Tax issues in transactions of immovable property and construction industry, capital gains and recent controversy

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Scope

The topic for today's talk is "Tax issues in transactions of immovable property and construction industry, capital gains and recent controversy". The scope of the topic is very wide. We are going to discuss the issues arising out of provisions of section 43CA, the amendment to section 50C by Finance Act, 2016, the issues arising in the context of deduction of tax at source under section 194IA, amendments made to sections 54 and 54F by the Finance (No. 2) Act, 2014 and also issues arising out of section 56(2)(vii)(b). In each of these provisions there are a large number of issues which can be discussed. However, considering the time available, we will analyse the provision and then discuss the issues which are of wide importance. Time permitting, we will also deal with the issue as to whether the ICDS – III applies to builders / developers. And whether the ICDS-IX on Borrowing Costs restricts the claim of deduction of interest under section 36(1)(iii) as a period cost.

The exact issues, on each of the topics, which are proposed to be covered during the course of the discussion are listed in subsequent slides.

Issues under section 43CA

- Is section 43CA applicable in respect of transfers after 1.4.2013 or in respect of agreements entered into after 1.4.2013?
- Is the transfer of flat under construction covered by the provisions of section 43CA?
- Is the section a charging section or a computation provision?
- For the purpose of section 43CA, what is the meaning of the word `transfer'?
- In the case of an assessee following percentage completion method of accounting –
  - In which year is the difference between the stamp duty value of the asset transferred and its full value of consideration chargeable?
  - How will the section work in respect of projects where some part of the profits have already been offered for taxation in the years where the section was not operative?
- What is the significance of the word `part of the building' not being there in section 43CA whereas the same is there in section 27, section 94IA, section 194LA, section 194LAA, section 269AB?
- Is the section applicable for computation of profits on transfer of development rights in respect of land held as stock-in-trade are granted?
- Are provisions of section 43CA applicable to transfer of assets located outside India?
- Are provisions of section 43CA applicable to transfer of assets located in Union Territories?
- What is the meaning of the word `agreement' as used in sub-section (3) of section 43CA?
- Is letter of allotment an agreement?

Issues under section 43CA …

- Will an agreement granting an option to purchase to the buyer be regarded as an agreement for the purpose of section 43CA/
- Will an agreement under which the buyer agrees to buy a flat but leaves the option open to himself to select one out of the three flats mentioned in the agreement qualify for the purposes of sub-section (3) of section 43CA?
- Will an oral agreement qualify for concession under section 43CA(3)?
- In case of cancellation of booking, is the difference offered for taxation under this section liable to be reversed?
- What is the meaning of the term `assessable' as used in section 43CA?
- Sub-section (2) of section 43CA states that the provisions of sub-section (2) and sub-section (3) of section 50C shall so far as may be apply in relation to the determination of the value adopted or assessed or assessable under sub-section (1). There are two explanations to section 50C which define the terms "valuation officer" and "assessable". Are these explanations also applicable to section 43CA?
- Is payment by a journal entry covered by sub-section (4) of section 43CA?

Issues arising from proviso to section 50C

- The proviso to section 50C(1), as inserted by Finance Act, 2016, is prospective w.e.f. 1.4.2017 and applies to assessment year 2017-18. In this connection, the question which arises for consideration is the date of applicability of the proviso –
  - Is it applicable to agreements entered into on or after 1.4.2016 and which satisfy the conditions stated in the second proviso?
  - Is it applicable to transfers happening on or after 1.4.2016 irrespective of the date of agreement? If the answer is in the affirmative, then –
    - Should such an agreement satisfy the conditions of second proviso or
    - Such an agreement need not satisfy the conditions of the second proviso.
  - Can it be said that the proviso is inserted to alleviate the difficulty and therefore, it has to be interpreted as being retrospective and therefore the amended provisions will apply to even transfers happening before 1.4.2016.

Issues under section 194IA

- Are the provisions applicable to transactions in respect of land or building or part of a building situated outside India?
- Is the threshold of Rs. 50 lakh referred to in sub-section (2) qua the property or qua the transferor or qua the transferee?
- Are the provisions applicable to transfer of development rigths in respect of land held as stock-in-trade?
- Are the provisions applicable to transfer by way of an exchange?
- Does consideration include VAT, Service tax and other amounts agreed to be paid by the flat purchaser to the builder?
- Are the provisions applicable to purchase of a flat under construction?
- Are the provisions of the section applicable to transfer of tenancy rights?
- Is the threshold to be computed with reference to consideration for transfer or stamp duty value?
- Is tax required to be deducted on consideration agreed or from greater of consideration agreed or stamp duty value of the property?

Issues under section 56(2)(vii)(b)

- Are the provisions of s. 56(2)(vii)(b)(ii) applicable to receipts after introduction of the sub-clause or to receipts under agreements entered into after the introduction of the sub-clause?
- Is receipt of agricultural land without consideration / for inadequate consideration covered by sub-clause (b) of clause (vii) of sub-section (2) of section 56?
- Are the provisions applicable to immovable property received which is stock-in-trade?
- Are the provisions applicable to applicable to transactions in respect of land or building or part of a building situated outside India?
- Is the threshold of Rs. 50 lakh referred to in sub-section (2) qua the property or qua the transferor or qua the transferee?
- Are the provisions applicable to transfer of development rights in respect of land held as stock-in-trade?
- Are the provisions applicable to transfer by way of an exchange?
- Does consideration include VAT, Service tax and other amounts agreed to be paid by the flat purchaser to the builder?
- Are the provisions applicable to purchase of a flat under construction?
- Are the provisions of the section applicable to transfer of tenancy rights?
- Is receipt of immovable property situated outside India covered?
- In which year is the difference between stamp duty value and the consideration chargeable to tax in case of receipt of a flat under construction?

Miscellaneous Issues

- Is ICDS III on Construction Contracts applicable to builders / developers?
- Does ICDS on Borrowing Costs debar an assessee from claiming interest as a period cost?
- Post amendment of sections 54 and 54F by the Finance Act, 2015 is it possible to claim exemption with reference to cost of two two adjacent houses which upon having been purchase are combined by the assessee into one and used as one residential house.
- While construction of a house can commence before the date of transfer of original asset, the question is whether the cost incurred on construction from the date of commencement of construction till the date of transfer of original asset qualifies for exemption / deduction under section 54 / 54F?

Section 43CA – Analysis and Issues

Section 43CA

- **Section 43CA - Special provision for full value of consideration for transfer of assets other than capital assets in certain cases.**
- The Finance Act, 2013 has with effect from 1.4.2014 inserted S. 43CA in the Income-tax Act, 1961 ("the Act"). This section deems value adapted or assessed or assessable by any authority of a State Government for the purpose of payment of stamp duty (stamp duty value) of an asset (other than capital asset) being land or building or both to be the full value of consideration, received or accruing as a result of transfer thereof, by the assessee, in the event consideration received or accruing is less than the stamp duty value of the asset so transferred. The provisions of this section are broadly identical to the provisions of S. 50C and the two provisos to S. 56(2)(vii)(b)(ii).
- The Memorandum explaining the provisions of the Finance Act, 2013 states as under –

  "E. WIDENING OF TAX BASE AND ANTI TAX AVOIDANCE MEASURES

  Computation of income under the head "Profits and gains of business or profession" for transfer of immovable property in certain cases

  Currently, when a capital asset, being immovable property, is transferred for a consideration which is less than the value adopted, assessed or assessable by any authority of a State Government for the purpose of payment of stamp duty in respect of such transfer, then such value (stamp duty value) is taken as full value of consideration under section 50C of the Income-tax Act. These provisions do not apply to transfer of immovable property, held by the transferor as stock-in-trade.

Section 43CA

It is proposed to provide by inserting a new section 43CA that where the consideration for the transfer of an asset (other than capital asset), being land or building or both, is less than the stamp duty value, the value so adopted or assessed or assessable shall be deemed to be the full value of the consideration for the purposes of computing income under the head "Profits and gains of business of profession".

It is also proposed to provide that where the date of an agreement fixing the value of consideration for the transfer of the asset and the date of registration of the transfer of the asset are not same, the stamp duty value may be taken as on the date of the agreement for transfer and not as on the date of registration for such transfer. However, this exception shall apply only in those cases where amount of consideration or a part thereof for the transfer has been received by any mode other than cash on or before the date of the agreement.

These amendments will take effect from 1st April, 2014 and will, accordingly, apply in relation to the assessment year 2014-15 and subsequent assessment years. [Clause 8]"

The section is introduced as a tax avoidance measure. The Memorandum states that this provision is intended to apply to stock-in-trade since the provisions of S. 50C are applicable only to capital asset. This objective will have to be kept in mind while interpreting the provisions in case two interpretations are possible due to ambiguity in the language of the provisions.

Section 43CA

- The text of the section is as under –

Special provision for full value of consideration for transfer of assets other than capital assets in certain cases.

"43CA. (1) Where the consideration received or accruing as a result of the transfer by an assessee of an asset (other than a capital asset), being land or building or both, is less than the value adopted or assessed or assessable by any authority of a State Government for the purpose of payment of stamp duty in respect of such transfer, the value so adopted or assessed or assessable shall, for the purposes of computing profits and gains from transfer of such asset, be deemed to be the full value of the consideration received or accruing as a result of such transfer.

(2) The provisions of sub-section (2) and sub-section (3) of section 50C shall, so far as may be, apply in relation to determination of the value adopted or assessed or assessable under sub-section (1).

(3) Where the date of agreement fixing the value of consideration for transfer of the asset and the date of registration of such transfer of asset are not the same, the value referred to in sub-section (1) may be taken as the value assessable by any authority of a State Government for the purpose of payment of stamp duty in respect of such transfer on the date of the agreement.

(4) The provisions of sub-section (3) shall apply only in a case where the amount of consideration or a part thereof has been received by any mode other than cash on or before the date of agreement for transfer of the asset.".

Section 43CA

- **Analysis of S. 43CA**
- **Conditions precedent**
  1. There is an assessee.
  2. There is a transfer by the assessee.
  3. The transfer is of an asset as defined in this section.
  4. There is consideration received or accruing as a result of such transfer.
  5. The value adopted or assessed or assessable by any authority of a State Government (stamp duty value) for the purpose of payment of stamp duty in respect of such transfer is greater than the consideration mentioned in 4 above.
- **Consequence –**
  1. For the purpose of computing profits and gains from transfer of such asset, stamp duty value shall be deemed to be full value of consideration received or accruing as a result of such transfer.
- **Exception:**
  1. The asset (i.e. land or building or both) is a capital asset of the assessee.
  2. Where the date of agreement of sale and the date of registration of transfer are not the same, the stamp duty value on the date of agreement shall be taken in place of stamp duty value on the date of registration provided the conditions mentioned in sub-sections (3) and (4) are satisfied (see notes later).
- **Definition:**

  Asset means land or building or both. However, such asset should not be capital asset.

Section 43CA

- **Analysis:**
- **Assessee:** The section applies to any assessee. For the section to apply legal status and / or residential status of the assessee are not relevant. Therefore, the section applies to an assessee being individual, hindu undivided family, firm, LLP, company, association of persons, body of individuals, trust, co-operative society, etc.

- **Transferee**: The transferee / buyer could be any person. Legal status and residential status of the buyer is not relevant. The transferee could even be a relative of the assessee or a wholly owned subsidiary, etc.

- **`Profits & Gains'** : The section applies while computing income under the head `Profits & Gains of Business or Profession'. The deeming fiction created by this section is for the purpose of computing "profits and gains" from transfer of such asset. The term "profits & gains" has been used and not `income'. It appears that the term "profits and gains" is used to signify the head under which the income is to be computed.

Section 43CA

- **Consideration received or accruing**: The section postulates comparison of consideration received or accruing as a result of the transfer of an asset with the stamp duty value thereof. The section does not cover transfers without consideration. Therefore, if the asset is transferred by the assessee without consideration by way of gift or otherwise then the section would not apply. The section may not even apply when the asset held as stock-in-trade is given without consideration as a part of scheme / sales promotion activity eg. a flat in a project being given free by way of lucky draw.

  The term `consideration' is not defined. The Courts, in the context of the provisions under the Direct Tax Laws have explained the word 'consideration' as follows:

- In the context of the provisions of the Indian Income-tax Act, 1922, Patna High Court in ***RaiBahadur H.P. Banerjee*** v.***CIT*** **[1941] 9 ITR 137** explained it as follows :

  > "In my judgment the word 'consideration' appearing in this sub-section is used in its legal sense as it is used in connection with the transfer of assets. A transfer of assets may be gratuitous or wholly without consideration or it may be with consideration, that is for some return moving from the transferee to the transferor. The word 'consideration' is not defined in the Transfer of Property Act, and in my judgment it must be given a meaning similar to the meaning which it has in the Indian Contract Act. Section 2(*b*), Indian Contract Act, defines 'consideration' in these words 'When at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing, or promises to do or to abstain from doing, something, such act or abstinence or promise is called a consideration for the promise".

Section 43CA

- In the context of the provisions of the Gift-tax Act, 1958 the Full Bench of the Kerala High Court in ***CGT* v.*Smt. C.K. Nirmala* [1995] 215 ITR 156, 160, 161** explained it as follows:

  "Within the framework of the above finding what is required to be decided by this court is whether the transfer of property involved in this case would come within the meaning of the word 'gift' in section 2(*xii*) of the Act. One of the essential ingredients constituting the gift under this provision is that the transfer of property by one person to another must be 'without consideration in money or money's worth'. However, the word 'consideration' is not defined in the Act and, therefore, it must carry the meaning assigned to it in section 2(*d*) of the Indian Contract Act, 1872. In *Keshub Mahindra* v.*CGT* [1968] 70 ITR 1, the Bombay High Court, in a similar situation, adopted the said course.

- Section 2(*d*) of the Indian Contract Act is thus :

  "When, at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing **or promises to do or to abstain from doing, something, such act or abstinence or promise is called a consideration for the promise."**

Section 43CA

- There is nothing to show in the definition of the term ‘consideration’ that the benefit of any act or abstinence must ‘directly’ go to the promisor. A contract can arise even though the promisee does or abstains from doing something for the benefit of a third party and the promisor can treat the benefit to a partnership firm where he is also a partner as consideration. Sir William R. Anson said : ‘The consideration may be of benefit to the promisor, or to a third party, or may be of no apparent benefit to anybody, but merely a detriment to the promise.’ (Principles of the English Law of Contract).... ...But the cardinal issue in this case has to be solved within the framework of the provisions contained in section 2(*xii*) of the Gift-tax Act read with section 2(*d*) of the Indian Contract Act...”

- Consideration may be in cash or in kind. Consideration need not be monetary consideration. The Bombay High Court has in the case of I. Chatterji v. CGT (53 Taxman428)(Bom) held that promise to marry was a valid consideration. Consideration may flow from a third party.

