



THE INSTITUTE OF CHARTERED ACCOUNTANTS OF INDIA

Refresher Course on GST

Organised By: GST & Indirect Taxes Committee

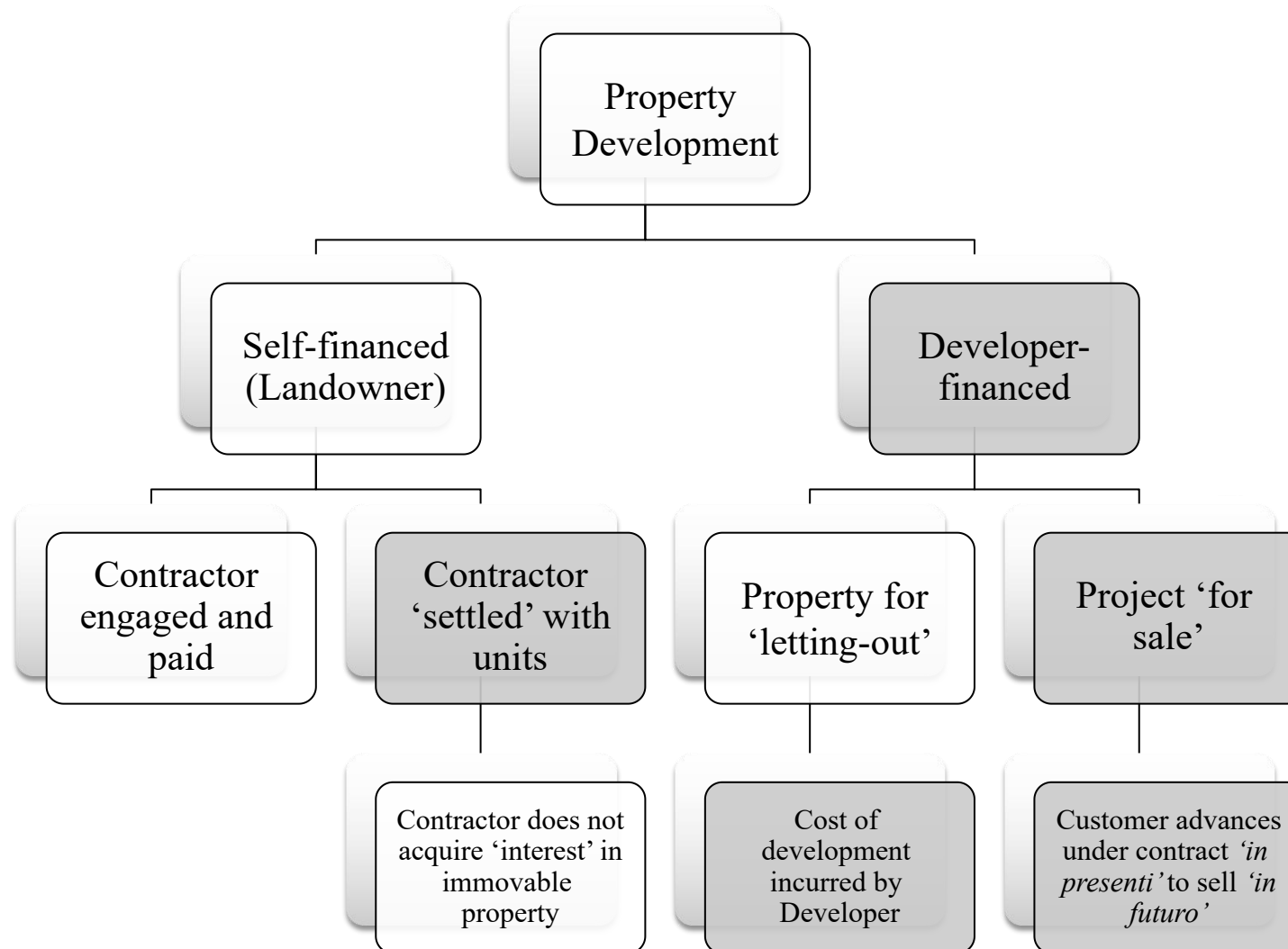
Hosted By- Tinsukia Branch of ICAI

Topic: Real Estate Development

Date: 8 Oct 2020



Development Models



Transfer of Property

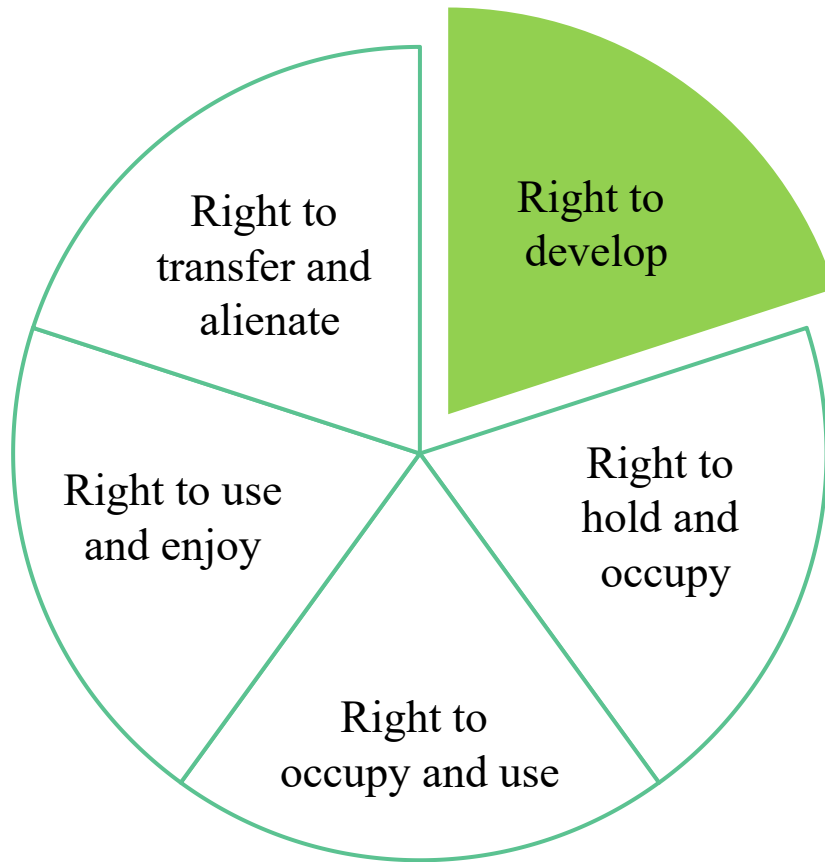
202. Termination of agency, where agent has an interest in subject-matter.—Where the agent has himself an interest in the property which forms the subject-matter of the agency, the agency cannot, in the absence of an express contract, be terminated to the prejudice of such interest."

17. Documents of which registration is compulsory.—(l) The following documents shall be registered, if the property to which they relate.....

(a)

(c) non-testamentary instruments which acknowledge the receipt or payment of any consideration on account of the creation, declaration, assignment, limitation or extinction of any such right, title or interest; and

Immovable property includes land



SCHEDULE III

*Activities or transactions which shall be **treated** neither as a supply of goods nor a supply of services*

1.

.....

*5. **Sale** of land and, subject to clause (b) of paragraph 5 of Schedule II, **sale** of building*

Composite supply

2(30) “*composite supply*” means a supply made by a taxable person to a recipient consisting of *two or more taxable supplies* of goods or services or both, or any combination thereof, which are naturally bundled and supplied in conjunction with each other in the ordinary course of business, one of which is the principal supply

8. The tax liability on a composite or a mixed supply shall be determined in the following manner, namely:-

(a) A composite supply comprising *two or more supplies*, one of which is a principal supply, shall be treated as a supply of such principal supply; and

(b)

Supply and its 'treatment'

Scope of supply

7. (1)

(1A) Where certain activities or *transactions* constitute a supply in accordance with the provisions of sub-section (1), *they shall be treated* either as supply of goods or supply of services *as referred to in Schedule II*

.....

