

# AHMEDABAD CHARTERED ACCOUNTANTS JOURNAL

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## Real Estate GST on Purchase from Unregistered Suppliers

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W.e.f. 1<sup>st</sup> April, 2019, there is a paradigm shift in Goods and Services Tax (GST) for the construction industry. Construction of new residential apartments are now being taxed at lower GST rate of 1% or 5% without Input Tax Credit (ITC) as compared to 12% with ITC earlier. As ITC was available earlier, procuring supply from registered person and paying GST to them was not a tax burden to promoters. However, in absence of ITC in new regime, it will result in extra cost to promoter and this may result in the generation of black money as promoters may resort to book bogus expenditure by showing supplies from unregistered persons. To avoid such possibility, it is provided that the promoter will have to procure at least 80% of their inward supplies from registered persons. If there is any shortfall, promoter will have to pay GST on shortfall, on his own under reverse charge mechanism.

Provisions and issues in this new mechanism are discussed below.

1. Is it compulsory for a promoter to procure goods or services from a registered person?

Ans. No, a promoter can purchase goods or services from unregistered persons. However, if such purchase is more than 20% during the year, the promoter will have to pay GST on shortfall from 80%. For example, if during the year the promoter has purchased 22% of total goods and services from unregistered persons, the promoter will have to pay GST on 2% under reverse charge mechanism.

2. Are these provision applicable to all promoter?

Ans. This provision of limitation of 80% of purchases from the registered supplier is

applicable to a promoter of the Residential Real Estate Project (RREP) where reduced GST rate of 1%/5% is applicable.

It is not applicable for full commercial projects. However, it is applicable to residential portion in a project other than RREP i.e. commercial and residential mix projects.

It is also not applicable to residential projects which were ongoing projects as on 31/03/2019 for which promoter has not opted for lower rate of 1%/5%. This proposition is also clarified at question No. 17 of FAQs (Part II) on real estate issued by Tax Research Unit from file No. 354/32/2019-TRU.

3. A promoter has construction scheme which is mostly residential scheme, but some portion of the scheme is used for commercial units like shops. How limitation of 80% above will effect such promoter?

Ans. If carpet area used in commercial units are limited to 15% or less in the scheme, entire project will be considered as Residential Real Estate Project and a promoter will have to comply with provision of limitation of 80% inward supplies from registered supplier. In such scheme, the promoter can't avail any Input Tax Credit (ITC) even if it is used for construction of commercial units as he has to pay GST @5% on sale of commercial units.

If carpet area used in commercial units are more than 15% of the total carpet area, such project will not be considered as RREP. Even in such projects, rate on residential units will be 1%/5%. In such case, a promoter will have to follow limitation of 80%

purchase from registered supplier for residential units only and not for entire scheme. Such proportion may be derived based on carpet area.

4. What types of inward supplies/purchases/expenses will be covered under this provision?

In terms of conditions prescribed against Entry Number 3 of the Notification No. 11/2017-CTR, 80% of value of input and input services used in supplying the service shall be received from registered suppliers. Thus, all types of inputs and input services (except specifically mentioned in the said entry) which are used in supply of construction service shall be received from the registered suppliers.

4. What types of inputs and input services are specifically excluded to calculate limit of 80%?

Ans. Following inward supplies are not subject to limitation of 80% meaning thereby such supplies are not to be considered while calculating limitation of 80% even if procured from unregistered person.

- i. Service by way of grant of development rights
- ii. Services by way of long term lease of land against upfront payment in the form of premium, salami, development charges
- iii. Purchase of FSI or additional FSI
- iv. Electricity
- v. High Speed Diesel
- vi. Motor Spirit (Petrol)
- vii. Natural Gas

5. Are exempted goods or services received from unregistered supplier to be considered for calculating limit of 80%?

Ans. 80% of all input and input services shall be from a registered person. No differentiation

is made between exempt supply and taxable supply. Thus, supplies, which are otherwise exempt, are received by the promoter, from an unregistered person is also required to be added to margin of 20%.

This proposition is already clarified through FAQ no. 18 of the FAQs (Part II) on real estate dated 14/05/2019 issued by Tax Research Unit (TRU) from File No. 354/32/2019-TRU.

