

GST – REAL ESTATE

[18TH MAY 2024]

CA PRITAM MAHURE AND ASSOCIATES

GST – 1.07.2017!



ONE NATION, ONE TAX

Rates!

Dates!

REAL TIME!

Upload E-way Bills!

Upload E-invoices!

Re-conciliations!

Data Set I

GSTR-1

GSTR-3B

GSTR-2A

Annual Return

E-way Bill

Data Set II

GSTR-3B

GSTR-1

GSTR-2A

Financial Statement - Income

Financial Statement - Expenses

Financial Statement - Credit

Income Tax Return

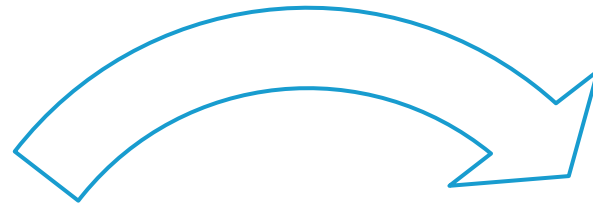
Income Tax Audit

Income Tax TDS

GST – ‘EoDB’!



Name changer!

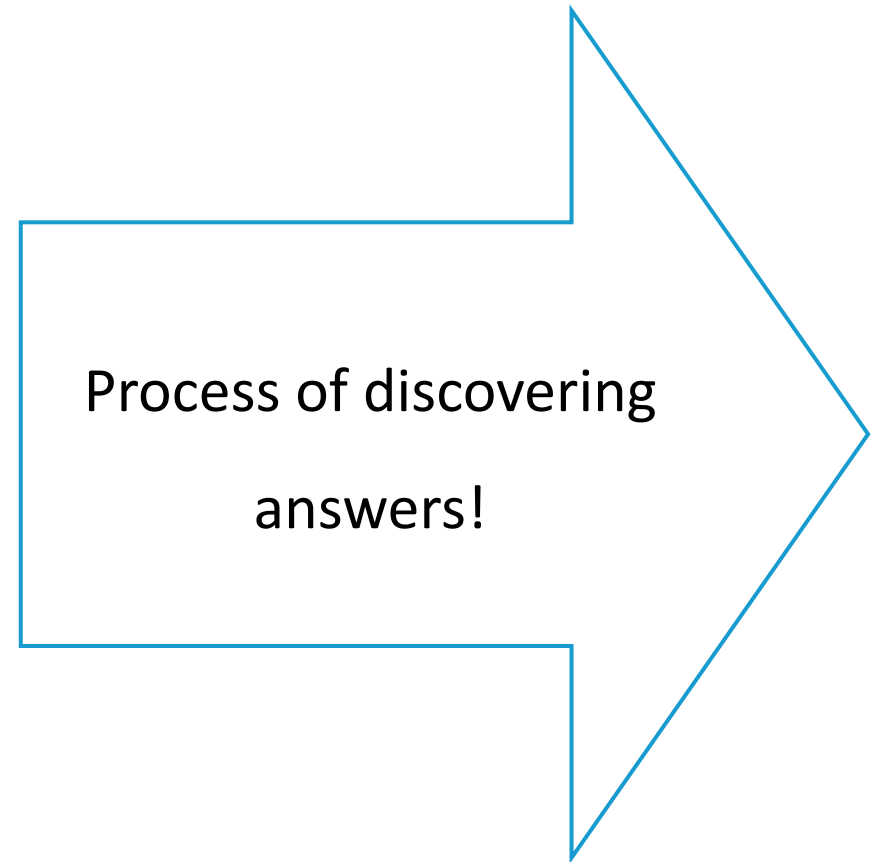
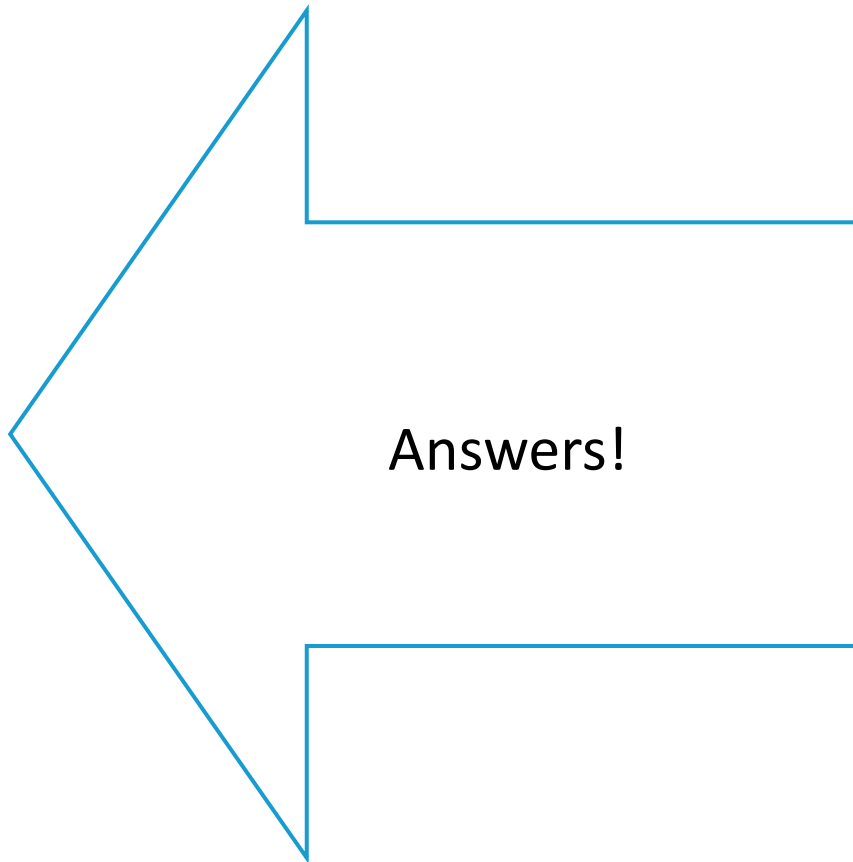


CBIC

CBEC!



Objective!



Are there any definite answers?

Sales Tax/ Excise

- 80 + years



ST

- 29 years



GST

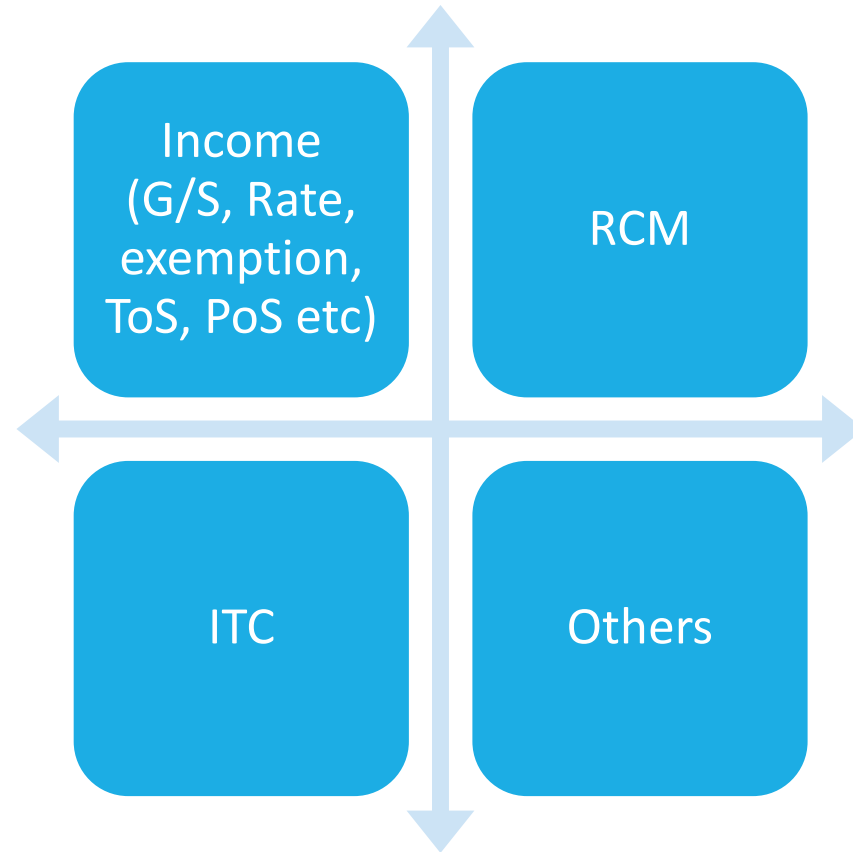
- ~7 yrs



everydayloveart.com

Nidhi Chanani

How many questions?



Issues!

Its

- First time!
- Nth time!

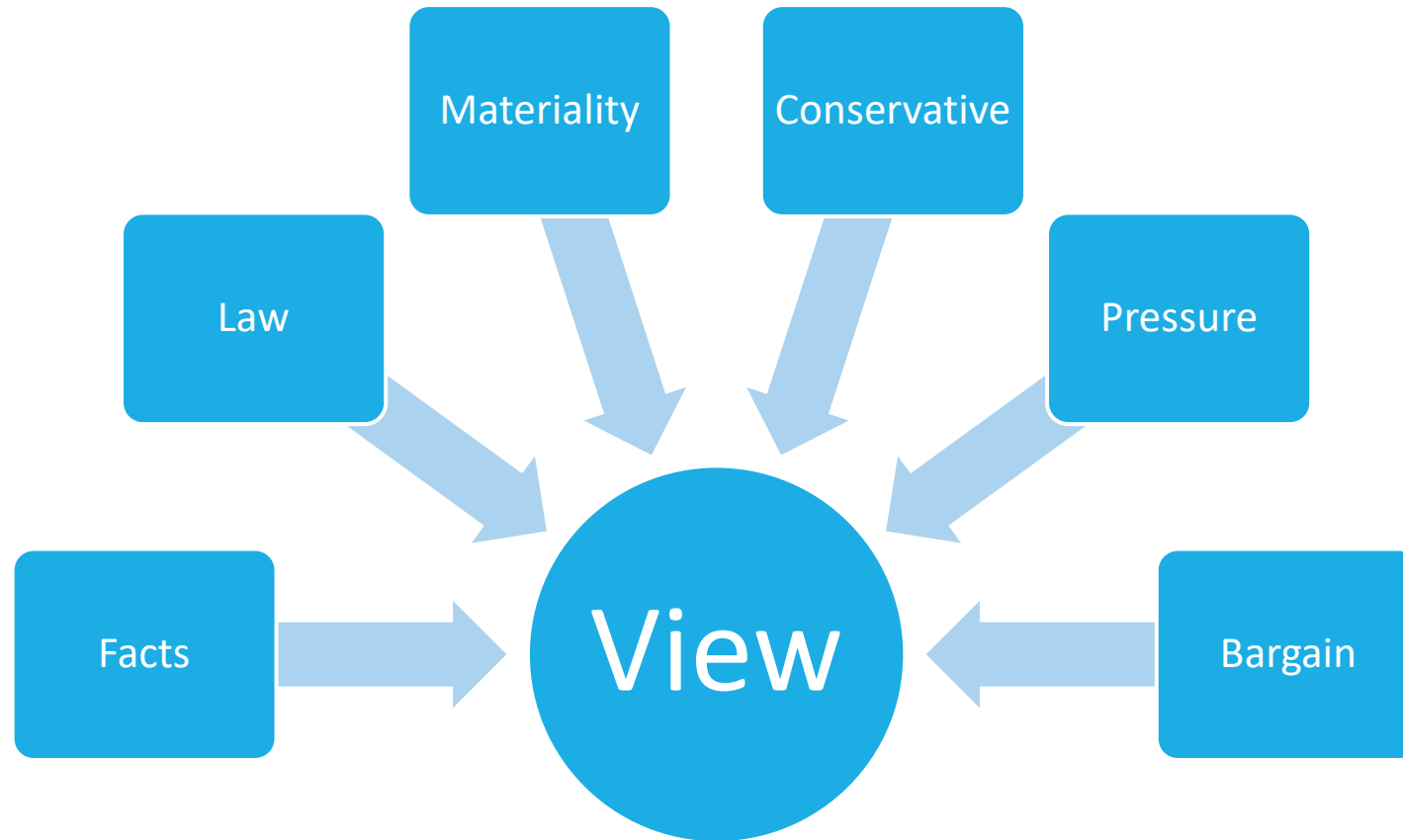
At stake!

- Revenue
- Expense

Approach

- Facts
- Law

How many answers?



Real Estate – Typical issues!

VAT or ST or
GST?

ToS

JDA

- Computation

ITC

- Reversal
- After completion

Affordable

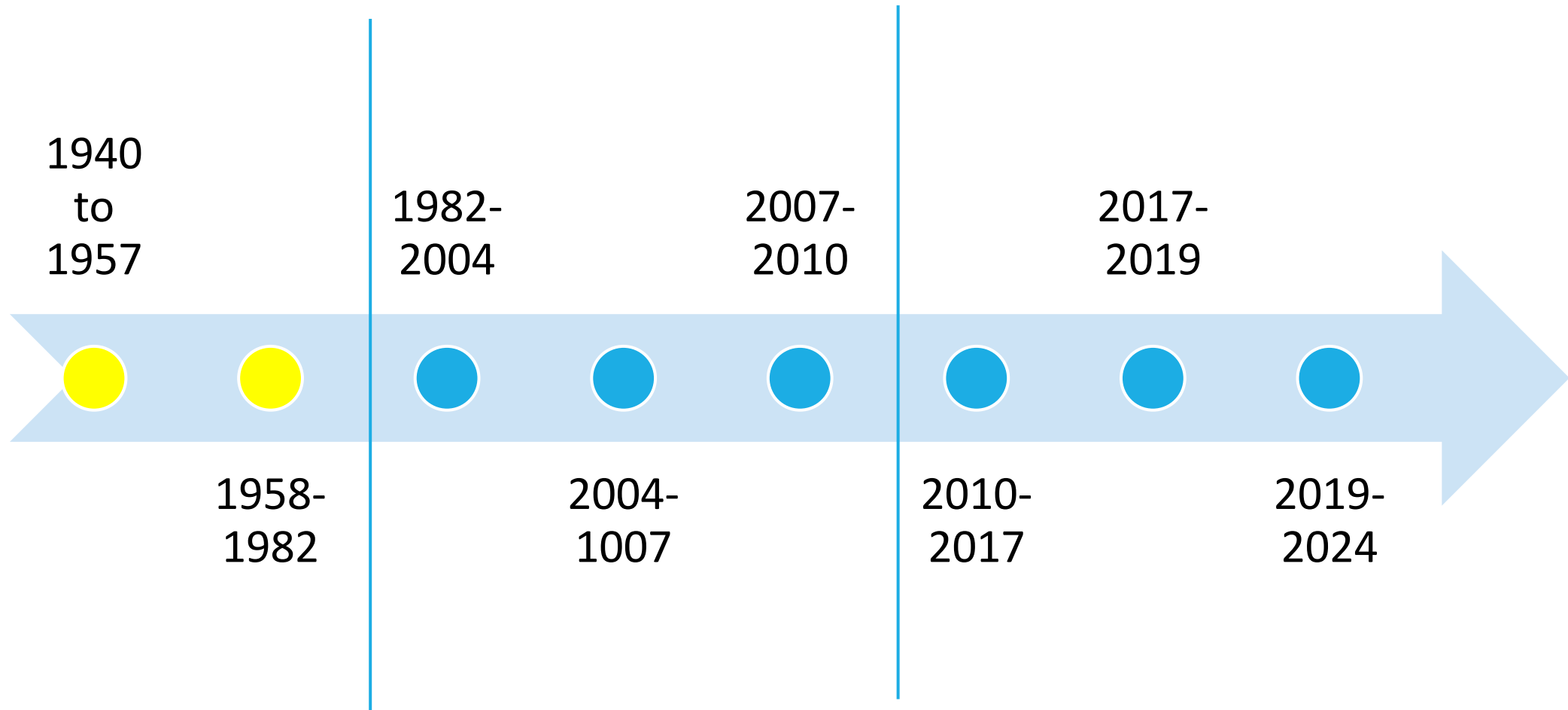
RREP and REP

APB

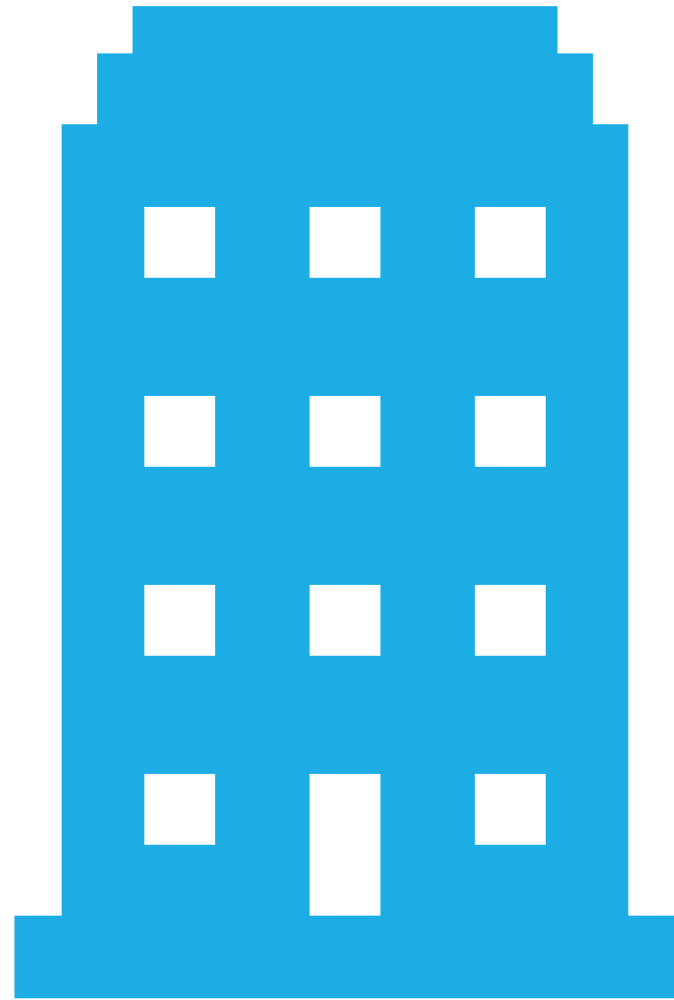
Must Know!

