

## JB Nagar CPE Study Circle

- Subject** : Redevelopment - GST Implication on Developers, Land owners  
Society & Members
- Date & Day** : 21<sup>st</sup> October, 2018, Sunday
- Venue** : Hotel Kohinoor Continental,  
Andheri-Kurla Road, JB Nagar,  
Andheri (E)
- Presented by** : CA Naresh Sheth



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1

## Scope of Presentation

- Scope of presentation is restricted to GST implications of:
- Transfer of development rights
  - Purchase/Sale of TDR
  - Leasehold land premium paid to CIDCO, etc
  - Joint development on area sharing basis
  - Joint development on revenue sharing basis
  - Society redevelopment – implications for developer, society and members
  - Slum Rehabilitation Development
  - Low cost houses in Affordable Housing projects

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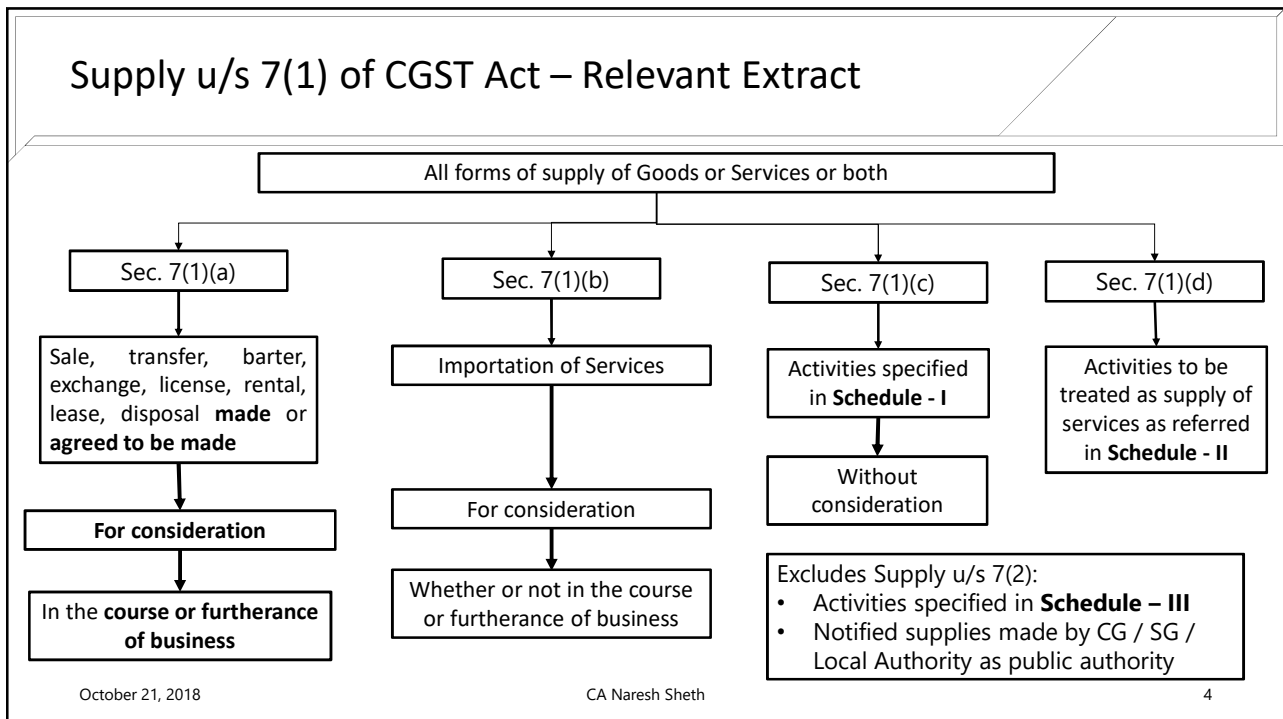
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2