Section 43CA

- Agreements without consideration are void (Section 25 of the Indian Contract Act). S. 25 further provides for following three cases where agreement made without consideration is not void. i.e. following are cases of agreements without consideration which are not void.
  - It is expressed in writing and registered under the law for the time being in force for the registration of documents, and is made on account of natural love and affection between parties standing in a near relation to each other; or unless
  - It is a promise to compensate, wholly or in part, a person who has already voluntarily done something for the promisor, or something which the promisor was legally compellable to do; or unless
  - It is a promise, made in writing and signed by the person to be charged therewith, or by his agent generally or specially authorised in that behalf, to pay wholly or in part a debt of which the creditor might have enforced payment but for the law for the limitation of suits.

- The provision contemplates comparison of consideration received or accruing as a result of the transfer with the stamp duty value of the asset transferred. The provision uses the term for a consideration which is less than the stamp duty value …. of the asset. They do not use the terms `monetary consideration' as was the case in the provisions of erstwhile Gift Tax Act.

Section 43CA

- The consideration need not always be monetary consideration. In the context of S. 56(2)(v)/(vi)/(vii), the Tribunal has in the following cases held –
  a. That the amount received by a beneficiary from a trustee on dissolution of a trust cannot be said to be without consideration - Mumbai Bench of ITAT in the case of Ashok C. Pratap v Addl. CIT (2012) 23 Taxmann.com 347 (Mum) held
  b. That the amount received by the assessee, from her ex-husband, representing accumulated monthly installments of alimony constitutes consideration for relinquishing all her past and future claims. The Tribunal held that since there was sufficient consideration in getting the said amount, S. 56(2)(vi) was not applicable – Delhi Bench of ITAT in the case of ACIT v. Meenakshi Khanna (143 ITD 744).
  c. That abstaining from contesting the will was consideration for the amount received by the assessee and therefore the amount so received was not covered u/s 56(2)(v) – Mumbai Bench of ITAT in the case of Purvez A. Poonawalla v. ITO (2011-TIOL-262-ITAT-MUM).

- Since the language of S. 43CA and that of S. 56(2)(v) / (vi) / (vii) is identical reliance can be placed on the ratio of the abovementioned decisions for the proposition that section 43CA does not envisage only monetary consideration.

Section 43CA

- In cases where the consideration is not monetary consideration but is received in kind possibly the value of the property / thing received may have to be compared with the stamp duty value of the asset but in cases where it is not possible to do so e.g., in case where a person gives up a personal legal right (eg right to file a suit to contest the will of the parent of the assessee) and receives the asset in lieu thereof, it cannot be said that the receipt is without consideration. Also S. 43CA may not apply since it requires comparison of the consideration with the stamp duty value. Since the consideration in such case is not capable of measurement it can be argued that the charge fails on the ground that the computation machinery does not contemplate such a situation. Illustrations of consideration not being capable of measurement could be giving up of a right to contest a will, inconvenience / hardship suffered in the course of redevelopment.

- The consideration could even be a detriment to the giver or a promise not to do a certain act. The applicability of the section in such cases may be doubtful since the consideration is not capable of being received / accrued eg promise not to enter a refuge area in a building.

Section 43CA

- **An Asset (other than capital asset)**: The section applies to transfer by the assessee of an asset provided –
  - The asset is land or building or both; and
  - The asset is not a capital asset.
- The section applies to transfer of land or building or both which are stock-in-trade of the assessee. Rights in land or building may not be covered by the provisions of this section. In the context of S. 50C of the Act where similar language is used, the Tribunal has, in the following cases, held that the section 50C does not apply to rights in land or building.
  - DCIT v Tejinder Singh (2012) (50 SOT 391) (Kol) - Transfer of leasehold righs in a buildiing do not attract provisions of S. 50C.
  - Atul G. Puranik v. ITO (132 ITD 499)(Mum) - Leasehold rights in plot of land is not `land or building or both'.
  - Kishori Sharad Gaitonde v. ITO ((ITA No. 1561/M/09), BCAJ Pg. 28, Vol 41 B Part 5, February 2010)
- It is also relevant to note that in the following cases, the Tribunal has held that the provisions of S. 50C apply to transfer of development rights.
  - Chiranjeev Lal Khanna v. ITO (132 ITD 474)(Mum) – S. 50C applies to Transfer of Development Rights
  - Mrs. Arlette Rodrigues v. ITO (ITA No. 343/Mum/2010) (Assessment Year 2006-07) order dated 18.02.2011 – S. 50C applies to Transfer of Development Rights.

Section 43CA

  - Smt. Myrtle D'Souza v. ITO (ITA No. 3168/Mum/2011) (Assessment Year 2006-07) order dated 20.06.2012 – follows Mrs. Arlette Rodrigues and holds that S. 50C applies to Transfer of Development Rights.

- It appears that the ratio of the said decisions will apply with equal force to S. 43CA as well.

- The section may not apply when the assessee transfers 100% of the shares of a company in which immovable property is the only asset. However, the section may be held to apply to transfer of shares with occupancy rights.

Section 43CA

- **What is covered is only land or buildings or both**. Part of building is not covered by the section. Similar is the language in S. 50C / S. 56(2)(vii). However, it needs to be noted that the legislature has in S. 27, S. 194IA, S. 194LA, S. 194LAA and S. 269AB made a specific reference to part of a building. This could mean that the section applies only when the building as a whole is transferred and does not apply to transfer of a part of a building and / or that the section applies only when 100% interest in the building is transferred. If this interpretation is correct then the section may not apply to transfer of flat (because a flat is a part of a building) and section may not apply to transfer of an undivided interest in a building eg transfer of 50% interest in a building. However, considering the intent with which this section is introduced, it is quite likely that such literal interpretation may not be acceptable to Courts.

- A building under construction may not be covered by this section because a building under construction is certainly not a building. The Hon'ble Punjab & Haryana High Court has in the case of CWT v. Smt. Neena Jain (189 Taxman 308)(P & H) held that an incomplete building does not fall within ambit of `assets' as defined in section 2(ea) of the wealth-tax Act as it does not fall within definition of `building' nor does it fall within purview of `urban land'.

Section 43CA

- **`Transfers'**: For the section to apply the assessee should transfer the asset. S. 2(47) defines the term `transfer'. However, the said definition is in relation to a capital asset. S. 43CA applies to an asset which is not a capital asset and therefore, the definition of the term `transfer' as defined u/s 2(47) may not be relevant. Normally, an immovable property being land or building is transferred only by way of a conveyance. Gujarat High Court has in the case of CIT v. Ashaland Corporation (133 ITR 55)(Guj) held that the transfer of stock-in-trade happens only when title is transferred to the buyer. It held that till such time as the sale is complete the amount received constitutes an advance. An advance received cannot be taxed as income. The Court has even observed that handing over of possession in part performance of the contract may be a good defense to the buyer against the seller yet it does not confer any title on the buyer. Also, the Apex Court has in the case of Alapati Venkataramiah v. CIT (57 ITR 185)(SC) held that for determining the year of chargeability, the relevant date is not the date of the agreement to sell but the date of the sale i.e., effective transfer of title as contemplated by the parties. To the same effect is the ratio of the decisions of Chidambaram Chettiar v. CIT [1936] 4 ITR 309 (Mad); CIT v. Motilal C. Patel & Co. (173 ITR 666)(Guj)(HC) and CIT v. Moghul Builders & Planners (252 ITR 488)(AP). However, it would be relevant to note that the Bombay High Court has in the case of Estate Investment Co. Ltd. v CIT (121 ITR 580)(Bom) rejected the contention made on behalf of the assessee that until a conveyance is executed by the vendor

in favour of the purchaser, the purchaser cannot be regarded as the owner of the property held that the assessee had done everything within its power to carry out its obligations with the purchasers viz. possession was given and price was received. The Court even noticed that the price had been stated to have been received in the Balance Sheet and was carried to reserve fund. It appears that the decision rendered by the Bombay High Court was on typical facts of the assessee.

- Also, **for the transfer to happen the asset has to be in existence**. For the proposition that the transfer can happen only when property is in existence, a useful reference may be made to the provisions of S. 5 of the Transfer of Property Act, 1882 (TOPA) which defines the term `Transfer of property' as under –

  "5. "**Transfer of property' defined**. – In the following sections "transfer of property" means an act by which a living person conveys property, in present or in future, to one or more other living persons, or to himself, or to himself and one or more other living persons : and "to transfer property" is to perform such act.

  In this section "living person" includes a company or association or body of individuals, whether incorporated or not, but nothing herein contained shall affect any law for the time being in force relating to transfer of property to or by companies, associations or bodies of individuals."

Section 43CA

- The following passage from the book by C. L. Gupta, titled Law of Transfer of Property, which has been revised by Justice S. D. Agarwala (Third Edition, 2002) throws light on the proposition that for a transfer to happen the property has to be in existence.
  - Significance of **Conveyance of property "in present or in future"** - A transfer of property may take place not only in the present, but also in future {Sumsuddin v. Abdul Hussein, ILR (1909) 31 Bom 165 (172)}; but the property must be in existence {Jugalkishore Saraft v. Raw Cotton Co. Ltd., AIR 1955 SC 376 : (1955) 1 SCR 1369 : 1955 SCJ 871 : 1955 SCA 440 ; Chief Controlling, Revenue Authority v. Sudarsanam Picutre, AIR 1968 Mad 319 (FB) : 81 Mad LW 75 : ILR (1968) 1 Mad 600 : (1968) 2 Mad LJ 1}. It has been observed by Bhagwati J. in Jugalkishore Saraf v. Raw Cotton Co. Ltd., {AIR 1955 SC 376 : (1955) 1 SCR 1369 : 1955 SCJ 871 : 1955 SCA 440; Chief Controlling, Revenue Authority v. Sudarsanam Picutre, AIR 1968 Mad 319 (FB) : 81 Mad LW 75 : ILR (1968) 1 Mad 600 : (1968) 2 Mad LJ 1} that the words "in present or in future", in Section 5, qualify the word "conveys" and not the word "property". **A transfer of property not in existence operates as a contract to be performed in the future which is specifically enforceable as soon as the property comes into existence. An assignment of future or non-existent property is quite valid and the transfer becomes operative as soon as the property comes into existence** {Purna Chandra Bhowmick v. Barna Kumari Devi, AIR 1939 Cal 715 (DB) : 43 CWN 953 : ILR (1939) 2 Cal 341}. Transfers of non-existent, or as it is conveniently called after-acquired property, provided they are not of the nature contemplated in Section 6(1), Transfer of Property Act, are perfectly valid. **The transfer would be regarded, in a Court of justice, as a**

contract to transfer after the vendor has acquired title and would fasten upon the property as soon as the vendor acquires it {Holroyd v. Marshall, (1864) 10 HLC 191 ; Coollyer v. Issacs, (1882) 19 Ch D 342 ; Taiby v. Official Receiver, (1888) 13 AC 523 ; Prem Sukh Gulgulia v. Habib Ullah, AIR 1945 Cal 355 (358) (DB) : 49 CWN 371}. Therefore, a contract for sale of non-existent property, that is, of property which is not of the vendor's at the time of the contract, but which the vendor thinks of acquiring by purchase later on, is not bad in law. There is nothing in the Contract Act or in any other law which makes it invalid {Prem Sukh Gulgulia v. Habib Ullah, AIR 1945 Cal 355 (358) (DB) : 49 CWN 371}.

Section 5, Transfer of Property Act, makes it clear that a transfer of property can effectively take place not merely where a person conveys property in present, but also when a living person conveys property in future, and this aspect has to be borne in mind, while considering the operation of Section 33(1)(b), Bombay Tenancy and Agricultural Lands Act, 1948 {Ganpati Joti v. Jayasingrao Abasaheb, AIR 1956 Bom 749 (751) (DB)}."

- Therefore, S. 43CA may not apply to a flat under construction since the subject matter of transfer is not in existence. However, upon the flat coming into existence the section may apply.

Section 43CA

- **Value adopted or assessed or assessable by any authority of a State Government for the purpose of payment of stamp duty in respect of such transfer**: The section contemplates comparison of consideration for transfer of an asset with the value adopted or assessed or assessable by any authority of a State Government for the purpose of payment of stamp duty in respect of such transfer. Therefore, in case the State Government levies stamp duty not on market value but on the consideration stated in the agreement then in such cases the section shall not apply. Also, in Union Territories, where the value of the property is adopted or assessed by an authority of a Central Government then this section may not apply. It appears that the Legislature has consciously kept areas where value is not adopted or assessed by any authority of State Government out of purview of this section. This is evident if one looks at the definition of "stamp duty value" in Explanation (f) to S. 56(2)(vii) which makes a mention of authority of a Central Government as well. Also, the section will not apply to transfer of an asset situated outside India because in such cases there will not be stamp duty value. It may be noted that S. 43CA and S. 50C make a mention of only authority of State Government whereas S. 56(2)(vii) makes a mention of authority of Central Government as well.

Section 43CA

- **Provisions of sub-section (2) and sub-section (3) of S. 50C shall apply in relation to determination of the stamp duty value:** Sub-section (2) of S. 43CA provides that the provisions of sub-section (2) and sub-section (3) of S. 50C shall apply in relation to determination of stamp duty value. The implication of this is as under –

1. In case the assessee has accepted the stamp duty value and claims before the AO that the value adopted or assessed or assessable by the stamp valuation authority exceeds the fair market value of the asset on the date of transfer then the AO may refer valuation of such asset to the DVO. Though the section uses the term `may', in the context of S. 50C, in the following cases, the Tribunal has held that the AO is bound to make a reference to the DVO.
   1. M/s Fortuna Structures Pvt. Ltd. v ACIT (2008)(60 itatindia 886)(Lucknow)
   2. Meghraj Baid v ITO 23 SOT 25 (Jodh)
   3. Kalpataru Industries v ITO (Mum)(41-B BCAJ 32)(ITA No. 5540/Mum/2007, Mum H Bench, Asst Year 2005-06, Order dated 24.8.2009)
   4. Abbas T. Reshamwala v ITO (41-B BCAJ 33)(Mum)(ITANo. 3093/Mum/2009)(AY 2006-07)(Decided on 30.11.2009)

   Upon a reference being made certain provisions of the Wealth-tax Act, 1957 shall apply in relation to such reference as they apply in relation to a reference made by the AO u/s 16A(1) of the Wealth-tax Act, 1957.

Section 43CA

2. In case the DVO determines the fair market value of the asset transferred to be less than the value adopted or assessed or assessable by the stamp valuation authority, the value determined by DVO shall be considered by the AO to be full value of consideration received or accruing as a result of such transfer. In other words, the computation of profits and gains arising on such transfer will be with reference to value determined by DVO and not the stamp duty value. However, if the DVO determines the fair market value of the asset transferred to be more than the value adopted or assessed or assessable by the stamp valuation authority, the stamp duty value shall be deemed to be full value of consideration received or accruing as a result of such transfer. In other words, the valuation done by the DVO in excess of stamp duty value needs to be ignored and computation of profits and gains is to be made with reference to stamp duty value.

3. In case the assessee has disputed the value adopted or assessed or assessable by the stamp valuation authority in any appeal or revision or reference has been made before any other authority, court or the High Court then the AO shall not be bound to make a reference to the DVO. In such cases, the value upheld in an appeal or revision or reference shall be deemed to be full value of consideration received or accruing as a result of the transfer of such asset.

