



THE INSTITUTE OF CHARTERED ACCOUNTANTS OF INDIA

GST & INDIRECT TAXES COMMITTEE

GST on JDA and Recent Cases

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- Understanding Development Agreements (DA)
- GST Framework for Development Agreements
- Land v/s Development Rights
- Judicial Rulings and Advance Rulings
- Understanding the implications of the prevailing GST Legislation



What is a Development Agreement in Real Estate?

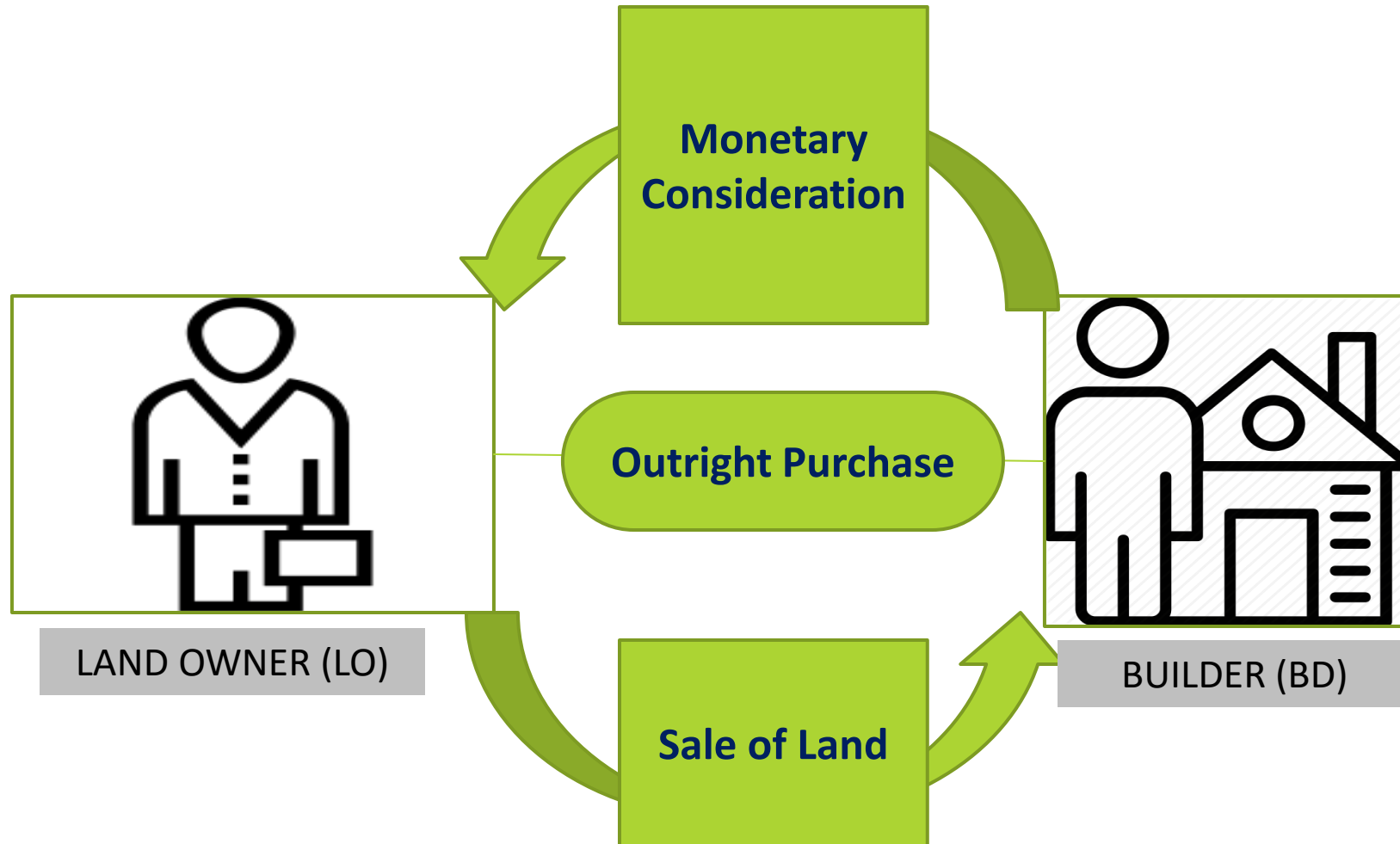
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- Legal contract between landowner and developer
- Landowner contributes land; developer undertakes construction
- In return, landowner gets:
 - Share in constructed property (area-sharing model), or
 - Share in sale revenue (revenue-sharing model)
- Common in land-rich but capital-constrained markets