Act	Rule	Not. No.	Circulars	Cases
<ul style="list-style-type: none">• Section 9• 7 (1A)• Sch. II – 5 (b) and 6 (a)• Sec. 11 – GST @5% w/o ITC• Sec. 13/14• Sec. 15• Sec. 16/ 17• Sec. 34• Sec. 140 (6)• Sec. 171	<ul style="list-style-type: none">• Rule 28• Rule 30• Rule 42/43	<ul style="list-style-type: none">• 4/2018• 3/2019• 4/2019• 5/2019• 6/2019• 7/2019• 8/2019• ROD 4/2019	<ul style="list-style-type: none">• <u>Cir. No. 151 /2 /2012 (10.02.2012)</u>• <u>Cir. No. 354/2015 (20.01.2016)</u>• FAQ 7.05.2019• FAQ 14.05.2019	<ul style="list-style-type: none">• Bala Bhaskar• Builders Asso.• Vasantha Green• DLF• Alembic• Suresh Bansal• Ethics Infra• Sadoday Builders• Chheda Housing• Mormugao Port

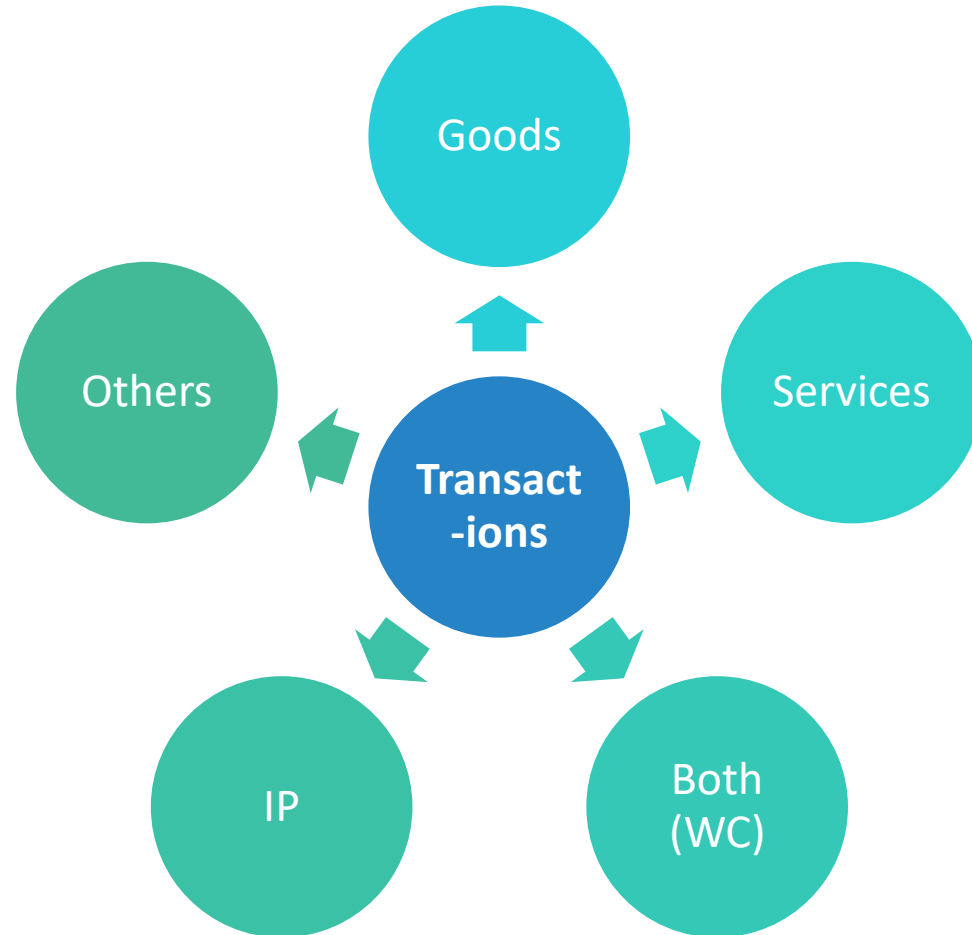
Baskets!



MEANING OF WC



WHAT IS WC?



COI - LEGISLATIVE ENTRIES!

Col

(Before 6th Amend. in 1956)

- Sch. VII
 - List II
 - Entry 54 *“Taxes on the **sale** or purchase of **‘goods’** other than newspapers”*

Col

(After 6th Amend. after 1956)

- Sch. VII
 - List II
 - Entry 54 *“Taxes on the **sale** or purchase of **‘goods’** other than newspapers, subject to the provisions of entry 92A of List I”*

Two views!

Gannon Dunkerley & Co.
[AIR 1954 Mad 130]

33. It is clear from the foregoing discussion that there is **no element of sale** of the materials in a building contract and that the **contract is one** and entire and is **indivisible**.

...the amendments introduced are **ultra vires** of the **Provincial Legislature** as they had **no power to tax transactions which are not sales of goods**.

Bhuramal And Ors.
[AIR 1957 Raj 104]

It is true that the **legislature could not, under the guise of entry 54, tax a sale of services** as a sale of goods; **but it can**, in our opinion, **tax** a genuine transaction of **sale of goods whatever form it takes**.

The reasoning in the Madras case does not take into account the fundamental fact that the Legislature could select out of a **composite transaction** the actual sale of materials and tax such sale

What SC held?

Gannon
Dunkerley &
Co.
[1958 AIR 560]

- **Construction contracts ... were agreements to execute works ..., and **were not contracts for sale** of the materials used therein, and that further, they were **entire and indivisible** and **could not be broken up** into a contract for sale of materials and a contract for payment for work done**

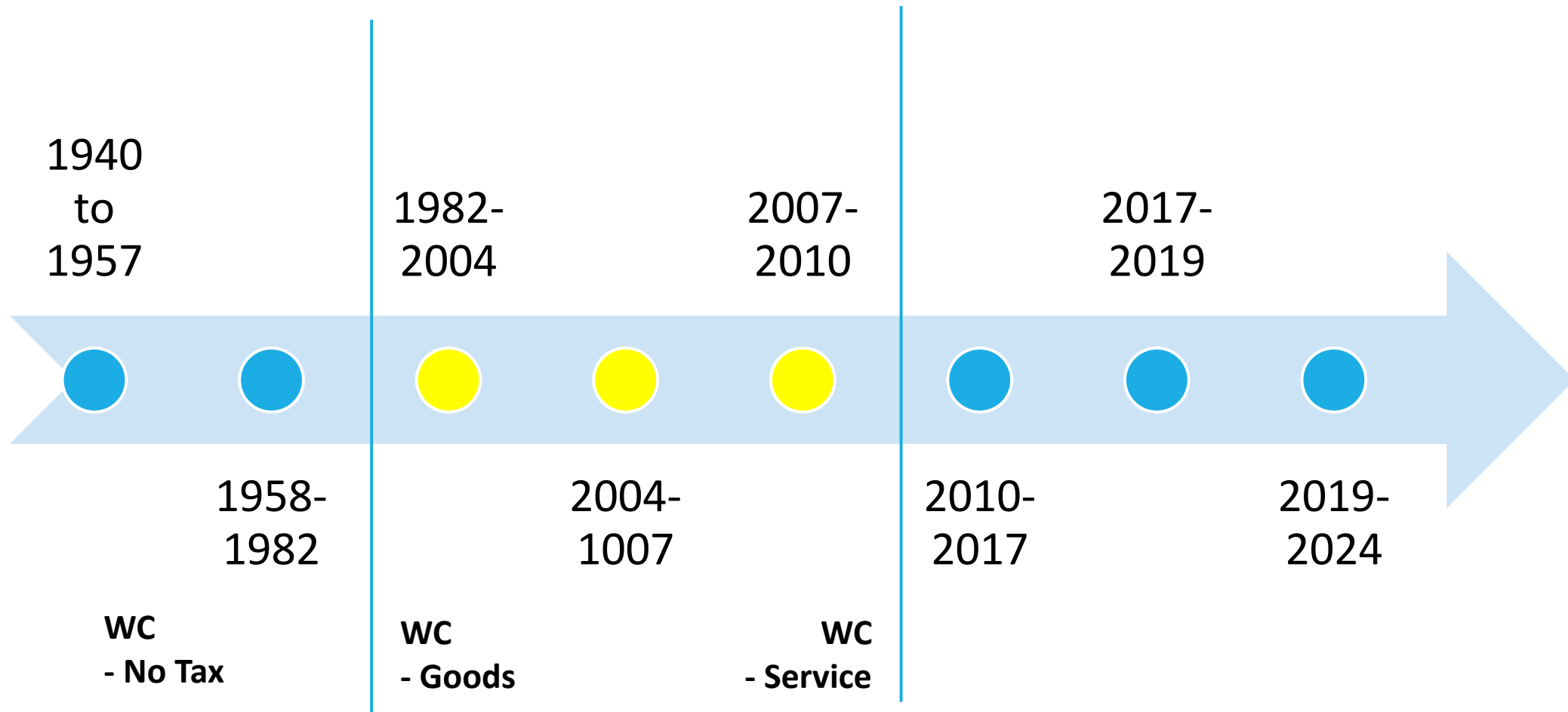
Article 366 of COI!

(29A) "tax on the sale or purchase of **goods**" includes-

...

(b) a tax on the **transfer of property** in goods (whether as goods or in some **other form**) involved in the execution of a works contract;

Baskets!



Construction related services!

Commercial construction

[Sec. 65 (105) (zzq) - 10.09.2004]

- “Taxable service” means any **service** provided or to be provided to any person, by any other person, in relation to **commercial or industrial construction** and the term “service provider” shall be construed accordingly.

Construction of Complex Service

[Sec. 65 (105) (zzzh) - 16.06.2005]

- “Taxable service” means any **service** provided or to be provided to any person, by any other person, in relation to **construction of complex**

Works contract service

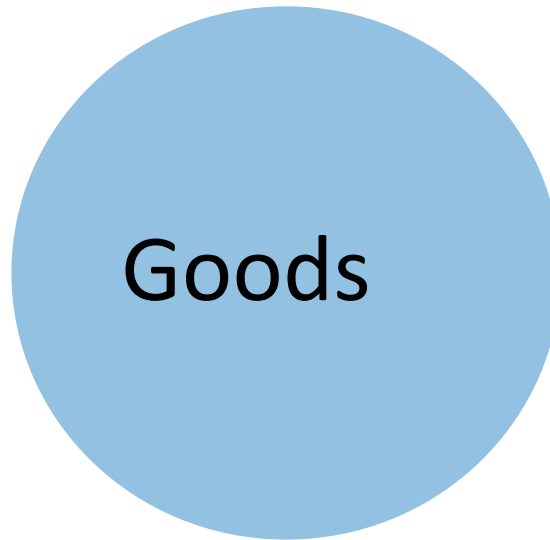
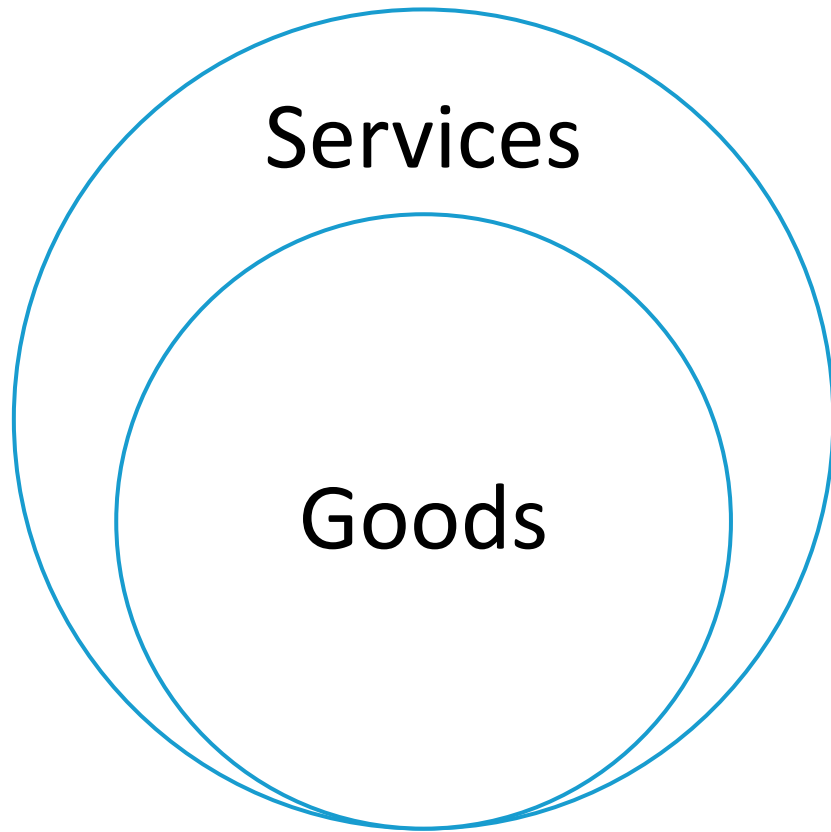
[Sec. 65 (105) (zzzza) - 1.06.2007]

- “Taxable service” means any **service** provided or to be provided to any person, by any other person in relation to the **execution of a works contract**, excluding works contract in respect of roads, airports, railways, transport terminals, bridges, tunnels and dams and the term “service provider” shall be construed accordingly.

Larsen & Toubro Ltd. — 2015 (39) S.T.R. 913 (S.C.)

- **Only w.e.f. 1 June, 2007 composite works contract covered** [i.e. only pure services covered under CCS]

Effect of Art. 366 (29A) on 'Works Contract'!