Section 43CA

4 The term `assessable' is used in S. 43CA(1) but the same is not defined. The expression `assessable' is defined in Explanation 2 to S. 50C. The term `Valuation Officer' is defined in Explanation 1 to S. 50C. Both the Explanations to S. 50C clearly state that the meanings therein are for the purpose of the said section i.e. S. 50C. S. 43CA makes sub-sections (2) and (3) of S. 50C applicable to S. 43CA but not the Explanations. However, since sub-sections (2) and (3) of Section 50C use the terms defined in Explanations to S. 50C it may be possible to contend that the said Explanations are also applicable to S. 43CA.

Section 43CA

- **Cases where date of agreement fixing value of consideration for transfer of the asset and the date of registration of such transfer are not the same {S. 43CA(3) and S. 43CA(4)}** - Sub-section (3) of S. 43CA deals with cases where date of agreement fixing value of consideration for transfer of the asset and the date of registration of such transfer are not the same. The language of this sub-section is identical to the language of first proviso to S. 56(2)(vii)(b)(ii) with the only difference being that this sub-section uses the expression `value of consideration' whereas the first proviso to S. 56(2)(vii)(b)(ii) uses the expression `amount of consideration'. The provisions of sub-section (3) apply when the following conditions are cumulatively satisfied –
  1. There is an agreement;
  2. the agreement is dated;
  3. the agreement is for transfer of the asset;
  4. the agreement fixes value of consideration;
  5. the date of agreement and date of registration of such transfer are not the same;
  6. the amount of consideration or a part thereof has been received by any mode other than cash;
  7. the amount referred to in 6 above is received on or before the date of the agreement.
- If all the above mentioned conditions are cumulatively satisfied the consequence is that the stamp duty value of the asset on the date of agreement shall be deemed to be full value of consideration received or accruing as a result of such transfer.

Section 43CA

- The term `agreement’ has not been defined in the Act. Therefore, a useful reference can be made to the definition in S. 2(e) of The Indian Contract Act, 1872 which defines the term `agreement’ as:

  “Every promise and every set of promises, forming the consideration for each other, is an agreement. (Indian Contract Act (9 of 1872), S. 2(e))”

- Dictionaries have explained the meaning of the term `agreement’ as under:
  1. the fact of being of one mind; concurrence in the same opinion. {**Casell Concise Dictionary (Revised Edition, P. 29)}**
  2. 1. The act of agreeing or of coming to a mutual arrangement. 2. The state of being in accord. 3. An arrangement that is accepted by all parties to a transaction. ……. 8. Law. A. ***an expression of assent by two or more parties to the same object. B. the phraseology written or oral, of an exchange of promises.*** { **Websters Unabridged Dicttionary (P. 40)}**
  3. AGREEMENT ranges in meaning from mutual understanding to binding obligation.

- The following observations lucidly explain the meaning of the term `agreement’.

  “An `agreement’ is an instrument between the parties who willfully agree to perform certain acts or refrain from doing something. The parties to the instrument should be agreed about the subject matter at the same time and in the same sense. The two or more parties which are agreed must communicate with each other.” [Felthouse v. Bindley, (1862) 142 ER 1037]

Section 43CA

- A question could arise as to whether letter of allotment is an agreement for transfer and therefore for the purpose of computing the difference between stamp duty value and consideration, the stamp duty value of the asset on the date of letter of allotment be considered. A letter of allotment which is dated and is for transfer of specific asset and is accepted by the purchaser and which fixes the value of consideration for transfer of the asset would be regarded as an agreement for transfer for the purposes of sub-section (3) of section 43CA provided the condition mentioned in sub-section (4) of section 43CA is satisfied viz. that consideration or part thereof has been received on or before the date of letter of allotment. However, if such a letter of allotment is not specific in terms of the property to be transferred / allotted but only mentions the area (i.e. size) without identifying the property it may be difficult to contend that such a letter of allotment constitutes an `agreement for transfer'. It could be a debatable question as to whether a letter of allotment which grants an option to the buyer to buy or not to buy the property but take interest on the amount given by him to the assessee would be regarded as an agreement for transfer. In my opinion, even such a letter of allotment would be regarded as an agreement for transfer envisaged by sub-section (3) of section 43CA if the property is specific and other conditions as stated earlier are satisfied.

Section 43CA

- For the proposition that the letter of allotment constitutes an agreement for transfer reliance can be placed on the ratio of the decision of the Supreme Court in the case of DLF Universal Ltd. v Appropriate Authority & Another (243 ITR 730)(SC) and also the following observations from the decision of the Division Bench of Delhi High Court in the case of Ansal Properties & Industries Ltd. v. Appropriate Authority which have been quoted by the Delhi High Court in the case of R. N. Soin and Sons (P) Ltd. v Appropriate Authority & Others (330 ITR 455)(Del).

  "27.1 The parties may enter into any private agreement for transfer. They must wait for arrival of the day on which the property has assumed the shape in which it is proposed to be transferred. On that day they must enter into the proforma agreement (Form 37-I) and file the same seeking no objection from the Appropriate Authority. It was submitted that this interpretation may put the parties to the agreement in a disadvantageous position. The initial private agreement may have been made in the year 1990. The property may take the shape in which it is to be transferred in the year 1998. The price would be one agreed upon between the parties in the year 1990. The value as shown on the date of proforma agreement in Form 37-I would appear to be undervalued persuading the Appropriate Authority to direct the purchase of the property by the Central Government. This is a misapprehension which has to be dispelled. The proforma agreement of the year 1998 would be accompanied by the private agreement entered into in the year 1990 and that will be a relevant fact to be kept in view by the Appropriate Authority while exercising its jurisdiction under Chapter – XXC."

Section 43CA

- One may therefore conclude that the letter of allotment which is dated and is accepted by the buyer and which is specific in terms of the property to be transferred, the consideration therefor, the dates of payment of consideration agreed between the parties can be regarded as the agreement for transfer of asset.

Section 43CA

- **Can the agreement of transfer contemplated by sub-section (3) of section 43CA be an oral agreement?** While, in law, an agreement may be an oral agreement, it appears that the section does not contemplate oral agreement because the section refers to date of the agreement fixing the value of consideration for the transfer of asset. Also, sub-section (4) of section 43CA contemplates that the consideration or part thereof has been received by any mode other than cash on or before the date of the agreement for the transfer of such asset. The use of the word `date of the agreement' gives an impression that the section contemplates a written agreement. Also, in the absence of a written agreement, it may be difficult to establish the date of the agreement except that the payment of consideration or part thereof may be one of the factors indicating the earliest date on which the agreement could have been entered. However, if the assessee is in a position to lead impeccable evidence to substantiate the date on which such oral agreement was entered into the Courts may accept such oral agreement as well as an agreement contemplated by sub-section (3) of section 43CA since this is a provision which is charging fictional amount to tax and sub-section (3) is intended to dilute the rigors of this provision.

Section 43CA

- **Significance of the word `may' in sub-section (3) of section 43CA –** Sub-section (3) of section 43CA " …….., the stamp duty value on the date of the agreement *may* be taken for the purposes of this sub-clause". What is the significance of the word `may'? Does it mean that the AO has discretion not to consider stamp duty value on the date of the agreement? It appears that for the following reasons the answer is in the negative.
- Sub-section (3) carves out an exception to the main provision contained in sub-section (1) viz. sub-section (3) deals with a situation where there is an agreement for transfer of an asset; such agreement fixes the value of consideration for the transfer of asset and the date of registration and date of the agreement are not the same. Once these conditions are satisfied sub-section (3) contemplates that the stamp duty value on the date of agreement may be taken for the purpose of comparison with the amount of consideration. The issue is whether the use of the word `may' signifies discretion to the AO to consider or not to consider the stamp duty value on the date of the agreement. It appears that the legislature has used the word `may' because this sub-section has to be read along with sub-section (4). Sub-section (4) states that sub-section (3) shall apply only in a case where the amount of consideration or a part thereof has been received by any mode other than cash on or before the date of the agreement for transfer. Therefore, if this condition is not satisfied then the AO will be justified in not considering the stamp duty value on the date of the agreement. However, if this condition is satisfied then the AO will have to mandatorily consider the stamp duty value on the date of the agreement.

Section 43CA

- It is relevant to note that the Legislature is conscious of the fact that there is a time gap between the booking of a property and its receipt by the purchaser on registration and there can be a considerable value difference between the two dates. Finance Act, 2009 had w.e.f. 1.10.2009 inserted S. 56(2)(vii) so as to interalia provide that when an individual or hindu undivided family receives an immovable property for a consideration less than its stamp duty value, the difference between the stamp duty value and the consideration is chargeable. Realizing that timing difference can give rise to a tax liability the Finance Act, 2010 deleted the portion of cl. 56(2)(vii)(b) dealing with receipt of immovable property for a consideration which is less than its stamp duty value with retrospective effect from 1.10.2009 for the following reasons stated in the Explanatory Memorandum.

  > "C. In several cases of immovable property transactions, there is a time gap between the booking of a property and the receipt of such property on registration, which results in a taxable differential. It is, therefore, proposed to amend clause (vii) of section 56(2) so as to provide that it would apply only if the immovable property is received without any consideration and to remove the stipulation regarding transactions involving cases of inadequate consideration in respect of immovable property."

Section 43CA

- Finance Act, 2013 reintroduced the same provision but with two provisos which are identical to sub-section (3) and (4) of section 43CA. The Memorandum to the Finance Bill, 2013 clearly states as under –

  > "Considering the fact that there may be a time gapt between the date of agreement and the date of registration, it is proposed to provide that where the date of the agreement fixing the amount of consideration for the transfer of the immovable property and the date of registration are not the same, the stamp duty value may be taken as on the date of the agreement, instead of that on the date of registration. This exception shall, however, apply only in a case where the amount of consideration, or a part thereof has been paid by any mode other than cash on or before the date of the agreement fixing the amount of consideration for the transfer of such immovable property."

- Thus, the Legislature has through the first proviso to S. 56(2)(vii)(b)(ii) carved out an exception which shall apply if the conditions mentioned in subsequent proviso are satisfied viz. that the consideration or a part thereof has been paid on or before the date of the agreement by any mode other than cash. Exactly identical to the two provisos are sub-sections (3) and (4) of section 43CA. If a view is taken that the first proviso to S. 56(2)(vii)(b)(ii) or sub-section (3) of section 43CA is discretionary then it would defeat the purpose of introduction of these provisions.

Section 43CA

- **Can the benefit of sub-section (3) be denied in a case where the initial amount is received by cash but subsequent amounts are received by cheque**: Sub-section (4) of section 43CA states that the provisions of sub-section (3) shall apply only when the consideration or part thereof has been received by any mode other than cash on or before the date of agreement for transfer of asset. In a given case the assessee may have entered into an agreement for transfer of asset say on 1.7.2013 and on that date received a sum of Rs 1,00,000 in cash towards part of consideration under the said agreement and two days later received further sum of Rs. 2,00,000 by cheque under the same agreement. Can the benefit of sub-section (3) be denied on the ground that the conditions prescribed by sub-section (4) are not satisfied. It appears that the Court in such case may take a liberal view and hold that if it is otherwise evident that the assessee is entitled to benefit of sub-section (3) the same may not be denied only on the ground that the initial amount was received by cash. Possibly the assessee may have to explain the reason for receiving the amount by cash. The intention of prescribing that the consideration should be received by mode other than cash appears to be to ensure that the assessee is gets the benefit only in genuine cases and therefore it the Court is convinced that the assessee's case is bonafide it may hold that the benefit should not be denied only for the reason that initial amount was received by cash.

Section 43CA

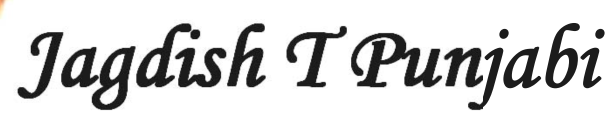
- **Can the assessee opt not to be covered by sub-section (3)**: In a case where the stamp duty value on the date of registration of transfer of asset has fallen as compared to stamp duty value on the date of agreement fixing value of consideration for the transfer of the asset it would be beneficial to the assessee to contend that since the provisions of sub-section (3) are intended to grant a benefit, he does not seek to avail of the same and therefore the stamp duty value on the date of agreement fixing the value of consideration for the transfer of the asset be ignored and the computation be done with reference to stamp duty value on the date of registration of transfer of asset. It appears that the assessee does not have any option in this regard. If the conditions of sub-section (4) are satisfied then the application of sub-section (3) would be mandatory. Also, the intention of the legislature appears to be that the value of consideration on the date it was fixed should have been equal to or greater than the stamp duty value of the asset.

Section 43CA

- **Is S. 43CA a computation provision or a charging provision?** : The section appears to be a computation provision and not a charging provision. Therefore, the section will apply when there is a charge created by the charging provision. The view that the section is a computation provision and not a charging provision is supported by the language of sub-section (1) which says that **for the purposes of computing** profits and gains from transfer of such asset. The stamp duty value of the asset is deemed to be full value of consideration received or accruing as a result of the transfer. The words `full value of consideration' are used in the context of computation of capital gains where section 48 states that capital gains are computed by subtracting from full value of consideration the cost of acquisition of the asset transferred, expenditure incurred in connection with transfer, etc. While computing income under the head `Profits and Gains of Business or Profession' the sales turnover, gross receipts are considered on the credit side of profit & loss account. The Memorandum states that section 50C applies to transfer of capital asset being land or building or both but when these assets are transferred by an assessee holding them as stock-in-trade, the provisions of S. 50C are not applicable. S. 43CA has been introduced so as to cover cases where land or building or both transferred by the assessee are held as stock-in-trade.

Section 43CA

- **Is the section retroactive?**
  While the section is not retrospective a question will arise as to whether the section is retroactive eg. In case the property is received (i.e. registration / possession of the property is received by the assessee) for a consideration which is less than its stamp duty value after the section was introduced i.e. in the year 2014-15 but the agreement for its transfer was entered into 3 years earlier i.e. in the year 2011-12 when the section was not applicable and the stamp duty value of the property was more than the consideration, will the provisions of the section apply in such a situation. In the context of S. 50C, the Tribunal has held that the provisions of S. 50C are not applicable where agreement fixing consideration was entered prior to enactment of S. 50C and the transfer takes place in a period after the provisions of S. 50C are effective provided the delay in completion of transfer is beyond the control of the assessee and the circumstances are documented. (M. Siva Parvathi & Ors. V. ITO (2011)(7 ITR 468)(Vish); Administrator of Estate of Late Mr. F. E. Dinsha v. ITO (2013-TIOL-831-ITAT-MUM).



B.Com., B.G.L., FCA.

Amendments to section 50C made by the Finance Act, 2016

General background of section 50C

- Section 50C is a special provision for computing capital gains arsing on transfer of a capital asset being land or building or both. This section is effective from assessment year 2003-04. It applies to all assessees. The section provides that in a case where the transfer by an assessee of a capital asset being land or building or both is for a consideration which is less than the stamp duty value adopted or assessed or assessable by the Stamp Valuation Authority then in that case the value adopted or assessed or assessable by the Stamp Valuation Authority will be considered to be the full value of consideration for computing capital gains arising on transfer of such asset.