Scope of supply

7. (1)

(2) Notwithstanding anything contained in sub-section (1),-

(a) *Activities or transactions* specified in Schedule III; or

.....

shall be *treated* neither as a supply of goods nor a supply of services

Taxable 'supplies' in GST

- ▶ Once 'supply' identified, taxability undoubted
- ▶ Composite-mixed supply affect rate not supply
- ▶ Works contracts is 'composite supply'
- ▶ No change once 'treatment' fixed by sch II
- ▶ 11/2017-CT(R) is comprehensive:
 - ▶ Rate of tax under s.9
 - ▶ Rate of exemption under s.11
 - ▶ Deemed value under s.15(5)
 - ▶ Credit restrictions under s.16(1)
 - ▶ Special dispensation under s.148
- ▶ Artificial 'carve out' of sch III activities fine
- ▶ Construction is not limited to 'super structure'
- ▶ Development works is internal and external
- ▶ Apartment has artificial definition from RERA
- ▶ Common sense understanding must make way
- ▶ Dominant object v. Ultimate intention
- ▶ Form of contract v. Legal recognition
- ▶ Power of taxation v. Purpose of taxation
- ▶ Role of 366(29A) under art.246A



'Apartment' defined

2(e) "Apartment" whether called block, chamber, dwelling unit, flat, office, show room, shop, godown, premises suit, tenement, unit or by any other name, means a separate and self-contained part of an immovable property, including one or more rooms or enclosed spaces, located on one or more floors or any part thereof, in a building or on a plot of land, used or intended to be used for any residential or commercial use such as residence, office, shop, showroom or godown or for carrying on any business, occupation, profession or trade, or for any other type of use ancillary to the purpose specified;

Tariff, where is composite supply?

Sl No.	Chapter, Section or Heading	Description of Service	Rate (per cent.)
(1)	(2)	(3)	(4)
1	Chapter 99	All Services	
2	Section 5	Construction Services	
3	Heading 9954 (Construction services)	[(i) Construction of affordable residential apartments by a promoter in a Residential Real Estate Project (herein after referred to as RREP) which commences on or after 1 st April, 2019 or in an ongoing RREP in respect of which the promoter has not exercised option to pay central tax on construction of apartments at the rates as specified for item	0.75
		(ie) or (if) below, as the case may be, in the manner prescribed therein, intended for sale to a buyer, wholly or partly, except where the entire consideration has been received after issuance of completion certificate, where required, by the competent authority or after its first occupation, whichever is earlier. (Provisions of paragraph 2 of this notification shall apply for valuation of this service)	

SCHEDULE II

[See section 7]

ACTIVITIES [OR TRANSACTIONS]¹⁰⁹ TO BE TREATED AS SUPPLY OF GOODS OR SUPPLY OF SERVICES

5. Supply of services

The following shall be treated as supply of services, namely:—

(a) renting of immovable property;

(b) construction of a complex, building, civil structure or a part thereof, including a complex or building intended for sale to a buyer, wholly or partly, except where the entire consideration has been received after issuance of completion certificate, where required, by the competent authority or after its first occupation, whichever is earlier.