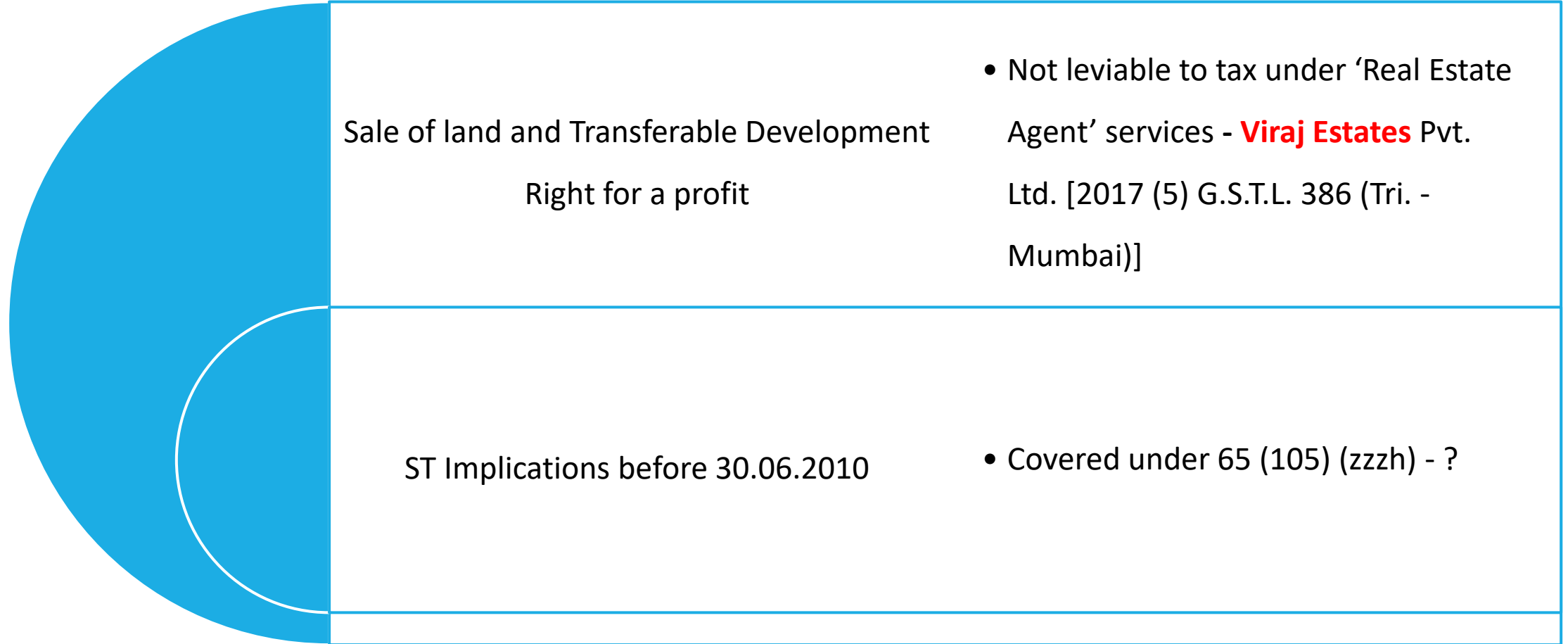


K. RAHEJA DEVELOPMENT CORPORATION [2006 (3) S.T.R. 337 (S.C.)]

Thus the Appellants are **undertaking to build as developers for the prospective purchaser**. Such construction/development is to be on payment of a price in **various instalments** set out in the Agreement. ... **Therefore**, it remains a **works contract** within the meaning of the term as defined under the said Act.

It must be clarified that if the **agreement** is entered into **after** the flat or unit is already constructed, then there would be **no works contract**. But so long as the agreement is entered into **before** the construction is complete it would be a works contract.

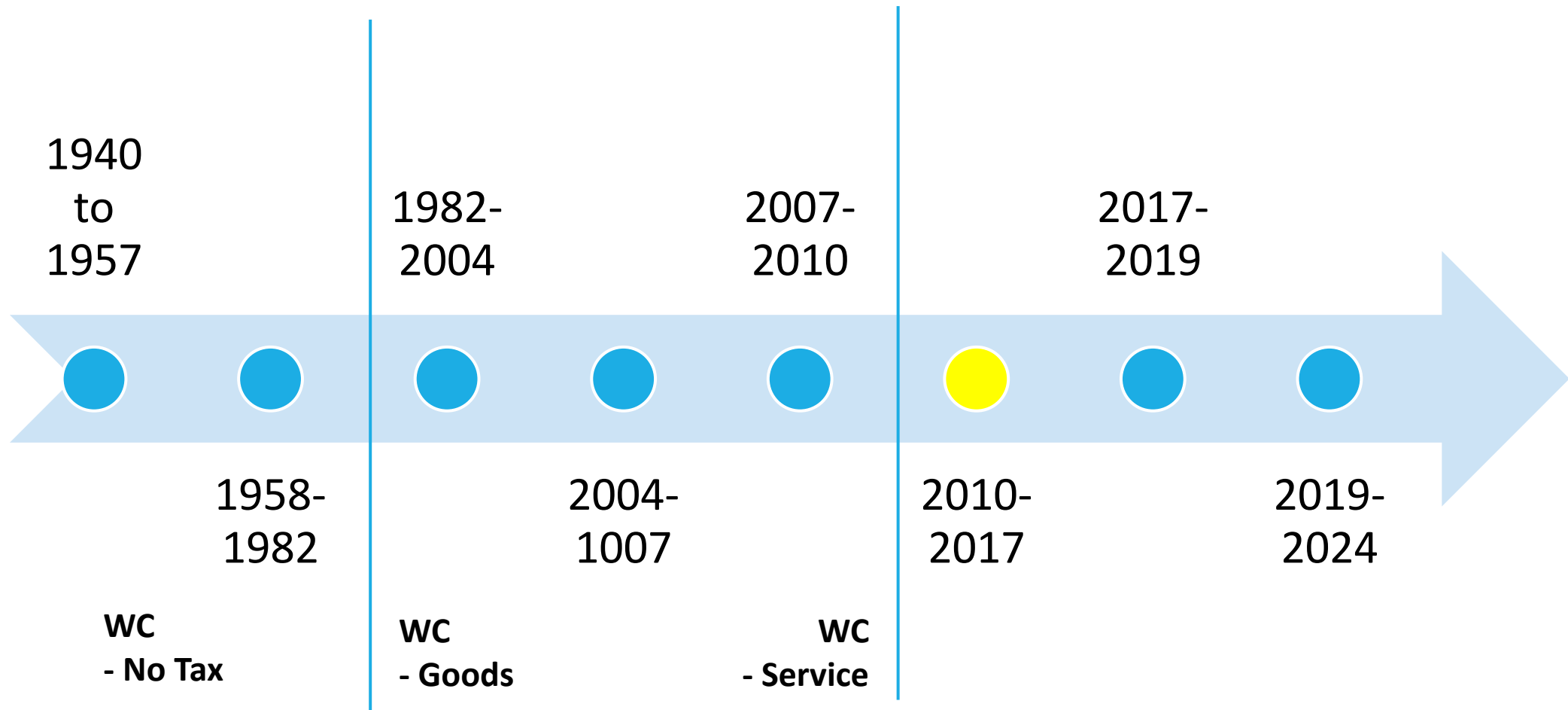
Landowner



Construction of Complex Service [Section 65 (105) (zzzh)]

- Section 65(105)(zzzh)
 - *“Taxable service” means any service provided or to be provided to any person, by any other person, in relation to construction of complex.*
- **From 1st July 2010 an Explanation was added**
 - *“Explanation: For the purposes of this sub-clause, construction of a complex which is **intended for sale**, wholly or partly, **by a builder** or any person authorised by the builder before, during or after construction (**except** in cases for which **no sum** is received from or on behalf of the prospective buyer by the builder or a person authorised by the builder **before the grant of completion certificate** by the authority competent to issue such certificate under any law for the time being in force) shall be deemed to be service provided **by the builder to the buyer.**”*

Baskets!



JDA

Then : Sale of Land

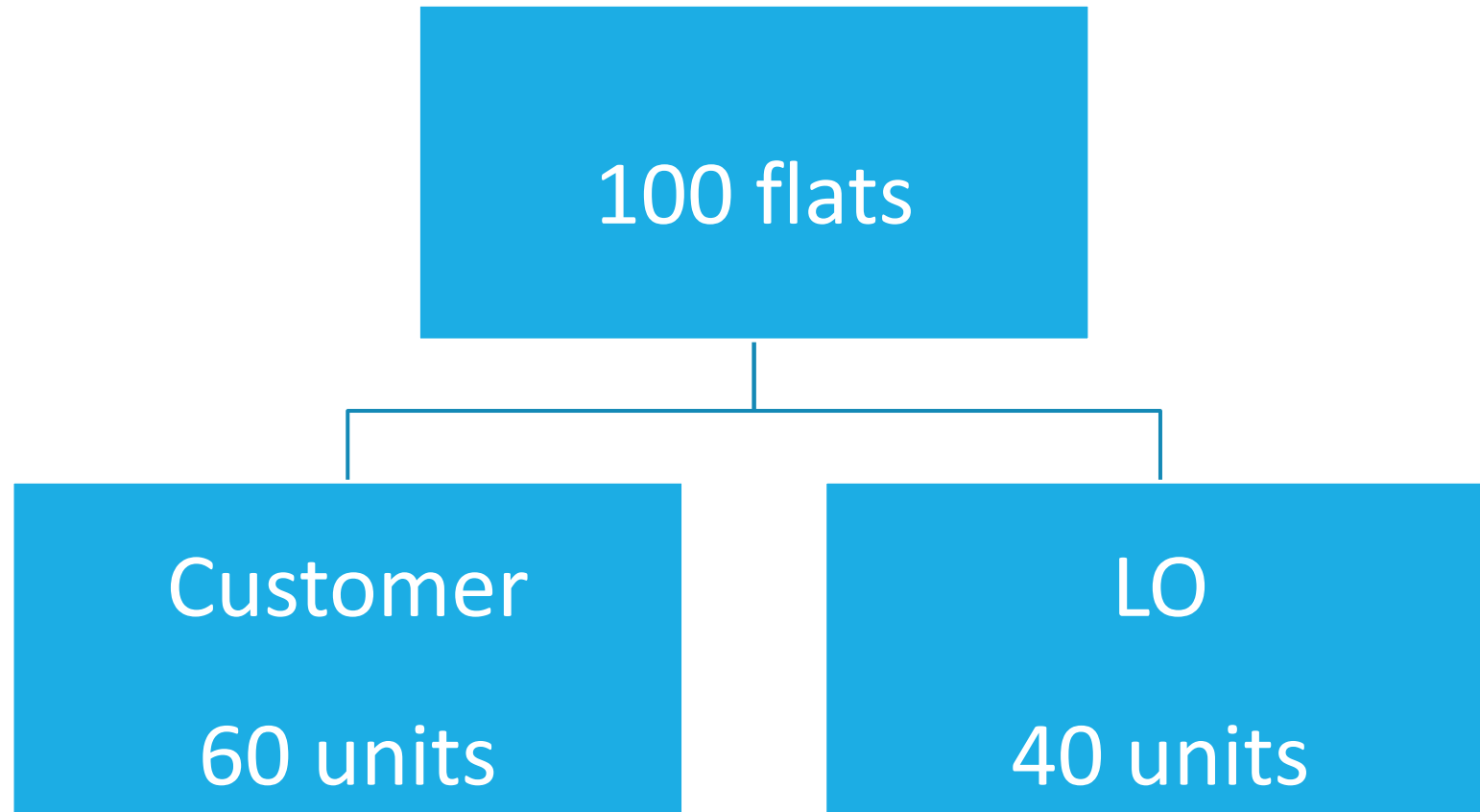
SR	Particulars	Transaction	Consideration
1.	Landowner	Sale of land	In cash/ bank
2.	Developer	Purchase of Land	In cash/ bank

Schedule III - ACTIVITIES OR TRANSACTIONS WHICH SHALL BE TREATED NEITHER AS A SUPPLY OF GOODS NOR A SUPPLY OF SERVICES	'Service' Section 65B (44)
5. Sale of land and, subject to clause (b) of paragraph 5 of Schedule II, sale of building	But shall not include .. (a) an activity which constitutes merely,- (i) a transfer of title in goods or immovable property , ...

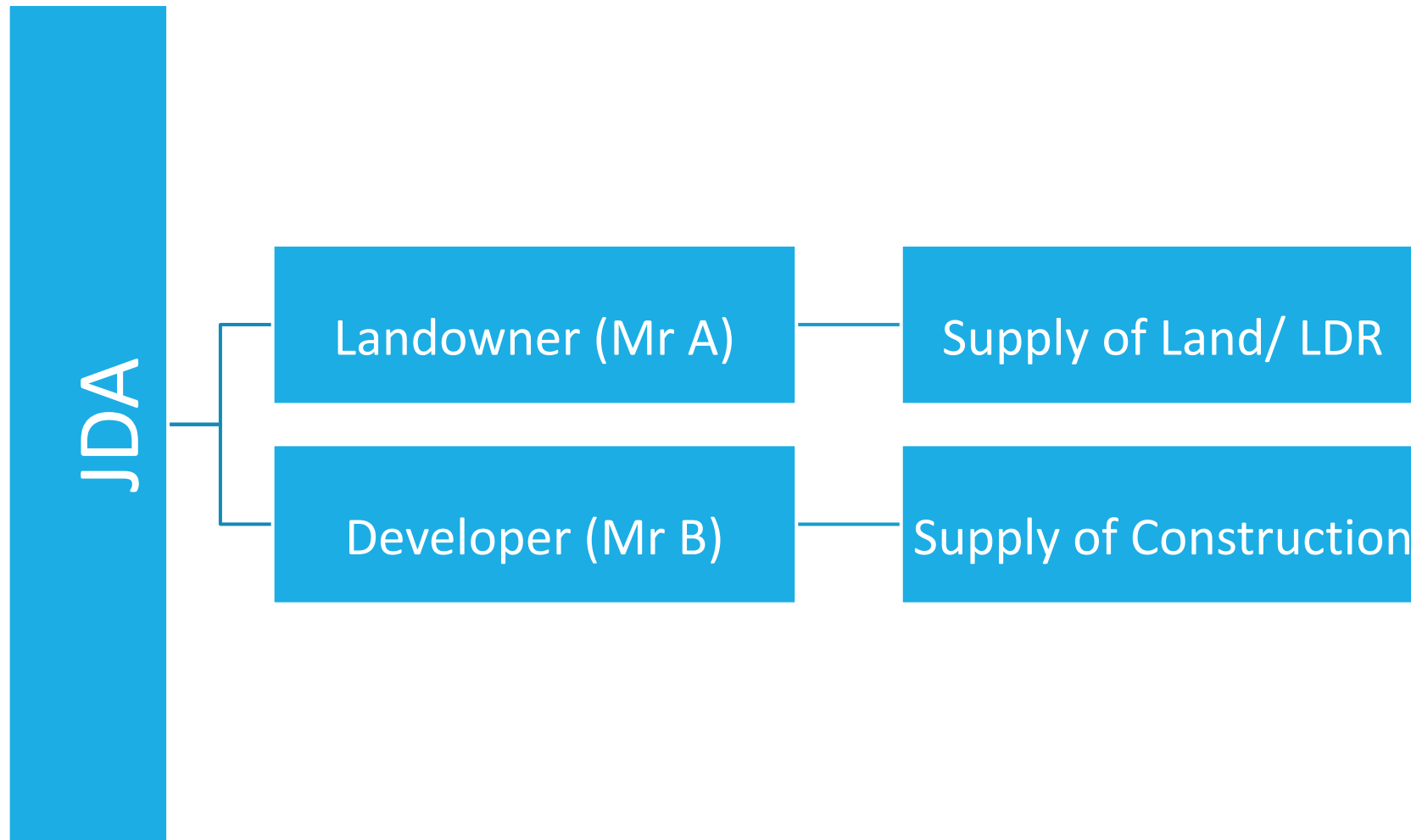
Now : JDA



Eg.



Implications



TDR – What is it?



'Transfer' of
Development Rights



'Transferrable'
Development Rights

Developer

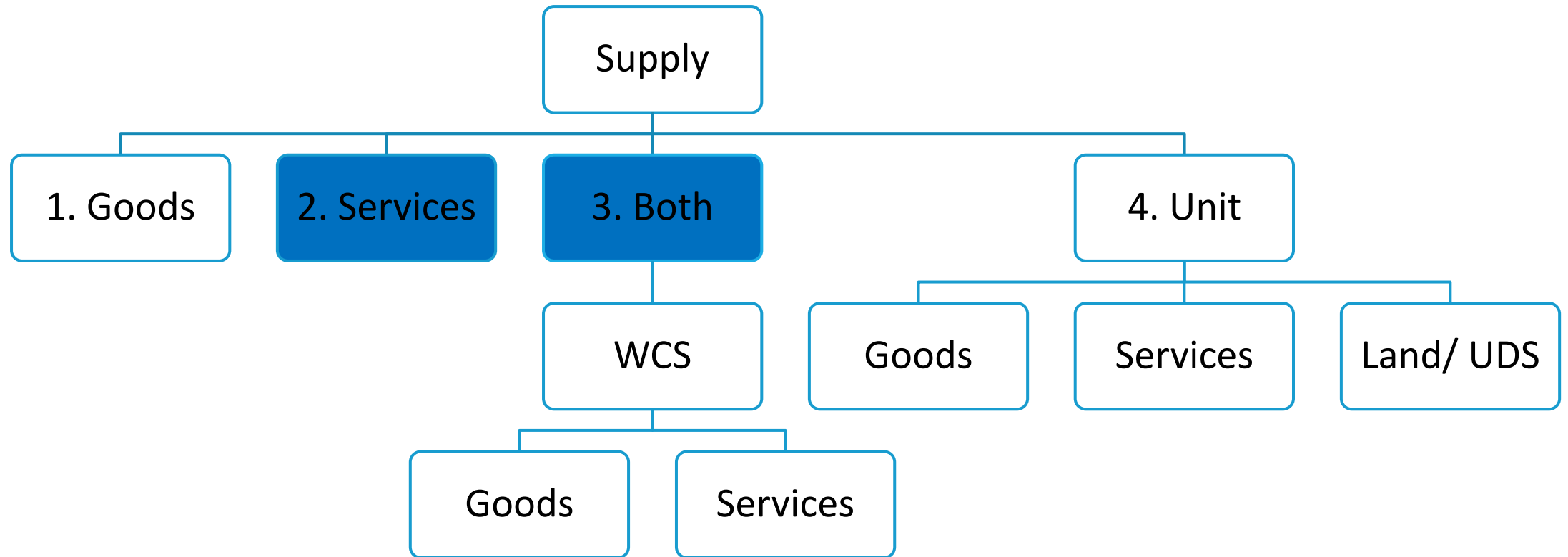
Qua Customers

- 'Construction of Complex service'

Qua Landowner

- 'Works Contract Service'

Developer – WC or Construction of Complex?



