

CAPITAL GAINS

UNDER INCOME TAX ACT, 1961 (as
amended by Finance Act, 2012)

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Section 45(1) - Charging Section

“When the capital gain tax shall levy”

“Any **profit/gain** arising from the **transfer** of any **capital asset** is chargeable to tax in the **previous year** in which the **transfer** took place such gains are **taxable only if no exemption is available u/s 54,54B,54D,54EC,54F,54G,54H,54GA.**”

From the above mentioned clause, below mentioned are the areas that are needed to be studied to understand the levy of Capital gain.

a. Profit / Gain

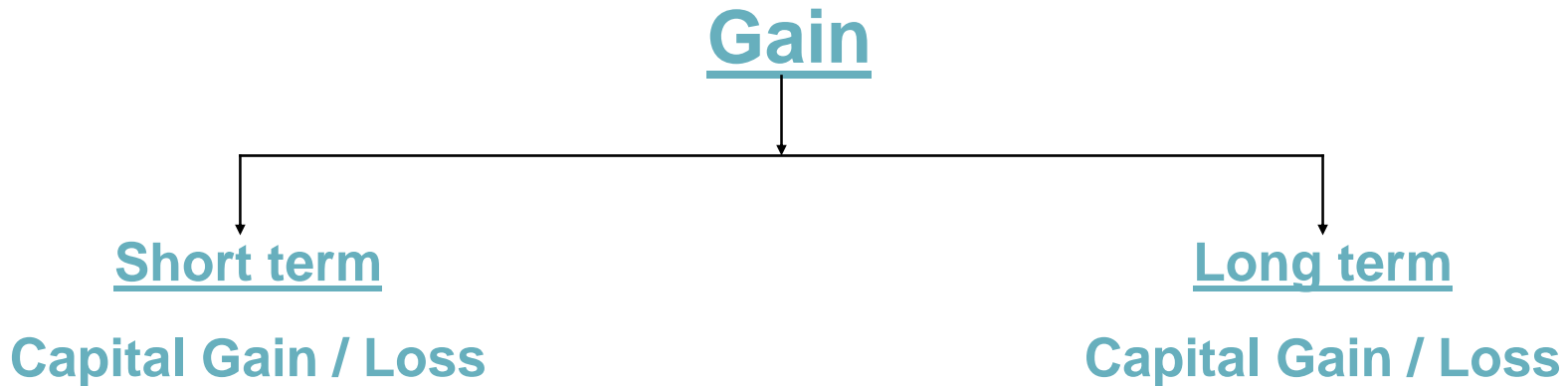
b. Transfer

c. Capital Asset

▪ Taxability in Previous Year of transfer

▪ Exemption is available u/s 54,54B,54D,54F,54EC,54G,54GA.

a. Profit / Gain.....



Section 2(29 B) - “Long term Capital gain” means capital gain arising from the transfer of a long term capital asset.

Section 2(42B) - “Short term capital gain” means capital gain arising from the transfer of a short term capital asset.

Difference between short term and long term capital gain

S.No.	Short term capital Gain	Long term capital Gain
i	STCG is included in the Gross total income of the assessee and <u>taxed as per rate applicable to that assessee</u>	LTCG is in Gross total income and) s taxed on the flat rate of 20% (10%in certain case or Nil in certain cases
ii	Deductions u/s 80C TO 80U are available	Deductions u/s 80C TO 80U are not available
iii	Set off of minimum exemption limit is available from <u>all STCG for resident as well as Non-resident.</u>	Set off of minimum exemption limit is available <u>only for resident.</u>
IV	STCL can be set off against <u>STCG and LTCG</u>	LTCL can be set off against <u>only LTCG</u>
V	Cost of acquisition & Cost of improvement are <u>not indexed in case of STCG.</u>	Cost of acquisition & Cost of improvement are <u>indexed in case of long term capital gains</u>

Capital gain
or
Business income

Capital gain or Business income

Taxed U/H Capital Gain as LTCG/STCG

If transaction involved
transfer of a capital
assets.

