tickets.
15	194H	Commission or brokerage,
16	194I	Rent payments on P&M, land/building/ furniture/fitting
17	194IA	Transfer of immovable property

18	194IB	Payment/credit of Rent by individual/HUF not covered u/s 44AB in immediate preceding financial year.
19	194IC	Payment under joint development agreement
20	194J	Fees for professional and technical services
21	194K	Any income inrespect of units of mutual fund / units of administror of specified units / units from specified company
21	194LA	Payment of compensation on acquisition of certain immovable property.
22	194LBA(1)	Distribution of rental income to unit holders - Other than Comapany - Company
23	194LBB	Income in respect of units of investment fund
24	194LBC	Income in respect of investment in securitization fund
25	194M	Certain payments by Individual/HUF
26	194N	Payment of certain amount in Cash
22	195	Other Sums

Note: Other TDS sections may also be refered.

4.5.2 Rates of Deduction of Tax

Tax is to be deducted at source strictly as per the prescribed rates applicable for different type of payments and nature/residential status of Recipients. The recipient of income i.edeductee has to intimate his PAN and if not given, tax has to be deducted either at the individual prescribed rates or at the rate of 20% whichever is higher, by virtue of section 206AA of Income Tax Act. The prescribed rates may change in finance acts amended/passed along with the union budget.

COMPLIANCES RELATED TO TAX DEDUCTION AT SOURCE

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5.1. Certificate for Lower Deduction of Tax [Section 197]: Sec 197 allows deduction of tax at lower or nil rate. **Who can apply for Certificate**:-For this purpose, contractor or sub-contractor has to file an application in Form 13 to the concerned Assessing officer. The assessee can apply to obtain the nil or lower TDS certificate in respect of section 194C, section 194M and section 195. If Assessing Officer is satisfied that total income of the contractor /sub-contractor justifies deduction of tax at lower or nil rate, then he may issue such certificate.

5.1.1. How to apply for Certificate: The application for issue of Nil or Lower Tax Deduction at Source certificate can be filed by the assessee with the Assessing Officer in Form number 13. Such Form can be filed electronically and shall be verified online under Digital signature or EVC(Electronic verification code). The application can be field at any time in the current financial year or even before the commencement of the financial year. PAN is mandatory to apply for this certificate.

In view of insertion of sub section (5E) in section 139A, vide the Finance (number 2) at, 2019, every person who is required to furnish or intimate or quote his PAN and who has not been allotted a PAN, but possesses the Aadhar number, may furnish his Aadhar number in lieu of PAN, and such person shall be allotted a PAN in the prescribed manner. Further, a person who has been allotted a PAN, and who has linked his Aadhar number with PAN as per section 139AA, may furnish his Aadhar number in lieu of PAN for all the transactions where quoting of PAN is mandatory as per Income Tax Act. However, the finance (number 2) Act, 2019 did not clarify whether the deductee can apply for lower deduction certificate if he furnishes his Aadhar number instead of PAN. Considering the non-obstante clause in section 139(5E) (not withstanding anything contained in this Act)

and the purpose behind introducing the inter changeability of PAN and Aadhar,it may be concluded that the asseessee can file application in Form 13 by quoting his Aadhar number instead of PAN.

5.1.2. Issue of certificate: Certificate for nil or lower deduction of tax shall be issued:

(a) Directly to the person responsible for deducting the tax advice to the person who made an application for issue of such certificate;

(b) If number of persons responsible for deducting the tax is likely to exceed 100 and the details of such person are not available with the person making such application, the certificate may be issued to the applicant authorizing him to received income after deduction of tax at lower rate.

In case of (a) above the certificate issued by the Assessing Officer is valid only in respect to the person responsible for deducting tax at source, whose name is mention in the certificate. In case of (b) above certificate shall be valid with regard to the person who made an application for issue of such certificate.

