

SVSR E-connect

SVSR & ASSOCIATES
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Reach us

Administrative office – No 6, 52nd street, 7th Avenue,
Ashok Nagar, Chennai – 600083.

E Mail – urs@svsr.in / info@svsr.in

Hand phone – 98403 78076

Landline – 044 4202 9777

Question & Answers on GST for Constructors & Realtors

Introduction:

The Real Estate industry contributes about 7.8% to India's GDP and it is the second largest employment generator after the IT industry. The sector had taken a blow during the demonetisation of currencies, after which GST was introduced. The tax reform aims at building more transparency and bring ease in the process of tax compilations for the sector. Through the following questions we are going to understand the GST provisions for this industry and its effects.

Q1. What are the GST applicability for Land & Buildings?

Land & Building are Immovable properties, GST can only be applied on goods & services, and therefore the application of GST is exempted for sale of land, whether it is for commercial purposes or not. For buildings GST is **exempted subject to clause (b) of paragraph 5 of Schedule II of The CGST Act, 2017**.

A question arises, **what is clause (b) of paragraph 5 of Schedule II of The CGST Act, 2017?**

The clause says Sale of under construction building will be subject to GST, whereas sale of completed building which clearly gets covered in the definition of immovable property shall not be subject to GST, hence form part of exempted supplies. In simple words, sale building, flat, unit or any other words assigned for which completion certificate has not been obtained will attract GST.

As Land & Buildings for which Completion certificate has been obtained come under **exempted supply ITC cannot be availed** and shall be written off for such supply as per **Section 17(2) & Section 17(3)** of the CGST Act, 2017.

Q2. What is a works contract & GST applicability for such contract?

Works Contracts has been defined in **Section 2(119)** of the CGST Act, 2017 as "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."

As per **Section 17(5) (c)** of CGST Act 2017 **ITC** in respect of work contract services has been restricted to the recipient when supplied for the construction of an **immovable property** (other than **plant and machinery**) except where it is an input service for further supply of work contract service.

As per section **17(5) (d)** of CGST Act, 2017 input tax credit shall not be available in case of goods or services or both received by a taxable person for construction of an immovable property (other than plant or machinery) on his own account including when such goods or services or both are used in the course or furtherance of business.

To comprehend these definitions let us see the below explanations:

The term "immovable property" is not defined under GST. According to **Section 3(26) of the General Clauses Act 1897**, "immovable property shall include land, benefits to arise out of land and things attached to the earth, or permanently fastened to anything attached to the earth As per **Section 3 of the Transfer of Property ACT 1882** "Immovable property does not includes standing timber, growing crops or grass"

The term "**plant and machinery**" means apparatus, equipment, and machinery fixed to earth by foundation or structural support that are used for making outward supply of goods or services or both and includes such foundation and structural supports but excludes:

- (i) Land, building or any other civil structures;
- (ii) Telecommunication towers; &
- (iii) Pipelines laid outside the factory premises.

Therefore in the following circumstances a recipient of works contractor services can avail ITC:

- (i) Works contract for Plant & Machinery;
- (ii) If the recipient is a works contractor. I.e. Sub-contractor; &
- (iii) Work contract services used for construction not resulting in capitalization to the said immovable property*

*If a business concern has availed the service of a works contractor, and such services are in the nature of expense as per the accounting principles, therefore it has been expensed, then the GST paid on such services can be availed as ITC by the business concern. Hence classification of the nature of expenses plays an important role in the availment of ITC for such services.

However, a recent **judgement by Orrisa High Court in the matter of M/s Safari Retreats Private Limited** has come with a twist in the tale which is summarized as below

Facts: M/s Safari Retreats Private Limited ("the Petitioner") is engaged in carrying on business activity of constructing shopping malls for the purpose of letting out of the same to numerous tenant and lessees. The Petitioner purchased cement, steel, sand, wires, etc., in bulk. Additionally, it also availed services like consultancy service, architectural services, legal and professional service etc. As these supplies were taxable, the Petitioner had accumulated ITC in respect of purchases of inputs and input services. It applied for availing credit, however, by applying **Section 17(5) (d) of the CGST Act**, the Revenue Officer took a view that input tax credit shall not be available in respect of goods and services or both received by a taxable person for construction of an immovable property (other than plant and machinery) on his own account including when such goods or services or both are used in the course of furtherance of business. The benefit of input tax credit was denied to the Petitioner.

Issues Involved: The key issue raised before the Court was, where inputs are consumed in the construction of an immovable property which is meant and intended to be for the provision of taxable output services, whether input tax credit was available to the Supplier?

Held: The Hon'ble Orissa High Court in **Safari Retreats Private Limited Vs Chief Commissioner of Central Goods & Service tax in W.P. (C) No. 20463 of 2018 vide order dated April 17 2019** read down **Section 17(5) (d) of the CGST Act** for the purpose of interpretation in continuation to give benefit to the person who has paid GST and it has to be interpreted in continuity of the transaction since rent income is arising out of the malls which are constructed after paying GST on different items. If input tax credit is denied on building meant and intended to be let out, it would amount to treating the transaction as identical to a building meant and intended to be sold. Further, treatment of these two different types of transactions as one for the purpose of GST, is contrary to the basic principles regarding classification of subject matter of tax levy and, therefore, **violative of Article 14 of the Constitution of India, 1950***.