Taxed U/H PGBP as Business Income

If the transaction
entered is in the
nature of trade.

Issues - Business Income or Capital Gain

- Where agreement for **construction of hostel building, agreement for lease of hostel building** and **agreement for provision of facilities in hostel building during lease period** were **part of one composite arrangement** for provision of hostel facilities by assessee to lessee, **entire income under three agreements was to be assessed as business income.**

[Kenton Leisure Services (P.) Ltd. v. DCIT 18 taxmann.com 158 (ITAT-Cochin) [2012]]

Issue - Taxability of waiver of loan taken for acquiring capital asset

Bombay Gas Co. Ltd. v. ACIT [2012] 23 taxmann.com 22 (Mum- ITAT)

Section 41(1) - Remission or cessation of trading liability

- **When loan is taken for acquiring capital asset, waiver thereof would not amount to any income exigible to tax; on other hand, if loan is for trading purpose and has been treated as such from very beginning in books of account, waiver thereof may result in income, more so when it is transferred to profit and loss account.**

Fact:

Loans/advances were taken by assessee-company from company B in course of its business activity. Company B approached assessee-company to clear its dues as they had immediate business obligation. Old outstanding dues of Rs. 1,20,67,817 was settled for Rs. 85,00,000. Balance amount of Rs. 35,67,817 was waived by company B. **Assessee credited this amount into capital reserve account.** Advance received by assessee from company B had never been allowed as a deduction in any of previous financial year.

It was a case of loan liability and not trading liability.

Waiver of loan liability credited by assessee under capital reserve account in its books of account would be a capital receipt and could not be deemed as remission or cessation of liability and consequently no benefit would have arisen to assessee in terms of section 41(1).

Contd...

Issues - Investment in land or sale of land after plotting - whether Business Income or Capital Gain

- A transaction of purchase and sale of land cannot be assumed, without more, to be a venture in the nature of a trade.

[CIT vs. Jawahar Development Association 127 ITR 431 (MP)(1981)]

- The activity of an assessee in dividing the land in to plots and not selling it as a single unit as he purchased, goes to establish that he was carrying on business in real property and it is a business venture.

[Raja J. Rameshwar Rao v CIT 42 ITR 179 (SC)(1961)] also see CIT vs Tridevi (V.A.) (1988) 172 ITR 95 (Bom)]

Contd...

**Issues - Investment in land or sale of land after plotting
- whether Business Income or Capital Gain**

- Mode of payment i.e. payment in installments is not a determinative factor if the income is in the nature of trade or capital gain.

[CIT v Radha Bai 272 ITR 264 (Del) (2005)]

- Where assessee constructed shops which were let out and rent has been received for 3 years, thereafter the shops were sold – Income from sale of shop is capital gain.

[ACIT v Janak Raj Chauhan 102 TTJ 297 (Asr.)(2006)]

- The assessee, after dividing the land into plots, sold the land situated in a village which was beyond 8 kms, of the municipal limit. Such land was sold pursuant to an agreement to sell executed earlier. It was held that land in question was rural agriculture not eligible to capital gain.

[CIT vs Sanjeeda Begum 154 Taxman 346 (All) (2006)]

Issues - Investment in land or sale of land after plotting - whether Business Income or Capital Gain

- When the land was acquired on the basis of a will on the death of her husband & she sold the same in parcels because the huge area could not be sold in one transaction. Such an activity could not amount to trade or business with in the meaning of the Act.

[CIT v Sushila Devi Jain 259 ITR 671 (P&H) (2003)]

- Selling of own land after plotting it out in order to secure a better price is not in the nature of trade or business, more so when the land was gifted to the assessee.

[CIT v Suresh Chand Goyal 209 CTR 410 (MP)(2007) see also
Ram Saroop Saini (HUF) v ACIT 15 SOT 470 (DeI)(2007)]

- Relinquishment of right in property against consideration shall attract capital gain.

