

# NAVI MUMBAI BRANCH OF WIRC

## WEBINAR SERIES ON GST ON REAL ESTATE INDUSTRY – A COMPREHENSIVE VIEW

**Subject** : Joint Development Agreement, Drafting and Tax Planning

**Day & Date** : Saturday, 17<sup>th</sup> July, 2021

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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 the time:

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



# **GST on or after 01.04.2019**

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

# 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 – 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)

- 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 and payment of tax under RCM on shortfall, if any
- No liability under RCM on procurement of Cement and Capital Goods from unregistered vendors

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

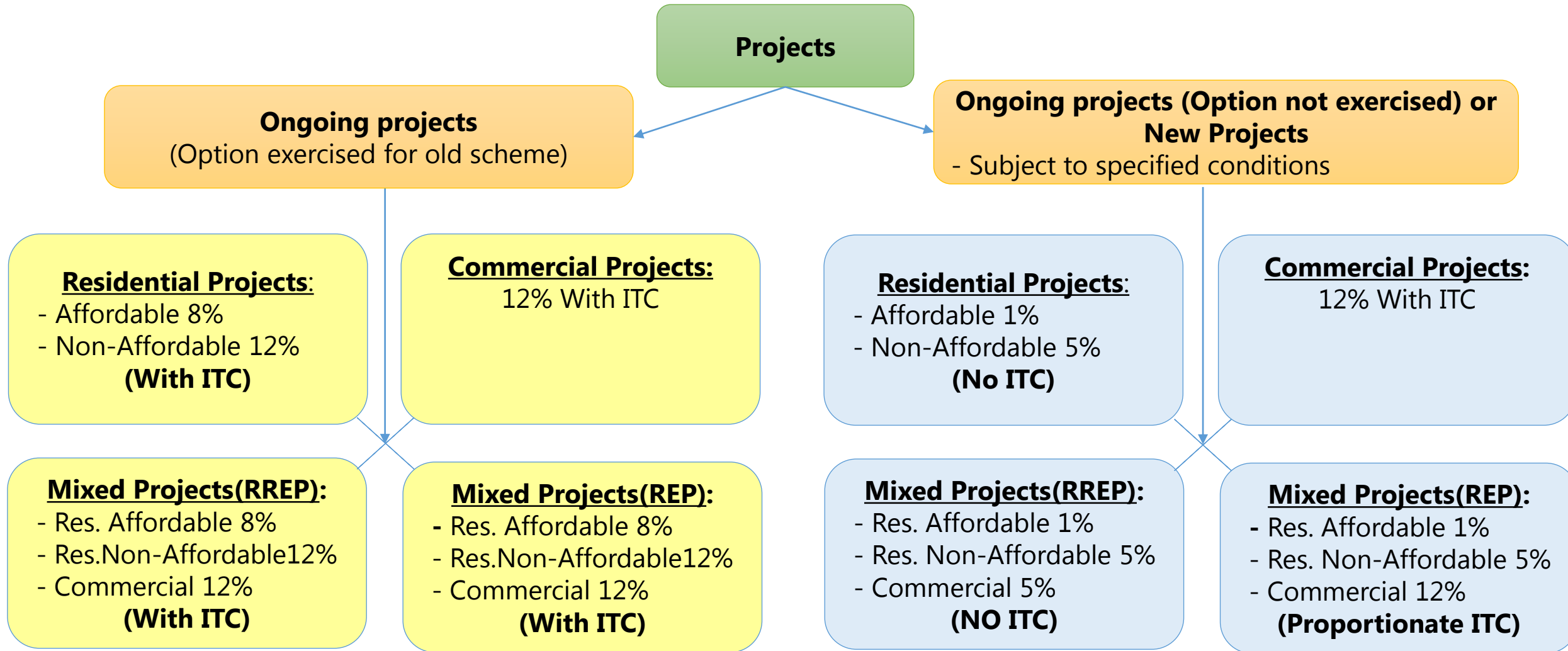
Particulars	Effective Tax Rate	Mode of payment
Sale of under-construction residential affordable house (Including houses under Specified Schemes)	1% (without ITC)*	Cash
Sale of under-construction residential units (other than affordable)	5% (without ITC)*	Cash
Sale of under-construction commercial units (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**