Outright Purchase of Land

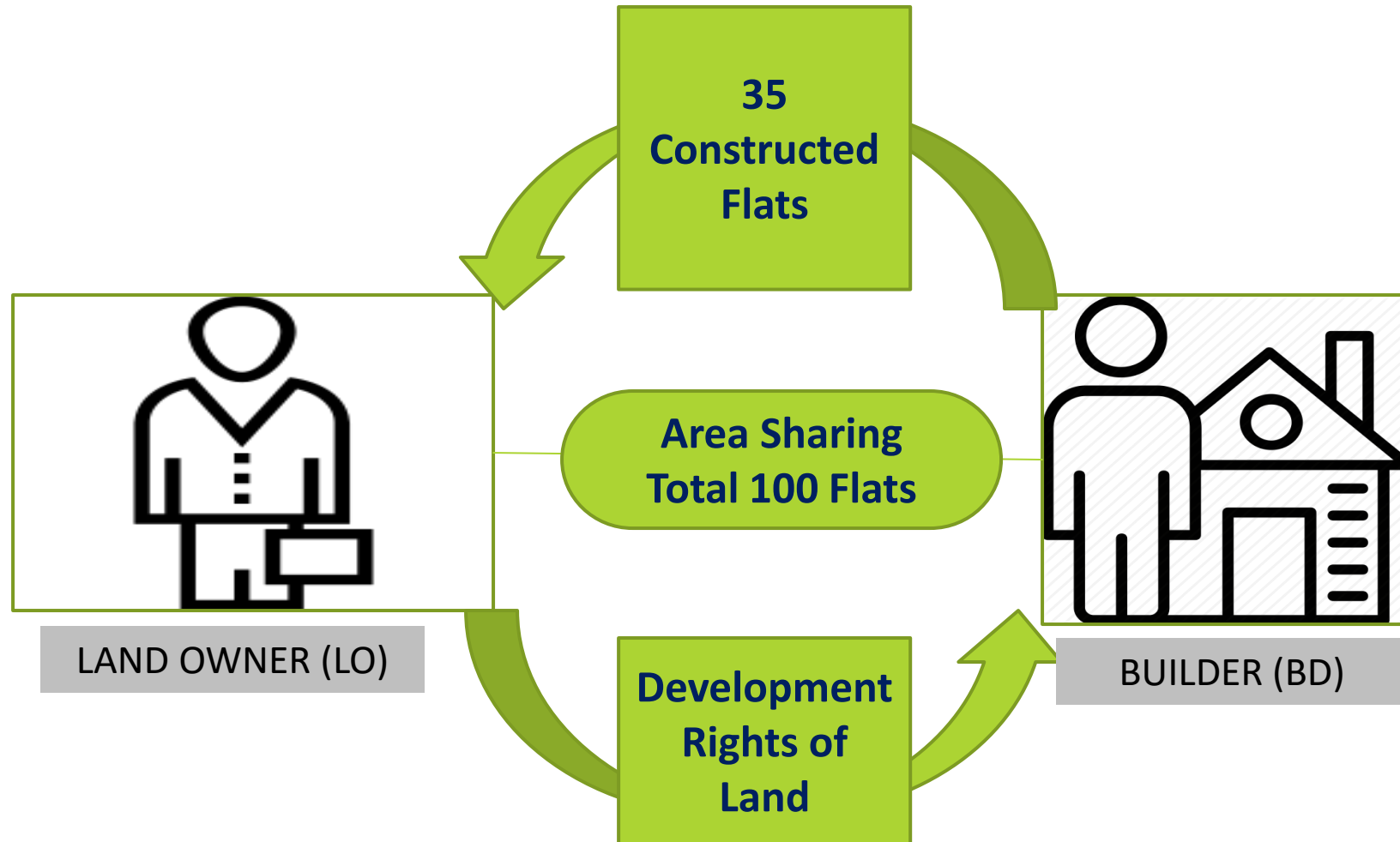
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Development Rights - Area