N. Bala Baskar

[2016 (43) S.T.R. 161 (Mad.) - Maintained by SC]

21. We have carefully considered the above submissions.

*22. At the outset, we have to point out that the **agreement for development** entered into between the petitioner and his siblings with the fifth respondent, in whatever manner worded, is an agreement for the construction of about 15,600 sq.ft of super built up area in the land that belongs to the petitioner and his siblings. It may be true that **after construction, the parties may exchange the constructed area for the undivided share of the land.** But, the agreement can also be looked at from another angle.*

N. Bala Baskar

[2016 (43) S.T.R. 161 (Mad.) - Maintained by SC]

- 23. It is **also possible for the Department to contend that a person, who is the owner of the land, had engaged a contractor to put up a construction for themselves upto a particular limit. Since the cost of construction **could not be paid** by the owner **in the form of cash**, they agreed to **exchange the undivided share of the land with the contractor**. If viewed from that angle, what the **developer had done is actually the service of construction**. Therefore, it is not an easy proposition that it was a transfer of immovable property by way of sale or exchange.”**

N. Bala Baskar

[2016 (43) S.T.R. 161 (Mad.) - *Maintained by SC*]

Possible for the
Department to contend
that Landowner engaged a
'contractor'

Cost of 'construction' paid
in the form of undivided
share of the land

Developer has actually
provided service of
'construction'

What if Landowner sales allotted flats before completion?

- Thus, it becomes clear that the flats sold by the land owner before the completion certificate was obtained i.e. before 20th March, 2012 **will invite the liability of Service Tax upon the land owner.** However, the flats sold after the said date of receiving completion certificate, since no more construction services were rendered after the said date, the land owner will not invite any liability to the Service Tax.
 - **Subhash Chand Surana** [2019 (21) G.S.T.L. 533 (Tri. - Del.)]

Time Zone – III
(After 1.07.2012 to
30.06.2017)

Landowner

ST regime!



+ List regime

- Exempted unless taxed specifically!

- List regime

- Taxable unless exempted specifically!

ST - Charging section

66B. Charge of service tax : *There shall be levied a tax (hereinafter referred to as the service tax) at the rate of Fourteen per cent. on the value of **all services**, other than those services specified in the negative list, **provided or agreed to be provided** in the taxable territory by one person to another and collected in such manner as may be prescribed.*

Section 65B (44) "Service" means **any activity** carried out by a person for another for consideration, and includes **a declared service**, but **shall not include**:

(a) an activity which constitutes merely,-

(i) **a transfer of title in** goods or **immovable property**, by way of sale, gift or in any other manner;

From 1st July 2012 to 30th June 2017

66E Declared Services. The following shall constitute declared services, namely:

...

(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 is received after issuance of completion certificate by the competent authority

(h) **service portion** in the execution of a **works contract**;

Immovable property

- Education Guide [Refer *Para 2.6.1, 2.6.11, 5.5.1 and 6.2.8*]
 - *“Immovable property has not been defined in the Act. Therefore the definition of immovable property in the **General Clauses Act, 1897** will be applicable which defines **immovable property to include** land, **benefits to arise out of land**, and things attached to the earth, or permanently fastened to anything attached to the earth.”*

DLF COMMERCIAL PROJECTS [2019 (27) GSTL 712 (Tri. - Chan.)

- 16. ...

*As the Hon'ble High Court observed in the case of **Sadoday Builders Private Ltd. and Ors.***

*(supra) that **transferrable development right is immovable property**, therefore, the*

*transfer of **development rights** in the case in hand is termed as **immovable property** in*

*terms of Section 3(26) of **General Clauses Act, 1897** and **no service tax is payable** as per the*

***exclusion** in terms of **Section 65B(44)** of the Finance Act, 1994.*

DLF COMMERCIAL PROJECTS [2019 (27) GSTL 712 (Tri. - Chan.)

17. We also take a note of the fact that from time to time the query was made to the Revenue by the **trade organization as well as M/s. DLF Ltd.** whether they are liable to pay service tax on transfer of development right of land or not and the same was not answered till yet which means revenue itself is not clear whether the said activity is taxable service or not. In that circumstances, we hold that the **extended period of limitation is not invocable** and it cannot be said that the appellant did not pay service tax with mala fide intentions.

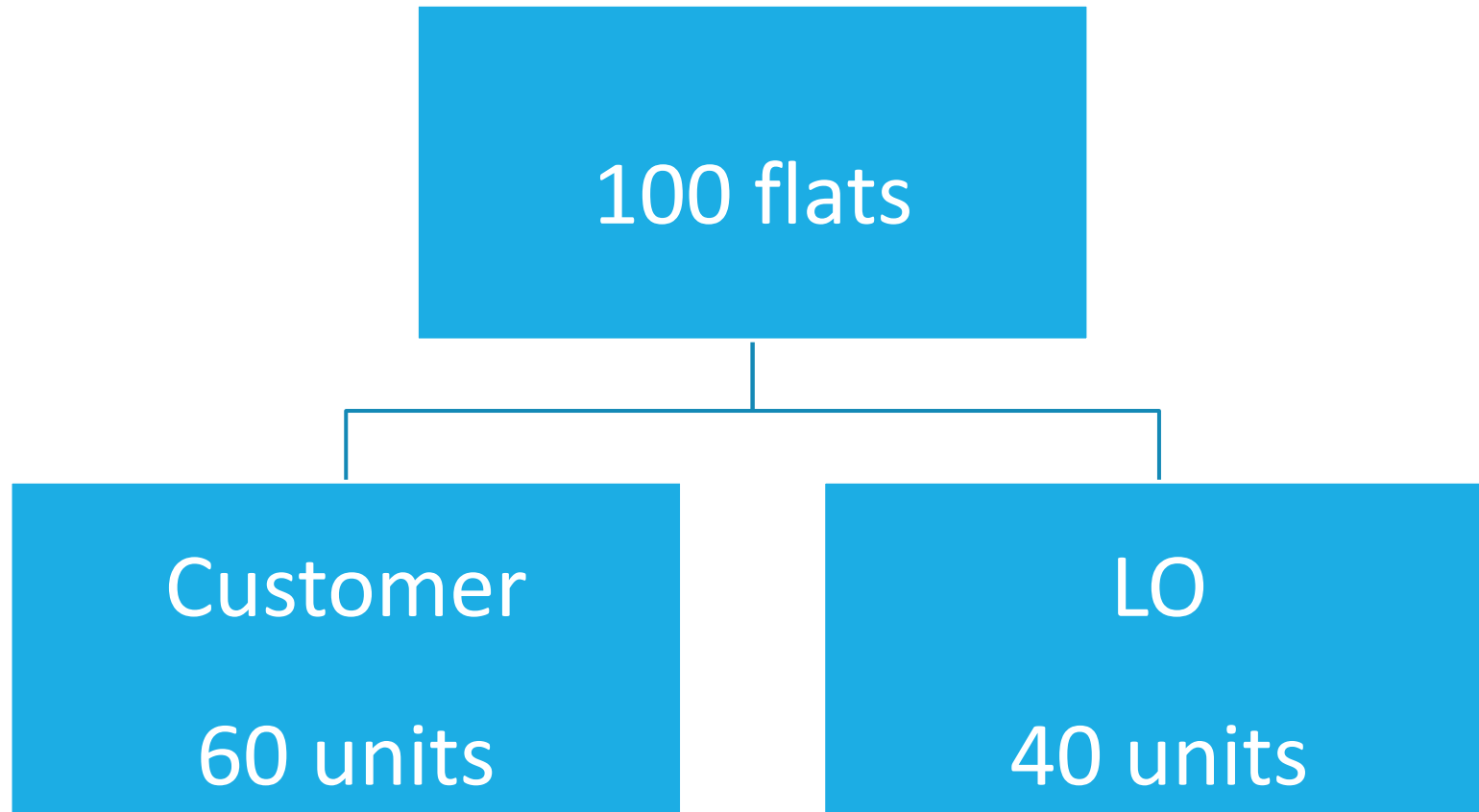
RAJASTHAN STATE MINES & MINERALS LTD. [2020 (35) G.S.T.L. 561 (Tri. - Del.)]

*“As the Hon’ble High Court observed in the case of **Sadoday Builders** Private Ltd. and Ors. (supra) that **transferable development right is immovable property**, therefore, the transfer of development rights in the case in hand is termed as immovable property in terms of Section 3(26) of General Clauses Act, 1897 and no service tax is payable **as per the exclusion** in terms of Section 65B(44) of the Finance Act, 1994.”*

Time Zone – III
(After 1.07.2012 to
30.06.2017)

Developer

Eg.



Two views?



CoC Service

- Similar units



WC Service

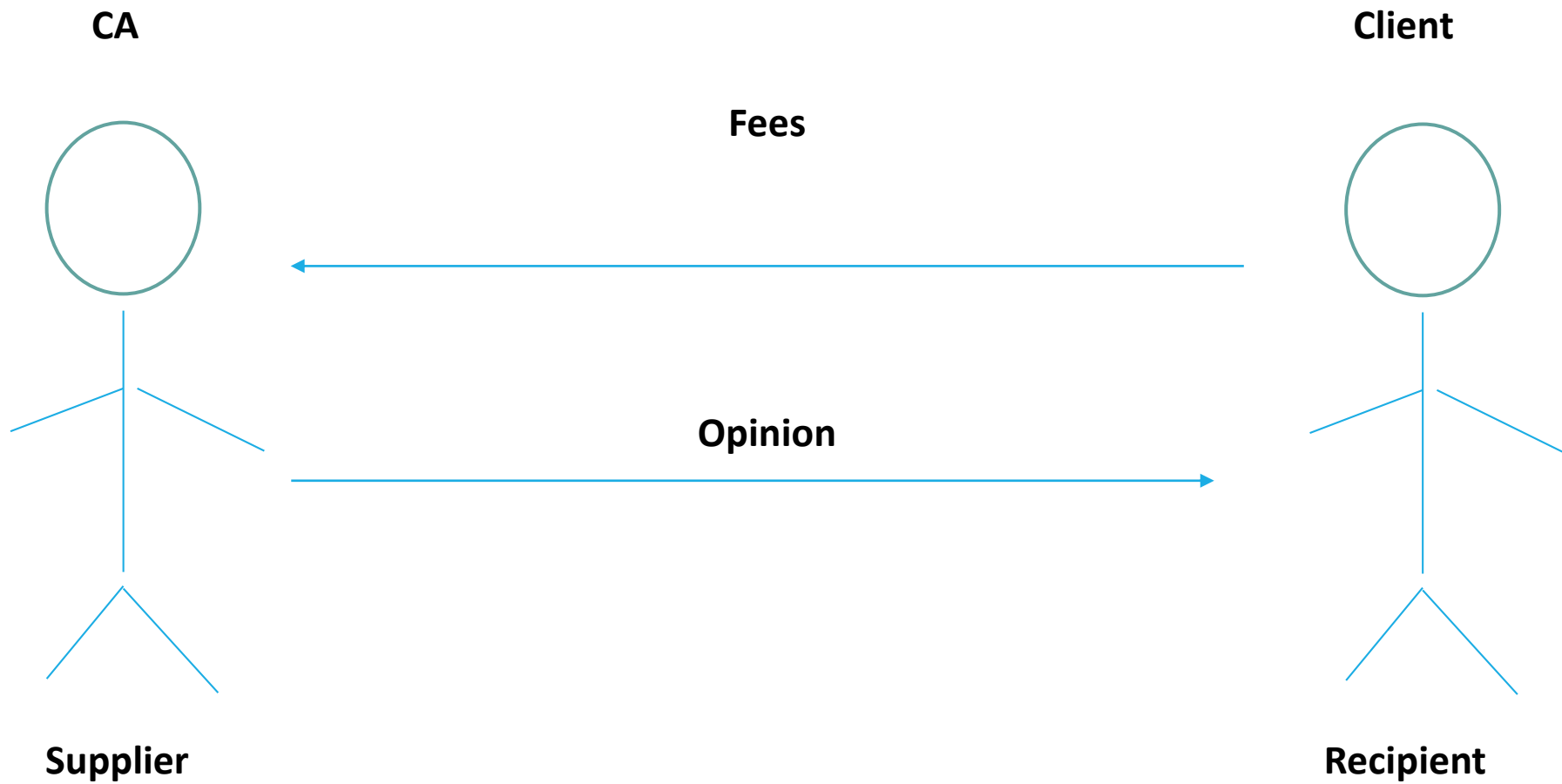
- Cost of construction

66F Principles of interpretation of specified descriptions of services or bundled services

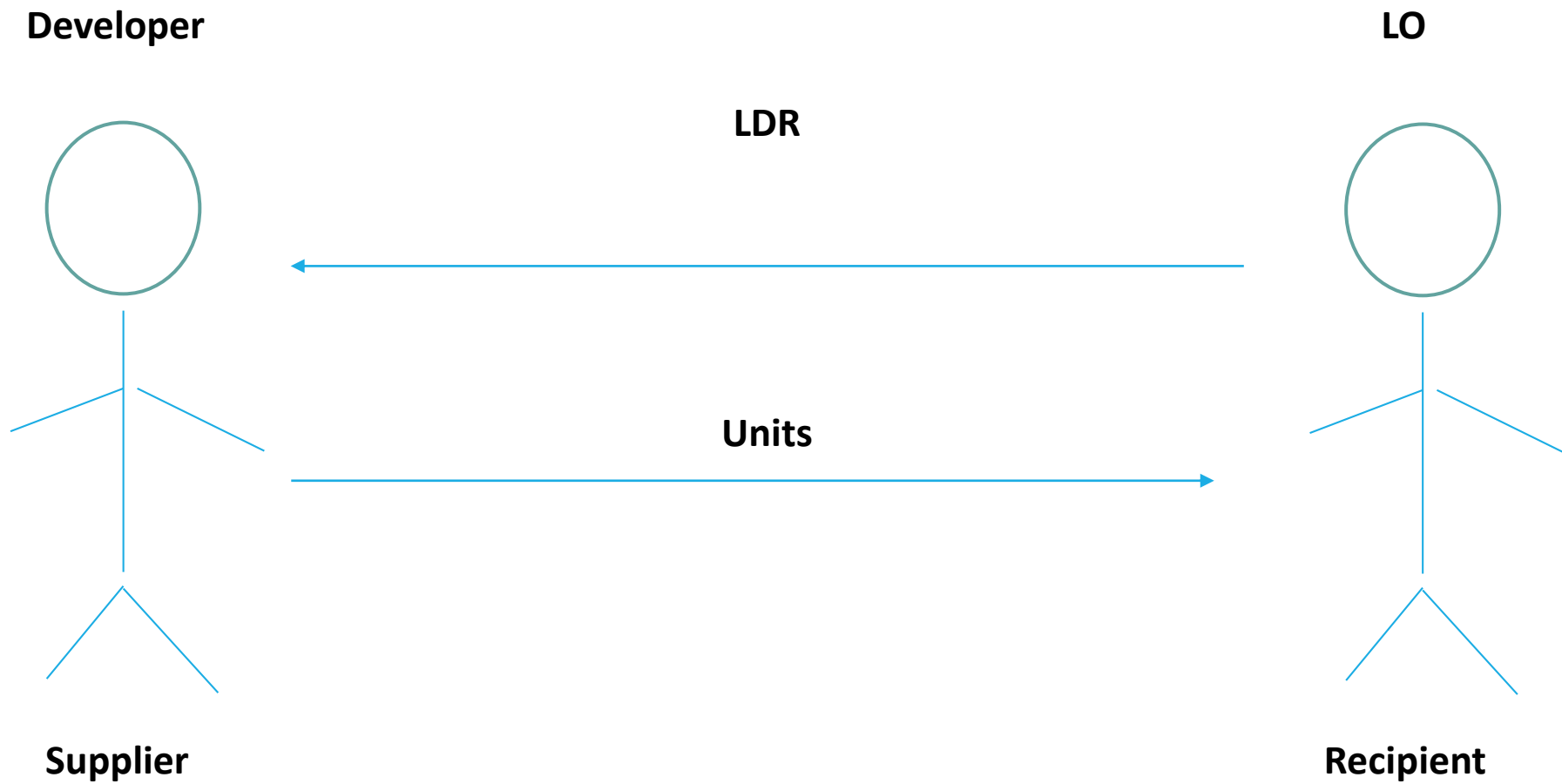
...