- Generally, in a transaction of transfer of land or building or both (‘asset”) there is a considerable time gap between the date when the vendor agrees to sell the asset and the date of actual transfer by way of a registered instrument to the buyer. The price is fixed between the parties at the time of entering into an agreement to sell. Thereafter, the buyer investigates the title of the vendor, payment is made and the document of transfer, generally, a conveyance is executed and registered in favour of the buyer.

General background of section 50C …

- Based on the language of section 50C, prior to its amendment by the FA, 2016, it was possible to take a view that the stamp duty value as on the date of transfer has to be compared with the consideration stated in the instrument of transfer and if the stamp duty value as on the date of transfer is more than the consideration stated in the instrument of transfer, the stamp duty value is to be regarded as full value of consideration for computing capital gains arising on transfer of such asset.

- Even when section 50C did not have a provision similar to the one contained in the proviso to section 56(2)(vii)(b)(ii) or the one contained in sub-sections (3) and (4) of section 43CA of the Act, the Tribunal has in the following cases held that in a case where the date of agreement for transfer is different from the date of transfer, the stamp duty value as on the date of agreement and not the stamp duty value as on the date of transfer is to be considered as full value of consideration.

Cases holding SDV on date of agreement to be full value of consideration

- Kodani Satya Srinivas Vijayawada v. ACIT (ITAT – Visakhapatnam)
- (ITA No. 556 & 557/Vizag/2008; AY : 2006-07; Date of order: 2.7.2010)

- Lahiri Promoters v. ACIT (ITAT – Visakhapatnam)
- (ITA No. 12/Vizag/2009; AY : 2006-07; Date of order: 22.6.2010)

- ITO v. Modipon Ltd. (ITAT – Delhi)
- (ITA No. 2049/Del/2009; AY : 2005-06; Date of order: 9.1.2015)

- Mohd. Imraan Baug v. ITO (ITAT – Hyderabad)
- (ITA No. 1942/Hyd/2014; AY : 2006-07; Date of order: 27.11.2015)

- Moole Rami Reddy v. ITO (ITAT – Visakhapatnam)
- (ITA No. 311/Vizag/2010; AY : 2006-07; Date of order: 10.12.2010)

- Parekh Marketing Ltd. v. ACIT (ITAT – Mumbai)
- (ITA No. 4307/Mum/2013; AY : 2008-09; Date of order: 26.5.2015)

Proposal to amend section 50C

- The Finance Act, 2016 has amended the provisions of section 50C of the Act by inserting the following two provisos with effect from 1.4.2017–

  "Provided that where the date of the agreement fixing the amount of consideration and the date of registration for the transfer of the capital asset are not the same, the value adopted or assessed or assessable by the stamp valuation authority on the date of agreement may be taken for the purposes of computing full value of consideration for such transfer.

  Provided further that the first proviso shall apply only in a case where the amount of consideration, or a part thereof, has been received by way of an account payee cheque or account payee bank draft or by use of electronic clearing system through a bank account, on or before the date of the agreement for transfer."

Explanatory Memorandum to the FB, 2016

- The Explanatory Memorandum to the Finance Bill, 2016 states as under –

- "**Rationalization of Section 50C in case sale consideration is fixed under agreement executed prior to the date of registration of immovable property**

  - Under the existing provisions contained in Section 50C, in case of transfer of a capital asset being land or building or both, the value adopted or assessed by the stamp valuation authority for the purpose of payment of stamp duty shall be taken as the full value of consideration for the purposes of computation of capital gains. The Income Tax Simplification Committee (Easwar Committee) has in its report, pointed out that this provision does not provide any relief where the seller has entered into an agreement to sell the property much before the actual date of transfer of the immovable property and the sale consideration is fixed in such agreement, whereas similar provision exists in section 43CA of the Act i.e. when an immovable property is sold as a stock-in-trade.

    It is proposed to amend the provisions of section 50C so as to provide that where the date of the agreement fixing the amount of consideration for the transfer of immovable property and the date of registration are not the same, the stamp duty value on the date of the agreement may be taken for the purposes of computing the full value of consideration.

Explanatory Memorandum to the FB, 2016 ...

- It is further proposed to provide that this provision shall apply only in a case where the amount of consideration referred to therein, or a part thereof, has been paid by way of an account payee cheque or account payee bank draft or use of electronic clearing system through a bank account, on or before the date of the agreement for the transfer of such immovable property.

- These amendments are proposed to be made effective from the 1st day of April, 2017 and shall accordingly apply to assessment year 2017-18 and subsequent years."

First proviso to s. 50C v. 43CA(3)

First Proviso to s. 50C	Sub-section (3) of section 43CA
Provided that where the date of the agreement fixing the ***amount*** of consideration and the date of registration for the transfer of the capital asset are not the same, the value adopted or assessed or assessable by the stamp valuation authority on the date of agreement may be taken for the purposes of computing full value of consideration for such transfer.	Where the date of agreement fixing the ***value*** of consideration for transfer of the asset and the date of registration of such transfer of asset are not the same, the value referred to in sub-section (1) may be taken as the value assessable by any authority of a State Government for the purpose of payment of stamp duty in respect of such transfer on the date of the agreement.

Second proviso to s. 50C v. 43CA(4)

Second Proviso to s. 50C	Sub-section (4) of section 43CA
Provided further that the first proviso shall apply only in a case where the amount of consideration, or a part thereof, has been received ***by way of an account payee cheque or account payee bank draft or by use of electronic clearing system through a bank account***, on or before the date of the agreement for transfer.	The provisions of sub-section (3) shall apply only in a case where the amount of consideration or a part thereof has been received by ***any mode other than cash*** on or before the date of agreement for transfer of the asset.

Issues arising out of the proposed amendments

- Will the amended provisions apply only to agreements entered into after the amended provisions became effective or to transfers chargeable to capital gains after the amendment becomes effective irrespective of the date of agreement.

- In view of the fact that the amendment to section 50C is prospective with effect from the assessment year 2017-18, does it mean that the ratio of various decisions of the Tribunal mentioned in earlier slide need to be disregarded and that the legal position, prior to 1.4.2017, was that the stamp duty value on the date of transfer is to be compared with the amount of consideration stated in the document of transfer.

- Can it be argued that the amendment proposed by the Finance Bill, 2016 to section 50C is clarificatory and therefore retrospective.

Issues arising out of the proposed amendments

- Can it be contended that the amendment merely tries to plug the loophole in the existing provision.

- Will the provisions of proviso apply to an agreement which fixes not the amount of consideration but the value of consideration eg. Development agreement for sharing area between the parties?

- The provisions may still not apply to a case of a transfer where the entire consideration is non-monetary because the second proviso as a precondition requires that the amount of consideration or a part thereof should be received by way of an account payee cheque or account payee bank draft or by use of electronic clearing system through a bank account. Therefore, transfers by way of a journal entry will not grant benefit under section 50C whereas the same will be covered by provisions of section 43CA.

Is annual value of vacant unsold flats / units chargeable to tax under the head Income from House Property

Jagdish T Punjabi **June 11, 2016**

Is annual value of stock-in-trade chargeable to tax under the head `Income from House Property' or `Income from Business'.

- A very common issue is whether annual value / notional income in respect of flats / units held as stock-in-trade, is chargeable to tax under the head `Income from House Property'.

- S. 22 which is the charging section for the head `Income from House Property' charges annual value of the property being buildings or lands appurtenant thereto to tax under the head `Income from House Property'. However, it carves out an exception in respect of property occupied for the purposes of the assesssee's business. For ready reference, section 22 is reproduced hereunder:

  > "22. The annual value of property consisting of buildings or lands appurtenant thereto of which the assessee is the owner, other than such portions of such property ***as he may occupy for the purposes of any business or profession carried on by him*** the profits of which are chargeable to income-tax, shall be chargeable to income-tax under the head `Income from house property'."

- Section 22 charges to tax annual value of the property. Section 23 lays down the manner of determination of annual value. Section 23(1) interalia states that for the purposes of section 22, the annual value of any property shall be deemed to be the sum for which the property might reasonably be expected to let from year to year; or ………

Is annual value of stock-in-trade chargeable to tax under the head `Income from House Property' or `Income from Business'.

- The question, therefore, is whether rental income in respect of units held as stock-in-trade is chargeable to tax under the head `Income from House Property'. If one comes to a conclusion that rental income needs to be charged to tax under the head `Income from house property', another question which arises is whether in the case of builders, the annual value of vacant unsold units, held as stock-in-trade, is also chargeable to tax.

- A question therefore, arises as to whether flats / shops held as stock-in-trade can be said to be occupied by the assessee for the purposes of his business, profits of which are chargeable to tax under the head `Profits and Gains of Business or Profession'?

- In this connection, ratio of the following decisions needs to be noted –

- **CIT v. Neha Builders (P.) Ltd. {(2007) 164 Taxman 342 (Guj)}**
- The question referred to the Court for its opinion was as under –
- "Whether, on the facts and in the circumstances of the case, the rental income received from any property in the construction business can be claimed under the head `Income from House Property' even though the said property was included in the closing stock and expenses on maintenance were debited to the P & L A/c?"

Is annual value of stock-in-trade chargeable to tax under the head `Income from House Property' or `Income from Business'….

- In this case, the assessee company, engaged in the business of construction of property, let out one of its properties which was held by it as its stock-in-trade. The rental income there from was offered for taxation in the revised return of income under the head `Income from House Property'. The AO taxed it under the head `Income from Business'. The CIT(A) confirmed the action of the AO but the Tribunal allowed the appeal filed by the assessee by observing interalia that any dividend received on the shares or any interest received from the bank would be taken to be income from other sources, therefore, any income derived under the head of `Rent' would also become income from property.
- While deciding the appeal filed by the Revenue, the High Court held as under:
- "From the order passed by the learned CIT(A), it would clearly appear that the case of the assessee was that the company was incorporated with the main object of purchase, take on lease, or acquire by sale, or let out the buildings constructed by the assessee. Development of land or property would also be one of the businesses for which the company was incorporated.
- True it is, that **income derived from the property would always be termed as 'income' from the property, but if the property is used as 'stock-in-trade', then the said property would become or partake the character of the stock, and any income derived from the stock, would be 'income' from the business, and not income from the property. If the business of the assessee is to construct the property and sell it or to construct and let out the same, then that would be the 'business' and the business stocks, which may include movable and immovable, would be taken to be 'stock-in-trade', and any income derived**

from such stocks cannot be termed as 'income from property'. Even otherwise, it is to be seen that there was distinction between the 'income from business' and 'income from property' on one side, and 'any income from other sources'. **The Tribunal**, in our considered opinion, **was absolutely unjustified in comparing the rental income with the dividend income on the shares or interest income on the deposits**. Even otherwise, this question was not raised before the subordinate Tribunals and, all of sudden, the Tribunal started applying the analogy.

- While in the case of Neha Builders, the Court was dealing with let out flats, the issue which came up for consideration of Delhi High Court in the case of CIT v. Ansal Housing Finance & Leasing Co. Ltd. (2012) 354 ITR 180 (Del) was whether the annual value of vacant unsold flats held as stock-in-trade could be charged to tax under the head `Income from house property'?

- **CIT v. Ansal Housing Finance & Leasing Co. Ltd. (2012) 354 ITR 180 (Del)**
  The assessee company engaged itself in the business of development of mini-townships, construction of house property, commercial and shop complexes etc. The AO assessed the ALV of flats which the assessee had constructed, but were lying unsold under the head "Income from house property". The assessee however, contended that the said flats were its stock-in-trade and therefore the ALV of the flats could not be brought to tax under the head "Income from house property". The AO however did not accept the stand of the assessee, and therefore, added the notional value of unsold flats to the total income of the assessee. On appeal by the assessee, the CIT(A) however set aside the addition made by the AO. The revenue's appeal to the Tribunal was unsuccessful.
- The Court held as under –
  In the present case, the assessee is engaged in building activities. It argues that flats are held as part of its inventory of stock in trade, and are not let out. The further argument is that unlike in the other instances, where such builders let out flats, here there is no letting out and that deemed income –

which is the basis for assessment under the ALV method, should not be attributed. This Court is of the opinion that the argument, though attractive, cannot be accepted.

As repeatedly held, in East India, Sultan, and Karanpura, the levy of income tax in the case of one holding house property is premised not on whether the assessee carries on business, as landlord, but on the ownership. **The incidence of charge is because of the fact of ownership.** Undoubtedly, the decision in Vikram Cotton indicates that in every case, the Court has to discern the intention of the assessee; in this case the intention of the assesse was to hold the properties till they were sold. **The capacity of being an owner was not diminished one whit**, because the assessee carried on business of developing, building and selling flats in housing estates. **The argument that income tax is levied not on the actual receipt (which never arose in this case) but on a notional basis, i.e. ALV and that it is therefore not sanctioned by law, in the opinion of the Court is meritless**. ALV is a method to arrive at a figure on the basis of which the impost is to be effectuated. The existence of an artificial method itself would not mean that levy is impermissible. Parliament has resorted to several other presumptive methods, for the purpose of calculation of income and collection of tax. Furthermore, application of ALV to determine the tax is regardless of whether actual income is received; it is premised on what constitutes a reasonable letting value, if the property were to be leased out in the marketplace. **If the assessee's contention were to be accepted, the levy of income tax on unoccupied houses and flats would be impermissible – which is clearly not the case.**

As far as **the alternative argument that the assessee itself is occupier, because it holds the property till it is sold, is concerned, the Court does not find any merit in this submission**. While there can be no quarrel with the proposition that **"occupation" can be synonymous with physical possession, in law, when Parliament intended a property occupied by one who is carrying on business, to be exempted from the levy of income tax was that such property should be used for the purpose of business. The intention of the lawmakers, in other words, was that occupation of one's own property, in the course of business, and for the purpose of business, i.e. an active use of the property, (instead of mere passive possession) qualifies as "own" occupation for business purpose.** This contention is, therefore, rejected. Thus, this question is answered in favour of the revenue, and against the assessee.

The **Calcutta High Court in Azimganj Estate (P) Ltd. v CIT (ITA No. 242/2003, decided on 13.9.2011)** was dealing with a case of an assessee who was a builder and had vacant flats, which were let out, the Court held that rental income was assessable not under the head `Profits and Gains of Business or Profession' but is properly assessable under the head `Income from House Property'.

The Hon'ble Delhi High Court has while rendering its decision in the case of Ansal Housing Finance and Leasing Co. Ltd. not considered the decision of the Gujarat high Court in the case of Neha Builders nor has it considered the decision of the Orissa High Court in the case of M. P. Bazaz.

It also needs to be noted that the Delhi High Court has while deciding the case of Ansal not considered the earlier Full Bench decision of the Delhi High Court in the case of ***CIT v. Modi Industries Ltd. (210 ITR 1)(Del-FB)***. The Full Bench of the Delhi High Court has in this case dealt with the meaning of the term `occupy'. Following observations are relevant in this connection –

> "… the point for consideration is whether to avail of exemption under section 22, the property must necessarily be : (i) in direct occupation of the assessee company, and (ii) used as such for transaction of assessee's business or profession. This would depend on the scope of the term `occupy'."