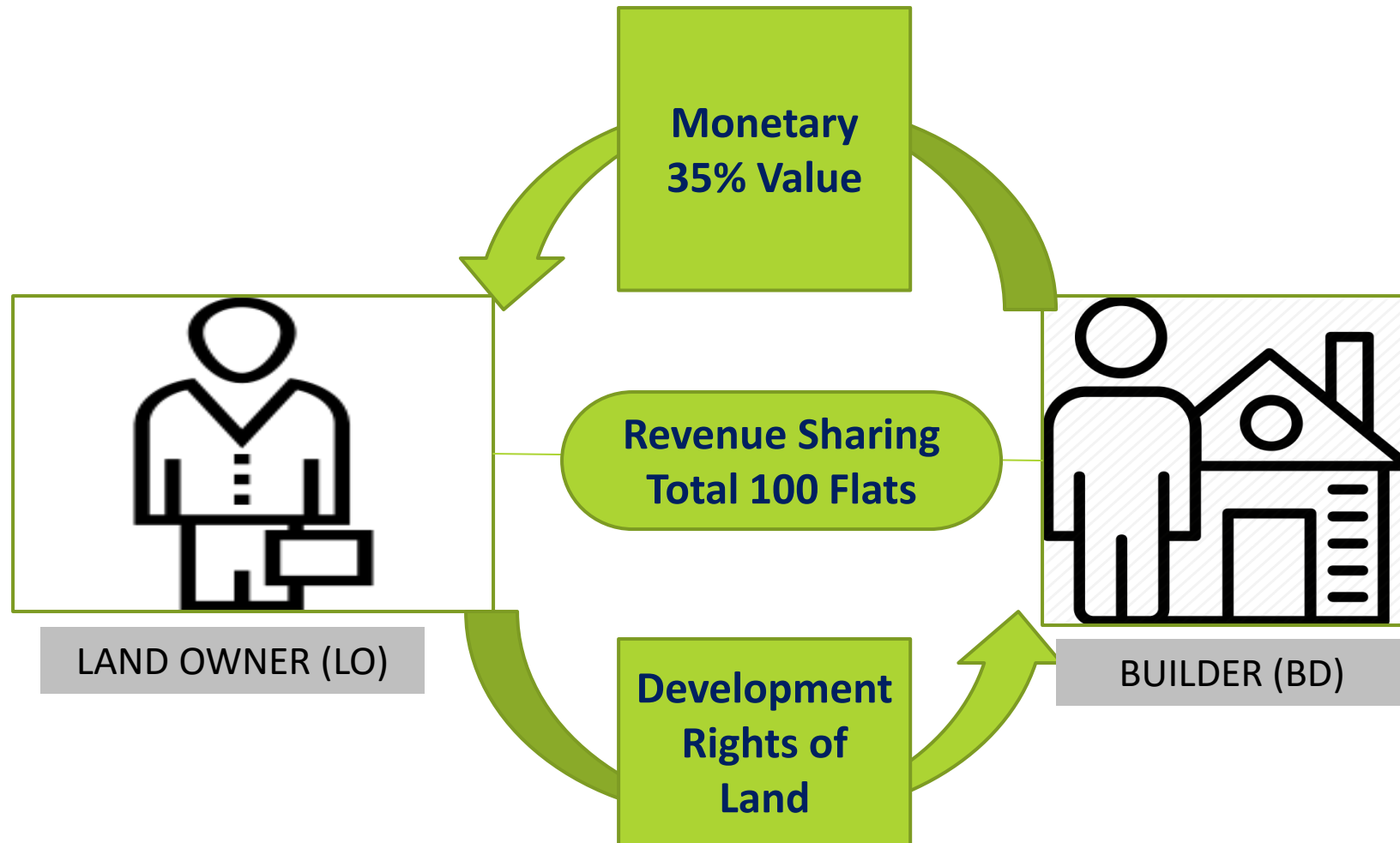
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Development Rights - Revenue

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Why are Development Agreements a Grey Zone Under GST?