- (2) Where a service is capable of differential treatment for any purpose based on its description, the **most specific description** shall be preferred over a more general description

Value



Value



Value

SECTION 67. Valuation of taxable services for charging service tax.

- (1) Subject to the provisions of this Chapter, where service tax is chargeable on **any taxable service** with reference to its value, then such value shall, —
- (i) in a case where the provision of service is for a consideration in money, be the gross amount charged by the service provider for such service provided or to be provided by him;
 - (ii) in a case where the provision of service is for a consideration **not wholly or partly consisting of money, be such amount in money** as, with the addition of service tax charged, is equivalent to the consideration;
 - (iii) in a case where the provision of service is for a consideration which is **not ascertainable**, be the amount as may be determined in the prescribed manner

ST Valuation Rules, 2006

3. Manner of determination of value

Subject to the provisions of section 67, the value of taxable service, **where such value is not ascertainable**, shall be determined by the service provider in the following manner :-

- (a) the value of such taxable service shall be equivalent to the **gross amount charged** by the service provider to provide **similar service to any other person** in the ordinary course of trade and the gross amount charged is the sole consideration;
- (b) where the value cannot be determined in accordance with clause (a), the service provider shall determine the equivalent money value of such consideration which shall, in no case be less than the **cost of provision of such taxable service**.

Value

- 'Consideration' from whose perspective?

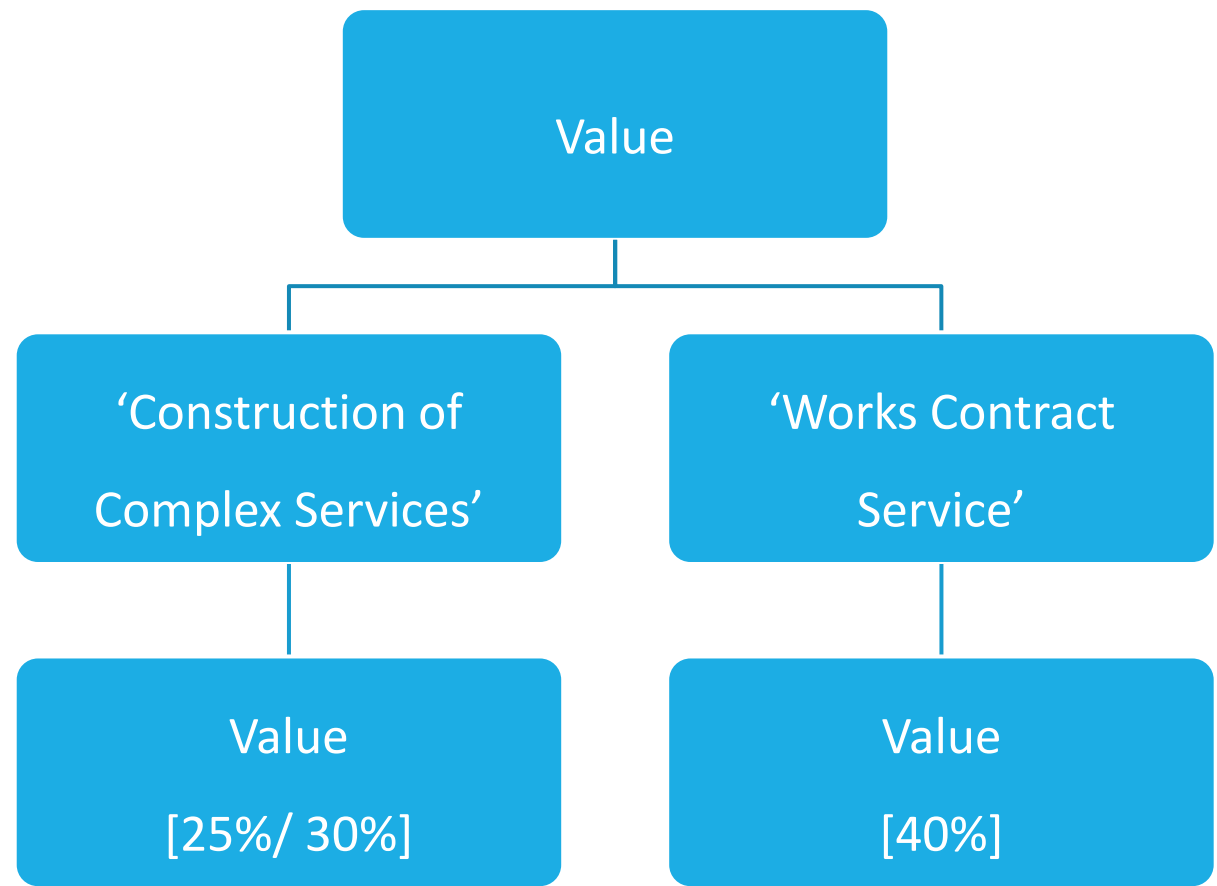
...the **Supreme Court** [in *Ku. Sonia Bhatia v. State of U.P. and Others* - AIR 1981 SC 1274] held that : *the in escapable conclusion that follows is that **consideration means a reasonable equivalent for other valuable benefit passed on by the promisor to the promisee or by the transfer of to the transferee.*** - Bhayana Builders (P) Ltd 2013 (32) STR 49 (LB)

- Conflict between Act and Rules

Clarifications

Ref.	Circular No. 151 /2 /2012-ST (Feb. 2012)	Education Guide (June 2012)	Cir. 354/2015
Value	Accordingly, the value of these flats would be equal to the value of <u>similar flats</u> charged by the builder/developer from the second category of service receivers.	Value, in the case of flats given to first category of service receiver will be the <u>value of the land</u> when the same is transferred	Hence, Circulars ...would prevail over the Education Guide, 2012.

Value!



POT

Point of Taxation

67A. Date of determination of rate of tax, value of taxable service ...

- *The rate of service tax, **value of a taxable** service and rate of exchange, if any, shall be the rate of service tax or value of a taxable service or rate of exchange, as the case may be, in force or **as applicable at the time when the taxable service has been provided or agreed to be provided.***

Rule 2 (e) of POTR

- *“Point of taxation” means the point in time when a service shall be **deemed to have been provided***

Rule 3 Determination of POT

- *For the purposes of these rules, unless otherwise provided, ‘point of taxation’ **shall be**,*
 - (a) *the time when the invoice for the service provided or agreed to be provided is issued*
 - (b) *in a case, where the person providing the service, **receives a payment** before,.. When he receives such payment...*

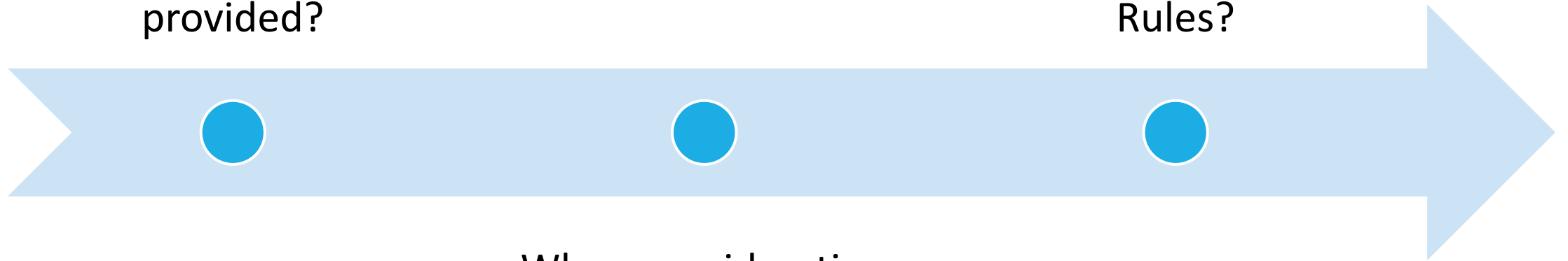
Clarifications

Ref.	Circular No. 151 /2 /2012-ST (Feb. 2012)	Education Guide (June 2012)	Cir. 354/2015
PoT	Service tax is liable to be paid by the builder/developer on the 'construction service' involved in the flats to be given to the land owner, at the time when the possession or right in the property of the said flats are transferred to the land owner by entering into a conveyance deed or similar instrument (eg. allotment letter).	and the point of taxation will also be determined accordingly (6.2.1)	-

PoT

When provided or
agreed to be
provided?

Whether Circulars
can override Act or
Rules?



When consideration
is received?

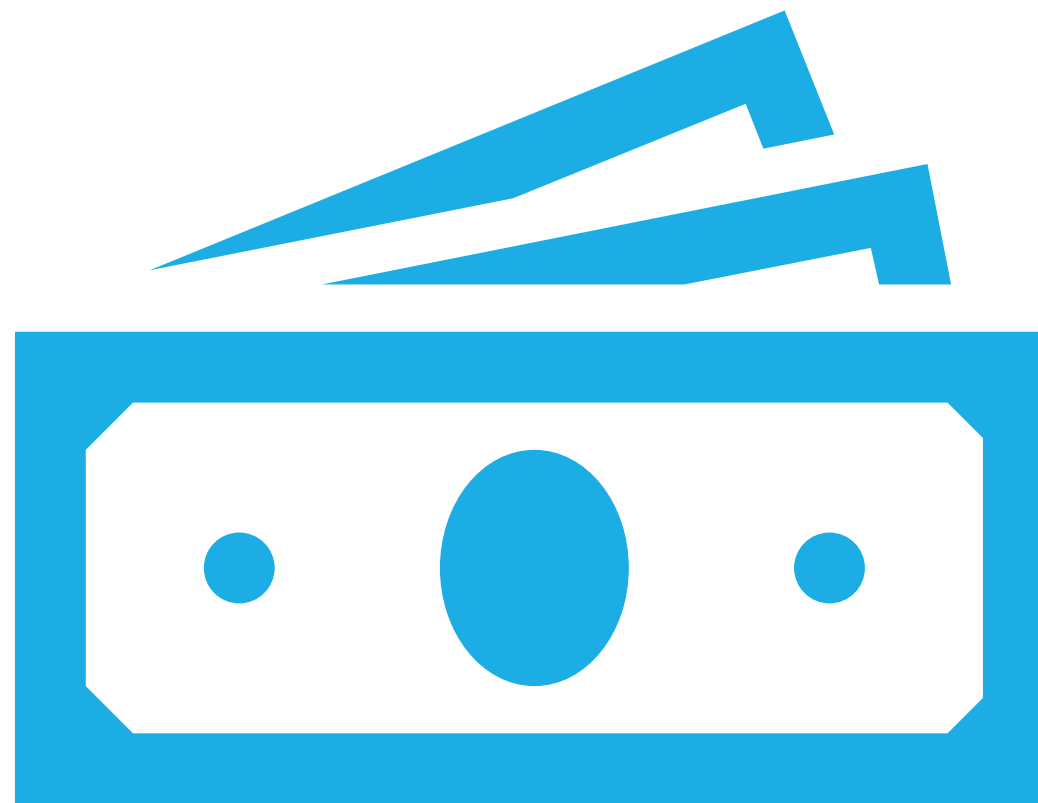
Receipt of payment?

FAQ 24 dated 14.05.2019	FAQ 24 dated 7.05.2019
<p>“The apartments given to the ‘Land Owner – Promoter’ are given by the ‘Developer – Promoter’ against consideration received by him in the form of TDR from the ‘Land Owner – Promoter’. Therefore, the payment by ‘Land Owner – Promoter’ for service of construction of apartments received from the ‘Developer – Promoter’ is made even before the service is provided”</p>	<p>The consideration for such apartments is receipt in the form of transfer of development rights from the original inhabitants in case of redevelopment projects or the government in case of slum rehabilitation projects Hence, the condition relating to credit of at least one instalment in the bank account of the promoter for the apartments being constructed in a slum redevelopment project to have been partly or wholly booked shall be deemed to have been satisfied</p>

Summary - ST regime!

Particulars	Landowner	Developer
Transfer of Development Rights	Not liable	-
Allotment of Units	-	Liable a. Value – Sale price vs Construction cost b. PoT – Date of signing vs Allotment

REAL ESTATE



Section 7. Scope of Supply

(1) *For the purposes of this Act, the expression “supply” includes —*

*(a) all forms of **supply** of **goods or services or both** such as sale, transfer, **barter**, exchange, license, rental, lease or disposal made or agreed to be made **for a consideration** by a person **in the course or furtherance of business**, ...*

(b) ...

*(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**.]*

Schedule II - Activities [or Transactions] To Be Treated As Supply Of Goods Or Supply Of Services

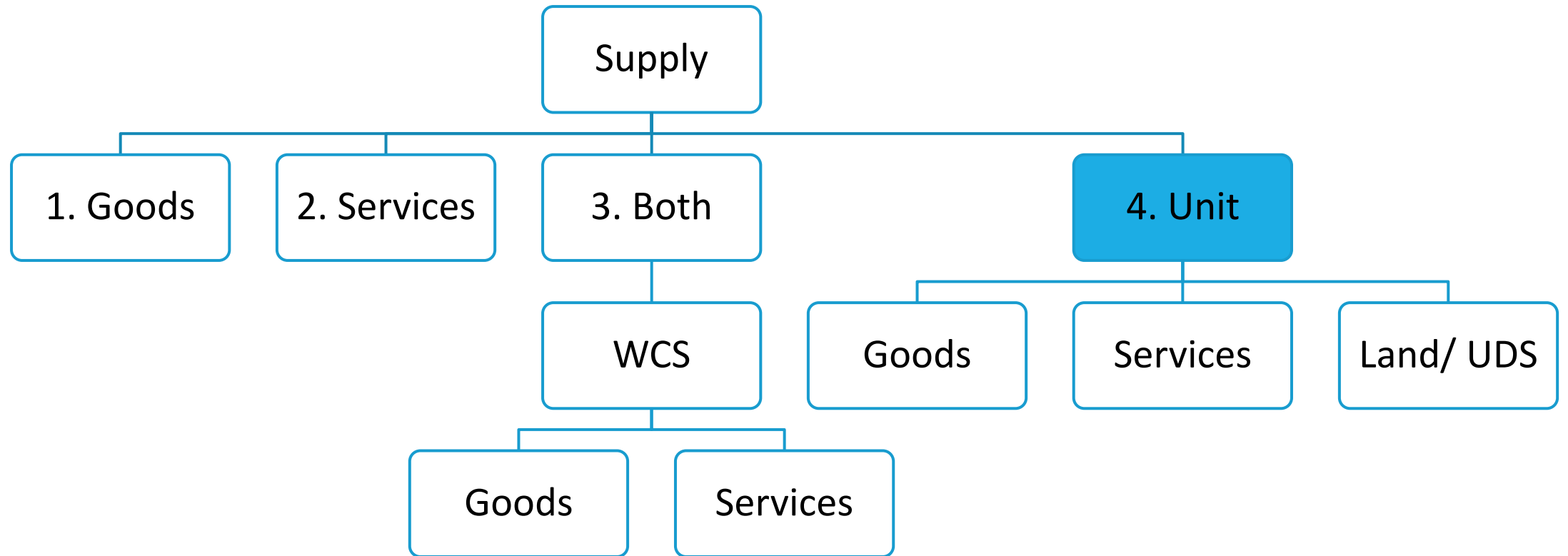
5. Supply of services	6. Composite supply
<p>The following shall be treated as supply of services, namely:</p> <p>(b) construction of a complex, building, civil structure or a part thereof, including a complex or building intended for sale to a buyer, wholly or partly, except where the entire consideration has been received after issuance of completion certificate, where required, by the competent authority or after its first occupation, whichever is earlier.</p> <p>Explanation. — For the purposes of this clause — ...</p> <p>(2) the expression “construction” includes additions, alterations, replacements or remodelling of any existing civil structure;</p>	<p>The following composite supplies shall be treated as a supply of services, namely :—</p> <p>(a) Works contract as defined in clause (119) of section 2;</p>

Under-construction units?



Variables

What is service provided by Developer?



When
(ST/ GST)

Who
(LO or Developer)

Time Zone – IV
(From 1.7.2017 to
24.01.2018)

Landowner

Landowner



GST
introduced
from
1.07.2017

- Meaning of 'Services'
- Exclusion of 'Sale of land'

Article 366 (12A) 'Goods and Services Tax'

'Goods and Services
tax'

- *Means any tax on **supply of goods, or services or both** except taxes on the supply of the alcoholic liquor for human consumption*

Key points

- Goods or services or both
- Both?