## Transfer of Development rights / Sale of TDR - Implications

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## Charging Provision: Sec 9 of CGST Act and SGST Act

Levy

There shall be levied a tax called **CGST / SGST**

On

All **intra-state supplies** of **goods** or **services** or both

**Except**

On the supply of **alcoholic liquor for human consumption**

Value

**On the value** determined u/s 15 of CGST Act

Rate

At such rates as may be notified by CG in this behalf but **not exceeding 20%** on recommendation of council

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## Charging Provision: Sec 9 of CGST Act and SGST Act

Collected

Collected in manner prescribed

Payable by

**Taxable person**

Petroleum &  
petroleum  
products

Government (on recommendation of GST council) shall levy CGST / SGST on following w.e.f. such date as may be notified:

- Petroleum crude
- High speed diesel
- Motor spirit (Petrol)
- Natural gas
- Aviation turbine fuel

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6

## Taxability of FSI, development right, TDR etc.

- GST is leviable on supply of **Goods and/or Services**
- Under General Clauses Act 'immovable property' is defined to include land, benefits to arise out of land and things attached to the earth or permanently fastened to anything attached to the earth
- Development rights, FSI, TDR, etc. are immovable property as per above referred definition
- Immovable property is not 'goods' as defined u/s 2(52) of CGST Act
- 'Service' is defined u/s 2(102) of CGST Act to mean 'anything other than goods, money and securities'
- Immovable property, therefore, will be a 'service' as defined u/s 2(102) of CGST Act
- As per Clause 5 of Schedule III to CGST Act following are **neither supply of goods nor supply of service**:
  - Sale of land
  - Sale of building (other than under construction sale of flats/unit)

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7

## Taxability of FSI, development right, TDR etc.

- Whether development rights / TDR in land can be regarded as land per se?
  - If yes, sale of development rights, FSI, etc. will not be treated as supply liable to GST
  - If not, then development potential, FSI, etc. will be exposed to GST liability
- One view - Development rights, TDR, FSI, etc. are rights in the land and hence to be treated as land per se consequently not taxable
  - **Land Acquisition Act, 2013** defines "land" to include benefits to arise out of land, and things attached to the earth or permanently fastened to anything attached to the earth;
  - Section 2(14) of **MRTP Act, 1996** defines "land" to include benefits to arise out of land, and things attached to the earth or permanently fastened to anything attached to the earth;
  - Supreme court in case of **Safiya Bee vs Mohd. Vajanath Hussain** held that land includes right in or over land and benefits arising out of land **[2011 2 SCC 94]**
  - Constitutional challenge in taxing land related rights [entry 18 of State List in Seventh Schedule to the Constitution]

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8

## Taxability of FSI, development right, TDR etc.

- Other strong view - Development rights, TDR, FSI, etc. are not land per se and hence liable to GST at 18%
  - Under service tax, "immovable property" was excluded from definition of service. While GST excludes "land" **only** from definition of supply
  - Term 'land' is neither defined under GST law nor under General Clauses Act
  - Definition under other Acts cannot be adopted in absence of specific reference in GST Act
  - Supreme court decision was in some different context and hence may not apply in context of GST
  - Rights in land is not land per se
  - Development rights is it license to occupy land and hence a service as per Clause 2(a) of Schedule II?
  - Notification No. 4/2018 – Central Tax dated 25.01.2018 defers date of payment of GST on development right under area sharing arrangement. This implies the legislative intent to tax development rights, TDR, FSI, etc.

