
*First Note on Changes to Real Estate Sector –
GST Aspects*

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Background:

1. The Central Government has issued various notifications dated 30th March 19 to bring out the changes to the tax rates applicable for real estate sector. In this note, we have made an attempt to understand the impact of such notifications and the way forward for the promoters. Without any further delay, let us proceed to understand the notifications.

Snapshot of Changes:

2. Essentially, the notification dealing with rate of tax has categorised, the projects as under:

Projects						
Fresh/Ongoing					Ongoing	
RREP			REP		PMAY & Likes	Res & Commerical
Affordable	Other than Affordable	Commercial Portion in RREP	Affordable	Other than Affordable	(ie)	(if)
(i)	(ia)	(ib)	(ic)	(id)	8%	12%
1%	5%	5%	1%	5%	ITC Allowed	ITC Allowed
No ITC	No ITC	No ITC	No ITC	No ITC		

Option of Old Rate - Only for Ongoing Projects:

3. The promoter has been given a onetime option for ongoing projects to choose whether the rate of tax for his services would be new rate (5%)¹ or old rate (12%)². Such option has to be frozen by 10th May 2019. If not selected by such date, the notification deems that promoter has opted for new rate and accordingly the balance credit shall lapse.
4. It is important to note that projects which commences on or after 01st April 19 does not have an option to choose 5% or 12%. They have to mandatorily collect and pay tax at 5%.

The option for choosing 5% or 12% is only for ongoing projects and not applicable for fresh projects which commence on or after 01st April 19.

Hence, promoter should satisfy as to whether his project falls under the definition of 'ongoing project'.

¹ In case of affordable, the new rate is 1%

² In case of PMAY and likes, the old rate is 8%

Conditions for Opting New Rate:

5. The difference between the old rate and new rate is detailed as under. **If a promoter wishes to choose the new rate that is 5% for the ongoing projects, he has to satisfy all the following conditions:**
- No input tax credit except in certain circumstances
 - Reversal of credit³ pertaining to credit attributable to project, where time of supply is after 1st April 19
 - Developer pays tax on services provided to land owner for construction of land owner share
 - Land owner shall avail credit of tax paid to builder and pays tax⁴ on services provided to his customers
 - 80% of value of input and input services⁵ should be received from registered supplier
 - Where in a financial year, such 80% threshold is not met, tax has to be paid by builder on shortfall @ 18%
 - Cement purchased from unregistered supplier, the builder shall be liable to pay tax at applicable rates
 - Promoter shall maintain project wise accounts for arriving 80% threshold and
 - Pay tax on shortfall by end 30th June of succeeding financial year
 - Tax on cement purchases from unregistered supplier has to be paid in month in which cement is received
 - Input tax credit received shall be reported as ineligible in returns.

The option of 5% comes with many conditions to be satisfied. The promoter has to carefully examine, whether he will be in a position to satisfy all such conditions before making a final call in choosing the rate. Once chosen, there is no roll back option and he has to continue for the entire project.

On selecting, the 5% rate:

- the balance in credit ledger which pertains to construction happening post 01st April 19 shall lapse.
- 80% purchases should be from Registered Suppliers qua FY. Shortfall attracts tax at 18% under RCM.
- Land owner should be registered and required to pay tax on his share. Such tax shall not be less than what builder charges land owner. If land owner deferred his capital gains tax vide Section 45(5A) of Income Tax Act, the same has to be revisited.
- Cement purchased from unregistered supplier shall attract tax at applicable rates. The payment of tax on cement will be counted to arrive at threshold (look illustration 3 of 03/19)

³ In absence of credit, payment has to be made in cash

⁴ Such tax should not be less than tax paid by land owner to the builder

⁵ Excluding Development Rights/FSI/Premium, Electricity, HSD, MS and Natural Gas

Fresh vs Ongoing Projects:

6. From the above, it is important to understand the difference between fresh project and ongoing projects. The definition of 'projects which commences on or after 01st April 19' has been defined in the notification to mean a project other than an 'ongoing project'.
7. A project shall be 'ongoing project' as defined in notification, when it meets all the following conditions, namely:
- **commencement certificate** (CC) in respect of project, where required to be issued by competent authority has been issued prior to 31st March 19 and it is certified by architect/engineer/surveyor that **construction of project** has started on or before 31st March 19:
 - where commencement certificate is not required to be issued by competent authority, it is certified by architect/chartered engineer/licensed surveyor that construction of project has started on or before 31st March 19
 - A completion certificate has not been issued or first occupation has not taken place before 31st March 19
 - Apartments being constructed under the project have been, partly or wholly, booked on or before 31st March 19
8. For the purposes of the above, the phrases 'commencement certificate', 'construction of project', 'an apartment booked on or before 31st March 19' has been laid out as under:

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.

construction of project:

construction of a project shall be considered to have started on or before the 31st March 19, if the earthwork for site preparation for the project has been completed and excavation for foundation has started on or before 31st March 19.

Apartment booked on or before 31st March 19:

shall mean an apartment which meets all the following conditions:

- part of supply of construction of which has time of supply on or before 31st March 19
- at least one of instalments has been credited to bank account of promoter on or before 31st March 19
- Allotment/AoS/similar instrument has been issued on or before 31st March 19

To call a project as 'ongoing project', it has to satisfy all the below conditions on or before 31st March 19:

- CC has been received from competent authority and same is certified by Architect/Engineer/Surveyor that construction has started
- In case no CC is required to be obtained, then certificate from Architect/Engineer/Licensed Surveyor that construction has started
- Completion Certificate has not been issued
- Bookings for partly/wholly of project should be there

In case project does not satisfy all the conditions, then such project shall be classified as fresh project and new rate of tax shall be applicable with all the conditions detailed vide 'Conditions for opting New Rate'.

RREP vs Commercial:

9. The term 'real estate project' (REP) has been defined to mean as defined in Section 2(zn) of Real Estate (Regulation & Development) Act, 2016 (for brevity 'RERA laws'). However, the term 'Residential Real Estate Project' (RREP) shall mean a REP in which the carpet area of **commercial apartments is not more than 15% of the total carpet area of all the apartments in REP.**

10. It is important to note that the phrase 'carpet area' has been defined to mean as defined in Section 2(k) of RERA laws. The definition of 'carpet area' under RERA laws specifically exclude the area covered by external walls, areas under service shifts, exclusive balcony or verandah area and exclusive open terrace area, but includes the area covered by internal partition walls of the apartment.

11. Hence, care has to be taken while calculating the area of 15% to decide whether a project is a residential or commercial. This is important because, the commercial space is allowed to be taxed at 5% only if it forms part of RREP. In situation, where it does not form part of RREP, the said commercial space would attract 12% rate of tax. The definition of 'commercial apartment' is defined to mean an apartment other than 'residential apartment'. The definition of 'residential apartment' shall mean an apartment intended for residential use as declared to RERA or to competent authority.

- RREP is a REP in which commercial apartments is not more than 15% of total carpet area of all apartments in REP.
- If area of commercial apartments is less than 15% of total carpet area in REP, the rate of tax applicable is 5%. Otherwise it would be 18%.
- Determination of 15% is based on carpet area as defined in RERA laws. Care should be taken to arrive appropriate carpet area to reckon whether it is less than 15% or not.

- Determination of 'Carpet Area' under RERA laws is complicated.
- In this connection, MahaRERA has issued a clarification as to how carpet area has to be arrived. The said circular can be referred at <https://maharera.mahaonline.gov.in/Upload/PDF/Clarification on Calculation of Carpet Area.pdf>

Affordable vs Other than Affordable:

12. The notification has defined 'affordable residential apartment' under two limbs. The first limb deals with fresh and ongoing projects, if the promoter has not chosen the old rate and opted for new rate. The second limb deals with constructions in the ongoing projects under specific schemes, where the promoter has not opted to pay tax at old rate.

First Limb:

13. The first limb of definition states that, an apartment shall be affordable residential apartment if such apartments having carpet area not exceeding 60 square meter in metropolitan cities⁶ and not exceeding 90 square meters in cities or towns other than metropolitan cities **and for which gross amount charged is not more than 45 Lakh rupees.**
14. For arriving 45 Lakh rupees, the consideration charged by builder for services provided, the value charged for transfer of land or undivided share of land including lease or sub-lease and any other amount charged by promoter from buyer including preferential location charges, development charges, parking charges, common facility charges shall be added.
15. If both the above conditions based on square meters and gross amount charged are satisfied, such apartments are called as 'affordable residential apartments', where effective rate of tax is 1%. All conditions as mentioned in 'Conditions for Opting New Rate' shall be applicable and observed by Promoters.