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- GST is supply-driven – needs clarity on:
 - What is being supplied?
 - Who is the supplier?
 - What is the value of supply?
- No cash component – valuation becomes complex
- Time of supply – unclear in barter scenarios
- Resulted in divergent practices, litigation, and advance rulings
- Triggered need for clarification via notifications



Section 7 of the CGST Act – Scope of Supply

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Section 7 lays the foundation of GST by defining what constitutes a “supply.”

- It includes **all forms of supply** of goods or services or both, such as sale, **transfer, barter, exchange**, license, rental, **lease**, or disposal, made for a **consideration in the course or furtherance of business**.
- Even in the absence of monetary consideration, transactions involving in-kind exchange (like transfer of development rights for constructed area) fall within the ambit of GST.
- In a DA, the landowner gives development rights to the developer, and the developer constructs flats and hands over a portion to the landowner – this reciprocal arrangement is considered **two taxable supplies under GST**.



Schedule II – Para 5(b): Construction Services

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Schedule II deems certain activities to be supplies of goods or services.

Para 5(b): Construction of a complex, building, civil structure or a part thereof, intended for sale to a buyer, wholly or partly, except where the entire consideration has been received after issuance of completion certificate, shall be treated as a supply of service.

- In a DA, when the developer constructs flats for the landowner, this constitutes a supply of construction services – taxable under GST.
- Since the consideration for the supply of construction service is by way of transfer of development rights, which is received before the completion certificate, such supply falls under entry 5(b) above.
- Vasantha Greens (Service Tax Hyderabad Tribunal)



Schedule III – Entry 5: Sale of Land (Excluded from GST)

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Schedule III lists activities which are neither a supply of goods nor a supply of services.

- Entry 5 reads: “Sale of land and, subject to clause (b) of paragraph 5 of Schedule II, sale of building.”
- This means pure sale of land is outside GST’s scope.
- However, a significant debate exists around whether transfer of development rights (DR) by a landowner is equivalent to sale of land.



Schedule II – Para 2(a): Occupy Land

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Schedule II deems certain activities to be supplies of goods or services.

Para 2(a): Land and Building (a) any lease, tenancy, easement, licence to occupy land is a supply of services

- In a DA, when the developer gets right it can fall under above entry ie licence to occupy land.
- Since the consideration for the supply of development rights is by way of construction service or monetary consideration, such supply falls under entry 2(a) above.



Testing the Applicability of GST on Development Rights

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Points in favour of GST applicability

- *Supply/ Service Definition*
- *Exclusion only for “Sale of Land”*
- *Business definition is wide (2019 FAQ)*

Points against GST Applicability

- *Land includes “Rights in Land”*
- *Final Conveyance to Society/ Apartment Association*
- *Two separate considerations are not given*



Notification 4/2018 dated 25th January 2018

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Issued on 25th January 2018, this notification, read with Section 148, addressed the timing of GST liability in DA cases

- The time of supply for development rights (supplied by landowner) and construction service (supplied by developer) was deferred to the date when possession or rights in the constructed property were handed over (e.g., via allotment letter or conveyance deed).
- This provided relief from upfront GST liability at the time of entering into the DA



Notifications issued in March 2019

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- 3/2019 – amendment to rates for services
- 4/2019 – amendment to exemption for services covering exemption for development rights and long lease rights
- 5/2019 – RCM on development rights and long lease rights
- 6/2019 – Time of Supply for development rights/ long lease rights services and corresponding construction services



Notification 6/2019

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Promoter receiving development rights or FSI or long term lease of land against consideration in cash or construction service of residential or commercial apartments

- TOS for construction services provided to Land Owners
- TOS for development rights or FSI wherein consideration is in the form of construction of commercial or residential apartments
- TOS for development rights or FSI or long term lease of land relatable to construction of residential apartments wherein consideration is in the form of money

shall be the date of issuance of completion certificate for the project or 1st occupation whichever is earlier