Hence, the interpretation adopted by the Revenue Officer is frustrating the objective of the CGST and other respective state GST Acts in as much as the Petitioner in that case has to pay huge amount without any basis. Relying on (1999) 2 SCC 361, **the very purpose of the credit is to give benefit to the Supplier.** Therefore, if the Petitioner is required to pay GST on the rental income arising out of the investment on which he had paid GST, it is required to have the input tax credit on the GST.

***Article 14 of the Constitution of India, 1950** was not a standalone provision in the Draft Constitution; it was part of **Draft Article 15** which read: 'Protection of life and liberty and **equality before law** - No person shall be deprived of his life or liberty except according to procedure established by law, nor shall any person be denied equality before the law or the equal protection of the law within the territory of India.'

From this what we shall comprehend is both rental income & income from sale of property is a benefit which is directly derived from the building, therefore, not providing ITC for rental incomers and providing ITC for sale of property incomers shows that the law is biased towards a group of income earners, which is against Article 14, where the constitution demands equality before law.

Q3. What are the GST rates, Place of Supply (POS) & Valuation for Construction/Work contract services?

Place of Supply:

Where both the supplier and recipient are located in India. The place of supply would be where the immovable property is located as per Section 12(3) of the IGST Act, 2017. In case the immovable property is located outside India, and the supplier as well as recipient both are located in India, the place of supply would be the location of recipient as per proviso to Section 12(3) of the IGST Act, 2017.

Valuation of work contract services:

Valuation of a works contract service is dependent upon whether the contract includes transfer of property in land as a part of the works contract.

As per explanation 2 of **Notification no 11/2017 CGST (rate)**:

In case of supply of service, involving transfer of property in land or undivided share of land, as the case may be, the value of supply of service and goods portion in such supply shall be equivalent to the total amount charged for such supply less the value of land or undivided share of land, as the case may be, and the value 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: "total amount" means the sum total of (a) + (b),

(a) Consideration charged for works contract service; and

(b) Amount charged for transfer of land or undivided

Share of land, as the case may be.

For example, Payment received by builder as first installment is 12,00,000 GST will be levied at applicable rate on **12,00,000*2/3 =8,00,000** and balance will be construed as cost of land on which no GST would be levied.

GST rates:

S. No	Goods or Services supplied	Rate
1.	Services provided to Promoter developing RREP/REP* (having less than 50% of the total carpet area as affordable residential apartment)	18%
2.	Services provided to Promoter developing RREP/REP (where carpet area of affordable residential apartment is not less than 50% of total carpet area)	12%
3.	Pure Labour Services** and other construction services	18%

***REP-Real Estate Project** means the development of a building or a building consisting of apartments, or converting an existing building or a part thereof into apartments, or the development of land into plots or apartments as the case may be, and includes the common areas, the development works, all improvements and structures thereon, and all easement rights and appurtenances belonging thereto.

RREP-Residential Real Estate Project shall mean a REP in which the carpet area of the commercial apartments is not more than 15% of the total carpet area of all the apartments in the REP.

Carpet Area means net usable floor of an apartment, excluding the area covered by the external walls, area under services shafts, exclusive balcony or verandah area and exclusive open terrace area, but includes the area covered by the internal partition walls of the apartment.

Affordable Residential Apartment shall mean:-

A residential apartment in a project which **commences on or after 1st April, 2019**, or in an going project in respect of which the promoter has not exercised option in the prescribed form to pay central tax on construction of apartments, as the case may be, having **carpet area not exceeding 60 square meter in metropolitan cities and 90 square meters in cities or towns other than metropolitan cities and for which the gross amount charged is not more than forty five lakhs rupees.**

(i) **Metropolitan cities** are Bangalore, Chennai, Delhi, Hyderabad, Kolkata, and Mumbai with their respective geographical Limits prescribed by an order issued by the Central Government or State Government in this regard;

(ii) **Gross amount** shall be the sum total of all charges except GST.

**** Pure labor contract** means supplier of service should not utilize any material in supplying the service. It should be a labor contract only.

Notification no. 12/2017-Central Tax (Rate) dated 28th June, 2017:

The following services of **pure labor contract are exempted from GST-**

(i) Services of construction / 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 housing for all (urban) mission or Pradhan Mantri Awas Yojana.

(ii) Services of construction / erection / commissioning or installation of original works* pertaining to a 'single residential unit'** otherwise than as a part of a residential complex.

***Original works** means all new constructions:

(i) All types of additions and alterations to abandoned or damaged structures on land that are required to make them workable; &

(ii) Erection, commissioning or installation of plant, machinery or equipment or structures, whether pre-fabricated or otherwise.

****Single Residential Unit** means a self-contained residential unit which is designed for use wholly or principally for residential purposes for one family.