Second Limb:

16. The second limb deals with constructions as per specified schemes with respect to ongoing projects. Vide second limb the constructions under specified scheme shall be called as 'affordable residential apartments' even though they do not satisfy the area requirement (60 or 90 square meter) or 45 lakh rupees. However, the promoter should not opt for payment of tax at old rates. The specified schemes are as under:
- A civil structure or any other original works pertaining to In-situ redevelopment of existing slums using land as a resource, under Housing for All (Urban) Mission/PMAY (Urban) – Entry 3(iv)(c)
 - A civil structure or any other original works pertaining to the 'Beneficiary led individual house construction / enhancement' under the Housing for All (Urban) Mission/PMAY – Entry 3(iv)(d)
 - 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/ PMAY (Urban) – Entry 3(iv)(da)
 - A civil structure or any other original works pertaining to the 'houses constructed or acquired under the Credit Linked Subsidy Scheme for Economically Weaker Section (EWS)/ Lower Income Group (LIG)/ Middle Income Group-1 (MIG-1)/ Middle Income Group-2 (MIG-2)' under the Housing for All (Urban) Mission/ PMAY (Urban) – Entry 3(iv)(db)

⁶ Bangalore, Chennai, Delhi NCR (specific areas), Hyderabad, Kolkata and Mumbai (whole of MMR)

- a single residential unit otherwise than as a part of a residential complex – Entry 3(v)(b)
- 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 of India – Entry 3(v)(c)
- low cost houses up to a carpet area of 60 square metres per house in a housing project approved by the competent authority under 'affordable housing in partnership' component of Housing for All (Urban) mission or PMAY or any other housing scheme of State Government – Entry 3(v)(d)
- low-cost houses up to a carpet area of 60 square metres per house in an affordable housing project which has been given infrastructure status vide notification of Government of India, in Ministry of Finance, Department of Economic Affairs vide F. No. 13/6/2009-INF, dated the 30th March, 2017 – Entry 3(v)(da)
- 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 Act – Entry 3(vi)(c).

17. If the promoter has not opted to pay tax under old rates and the project is an ongoing and falls under any of the above schemes, the rate of tax applicable is 1%. All conditions as mentioned in 'Conditions for Opting New Rate' shall be applicable and observed by Promoters.

18. If the promoter is engaged in construction of apartments which is not falling under 'Affordable Residential Apartments' and such project being a REP/RREP, then rate of tax applicable is 5%, if the promoter does not opt for old rate.

19. Composite supply of works contract in respect of apartments:

- a. which contains units which fit under 60/90 square meter and gross consideration is less than 45 lakhs (specific units)
- b. and such project is not covered under RREP or REP or
- c. and such project is not a project under specific schemes like PMAY and Others and
- d. promoter has not opted to pay tax at old rates

then the rate of tax applicable is 12%.

20. The said rate shall be applicable only if the project has carpet area of specific units not less than 50% of the total carpet area of all the apartments in the project. **Further, in a case, where it finally turns out that carpet area of specific units is less than 50% of the total carpet area of apartments, then promoter shall be liable to pay under reverse charge equivalent to difference between the tax payable on service at applicable rate but for rate prescribed herein and the tax actually paid at the rate prescribed. For example, if the rate of tax is 18% and because of this entry, the rate was fixed at 12% and in case, if the carpet area of specific units is less than 50% of total carpet area, then promoter has to pay tax at 6%.**

- Affordable Residential Apartments are of two kinds. One with conditions linked to area and gross amount charged. The other is constructions under specified schemes.

Fresh or Ongoing Project:

- If area of apartment is less than 60/90 square meter and gross amount charged is less than Rs 45 lakhs – then the rate of tax is 1% with all conditions as applicable for option of new rate.

Ongoing Project:

- If project is under specified scheme under PMAY or Others, then rate of tax is 1% with all conditions as applicable for option of new rate.

Other than Affordable Residential Apartments:

- If the project is not an 'affordable residential apartments', and is REP/RREP, then the rate of tax applicable is 5%. The conditions as applicable for option of new rate shall be applicable.

