



# Issues in GST on construction and Real-Estate Sector

- CA Ravi Kumar Somani



# Construction sector overview

- Transactions are broken into three components–
    - ✓ Goods/materials
    - ✓ Labour/Services
    - ✓ Land
  - High litigation on indirect taxes in past – both central and state laws
  - Largely unorganised sector - non-compliances prevalent;
  - Implementation of RERA;
  - Constitutes around 9% of the country's total GDP. Growth of this sector has a direct nexus with the national growth;
- 



# GST Levy

- ▶ Section 7(1): Supply **includes** -
  - ▶ All forms of supply made for the consideration
  - ▶ Activities to be treated as supply as per Schedule - II
- ▶ Schedule – II:
  - ▶ 5(b): Construction of a complex, building, civil structure or a part thereof
  - ▶ 5(b) : Construction of complex or building intended for sale to a buyer. Exceptions,
    - ▶ **Entire consideration** has been received after issuance of completion certificate
    - ▶ After its first occupation

# Levy

- ▶ Schedule – II:
  - ▶ 6(a) : Composite supply of works contract
  - ▶ “works contract” means a **contract for building**, construction-----  
-----of any immovable property -----
    - ▶ (whether as goods or in some other form) is involved in the execution of such contract
  - ▶ Excludes sale of land + building – Schedule III