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9

## Taxability of FSI, development right, TDR etc.

- If development rights are not transferred in course of or furtherance business, one may take a position that it is not liable to GST
- If development rights are transferred in course of or furtherance of business and one decides to take conservative position, same would be liable to GST
- Time of Supply is usually a point of time when development rights are transferred irrevocably
- Tax would be on market value of development rights i.e. reckoner value or stamp duty valuation
- Applicable tax rate will be 18% under HSN code 999799 (Other services nowhere else classified)
- Many developers / builders have taken a conservative position of treating transfer of such rights as taxable for following reasons:
  - Availability of input tax credit makes it tax neutral (though it may create some liquidity issues)
  - To avoid the hassles and cost of long drawn litigation

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10



## Leasehold Land Premium - Implications

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## Taxability of Leasehold Land

- Whether long term lease of land is a “service” liable to GST even when stamp duty is paid thereon?
- Clause 2(a) of Schedule II provides that following are **supply of services**:
 

• Lease	• Tenancy	}	To occupy land
• Easement	• License		
- Entry no. 41 of Notification no. 12/2017 – CT(R) **exempts** upfront premium / salami paid for industrial plot to government or local / public authority. No such exemption is provided for residential plots.
- Bombay High Court decision in the case of **Builders Association of Navi Mumbai & Neelsidhi Realities (2018-TIOL-24-HC-MUM-GST)** held that:
  - any lease of land is a supply of service; and
  - activities performed by sovereign or public authorities under the provisions of law, which are in the nature of statutory obligations are not excluded from the purview of GST
- SLP is filed in Supreme Court against above referred decision. It is yet to be admitted.

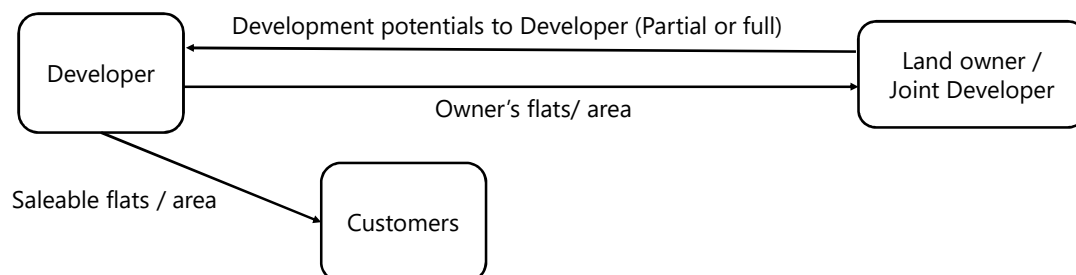


JDA for Area Sharing  
- Implications

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## Tax implications - JDA for Area Sharing

- **Land Owner transfers certain percentage of development potential to Developer and retains balance potential or transfers entire development potential**



## Tax implications - JDA for Area Sharing

### ➤ **Taxability of development rights in the hands of owner:**

- Refer earlier slides for leviability, time of supply, value and tax rate.
- Whether development rights are transferred by landlord in course or furtherance of business or otherwise?

### ➤ **Taxability of area allotted to Land Owner:**

- Supply includes all barter and exchanges
- Flats/ area allotted to land owner will be a taxable supply liable to GST where consideration is received in kind form of development potentials

### ➤ **Time of supply for area allotted to Land owner:**

- Receipt of development rights amounts to advance receipt of consideration in kind
- Hence, date when irrevocable rights are received will be time of supply
- Invoice to be issued by developer to owner on receipt of development right

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15

## Tax implications - JDA for Area Sharing

### ➤ **Implications of Notification No. 4/2018 – CT (Rate) dated 25.01.2018:**

- This Notification applies to Area sharing and not Revenue sharing
- This Notification applies only when both the parties are registered under GST
- Liability to pay tax on development right as well as construction service shall arise at the time when the builder/developer **transfers possession** or the **right in the constructed complex, building or civil structure**, to the person supplying the development rights by entering into a **conveyance deed or similar instrument (for example allotment letter)**
- This notification does not defer time of supply. It only defers liability to pay the tax on development right and construction services