Thereafter, the Court after discussing a few decisions states as follows –

> "….. To fall within the ambit of exemption in section 22, it is not necessary that the property must as such be in the occupation of the assessee-company itself or necessarily used for carrying on its business activity and not used for residential purposes."

Is annual value of stock-in-trade chargeable to tax under the head `Income from House Property' or `Income from Business'....

The Gujarat High Court has in the case of Neha Builders held that rental income in respect of flats held as stock-in-trade is chargeable to tax under the head `Profits and gains of business or profession' and not `Income from House Property'. The only distinction between the facts of the decision of Gujarat High Court and Delhi High Court is that the Gujarat High Court was dealing with a situation where the flats held as stock-in-trade were let out whereas Delhi High Court was dealing with a case where the flats held as stock-in-trade were not actually let out but their notional annual value was sought to be taxed.

Is annual value of stock-in-trade chargeable to tax under the head `Income from House Property' or `Income from Business'….

Mangla Homes (P) Ltd. v. ITO {(182 Taxman 55)(Bom)}

The assessee was a company incorporated with the object of dealing and investment in properties, flats, warehouses, leasing, hire purchase, renting, selling, reselling , etc. The assessee purchased flats for trading purposes at a cost of Rs. 4 crore. At the time of purchase, the building needed major repairs and the assessee expected the price would go up after completion of repairs.

Subsequently, due to recession in the market, the flat could not be sold hence the assessee let out the flat on leave and licenses basis and earned rental income.

The assessee treated rental income as business income.

The AO, CIT(A) and the Tribunal, all held that the rental income was chargeable to tax under the head `Income from House Property'.

The Tribunal based its decision on the decision of the Supreme Court in the case of East India Housing & Land Development Trust Ltd. v. CIT (1961) 42 ITR 49 (SC). The Supreme Court, in the case of East India relied upon its earlier judgment in the case of United Commercial Bank Ltd. v. CIT (1957) 32 ITR 688 (SC) wherein the apex Court had explained after exhaustive review of authorities that under the scheme of the Act the heads of income, profits and gains enumerated in the different clauses are mutually exclusive and specific head covering items of income arising from a particular source.

Mangla Homes (P) Ltd. v. ITO {(182 Taxman 55)(Bom)}

The Court held that the assessee's case is covered by the judgment in the case of East India Housing & Land Development Trust Ltd on which reliance has been rightly placed by the authorities below in reaching the conclusion that the rental income earned by the assessee was an income from house property.

CIT v. Sane & Doshi Enterprises (Bom) (2015) 377 ITR 165 (Bom.){order dated 9.4.2015}

The assessee, a partnership firm, was engaged in construction business and had constructed a commercial property known as May Fair Tower. The unsold portion of the property was let out and assessee earned rental income there from. The rental income earned was offered for taxation under the head `Income from House Property' and deduction u/s 24(a) was claimed.

The AO was of the view that receipts from this property were on account of exploitation of commercial assets and as such rent was business profit of the assessee. He further observed that the assessee is engaged in the business of construction of building with a view to sell the same and not leasing it. Thus, leasing of unsold units is an integral part of its business. He, accordingly, taxed rental income as `Business Income'.

The CIT(A) held that the rental income should be charged to tax under the head `Income from House Property'.

The Tribunal, relying upon the decision of the Apex Court in the case of East India Housing and Land Development Trust Ltd. v. CIT (1961) 42 ITR 49 (SC), upheld the view of the CIT(A) and dismissed the appeal filed by the Revenue.

Aggrieved, the revenue preferred an appeal to the High Court.

CIT v. Sane & Doshi Enterprises (Bom) (2015) 377 ITR 165 (Bom.){order dated 9.4.2015}

Held: The underlying test and as evolved throughout is whether the income has been derived from property. The treatment given in the books of account as stock-in-trade would not, therefore, alter the character or the nature of the income as held by the Supreme Court. If there is a test and which is in the field and emerging from repeated judgments rendered eitehr by the Hon'ble Supreme Court or by other High Courts, then a different conclusion cannot be reached.

Chennai Properties & Investments Ltd. v. CIT (SC) (2015) (373 ITR 673)(SC) order dated 9.4.2015}

The main object of the assessee company as per its Memorandum of Association was to acquire and hold the properties known as "Chennai House" and "Firhavin Estate" both in Chennai and to let out those properties as well as make advances upon the security of lands and buildings or other properties or any interest therein.

In the return of income filed by the assessee, the rental income from these properties was shown as income from business. The AO, however, refused to accept this income as `Business Income' but taxed it as `Income from House Property'.

The CIT(A) allowed the appeal filed by the assessee and held that the rental income be charged to tax as Business Income. The Tribunal upheld the order passed by the CIT(A). The Department approached the High Court. The High Court allowed the appeal of the Department i.e. it held that the rental income is chargeable to tax as `Income from House Property'.

The High Court rested its decision primarily on the judgment of the Apex Court in the case of East India Housing and Land Development Trust Ltd. v. CIT (1961) 42 ITR 49 as well as the Constitution Bench judgment of the Apex Court in the case of Sultan Brothers (P) Ltd. v. CIT (1964) 51 ITR 353 (SC)__

Chennai Properties & Investments Ltd. v. CIT (SC) (2015) (373 ITR 673)(SC){order dated 9.4.2015}

The Apex Court noted the main object as per Memorandum of Association and emphasised that the main object of the company was holding the aforesaid properties and earning income by letting out those properties. The court also noted that the entire income was through letting out of the aforesaid two properties viz. Chennai House and Firhavin House. There was no other income of the assessee other than income from letting out of these two properties.

The Court observed that in the case of East India Housing and Land Development Trusts Ltd., the company was incorporated with the object of buying and developing landed properties and promoting and developing markets. Thus, the main objective of the company was to develop the landed properties into markets. It so happened that some shops and stalls, which were developed by it, had been rented out and income was derived from the renting of the said shops and stalls. In those facts, the question arose for consideration was: whether the rental income that is received was to be treated as income from the house property or the income from business. This court while holding that the income shall be treated as income from house property rested its decision in the context of the main objective of the company and took note of the fact that letting out of the property was not the object of the company at all.

Chennai Properties & Investments Ltd. v. CIT (SC) (2015) (373 ITR 673)(SC){order dated 9.4.2015}

The court was therefore, of the opinion that the character of that income was from the house property had not altered because it was received by the company formed with the object of developing and setting up properties.

The Court observed that the Constitution Bench in the case of Sultan Bros. had pointed out that the deciding factor is not the ownership of land or leases but the nature of the activity of the assessee and the nature of the operations in relation to them. It was highlighted and stressed that the objects of the company must also be kept in view to interpret the activities. In support of the aforesaid proposition, number of judgments of other jurisdictions, i.e. Privy Council, House of Lords in England and US Courts were taken note of.

The Court finally held that in this case, letting of the properties is in fact the business of the assessee, The assessee therefore, rightly disclosed the income under the head `Income from Business'. It cannot be treated as `Income from House Property'.

C. R. Developments Pvt. Ltd. v. CIT (Mum ITAT) {ITA No. 4277/Mum/2012; Mumbai `C' Bench; AY 2009-10; Order dated 13.5.2015}

In this case, the AO had charged notional income in respect of 3 unsold shops shown as stock-in-trade under the head `Income from House Property'. The action of the AO was confirmed by the CIT(A).

Before the Tribunal, on behalf of the assessee, reliance was placed on the decision of Mumbai Bench of the Tribunal in the case of M/s Perfect Scale Company Pvt. Ltd. (ITA Nos. 3228 to 3234/Mum/2013; order dated 6.9.2013) wherein it has been held that in respect of assets held as business, income from the same is not assessable u/s 23(1) of the Act.

The Tribunal applying the analogy of the decision of the SC in the case of Chennai Properties stated that it can held that the assessee is engaged in the business of construction and development, which is the main object of the assessee company. The three flats could not be sold at the end of the year were shown as stock-in-trade. Estimating rental income by the AO for these three flats as income from house property was not justified in so far as these flats were neither given on rent nor the assessee has intention to earn rent by letting out the flats. The flats not sold were its stock-in-trade and income arising on its sale is liable to be taxed as business income. Accordingly, we do not find any justification in the order of AO for estimating rental income from these vacant flats under section 23 which is assessee's stock-in-trade as at the end of the year.

- A practical suggestion which can be given to builders having unsold inventory in such case could be to let out at least some of the flats in the building and then contend that the provisions of section 23(1)(c) are applicable and therefore, only the amount received is chargeable to tax. Possibly, this way the charge on vacant unsold flats can be avoided.

- **Income from house property.**

  22. The annual value of property consisting of any buildings or lands appurtenant thereto of which the assessee is the owner, other than such portions of such property as he may occupy for the purposes of any business or profession carried on by him the profits of which are chargeable to income-tax, shall be chargeable to income-tax under the head "Income from house property".

- Section 23(1)(c) of the Act w.e.f. Assessment Year 2002-03 reads as under –

- **Annual value how determined.**

  23. (1) For the purposes of section 22, the annual value of any property shall be deemed to be—

  (*a*) the sum for which the property might reasonably be expected to let from year to year; or

  (*b*) where the property or any part of the property is let and the actual rent received or receivable by the owner in respect thereof is in excess of the sum referred to in clause (*a*), the amount so received or receivable; or

  (*c*) where the property or any part of the property is let and was vacant during the whole or any part of the previous year and owing to such vacancy the actual rent received or receivable by the owner in respect thereof is less than the sum referred to in clause (*a*), the amount so received or receivable:

A possible way out ?

- In view of the language employed by section 22 it can be argued that what section 23 envisages to be covered by the word property is any buildings or lands appurtenant thereto of which the assessee is the owner. Section 22 uses plural form of buildings and lands. Whether some importance should be given to use of plural form by the Legislature in section 22.

- It can be argued that all the flats constitute a property and when some of the flats in the building are let out it is part of the property which has been let out and in a case where part of the property is let out and part is vacant, the rent received in respect of the part let out needs to be considered as the annual value of the property in view of the provisions of section 23(1)(c) of the Act.

Is annual value of vacant unsold flats / units chargeable to tax under the head Income from House Property

Jagdish T Punjabi

June 11, 2016

Memorandum explaining the provisions

- Section 194 IA has been introduced in the Income Tax Act, 1961 (ITA) w.e.f. 01.06.2013.
- The memorandum explaining the provisions of Finance Bill, 2013 reads as under :

"E. WIDENING OF TAX BASE AND ANTI TAX AVOIDANCE MEASURES

Tax Deduction at Source (TDS) on transfer of certain immovable properties (other than agricultural land)

There is a statutory requirement under section 139A of the Income-tax Act read with rule 114B of the Income-tax Rules, 1962 to quote Permanent Account Number (PAN) in documents pertaining to purchase or sale of immovable property for value of Rs.5 lakh or more. However, the information furnished to the department in Annual Information Returns by the Registrar or Sub- Registrar indicate that a majority of the purchasers or sellers of immovable properties, valued at Rs.30 lakh or more, during the financial year 2011-12 did not quote or quoted invalid PAN in the documents relating to transfer of the property.

Under the existing provisions of the Income-tax Act, tax is required to be deducted at source on certain specified payments made to residents by way of salary, interest, commission, brokerage, professional services, etc. On transfer of immovable property by a non-resident, tax is required to be deducted at source by the transferee. However, there is no such requirement on transfer of immovable property by a resident except in the case of compulsory acquisition of certain immovable properties. **In order to have a reporting mechanism of transactions in the real estate sector and also to collect tax at the earliest point of time**, it is proposed to insert a new section 194-IA to provide that every transferee, at the time of making payment or crediting of any sum as consideration for transfer of immovable property (other than agricultural land) to a resident transferor, shall deduct tax, at the rate of 1% of such sum.

In order to **reduce the compliance burden on the small taxpayers**, it is further proposed that no deduction of tax **under this provision** shall be made **where** the total amount of **consideration** for the transfer of an immovable property **is less than fifty lakh rupees**. This amendment will take effect from 01.06.2013. *[Clause 42]*

Notes on clauses

- The notes on clauses state as under :

  "Clause 42 of the Bill seeks to insert a new section 194-IA in the Income-tax Act relating to payment on transfer of certain immovable property other than agricultural land. It is proposed to insert a new section 194-IA to provide that any person, being a transferee, responsible for paying (other than the person referred to in section 194LA) to a resident transferor any sum by way of consideration for transfer of any immovable property (other than agricultural land) shall deduct an amount equal to one per cent of such sum as income-tax at the time of credit of such sum to the account of the transferor or at the time of payment of such sum in cash or by issue of cheque or draft or by any other mode, whichever is earlier.

  It is further proposed to provide that no deduction shall be made where consideration for the transfer of an immovable property is less than fifty lakh rupees.

  It is also proposed to provide an *Explanation defining the* expressions "agricultural land" and "immovable property".

  This amendment will take effect from 1st June, 2013."

Text of S. 194-IA

- Section 194-IA reads as under :

  '194-IA. (*1) Any person, being a transferee, responsible for paying (other than the person referred* to in section 194LA) to a resident transferor any sum by way of consideration for transfer of any immovable property (other than agricultural land), shall, at the time of credit of such sum to the account of the transferor or at the time of payment of such sum in cash or by issue of a cheque or draft or by any other mode, whichever is earlier, deduct an amount equal to one per cent. of such sum as income-tax thereon.

  (*2) No deduction under sub-section (1) shall be made where the consideration for the transfer of* an immovable property is less than fifty lakh rupees.

  (3) The provisions of section 203A shall not apply to a person required to deduct tax in accordance with the provisions of this section.

  Explanation.— For the purposes of this section,—

  (*a) "agricultural land" means agricultural land in India, not being a land situate in any area* referred to in items (*a) and (b) of sub-clause (iii) of clause (14) of section 2;*

  (*b) "immovable property" means any land (other than agricultural land) or any building or part* of a building.'.

Analysis

- With an objective :
  - to have a reporting mechanism of transactions in the real estate sector;
  - and also to collect tax at the earliest point of time.
- Section 194-IA has been introduced w.e.f. 01.06.2013.
- The obligation to deduct tax at source is on the purchaser of any immovable property.
- The purchaser may be any person. He may be an individual, HUF, firm, LLP, company, AOP, BOI, co-operative Society. He could even be a builder / developer. However, where Government is the purchaser, the section may not apply since Government is not a person (CIT v. Dredging Corporation of India (174 ITR 682) (AP)).
- Residential Status of purchaser / transferee is immaterial. The section applies even to a non-resident buyer or even to a buyer who is an agriculturist.
- Other conditions being satisfied this section will apply even when the purchaser / transferee is a family member / relative of the seller / transferor.
- However, the purchaser / transferee should not be a person referred to in S. 194LA. If the purchaser / transferee is a person referred to in S. 194LA, such a person is not required to deduct tax under this system.
- In case of joint transferee each co-owner could be liable.
- The seller / transferor should be a resident. He may even be R but NOR. If the seller / transferor happens to be a non-resident the provisions of section 195 may apply but certainly not the provisions of this section.

