

## WIRC of ICAI

### National Conference on GST (Virtual)

**Subject** : Real Estate Sector in GST

**Day & Date** : Friday, 10<sup>th</sup> December, 2021

**Presented by** : CA Naresh Sheth



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## Snapshot - Indirect Taxes Applicable to Real Estate Sector

- Real estate projects are long gestation projects which may run for 2 to 10 years
- Indirect tax laws applicable to real estate sector have changed drastically over period:

Period	Tax Regime
01.07.2010 to 30.06.2012	<b>Service tax</b> - Positive List based taxation of services <b>VAT</b> – On material component of under-construction flat (Works Contract)
01.07.2012 to 30.06.2017	<b>Service tax</b> – Negative List based taxation of services <b>VAT</b> – On material component of under-construction flat (Works Contract)
01.07.2017 to 31.03.2019	<b>GST</b> – old scheme of taxation
01.04.2019 onwards	<b>GST</b> – amended scheme of taxation post issuance of notification no. 03/2019 to 08/2019 – Central tax (rate) dated 29.03.2019

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## Snapshot - Indirect Taxes Applicable to Real Estate Sector in Service Tax Regime

Period	Tax rates
01.07.2010 to 28.02.2013	<p><b>Service tax – 3.09%</b>- Cenvat credit allowed in respect of input services. <b>No Cenvat</b> in respect of inputs (material) &amp; capital goods</p> <p><b>VAT – 1%</b> of agreement Value-<b>Without Input Tax credit + stamp duty 5%</b></p>
01.03.2013 to 31.03.2016	<p><b>Service tax</b> – Different rates during different period for different categories i.e. <b>3.09%, 3.625%, 3.708% &amp; 4.35%</b>- (Cenvat credit allowed in respect of input services. <b>No Cenvat</b> in respect of inputs (material) &amp; capital goods)</p> <p><b>VAT – 1%</b> of agreement value -<b>Without Input Tax credit+ stamp duty 5%</b></p>
01.04.2016 to 30.06.2017	<p><b>Service tax</b> – Residential &amp; Commercial- <b>4.5%</b> -Cenvat credit allowed in respect of input services. <b>No Cenvat</b> in respect of inputs (material) &amp; capital goods</p> <p><b>VAT – 1%</b> of agreement Value-<b>Without Input Tax credit+ stamp duty 5%</b></p>

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## Snapshot - Indirect Taxes Applicable to Real Estate Sector in GST Regime

Period	Tax rates
01.07.2017 to 31.03.2019	<p><b>GST</b> on Sale of under-construction affordable units- <b>8% with ITC</b> of inputs , input services and capital goods</p> <p><b>GST</b> on Sale of under-construction units (residential &amp; commercial) – <b>12% with ITC</b> of inputs , input services and capital goods</p> <p><b>Stamp duty -5%</b></p>
01.04.2019 onwards	<p><b>GST</b> on Sale of under-construction affordable units- <b>1% without ITC</b></p> <p><b>GST</b> on Sale of under-construction residential units - <b>5% without ITC</b></p> <p><b>GST</b> on Sale of under-construction commercial units in RREP project: <b>5% without ITC</b></p> <p><b>GST</b> on Sale of under-construction commercial units in REP project or in an exclusive commercial project: <b>12% without ITC</b></p> <p><b>Stamp duty -5%</b></p>

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**GST on or after  
01.04.2019**

***[Post Amendments  
vide Notification 03  
to 09 – Central Tax  
(Rate) dated  
29.03.2019]***

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## One Time Option for Ongoing Projects

- Builders to have **one-time option for ONGOING PROJECTS:**
  - To pay tax at **existing effective rates** i.e. 8% (affordable houses) or 12% (others) with Input tax credit ('ITC');  
**or**
  - To pay tax at **new rate** i.e. 1% (affordable houses) or 5% (others) without ITC
- Option to be exercised by filing notified form **on or before 10<sup>th</sup> May, 2019 (which was further extended to 20<sup>th</sup> May, 2019)**
- In case of failure to exercise option, new taxation scheme will apply
- Above option is **not available for projects:**
  - other than ongoing project
  - New Projects commencing **on or after 1<sup>st</sup> April, 2019**
- Ongoing project is a project satisfying stipulated conditions in notification