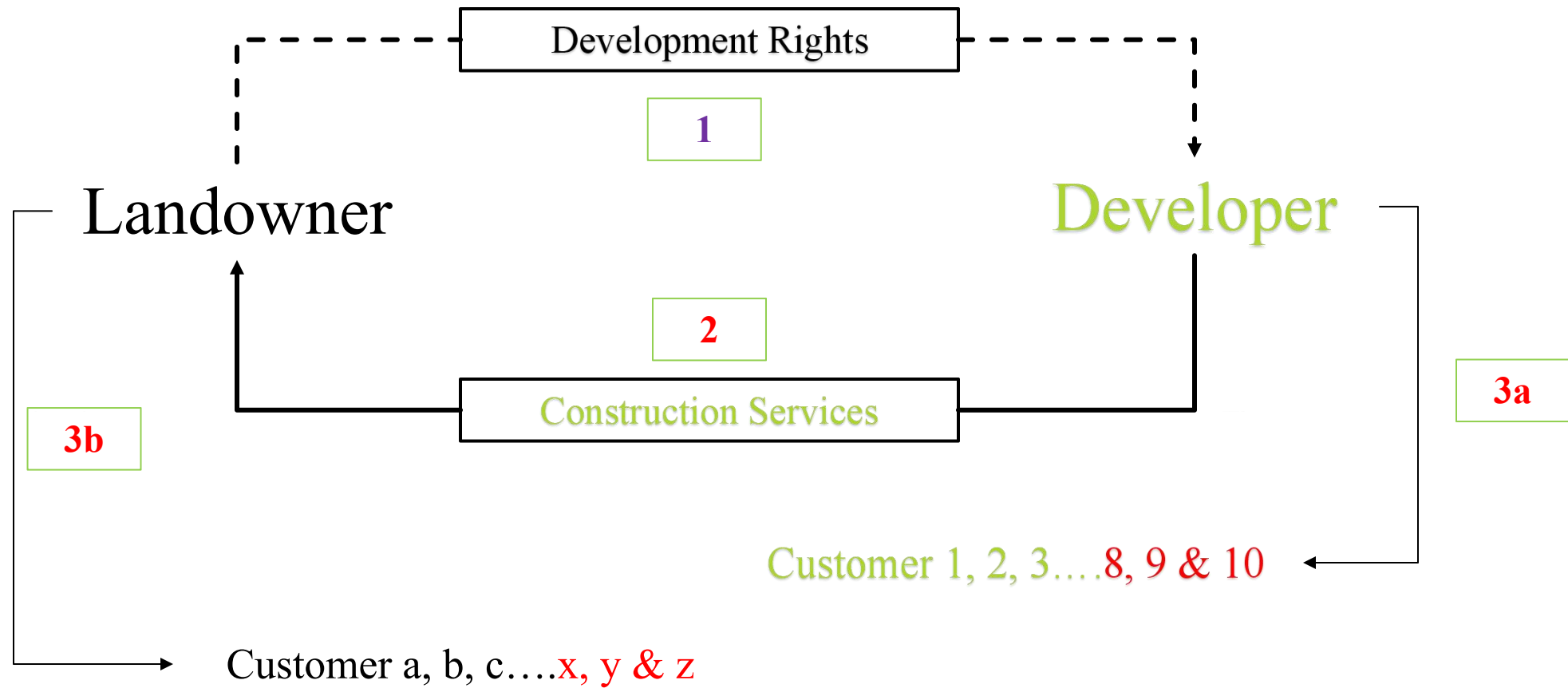
6. Composite supply

The following composite supplies shall be treated as a supply of services, namely:—