6. A promoter of RREP has paid interest to the unregistered person. Will this interest be considered for calculating 80%?

Ans. Yes, as interest on loan, advance and deposit is an exempted services, it will be considered for limit of 80% as discussed earlier. However, please note that if such interest is paid to a registered person (for example bank), it will not be considered as shortfall and GST is not payable on such interest even if there is shortfall.

7. A promoter has paid salary and wages to its employee. Will such expenditure be considered as supply received from unregistered person and considered for limit of 80%?

Ans. As clarified at FAQ No. 15 of the FAQs (Part II) issued by TRU, from file No. 354/32/2019-TRU dated 14/05/2019, such salary and wages are neither goods nor services and hence will not be considered as supply received from unregistered person for limitation of 80%.

8. A promoter has shortfall which comprises of many types of supplies, received from many unregistered suppliers which are taxable at different rates. What is the applicable rate of GST on this shortfall?

Ans. Irrespective of actual rate prevailing on such goods or services received from unregistered suppliers, GST at flat rate of 18% is required to be paid on such shortfall.

9. Land is not included in the list of specific supplies which are excluded for limit of 80%. Does it mean that land is also required to be considered for a limit of 80%?

Ans. In terms of the conditions specified against Entry No. 3 of the Notification No. 11/2017-CTR, “input and input services” shall be received from the registered person. In terms of Section 2(59) & (60) of the CGST Act, 2017, “input” means any goods other than capital goods used or intended to be used by a supplier in the course or furtherance of business and “input service” means any service used or intended to be used by a supplier in the course or furtherance of business. In terms of the Entry No. 5 to Schedule 3 of the CGST Act, 2017, Sale of Land is neither supply of goods nor supply of services. Hence, sale of land is not a supply and can't be “input” or “input service” and hence it is not required to be considered for computing limit of 80%. This proposition is also clarified vide FAQ no. 19 of the FAQs (Part II) on real estate dated 14/05/2019 issued by TRU from File No. 354/32/2019-TRU.

10. Specified services and goods are covered under Reverse Charge Mechanism applicable to all and in addition to that a promoter is required to pay GST under RCM on shortfall under limitation of 80%. For example, Goods Transport Agency services and legal services received from an Advocate. Suppliers of such supplies are generally not registered. How will these supplies be considered for RCM on shortfall under limitation of 80%?

In terms of the conditions specified against Entry No. 3 (i) to (id) of the Notification No. 11/2017-CTR, inputs and input services on which tax is paid on reverse charge basis shall be deemed to have been purchased from registered person. Thus, for calculating limit of 80%, such supplies will be deemed to be received from a registered person.

For example, out of total purchase of Rs. 100 Cr during the year, 75% is from registered supplier and 25% is from unregistered supplier and shortfall of 5% out of 80% limit. Out of 25% from unregistered supplier, 7% is pertaining to transportation services received from GTA on which promoter is required to pay tax under normal RCM. This services will be considered as if received from a registered person and hence now total purchase from registered person is 82% (75+7) which is above limit of 80% and there is no shortfall on which the promoter has to pay GST under this provision.

11. A promoter of RREP has imported services for the project and supplier of such service who is located outside India is not registered under the GST. How this amount of import of service will be considered for limitation of 80%?

Import of service is subject to RCM as provided under Entry 1 of the Notification No. 10/2017-IGST (Rate) and as discussed in forgoing question, services received by promoter which are covered under RCM are deemed to be received from a registered supplier. Hence, it will not be considered as part of shortfall.

12. A promoter of RREP has imported goods for the project and supplier of such service who is located outside India is not registered under the GST. How this amount of import of goods will be considered for limitation of 80%?

Import of services are subject to RCM under Section 5(3) of the IGST Act, 2017) however, import of goods are not subject to RCM under Section 5(3) of the IGST Act, 2017 but IGST on such goods are to be levied and collected under the Customs Tariff Act, 1975 as provided in proviso to Section 5(1) of the IGST Act, 2017.