## Tax Implications on or after 01.04.2019 – Ongoing Projects Opting for Old Scheme

Particulars	Effective Tax Rate
Sale of under-construction residential affordable house	8% (with ITC)
Sale of under-construction residential units (other than affordable)	12% (with ITC)
Sale of under-construction commercial units	12% (with ITC)
Sale of Completed Flats/ units Post OC	Nil

- Accumulated ITC as on 31<sup>st</sup> March, 2019 remains intact
- Credit of tax paid for inputs, input services and capital goods procured on or after 1<sup>st</sup> April, 2019 can be availed
- Output tax liability can be discharged from ITC balance
- No stipulation as to procurement of 80% of input and input services from registered vendors
- No stipulation for payment under RCM on procurement from unregistered vendors

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## Tax Implications on or after 01.04.2019 – Ongoing Projects (Not Opting for Old Scheme) and New Projects

Particulars	Effective Tax Rate	Mode of payment
Sale of under-construction residential affordable house (Including houses under Specified Schemes)	1% (without ITC)	Cash
Sale of under-construction residential units (other than affordable)	5% (without ITC)	Cash
Sale of under-construction commercial units (in RREP i.e. upto 15% of total carpet area)	5% (without ITC)	Cash
Sale of under-construction commercial units (in REP)	12% (proportionate ITC)	Cash / Credit
Sale of under-construction commercial units (in exclusive commercial complex)	12% (with ITC)	Cash / Credit
Sale of completed flats / Units Post OC	Nil	NA

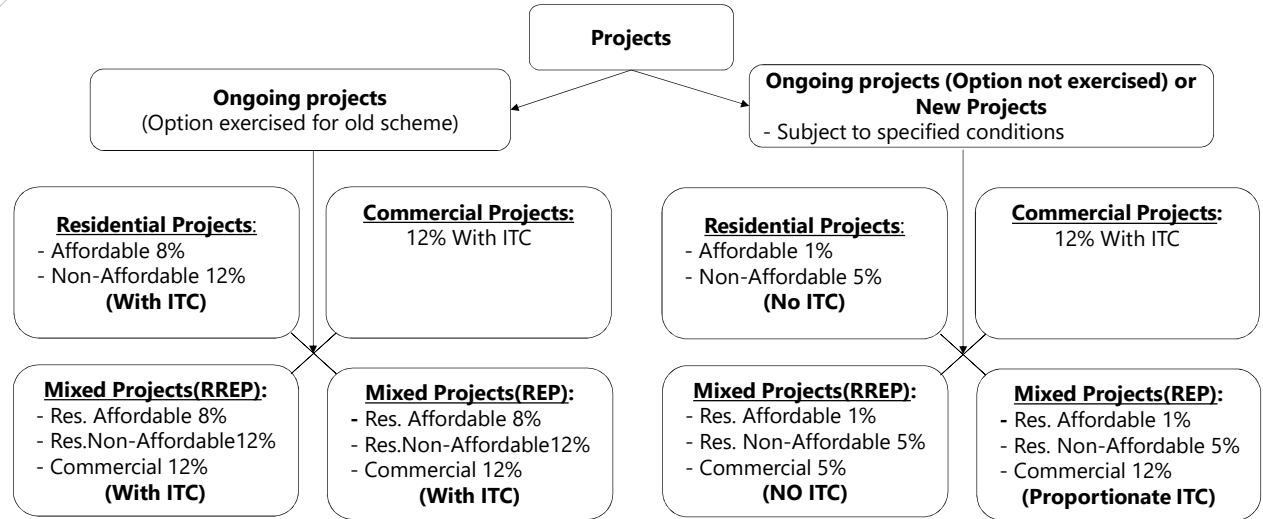
- Builder is not entitled to ITC in respect of services taxed at concessional rate
- Mandatory procurement to the extent of 80% from Registered Person and tax payable under RCM on shortfall

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# Snapshot – Amended Scheme of Taxation