Certificate shall remain valid for such period as may be mention in that unless it is cancelled by the Assessing Officer before the expiry of that period.Similarly in some case like certificate issued to a Goods Transport Agency, Assessing Officer may mention the higher limit of amount of payment and beyond this tax shall be deducted at the normal rate of TDS. **For Example**, AO issued a certificate for lower deduction to ORISSA BENGAL CARRIER LTD. For the year 2019-20. As per this certificate rate of TDS shall be at rate of 0.15% instead of 2% till the payment received from SAIL up to ₹ 2 crore. When amount payment exceeds ₹ 2 crore, the tax shall be deducted at the rate of 2% over the amount exceeding ₹ 2 crore.

5.2. Time of Deposit of Income Tax Deducted at Source

By an office of the Govt. and tax is paid without production of income tax challan.	TDS : On the same day on which tax is deducted

By an office of Govt. and tax is paid accompanied by Income tax challan (ITNS- 281)	On or before 7 days from the end of month in which tax is deducted
Tax is deducted by a person other than office of Government	Income is paid or credited before March: within 7 days from the end of month in which tax is deducted. Income paid or credited in the month of March: Tax should be deposited by April 30.

5.2.1. TDS Payment

- TDS should be deposit in Challan No. 281
- TDS will have to deposit through internet banking.
- Indicate accurate PAN in challan
- Minor Head of Challan- 200 : TDS payable by tax payer
- Minor Head of Challan- 400 : TDS Regular assessment raised by Income Tax Department.
- Amount of TDS, Interest, Late filing fee, penalty etc,. should be separately shown while filing the challan
- Note down BSR code, Challan serial number, Date of payment, and amount of challan. This will help you in case challan is misplaced.

5.3. Time limit for filing TDS Return and issue of TDS certificate related to works contract:

Every deductor/contractee responsible for deduction of tax from payment to works contractor shall **file quarterly return in Form 26Q** and issue quarterly TDS certificate's by following dates: Similarly in case deductee is non- resident contractor the quarterly return shall be filed in Form No. 27Q. Every deductor / contractee is required to issue TDS certificate in Form 16A (For tax deducted on payments to works contractor) to the deductee / works contractor on

quarterly basis. Every deductor / contractee shall issue Form 16A by downloading it from TRACES website and properly authenticated by using digital signature or manual signature.

Quarter	Due date of filing TDS return	Due date for TDS Certificate
April to June	31st July	15th August
July to September	31st October	15th November
October to December	31st January	15th January
January to March	31st May	15th June

5.4. Mode of Furnishing Quarterly Returns of TDS:

- In case where deductor are an office of Govt. or Principal officer of a company or is person who is required to get his account audited u/s 44AB in immediately preceding financial year or when the numbers of deductee's are more than 20, then TDS quarterly return shall be submitted electronically.
- Other than above, any other deductor can submit TDS return either in paper format or electronically.
- Electronic return can be uploaded with Digital signature or verification of form 27A electronically
- Electronic return will be uploaded in FVU file
- FVU file can be generated through e TDS RPU (return prepare utility) which is available in https://www.tin-nsdl.com/services/etds-etcs/etds-rpu.html
- In every quarter download latest e TDS RPU
- In e TDS return details of challan paid [i.e. TDS amount, Interest, Fee, Other/penalty, BSR code, Challan serial No., Date of challan, Minor head], details of deductee has to fill like section under

which payment made, PAN, Name, Date of payment, Date deposit of TDS, amount paid, amount of TDS, Rate of TDS etc,.

5.5. Process of TDS return by the Income tax department through Traces

- After uploading of TDS return, IT department will process the return.
- Deductor has to registered in Traces site and create User ID and Pass word
- After uploading return, TDSreturn can be process without default. If TDSreturn is process with default, that means there is some error in return and there may be demand of short deduction, interest, late filing fee or penalty.
- To know details of process with defaults, justification report has to download.
- If there is demand of short deduction or interest or late filing fee, then deductor has to deposit the demand under minor head 400 showing separately TDS, Interest, late fee or others penalty and add this challan to the respective quarterly statement.
- After Tag/add of challan, again TDS correction return has to be uploaded.
- When TDS return is process without default that means TDS return process is completed. Thereafter TDS certificate has to download.