80% Threshold & Consequences:

21. One of the conditions that promoter has to observe by opting for new rate (for fresh or ongoing project) is that he has to purchase 80% of inputs and input services from registered suppliers qua financial year. If in a financial year the promoter obtains completion certificate, then he has to comply with 80% by the time he obtains completion certificate.

Exclusions for 80% threshold:

22. For arriving 80% threshold, the purchase of development rights, FSI, premium, electricity, high speed diesel, motor spirit, natural gas shall be excluded. In other words, the promoter has to purchase 80% of his inputs and input services from registered suppliers by not taking the above purchases into consideration. For example, if 30% of purchases of promoter is diesel, such 30% shall not be taken for arriving the 80% threshold. Hence, out of the 70% expenditure, 80% has to be procured from registered suppliers, since purchase of diesel is not considered for arriving 80% threshold.

Inclusions for 80% threshold:

23. The promoter is allowed to include expenditure on which he is obliged to pay tax under reverse charge under Section 9(3) into the 80% threshold. In other words, the tax paid under reverse charge by promoter is deemed to be purchases from registered suppliers.
24. For example, if promoter has made purchases of 75% from registered suppliers and 25% from unregistered suppliers and out of 25% of purchases, if promoter is obliged to pay tax under reverse charge to the extent of 15% (say lawyer fee, goods transport agency services, sponsorship or import of services), then for calculating 80% threshold, the 15% expenditure shall be included. Hence, in this example, it would be deemed that promoter has purchased 90% (75% + 15%) from registered suppliers.
25. Further, the notification states that if promoter purchases cement from unregistered supplier, the applicable tax on such cement has to be paid under reverse charge under Section 9(4) by the promoter. **It is important to note that the tax shall be paid on cement not @ 18%, but on the rate applicable to cements.**
26. The said payment of tax on cement purchased from the unregistered supplier by promoter shall also be taken for calculating the 80% threshold. For example, if promoter has purchased 50% from registered suppliers, 15% of purchases of cement from unregistered supplier and balance 35% from unregistered supplier, then first tax under reverse charge on cement has to be paid at applicable rates and accordingly the said quantum will be included to arrive at 80%, in the instant case, the purchases from registered suppliers shall be 65% (50% + 15%) and tax @ 18% shall be paid on 15% (80% - 50% - 15%).

Liability to pay tax under reverse charge:

For Cement:

27. The liability to pay tax under reverse charge pertaining to purchases from unregistered suppliers shall be done at the time of receipt of cement.

For Shortfall:

28. The shortfall from the 80% threshold shall be computed on financial year basis and the tax on such shortfall shall be paid by 30th June of succeeding financial year. In other words, for the FY 19-20, the liability to pay tax shall be made not later than 30th June 20.

JDA – Obligations & Reliefs:

For transfer of development rights on or after 01st April 19:

29. Where the land owner has transferred development rights on or after 01st April 2019 the implications are detailed as under.

Exemption of tax on Transfer of Development Rights by Land Owner:

30. The land owner is relieved from payment of tax on transfer of development rights to the builder, wherein the consideration for land owner is agreed to be certain portion of constructed complex. In other words, the transfer of development rights (which attract tax under Notification 4/18) in the hands of land owner are exempted from payment of tax in terms of specific exemption vide Entry 41A to Notification 12/17 – CT (Rate).
31. It is important to note that the exemption is granted only to the extent of development rights pertaining to residential apartments. Hence, if a land owner parts away with development rights in a project where commercial and residential apartments are intended, then exemption shall be only to the extent of tax payable on development rights pertaining to residential apartments.
32. The value of supply of developmental rights parted by land owner which is eligible for exemption is deemed to be equal to the value of similar apartments charged by promoter from the independent buyers nearest to the date on which such developmental rights are transferred by land owner – Para 1A of Notification 12/17 – CT (Rate).
33. For example, if a land owner transfers development rights on 25th April 19, and as per the joint development agreement, the land owner is entitled for 40 flats (assuming entire project is residential), then value of development rights is equal to value of similar flats sold by promoter near to the date of transfer of development rights. That is to say, if promoter enters into an agreement of sale with an independent buyer for Rs 1 Crore on 5th May 19, then value of development rights transferred by land owner is Rs 40 Crores (40 flats * 1 Crore/flat).
34. Assuming, the entire project is 100 flats, out of which 20 are commercial and 80 are residential and land owner is entitled to 30 residential flats and 10 commercial flats, then exemption from transfer of

development rights shall only be restricted to Rs 30 Crores pertaining to residential flats and land owner continues to be taxable for the transfer of development rights pertaining to 10 commercial flats.