[CIT v Smt Laxmidevi Ratani 296 ITR 0363 (MP)[2008]]

Business income or Capital gain

- Where assessee held shares from seven to eleven months, earned dividend and entered into a few transactions of sale of such shares during relevant year even though he held a huge number of shares, income arising from sale of shares would be taxable as short-term capital gain.

[CIT v. Vinay Mittal [2012] 22 taxmann.com 151 (Delhi)]

- Where assessee-company's main business was investment in shares & securities, shares could not be treated as business assets but income from sale of shares was liable to capital gains.

CIT v. Trishul Investments Ltd.(2008) 305 ITR 434 (Mad.)

Taxability of income arising from sale of shares whether taxable as business income or short term capital gain - Guiding principles

Asst. CIT v. Om Prakash Arora [2011] 16 taxmann.com 396 (ITAT-Delhi)

Following principles, can be applied on the facts of a case to find out whether transaction(s) in question are in the nature of trade or are merely for investment purposes:

- 1) ***What is the intention of the assessee at the time of purchase of the shares (or any other item). This can be found out from the treatment it gives to such purchase in its books of account. Whether it is treated as stock-in-trade or investment. Whether shown in opening/closing stock or shown separately as investment or non-trading asset.***
- 2) ***Whether assessee has borrowed money to purchase and paid interest thereon. Normally, money is borrowed to purchase goods for the purposes of trade and not for investing in an asset for retaining.***
- 3) ***What is the frequency of such purchases and disposal in that particular item? If purchase and sale are frequent, or there are substantial transactions in that item, it would indicate trade. Habitual dealing in that particular item is indicative of intention of trade. Similarly, ratio between the purchases and sales and the holdings may show whether the assessee is trading or investing (high transactions and low holdings indicate trade whereas low transactions and high holdings indicate investment).***

Contd...

- 4) Whether purchase and sale is for realizing profit or purchases are made for retention and appreciation in its value ?** Former will indicate intention of trade and latter, an investment. In the case of shares whether intention was to enjoy dividend and not merely earn profit on sale and purchase of shares . A commercial motive is an essential ingredient of trade.
- 5) How the value of the items has been taken in the balance sheet ?** If the items in question are valued at cost, it would indicate that they are investments and where they are valued at cost or market value or net realizable value (whichever is less), it will indicate that items in question are treated as stock-in-trade.
- 6) How the company (assessee) is authorized in memorandum of association/articles of association ?** Whether for trade or for investment? If authorized only for trade, then whether there are separate resolutions of the board of directors to carry out investments in that commodity and vice versa.
- 7) It is for the assessee to adduce evidence to show that his holding is for investment or for trading and what distinction he has kept in the records or otherwise, between two types of holdings.** If the assessee is able to discharge the primary onus and could prima facie show that particular item is held as investment (or say, stock-in-trade) then onus would shift to revenue to prove that apparent is not real.

Contd...

- 8) *The mere fact of credit of sale proceeds of shares (or for that matter any other item in question) in a particular account or not so much frequency of sale and purchase will alone will not be sufficient to say that assessee was holding the shares (or the items in question) for investment.*
- 9) ***One has to find out what are the legal requisites for dealing as a trader in the items in question and whether the assessee is complying with them.*** *Whether it is the argument of the assessee that it is violating those legal requirements, if it is claimed that it is dealing as a trader in that item ? Whether it had such an intention (to carry on illegal business in that item) since beginning or when purchases were made ?*
- 10) ***It is permissible as per CBDT's Circular No. 4 of 2007 of 15-6-2007 that an assessee can have both portfolios, one for trading and other for investment provided it is maintaining separate account for each type, there are distinctive features for both and there is no intermingling of holdings in the two portfolios.***
- 11) *Not one or two factors out of above alone will be sufficient to come to a definite conclusion but the cumulative effect of several factors has to be seen.*

b. What "Transfer" means in relation to Capital Asset- Sec. 2(47).....

- **It will be discussed later.....**

c. Capital Assets - Sec. 2(14).....