Analysis…

- The purchaser / transferee should be responsible for paying to the seller / transferor –
  - any sum
  - by way of consideration
  - for transfer of any immovable property (other than agricultural land).
- The term `sum' has not been defined in the Act. An issue would arise as to whether this section applies when the consideration is in kind.
- Does service tax and VAT form part of consideration?
- The terms `immovable property' and `agricultural land' are defined in Explanation to the section.
- "Immovable Property" is defined to mean –
  - any land (other than agricultural land); or
  - any building; or
  - part of a building.
- In view of the above definition, a question could arise as to whether part of land is covered or not.
- The term agricultural land is defined exhaustively to mean agricultural land in India not being land situated in any area referred to in items (a) and (b) of S. 2(14)(iii).

Analysis…

- Thus, to qualify as an agricultural land, land should be –
  - agricultural; and
  - it should be situated in India; and
  - should not be situated in any area referred to in items (a) and (b) of S. 2(14)(iii).
- Thus, urban agricultural land is not agricultural land and is therefore an immovable property. Similarly, agricultural land situated outside India is not agricultural land as defined in Explanation and therefore, is immovable property subject to a view on whether immovable property outside India is covered.
- Immovable property could be stock-in-trade of the developer.
- Immovable property could be held as either stock-in-trade or as capital asset.
- Immovable Property could be land, agricultural land outside India, urban agricultural land, office building, flat, shop, godown, theatre, hotel building, hospital building, etc.
- Immovable property could be located in India or outside India. This is a literal interpretation of the provision. If, a view is taken that even immovable property located outside India is also covered then certain un intended consequences and difficulties would flow. ⇨
- Tax is required to be deducted at the time of payment or the credit of such sum to the account of the transferor which ever is earlier. This is the triggering event.
- Tax is required to be deducted @ 1% of such sum.
- If the seller / transferor does not provide PAN the rate of tax could be 20% by virtue of provisions of S. 206AA of the Act.

Analysis…

- However, if the consideration for transfer of immovable property is less than Rs. 50,00,000 then deduction is not required.
- The threshold for trigger is Rs. 50,00,000. The threshold is the same irrespective of the location or nature of immovable property.
- It could be debated as to whether the threshold is to be applied qua an immovable property or qua each co-owner.
- Tax is to be deducted with reference to consideration and not with reference to valuation as done by stamp valuation authorities though in the case of the seller / transferor S. 50C / S. 43CA may be attracted.
- Thus, tax is deductible at source even in cases where the transferor is entitled to exemption u/s. 54, 54EC, 54F. Similar is the position where the transferor is to suffer a loss as a result of transfer or has brought forward losses which are available for set off against gain on transfer of immovable property.
- There is no provision of either the purchaser / transferor giving a declaration to the buyer for non deduction or for his obtaining an order from the Assessing Officer authorizing the buyer / transferee not to deduct tax / deduct tax at a lower rate.
- Once the conditions are satisfied the transferee is required to deduct tax and pay it to the credit of Central Government in accordance with the provisions of the Act.
- Failure to deduct tax will attract interest and penalty. w.e.f. 01.04.2015, provisions of section 40(a)(ia) also will be attracted.

Analysis…

- The transferee is not required to obtain TAN as required by section 203A.
- Having deducted tax in accordance with this section the transferee is required to pay it within 7 days from the end of the month in which the deduction is made.
- TDS payment shall be accompanied by a challan-cum-statement in Form 26QB. With effect from 1st June, 2016, the time limit for filing Form 26QB has been extended from 7 days from the end of the month to 30 days from the end of the month in which tax is deducted.
- Payment is to be made by remitting it electronically to RBI or SBI or any authorised bank or by paying it physically in any authorised bank.
- Payer is required to issue TDS certificate in Form 16B, to be generated online from the web portal.
- The TDS certificate is to be issued within 15 days from the due date for furnishing challan-cum-statement in Form No. 26QB.

'Consideration'

- The term `consideration' has not been defined in the Act. The term is also not defined in Transfer of Property Act. Patna High Court in ***RaiBahadur H.P. Banerjee*** **v.*CIT*** **[1941] 9 ITR 137** held that the word 'consideration' is not defined in the Transfer of Property Act, and must be given a meaning similar to the meaning which it has in the Indian Contract Act. Similar view has been taken by the Kerala High Court in the case of CGT v. Smt. C K Nirmala (215 ITR 156) and by the Bombay High Court in the case of Keshub Mahindra v. CGT (70 ITR 1). Section 2(*b*), of the Indian Contract Act defines `consideration' as under:

  > **"When, at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing or promises to do or to abstain from doing, something, such act or abstinence or promise is called a consideration for the promise."**

‘Consideration’…

- There is nothing to show in the definition of the term ‘consideration’ that the benefit of any act or abstinence must ‘directly’ go to the promisor. A contract can arise even though the promisee does or abstains from doing something for the benefit of a third party and the promisor can treat the benefit to a partnership firm where he is also a partner as consideration. Sir William R. Anson said : ‘The consideration may be of benefit to the promisor, or to a third party, or may be of no apparent benefit to anybody, but merely a detriment to the promise.’ (Principles of the English Law of Contract).... ...But the cardinal issue in this case has to be solved within the framework of the provisions contained in section 2(*xii*) of the Gift-tax Act read with section 2(*d*) of the Indian Contract Act...”
- Thus, consideration may be in cash or in kind. Consideration need not be monetary consideration. Consideration may flow from a third party. Agreements without consideration are void (Section 25 of the Indian Contract Act). S. 25 further provides for following three cases where agreement made without consideration is not void. i.e. following are cases of agreements without consideration which are not void.
  - It is expressed in writing and registered under the law for the time being in force for the registrationn of documents, and is made on account of natural love and affection between parties standing in a near relation to each other; or unless

‘Consideration’…

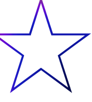
- It is a promise to compensate, wholly or in part, a person who has already voluntarily done something for the promisor, or something which the promisor was legally compellable to do; or unless
- It is a promise, made in writing and signed by the person to be charged therewith, or by his agent generally or specially authorised in that behalf, to pay wholly or in part a debt of which the creditor might have enforced payment but for the law for the limitation of suits.

Issues

- The section applies w.e.f. 01.06.2013. Therefore, is tax deductible in the following situations :
  - payments made after 01.06.2013 when the agreement –
    - is entered before 01.06.2013 but is registered afterwards.
    - is entered before 01.06.2013 and is registered before 01.06.2013.
- In respect of the abovementioned situations if tax is deductible under this section, is it also deductible on the amounts paid before 01.06.2013?
- The threshold for applicability of section is Rs. 50,00,000. To compute the threshold should one consider payments made before 01.06.2013 as well.
- Is tax to be deducted on the amount of consideration inclusive of service tax and VAT or exclusive of these amounts?
- Does the limit of Rs 50,00,000 apply qua the immovable property which is subject matter of this transfer or is it to apply qua each transferee or qua each transferor?
- To determine the threshold is service tax / VAT to be considered as part of consideration ?
- Does the section apply to property located outside India ?
- Does S. 194-IA apply to an exchange ?
- If yes, on what value is tax to be deducted ?
- Does S. 194-IA apply to transfer of shares with occupancy rights ?

Issues…

- Does S. 194-IA apply to development agreement –
  - between Landlord and Developer where consideration is only monetary payment;
  - between Landlord and Developer where consideration is partly monetary payment and partly in the form of constructed area;
  - between Co-operative Society and Developer.
- In case the buyer has taken a housing loan to finance the purchase of immovable property and the lendor is making direct payments to the transferor, how does the section operate?
- Does S. 194-IA apply to transfer of Tenancy Rights, Lease, etc.?
- Does S. 194-IA apply to, purchase of an immovable property in an auction, purchase from bank / DRT of an immovable property belonging to a defaulter of the bank?
- Is tax deductible from premium paid to take land on lease for 99 years ?
- Does it make any difference if the duration of the lease is 10 or 5 or 2 years?
- In case of long term rent agreements if rent is passed on as premium can the rate of TDS be reduced from 10% to 1%?



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Amendments to sections 54 and 54F made by the Finance (No. 2) Act, 2014

Section 54

- Section 54 of the Act is applicable to an individual or a HUF. Section 54 grants exemption in respect of long term capital gain arising on transfer of a long term capital asset being buildings or land appurtenant thereto and being a residential house the income of which is chargeable to tax under the head `Income from House Property' if the assessee has within a period of one year before the date of transfer or within a period of two years after the date of transfer of original asset purchased one residential house in India or has within a period of three years after the date of transfer constructed one residential house in India.

- The words `constructed, one residential house in India' have been inserted by the Finance (No.2) Act, 2014 has with effect from 1.4.2015 in place of "constructed, a residential house".

- Similar amendment has been carried out in section 54F as well.

Amendment to S. 54 w.e.f. 1.4.2015 is prospective

- The Madras High Court has in the case of ***CIT v. Smt. V. R. Karpagam (2014) 50 taxmann.com 55 (Mad)***
  - The amendment to section 54F by the Finance (No. 2) Act, 2014 which will come into effect only from 01-04-2015, makes it very clear that the benefit of section 54F will be applicable to constructed, one residential house in India and that clarifies the situation in the present case, i.e, post amendment, *viz*. from 01-04-2015, the benefit of section 54F will be applicable to one residential house in India. Prior to the said amendment, it is clear that a residential house would include multiple flats/residential units as in the present case where the assessee has got five residential flats.
- The above decision of the Madras High Court has been followed by the Chennai Bench of the Tribunal in the case of ***ITO v. Mrs. P. A. Sarala (2015) 58 taxmann.com 290 (Chennai).***

- One can reasonably take up the position that prior to 1.4.2015, purchase or construction of more than one residential flats qualifies for exemption u/s 54 and 54F, subject to satisfaction of other conditions.

Many to many

- Is exemption available in respect of sale of multiple houses with corresponding purchase / construction of multiple houses

- ***Rajesh Keshav Pillai v. ITO [2011] 44 SOT 617 (Mum)*** (Mum ITAT ` D' Bench) (ITA No. 6661/M/2009; AY 2006-07; order dated 13.8.2010
  - 4.1 A perusal of provisions of section 54(1) which has been reproduced at page 2 earlier shows that capital gain arising from transfer of a long term capital asset being a residential house the income of which is chargeable under the head "income from house property" is exempt if the capital gain is invested in a residential house in the manner prescribed in the section. ***There is no restriction placed any where in the section 54 that exemption is available only in relation to sale of one residential house. Therefore in case the assessee has sold two residential houses, being long term assets, the capital gain arising from the second residential house is also capital gain arising from the transfer of a long term asset being a residential house.*** The provisions of section therefore will also be applicable to the sale of second residential house and similarly to a third residential house and so on. Whenever the exemption available to restricted to one asset, a suitable provision is incorporated in the relevant section itself. For instance section 23(2) exempts income from a property consisting of a house or a part of house which is in occupation of the assessee or which could not be occupied by the assessee because of

Many to many …

- his employment / business / profession being carried on at some other place. Based on such provisions contained in section 23(2), income from any number of properties being residential houses which are self occupied will have to be treated as exempt. But a restriction has been placed in section 23(4) which provides that where the property referred to in sub-section (2) consists of more than one residential houses exemption would be available only in respect of one house and other self occupied residential houses will be treated as let out. There is no such provision in section 54 to restrict the exemption of capital gain only to sale of one residential house. The authorities below have taken the view that whenever more than one option is given to the assessee the word used is " any" . The reference has been made to the provisions of section 54E etc. We find from the perusal of the said sections that the word " any" has been used because the assessee has an option to invest in any of the assets mentioned therein. For instance, section 54E provides exemption in respect of capital gain arising from transfer of a long term capital asset if whole or any part of the net consideration is invested in any specified assets within six months from the date of transfer. Since the specified assets were more than one, the word " any" has been used because the exemption will be available if the investment is made in any of the specified assets. The situation in section 54 is different. ***Considering the language used in section 54(1), in our view exemption will be available in respect of transfer of any number of long term capital assets being residentail houses if other conditions are fulfilled.***

Many to one

- ***DCIT v. Ranjit Vithaldas (Mum ITAT ` A' Bench)*** (ITA No. 7443/M/2002; AY 1998-99; order dated 22.6.2012

  "10 Having held that the two flats were two different residential houses, it is required to be examined whether the assessee is entitled for exemption u/s 54 of the Act in respect of sale of more than one residential houses. We see no restriction placed in section 54 that exemption is allowable only in respect of sale of one residential house. Even if the assessee sells more than one residential houses in the same year and the capital gain is invested in a new residential house, the claim of exemption cannot be denied if the other conditions of section 54 are fulfilled. This aspect had been examined by the Mumbai Bench of the Tribunal in the case of Rajesh Keshav Pillai v. ITO (2011) 44 SOT 617 (Mum.) in which it has been held that exemption u/s 54 will be available in respect of transfer of any number of long term capital assets being residential houses if other conditions are fulfilled. ……….

  - 11 Another important aspect which needs to be examined is ***whether the exemption u/s 54 will be available, in case, capital gain arsing from sale of more than one residential house, is invested in one residential house***. The ld. Counsel appearing for the assessee argued that there was no restriction under section 54 that capital gain arising from two residential houses cannot be invested in one residential house.

Many to one …

- We find substance in the argument advanced by the ld. Counsel for the assessee. No rulings have been brought on record by the ld. DR to show that the capital gain arising from sale of more than one residential houses cannot be invested in one residential house. The provisions of section 54 as pointed out earlier apply to transfer of any number of residential houses by the assessee provided the capital gain arising therefrom is invested in a residential house. The exemption u/s 54 is available if capital gain arsing from transfer of a residential house is invested in a new residential house within the prescribed time limit. Thus there is an inbuilt restriction that capital gain arising from the sale of one residential house cannot be invested in more than one residential house. However, ***there is no restriction that capital gain arising from sale of more than one residential houses cannot be invested in one residential house.*** In case, capital gain arising from sale of more than one residential houses is invested in one residential house, the condition that capital gain from sale of a residential house should be invested in a new residential house gets fulfilled in each case individually because the capital gain arising from sale of each residential house has been invested in a residential house. ***Therefore, even if two flats are sold in two different years, and the capital gain of both the flats is invested in one residential house, exemption u/s 54 will be available in case of sale of each flat provided the time limit of construction or purchase of the new residential house is fulfilled in case of each flat sold.***

Is annual value of vacant unsold flats / units chargeable to tax under the head Income from House Property

Jagdish T Punjabi

June 11, 2016

General background

- Gift Tax Act, 1957 – applicable to gifts made on or after 01.04.1957.
- Finance (No. 2) Act, 1998 abolished the Gift Tax Act, 1957 and proposed to tax value of any movable or immovable property received on or after 01.10.1998 by any person without consideration in money or money's worth as income. This provision did not see the light of the day.
- S. 56(2)(v) introduced by Finance (No. 2) Act, 2004 – applicable to gifts made on or after 01.09.2004.
- S. 56(2)(vi), introduced by Taxation Laws (Amendment) Act, 2006, replaced S. 56(2)(v) – applicable to gifts made on or after 01.04.2006.
- S. 56(2)(vii), introduced by Finance (No. 2) Act, 2009, replaced S. 56(2)(vi) – applicable to gifts made on or after 01.10.2009. Property in kind covered.
- S. 56(2)(viia) introduced by Finance Act, 2010 – applicable to firms or closely held companies receiving shares of closely held companies, on or after 01.06.2010, without consideration or for inadequate consideration.
- Rules 11U and 11UA notified on 07.04.2010 w.e.f. 01.10.2009 for determination of fair market value of the property other than immovable property – Valuation Rules for Ss. 56(2)(vii) and 56(2)(viia).
- S. 56(2)(viib) introduced by Finance Act, 2012, w.e.f. 01.04.2013 – applicable to closely held companies receiving consideration for issue of shares in excess of FMV of the shares.