Col – Goods vs. Services

Goods - Article 366 (12)	Services - Article 366 (26A)
“Goods” includes all materials, commodities, and articles	“Services” means anything other than goods

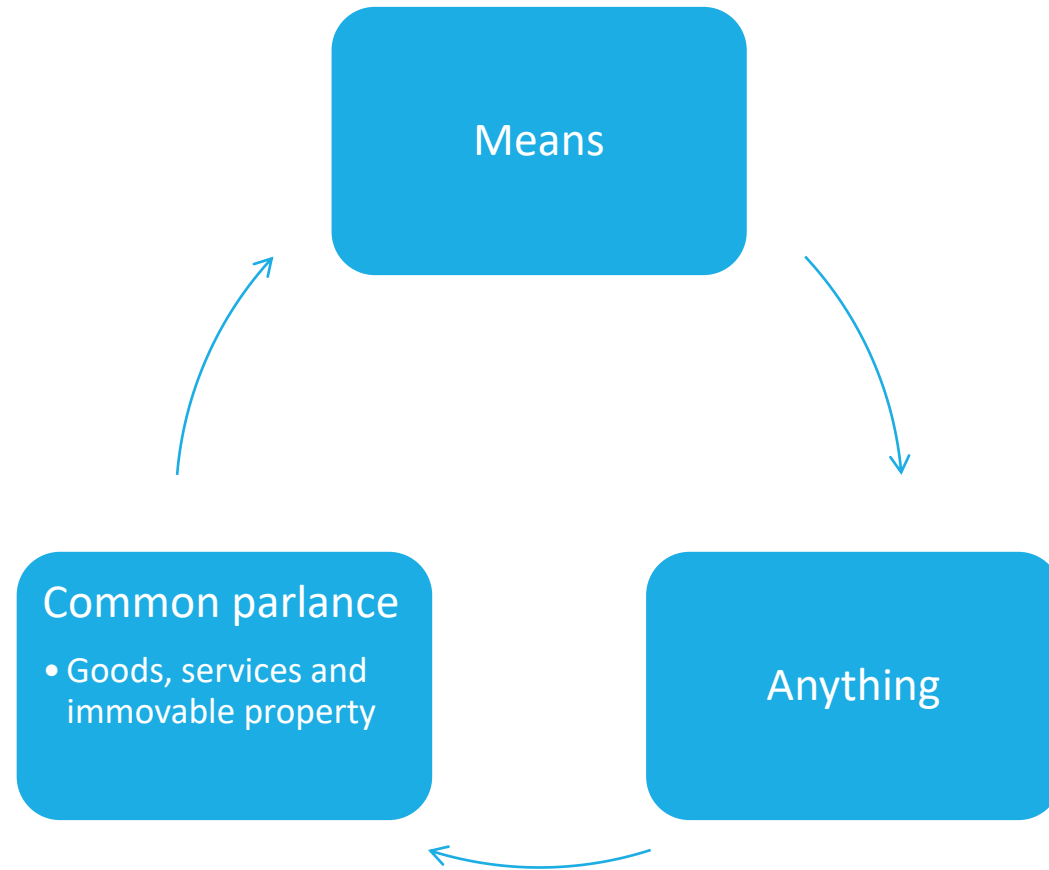
CGST Act – Goods vs. Services

Goods - Section 2 (52)	Services - Section 2 (102)
<p>“Goods” means every kind of movable property other than money and securities but <u>includes actionable claim</u>, growing crops, grass and things attached to or forming part of the land which are agreed to be severed before supply or under a contract of supply</p>	<p>“Services” means anything other than goods, money and securities but includes activities relating to the use of money or its conversion by cash or by any other mode, from one form, currency or denomination, to another form, currency or denomination for which a separate consideration is charged;</p> <p>Explanation. — For the removal of doubts, it is hereby clarified that the expression “services” includes facilitating or arranging transactions in securities;</p>

SCHEDULE III - Activities Or Transactions Which Shall Be Treated Neither As A Supply Of Goods Nor A Supply Of Services

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

Service - Meaning



Immovable property - Case laws

SR	Case	Held
1.	Chheda Housing Development Corporation (Bombay HC)	TDR is a benefit arising from the land thus 'immovable property'
2.	Sadoday Builders Private Limited (Bombay HC)	TDR is a benefit arising from the land thus 'immovable property'
3.	Shakti Insulated Wires Limited	DR are embedded in land
4.	Titaghur Paper Mills 1985 AIR 1293	A benefit arising out of land is an interest in land and therefore immovable property
5.	Safiya Bee (2011) 2 SCC 94	'Land' includes rights in or over land, benefits to arise out of land . The Apex court in the case of Pradeep Oil Corporation vs Municipal Corporation of Delhi – (2011) 5 SCC 270 observed that land includes benefits to arise out of land.

Land

Col

- 18. **Land**, that is to say, **rights in or over land**, land tenures including...
- 49. Taxes on lands and buildings

Time Zone – IV
(From 1.7.2017 to
24.01.2018)

Developer

SCHEDULE II Activities [or Transactions] to be Treated as Supply of Goods or Services

5. Supply of services	6. Composite supply
<p>The following shall be treated as supply of services, namely:</p> <p>...</p> <p>(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.</p>	<p>The following composite supplies shall be treated as a supply of services, namely :—</p> <p>(a) Works contract as defined in clause (119) of section 2;</p>

Section 2 - Definitions

(119) “works contract” means **a contract for building, construction, fabrication, completion, erection, installation, fitting out, improvement, modification, repair, maintenance, renovation, alteration or commissioning of any *immovable property* wherein transfer of property in goods (whether as goods or in some other form) is involved in the execution of such contract;**

Explanatory Notes to Classification

- *However, it may be noted that where a service is capable of differential treatment for any purpose based on its description, the **most specific description** shall be preferred over a more general description.*

27. Value of supply of goods or services where the consideration is not wholly in money

Where the supply of **goods or services** is for a consideration not wholly in money, the value of the supply shall,-

- (a) be the **open market value** of **such** supply;
- (b) if the open market value is not available under clause (a), be the sum total of consideration in money and any such further amount in money as is equivalent to the consideration not in money, if such amount is known at the time of supply;
- (c) if the value of supply is not determinable under clause (a) or clause (b), be the value of supply of goods or services or **both of like kind and quality**;
- (d) if the value is not determinable under clause (a) or clause (b) or clause (c), be the sum total of consideration in money and such further amount in money that is equivalent to consideration not in money as determined by the application of rule 30 or rule 31 in that order.

OMV

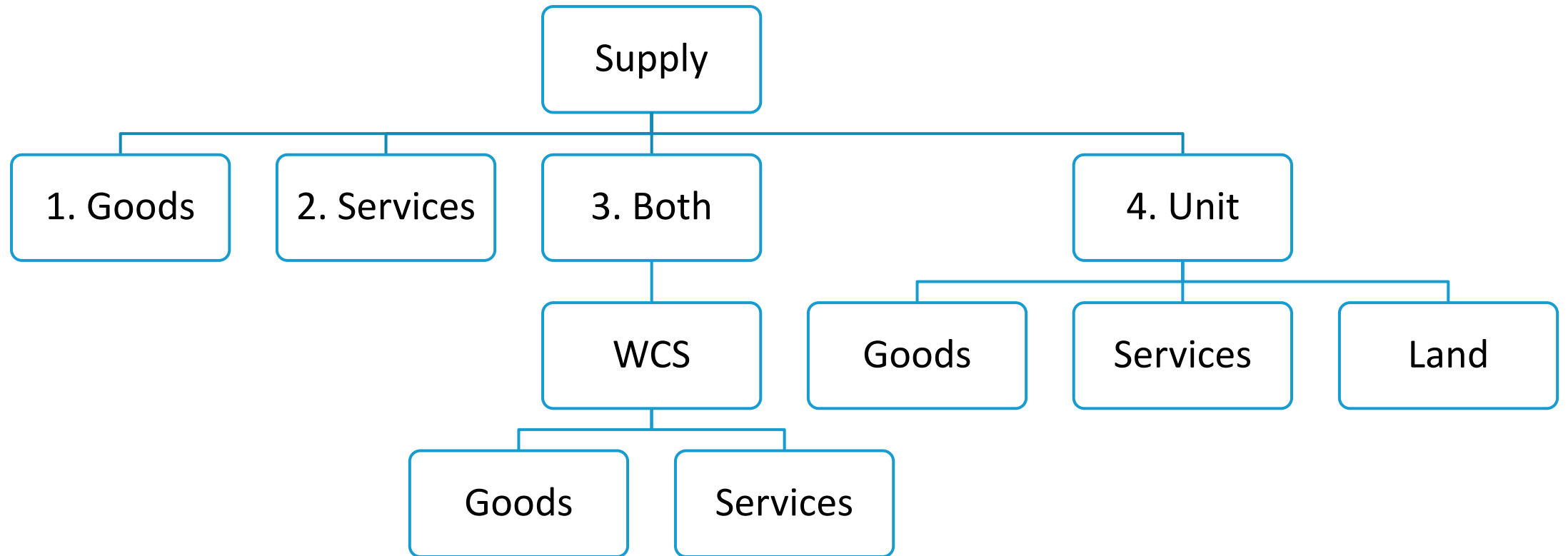
Explanation. — For the purposes of the provisions of this Chapter, the expressions -

- (a) “**open market value**” of a supply of goods or services or both means the full value in money, excluding the Integrated tax, Central tax, State tax, Union territory tax and the cess payable by a person in a transaction, where the supplier and the recipient of the supply are not related and the price is the sole consideration, to obtain such supply at the same time when the supply being valued is made;
- (b) “supply of goods or services or both of like kind and quality” means any other supply of goods or services or both made under similar circumstances that, in respect of the **characteristics, quality, quantity, functional components, materials, and the reputation** of the goods or services or both first mentioned, **is the same** as, or closely or substantially resembles, that supply of goods or services or both.

30. Value of supply of goods or services or both based on cost.-

*Where the value of a supply of goods or services or **both** is not determinable by any of the preceding rules of this Chapter, the value shall be **one hundred and ten percent** of the cost of production or manufacture or the cost of acquisition of such goods or the cost of provision of such services.*

What is service provided by Developer?



Larsen & Toubro Ltd 2015 (39) STR 913 (SC)

- *Further, the finding that Section 67 of the Finance Act, which speaks of “gross amount charged”, **only speaks of the “gross amount charged” for service provided and not the gross amount of the works contract as a whole** from which various deductions have to be made to arrive at the service element in the said contract.*
- Section 15
 - *‘The value of a supply of goods or services or both shall be the transaction value...’*

Larsen & Toubro Ltd 2015 (39) STR 913 (SC)

- *When it comes to composite indivisible works contracts, such contracts can be taxed by Parliament as well as State legislatures. Parliament can only tax the service element contained in these contracts, and the States can only tax the transfer of property in goods element contained in these contracts. Thus, it becomes **very important to segregate** the two elements completely for **if some element of transfer of property in goods remains** when a service tax is levied, **the said levy would be found to be constitutionally infirm.***

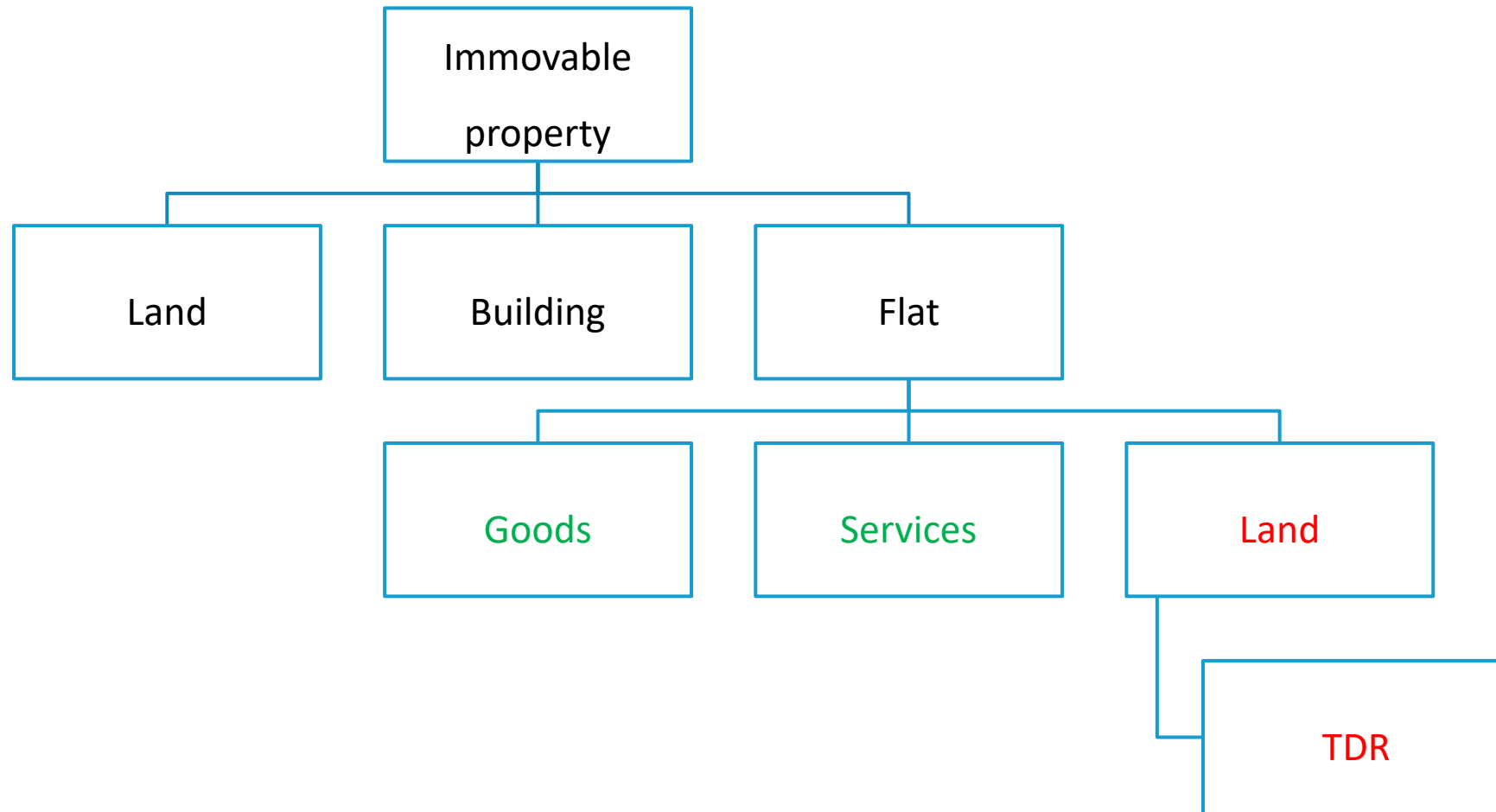
LAND VALUE - DEEMED DEDUCTION

Schedule III - ACTIVITIES OR TRANSACTIONS WHICH SHALL BE TREATED NEITHER AS A SUPPLY OF GOODS NOR A SUPPLY OF SERVICES

...

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

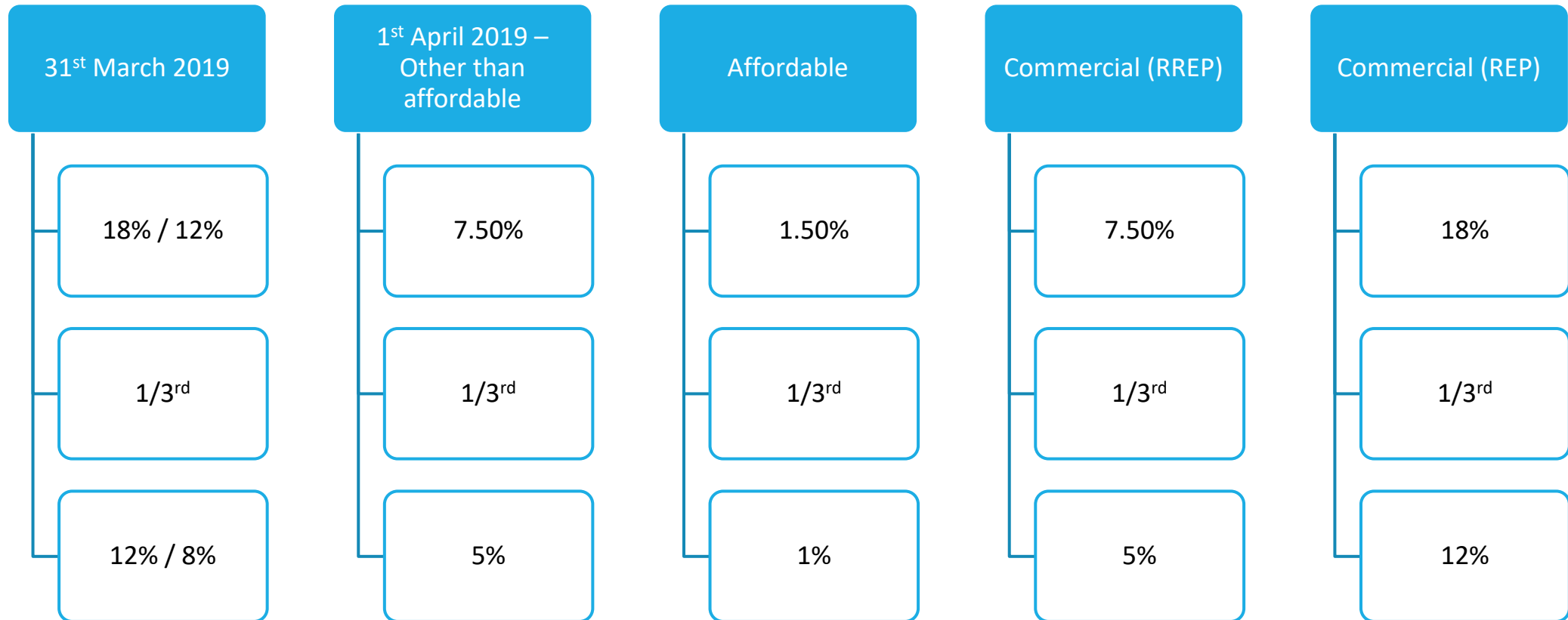
Transactions



Land Value - Deemed Deduction

*'...the value of such transfer of land or undivided share of land, as the case may be, in such supply shall be **deemed to be one third** of the total amount charged for such supply'*

GST Rates



Suresh Kumar Bansal [2016-TIOL-1077-HC-DEL-ST]

In order to sustain the levy of service tax on services, it is essential that the **machinery provisions provide for a mechanism for ascertaining the measure of tax**, that is, the value of services which are charged to service tax

Levying a tax on ... land would clearly intrude into the legislative field reserved for the States under List II of the Seventh Schedule of the Constitution of India.