Means

Property of **any kind** held by an assessee, whether or not connected with his business or profession.

Property of any kind is wide term and include all

- Movable assets – shares, securities ,gold ,silver etc..
- Immovable assets – land ,building
- Tangible / intangible assets – goodwill, patents ,copyrights etc
- Any right in an asset- tenancy right , right of a lessee etc.

Held by the assessee means either

- he is a legal owner in possession of the property
- has a legal right to take possession

Capital Asset - Exclusions

Contd....

EXCLUDING Items enumerating in sub-clause (i) to (vi) of section 2(14) which are as follows:-

- (i) Stock-in-trade, Consumable stores & raw material held for the purposes of business or profession.
- (ii) Personal effects
- (iii) Rural Agriculture land in India
- (iv) 6.5 % gold bonds 1977 , 7% gold bonds 1980, national defense gold bonds 1980 ,issued by central government
- (v) Special bearer bonds 1991,issued by central government
- (vi) Gold deposit bonds issued under the gold deposit scheme,1999 notified by central government .

Income deemed to accrue or arise in India

- Amendment to Section 2(14)- Explanation to Section 2(14).
[Newly Inserted, w.e.f. 1st April, 1962]
- *Explanation.—For the removal of doubts, it is hereby clarified that “property” includes and shall be deemed to have always included any rights in or in relation to an Indian company, including rights of management or control or any other rights whatsoever.*”

Brief of Amendment

- To be classified as capital asset under the act the precondition is that it has to be property of any kind held by the assessee. The amendment seems to overcome famous Judgment in so far it alluded to distinction between legal or contractual rights to constitute property. The amended provisions provide that property shall include and shall always be deemed to have been included any rights in or in relation to an Indian company including rights of management or control or any other rights whatsoever. Noteworthy is the Fact that such deeming will not happen when such rights are held in the company but also when such rights are held in relation to an Indian Company. The implication of the amendment will abound not only for non residents assesses but for resident assessee as well.

Personal effects - Sec.2(14)(ii)

Contd....

Personal effects have been held to be the property

- which is 'movable' and
- which is used by the assessee for his/her own personal needs.

But excludes (w.e.f. 01-04-2008)

- | | |
|---------------|--------------------------------|
| i. Jewellery | ii. Archaeological collections |
| iii. Drawings | iv. Paintings |
| v. Sculptures | vi. Any work of art |

For the purpose of this sub-clause 'Jewellery' includes:-

- 1) Ornaments made of gold, silver, platinum or any other precious metal or alloy
- 2) Precious or semi-precious stones – [includes embedded in to any furniture, utensils or other articles or worked or sewn in to any wearing apparel.]

Note-Transfer of personal effects does not attract the provisions of section 45

Issues.....

Contd....

What constitute or do not constitute-personal effects

1. Silver utensils of the type which were used in the kitchen by the assessee are personal effects and not capital assets.

[CIT V. Sitadevi N. Poddar 148 ITR 506 (Bom.) (1984)]

2. Silver bars , sovereign , bullion and silver coins were held not to be personal effects.

[Maharaja Rana Hemanth Singhji (H E G) V. CIT 103 ITR 61(SC) (1976)]

3. Gold caskets , gold tray, gold cups , saucers, spoons and photo frames were not regarded as personal effects.

[Poddar (GS) V. CWT 57 ITR 207(Bom.) (1965)]

Types of Capital Assets.....

Contd....

Whether a Capital Asset is short term or long term capital asset, is depends on the period for which that particular asset was held by the assessee before its transfer.

Long Term Capital Asset

Section 2(29A) → Period of Holding >36 Months
 → Period of Holding >12 Months

In case of shares, units of UTI, Mutual Fund specified u/s 10(23D) and Zero Coupon Bonds

Short Term Capital Asset

Section 2(42A) → Other than Long term Capital Asset

Note: The entire period of holding i.e. from the date of initial acquisition upto the date of transfer has to be taken into account, although it may not have held as capital asset initially.