Conditions for above Exemption:

35. The said exemption is on condition that the promoter will sell all flats of his share prior to the completion certificate. In a situation, where the promoter is unable to sell certain flats prior to completion certificate, then tax is required to be paid by promoter under reverse charge mechanism vide Entry 5B of Notification 13/17 – CT (Rate) on the date of completion certificate.
36. The value of such unsold or un-booked flats at the date of completion certificate, shall be deemed to be equal to value of similar apartments charged by promoter nearest to the date of issuance of completion certificate – Para 1B of Notification 12/17 – CT (Rate).

Rate of Tax & Liability of Tax:

37. The rate of tax in any case shall not exceed 1%⁷/5% of value of residential apartments remaining un-booked on date of issuance of completion certificate. The liability to tax arises on the date of issuance of completion certificate.
38. Continuing with the above example, if the promoter could not sell 15 flats (assuming the entire project is residential apartments other than affordable) of his share as on the date of issuance of completion certificate. Assuming carpet area un-booked is 10%, then, the liability of promoter is arrived as under:

[GST Payable on Development Rights in residential apartment but for exemption contained] * [Carpet area of residential apartments in project which remain un-booked as on date of issuance of completion certificate] / [Total carpet area of residential apartments in the project]

39. Hence, the liability on promoter pertaining to un-booked flats shall be value of development rights * percentage of un-booked carpet area that is Rs 40 Crores * 10% which is Rs 4 Crores, on which tax payable will be 18%⁸, which is amounting to Rs 0.72 Crore. However, this is not the final liability. Such liability of Rs 0.72 Crore has to be compared with 5% of value of 15 flats which are un-booked as on the date of issuance of completion certificate. Assuming the rate of flats near to the date of issuance of completion certificate is Rs 2 Crores, then value of un-booked 15 flats shall amount to Rs 30 Crores (15 flats * Rs 2 Crore/flat).

⁷ In case of affordable residential apartments

⁸ Since DR attracts 18% rate of tax

40. The liability of 5% on Rs 30 Crores shall be Rs 1.5 Crore and the notification states that liability cannot exceed 5% of value of un-booked flats as on the date of issuance of completion certificate. Hence, liability shall be to the tune of Rs 0.72 Crore. Hence, the notification states that there should be a comparison between 18% of value of carpet area which remains un-booked based on the value near to the transfer of development right with 5% of value of carpet area which remains un-booked based on the value near to the date of issuance of completion certificate. In any case, such tax payable shall not be more than 5% of value of un-booked flats near to the date of issuance of completion certificate.

- Development Rights (DR) transferred by Land Owner on/after 1st April 19 are exempted subject to a condition that promoter sells the entire share of his flats prior to issuance of completion certificate.
- If there are flats un-booked as on date of issuance of completion certificate, the promoter is required to pay tax under reverse charge.
- The tax is calculated based on value of DR * percentage of carpet area belonging to un-booked flats to the total residential apartments.
- However, the tax will be restricted to 5% of value of un-booked flats as on the date of issuance of completion certificate. 5% has to be replaced with 1% if project is affordable residential apartments,

Valuation:

- The value of DR is deemed to be equivalent to value of similar flats sold by promoter to independent buyer nearest to the date of transfer of DR.
- The value of un-booked flats as on date of issuance of completion certificate is deemed to be equal to the value of similar flats sold by promoter to independent buyer nearest to the date of issuance of completion certificate.

Supply of Construction Services by Promoter to Land Owner:

41. Under the new rate, the promoter shall continue to charge the land owner for the construction services provided by him to the land owner. In the above example, the promoter shall charge tax on value of construction services pertaining to 40 flats to the land owner at 5%.