Conditions provided for lower rate of 1%/5% excludes only services or goods which are covered under RCM as provided under

Section 5(3) and not the goods on which IGST is to be paid under the Customs Tariff Act, 1975. [Refer conditions specified against Entry 3(i) to (id) of the Notification 11/2017-CTR]

In absence of any other specific exclusion, it *prima facie* appears that such imported goods are nowhere excluded but may be considered at par of other purchases made from unregistered person and may form part of the shortfall.

However, import of goods is an “inter-state transaction” and CGST or SGST can’t be levied thereon. Further, in terms of proviso to Section 5(1) of the IGST Act, 2017, GST can be levied on import of goods only under the Customs Tariff Act, 1975. Thus, such import, which is a supply from unregistered person, can’t be considered as shortfall as no demand can be made under CGST/SGST or IGST Act, 2017.

13. How the Capital Goods purchased by a promoter from an unregistered supplier will be considered for the limit of 80% ?

In terms of conditions stated against Entry 3(i) to (id) of the Notification No. 11/2017-CTR, limitation of 80%, value of only input and input services are to be considered. In terms of the Section 2(59) of the CGST Act, 2017, definition of “input” specifically excludes “capital goods”. Hence, purchase of capital goods by a promoter of the RREP, from an unregistered person will not be considered for 80%.

However, in terms of Entry 3 to the Notification No. 07/2019-CTR, w.e.f. 1<sup>st</sup> April, 2019, a promoter is required to pay GST on supply of capital goods received from an unregistered person. Thus, purchase of capital goods by promoter is already subject to Reverse Charge Mechanism.

However, this provision is applicable for Residential Real Estate Projects and residential units where GST rate of 1%/5%

is applicable and not applicable to the full commercial schemes.

14. Are all the expenditure of the promoter or expenditure related to RREP scheme are subject to limitation of 80% ?

In term of limitations stated against Entry 3 (i) to (id) of the Notification 11/2017-CTR, eighty percent of value of input and input services, which are used in supplying the service shall be received from registered supplier. If any expenditure which are not related to such project, directly or indirectly, are not subject to such limitation. For example, if a promoter has paid interest to unregistered person for loan which are not used for the RREP, such interest will not be considered for limitation of 80%.

15. A promoter has shortfall in purchase from registered suppliers in a one project but for another project he has more than 80% of supplies received from registered person. Can he set off such excess and shortfall of different projects?

In terms of Explanation 1 to conditions prescribed against Entry 3 (i) to (id) of the Notification 11/2017-CTR, the promoter shall maintain project wise account of inward supply from registered and unregistered suppliers. Further, from the wordings of the entries in the notification also it seems that limitation of 80% is to be applied for each project separately. Hence, in my opinion, excess in once project may not be set off against another project.

16. What is periodicity to calculate limit of 80% and payment of tax under RCM on shortfall?

In terms of Explanation 1 to conditions prescribed against Entry 3 (i) to (id) of the Notification 11/2017-CTR, the promoter shall calculate tax payments on the shortfall at the end of the financial year and shall submit the same in the prescribed form electronically on the common portal by end of the quarter following the financial year.

(No form is yet prescribed or made available on GST network till writing of this article).

Further, the tax liability on the shortfall of inward supplies from unregistered person so determined shall be added to his output tax liability in the month not later than the month of June following the end of the financial year. (As form is not yet prescribed, it is not possible to comment whether payment will be through GSTR3B or other mode).

17. For the year 2019-20, has shortfall in receiving supply from the registered person. However, for the year 2020-21 has received supply more than 80% from registered supplier. Can he adjust the shortfall and excess of the different years?

In terms of Explanation 1 to conditions prescribed against Entry 3 (i) to (id) of the Notification 11/2017-CTR, the promoter shall calculate tax payments on the shortfall at the end of the financial year and there is no provision to calculate shortfall finally at end of the project based on actual figures. Thus, payment on shortfall is required to be made annually and in absence of provisions of calculating shortfall finally, such adjustment will not be possible.

18. Is tax paid by a promoter on shortfall of receiving supply from registered person is required to be disclosed in GSTR-3B?

As form for declaring shortfall is not yet prescribed, it is difficult to assume how it will be disclosed in the Form GSTR-3B. However, in terms of Explanation 3 to Conditions specified against Entries 3(i) to (id) of the Notification No. 11/2017-CTRm, such promoter is required to disclose this amount, when paid, as ineligible ITC not availed in GSTR-3B [Row No. 4 (D)(2)].