Background for 56(2)(vii)(b)

- The Finance Act, 2009 inserted section 56(2)(vii) w.e.f. 01.10.2009. Simultaneously with introduction of this section, s. 56(2)(vi) was deleted.
- S. 56(2)(vi) did not cover receipts in kind whereas S. 56(2)(vii) covers receipts in kind as well.
- S. 56(2)(vii) covers receipt of property mentioned therein. Such receipt may be without consideration or for a consideration which is less than its stamp duty value / fair market value
- This presentation deals with only sub-clause (b) of clause (vii) of sub-section (2) of Section 56. i.e. provision dealing with receipt of immovable property without consideration or for a consideration which is less than its stamp duty value. The term ‘immovable property’ is defined for this purpose.
- Receipt of immovable property without consideration is chargeable to tax if such receipt is on or after 01.10.2009 and other conditions are satisfied.
- Receipt of immovable property for a consideration which is less than its stamp duty value is chargeable to tax w.e.f. Asst Year 2014-2015. Earlier, such receipt was chargeable to tax w.e.f. 01.10.2009. However, Finance Act, 2010 deleted this part with retrospective effect from 01.10.2009. The Memorandum explaining the provisions of the Finance Bill, 2010 explained the reason for deletion as under :

Background for 56(2)(vii)(b)…

"C. In several cases of immovable property transactions, there is a time gap between the booking of a property and the receipt of such property on registration, which results in a taxable differential. It is, therefore, proposed to amend clause (vii) of section 56(2) so as to provide that it would apply only if the immovable property is received without any consideration and to remove the stipulation regarding transactions involving cases of inadequate consideration in respect of immovable property."

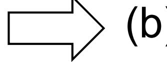
- The difficulty envisaged by the Finance Bill, 2010 is sought to be resolved by the proviso to 56(2)(vii)(b)(ii).
- Except for the proviso to S. 56(2)(vii)(b)(ii) the provisions are the same as they were introduced by the Finance Act, 2009 and amended by the Finance Act, 2010.
- In the event that there is an issue of interpretation of the provisos in view of the language not being clear or being capable of two interpretations the provisos will have to be interpreted in a manner that they resolve the difficulties which were envisaged by the Finance Act, 2010.

Text of Section 56(2)(vii)

"56(2) In particular, and without prejudice to the generality of the provisions of sub-section (1), the following incomes, shall be chargeable to income-tax under the head "Income from other sources", namely :—

(*vii*) where an individual or a Hindu undivided family receives, in any previous year, from any person or persons on or after the 1st day of October, 2009,—

(*a*) any sum of money, without consideration, the aggregate value of which exceeds fifty thousand rupees, the whole of the aggregate value of such sum;



(b) any immovable property, -

(i) without consideration, the stamp duty value of which exceeds fifty thousand rupees, the stamp duty value of such property;

(ii) For a consideration which is less than the stamp duty value of the property by an amount exceeding fifty thousand rupees, the stamp duty value of such property as exceeds such consideration;

Provided that where the date of the agreement fixing the amount of consideration for the transfer of immovable property and the date of registration are not the same, the stamp duty value on the date of the agreement may be taken for the purposes of this sub-clause;

Provided further that, the said proviso said apply only in a case where the amount of consideration referred to therein, or a part thereof, has been paid by any mode other than cash on or before the date of the agreement for the transfer of such immovable property.

Text of Section 56(2)(vii) …

(*c*) any property, other than immovable property,—

(*i*) without consideration, the aggregate fair market value of which exceeds fifty thousand rupees, the whole of the aggregate fair market value of such property;

(*ii*) for a consideration which is less than the aggregate fair market value of the property by an amount exceeding fifty thousand rupees, the aggregate fair market value of such property as exceeds such consideration :

Provided that where the stamp duty value of immovable property as referred to in sub-clause (*b*) is disputed by the assessee on grounds mentioned in sub-section (2) of section 50C, the Assessing Officer may refer the valuation of such property to a Valuation Officer, and the provisions of section 50C and sub-section (15) of section 155 shall, as far as may be, apply in relation to the stamp duty value of such property for the purpose of sub-clause (*b*) as they apply for valuation of capital asset under those sections :

Provided further that this clause shall not apply to any sum of money or any property received—

(*a*) from any relative; or

(*b*) on the occasion of the marriage of the individual; or

(*c*) under a will or by way of inheritance; or

(*d*) in contemplation of death of the payer or donor, as the case may be; or

(*e*) from any local authority as defined in the *Explanation* to clause (*20*) of section 10; or

(*f*) from any fund or foundation or university or other educational institution or hospital or other medical institution or any trust or institution referred to in clause (*23C*) of section 10; or

(*g*) from any trust or institution registered under section 12AA.

E*xplanation.*—For the purposes of this clause,—

(*a*) "assessable" shall have the meaning assigned to it in the *Explanation 2* to sub-section (2) of section 50C;

(*b*) "fair market value" of a property, other than an immovable property, means the value determined in accordance with the method as may be prescribed;

(*c*) "jewellery" shall have the meaning assigned to it in the *Explanation* to sub-clause (*ii*) of clause (*14*) of section 2;

(*d*) "property" means the following capital asset of the assessee, namely:—

(*i*) immovable property being land or building or both;

(*ii*) shares and securities;

(*iii*) jewellery;

(*iv*) archaeological collections;

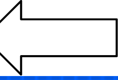
(*v*) drawings;

(*vi*) paintings;

(*vii*) sculptures;

(*viii*) any work of art; or

(*ix*) bullion;



Text of Section 56(2)(vii)…

(e) *"relative" means,—*

(i) *in case of an individual—*

(A) *spouse of the individual;*

(B) *brother or sister of the individual;*

(C) *brother or sister of the spouse of the individual;*

(D) *brother or sister of either of the parents of the individual;*

(E) *any lineal ascendant or descendant of the individual;*

(F) *any lineal ascendant or descendant of the spouse of the individual;*

(G) *spouse of the person referred to in items (B) to (F); and*

(ii) *in case of a Hindu undivided family, any member thereof;*

(*f*) "stamp duty value" means the value adopted or assessed or assessable by any authority of the Central Government or a State Government for the purpose of payment of stamp duty in respect of an immovable property;"

Analysis of S. 56(2)(vii)(b)

- **Conditions to be satisfied for the section to apply:**

1. The assessee is an individual or a hindu undivided family;
2. The assessee receives from any person or persons any immovable property. For this purpose immovable property is land or buildings or both (for brevity sake hereafter referred to as IP).
3. The immovable property so received is capital asset of the assessee.
4. The assessee receives the immovable property either –
   a) without consideration and the stamp duty value of such property exceeds Rs. 50,000 ; or
   b) for a consideration which is less than the stamp duty value of such property and the difference between the stamp duty value and the consideration exceeds Rs. 50,000;
5. The IP is not received from the relative as defined in Explanation (e) to the section.
6. The IP is not received from a person or in any of the situations mentioned in second proviso to section.

Consequences if the above conditions are satisfied:

- **Consequences if the above conditions are satisfied:**

Situation	Amount taxable under IFOS
In case immovable property is received by an assessee -	
without consideration	The stamp duty value of such property
for a consideration which is less than its stamp duty value	Difference between the stamp duty value and consideration.

- For computing capital gains arising on transfer of such property, the cost of acquisition shall be deemed to be the value which has been taken into account for the purposes of S. 56(2)(vii) {Section 49(4)}.

Exceptions

- **Exceptions:**

1 In case the assessee has –

   a) entered into an agreement;
   b) the agreement is for transfer of immovable property; and
   c) the agreement fixes the amount of consideration;
   d) the date of such agreement and the date of registration are not the same;
   e) the amount of consideration referred to in the said agreement or a part of the consideration has been paid by any mode other than cash on or before the date of the said agreement

   then,

   the stamp duty value on the date of the agreement may be taken for the purposes of S. 56(2)(vii)(b)(ii).

2 In case the assessee disputes the stamp duty value and claims before the Assessing Officer (AO) that the value adopted or assessed or assessable by the stamp duty value exceeds the fair market value of the property and the stamp duty value has been accepted (i.e. it has not been disputed in an appeal or revision or no reference has been made before any other authority, court or the High Court) then the AO may refer the valuation of such property to a Valuation Officer and the provisions of Section 50C and S. 155(15) shall apply in relation to the stamp duty value of such property for the purposes of clause 56(2)(vii)(b).

‘Immovable Property’

- S. 56(2)(vii)(b) contemplates assessee receiving ‘immovable property’ without consideration or for a consideration which is less than its stamp duty value.
- Explanation to S. 56(2)(vii) defines ‘property’ interalia to mean capital asset being immovable property being land or building or both.
- Question may arise whether rights in land or building, such as tenancy, lease, license in or with respect to land or building or both, are covered by this section. Since the definition of property does not refer to rights or transactions which may enable use or enjoyment of property, it appears that having regard to the description, context and objective, acquisition of such rights cannot be equated with immovable property because the Act specifically refers to such rights or transactions where the same are sought to be covered.
  - Chapter XXC as was applicable, before 01.07.2002, to transfer of immovable property specifically included rights in or with respect to any land or any building apart from land or building [S. 269UA(d)(ii)].
  - Section 27(iii) to (iiib) refer to certain types of transactions w.r.t. land or building.

'Immovable Property'…

- In the context of S. 50C, Tribunal has in the following cases held that the said section does not apply to rights in immovable property.
  - DCIT v Tejinder Singh (2012) (50 SOT 391) (Kol) - Transfer of leasehold righs in a buildiing do not attract provisions of S. 50C.
  - Atul G. Puranik v. ITO (132 ITD 499)(Mum) - Leasehold rights in plot of land is not `land or building or both'.
  - Kishori Sharad Gaitonde v. ITO ((ITA No. 1561/M/09), BCAJ Pg. 28, Vol 41 B Part 5, February 2010)
  - Per contra –
    - Chiranjeev Lal Khanna v. ITO (132 ITD 474)(Mum) – S. 50C applies to Transfer of Development Rights
    - Mrs. Arlette Rodrigues v. ITO (ITA No. 343/Mum/2010) (Assessment Year 2006-07) order dated 18.02.2011 – S. 50C applies to Transfer of Development Rights.
    - Smt. Myrtle D'Souza v. ITO (ITA No. 3168/Mum/2011) (Assessment Year 2006-07) order dated 20.06.2012 – follows Mrs. Arlette Rodrigues and holds that S. 50C applies to Transfer of Development Rights.
- Are the following immovable property –
  - Development agreements
  - Shares with occupancy rights
  - Transfer of 100% shares of the Company whose only asset is an immovable property.
- Is receipt of immovable property situated outside India covered by S. 56(2)(vii)(b)?
- Is receipt of immovable property held as stock-in-trade covered?

'Proviso to sub-clause (b)

- Proviso to sub-clause (b) provides that in case an agreement for transfer has been entered into before registration then the stamp duty value as on the date of the agreement is to be considered instead of the stamp duty value on the date of registration. The conditions to be satisfied for the proviso to be applicable are as under:

  a) The assessee has entered into an agreement;

  b) The agreement is dated;

  c) The agreement is for transfer of immovable property;

  d) The agreement is entered into before the date of registration;

  e) The agreement fixes consideration;

  f) The consideration or part thereof has been paid on or before the date of the agreement;

  g) Such payment is by a mode other than cash.

  The term `agreement' has not been defined in the Act. Therefore, a useful reference can be made to the definition in S. 2(e) of The Indian Contract Act, 1872 which defines the term `agreement' as:

  > "Every promise and every set of promises, forming the consideration for each other, is an agreement. (Indian Contract Act (9 of 1872), S. 2(e))"

Proviso to sub-clause (b)…

- Dictionaries have explained the meaning of the term `agreement' as under:
  1. the fact of being of one mind; concurrence in the same opinion. {**Casell Concise Dictionary (Revised Edition, P. 29)**}
  2. The act of agreeing or of coming to a mutual arrangement. 2. The state of being in accord. 3. An arrangement that is accepted by all parties to a transaction. ……. 8. Law. A. ***an expression of assent by two or more parties to the same object. B. the phraseology written or oral, of an exchange of promises.*** { **Websters Unabridged Dictionary (P. 40)**}
  3. AGREEMENT ranges in meaning from mutual understanding to binding obligation.
- The following observations lucidly explain the meaning of the term `agreement'.

  "An `agreement' is an instrument between the parties who willfully agree to perform certain acts or refrain from doing something. The parties to the instrument should be agreed about the subject matter at the same time and in the same sense. The two or more parties which are agreed must communicate with each other." [Felthouse v. Bindley, (1862) 142 ER 1037]
- Can a letter of allotment be regarded as an agreement for transfer?
- Can the agreement of transfer contemplated by the first proviso to S 56(2)(vii)(b) be an oral agreement?
- Significance of the word `may' in proviso to S. 56(2)(vii)(b) ?

First Proviso to S. 56(2)(vii)

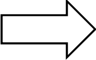
- The proviso grants the assessee a right to dispute SDV of the IP received by him without consideration or for a consideration which is less than the stamp duty value thereof on the ground that the FMV of the property is less than the stamp duty value of the property.
- Upon the assessee disputing the stamp duty value of the property, the AO may refer the valuation of the property to a Valuation Officer.
- The proviso uses the word `may'. In the context of S. 50C(2), the Tribunal has in the following cases held that "may" should be read as as `should'. It is held that if S. 50C is read to mean that if the AO is not satisfied with the explanation of the assessee then he `may' or `may not' send the matter for valuation to the DVO, then in that case this provision would be rendered redundant.
  - M/s Fortuna Structures Pvt. Ltd. v ACIT (2008)(60 itatindia 886)(Lucknow)
  - Meghraj Baid v ITO 23 SOT 25 (Jodh)
  - Kalpataru Industries v ITO (Mum)(41-B BCAJ 32)(ITA No. 5540/Mum/2007, Mum H Bench, Asst Year 2005-06, Order dated 24.8.2009)
  - Abbas T. Reshamwala v ITO (41-B BCAJ 33)(Mum)(ITANo. 3093/Mum/2009)(AY 2006-07)(Decided on 30.11.2009)

First Proviso to S. 56(2)(vii)...

- A question arises as to whether the condition mentioned in sub-section (2) of S. 50C viz. that the stamp duty value has been accepted is applicable in the context of S. 56(2)(vii)(b) because the proviso only makes a reference to the ground on which the stamp duty value is disputed by the assessee and not any other condition. While this may be a possible way of looking at the situation the proviso also mentions that S. 155(15) shall apply. S. 155(15) applies to a case where stamp duty value was accepted and thereafter in an appeal or revision such value undergoes a change. Upon stamp duty value undergoing a change, the order passed will be rectified u/s 154 of the Act. It appears that the better view would be that the stamp duty value should be accepted.
- Once reference is made to the Valuation Officer the provisions of S. 50C and S. 155(15) shall, as far as may be, apply in relation to the stamp duty value of such property for the purpose of sub-clause (b) as they apply for valuation of capital asset under those sections.