Obligation of Land Owner on his Supplies:

42. The land owner can avail the credit of taxes paid to the builder for his construction services and utilise the same against his liabilities when he sells his share of flats prior to issuance of completion certificate. However, if land owner fails to sell any of his share of flats prior to date of issuance of completion certificate, the land owner is required to reverse such credit pertaining to unsold flats in his share as on the date of issuance of completion certificate. If he has utilised such credit by that time, then the same has to be paid in cash.

For transfer of development rights before 01st April 19:

43. No change in taxability of the transaction. The old position as in existence in light of Notification 4/18 – CT (Rate) shall be applicable.

- What is conditionally exempted is tax on transfer of DR and not any other leg of the entire JDA transaction.
- Hence, builder continues to charge tax on construction services provided by him to land owner.
- Land owner avails credit of tax paid to builder and uses the same for sale of his share of flats prior to issuance of completion certificate.

- The area of concern is what happens to the taxability of DR in a case, where DR is transferred prior to 1st April 19 but the promoter has opted for new rate of tax.
- This is a problem because the exemption is given only for DR transferred post 1st April 19. Further, since the promoter is not eligible for credit of taxes which are attributable to supplies post 1st April 19, the tax paid on DR by promoters becomes big cost.
- It would have been great if exemption is granted to DR also for ongoing projects where promoter has opted for new rate or by excluding such DRs from the ambit of services requiring reversal when dealing with credit attribution for supplies post 1st April 19.

Reversal of Credit attributable for supplies post 01st April 19:

44. One of the conditions for ongoing projects to opt for new rate is that the balance of credit which is attributable to construction of project, where time of supply is post 01st April 19 shall be lapsed. The Notification has laid down a detailed mechanism to arrive at the attribution of credit pertaining to the period post 01st April 19 for REP and RREP. In this note, we have dealt only with attribution pertaining to REP.
45. The notification deals with majorly two instances. One, where percentage of completion as on 31st March 19 is not zero or where there is inventory in stock. Two, where percentage of completion as on 31st March 19 is zero but invoicing has been done having time of supply before 31st March 19 and no input services or inputs have been received as on 31st March 19.

Scenario 1:

Where % of completion is not zero or where there is inventory in stock

46. The entire objective of this exercise is to find out the credit which is attributable to the supplies post 01st April 19. If such amount is found to be positive, then such amount requires reversal. If such amount is negative, then such amount can be carried forward as credit and can be used for payment post 01st April 19. Hence, we have to find such credit of input and input services which has time of supply (ToS) post 01st April 19. The said amount is represented as Tx.
47. This Tx can be arrived by removing the credit of inputs and input services pertaining to residential apartments for which ToS is prior to 31st March 19 (Tr) and removal of credit of input and input services pertaining to commercial apartments (Tc) from the total credit availed by promoter (T).

$$\mathbf{T_x = T - T_e} \text{ [where } T_e = T_c + T_r]$$

48. Here, T denotes total credit availed (whether utilised or not) on inputs and input services from 1st July 17 to 31st March 19 including transitional credit. Te denotes eligible credit attributable to commercial apartments and residential apartments for which ToS is prior to 31st March 19.
49. As stated earlier, if Tx is positive, that is $T > T_e$, then the promoter has to reverse the credit or pay in cash an amount equivalent to $T - T_e$. The logic behind the same is simple, Tx represents the credit pertaining to supplies where ToS is post 1st April 19, which cannot be availed because the promoter has opted for new rate. In other words, Tx is nothing but difference of total credit and credit attributable to residential and commercial apartments where ToS is prior to 31st March 19 and only such credit can be availed. By reversing the Tx, the credit pertaining to supplies where ToS is post 01st April 19 stands lapsed and credit pertaining to commercial apartments is separately availed, thereby the net effect is achieved.
50. If Tx is negative, that is $T < T_e$, then the promoter can avail credit on goods and services received post 01st April 19 to the extent of difference between T and Te and utilise the same for payment of taxes. The logic behind the same is simple, the Te shall be more than T only in cases where promoter supplies for which ToS is before 31st March 19 and credit to such an extent has not flowed to him. Hence, he

will be eligible for availing credit pertaining to inputs and input services which he receives post 01st April 19 for which tax has been paid prior to 31st March 19 based on time of supply provisions.