➤ **\*RCM liability on shortfall when more than 20% of procurements are from unregistered vendors**



# Snapshot – Amended Scheme of Taxation



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

# New Scheme of Taxation – Some Issues

- Is new scheme of taxation is optional or mandatory?
  - Whether ITC benefit granted by statute can be withdrawn through rate notification?
  - The concessional rate prescribed is subject to certain conditions. Whether non-compliance of such conditions give an opportunity to continue old scheme (with ITC) for ongoing as well as new project?
- Whether different options can be exercised in respect of different buildings in same plan layout?
- Whether JDA partners (land owner and developer) can opt for different options?
- Whether concessional rate apply to consideration received on or after 01.04.2019 against installments due on or before 31.03.2019?
- What will be the tax rate on advance received on or before 31.03.2019 against work done and demand raised on or after 01.04.2019?





# Tax Implications of Transfer of Development Rights

# Whether Development Rights are Taxable ?

- What should be the point of taxation of time of supply of development right?
- Whether transfer of the development rights is a 'one time supply' or 'continuous supply' of services?
- Implications and relevance of Notification No. 4/2018 dt. 25.01.2018, Notification No. 6/2019 dt. 25.03.2019 and Circular No. 151/2/2012-ST dt. 10.02.2012
- Whether development rights are / were taxable during following period:
  - Up to 30.06.2012 (positive list based service tax regime)
  - 01.07.2012 to 30.06.2017 (negative list based service tax regime)
  - On or after 01.07.2017 (GST regime)

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

## **Taxability**

*[Notification No. 4/2019 – CT (R)]*

- Transfer of DR / TDR / FSI / Lease used for sale of **under construction residential units** is **exempt**
- **Taxable** to the extent of **unsold** residential flats on the date of issuance of completion certificate or first occupation, whichever is earlier

## **Due date for payment of Tax**

- In area sharing, revenue sharing or outright purchase of DR/TDR/FSI/Lease

## **Earlier of:**

- Issuance of Completion certificate; or First occupation of project
- [Notification No. 6/2019 – CT (R)]*

## **Person liable to pay Tax**

Promoter – Developer under RCM *[Notification No. 5/2019 – CT (R)]*

## **Credit of tax paid under RCM by developer on or after 01.04.2019**

New scheme – ITC not eligible  
Old scheme – ITC eligible

# 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  
*[Notification No. 4/2019 – CT (R)]*

## Lower of:

- 18% on Value of DR/TDR/FSI\* in proportion to carpet area of such unsold flats to total carpet area of residential flats; or
- 1% / 5% of Value of such unsold flats\*\*

## \* Valuation of DR/TDR/FSI/Lease

- ✓ **Outright purchase:** value of monetary consideration paid for outright purchase
- ✓ **Revenue sharing:** monetary consideration paid to the Landowner as revenue share;
- ✓ **Area sharing:** value of similar apartments charged by promoter from **independent buyers nearest to the date of transfer of DR/TDR/FSI;**

**\*\*Value of unsold flats** is deemed as equal to value of similar apartments charged by the promoter nearest to the **date of completion certificate or first occupation**, whichever is earlier

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

Taxability	Fully Taxable - No exemption
<b>Due date for payment of tax</b>	Outright purchase: Date of transfer of DR/TDR/FSI/Lease Area Sharing: Earlier of: <ul style="list-style-type: none"> <li>• Issuance of Completion certificate; or</li> <li>• First occupation of project</li> </ul> Revenue Sharing: <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 (to be paid under RCM) – Notification No. 5/2019-CT(R) dated 29.03.2019
<b>Credit of tax paid under RCM by Developer on or after 01.04.2019</b>	ITC eligible

# Tax Implications of TDR / Additional FSI

- What is the tax implications of developer selling TDR to trader?
- What is the tax implications of trader selling this TDR to the developer?
- Whether developer is liable to discharge GST under reverse charge on premium paid to Municipal Corporation for additional FSI in respect of **residential project**?
- Whether developer is liable to discharge GST under reverse charge on premium paid to Municipal Corporation for additional FSI in respect of **commercial project**?