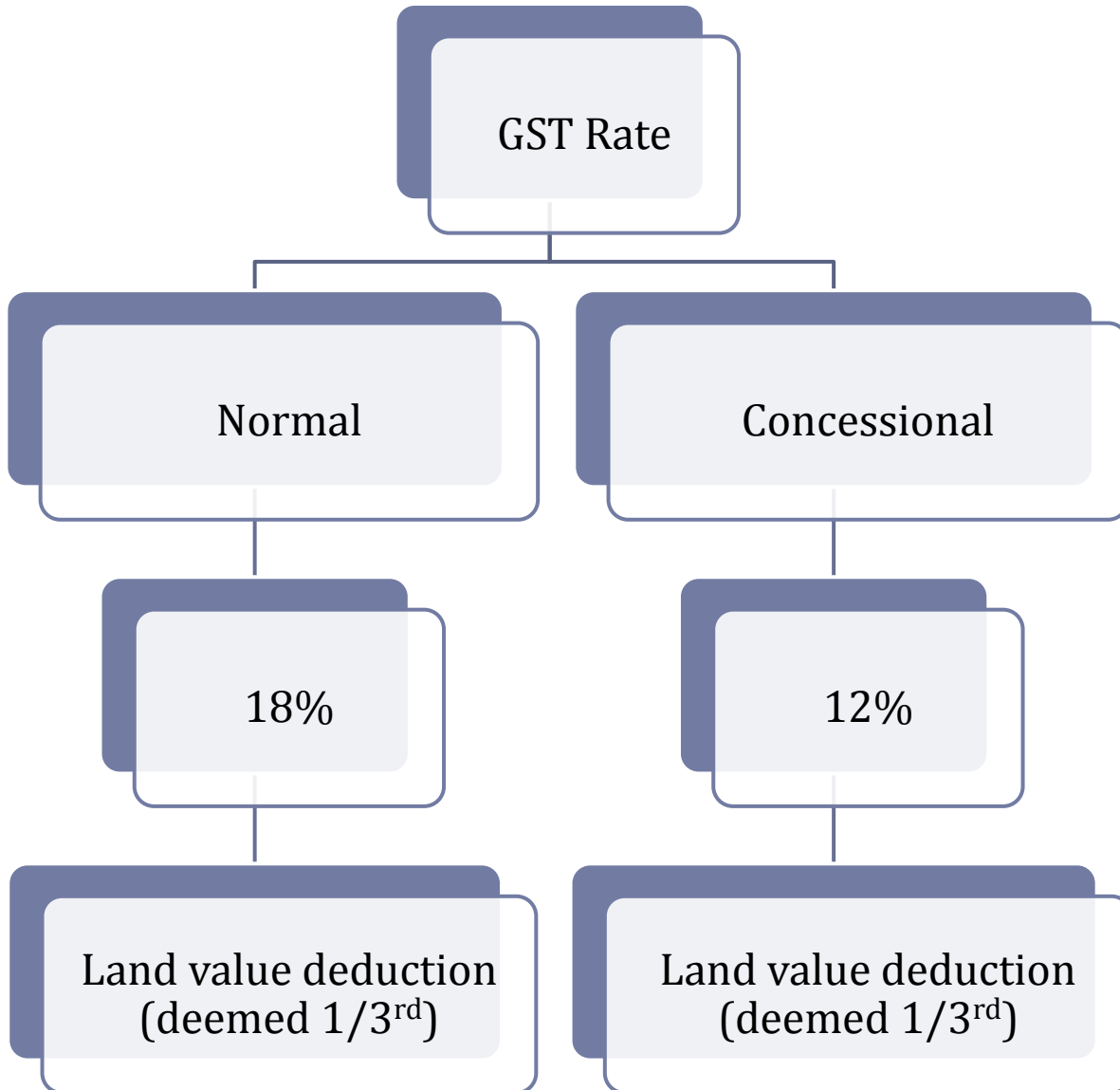
## Levy - Issues

- ▶ How to differentiate between works contract and construction of residential complex service?
- ▶ Facing, amenities/ infra parking charges liable to GST and if yes, what is the rate?
- ▶ What is 'First Occupation'? How to establish this?
- ▶ Whether the electricity, water supplied along with commercial space liable to GST?
- ▶ Does Land converted into Plots and sold liable to GST?

## Levy - Issues

- ▶ Impact on 'Cancellation Charges' or transfer charges?
- ▶ Interest or any penal charges received are liable to GST?
- ▶ What is the taxability for Villas / Row Houses?
- ▶ Additional works – Composite supply?
- ▶ Compensation paid for delay in handing over/completion?
- ▶ What is the nature of taxability for legal charges, documentation charges collected by the developer?
- ▶ Maintenance income collected until society is formed and commensurate expenses incurred – whether GST payable or shelter of Pure agent available..??

# GST Rate



## Concessional Rate

- ▶ Composite supply of works contract to CG, SG, GA, GE, LA etc. @ 12%
- ▶ (a) a historical monument, archaeological site or remains of national importance, archaeological excavation, or antiquity specified under the Ancient Monuments and Archaeological Sites and Remains Act, 1958 (24 of 1958);
- ▶ (b) canal, dam or other irrigation works;
- ▶ (c) pipeline, conduit or plant for (i) water supply (ii) water treatment, or (iii) sewerage treatment or disposal.



## Concessional Rate

- ▶ Composite supply of works contract by way of construction, erection, commissioning, or installation of original works pertaining to,-
- ▶ (a) railways, [including] monorail and metro;
- ▶ 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.

**Note:** Taxable at the concessional rate of 12%.

## Concessional Rate

- ▶ Composite supply of works contract to CG, SG, GA, GE, LA by way of construction, erection, commissioning, or installation etc 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 use as (i) an educational, (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.

**Note:** Taxable at the concessional rate of 12%.

## Concessional Rate

- ▶ Composite supply of works contract as defined in clause (119) of section 2 of the Central Goods and Services Tax Act, 2017, involving predominantly earth work (that is, **constituting more than 75 per cent.** of the value of the works contract) provided to the Central Government, State Government, Union territory, local authority, a Governmental Authority or a Government Entity.
- ▶ .

**Note:** Taxable at the concessional rate of 5%.

# Concessional Rate

- ▶ In case of composite supply of works contract by way of construction, erection, commissioning, installation-----of a civil structure -
  - ▶ Under Jawaharlal Nehru National Urban Renewal Mission or Rajiv Awaas Yojana.
  - ▶ under the Housing for All mission/Pradhan Mantri Awaas Yojana –
    - ▶ In-situ redevelopment of existing slums using land as a resource

# Concessional Rate

- ▶ Beneficiary led individual house construction/enhancement,
  - ▶ Economically Weaker Section houses constructed under the Affordable Housing in partnership by state.
  - ▶ Houses constructed or acquired under the **Credit Linked Subsidy Scheme (CLSS)** for Economically Weaker Section/LIG/MIG-1/MIG-II.
- ▶ **Concessional rate of 12% with a deduction of 1/3<sup>rd</sup> towards land making an effective rate of tax @ 8%.**

# Concessional Rate

- ▶ In case of composite supply of works contract by way of construction, erection, commissioning, installation of **ORIGINAL WORKS** pertaining to -
  - ▶ Single residential unit otherwise than as a part of a residential complex.
  - ▶ Low cost houses upto a carpet area of 60 square metres per house in a housing project