5.6. What are the consequences of non-compliance?

A. Non-Deduction or Non-Payment of TDS on payment made to contractor/sub-contractor on or before due date as specified in Sec 139(1) will lead to disallowance under section 40(a) (ia) / (a(i))

TDS default	If such expense is deductible in the current previous year	If such expense is deductible in any subsequent year
Tax is deductible but not deducted from payment made to works contractor	30% of expenditure is disallowed in the current year	If tax is deducted in the subsequent year, the expense (which is disallowed in the current year) will be allowed in the year in which TDS is deducted and deposited by the assesse.
Tax is deducted in the current year but is not deposited on or before due date of filing Income-tax return	30% of expenditure is disallowed in the current year	If tax is deposited after the due date of filing income tax return, the expense will be allowed in the year of deposit
if any assessee fail to deduct tax at source or fail to deposit TDS deducted from payment to contractors being non - resident.	100% expenditure shall be not allowed to deduct from income chargeable under the "profits and gains from business or profession",	If tax is deposited after the due date of filing income tax return, the expense will be allowed in the year of deposit

B. The deductor shall be deemed to be in default and he shall be liable to pay interest in accordance with Sec 201(1A). Besides above the Deductor will also be liable to pay fee under sec 234E for default in furnishing quarterly TDS return in Form 26Q and penalty u/s 271H,

(i) If a person fails to deduct tax:	Interest is levied at the rate of 1% per month or part of the month from the date on which the tax was deductible to the date on which such tax is deducted

(ii) If a person has deducted tax but after deduction has failed to deposit tax	Interest is levied at the rate of 1.5% per month or part of the month from the date on which the tax was deducted to the date on which such tax is actually paid.
Failure in furnish TDS return within stipulated time [U/S 234E]	Fee of ₹200 is payable for every day during which failure continues. However, the fees shall not exceed the maximum amount of TDS deducted. It is mandatory to pay late fee before furnishing return.
Penalty for failure to furnish quarterly TDS return / incorrect information while filing TDS return related to payment made to works contractor [Section - 271H]	the defaulter would be liable to pay a minimum penalty amount of ₹10,000, however, the maximum penalty amount may extend till ₹1,00,000.

5.7. Penalty for failure to furnish information or furnishing inaccurate information under section 195

As per section 195(6) of the Act, any person responsible for paying to a non-resident (not being a company) or to a foreign company, any sum (whether or not chargeable to tax), shall furnish the information relating to payment of such sum in Form 15CA and 15CB. In case of any failure in this regard a penalty of ₹ 1 ,00,000 shall be leviable.

5.8. Annual Information Statement (AIS) – New 26AS under section 285BB & Rule 114 – I will provide information related to transaction under a works contract

Section 285BB is introduced in the Income-tax Act, 1961 and Rule 114-I in the Income Tax Rules, 1962.In exercise of the powers conferred by section 285BB read with section 295 of the Income-tax Act, 1961 (43 of 1961), the Central Board of Direct Taxes hereby makes rule 114-I by way of further to amend the Income-tax Rules, 1962 vide Notification No.30/2020 (F. No.370142/ 20/2020-TPL) dated. 28th May 2020 to replace age-old Form 26AS notified under Rule 31AB. The New Annual Information Statement (AIS) will be effective from 01.06.2020 to provide different information as notified in above

Circular. Rule 114-I of Income Tax Rules provides that the Principal Director General of Income-tax (Systems) or the Director General of Income-tax (Systems) or any person authorised by him shall, under section 285BB of the Income-tax Act, 1961, upload in the registered account of the assessee an annual information statement in Form No. 26AS containing the information specified in colunm (2) of the table below, which is in his possession within three months from the end of the month in which the information is received by him.

Further sl no.2 of part B of the Table in sub rule (1) of rule 114-I, provides for information relating to **specified financial transaction**. It is pertinent to mention that no list of specified transaction has been provided. However sub-section (3) of section 285BA of the Income - tax Act define the **"Specified Financial Transaction"** which includes ***(iii) transaction under a works contract.*** Further, it has also been described that the CBIC can prescribe different values for different transactions in respect of different persons having regard to the nature of such transactions and the aggregate value of such transactions during a FY so prescribed shall not be less than a specified sum.