➤ Sale of completed flats/ commercial units (Post OC) – Not liable to GST



**Affordable  
Apartment**

## Affordable Residential Apartment

Particulars	Conditions
Metropolitan Cities*	House having carpet area upto 60 sq. mt. (approx. 644 sq. ft. – RERA Carpet) ; and having Gross amount upto Rs. 45 Lacs
Non-metropolitan cities/towns	House having carpet area upto 90 sq. mt. (approx. 968 sq. ft. – RERA Carpet) ; and having Gross amount upto Rs. 45 Lacs
An apartment in an ongoing project	Covered under specified schemes [Under Notification No. 11/2017-CT(R)] for which the promoter has not exercised option to pay tax under old scheme

**\*Metropolitan cities include following:**

Bengaluru, Chennai, Delhi NCR (limited to Delhi, Noida, Greater Noida, Ghaziabad, Gurgaon, Faridabad), Hyderabad, Kolkata, Mumbai (whole of Mumbai Metropolitan region (MMR) i.e. consists of 8 Municipal corporation and 9 Municipal councils around Mumbai)

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## Value of Affordable Residential Apartment

➤ Determination of threshold value (i.e. Gross amount) of Rs. 45 lakhs:

- Consideration charged for services
- Amount charged for the transfer of land or undivided share of land, including by way of lease or sublease
- Following to be included for calculating threshold:

Development charges	Parking charges	Preferential Location Charges	Common Facility charges	Similar Charges
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➤ Whether following should be included for calculating threshold of Rs. 45 lakhs?

Infrastructure Charges	Extra amenities	Club House Charges	Furniture
Society formation charges	Share capital contribution	Advance maintenance	Legal charges

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## Conditions for concessional rate of tax under new scheme of taxation

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## Non – Availment of ITC

- Builder not entitled to ITC related to supply used in construction services taxed at 1% or 5%
- Builder not entitled to utilize ITC for discharging tax liability
- ITC not availed shall be reported every month by reporting the same as **ineligible credit in GSTR-3B**
- Builder to reverse the ITC availed from inception of project till 31.03.2019 which is attributable to installments due on or after 1<sup>st</sup> April, 2019 (to be taxed at concessional rate) *[Refer Next Slide]*
- Whether transitional credit needs to be taken into account for above referred reversal?

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## Transition of ITC for Ongoing Projects under New Scheme

- Reversal to be worked out project wise as per formula provided in NN 3/2019 – CT (R) dated 29.03.2019`
- Reversal to be done before due date for filing of return for September, 2019 (**i.e. 20<sup>th</sup> October, 2019**)
- Reversal can be done by utilizing ITC balance lying in the electronic credit ledger and/or by making cash payment
- Application can be made in in **Form GST DRC – 20** to Commissioner for seeking extension of time and instalments for payment
- The Commissioner has discretionary power to permit extension of time for period not exceeding 24 months
- Interest payable @ 18% p.a. from 20<sup>th</sup> October 2019 till date of payment in instalments

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## Procurement from Registered Persons

- Eighty percent (80%) of value of input and input services used for supplying construction services [taxed at concessional rate] to be procured from registered persons
- For calculating shortfall, following procurement should be excluded:

<b>Development rights</b>	<b>High speed diesel</b>	<b>Electricity</b>	<b>Long term lease of land</b>
Motor spirit	Natural gas	FSI	(against upfront payment in the form of premium, salami, development charges etc.)

- GST to be paid under RCM at 18% on inputs (other than cement) and input services in case of shortfall of purchases of 80% from registered person (irrespective of applicable tax rates)
- GST to be paid under RCM on following procurements from unregistered person (irrespective of stipulated shortfall):
  - Capital goods at **applicable rate** [Notification No. 7/2019 – CT (R)]
  - **28%** on Cement

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## Procurement from Registered Persons

- Builder 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 (or up to date of completion of project)
- Builder shall submit the above details in the **prescribed form electronically** on the common portal by end of the quarter (30<sup>th</sup> June) following the financial year (*Form – not yet notified*)
- **Tax liability on the shortfall of inward supplies from unregistered person (except cement and capital goods) to be added to output tax liability in the month of June following the end of the financial year.**
- **Monthly payment** of tax under RCM on procurement of following from unregistered persons:
  - Cement at 28%;
  - Capital goods at applicable rates