*"The **abatement** to the extent of 75% **by a notification or a circular cannot substitute** the lack of statutory machinery provisions to ascertain the value of services involved in a composite contract."*

Tata Sky Ltd 2013 (30) S.T.R. 337 (S.C.)

39. ... It is well settled that **if the collection machinery** provided under the Act is such that it **cannot be applied** to an event, it follows that the **event is beyond the charge** created by the taxing statute.

Larsen & Toubro Ltd 2015 (39) STR 913 (SC)

38. Similarly, the Madras High Court in Larsen and Toubro Ltd. v. State of Tamil Nadu and Ors., [1993] 88 STC 289, **struck down** Rules 6A and 6B of the Tamil Nadu General Sales Tax Rules as follows :-

...The rules miserably failed to provide the procedure and principles for effectively determining the taxable turnover, after excluding the items of turnover relating to such works contract which could not be subjected to levy of tax by the State in exercise of its power of legislation under entry 64 of the State List....

No mans land!

**What about JDA signed from
1.07.2017 to 24.01.2018**

- **Time of Supply – Allotment or Signing?**

Time Zone – V
(From 25.01.2018 to
31.03.2019)

Landowner

Not. No. 4/2018-CT

G.S.R.....(E).- In exercise of the powers conferred by **section 148** of the Central Goods and Services Tax Act, 2017 (12 of 2017), the Central Government, on the **recommendations of the Council**, hereby **notifies** the following classes of registered persons, namely :-

- (a) **registered persons who supply development rights** to a developer, builder, construction company or any other registered person against consideration, wholly or partly, in the form of construction service of complex, building or civil structure; and
- (b) **registered persons who supply construction service of complex**, building or civil structure to supplier of development rights against consideration, wholly or partly, in the form of transfer of development rights, as the registered persons in whose case the liability to pay central tax on supply of the said services, on the consideration received in the form of construction service referred to in clause (a) above and in the form of development rights referred to in clause (b) above, **shall arise at the time when** the said developer, builder, construction company or any other registered person, as the case may be, 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**).

148. Special procedure for certain processes

The Government may, on the recommendations of the Council, and subject to such conditions and safeguards as may be prescribed, **notify certain classes of registered persons, and the special procedures** to be followed by such persons including those with regard to **registration, furnishing of return, payment of tax** and administration of such persons.

FAQ dated 7th May 2019

27. In case where the Development rights are supplied by the Landowner to the Promoter, under an **area sharing arrangement** between 1st July 2017 and 31/3/19, but the allotment of constructed area in an ongoing project is made by the Promoter to the Landowner on or after 1/4/2019, whether the tax liability, if any, is required to be discharged in terms of the Notification No. 4/2018 – CT (R)?

Comment: Yes. Tax liability on service by way of transfer of development rights prior to 01-04-2019 is required to be discharged in terms of **Notification No. 4/2018** - Central Tax (Rate) dated 25.01.2018.

Tata Sky Ltd 2013 (30) S.T.R. 337 (S.C.)

- 41.** *Coming now to the notification dated May 5, 2008, it is elementary that a notification issued in exercise of powers under the Act cannot amend the Act....*
- The **notification cannot enlarge either the charging section** or amend the provision of collection under section 4 of the Act read with the 1942 Rules.*

No mans land!

What about value of units
upto 31.03.2019?

- Open Market Value or Cost of Construction?

Time Zone – VI
(From 1.04.2019 unless
amended further!)

Press Release - JDA

DR -RCM - Developer

- 7.2 The liability to pay tax on TDR, FSI, long term lease (premium) shall be shifted from land owner to builder under reverse charge mechanism (**RCM**)

Construction – ToS - CC

- 7.4 The liability of builder to pay tax on construction of houses given to land owner in a **JDA** is also being shifted to the **date of completion**

TDR - ToS - CC

- 7.3 The date on which builder shall be liable to pay tax on TDR, FSI, long term lease (premium) of land under RCM in respect of flats **sold after completion certificate** is being shifted to **date of issue of completion certificate**

Notifications and ROD

CG Not.	Particulars	W.e.f.
3/2019	Changes in rates	1.4.19
4/2019	Exemption to DR, FSI, premium	1.4.19
5/2019	RCM for DR, FSI, premium	1.4.19
6/2019	Time of Supply for JDA	1.4.19
7/2019	RCM (shortfall)	1.4.19
8/2019	Rate for RCM	1.4.19
16/2019	Changes in GST Rules	1.4.19
4/2019	Credit on carpet (RoD)	1.4.19 (?)

'Complex' Construction!

Notifications

- 28 + 1

PR

- 5

Circular and FAQ

- 41 + 27

Rates

- 7 sub-clauses
- New rates - 8 conditions

New definitions

- 20 +

Annexures

- 4

Illustrations

- 7

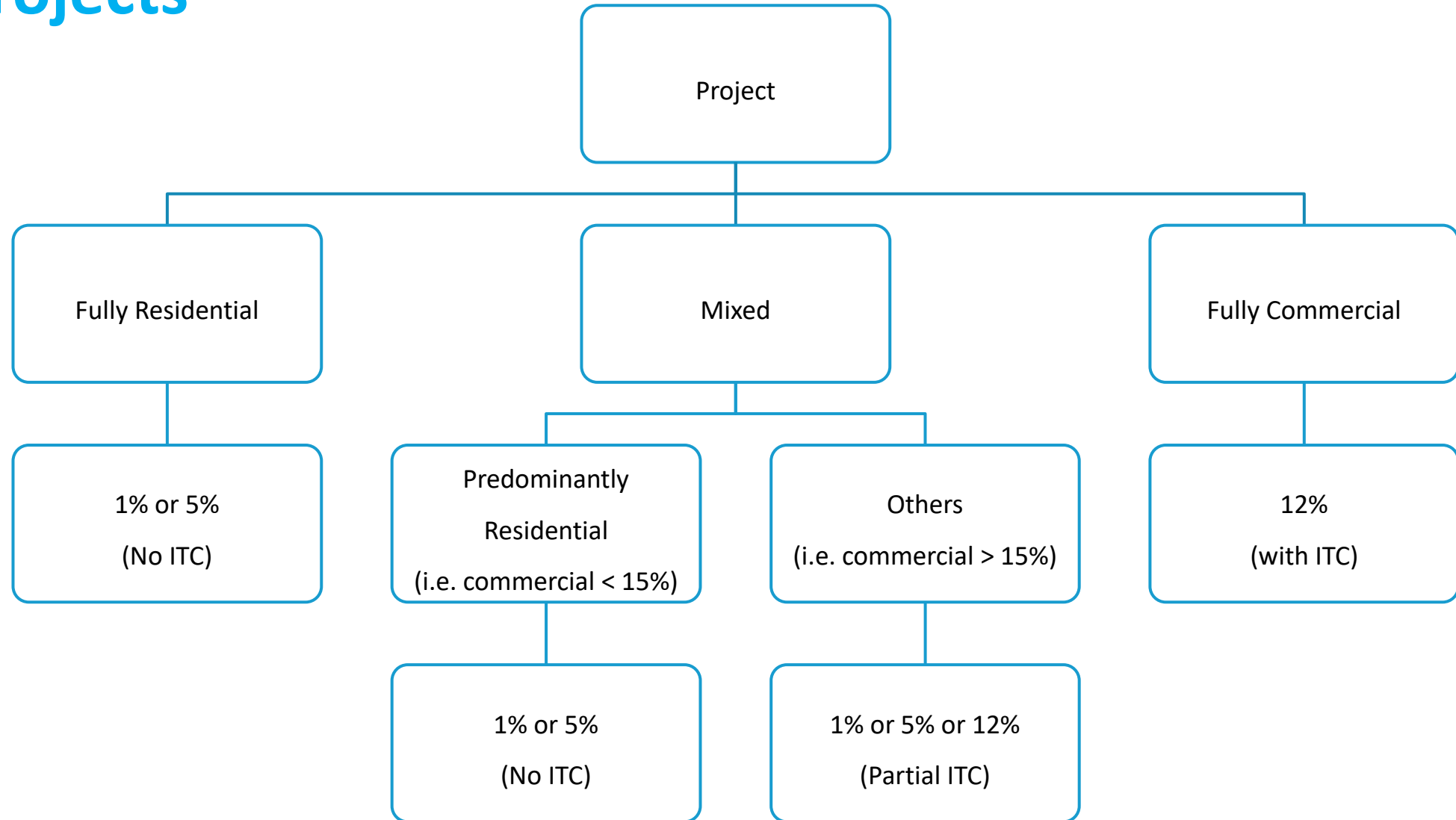
Ratio analysis

- Carpet
- 80% (RCM)
- 15% (RREP)

Inter-linking of notifications

Applicability not specified
(RoD, Rules, JDA)

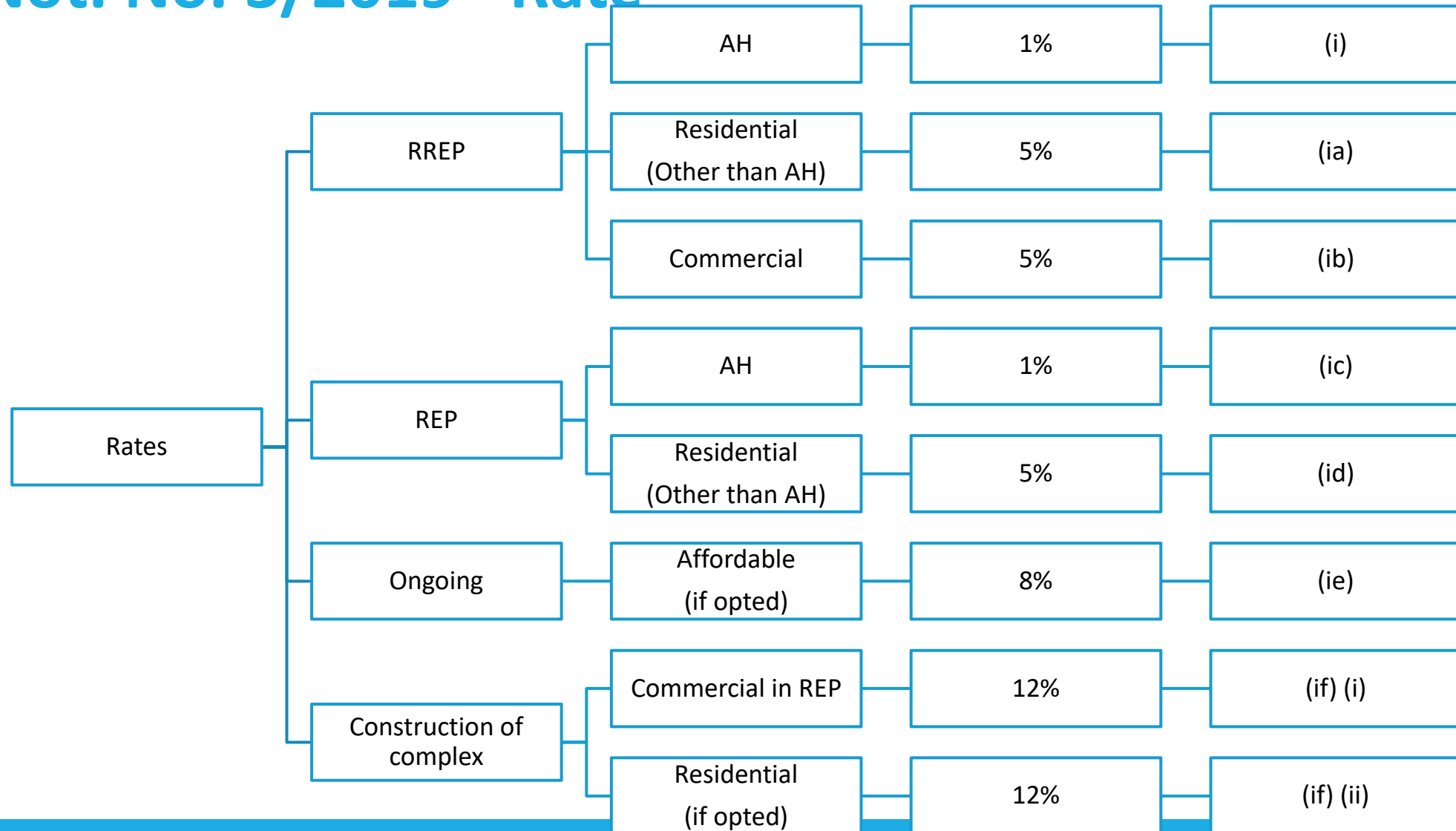
Projects



Brief

Rate	<ul style="list-style-type: none">• New projects<ul style="list-style-type: none">• New rates<ul style="list-style-type: none">• Residential – 1% or 5%• Commercial - 5% or 12%• Ongoing projects<ul style="list-style-type: none">• Option to continue old rates (8% and 12%)
ITC	<ul style="list-style-type: none">• New rates<ul style="list-style-type: none">• 1 and 5% - ITC not available• 12% - ITC Available• Old rates – ITC available• Completion – Reversal on carpet area
DR/FSI / Upfront premiums	<ul style="list-style-type: none">• Residential – Applicable subject to conditional exemption (payable on carpet area sold after CC) and under RCM• Commercial – Applicable and under RCM
JDA	<ul style="list-style-type: none">• Time of Supply shifted• Value specified

Not. No. 3/2019 - Rate



Not. No. 3/2019-CT (R)

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.

Not. No. 3/2019-CT (R)

2. In case of **supply of service** specified in column (3), in item [(i), (ia), (ib), (ic), (id), (ie) and (if)], against serial number 3 of the Table above, **involving transfer of land** or undivided share of land, as the case may be, the **value of such supply** shall be equivalent to the **total amount charged** for such supply **less the value of transfer of land or undivided share of land**, as the case may be, and the value of such transfer of land or undivided share of land, as the case may be, in such supply shall be **deemed to be one third** of the total amount charged for such supply.

Explanation. For the purposes of this paragraph, 'total amount' means the sum total of,-

- (a) consideration charged for aforesaid service; and
- (b) amount charged for transfer of land or undivided share of land, as the case may be including by way of lease or sublease.

Not. No. 4/2019-CT (R)

“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”

**ACER INDIA LTD. ACER INDIA LTD. 2004 (172) E.L.T. 289 (S.C.)
[Approved in 2018 (360) ELT 769 (Supreme Court)]**

*Section 3 of the Act being the charging section, the definition of **'transaction value'** must be read in the text and context thereof and not de'hors the same. ... When an exemption has been granted from levy of any excise duty on software whether it is operating software or application software in terms of heading 85.24, **no excise duty can be levied thereupon indirectly as it was impermissible to levy a tax indirectly.***

Prescribed

- **Section 15 Value of Taxable Supply**

...