5.9. Under what circumstances a deductor would not be deemed as an assessee-in-default even after he fails to deduct TDS or after deducting the same fails to deposit it to the Government's account?

5.9.1. This is applicable only in case the payee is resident. A deductor/ contractee who fails to deduct the whole or any part of the tax on the sum paid to a resident or on the sum credited to the account of a resident shall not be deemed to be an assessee-in-default in respect of such tax if such resident—

- has furnished his return of income under section 139;
- has taken into account such sum for computing income in such return of income; and
- has paid the tax due on the income declared by him in such return of income, and the deductor furnishes a certificate to this effect in Form No.26A from a practicing-chartered accountant.

In other words, in case of non-deduction of tax at source or short deduction of tax, if all the above conditions are satisfied, then the payer/contractee will not be treated as an assessee-in-default. However, in such a case, even if the payer/contractee is not treated as

an assessee-in-default, he will be liable to pay interest under section 201(1A). In this case, interest shall be payable from the date on which such tax was deductible to the date of furnishing of return of income by such **resident payee**. Interest in such a case will be levied at 1% for every month or part of the month.

In exercise of the powers conferred by section 295 of the Income-tax Act, 1961 (43 of 1961), the Central Board of Direct Taxes issued **Notification No. 37/2012 dated 12-9-2012,** and amended Rule 31ACB with introduction of Form No. 26A for submission of Certificate for furnishing accountant certificate under the first proviso to sub-section (1) of section 201 of the Income-tax Act, 1961.

Few relevant case laws: Few decisions on the subject e.i. circumstances a deductor would not be deemed as an assessee-in-default even after he fails to deduct TDS or after deducting the same fails to deposit it to the Government's account are given below

Hindustan Coca Cola Beverage (P.) Ltd. *v.* Commissioner of Income-tax, [2007] 163 Taxman 355 (SC)/[2007] 293 ITR 226 (SC)/[2007] 211 CTR 545 (SC) / [2007] 163 Taxman 355 (SC)

The Circular No. 275/201/95-IT(B), dated 29-1-1997 issued by the Central Board of Direct Taxes would put an end to the controversy. The circular declares that no demand visualized under section 201(1) should be enforced after the tax deductor has satisfied the officer-in-charge of TDS that taxes due have been paid by the deductee-assessee. However, this will not alter the liability to charge interest under section 201(1A) till the date of payment of taxes by the deductee-assessee or the liability for penalty under section 271C. [Para 10]

In the instant case, the assessee had paid the interest under section 201(1A) and there was no dispute that the tax due had been paid by 'P'. It was not disputed that the circular was applicable to the facts situation at hand. [Para 11]

Hence, the judgment of the High Court was, accordingly, set aside. The appeal was to be allowed.

Commissioner of Income Tax (TDS), Lucknow *v.* Sahara India Commercial Corpn. Ltd.* [2017] 88 taxmann.com 719 (Allahabad)/[2017] 395 ITR 734 (Allahabad) /[2017] 88 taxmann.com 719 (Allahabad)

The assessee was engaged in the business of real estate development, construction and media activities, etc. It made payment to SAL for advertisement activity without deducting tax at source. The Assessing Officer treated assessee as 'assessee-in-default' under section 201 and had made assessee liable to pay entire amount of tax which it had failed to deduct from payments made to SAL.

Held that if the assessing authority found that SAL was not liable to pay any tax during the relevant assessment year or had actually paid tax, the assessee could not be held to be 'assessee-in-default' merely for the reason that it had failed to deduct tax or had short deducted tax and for that reason alone the assessing authority could not raise demand of tax from the assessee. Since this aspect was not examined by the assessing authority, therefore, the Tribunal has rightly remanded the matter to the assessing authority to examine this aspect.

Ghaziabad Development Authority *v.* Union of India, [2017] 88 taxmann.com 689 (Allahabad)/[2017] 395 ITR 597 (Allahabad)/ [2017] 88 taxmann.com 689 (Allahabad)

The petitioner development authority paid interest to the 'PNBHFL' and 'LICHFL 'on borrowed funds without deducting TDS. The Assessing Officer treated the assessee as the 'assessee-in-default' and demanded the amount of TDS as tax, and, interest under section 201(1A).