# Concessional Rate

- ▶ Under Scheme of Affordable Housing in Partnership.
- ▶ Affordable Housing in Partnership component of the Housing for All Mission/Pradhan Mantri Awaas Yojana
- ▶ Any Housing scheme of a state government.
- ▶ Given infrastructure status vide Notification - 13/6/2009-INF
- ▶ **Concessional rate of 12% with a deduction of 1/3<sup>rd</sup> towards land. Making an effective rate of tax @ 8%**

# Concessional Rate

- ▶ **Clarifications on Affordable Housing - 8% GST Rate**
- ▶ **Documents to avail the concessional Rate under CLSS housing**
  - ▶ Ministry of Housing and Urban Affairs may prescribe a certificate by PLIs – Basis for the builder to charge reduced rate. (To be applied for first time home buyers)



# Concessional Rate

- ▶ **Affordable Housing** – Housing project using at least 50% of FAR (Floor Area Ratio /FSI (Floor Space Index) for dwelling units with carpet area of not more than 60 Sq. mts.
- ▶ No certificate is required.
- ▶ Initially full rate later on changed to concessional – Issue a credit note and adjust the liability in GSTR-3B

# Valuation

- ▶ Transaction value – Value for land + Value for construction service
- ▶ Separate Agreements for sale of land + Construction?  
(Advance Ruling - Shri Sanjeev Sharma – Delhi)
- ▶ FOC material supplied by the customer?
- ▶ Whether stamp duty and labour cess should be included in the value? Pure agent deductions possible?

# Valuation

- ▶ Interest collected for delayed payment?
- ▶ Amount paid for delayed handover? Can be it called as price reduction or discount?
- ▶ Amount collected from investors and later repaid or allotted flats at later point of time?
- ▶ Credit Note for cancellation of flats;

# Time of Supply

Time of Supply shall be

- ✓ Date of issue of the invoice - if invoice issued with in due date; or
- ✓ Date of Provision of Service - if Invoice not issued with in due date; or
- ✓ Date of Receipt of Payment, **(which ever is earlier)**.

Time-limit  
for issue of  
invoice in  
case of  
Continuou  
s supply of  
services

- ✓ Where due date of payment is ascertainable from contract - invoice to be issued on or before due date of payment;
- ✓ Where due date of payment is not ascertainable from contract - invoice to be issued before or at the time when supplier of service receives payment
- ✓ When payment is linked to the completion of event - invoice to be issued on or before date of completion of event.

## Change in rate of tax

Date of completion of supply (1)	Date of invoice (2)	Date of receipt of payment (3)	Time of supply	Rate of tax
Before	After	After	Earlier of (2) and (3)	New
	Before	After	(2)	Old
	After	Before	(3)	Old
After	Before	After	(3)	New
	Before	Before	Earlier of (2) and (3)	Old
	After	Before	(2)	New

# Time of Supply - Issues

- ▶ Milestone basis Vs. Receipt basis?
- ▶ Receipt voucher Vs. Tax invoice?
- ▶ OC received but part of the consideration is yet to be received. ToS for the balance?
- ▶ No linkage between continuous supply provisions and Time of supply. Section 31(5) not linked to Time of Supply - Issues?
- ▶ Time-limit of 30 days for raising invoice in case of continuous supply of services..?
- ▶ GST on Mobilization advance received

## Place of Supply/ Nature of Tax for Developer/ Contractor/ Land owner

Nature of Service	Goods/ Service	Location of Supplier	Place of Supply	Nature	Taxes
Construction of complex service/ works contract service	Service	Pune	Place where Immovable property is located i.e. Pune	Intra- state	CGST+ SGST
Maintenance or Repair Service	Service	Pune			
Rental Income	Service	Pune			
Amenities and other services	Service	Pune			

# Place of Supply - Issues

- ▶ Services by Architects, estate agents..?
- ▶ Service provided to a person location in India but the construction carried out outside the taxable territory
- ▶ Construction of a property located in SEZ



# Anti Profiteering

- Press Release on anti-profiteering dated 15.06.2017 states as under:
- The CBEC and States have received several complaints that **the people who have booked flats and made part payment are being asked to make entire payment before 1st July 2017 or to face higher tax incidence for payment made after 1st July 2017.**
- Under GST, full input credit would be available for offsetting the headline rate of 12%. As a result, the input taxes embedded in the flat will not (& should not) form a part of the cost of the flat. **The input credits should take care of the headline rate of tax;**