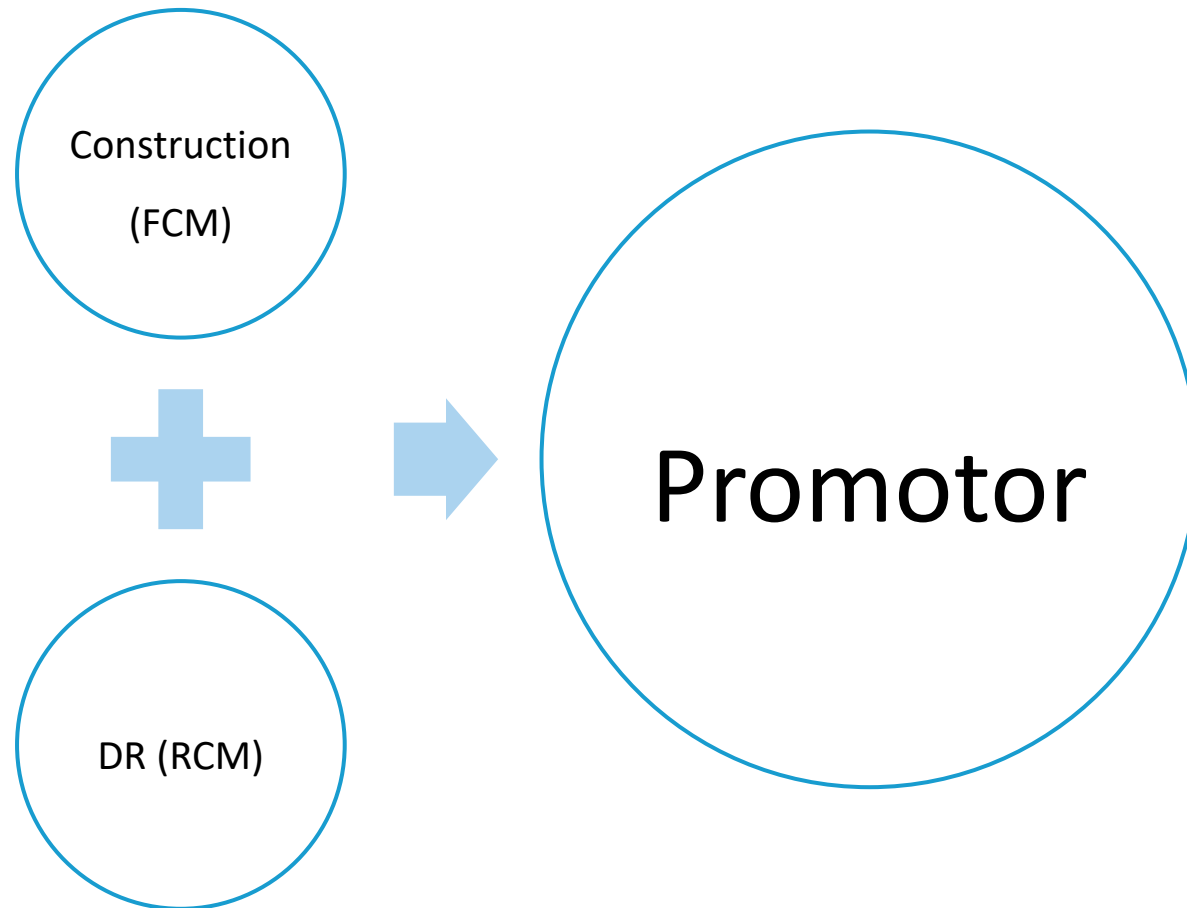
(4) *Where the value of the supply of goods or services or **both** cannot be determined under sub-section (1), the same shall be determined in such manner as may be prescribed.*

(5) *Notwithstanding anything contained in sub-section (1) or sub-section (4), the value of such supplies as may be notified by the Government on the recommendations of the Council shall be determined in such manner as may be prescribed.*

- **Voltas Ltd 2007 (7) STR 106 (SC)**

- *When the law provides that something is to be prescribed in the Rules then that thing must be prescribed in the Rules to make the provisions workable and constitutionally valid.*

Promotor – FCM and RCM



FAQ dated 7th May 2019

12. Who is liable to pay GST on TDR and floor space index?

Comment: The promoter is liable to pay GST on TDR or floor space index supplied on or after 01-04-2019 on reverse charge basis.

RCM - DR/FSI/Premium – 9 (3)

Not. No. 5/2019

- Supply – DR/ FSI/ Premium
- Supplier – Any person
- Person liable to pay - Promotor

DR/FSI/Premium

Not. No. 4/2019

- Exemption for services from 1st April 2019
- Only for **Residential**
- Payable if residential remain un-booked on completion
- Value
 - Value nearest to date of transfer of DR to promotor
 - However, GST payable not to be more than GST payable on such apartments
(Value nearest to date of CC)

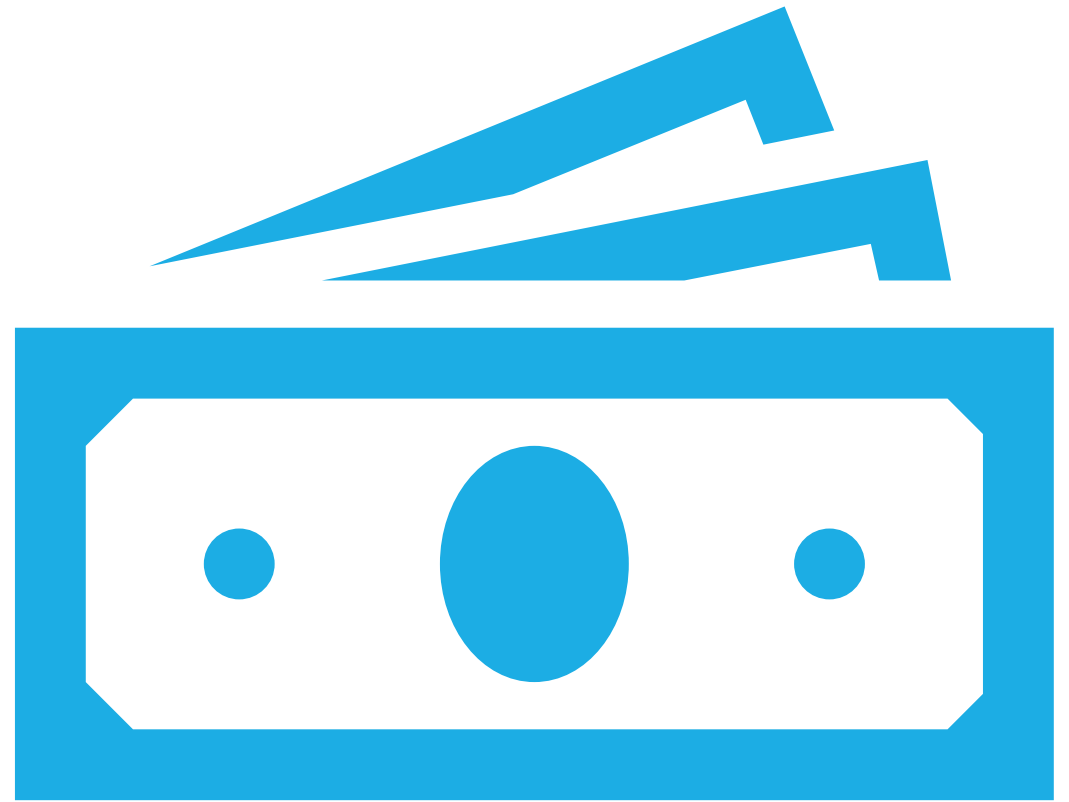
TOS

ToS

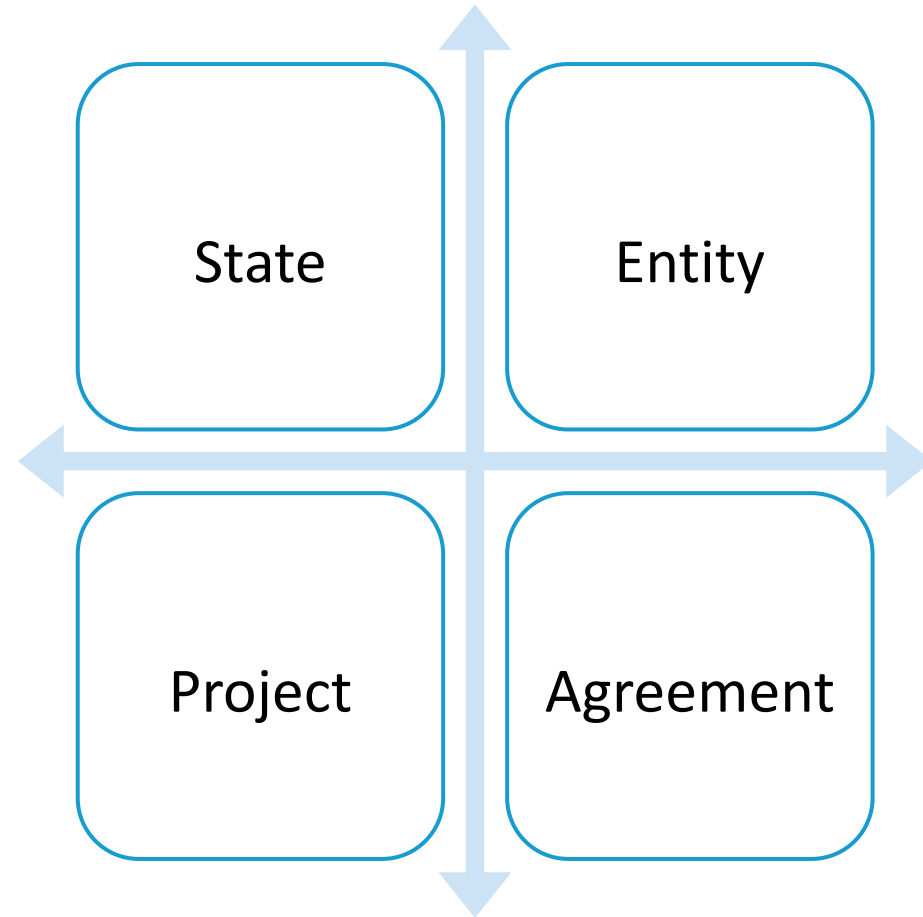
Not. No. 6/2019

- DR/FSI/ Premium
 - Transferred on or after 1st April 2019
- ToS
 - Completion or Occupation

INCOME



Approach!



Entity!

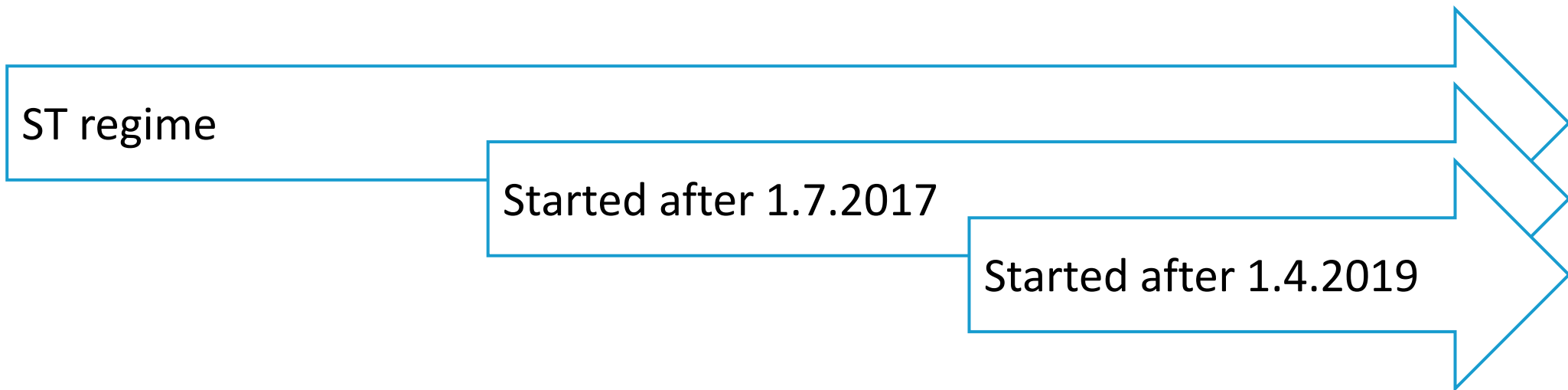
Chart of entities

Are they related?

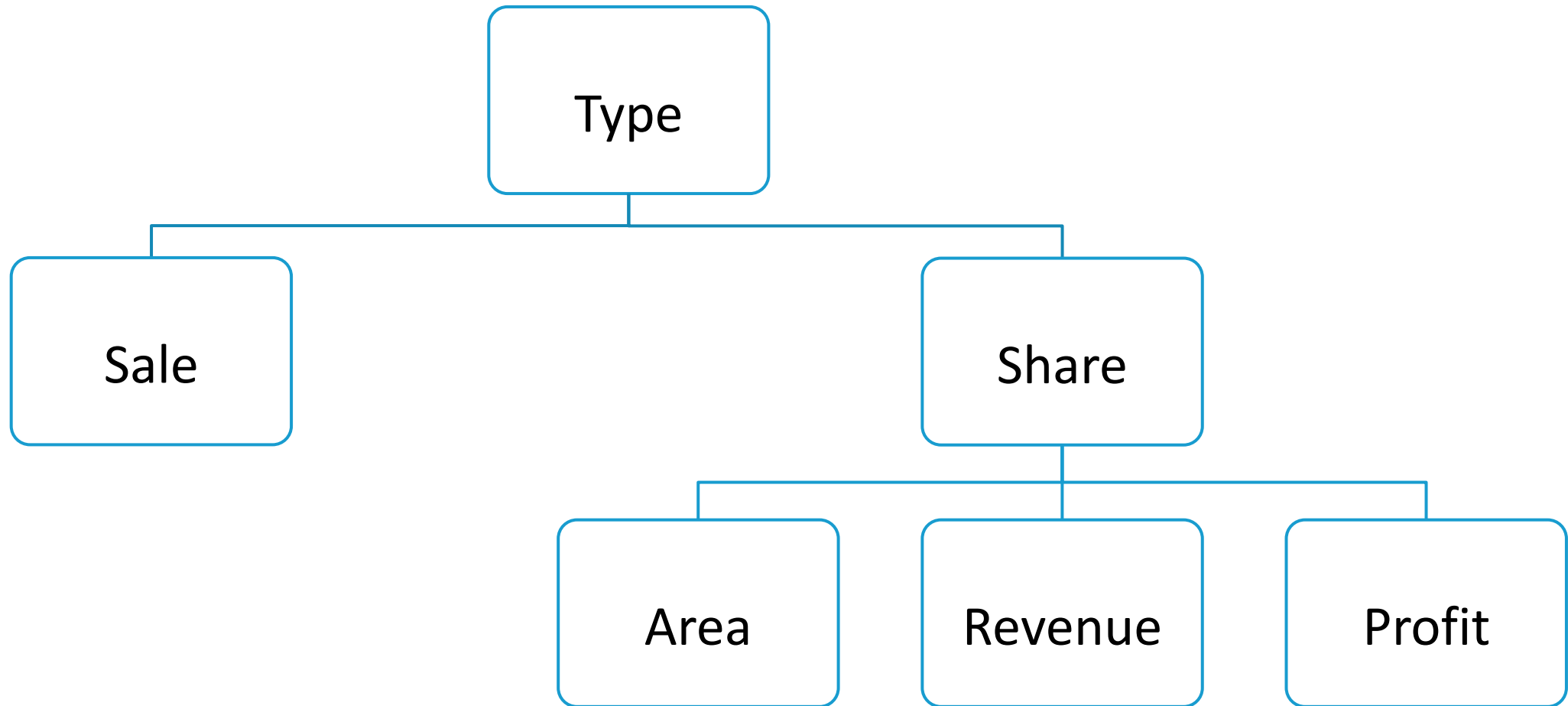
Nature of work!

Free supply!

Project!



JDA?



Scenarios

Particulars	Agreement	Construction	Handover	Remarks
I	1.04.2009	From 2009 to 2014	1.04.2015	
II	1.07.2010	From 2010 to 2014	1.04.2015	
III	1.07.2012	From 2013 to 2016	1.04.2016	
IV	1.07.2015	From 2015 to 2018	1.04.2018	
V	1.07.2015	From 2015 to 2020	1.04.2020	
VI	1.07.2017	From 2017 to 2020	1.04.2020	
VII	1.07.2019	From 2019 to 2021	1.04.2021	

Other key points!

Is it 'ongoing'?

- Letter filed?

Is it affordable (1% or 8%)?

Commercial units 5% or 12%?

Sale of DR?

Cancellation charges?

Maintenance and other charges (or deposits)?

GST rate on Works contract?

Anti-profiteering?

ITC!

Reversal if
transitioned to new
rates!

Reversal on
completion/ first
occupation!

ITC after completion/
first occupation

Thank you!

CA Pritam Mahure and Associates

Happy to Discuss

For suggestions: info@lawgical.in / +91 9920644648 / 020-27293425

E-books on GST

E-books on How to be Future Proof

Smile please 😊