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## Procurement from Registered Person- Questions

- Whether following exempt supplies need to be considered for determining shortfall of 20% in procurement of supply from registered persons and RCM u/s 9(4) will be payable in respect of :
  - Interest on loans
  - Interest free loans from related parties such as promoters, family members, associate concerns, etc.
  - Hardship allowance, compensation, shifting allowance, rent, corpus paid to society members / slum dwellers in Redevelopment project / SRA project
  - Procurement of water or other goods leviable to NIL rate of tax
  - Salary and wages paid to the employees

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## Input Tax Credit reversal u/s 17(2) read with Rule 42

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## Sale of Completed Flats – Reversal of ITC

- Section 17(2) provides that where goods or services are used partly for effecting taxable supplies and partly for exempt supplies, ITC attributable to taxable supplies can only be taken
- ITC attributable to exempt supplies need to be reversed
- Section 17(3) specifically includes sale of building and sale of land (post issuance of completion certificate) as exempt supply
- Mechanism for reversal of ITC u/s 17(2) of CGST Act is provided under Rules 42 of CGST Rules, 2017
- Rule 42 provides for reversal of common ITC in respect of inputs and input services which are used for effecting exempt as well as taxable supplies

## Sale of Completed Flats – Reversal of ITC

- **Upto 31.03.2019**, Rule 42 of CGST Rules provided for proportionate reversal of ITC based on turnover of exempt supply to the total supply
- **On or after 01.04.2019, Rule 42 will be relevant only in respect of ongoing residential project (opting for old scheme) or commercial projects**
- Reversal u/R 42 of CGST Rules is to be done provisionally on monthly basis and finally when completion certificate for the project has been received

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## ITC Reversal under Rule 42

- **Rule 42 is amended w.e.f. 01.04.2019**
- Reversal u/R 42 (as amended) is to be done on the basis of ratio of carpet area of exempt apartments to carpet area of total apartment
- ITC to be reversed = Common ITC \* (Exempt Carpet Area / Total Carpet Area) **[Final reversal]**
- Exempt Carpet area :

Particulars	Carpet Area
Aggregate carpet area of the apartments taxed at concessional rate	XXX
Add: Aggregate carpet area of apartment which is unsold on the date of issue of completion of the project	XXX
<b>Total Exempt Carpet Area for the purpose of final reversal</b>	<b>XXX</b>

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## ITC Reversal - Issues

- Project is completed in the month of **December'2018**. Final ITC reversal pertaining to unsold apartment in respect of said project is to be done on or before **September'2019**.
    - Whether final reversal of ITC to be done as per amended Rule 42 i.e. area-based reversal?
    - Whether one is justified to reverse ITC based on pre-amended Rule 42 i.e. turnover-based reversal?
  - Authorities in service tax as well as GST regime (pre-amended regime) were insisting on reversal of ITC as under:
    - ITC for entire project period to be considered for reversal;
    - ITC reversal to be calculated in proportion of unsold area on the date of OC to the total project area; and
    - ITC to be reversed on date of OC itself
- Whether authority is justified in demanding reversal of Input tax credit as above?

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## Taxability of Development Rights and Lease rights

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## Transfer of DR/TDR/FSI/Lease on or after 01.04.2019 for Construction of Residential apartments

<b>Taxability</b> <i>[Notification No. 4/2019 – CT (R)]</i>	<ul style="list-style-type: none"> <li>Transfer of DR / TDR / FSI / Lease used for sale of <b>under construction residential units</b> is <b>exempt</b></li> <li><b>Taxable</b> to the extent of <b>unsold</b> residential flats on the date of issuance of completion certificate or first occupation, whichever is earlier</li> </ul>
<b>Payment of Tax</b> - In area sharing, revenue sharing or outright purchase of DR/TDR/FSI/Lease	Not later than tax period in which Completion certificate is issued or First occupation in the project whichever is earlier <i>[Notification No. 6/2019 – CT (R) amended by Notification No. 03/2021 – CT (R) dated 02.06.2021]</i>
<b>Person liable to pay Tax under RCM</b>	Promoter – Developer <i>[Notification No. 5/2019 – CT (R)]</i>
<b>Credit of tax paid under RCM by Developer on or after 01.04.2019</b> <small>10th December, 2021</small>	New Scheme – ITC not eligible; Old Scheme – ITC eligible <small>CA Naresh Sheth</small>