(a) works contract as defined in clause (119) of section 2; and

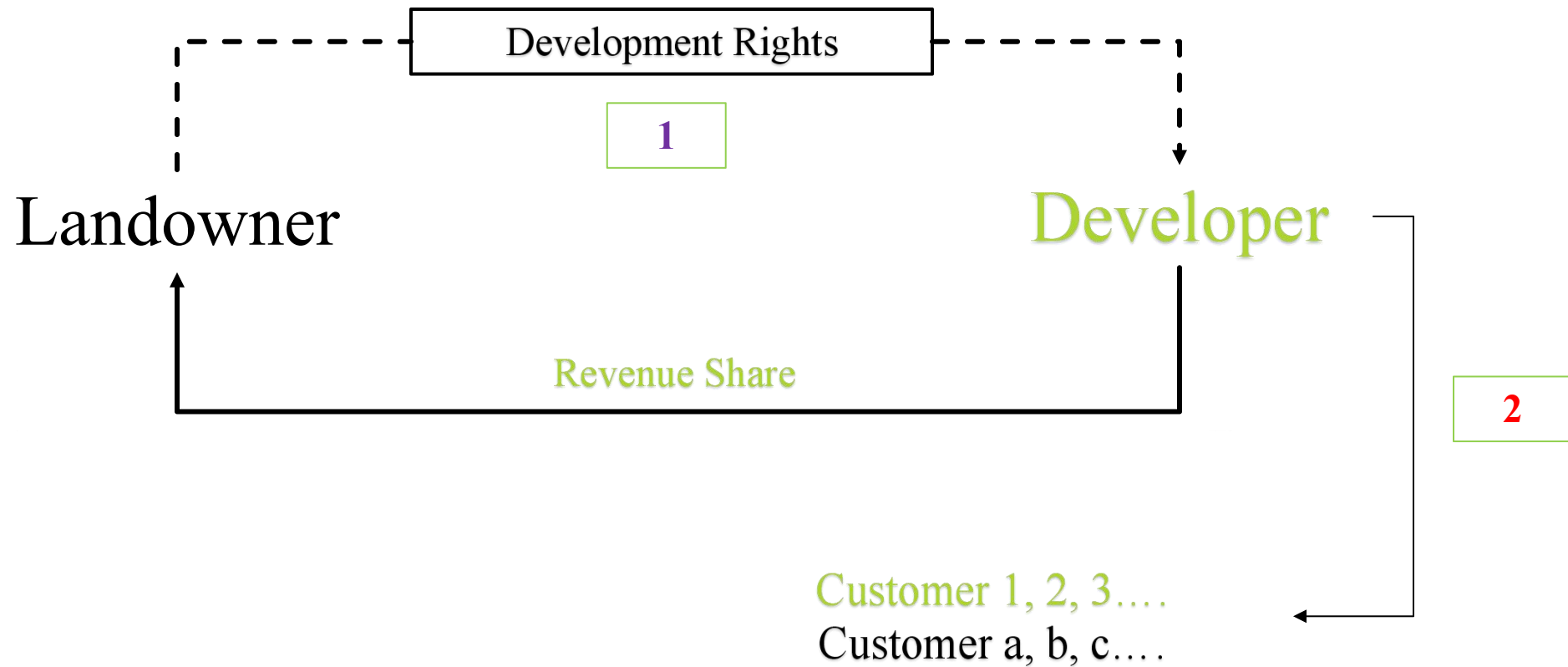


Supplies in 'Area Sharing'