51. Now, let us proceed to understand how T_e is determined. T_e is nothing but summation of T_c and T_r . T_c is the credit of input and input services attributable to construction of commercial apartments. T_c can be arrived as under:

$$T_c = (T) * \frac{\text{carpet area of commercial apartments in REP}}{\text{total carpet area of commercial and residential apartments}}$$

52. Now, T_r has to be determined. It is important to note that T_r is nothing but the input tax credit attributable to inputs and input services which are used for construction of residential apartments where time of supply for such construction services is prior to 31st March 19. The notification states that T_r can be arrived as under:

$$T_r = (T) * F1 * F2 * F3 * F4$$

53. $F1$ is the quantum of carpet area of residential apartments in the total carpet area of project which contains both residential and commercial. If the project is only residential, then $F1$ shall be 100%. If project is 50% residential and 50% commercial, then $F1$ shall be 50%. It is important to find out $F1$ since, we have to identify the credit pertaining to residential apartments from the total credit. $F1$ is calculated as under:

$$F1 = \frac{\text{carpet area of residential apartments in REP}}{\text{total carpet area of commercial and residential apartments}}$$

54. $F2$ deals with quantum of carpet area of residential apartments for which booking were received before 31st March 19. This is important because, we are trying to identify the credit pertaining to supplies where ToS is prior to 31st March 19 from the total credit. $F2$ gives us the quantum of bookings happened pertaining to residential apartments out of the total carpet area of residential apartments.

$$F2 = \frac{\text{total carpet area of residential apartments booked on or before 31st March 19}}{\text{total carpet area of residential apartment in REP}}$$

55. $F3$ is arrived by ascribing value to the booking that happened prior to 31st March 19, where ToS is prior to 31st March 19. In other words, the total value of bookings happened prior to 31st March 19 is arrived and from that amount the value pertaining to supplies where ToS is prior to 31st March 19 is identified. For example, 40 flats are booked prior to 31st March 19 and assuming each flat is Rs 0.6 Crore, the value of bookings happened prior to 31st March 19 would be Rs 24 Crores (40 flats * 0.6 Crore/flat). In this the promoter has to identify the percentage of supplies where the ToS is prior to 31st March 19. That is suppose, 20% of the invoices are raised because of ToS has been met, then the value of $F3$ will be Rs 4.8 Crore (20% of Rs 24 Crore).

56. If it is 60%, then F3 shall be Rs 14.4 Crore (60% of Rs 24 Crore). There is a possibility that percentage of completion might be lower than the percentage of invoices/receipt vouchers⁹ of booked residential apartments prior to 31st March 19. In other words, a project may be completed 20% as on 31st March 19, but the invoices/receipt vouchers raised for bookings as on 31st March 19, may be 60%. Hence, F3 is determined as under:

$$F3 = \frac{\text{value of supply of construction of booked apartments for which ToS is prior 31st Mar 19}}{\text{Total value of supply of construction of residential apartments booked on or before 31st March 19}}$$

57. F4 is bit tricky. F4 is trying to estimate the total credit that might be available for the promoter based on the percentage of completion of construction as on 31st March 19. In other words, if the total credit available for 20% completion of project is Rs 1 Crore, then F4 estimates that total credit that would be available for 100% completion is Rs 5 Crores (Rs 1 * 100/20). This is done to estimate the total credit that would be available for the promoter when juxtaposed with the invoicing/receipt vouchers. Let us assume, the credit for 20% completion is Rs 1 Crore. If the % of invoicing/receipt vouchers is 60%, then there is a chance that, credit pertaining to 40% (60% - 20%) has not flowed to the promoter. It is important to note that credit flows to promoter based on percentage of completion of project and not just by receipt of advances. However, promoter would have paid tax on receipt of advances. To give the additional credit which has not accrued to the promoter as on 31st March 19, but tax was paid, F4 is being calculated for the entire project and then restricting it to ToS prior to 31st March 19. F4 is calculated as under:

$$F4 = 1/\% \text{ of completion as on 31}^{\text{st}} \text{ March 19}$$

58. Once F1, F2, F3 and F4 are arrived, the same shall be multiplied with Total Credit to arrive the credit that is attributable to the supplies where ToS is prior to 31st March 19. This is the methodology to arrive Tr. Once Tr is available, Te can be arrived by adding Tc and Tr. Then, removing Te from T, gives the Tx, which has to be reversed or taken as per the discussion above.