19. During the year 2020-21, Completion Certificate (Building Usage Permission) is received on 15/09/2020. Is limitation of 80% is applicable upto 15/09/2020 or for entire year 2020-21?

In terms of the condition specified against Entry No. 3(i) to (id) of the Notification 11/2017-CTR, shortfall is to be calculated for the financial year or part of the financial year till the date of issuance of completion certificate or first occupation of the project, whichever is earlier. Thus, only supplies received till 15/09/2020 will be covered under limitation of 80%.

20. A promoter of RREP has purchased 99% of the supplies from registered person. However, they have purchased 1% of total inward supplies from unregistered person, which is Cement. Is there any liability of the promoter under RCM on this?

In terms of the conditions provided against Entry 3(i) to 3(id) of the Notification No. 11/2017-CTR, if cement is purchased from unregistered supplier, promoter has to pay GST under RCM, notwithstanding that total inward supply from registered person is more than 80%.

21. A promoter of a commercial scheme has purchased cement from the unregistered person, is he liable to pay GST on it under RCM?

Limitation of 80% inward supply is applicable to promoter of Residential Real Estate Project and residential units in common scheme but not applicable to promoter of scheme with only commercial units.

However, w.e.f. 01/10/2019, Entry 2 of the Notification No. 7/2019-CTR is amended and now, a promoter of all schemes, including for commercial construction, a promoter is required to pay GST on receipt of cement from unregistered person. From 01/4/2019 to 30/09/19, this provision was applicable only to construction of residential units.

22. At what rate GST is required to be paid by a promoter on receipt of supply of cement from an unregistered supplier?

In terms of the conditions specified against Entry No. 3 (i) to (id) of the Notification No. 11/2017-CTR, a promoter of RREP and residential units is required to pay GST at applicable rate on Cement, which is 28% currently.

For promoter of other schemes, say commercial construction scheme, in absence of any specific provision, rate prevailing will be applied which is 28% currently.

23. What is periodicity for payment of GST under RCM by a promoter on purchase of Cement?

Tax on shortfall from 80% of received supplies from unregistered is required to be paid on yearly basis. However, in terms of Explanation 2 to conditions specified against Entry 3(i) to (id) of the Notification No. 11/2017-CTR for cement received from unregistered person, a promoter of RREP is required to pay such tax on monthly basis. In absence of specific provisions for projects other than RREP, such tax is payable on monthly or quarterly according to the returns as made applicable to the promoter.

24. A promoter of RREP has shortfall in purchase from registered person during the year 2019-20. Shortage is mainly due to receipt of works contract service from unregistered construction contractors. Being affordable residential scheme, registered contractors charges 12% GST to promoter, as provided in Entry Number 3(va) of the Notification No. 11/2017-CTR. At what rate a promoter is required to pay GST on shortfall of such service if received from unregistered contractor?

As discussed earlier, GST @ 18% is required to be paid on entire shortfall irrespective of the fact that such shortfall comprise of supplies which are subject to lower rate or even exempted. Thus, if such service is received from a registered supplier, GST @ 12% will be payable (normal charge by supplier) and if such service is received from an unregistered supplier GST @ 18% will be payable (by promoter under RCM).

25. A promoter of RREP is anticipating shortfall in purchase from registered person during the year 2020-21. He has option to receive pure service of construction from various contractors. Some of them are unregistered, some of them are registered and having turnover more than Rs. 50 L and some of them are registered having turnover less than Rs. 50L and has opted for composition scheme. Basic rate without GST are quoted at par by all supplier. From whom, a promoter should receive such service?

If there is shortfall in receipt of supply from registered person, tax will be payable at flat 18%. And if received from a registered having turnover more than Rs. 50L, he will also charge 18%. Hence, there is no difference between both of them as far as tax burden is concerned.

However, if such services are received from an registered person with turnover upto Rs. 50 L and he has also opted for composition scheme, he will pay GST @ 6%. As he is registered, supply received from him will not be considered in shortfall. Thus, to save tax burden (as there is no ITC), such supplier should be given priority.

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