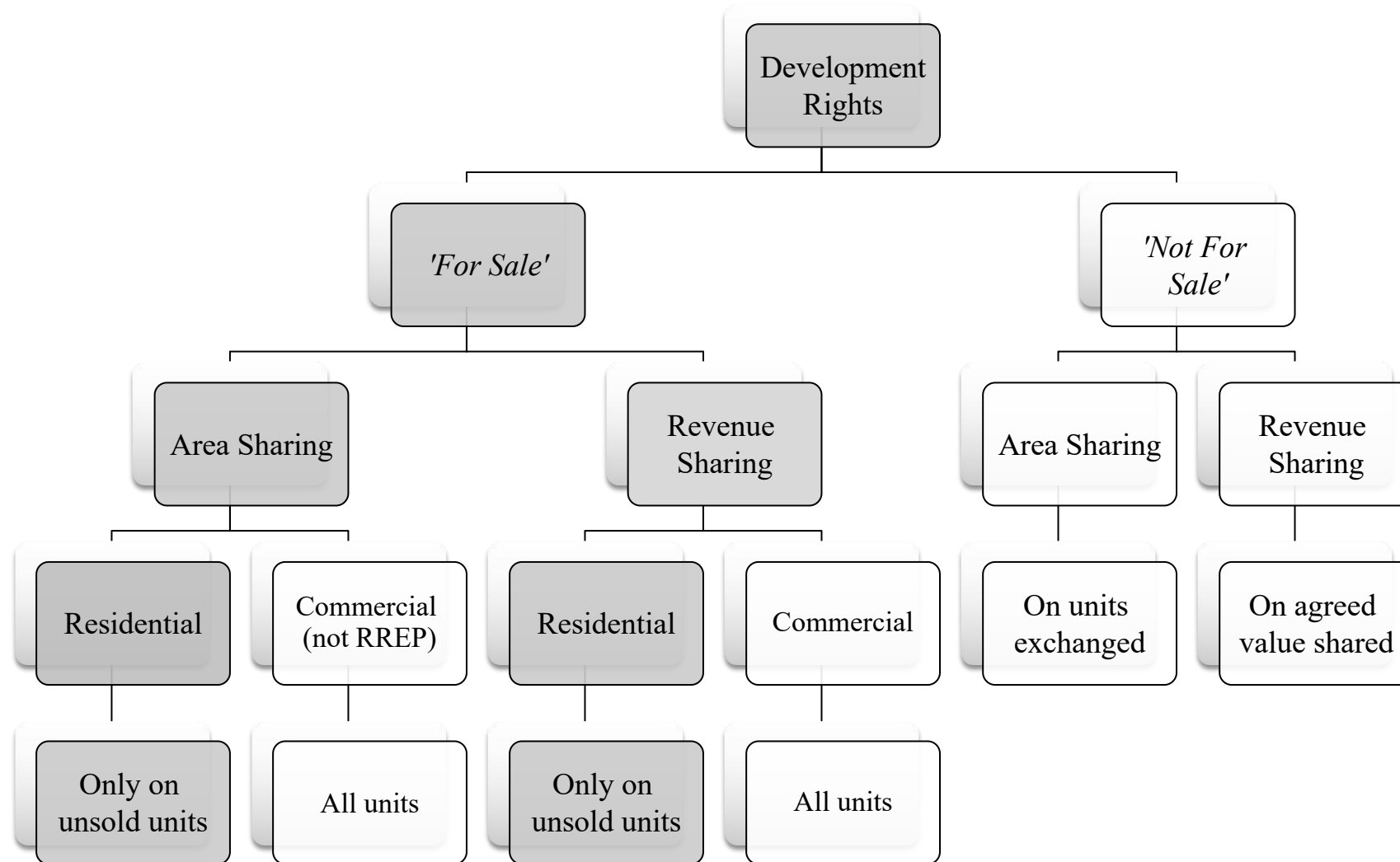


Supplies in 'Revenue Sharing'





Development Rights





Old Rate Regime

From Jul 2017 to Mar 2019 (and ongoing projects)

Description	Residential			Commercial		
	Affordable	Non-affordable	Plots	RREP	Complex	Leasing-property
Development rights	18%					
* area-sharing JDA	FCM, on date of OC/CC					
* revenue-sharing JDA	FCM, on date of JDA [§]					NA
Valuation **	Cost+10% (or revenue share agreed, if higher)					
Construction service	18%			18%		