Scenario 2:

Where % of completion is zero, but credit has been availed on goods and services prior to 31st March 19:

59. Where percentage of completion is zero but credit has been availed on goods and services received prior to 31st March 19, credit attributable to construction of residential portion which has ToS on after 1st April 19, shall be calculated and the amount equal to Tx shall be paid or taken credit, by arriving F4

⁹ The notification uses the word 'invoices'. Normally, the % of completion in any case cannot be lower than % of invoicing. In other words, % of completion matches with % of invoicing. Hence, we have to understand that invoicing used in notification includes receipt vouchers which were raised when collecting advances. Since ToS is being calculated, inclusion of receipt vouchers in the ambit of 'invoicing' sounds better. Otherwise, we do not envisage a situation as mentioned in Illustration 2, where % completion is 20% and % invoicing is 60%.

based on the certificate of architect/engineer, which should match with input services received and inputs in stock as on 31st March 19.

Scenario 3:

Where % completion as on 31st March 19 is zero but invoicing has been done having ToS before 31st March 19 and no inputs and input services have been received as on 31st March 19:

60. Since invoice/receipt vouchers have been done prior to 31st March 19, the promoter would have paid tax in cash/other credits at old rate. Since he has paid tax at old rate, credit to such an extent should be given to the promoter. Hence, the credit which arrives post 01st April 2019 to 31st March 2020 has to be taken into consideration to arrive such credit which is attributable to the invoicing happened at old rate.
61. The entire methodology as detailed in Scenario 1, shall be applicable with few changes with respect to T and F4. F4 will not be in existence since % completion is zero and one divided by zero would lead to infinity. Hence, F4 is dropped from the formula. Instead of T (total credit), Tn is being considered which is nothing but credit on goods and services availed during the period 19-20. Hence, with the said two changes, Te can be calculated and can be availed. F1, F2 and F3 would remain same and everything else also does not require any change.

Deemed value of Te:

62. The notification states in certain situations, the Te shall be determined by adopting a different mechanism. One of such instances is, where % completion of invoice > % completion of project and the difference is greater than 25% points, the value of % invoicing shall be restricted to % completion of project plus 25% points. In other words, if % completion of invoice is 60% and % completion of project is 20%, then the % completion of invoice shall be taken as 45% instead of actual 60%. This will happen only if the difference between % completion of invoice and % completion of project is greater than 25% points. In the instant case, it is 40% (60 – 20), hence 25% shall be added to % completion of project to arrive at % completion of invoice. **In the above scenario, the % completion of invoice shall be substituted with 45% instead of 60% while arriving F3. The logic behind this is simple, in absence of such deeming fiction, certain promoters might increase F3 artificially, so that Te becomes negative and thereby avails such amounts as credit for utilisation post 01st April 19. Hence, the deeming substitution of % completion of invoices has been proposed.**
63. Further, where value of invoices issued on 31st March 19 exceeds the actual consideration received on or prior to 31st March 19 by more than 25% of consideration actually received, the value of such invoices for the purposes of determination of % invoicing shall be deemed to be actual consideration received plus 25% of actual consideration. **This is also to restrict artificial inflation of F3. There may be certain promoters who would like to raise invoices stating that ToS was on 31st March 19, but consideration might not be received. The law states value of invoices should not exceed by more than 25% of actual consideration.**

64. Let us take an example to understand. Promoter has raised invoices on 31st March 19 stating ToS as said date and value of invoices is Rs 1 Crore and actual consideration received is Rs 70 lakhs. Hence, the invoice value has exceeded actual consideration by more than 25% that is Rs 87.5 lakhs (70 lakhs + 25%), hence the % value of invoices for the purposes of F3 shall be taken as Rs 87.5 lakhs and not Rs 1 Crore.
65. Where value of inputs and input services prior to 1st April 19 exceeds the value of actual consumption of inputs and input services used in % completion of construction as on 31st March 19 by more than 25% of value of actual consumption of inputs and input services, the jurisdictional Commissioner or any other Officer authorised in this regard may fix Te based on actual per unit consumption of inputs and input services based on documents duly certified by Chartered Accountant or Cost Accountant submitted by promoter.

The above is contributed by CA Sri Harsha and CA Manindar. For any further queries or discussion on the above, please reach us at harsha@sbsandco.com or manindar@sbsandco.com

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