

GST: Joint Development Agreements (JDAs) : Real Estate in a Fix, Confusion Costs Consumers

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Joint Development Agreements or JDAs are a common feature in the real estate sector wherein the land owner transfers the land to the real estate developer and gets flats, a certain amount of revenue or a combination of both in return. In JDA, the Developer enters into a Development Agreement with Landowner, whereby

> **The Developer Acquires the Development Rights** from Land Owner with respect to the Land.

> The development right entitles the developer to **Obtain various types of licenses and approvals** from the government authorities and **Construct the Complex, Building or Civil Structure on the Land.**

> In return for the transfer of development rights by landowner, **the Developer hands over the Ownership Rights of certain percentage of the developed area ie Super Structures and may also certain Amount.**

> **The Remaining Flats Retained by Developer and Sold** to various Buyers

Example :

For Example, Developer ABC Ltd enters into a agreement with land owner Mr. XYZ whereas in lieu of this agreement a total of 100 residential units will be constructed by ABC ltd on the land provided by Mr. XYZ whereas 40% of the units i.e. 40 units shall be given to Mr. XYZ and rest 60 units shall be taken by ABC ltd.

Both can commercially sell the units in the open market. Land owner gets 40 units of flats in lieu of the land given and Developer gets 60 units of flats in lieu of the construction work done.

JDA – Joint Development Agreements

Example: Share: Land owner 40% and Developer 60%



Total 100 Flats :

Developer Retains 60 & Hands Over to Land Owner 40 Flats

Let's us now discuss various transactions in such agreements and the applicability of GST and ITC eligibility. Generally, there are Three Types of Transactions:

- > Transaction 1: **Landowner – Developer**: Transfer of Development Rights by the Landowner to Developer
- > Transaction 2: **Developer – Landowner**: Supply of Construction Service of Super Structures like complex, building or civil structure by the Developer to Landowner
- > Transaction 3: **Developer & Landowner Sells Flats to Third Parties**

Transaction 1: Landowner – Developer : Transfer of Development Rights by the Landowner

The Transfer of Development Rights by Landowner to Developer is treated as Supply in which Development Rights are Transferred in return for Consideration that involves in kind by way of wholly or partly, in the form of Construction Service of Complex, Building or Civil Structure.

Notification No. 4/2018-Central Tax (Rate), dated 25th January, 2018 which reads as follows, clearly establishes liability of payment of GST by the Landowner for Transfer of Development Rights.

.....

(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;

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..... 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)

From the above Notification, it can be derived that

> The Landowner must be Registered Person to attract the Liability to Pay GST

> **Supply in the Transaction** : Development Rights

> **Value of Supply (Consideration)** : wholly or partly, **in the form of construction service** of complex, building or civil structure

> **Time of Supply** : when the developer **transfers possession** or the right

*Since there is Supply with involvement of Consideration, the transaction of **Transfer of Development Rights** is **treated as Supply** as per Sec 7 (1)(a) of **CGST Act** and therefore GST is payable by the Landowner @ 18% (SAC Code: 999799) at the time when the developer transfers possession or the right through a conveyance deed or similar instrument like allotment letter.*

Transaction 2: Developer – Landowner: Supply of Construction Service of Super Structures like complex, building or civil structure by the Developer to Landowner

The Developer hands over the Ownership Rights of certain percentage (in the above example 40%) of the developed area ie Super Structures like complex, building or civil structure or flats to the landowner.

Again referring to the above **Notification No. 4/2018-Central Tax (Rate), dated 25th January, 2018**, which states as follows, is treated as supply

.....

(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 in the form of development rights 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).