# Tax Implications of Free Flats / Units Allotted to Landowner in JDA



# Whether Free Flats Allotted to Land Owner in JDA Arrangement is Liable to GST?

- What should be the point of taxation or time of supply of construction services provided to land owner?
- Whether such service / supply is a 'works contract service' or 'construction service i.e. sale of under construction flats or units?
- Implications of decision of *Hyderabad CESTAT in case of Vasantha Green Projects [2018-TIOL-1611-CESTAT-HYD]*
- What are the tax implications of Development agreement executed on or before **30.06.2012** and possession of owner's area given in GST regime:
  - During the period 01.07.2017 to 31.03.2019
  - On or after 01.04.2019 onwards
- What are the tax implications of Development agreement executed during the period **01.07.2012 to 30.06.2017** and possession of owner's area given in GST regime:
  - During the period 01.07.2017 to 31.03.2019
  - On or after 01.04.2019 onwards

# 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 area 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 at time of receipt of completion certificate or first occupation, 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 is liable to GST when he sells owner's area under construction:
  - It is tax at applicable rate i.e. 1% (affordable house), 5% residential flat (other than affordable), 12% commercial apartment (in REP project) and commercial apartment 5% (in RREP project)
  - Time of supply – when he is due for payment from flat buyer
  - Value of supply – transaction value
- Landowner is entitled to input tax credit of tax charged by developer promoter when he further supplies such apartments allotted to him
- Such credit can not exceed the tax payable by him on sale of under construction flats or apartments
- GST is payable on units handed over to landowner on the completion of project. Landowner (for re-sale of its units) is required to pay GST as per regular TOS. There could be a timing mismatch of tax payable by landowner on sale of under construction flats / units and input tax credit charged by landowner.

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

- Notification No. 02/2021 – Central Tax (Rate) and 03/2021-Central Tax (Rate) dated 02.06.2021 have resolved this mismatch issue whereby developer can pre-pone the payment of :
  - Tax payable on development rights under RCM
  - Tax payable on long term lease rights under RCM
  - Supply of construction services against consideration in the form of development rights or FSI