# Anti Profiteering

- **The builders are expected to pass on the benefits of lower tax burden under the GST regime to the buyers of property by way of reduced prices/ installments.**
- **Despite this clarity on law position, if any builder resorts to such practice, the same can be deemed to be profiteering under section 171 of GST law.**
- Higher tax outflow - currently procured from inter-state – cement/ steel paying only 2% CST/ increase in tax rate on services.
- ▶ **171. (1) Any reduction in rate of tax on any supply of goods or services or**
- ▶ **the benefit of input tax credit** shall be passed on to the recipient by way of commensurate reduction in prices.

# Input Tax Credit

- ▶ Whether ITC of Works contract can be availed by a person providing construction services?
- ▶ For cancellation charges, other incomes, maintenance service etc...?
- ▶ Credits being blocked in Electronic Credit ledger?
- ▶ Reconciliation – GSTR 2A Vs. GSTR 3B?
- ▶ Reversal of ITC in respect of Sale of land & sales post first occupancy or OC – mechanism for reversal.. Interest payable for every time reversal required;
- ▶ Reversal of credit for 1/3<sup>rd</sup> deduction?

# Input Tax Credit

- ▶ Reversal for retention Money – failure to pay???
- ▶ ITC reversal for payments outstanding for more than 180 days along with interest (***Proposed amendment – No interest?***)?
- ▶ ITC on advances paid?
- ▶ ITC on commercial complex given on lease by the developer?
- ▶ ITC on free supplies to customers?

# Input Tax Credit

- ▶ Whether builder and contractor can claim the refund of accumulated ITC under inverted duty structure?
- ▶ ITC on purchase of motor vehicles?  
*(Proposed amendment – Seating capacity not more than 13)*
- ▶ ITC on insurance and repairs of vehicle?  
*(Proposed amendment – Not eligible for vehicles having seating capacity not more than 13)*
- ▶ ITC on catering bills if GST is paid on employee recoveries?

# GST on Rentals of Property

- Increase in rate of Tax from 15% to 18%;
  - Renting of residential dwelling continued to be exempted;
  - Rental Deposits to be treated as consideration when applied towards the rental dues;
  - Pure agent deduction in respect of reimbursement from tenants:
    - ✓ Municipal taxes;
    - ✓ Water;
    - ✓ Electricity charges
  - Property tax deduction not available.
  - Place of supply – CGST – from the state Vs. SGST – In the state?
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# Transitional

## Transitional Credits

- ▶ Eligibility of credit on stock?
- ▶ Credit on un-booked flats?
- ▶ WIP - **Semi constructed building, structure etc. shall be treated as Semi finished goods for availing credit or not?**
- ▶ Carry forward of cesses/ KKC in TRAN-1?
- ▶ Credit being blocked by the department in Electronic Credit ledger?

# Transitional

## Other transitional aspects

- ▶ Service tax paid on receipt basis till 30<sup>th</sup> June 2017  
– Shift to milestone?
- ▶ VAT on the advances received?
- ▶ Service tax paid - flat cancelled in GST regime -  
Deficiency of service Vs. Non provision of service?
- ▶ Refund -1 year from when?



# Transitional

## **Transitional levy under MVAT :**

- In case of construction, As per trade circular no. 18T of 2017, new composition scheme under MVAT is introduced i.e. 1<sup>st</sup> June, 2017. As per new scheme, the registered developer who undertakes construction & who desires to opt for the revised composition scheme is required to pay 1% of the amount received as advance or otherwise.
- **Agreement to sale is registered on or before May 31, 2017:** Additional Tax paid on account of 1% over and above the monies received can be availed as credit.
- **Agreement of sale is not registered after May 31, 2017:** Tax payable @ 1% of the advances received by June 30, 2017;
- **Agreement of sale is registered after May 31, 2017:** Tax payable @ 1% of the advances received by June 30, 2017;

# Levy - JDA

- ▶ Levy under ST – Circular No. 151/2/2012
- ▶ Vasantha Green Projects?
- ▶ Levy under GST – Supply includes barter, exchange?
- ▶ Supply definition Vs. Schedule III (Schedule III covers only sale and not transfer).
- ▶ Landowner liability on development rights given?
- ▶ Revenue share arrangement?
- ▶ GST on Transferrable Development Rights