It may be noted from the above Notification that

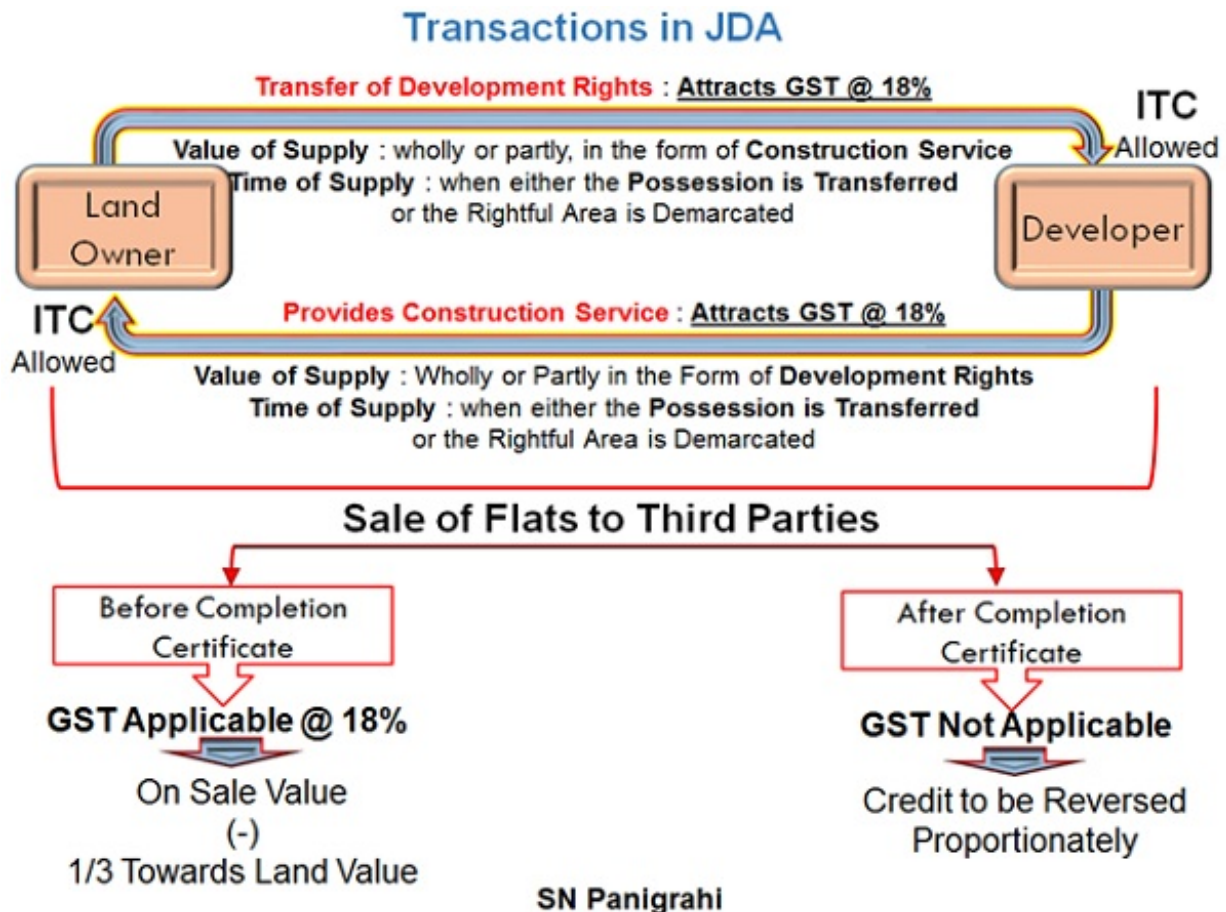
> The Developer must be Registered Person to attract the Liability to Pay GST

> **Supply in the Transaction** : Supply of Construction Service of complex, building or civil structure etc

> **Value of Supply (Consideration)** : wholly or partly, wholly or partly, **in the form of transfer of development rights**

> **Time of Supply** : when the developer **transfers possession** or the right

It is Clear from above that Supply of Construction Services by the Developer to Landowner (supplier of Development Rights) is a **Supply** for a consideration in the form of Transfer of Development Rights and therefore GST is payable by the Developer when he transfers possession of flats to the Landowner.



Transaction 3: Developer & Landowner Sells Flats to Third Parties:

Both the Developer and Landowner may sell their respective share of flats to third parties.