'Capital Asset'

- For the purpose of S. 56(2)(vii) the term 'property' has been defined to mean 'capital asset' of the assessee viz………...
- Therefore, it is the receipt of nine items mentioned in the definition of the term 'property' and which are capital assets of the assessee would be covered by this clause.
- The term 'assessee' refers to the recipient of the property.
- If the term 'capital asset' in the above definition is understood to be as defined in Section 2(14) than it would not cover personal effects, agricultural land outside the notified area, furnitures, motor cars, etc. However, the other view could be that it is used in contradistinction to `stock-in-trade' and not as it is understood in S. 2(14).
- The clause covers certain specified properties only but still does not cover yatches, aeroplanes, etc. Receipt of these items without consideration will not attract the provisions of S. 56(2)(vii).



'Relative'

- The term 'relative' is defined as follows :

  "(e) "relative" means,—

  (i) in case of an individual—

  (A) spouse of the individual;

  (B) brother or sister of the individual;

  (C) brother or sister of the spouse of the individual;

  (D) brother or sister of either of the parents of the individual;

  (E) any lineal ascendant or descendant of the individual;

  (F) any lineal ascendant or descendant of the spouse of the individual;

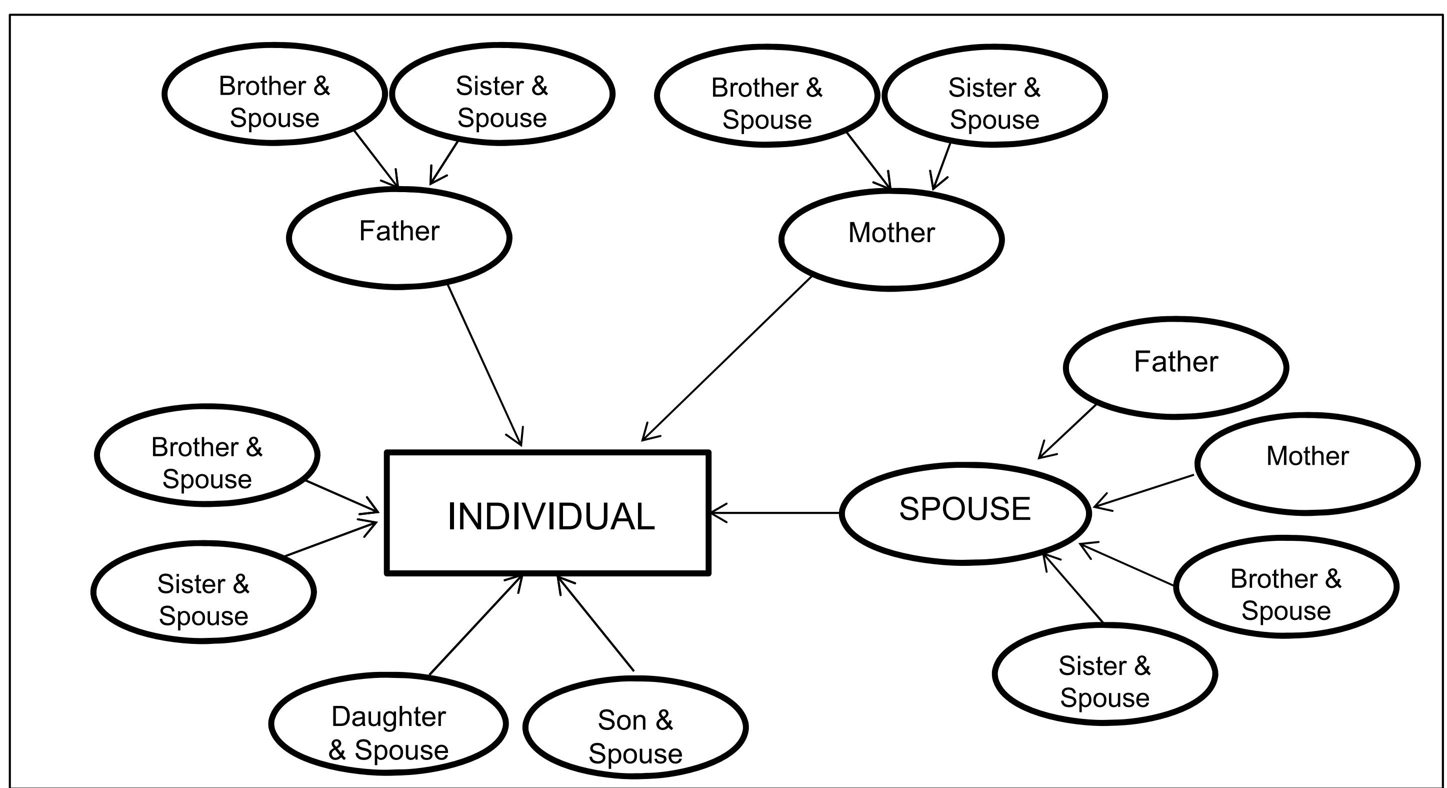
  (G) spouse of the person referred to in items (B) to (F); and

  (ii) in case of a Hindu undivided family, any member thereof;"

- The definition to be examined from the view point of the recipient.
- A two way relationship cannot always be assumed.
- It is possible that Donor may be relative of the Donee. The gift may therefore, be within the exception. If the said Donee were to make a gift to the Donor it cannot always be presumed that the gift originates from a relative. For eg. A gift given by an individual to his brother's son may be exempt as originating from a relative. However, if the said individual were to receive a gift from his nephew the gift may not fall within the exception.

'Relative'…

- **The relatives of an assessee who is an individual are very nicely explained by the following diagram from BCAS Referencer.**



Source : BCAS Referencer

Cost of acquisition for the purpose of computing capital gains arising on transfer of an immovable property received without consideration or for a consideration which is less than its stamp duty value:

- Section 49 dealing with Cost with reference to certain modes of acquisition provides as under–

  "(4) Where the capital gain arises from the transfer of a property, the value of which has been subject to income-tax under clause (vii) or clause (viia) of sub-section (2) of section 56, the cost of acquisition of such property shall be deemed to be **the value which has been taken into account for the purposes of the said clause (vii)** or clause (viia)."

  Cost of acquisition of the property whose value has been subject to income-tax under clause (vii) of sub-section (2) of section 56 shall be deemed to be the value taken into account for the purposes of the said clause (vii).

- To illustrate, to compute capital gains arising on transfer of an immovable property which was received by the assessee for a consideration of Rs. 15,00,000 and whose stamp duty value was Rs. 25,00,000 but the DVO valued it at Rs. 20,00,000, the cost of acquisition will be deemed to be Rs. 20,00,000 (being value taken into account for the purposes of S. 56(2)(vii)).

Conflict between 49(4) and 49(1).

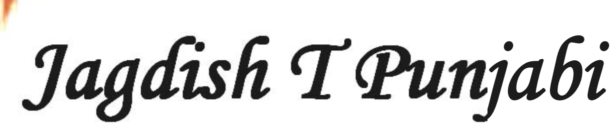
- Section 49(1) provides that where a capital asset is received by the assessee in any of the modes stated therein the cost to the previous owner shall be deemed to be its cost of acquisition. When an assessee who is an individual receives immovable property without consideration from a person who is not a relative of the assessee, the stamp duty value of the immovable property so received will be charged to tax u/s 56(2)(vii)(b). It may so happen that the cost of acquisition of the property to the donor may be more than its stamp duty value on the date of its receipt by the assessee. In such a case, for the purposes of computing capital gains on transfer of this property an issue would arise as to whether the cost of acquisition should be as per provisions of S. 49(1) or S. 49(4). To illustrate, in a case where assessee has on 13th October, 2013 received an immovable property without consideration from a person other than a relative and the stamp duty value of the property so received was Rs. 10,00,000 but the cost of acquisition of this property to the previous owner is Rs. 12,00,000. For computing capital gains arising on transfer of this property in assessment year 2014-15, the cost of acquisition will be deemed to be Rs. 10,00,000 for the following reason –

Conflict between 49(4) and 49(1)...

- The assessee has received immovable property as gift i.e. in one of the modes mentioned in S. 49(1). S. 49(1) provides that where the capital asset became property of the assessee in any of the modes stated therein the cost of acquisition of the asset shall be deemed to be the cost for which the previous owner of the property acquired it, as increased by the cost of any improvement of the assets incurred or borne by the previous owner or the assessee, as the case may be. In other words, as per S. 49(1) the cost of acquisition will be Rs. 12,00,000.
- However S. 49(4) provides that capital gain arising from transfer of a property, the value whereof has been subject to income-tax under S. 56(2)(vii), the cost of acquisition shall be deemed to be the value which has been taken into account for the purposes of the said clause (vii). In other words, the cost of acquisition will be Rs. 10,00,000.
- Since there are two provisions dealing with the same situation one needs to consider whether the assessee has an option to disregard the provisions of S. 49(4) and exercise the option to apply S. 49(1) or will it be contended that 49(4) is a specific provision whereas S. 49(1) is a general provision therefore, the specific will prevail over general. It appears that the specific provision will prevail over the general one. Section 49(1) is a general provision dealing with all assets acquired in modes mentioned therein but S. 49(4) is a specific provision dealing with a particular class of assets whose value has been charged to tax under clause (vii) of sub-section (2) of section 56.

Gift of immovable property under construction

- The participants can consider whether a gift received of flat under construction would be covered by sub-clause (b) of clause (vii) of sub-section (2) of section 56. If yes, whether the charge will be in the year of gift by way of registered deed or in the year in which the assessee receives the possession of immovable property. Also, will the amount chargeable be the stamp duty value of the property on the date of receipt of gift i.e. the date of registration of gift deed or will it be stamp duty value on the date on which possession is received?



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Is annual value of vacant unsold flats / units chargeable to tax under the head Income from House Property

Jagdish T Punjabi **June 11, 2016**

Does ICDS III apply to a real estate developer

- ICDS III deals with Construction Contracts
- A question which arises is whether ICDS III applies to a real estate developer?
- To answer this question, one has to look at the scope of ICDS III and then compare the same with the scope of AS issued by ICAI. ICAI issued AS 7 dealing with Construction Contracts in 1985 and thereafter this AS was revised in 2002.
- Scope of Accounting Standard 7 – 2002 Edition
  - "*This Standard should be applied in accounting for construction contracts in the financial statements of contractors.*"
- Scope of Accounting Standard 7 – 1985
  - "*This Statement deals with accounting for construction contracts in the financial statements of enterprises undertaking such contracts (hereafter referred to as `contractors'). The Statement also applies to enterprises undertaking construction activities of the type dealt with in this Statement not as contractors but on their own account as a venture of a commercial nature where the enterprise has entered into agreements for sale.*"
- Scope of ICDS III
  - "*This Income Computation and Disclosure Standard should be applied in determination of income for a construction contract of a contractor.*"

Does Revised AS 7 apply to Builder / Developer ?

- **In the following decisions it has been held that revised AS 7 applies to contractors and does not apply to builders / developers**
  - DCIT v. Omega Shelters Pvt. Ltd. (2011-(ID2)-GJX-3005-THYD)
  - ACIT v. National Builders (137 ITD 277)(TAhd)
  - Prem Enterprises v. ITO (2012)(54 SOT 367)(TBom)
  - Unique Enterprises v. ITO (2010-TIOL-737-ITAT-Mum)
  - ITO v. Bhadrasen Construction Pvt Ltd. (2010-TIOL-421-ITAT-Mum)
  - DCIT v. Shiv Construction Consortium (2012-(ID2)-GJX-1296-TAhd)
  - ITO v. Elixir Infrastructures (2011-(ID2)-GJX-2678-TIND)

- Opinion dated 16.07.2003 issued by Expert Advisory Committee

- Queries and Response :

Query	Response
Whether the revised AS 7 would be applicable to the company for accounting for new housing projects, which may be undertaken by the company on or after 01.04.2003 on the same business model as mentioned in the facts of the case.	The revised AS 7 would not be applicable to the company for accounting for new housing projects, which are undertaken by the company during the accounting periods commencing on or after 01.04.2003.
In case revised AS 7 is not applicable to the company, whether the company can value its inventories in accordance with Accounting Standard (AS) 2, 'Valuation of Inventories', issued by the Institute of Chartered Accountants of India, considering the definition of inventory as 'an asset in the process of production for the purpose of sale', i.e., whether the activity of developing housing projects on its own account as a commercial venture by the company can be construed as a production activity.	The activity of developing housing projects on its own account as a commercial venture by the company is of the nature of production activity and, therefore, should be construed as such. The inventories should be valued by the company in accordance with AS 2 as explained in paragraph 9 above.

Opinion issued by EAC on 16.07.2003 (Volume XXIII – Query No. 15)…

- Queries and Response :

Query	Response
If the activities of the company cannot be considered as a production activity and consequently AS 2 is also not applicable, which Accounting Standard should be followed for recognition of revenue and valuation of its construction work-in-progress ?	AS 2 is relevant for valuation of inventories including construction work-in-progress and not for recognition of revenue. AS 9 would be relevant for recognition of revenue.

Para 9 of EAC Opinion
The Committee notes that the activities carried on by the company under consderation as explained in paragraphs 1 and 2 above (refers to first two bullet points under facts), cannot be construed as rendering of services. The construction activities carried on by the company are of the nature of production activities. Accordingly, in terms of the above definition of the term 'inventories', the Committee is of view that the company should value the completed projects as inventories held-for-sale in the ordinary course of business; the semi-finished housing projects as inventories in the process of construction for such sale; and materials and supplies held for use in the housing projects as inventories in the form of materials or supplies to be consumed in the construction process.

Does ICDS III apply to a real estate developer

- Extracts from the Committee Report –
  - "*the Committee recommends that TAS covering the following areas may also be considered for notification under the Act –*

    …..

    …..

    (iii) Revenue recognition by real estate developers"

- Supreme Court has in the case of M/s Larsen & Toubro (2014)(1) SCC 708 held that a real estate transaction when flats are sold under construction to be a works contract for MVAT.

- The Gujarat High Court has in the case of Mangala Properties (57 taxmann.com 35) allowed deduction u/s 80IB(10) to a developer who had entered into a JDA with the land owner. The Gujarat High Court stated as follows –
  - "*While construing the provisions of the Income-tax Act, the ordinary meaning of the expression "works contract" is required to be taken into and resort cannot be had to the meaning of the said expression as envisaged under the relevant Sales Tax Act which are enacted in the context of the provisions of article 366(29A)(b) of the Constitution.*"

Does ICDS III apply to a real estate developer

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Does ICDS III apply to a real estate developer

- For the following reasons it is possible to take a view that the ICDS III does not apply to a real estate developer –
  - Principle of consistency
  - Both the methods are revenue neutral
  - Decisions holding that AS 7 (revised) does not apply to real estate developer
  - Committee Report is indicative of the fact that ICDS III does not apply to a real estate developer

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