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16



## Tax implications - JDA for Area Sharing

- Valuation to be done as per GST Valuation Rules (Refer next slide)
- Taxable @ 18% or 12% depending on whether FSI (in respect of owners area) is retained by land owner or not
- Does Vasantha Green Projects **[2018-TIOL-1611-CESTAT-HYD]** hold good for non-taxability of owners share?
- **Taxability of saleable flats:**
  - Taxable on transaction value under construction service category @12% (or 8% for low cost housing)

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17

## Valuation – Consideration not wholly in money

To be valued in following manner in chronological order of Rules:

**Rule 27(a)** - Open market value of Supply

**Rule 27(b)** - Open market value not available then

**Value** = Money consideration + money equivalent of non-monetary consideration

**Rule 27(c)** - Not determinable in clause (a) and (b) then

Value will be supply of goods or services or both of **like kind and quality**

**Rule 27(d)** - Not determinable in clause (a),(b) and (c) then

**Value** = Money consideration + money equivalent of non-monetary consideration as determined by application of Rule 30 or Rule 31

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18

## Valuation - Consideration not wholly in money

### Rule 30: Cost based Valuation

Where value of supply cannot be determined under Rules 1 to 3:

Value shall be **110% of** cost of provision of services

### Rule 31: Residuary Rule:

Where value of supply cannot be determined under Rules 1 to 4:

Value to be determined using **reasonable means** consistent with principles and general provisions of section 15 and these Rules

Supplier of services has option to disregard Rule 4 and opt for Rule 5

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19



JDA for Revenue Sharing  
- Implications

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20

## Tax implication - JDA for Revenue Sharing

- **Land owner is getting revenue share as a deferred consideration for transfer of development right**
- **Taxability of development rights in the hands of owner:**
  - Refer earlier slides
  - Whether development rights are transferred by landlord in course or furtherance of business or otherwise?
- **Point of taxation:**
  - One view – It arises when development rights are irrevocably transferred to the developer
  - Second view – It arises when land owner gets his revenue share
- **Value of transfer of development rights**
  - In case of first view above - Actual consideration will not be known at this point and stamp duty valuation might apply. What is to be done subsequently when actual realization is more or less than stamp duty valuation?
  - In case of second view – Actual realisation
- **Position of Input Tax Credit**

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21



Society  
redevelopment –  
Implications for  
developer, society  
and members

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22

## Redevelopment of society – Tax Implications

### ➤ **Taxability of rehab flats:**

- Supply includes all barter and exchanges
- Rehab flats allotted to society members are taxable supply liable to GST where consideration is received in kind in form of development potentials
- Can developer contend non-taxability on rehab flats based on decision of Vasantha Green Projects?
- Time of supply:
  - Receipt of development rights amounts to advance receipt of consideration in kind
  - Hence, date when irrevocable rights are received will be time of supply
- Notification no. 04/2018-CT(Rate) dated 25.01.2018 has deferred the liability to pay tax on development rights and construction services till transfer of possession of flats or issue of allotment letter.
- Valuation to be done as per Valuation Rules
- Taxable under works contract service category @ 18%

### ➤ **Whether society is liable to GST on transfer of development rights?**

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23

## Redevelopment of society – Tax Implications

### ➤ **Whether allowances paid to members are liable to GST?**

#### ➤ Schedule II (5) (e) deems following to be supply of services:

- Agreeing to the obligation :
- To refrain from an act; or
- To tolerate an act or a situation; or
- To do an act

#### ➤ Advance ruling in case of Zaver Shankarlal Bhanushali **[2018-TIOL-84-AAR-GST]**

- Whether above ruling can be applied in case where allowances are paid to members occupying residential flats?
- Most of the members will be within threshold limit of Rs. 20 lakhs and hence not liable to GST
- Whether builder / developer should bother for this issue on or after 13<sup>th</sup> October, 2017 as reverse charge in respect of procurement from unregistered dealers is not applicable?