As per entry number 5 of Schedule III Sale of land and, **subject to clause (b) of paragraph 5 of Schedule II, sale of building shall be treated as neither supply of goods nor supply of services.**

Clause (b) of paragraph 5 of Schedule II, reads as follows:

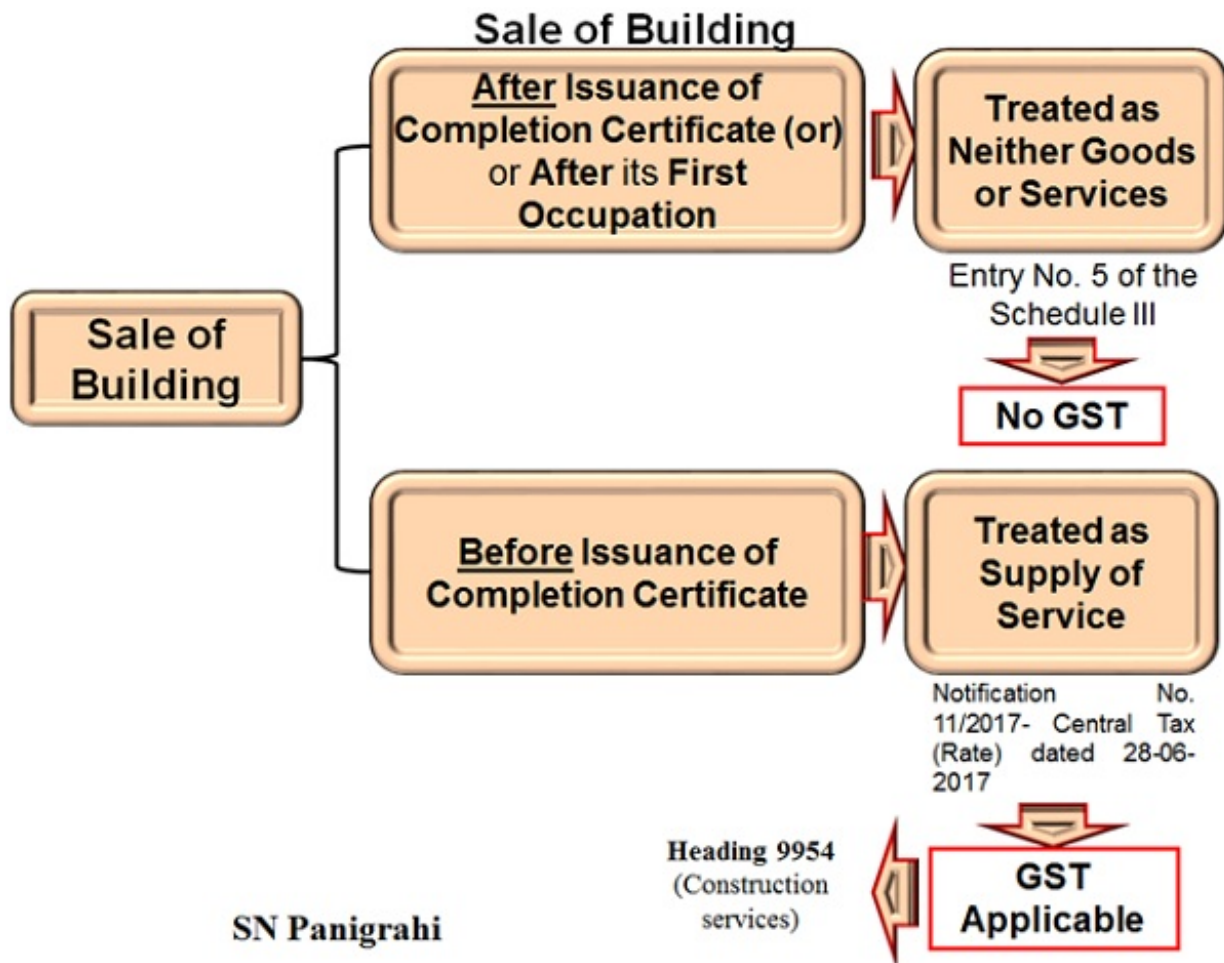
“construction of a complex, building, civil structure intended for sale to a buyer, wholly or partly, except where the entire consideration has been received after issuance of completion certificate”.