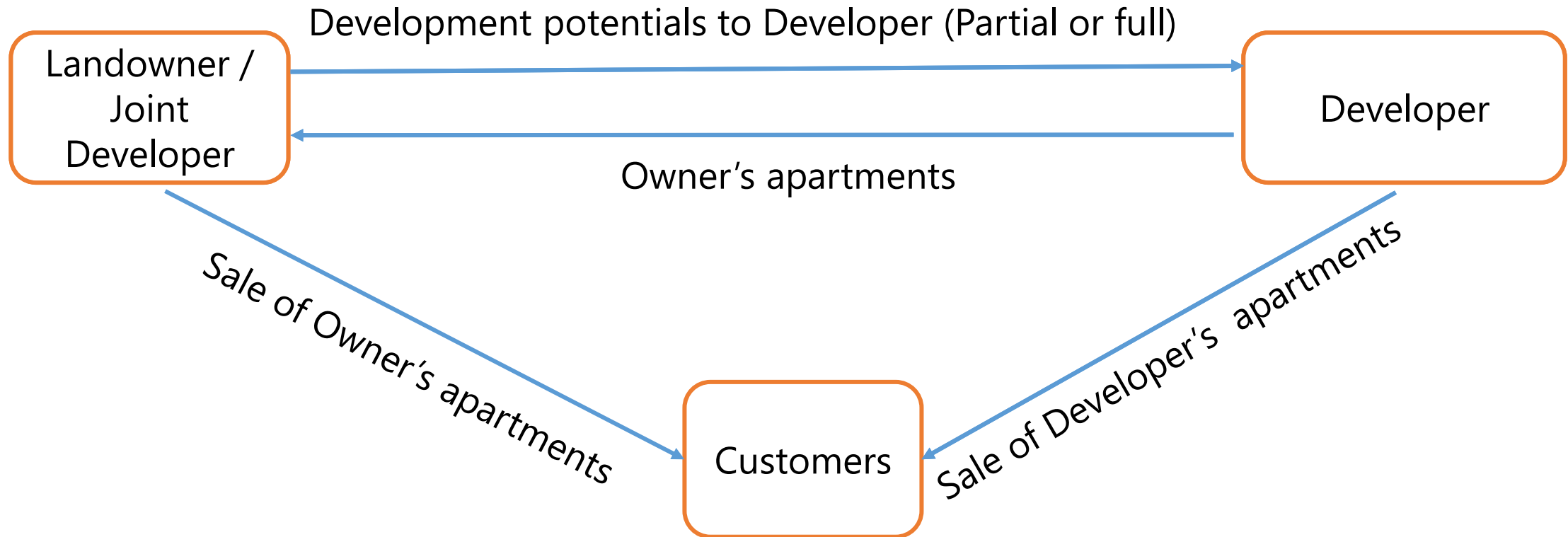
Above referred payment is to be made in a tax period not later than the tax period in which completion certificate in respect of the project is received or the date of its first occupation, whichever is earlier

- These amendments are effective from **02.06.2021**
- Does this mean that pre-ponement of tax payment on development rights under RCM and on allotment of owner's flat was not permissible on or before 02.06.2021?



**Joint  
Development  
Agreements on  
or after  
01.04.2019**

# Joint Development Agreement (Area Sharing)



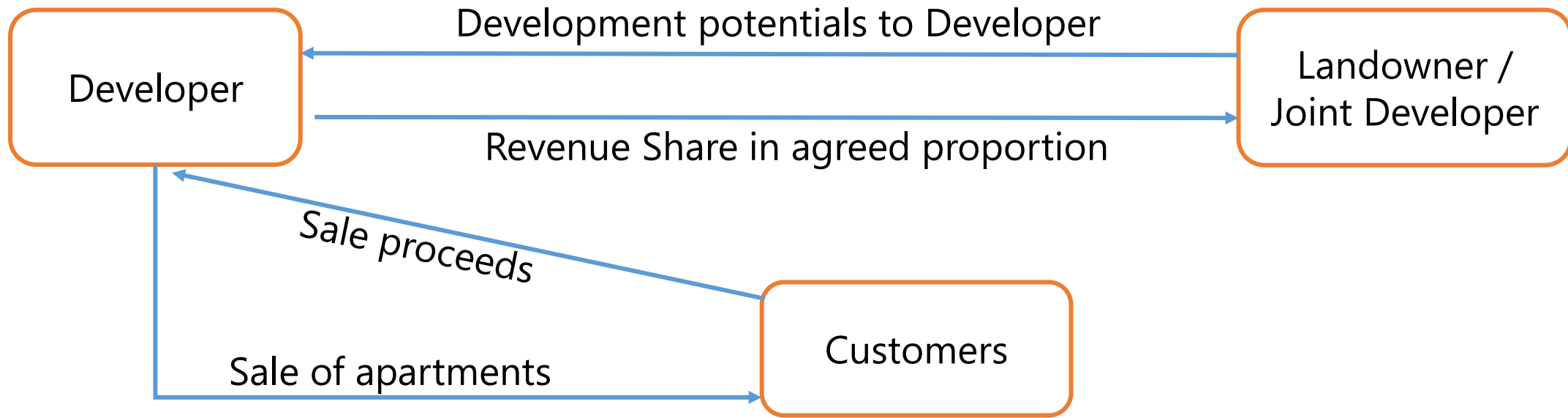
- What are the tax implications of above arrangement for residential or commercial complex?