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## Transfer of DR/TDR/FSI/Lease on or after 01.04.2019 for Construction of Residential apartments

Tax on transfer of DR/ TDR/ FSI/Lease pertaining to unsold flats on completion of project	<b>Lower of:</b> <i>[Notification No. 4/2019 – CT (R)]</i> <ul style="list-style-type: none"> <li>18% on <u>Value of DR/TDR/FSI*</u> in proportion to carpet area of such unsold flats to total carpet area of residential flats; or</li> <li>1% / 5% of <u>Value of such unsold flats**</u></li> </ul>
<b>* Valuation of DR/TDR/FSI/Lease</b> <ul style="list-style-type: none"> <li>✓ <b>Outright purchase:</b> value of monetary consideration paid for outright purchase</li> <li>✓ <b>Area sharing:</b> value of similar apartments charged by promoter from independent buyers nearest to the date of transfer of DR/TDR/FSI;</li> <li>✓ <b>Revenue sharing:</b> monetary consideration paid to the Landowner as revenue share;</li> </ul>	
<b>**Value of unsold flats</b> is deemed as equal to value of similar apartments charged by the promoter nearest to the <b>date of completion certificate or first occupation</b> , whichever is earlier	

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## Transfer of DR/TDR/FSI/Lease on or after 01.04.2019 for Construction of Commercial apartments

<b>Taxability</b>	<b>Taxable</b>
<b>Time of Supply / Time of payment of Tax</b>	<p><b>Outright purchase:</b> Date of transfer of DR/TDR/FSI/Lease</p> <p><b>Area Sharing:</b> Not later than the tax period in which:</p> <ul style="list-style-type: none"> <li>• Completion certificate is issued; or</li> <li>• First occupation of project.</li> </ul> <p>Whichever is earlier</p> <p><b>Revenue Sharing:</b></p> <ul style="list-style-type: none"> <li>• JDA projects → Date of transfer of DR / FSI; or Payment of revenue share</li> </ul>
<b>Person liable to pay Tax</b>	Promoter – Developer <b>(to be paid under RCM)</b>

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## Transfer of DR / TDR / FSI/ Lease – Questions

- What is the tax implications of developer selling TDR to trader and trader selling this TDR to the developer?
- Whether developer is liable to discharge GST under reverse charge on premium paid to BMC for additional FSI in respect of residential or commercial project?
- What are the GST implications when balance leasehold rights are assigned to buyer of an immovable property on leasehold land?

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## Implications of free flats allotted to landowner in JDA on or after 01.04.2019

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## Tax implications – Free Flats / Units Allotted to Landowner on or after 01.04.2019

### ➤ **Taxability** [Notification no. 3/2019 – CT(R) dated 29.03.2019]:

- Whether construction of owner's apartments is a supply of service liable to GST?
- Implications of decision of Hyderabad CESTAT in case of Vasantha Green Projects

### ➤ **Payment of Tax** [Notification no. 6/2019 – CT(R) dated 29.03.2019]:

- Tax on owner's area to be paid not later than the tax period in which completion certificate is issued or first occupation in the project, whichever is earlier
- Does this mean that time of supply itself is deferred?

### ➤ **Valuation** [Notification no. 3/2019 – CT(R) dated 29.03.2019]:

- GST to be paid on the value of total amount charged for similar apartments in the project to independent buyers **nearest to the date of transfer of development rights**

## **Tax implications – Free Flats Allotted to Landowner on or after 01.04.2019**

- Landowner shall be entitled to claim Input tax credit of tax charged by developer promoter when he further supplies such apartments allotted to him and pays tax which is not less than the amount of tax charged from him on construction of such apartments by the developer

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## **Joint Development Agreements on or after 01.04.2019**