Valuation	Cost+10%					
Time of supply [@]	Date of OC/CC				POC	
Input tax credit	Allowed to Developer					JD share
Credit to Landowner [@]	Allowed for units resold before OC/CC				Allowed	NA
Unsold units (OC/CC) [#]	Credit reversal					NA
Units sales	8%	12%				NA

[§] Revenue share agreed is value of DR and payment deferment applies only to area sharing JDA (4/2018)

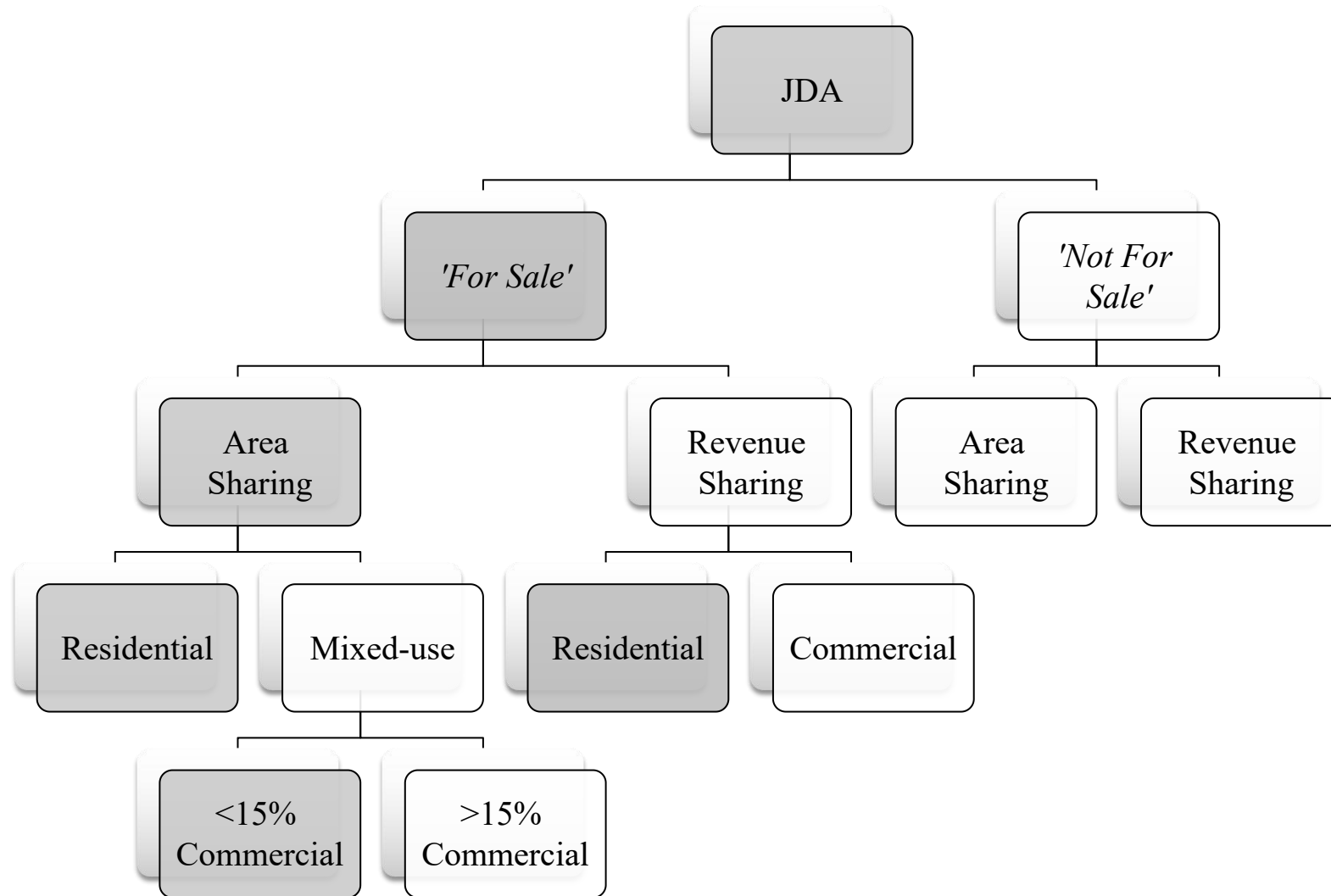
** Non-refundable deposited to be added to Cost base for valuation