# Joint Development Agreement (Area Sharing) - Issues

- GST on Developments rights is payable at the end of the project under RCM. How to utilize such credit at the end of the project when most of the GST output liabilities would have been already paid during the construction stage? Does GST paid on development rights under RCM effectively becomes cost?
  - This issue is resolved by Notification No. 02/2021-Central Tax (Rate) and 03/2021-Central Tax (Rate) dated 02.06.2021 (as discussed in earlier slide)
- GST is payable on units handed over to land-owner is at the end of the project. However, the land-owner (for re-sale of its units) is required to pay GST as regular TOS. How will the land-owner get credit of the GST which will be charged by the Developer at the end of the project? Does this lead to cascading of tax?
  - This issue is resolved by Notification No. 02/2021-Central Tax (Rate) and 03/2021-Central Tax (Rate) dated 02.06.2021 (as discussed in earlier slide)

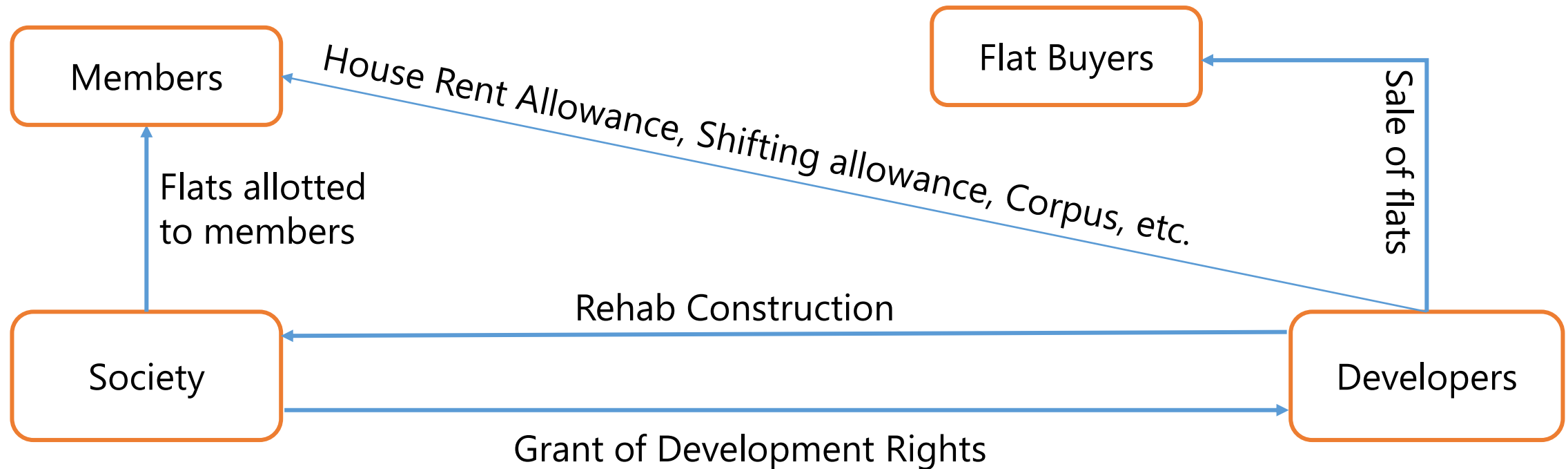


# Joint Development Agreement (Revenue Sharing)



- 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?

# Society Redevelopment



➤ What are the tax implications of above transaction?

# Society Redevelopment - Issues

- Whether society / developer is liable to discharge tax on development rights in pre-amended or amended scheme of taxation?
- Whether house rent allowance, corpus, shifting allowance, etc. is liable to GST?
- Whether the amended scheme of taxation as notified by NN 3/2019 – CT (R) applies to society redevelopment?
- Whether explanation put in Rate Notification can change the nature of supply from “works contract” to “sale of under-construction flat” resulting into higher tax liability?

# Word of Caution

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Any Questions ?

**THANK YOU**

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