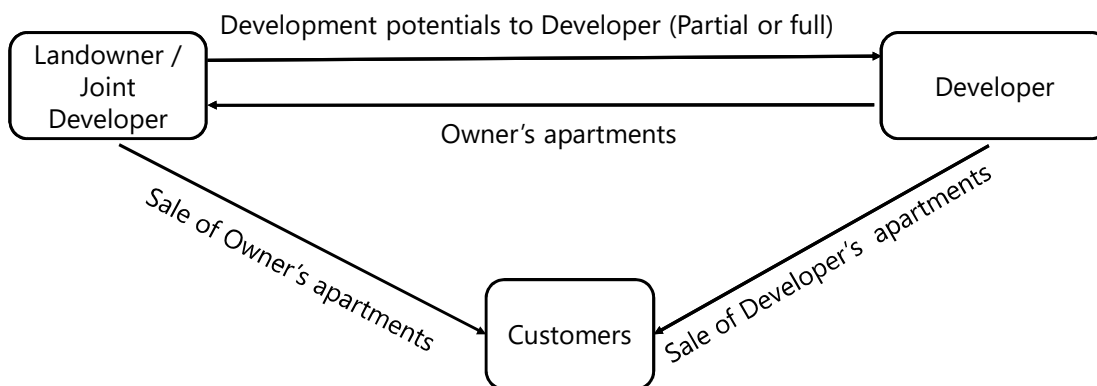
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## Joint Development Agreement (Area Sharing)



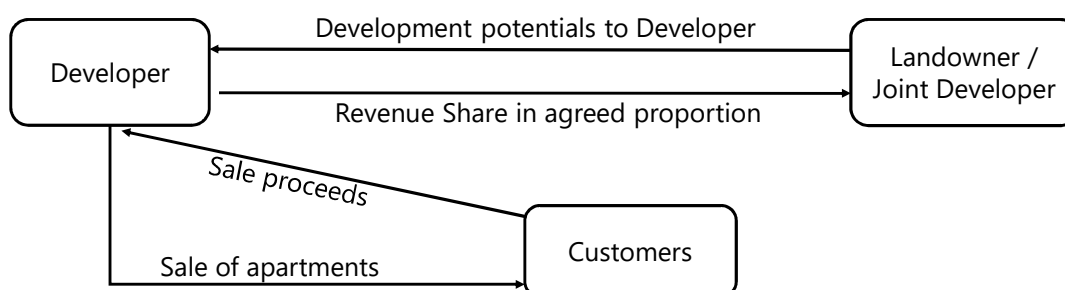
- What are the tax implications of above arrangement for residential or commercial complex?

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## Joint Development Agreement (Revenue Sharing)



- Revenue Share could be on:
- **Top Line** (Sales proceeds/ Realization); or
  - **Bottom Line** (Project Profit); or
  - **Any other basis**

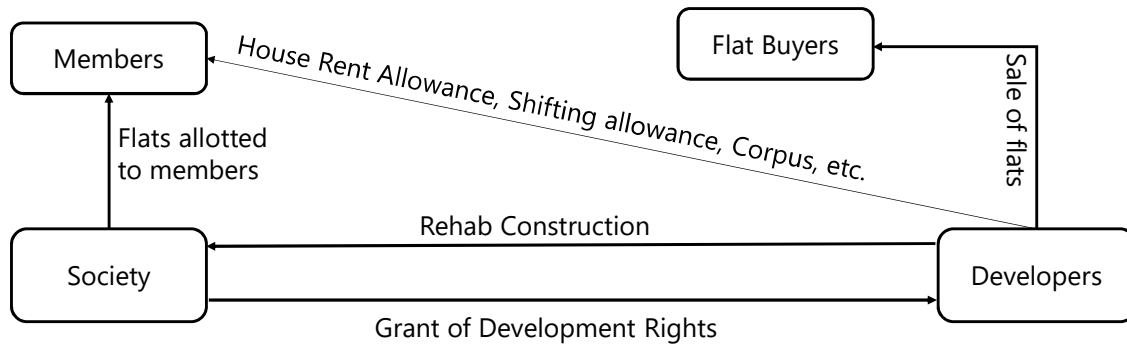
- What are the tax implications of above arrangement?

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## Society Redevelopment



- What are the tax implications of above transaction?

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## Word of Caution

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- Presentation needs to be revised and revisited on future amendments in GST Law
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Any Questions ?

**THANK YOU**

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