[@] 'Switch' ToS (construction services) from date of OC/CC to POC, if resales by Landowner during construction

[#] Landowner's share of units are all considered sold; base for reversal is whole project credits



New Rate Regime (1 Apr 2019)





New Rate Regime (1 Apr 2019)

After Apr 2019 (and projects opted to new rate regime)

Description	Residential			Commercial		
	Affordable	Non-affordable	Plots	RREP	Complex	Leasing-property
Development rights	1%	5%	5%	5%	18%	18%
* area-sharing JDA	RCM, but exempt				RCM on date of OC	FCM
* revenue-sharing JDA	RCM, but exempt [§]					NA
Valuation **	Deemed value, launch price				Cost+10%	
Construction service	1%	5%	5%	5%	18%	18%
Valuation	Deemed value, launch price				Cost+10%	
Time of supply	Date of OC/CC				POC	
Input tax credit	Not allowed				Allowed	
9(4) on COGS	On CG, cement and 80% of annual COGS				NA	
Sub-contractor	12%	18%				
Credit to Landowner [Ⓔ]	Allowed for units resold before OC/CC				Allowed	NA
Unsold units (OC/CC) [#]	DR-RCM at 1%/5% of launch price				Credit reversal	
Unit sales	1%	5%	5%	5%	12%	NA

[§] RCM on share of revenue paid cannot be taxed once as DR-RCM on JDA date and again on construction services

** Non-refundable deposited included where DR-RCM on deemed value, else added to Cost base for valuation

[Ⓔ] Tax on launch price paid by Developer set-off with tax on actual sale price by Landowner

[#] Landowner's share of units are all considered sold, for DR-RCM on OC/CC



Notification 03/2019.....

Government of India
Ministry of Finance
(Department of Revenue)
Notification No. 03/2019-Central Tax (Rate)

New Delhi, the 29th March, 2019

G.S.R.....(E):- In exercise of the powers conferred by sub-sections (1), (3) and (4) of section 9, sub-section (1) of section 11, sub-section (5) of section 15, sub-section (1) of section 16 and section 148 of the Central Goods and Services Tax Act, 2017 (12 of 2017), the Central Government, on the recommendations of the Council, and on being satisfied that it is necessary in the public interest so to do, hereby makes the following further amendments in the notification of the Government of India, in the Ministry of Finance (Department of Revenue) No.11/2017- Central Tax (Rate), dated the 28th June, 2017, published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (i), vide number G.S.R. 690(E), dated the 28th June, 2017, namely:-

(ii) in the Table, -

(a) against serial number 3, for item (i), and the entries relating thereto in column (3), (4) and (5), the following items and entries shall be substituted, namely, -