Valuation of Construction Services

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Value of construction service by Developer to Land Owner

- Value of similar apartments sold to independent customers closest to the date of Development Agreement
- Reference – Notification 3/2019, paragraph 2A

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



Valuation of Development Rights

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Value of Development Rights by Land Owner to Developer

- Value of similar apartments sold to independent customers closest to the date of Development Agreement plus monetary consideration paid (if any)
- Reference – Notification 4/2019, paragraph 1A

*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.***



Valuation of unsold inventory

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Value of unsold inventory with the Developer on the date of completion certificate or 1st occupation will be

- Equal to value of similar apartments charged by the Developer nearest to the date of issuance of completion certificate or 1st occupation as the case may be
- Reference – Notification 4/2019, paragraph 1B

*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.*



Residential Project – Area

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| Nature of Transaction | TOS | VOS | Effective Rate |
|--|---|--|--|
| Rights Service (By LO to BD) (Taxable under RCM) | Comp Cert or 1st occupation | Value of unsold inventory (based on value of similar apts sold closest to TOS by BD) | 5/1% on unsold inventory or 18% on dev rights value (whichever is lower) |
| Construction Service (By BD to LO) | Comp Cert or 1st occupation | Value of similar apts sold to 3 rd party customers closest to the date of Dev Agreement | Rate applicable to units handed over to LO ie 1/5% |
| Notification 4/2018, 3/2019, 4/2019, 6/2019 | | | |



Residential Project – Revenue

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| Nature of Transaction | TOS | VOS | Effective Rate |
|--|---|--|--|
| Rights Service (By LO to BD) (Taxable under RCM) | Comp Cert or 1st occupation | Value of unsold inventory (based on value of similar apts sold closest to TOS by BD), Revenue paid is value of dev rights (proportionate to area remaining unsold) | 5/1% on unsold inventory or 18% on dev rights value (whichever is lower) |
| No Construction Service (By BD to LO) | NA | NA | NA |



Residential Project – Area + Revenue

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| Nature of Transaction | TOS | VOS | Effective Rate |
|--|---|--|--|
| Rights Service (By LO to BD) (Taxable under RCM) | Comp Cert or 1st occupation | Value of unsold inventory (based on value of similar apts sold closest to TOS by BD), Revenue paid + value of area given to LO is value of dev rights (proportionate to area remaining unsold) | 5/1% on unsold inventory or 18% on dev rights value (whichever is lower) |
| Construction Service (By BD to LO) | Comp Cert or 1st occupation | (Area given to LO) Value of similar apts sold to 3 rd party customers closest to the date of Dev Agreement | Rate applicable to units handed over to LO ie 1/5% |



Commercial Project – Area

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| Nature of Transaction | TOS | VOS | Effective Rate |
|---|---|---|--|
| Rights Service (By LO to BD) (Taxable under RCM) | Comp Cert or 1st occupation | (Area given to LO) Value of similar apts sold to 3 rd party customers closest to the date of Dev Agreement | Rate applicable to Rights Service ie 18% (ITC available) |
| Construction Service (By BD to LO) | Comp Cert or 1st occupation | (Area given to LO) Value of similar apts sold to 3 rd party customers closest to the date of Dev Agreement | Rate applicable to units handed over to LO ie 12% |
| Excess ITC of 6%, how to utilize? Can GST be paid before the receipt of OC and credit taken? | | | |



Commercial Project – Revenue

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| Nature of Transaction | TOS | VOS | Effective Rate |
|--|---------------------------|------------------------|--|
| Rights Service (By LO to BD) (Taxable under RCM) | Dev Agreement Date | Monetary Consideration | Rate applicable to Rights Service ie 18% (ITC available) |
| No Construction Service (By BD to LO) | NA | NA | NA |
| Valuation in case of Revenue Sharing Arrangement? | | | |