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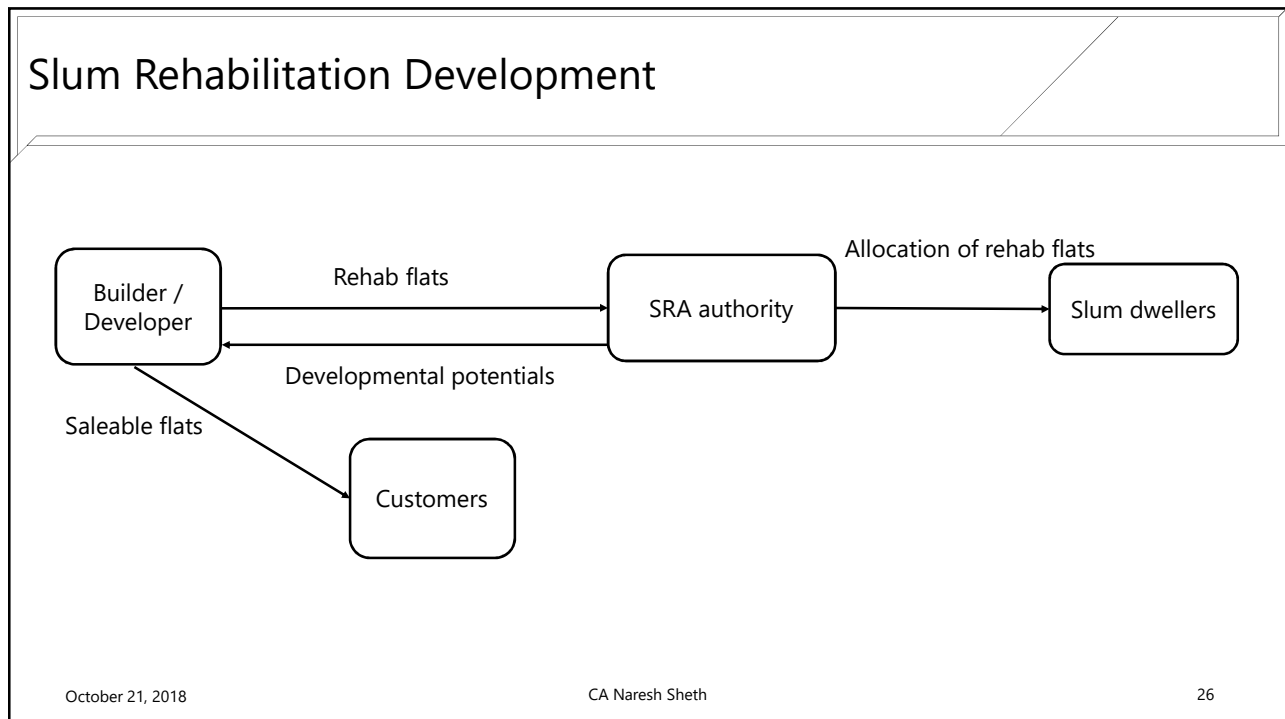
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24



Slum Rehabilitation Development - Implications

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## Slum Rehabilitation Development- Post GST

### ➤ Taxability of rehab flats:

- supply includes all barter and exchanges
- Valuation to be done as per Valuation Rules
- Taxable as works contract service
- Tax rate – Whether 18% or 12%? Whether benefit of Notification No. 1/2018 dated 25.01.2018 for Low Cost Housing project can be claimed?
- Whether tax paid on SRA services can be claimed as input tax credit and whether set off can be claimed against tax payable on saleable flats?
- Can SRA construction fall under following exemptions as per notification no. 12/2017-CGST (Rate) dated 28.06.2017:
  - Refer next slide for exemption notification