Table		
(3)	(4)	(5)
exercised option to pay central tax on construction of apartments at the rates as specified for item (ie) or (if) below, as the case may be, in the manner prescribed therein, intended for sale to a buyer, wholly or partly, except where the entire consideration has been received after issuance of completion certificate, where required, by the competent authority or after its first occupation, whichever is earlier. (Provisions of paragraph 2 of this notification shall apply for valuation of this service)	3.75	Provided also that where a registered person (landowner- promoter) who transfers development right or FSI (including additional FSI) to a promoter (developer- promoter) against consideration, wholly or partly, in the form of construction of apartments, - (i) the developer- promoter shall pay tax on supply of construction of apartments to the landowner- promoter, and
(ib) Construction of commercial apartments (shops, offices, godowns etc.) by a promoter in an RREP which commences on or after 1 st April, 2019 or in an ongoing RREP in respect of which the promoter has not exercised option to pay central tax on construction of apartments at the rates as specified for item (ie) or (if) below, as the case may be, in the manner prescribed therein, intended for sale to a buyer, wholly or partly, except where the entire consideration has been received after issuance of completion certificate, where required, by the competent authority or after its first occupation, whichever is earlier. (Provisions of paragraph 2 of this notification shall apply for valuation of this service)	3.75	(ii) such landowner - promoter shall be eligible for credit of taxes charged from him by the developer promoter towards the supply of construction of apartments by developer- promoter to him, provided the landowner- promoter further supplies such apartments to his buyers before issuance of completion certificate or first occupation, whichever is earlier, and pays tax on the same which is not less than the amount of tax charged from him on construction of such apartments by the developer- promoter.
(ic) Construction of affordable residential apartments by a promoter in a Real Estate Project (herein after referred to as REP) other than RREP, which commences on or	0.75	Explanation - (i) "developer- promoter" is a promoter who constructs or converts a building into apartments or develops a plot for sale,

promoter.

Explanation. -
(i) "developer- promoter" is a promoter who constructs or converts a building into apartments or develops a plot for sale,

0.75



Valuation Review

Components	Base Cost	Dev. Cost	Total	GST on Dev. Works (land tax-free)			Risk of Additional Tax		
				Taxable Value #	Rate	Tax Amount	Adjusted Taxable Value @	Rate	Tax Amount
Land *	100	100	200	2170	0%	0	1000	0%	0
Dev. Works	0	300	300	330	18%	59.4	1500	18%	270
	100	400	500	2500		59.4	2500		270
				Input tax availed and utilized		-54	Less: Tax already paid		-59.4
Selling Price			2500	Net tax actually paid		5.4	Add: Credit used recovered		54
							Addl. tax burden		264.6
* Saleable area will be half; hence land cost will double				# Taxable value offered is cost + 10% with full credit			@ pro-rata adjustment of costs incurred to Selling Price		

NOTE: Tax at 5% on Rs.2500 will be Rs.125 and credit foregone on cost of Rs.300 will be Rs.54. Total GST on plot Rs.179.



RERA

- s.2(e) Apartmentmeans a separate and self contained part of an immovable property,, locatedon a plot of land, used or intended to be used for residential or commercial use
- s.2(zj) Project means REP
- s.2(zn) Real Estate Project meansthe development of land into plots,for the purpose of sellingand includes, the development works
- s.2(t) Development works means the external development workson immovable property
- s.2(w) External development works includes roads and road systems, landscaping, water supply, sewage and drainage (*sic*)and other work which may have to be executed in the periphery of, or outside, a project for its benefit,

Aspects to Consider

- ▶ Nature of development model employed
- ▶ Identify ‘intention to sell’, not by actual sales
- ▶ Extent of effect by RERA
- ▶ Guidance from Transfer of Property laws
- ▶ Treatment required by GST
- ▶ Sch II exhausts quest for ‘composite supply’
- ▶ Equity in ‘one third’, questionable abatement
- ▶ Investment property and settlement with units
- ▶ Effect of omission to report (non-business)
- ▶ Customer acceptance of GST treatment
- ▶ Transition projects, treatment
- ▶ Election of ‘on-going project’ (twin tests)
- ▶ Affordable or not, subject to redetermination
- ▶ Artificial contract-writing, subject to challenge
- ▶ Role of ‘deemed value’
- ▶ Relevance of FAQs (#22)
- ▶ Valuation distortion, subject to review
- ▶ Taxability of ‘plotted’ development
- ▶ Guidance to ‘old rate regime’
- ▶ Informed decision, not presumed exempt



Thank You

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