Commercial Project – Area + Revenue

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| Nature of Transaction | TOS | VOS | Effective Rate |
|--|---|---|---|
| Rights Service (By LO to BD) (Taxable under RCM) – Area | Comp Cert or 1st occupation | (Area given to LO) Value of similar apts sold to 3 rd party customers closest to the date of Dev Agreement | Rate applicable to Rights Service ie 18% (ITC available) |
| Proportionate Rights Service (By LO to BD) (Taxable under RCM) – Revenue | Dev Agreement Date | Monetary Consideration | Rate applicable to Rights Service ie 18% (ITC available) |
| Construction Service (By BD to LO) | Comp Cert or 1st occupation | (Area given to LO) Value of similar apts sold to 3 rd party customers closest to the date of Dev Agreement | Rate applicable to units handed over to LO ie 12% |



Mix Project (Comm upto 15%) – Area

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| Nature of Transaction | TOS | VOS | Effective Rate |
|---|---|---|--|
| Rights Service (By LO to BD) (Taxable under RCM) - Residential | Comp Cert or 1st occupation | Value of unsold inventory (based on value of similar apts sold closest to TOS by BD) | 5/1% on unsold inventory or 18% on dev rights value (whichever is lower) |
| Rights Service (By LO to BD) (Taxable under RCM) – Commercial | Comp Cert or 1st occupation | Total value of area given to LO (based on price of similar apts sold to 3 rd party customers closest to the date of Dev Agreement) X % of Commercial area to total project | Rate applicable to Rights Service ie 18% (ITC not available) |
| Construction Service (By BD to LO) – Total area given | Comp Cert or 1st occupation | (Area given to LO) Value of similar apts sold to 3 rd party customers closest to the date of Dev Agreement | Rate applicable to units handed over to LO ie 1/5% |



Mix Project (Comm more than 15%) – Area

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| Nature of Transaction | TOS | VOS | Effective Rate |
|---|---|---|--|
| Rights Service (By LO to BD) (Taxable under RCM) - Residential | Comp Cert or 1st occupation | Value of unsold inventory (based on value of similar apts sold closest to TOS by BD) | 5/1% on unsold inventory or 18% on dev rights value (whichever is lower) |
| Rights Service (By LO to BD) (Taxable under RCM) – Commercial | Comp Cert or 1st occupation | Total value of area given to LO (based on price of similar apts sold to 3 rd party customers closest to the date of Dev Agreement) X % of Commercial area to total project | Rate applicable to Rights Service ie 18% (ITC available) |
| Construction Service (By BD to LO) – Total area given | Comp Cert or 1st occupation | (Area given to LO) Value of similar apts sold to 3 rd party customers closest to the date of Dev Agreement | Rate applicable to units handed over to LO ie 1/5/12% |



Mix Project – Revenue

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| Nature of Transaction | TOS | VOS | Effective Rate |
|--|---|--|--|
| Proportionate Rights Service (By LO to BD) (Taxable under RCM) – Residential | Comp Cert or 1st occupation | Value of unsold inventory (based on value of similar apts sold closest to TOS by BD) | 5/1% on unsold inventory or 18% on dev rights value (whichever is lower) |
| Proportionate Rights Service (By LO to BD) (Taxable under RCM) – Commercial | Dev Agreement Date | Monetary Consideration | Rate applicable to Rights Service ie 18% (ITC available) |
| No Construction Service (By BD to LO) | NA | NA | NA |



Re-sale by Land Owners

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Re-sale of its units by Land Owners during construction stage:

1. Is there any supply by the Land Owner? Is he supplying construction service? Service tax matter in case of Subhash Chand Surana (Delhi Tribunal) held that units sold before completion certificate will attract service tax liability of LO
2. Land Owner will be treated as trading in construction service and hence will charge GST to its customers (Notification 3/2019)
3. Land Owner is allowed credit of GST charged by the Developer i.e. 1/5/12%
4. ITC will be restricted to the amount of credit availed or tax payable on output supply whichever is less
5. Land Owner will be allowed ITC of only GST charged by Developer on such construction service. No other ITC will be allowed to Land Owner
6. Notification 6/2019 provides for payment of GST by Developer upto the time of completion certificate, Developer can prepay its GST liability vis-à-vis the units sold Land Owners during the construction stage and pass on GST credit