[Keshavji Karsondas v. CIT 207 ITR 737(Bom.)(1994)]

Period of Holding.....

Contd....

- **For computing holding period of asset both date on which asset is acquired & date on which said asset is sold or transferred are not to be excluded.** [Bharti Gupta Ramola v. CIT [2012] 20 taxmann.com 762 (Delhi)]
- Expression '**immediately preceding date of transfer**', in section 2(42A) is a cut off point for determining and deciding period during which asset was held by an assessee.
- Section 2(42A) refers to holding period and for computing said period date on which asset is acquired is not to be excluded because holding starts from said date; further, date of sale/transfer is also not to be excluded.
- Therefore, if an asset is sold very next day after period of 12/36 months is over, asset would be treated as a long-term capital asset.

Exclusion/Inclusion of certain period

Contd....

Particular	Exclusion / Inclusion of period
Shares held in a company in liquidation	Exclude the period subsequent to the date of liquidation.
Property acquired in any mode given u/s 49(1) i.e. by way of gift / will	Include the holding period of previous owner also.
Shares in an Indian Amalgamated Company acquired in a scheme of <u>Amalgamation</u> .	Include the holding period of shares in the Amalgamating Company by the assessee.
Shares in Indian Resulting company acquired in case of <u>demerger</u> .	Include the period for which the person was a member of the recognized stock exchange in India.
Equity shares in a company acquired by a person pursuant to the demutualization or corporatisation of recognized stock exchange .	Include the period for which the person was a member of the recognized stock exchange in India.

ISSUES

Sec.2(14)

- Definition of 'capital asset' refers to property of any kind 'held' by an assessee: definition is of wide amplitude to include every possible interest that a person may hold and enjoy.

[Madathil Brothers v. Dy. CIT(2008)301 ITR 345(Mad.)]

- Right to possession and enjoyment of property and such rights were in nature of capital assets for purpose of section 45 and therefore consideration received by assessee for transfer of his rights in property was liable to be treated as long term capital gains.

[ITO v Balram Bhasim 154 Taxmann (118) (Delhi – Trib) (2006)].

- The right to obtain conveyance of an immovable property was held to be a capital asset.

[CIT v Tata Services Ltd. 122 ITR 594 (Bom) (1980)].

- Right to claim specific performance of an agreement was held to be a capital asset.

[K.R. Srinath V ACIT 268 ITR 436 (Mad) (2004)].

- Property transferred must be capital asset on the date of transfer, however it may not be a capital asset on the date of acquisition.

[Nachiappan (M.) v CIT (1998) 230 ITR 98 (Mad). Also see Alexander George V CIT (2003) 262 ITR 367 (Ker) and Arun Sunny v CIT (2009) 184 Taxmann 498 (Ker)].

- The word held by assessee include physical, actual, constructive and also symbolic possession of property of any kind.

[CIT v All India Tea and Trading Co. Ltd. (1979) 117 ITR 525(Cal.)]

- In case of sale of land and building, capital gains is bifurcated between LTCG & STCG.

[CIT V. C. R. Subramanian 242 ITR 342 (KAR) (2000)]

Contd....

Property held to be 'Capital Assets'

- Leasehold rights in mines. [\[Rajendra Mining Syndicate v. CIT \(1961\) 43 ITR 460 \(AP\)\]](#)
- Right to subscribe for shares in a company. [\[Hari Bros. P. Ltd. v. ITO 52 ITR 399 \(Pun\) \(1964\)\]](#)
- Route Permits. [\[S. Vaidyanathaswami v CIT \(1979\) 19 ITR 369 \(Mad.\)\]](#)
- A right to obtain conveyance of an immovable property. [\[CIT v Tata Services Ltd. \(1980\) 122 ITR 594 \(Bom\)\]](#)
- Right of tenancy under a Tenancy Act. [\[A. Gasper v CIT 117 ITR 581, 588 \(Cal\) \(1979\)\]](#)
- Foreign currency held by an Indian company in a foreign bank. [\[Kirloskar Asea Ltd. v CIT 117 ITR 82 \(Karn\) \(1979\)\]](#)
- Old and unyielding rubber trees. [\[Gokul Rubber and Tea Plantations Ltd. v CIT 172 ITR \(Ker.\) \(1988\)\]](#)
- Precious Stones. [\[Vimal Chand Hirawat v CIT 208 ITR 839 \(1994\)\]](#)
- Business Undertaking. [\[Cooper \(RC\) v UOI AIR 564 \(SC\) \(1970\)\]](#)

Property held to be 'Capital Assets'

Contd....