# Levy - JDA

- ▶ Lake is an immovable property and therefore the petitioner's right to enter in that estate, which he does not own and take away fish from the lake is a 'Profit a Prendre' and in India it is regarded as a benefit to arise out of the land and hence it is immovable property. - **Anand Behera v. State of Orissa (1955) 2 SCR 919.**
- ▶ Felling, cutting and removing bamboos from forest for the manufacture of paper is a benefit to arise out of land and hence it would be an interest in immovable property. - **State of Orissa v. Titagarh Paper Mills Company Limited AIR 1985 SC 1293.** Right to enter upon land and cut trees is a benefit arising out of land - **Shantabai V. State of Bombay AIR 1958 SC 532.**

# Levy - JDA

- ▶ Hon'ble Mumbai High Court in a case of **Chhada Housing Development Corporation v. Bibijan Shaikh Farid** reported in **2007 (3) Mah. L.J.P. 402** lay down that *“the expression TDR, is transfer of development rights, which enables the FSI to be used on any other plot of land generated from some other plot and can be used in terms of DC Regulations in force. It is the benefit arising out of land and is immovable property.*


# Levy - JDA

- ▶ Let us first analyse the word 'sale'. As per Section 54 of Transfer of Property Act, 1882, *"sale' is a transfer of ownership in exchange for a price paid or promised or partpaid and part-promised"*.
- ▶ Hon'ble Bombay High Court in the case of **Provident investment Co. Ltd vs Commissioner of income tax - AIR 1954 Bom 95** observed that *a sale or transfer presupposes the existence of the property which is sold or transferred. It presupposes the transfer from one person to another of the right in the property.*


# Levy - JDA

- ▶ **Hon'ble Guwahati High Court in the case of Nagen Hazarika vs Manorama Sharma - AIR 2007 Gau 62 held that *the expression 'title' is a broad expression in law which cannot always be understood as akin to ownership. It conveys different forms of a right to a property which can include right to possess such property.***

# Levy - JDA

- ▶ As per Section 3(a) of Land Acquisition Act, 1894, the expression *'land' includes benefits that arise out of land and things attached to earth or permanently fastened to anything attached to the earth.* 
- ▶ As per Section 3(4) of Bombay Land Revenue Code, 1879 *'land' includes benefits to arise out of land and things attached to the earth or permanently fastened to anything attached to the earth and also shares in or charges on the revenue or rent of village or other defined portions of territory.*

# Levy - JDA

- ▶ In Hill & Redman's law of landlord and tenant (Seventeenth Edition, Vol. 1) detailed discussion laying down the determinative tests have been laid down. One of the test is to see ***“if the effect of the instrument is to give the holder the exclusively right of occupation of the land, though subject to certain reservations, or to a restriction of the purposes for which it may be used, it is prima facie a lease; and if the contract is merely for the use of the property in a certain way and on certain terms, while it remains in the possession and under the control of the owner, it is a license.”*** 



# Levy - JDA

- ▶ Transfer of land development rights is not a lease transaction because it is a right to develop a land. Lease is a right to enjoy the immovable property. Moreover, the ***transfer of land development right is permanent and irrevocable right on the land subject to agreed terms and conditions. It grants right to the developer to also sell the said rights.*** Lease is always for a specified duration and at the end of the same, the possession vests with the owner. Lessee has no right to sell the property.

# Time of Supply - JDA

- ▶ Notification 4/2018 – Central Tax (Rate) dated 25<sup>th</sup> Jan'18
- ▶ At the time of transfer of possession or the right in constructed complex for:
  - ▶ Developer to landlord for the construction service provided
  - ▶ **Landlord to the developer for the grant of developmental rights**
- ▶ JDA entered in old tax regime and possession of flats given in GST regime.. Tax treatment..?

# Tax rate & Valuation - JDA

- ▶ Developer to landlord – Construction services or works contract?
- ▶ Can 12% or 18% be adopted for transfer of developmental rights by the landlord?

## **Valuation – Developer to landlord**

- Open market value (OMV) of such flats or First Sale value?.
- OMV of the land?
- Cost of construction?

## **Valuation – Landlord to developer**

- First sale?
- Land value?
- Any other?

# THANK YOU



**- CA Ravi Kumar Somani**

**Contact details**

***ravikumar@hiregange.com***

***+91 9000262601***