Prahitha Constructions – Telangana HC

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- Facts
 - Prahitha Constructions entered into a Joint Development Agreement (JDA) with landowners, wherein the landowners transferred development rights to the developer in exchange for a share in the constructed area. The developer challenged the applicability of GST on the transfer of development rights.
- Arguments
 - Petitioner: Contended that the transfer of development rights under the JDA is akin to the sale of land, which is not a supply under GST law.
 - Respondent: Argued that the transfer of development rights is a supply of service and thus taxable under GST.
- Ruling
 - There is no outright sale of land; JDA does not lead to sale of land by itself
 - Transfer of development rights is subject to GST and cannot be brought within the purview of Entry 5 of Schedule III



Gujarat Chamber of Commerce and Industry and Others (Guj HC)

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- Facts
 - The case involved the transfer of leasehold rights of industrial plots allotted by the Gujarat Industrial Development Corporation (GIDC). The lessees assigned their leasehold rights to third parties, and the GST authorities sought to levy tax on these assignments, treating them as supply of services.
- Arguments
 - Petitioner: Argued that the assignment of leasehold rights constitutes a transfer of immovable property, akin to the sale of land, which is outside the scope of GST.
 - Respondent: Contended that the assignment of leasehold rights is a supply of service under GST law and thus taxable.
- Ruling
 - The Court held that the assignment of leasehold rights in GIDC plots is not liable to GST. It reasoned that such assignments are transfers of immovable property, which are excluded from the scope of supply under Schedule III of the CGST Act, 2017.



Shrinivasa Realcon (Bombay HC, Nagpur Bench)

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- Facts
 - Shrinivasa Realcon entered into a DA with a landowner to construct a residential project. The landowner transferred development rights (DR) to the developer in exchange for a share in the constructed area. The GST department issued a notice demanding tax under the RCM based on Entry 5B of Notification No. 13/2017.
- Arguments
 - Petitioner: Argued that the transfer of DR under a private development agreement does not fall within the ambit of Entry 5B, which pertains to TDR/FSI granted by government authorities. Therefore, the transaction is not taxable under RCM.
 - Respondent: Contended that the transfer of DR is a taxable supply of service under GST law and falls within the scope of Entry 5B, attracting tax liability under RCM.



Shrinivasa Realcon (Bombay HC, Nagpur Bench)

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- Ruling
 - The Court held that the transfer of development rights under a private development agreement does not attract GST under the reverse charge mechanism as per Entry 5B of Notification No. 13/2017. The Court emphasized that Entry 5B applies specifically to TDR/FSI granted by government authorities and not to private agreements. Consequently, the GST demand under RCM was quashed.



Nirmal Lifestyle Developers (Bombay HC)

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- Facts
 - Nirmal Lifestyle entered into a revenue-sharing DA with L&T Asian Realty. Under the agreement, the developer was to construct a project and share revenue with the landowner. The GST department issued a demand, treating the transfer of development rights as a taxable supply of service.
- Arguments
 - Petitioner: Claimed that the transfer of development rights under the agreement constitutes a sale of land, which is excluded from the scope of supply under Schedule III of the CGST Act, 2017, and thus not liable to GST.
 - Respondent: Argued that the transaction involves a supply of service, specifically the transfer of development rights, which is taxable under GST law.



Nirmal Lifestyle Developers (Bombay HC)

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- Ruling
 - The Court took cognizance of Guj HC GIDC lease matter. The Court observed that the Petitioner argues that there is no transfer at all. Even if it is, then it is a transfer of immovable property. Hence, a prima facie case of interim relief is made out. The Court acknowledged that the matter raises substantial questions regarding the nature of development rights and their taxability under GST. The case remains pending for final adjudication.



Disclaimer

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My comments are based on GST Act assented on 12th April 2017 (as amended from time to time), RERA Act 2016 (as amended from time to time) and various updates (available in public domain).

This publication contains information in summary form and is therefore intended for general guidance only. It is not intended to be a substitute for detailed research or the exercise of professional judgment. On any specific matter, reference should be made to appropriate advisor.

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Thank You

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