- Goodwill of a Business. [\[Jogta Coal Co. v CIT \(1959\) 36 ITR 521\]](#)
- Leasehold and Tenancy rights. [\[Traders and Miners Ltd. v. CIT 27 ITR 341 \(Pat\) \(1955\)\]](#).
- Interest in partnership. [\[Rang swami Naidu \(V\) v CIT 31 ITR 711 \(Mad\) \(1957\)\]](#)
- The management right of a business. [\[CIT v New India Assurance Co. Ltd. 122 ITR 633 \(Bom.\) \(1980\)\]](#)
- Right debentures issued on basis of shares held as stock in trade are capital assets. [\[CIT v Motichand Construction Co. Pvt. Ltd. 261 ITR 71 \(Bom\) \(2003\)\]](#)

Property held to be 'Capital Assets'....

Contd....

- Receipt of sum by assessee in lieu of forgoing its right to use of premises is neither a revenue receipt nor a capital receipt but chargeable as capital gain.

[ACIT v United Motors (I) Ltd. 001 ITR (Trib) 0578 ITAT (Mum) [2010]]

- Right to construct additional storey on account of increase in FSI is “capital asset”.

[Maheshwar Prakash 2 Cooperative Housing Society Ltd. V ITO 313 ITR (A.T.) 0103 ITAT (Mum.) [2009]]

It is not necessary that asset transferred should be a capital asset also on the date of acquisition.....

- The property transferred must be a capital asset on the date of transfer and it is not necessary that it should have been capital asset also on the date of its acquisition by the assessee.
- Cost of acquisition of such property should be taken as FMV of as on 1-4-1981 even if such property should was notified as capital assets before 1-4-1981.

[Arun Sunny V. Dy CIT 184 Taxman 498 (Kar.) (2009)]

Agricultural Land in India



Test to determine whether the land is Agricultural or not ?

The Gujrat HC in ***CIT v Siddhartha J. Desai 139 ITR 628 (Guj)(1983)*** has laid down the following tests for determining whether the land is agricultural or not:

- a) Whether, the land was classified in the revenue records as agricultural and whether it was subject to payment of land revenue? [***CIT vs. Smt. Debbie Alemao 331 ITR 0059 (Bom) [2011]***]
- b) Whether, the land was actually or ordinarily used for agricultural purposes at or about the relevant time?
- c) Whether, such user of the land was for a long period or whether it was of temporary character or by way of stop gap arrangement?
- d) Whether the income derived from the agricultural operations carried on in the land bore any rational proportion to the investment made in purchasing land?
- e) Whether the land, on the relevant date, had ceased to be put to use? If so, whether it was put to an alternative use? Whether such lessor and/ or alternative user was of permanent or temporary nature?
- f) Whether the land, though entered in revenue record, had never been actually used for agricultural, that is, it had never been ploughed or tilled?
- g) Whether the owners meant or intended to use it for a agricultural purposes?

Agricultural Land - Issues

- The use to which the transferee put the land is immaterial and not relevant.
What is relevant is that, in the hands of transferor, the land must be agricultural in nature at the time of transfer.
- If the transferee converts the agricultural land into non agricultural land or divides it in two plots and sells the same as house sites, the transfer of the land would not give rise to capital gains tax in the hands of transferor.
[Motibhai Patel v CIT 131 ITR 120 (Guj)(1981)].
- It was held that the purchaser who had no intention of carrying on agricultural operations, the seller assessee should not lose the benefit as long as he had been using the land for agricultural purposes.
[M.S. Srinivasa Naicker V ITO 292 ITR 0481 (Mad)[2007]].
- If the land was put to agricultural use for a long period and the agricultural operations were temporarily suspended, the land does not cease to be agricultural.
[Ranganatha Sastri (M) V CIT 119 ITR 488 (Mad) (1979)].