With Conjoint reading of both the provisions it is clear that

> Sale of Building **after receipt of Completion Certificate** is treated as neither goods nor service, that means not considered as supply and therefore GST is not applicable.

> Sale of Building **before** receipt of **Completion Certificate** is treated as supply of Service and therefore attract GST.

As per **Notification No. 11/2017- Central Tax (Rate) dated 28-06-2017**, under Heading **9954** (Construction services), the rate of GST is 18% (9% CGST + 9% SGST)



In fact, there may be possibility of Three Types of Scenarios.

- > Landowner / Developer Sells the Flats **before** Receipt of Completion Certificate
- > Landowner / Developer Sells the Flats **After** Receipt of Completion Certificate
- > Landowner / Developer may **Retain Flats for Own use**

The applicability of GST **before** and **after** receipt of Completion Certificate is already discussed above.

Regarding eligibility of Input Tax Credit, let's discuss the following provisions in the GST Law:

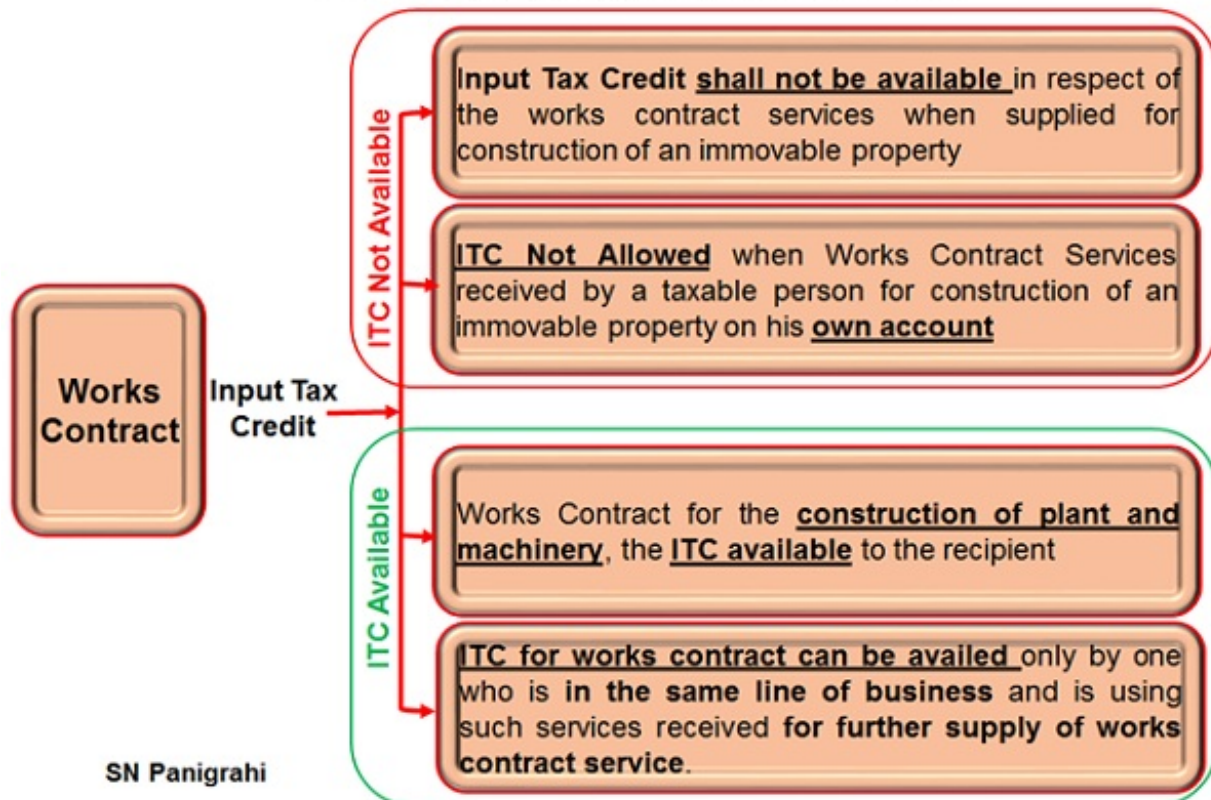
Sec 17(5) of CGST Act, Notwithstanding anything contained **input tax credit shall not be available** in respect of the following, namely:—