Held that since whatever tax was due on the amount of interest paid by petitioner to PNBHFL and LICHFL, the same had been paid by two recipient companies to the revenue, if again tax was allowed to be recovered from petitioner, it would amount to realizing tax twice, which was not permissible in law and, therefore, demand of tax was patently illegal and without jurisdiction

Commissioner of Income-tax (TDS)-I, Chandigarh *v.* Punjab Infrastructure Dev. Board [2017] 88 taxmann.com 704 (Punjab & Haryana)/[2017] 394 ITR 216 (Punjab & Haryana) / [2017] 88 taxmann.com 704 (Punjab & Haryana)

Where the deductee in the case of TDS had paid the tax or filed a 'nil' return, the demand for the principal amount cannot be enforced. However, this would not alter the liability of deductor to pay interest under section 201(1A) or for penalty under section 271C. For the same reasons, therefore, even assuming that the liability to collect tax at source cannot be enforced on account of the deductee having paid the tax, the liability of assessee for interest under sub-section (7) would not be affected.

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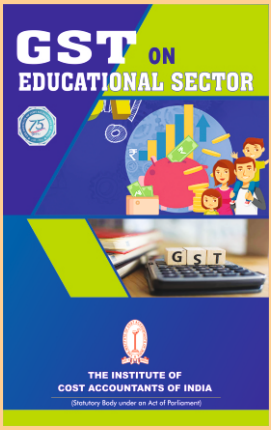

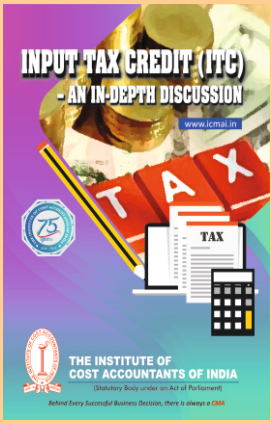

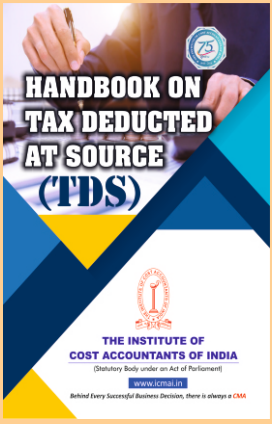

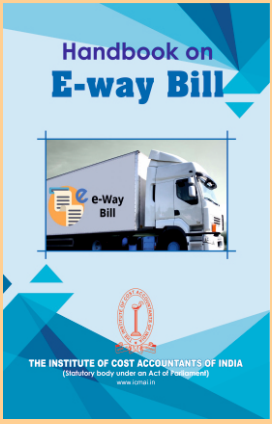

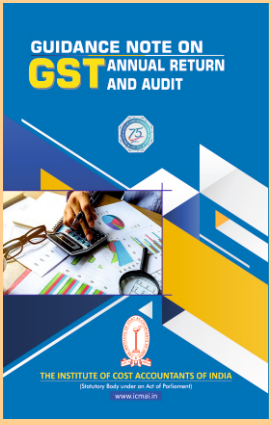

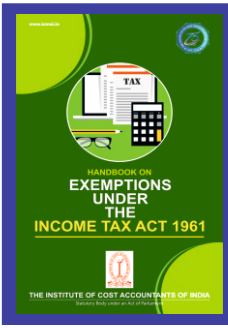

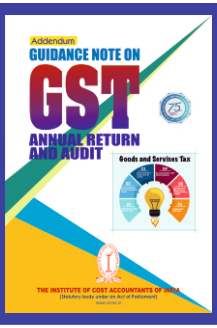

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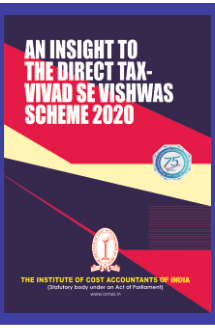

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