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27

## Slum Rehabilitation Development- Post GST

Serial No.	Description of service
3	<p><b>Pure services</b> (excluding works contract service or other composite supplies involving supply of any goods) provided <b>to</b> the Central Government, State Government or Union territory or local authority or a Governmental authority <b>by way of any activity in relation to any function</b> entrusted to a Panchayat under article 243G of the Constitution or in relation to any function <b>entrusted to a Municipality under article 243W of the Constitution.</b></p> <p>- Article 243W r.w. Schedule 12 includes slum improvement and upgradation</p>
Serial No.	Description of service
10	<p>Services provided by way of <b>pure labour contracts of construction</b>, erection, commissioning, installation, completion, fitting out, repair, maintenance, renovation, or alteration of a civil structure or any other original works pertaining to the beneficiary-led individual house construction or enhancement under the <b>Housing for All (Urban) Mission or Pradhan Mantri Awas Yojana.</b></p>

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28

## GST Rates applicable on Construction services provided to the SRA

<b>SRA Construction</b>	<b>Period</b>	<b>Main Contractor</b>	<b>Sub - Contractor</b>
Entry 12(a) of Mega Exemption Notification	Upto 31.03.2015	Exempt	Exempt
Entry 12(A) of Mega Exemption	01.04.2015 to 30.06.2017 (for contracts entered prior 01.03.2015)	Exempt	Exempt
Entry 3 of 11/2017 – CT(R) dated 28.06.2017	01.07.2017 to 20.09.2017	18%	18%
Entry 3(vi)(a) of 11/2017 – CT(R) amended vide 24/2017 – CT(R) dated 21.09.2017	21.09.2017 to 24.01.2018	12%	18%
Entry 3(vi)(a), Entry 3(ix) inserted vide Notification no. 01/2018 – CT(R) dated 25.01.2018	25.01.2018 to till date	12%	12%

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29



Low cost houses in Affordable Housing Projects - Implications

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30

## Taxability of Low Cost Houses in Affordable Housing Projects

- Notification No. 1/2018 – CT(Rate) dated 25<sup>th</sup> January 2018 prescribes effective rate of 8% in respect of **Low Cost Houses which are :**
  - Up to a carpet area of **60 sq. m.**
  - In a **Affordable Housing Project** given Infrastructure status vide Notification no F. No. 13/6/2009-INF dated 30.03.2017 issued by Ministry of Finance, Department of Economic Affairs.
- Affordable Housing Project is defined under Notification F. No. 13/6/2009-INF dated 30.03.2017 to mean a housing project using at least 50% of the Floor Area Ratio (FAR)/Floor Space Index (FSI) for dwelling units with carpet area of not more than 60 sq. m.
- What does term “**project**” means:
  - Layout plan
  - Approved plan by corporation or local authority
  - Project as registered under RERA

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31

## Taxability of Low Cost Houses in Affordable Housing Projects

- The Carpet area is to be taken as per sec. 2(k) of RERA Act, 2016 (net usable floor area including area covered by internal wall but excluding area covered by external wall, service shafts, balcony and veranda)
- There is no stipulation that the project has to be under PMAY(U) or should be in the partnership with Government.
- No prior approval, intimation or registration with any authorities is stipulated in the law
- The term ‘Low cost Houses’ is neither defined in notification nor in GST law. It seems houses not exceeding 60 sq. m. is regarded as “low cost houses”
- If the project falls under the definition of ‘Affordable housing project’, all residential units having a carpet area upto 60 sq. m. (equivalent to 645.83 sq. feet) will be taxed at 8%
- This exemption is available **irrespective of sale value of the flat**

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32



## Taxability of Low Cost Houses in Affordable Housing Projects

- Residential units having RERA carpet area exceeding 60 sq. m. (equivalent to 645.83 sq. feet) in the same project will be taxed at 12%
- Commercial units in same project will be taxed at 12% even if carpet area is below 60 sq. m.
- Demand raised on or after **25.01.2018** are entitled to such concessional rate.
- Can credit be taken of excess tax payment of 4% on demand letters raised on or after 25.01.2018?
- What is the tax implications for subcontractor working for affordable housing project?

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33

**THANK YOU**  
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34