(c) works contract services when supplied for construction of an immovable property (other than plant and achinery) **except where it is an input service for further supply of works contract service;**

(d) 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.

Explanation.—For the purposes of clauses (c) and (d), the expression “**construction**” includes **re-construction, renovation, additions or alterations or repairs, to the extent of capitalisation**, to the said immovable property

Works Contract – Availability of Input Tax Credit Sec 17(5) (c) & (d) of CGST Act, 2017



Accordingly, if the Developer / Landowner being in the works contract, sells Flats / Buildings, then they are eligible for taking Input Tax Credit, when they charge GST on such sales ie when they sell **Before** receipt of Completion Certificate. In case of sale of Flats / Buildings **After** receipt of Completion Certificate or retains for **Own Use**, then **Input Tax Credit is not Available**.

Further in case, Developer / Landowner, sells some Flats / Buildings **Before** receipt of Completion Certificate and some others **After** receipt, that is partly for effecting Taxable Supplies (Before Receipt of CC) and partly for effecting exempt supplies (After Receipt), then the amount of credit shall be restricted to input tax as is attributable to the taxable supplies as per Sec 17(2)(3) which reads as follows :

(2) Where the goods or services or both are used by the registered person partly for effecting taxable supplies including zero-rated supplies under this Act or under the **Integrated Goods and Services Tax Act** and partly for effecting exempt supplies under the said Acts, the **amount of credit shall be restricted to so much of the input tax as is attributable to the said taxable supplies** including zero-rated supplies.

(3) The value of exempt supply under sub-section (2) shall be such as may be prescribed, and shall include supplies on which the recipient is liable to pay tax on reverse charge basis, transactions in securities, sale of land and, subject to clause (b) of paragraph 5 of Schedule II, sale of building.

Generally, at the time of taking credit, the Developer / Landowner, may not knowing whether the flats will be sold out before or after the receipt of Completion Certificate, therefore they avail total eligible credit and in case they sell any flats after the completion certificate or decided to retain for own use, then the corresponding credit should be reversed at the time of such sales.

The summary of above discussions shown below in the table:

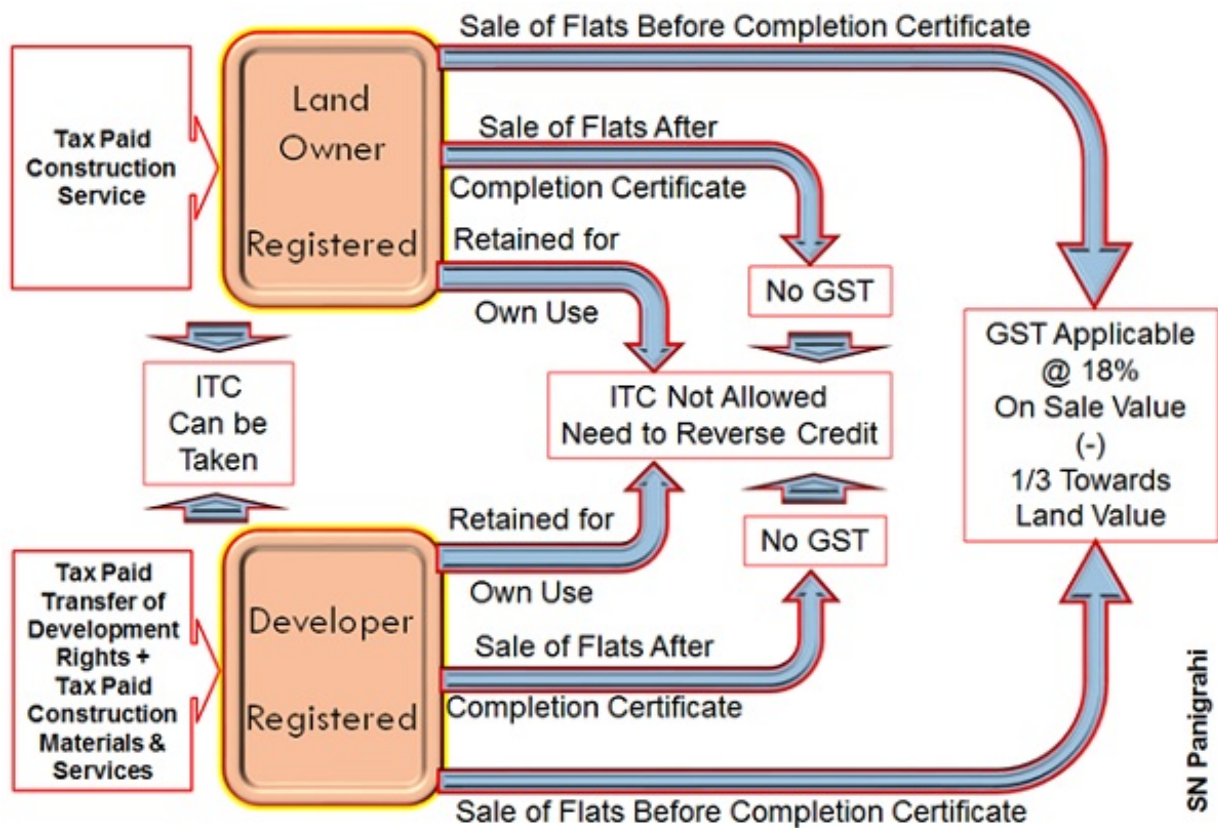
	Landowner / Developer Sells the Flats <u>before</u> Receipt of Completion Certificate	Landowner / Developer Sells the Flats <u>After</u> Receipt of Completion Certificate	Landowner / Developer Retain Flats for <u>Own use</u>
Applicability of GST	Yes	No	No
Availability of ITC	Yes	No	No
Need for Reversal of ITC in case already Availed	No	Yes	Yes

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The Developers are entitled to take credit of Input Tax paid on Steel, Cement and other such items as well as on various types of services like architectural, engineering, manpower services. They also entitled for tax paid on reverse charge mechanism on payments made to government and local authorities for getting various types of approvals, licenses etc.

The Landowner also may take credit of tax collected by Developer when he hands over the possession rights of flats.

The Input Tax Credits so taken may be utilized towards liability of payment of GST when they sell flats before receipt of Completion Certificate.



Dispute Over Applicability Tax on Development Rights:

Though there is clarity vide **Notification No. 4/2018-Central Tax (Rate), dated 25th January, 2018**, many experts and real estate industry questioning the applicability of tax on mere transfer of land development rights by owner to a real estate developer.

Some builders have dragged the GST Council, Central and Maharashtra governments, to court for including such transactions under the GST framework, citing such transactions were exempt under the previous service tax regime and the notification goes against the essence of GST framework that excludes sale of land and building from tax ambit.

Also there is certain apprehensions and confusions regarding valuation of Development Rights passed on by the Landowner to Developer and Transfer Right of possession of flats by the Developer to the Landowner.

Amid the dispute and its related confusions, the builders are smart to pass on the cost & risk to the consumers and not the benefits of input tax credit which legitimately they avail. **Since these Confusions Costing the Consumers, CBIC should clarify explicitly about Valuation, Credit and Taxability.**

PPT can be viewed @: <https://www.youtube.com/watch?v=byUCemj0B9s&feature=youtu.be>

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