Agricultural Land - Issues

- Where agricultural land which is outside the scope as per section 2(14)(iii) is sold along with standing trees, there will be no liability to capital gains tax even in respect of the standing trees. On the other hand, if the standing trees are sold separately after they are cut and removed, they do not partake of the nature of the land and there will be liability to tax on capital gains arising from the sale.

[Gokul Rubber and Tea Plantations Ltd. V CIT 172 ITR 197 (Ker)(1988)].

- Where land was shown as agricultural land in the revenue records and was never sought to be used for non agricultural purposes by the assessee till it was sold, it was held that such land has to be treated as agricultural land even though no agricultural income is shown by the assessee as the assessee stated that the agricultural income derived by sale of coconut grown on the was just enough to maintain the land and there was no surplus.

[CIT v Debbie Alemao 46 DTR 341 (Bom.)(2010)]

Agricultural Land - Issues

- ▶ Agricultural land not covered under specified urban area and therefore not a capital asset.

[Ramjibhai P. Chaudhry v DCIT 314 ITR (AT) 0259 ITAT – Ahm.] [2009] .


- ▶ How the distance to be measured - Distance to be taken by approach road and not as a straight line;

[Radhasoami Satsang v. CIT 193 ITR 321 (SC) (1992), CIT v. Satinder Pal Singh 188 Taxmann 54 (P&H)(2010)]

- ▶ Jurisdictional Municipality has to be considered for calculating the distance.

[DCIT v. Capital Local Area Bank Ltd 29 SOT 394 (ASR)(2009) & Srinivas Pandit HUF v. ITO 39 SOT 350 (Hyd.)(2010)]

Compulsory Acquisition u/s 45(5)



Capital gain - Compulsory Acquisition- Sec. 45(5)

- Consideration received against Compulsory acquisition by the Central Government shall also attract Capital Gain.

[Jehangir P. Vazifdar V ITO (1992) 42 ITD 67 (Bom-Trib) – Received would mean when it has become finally receivable or the same is received unconditionally.]

- Enhanced & further enhanced compensation will also be considered for the purpose of Capital gain in the below mentioned manner.
 - Consideration determined / awarded / approved at first instance shall be chargeable in the P.Y. in which, wholly or partly, was first received.
 - Enhanced & Further enhanced compensation shall be chargeable in the Year or receipt.
 - In case the amount of compensation or enhanced compensation is subsequently reduced the capital gain shall be recalculated by the taking the compensation or enhanced compensation so reduced.
(Refer Sec 155(16)).

Contd...

Capital gain - Compulsory Acquisition- Sec. 45(5)

- Explanation :
 - COA & COI shall be taken to be nil while calculating CG from enhanced compensation or further compensation.
 - Provision of capital gain in relation to EC & FC are retrospective.

S. 10(37) - Exemption from Capital Gain.

Contd...

- Any STCG / LTCG arising to an Individual / HUF.
- From transfer of agricultural land by way of Compulsory acquisition.
- Where the consideration or the EC is received on or after 01/04/2004.
- Provided such land was used for agricultural purposes during the preceding two years by such individual or a his parents or by such HUF.
- Cases where compulsory acquisition has taken place before 01/04/2004 but the compensation is received after 31/03/2004 – it shall be exempt.
- Where original compensation has been received in part before 31/03/2004, then exemption shall not be available even though balance OC is received after 31/03/2004.
- If Enhanced compensation received on or after 01/04/2004 against agricultural land compulsory acquired before 01/04/2004 shall be exempt.

S. 155(16) - Rectification.

Contd...

- In case consideration or EC or FC is reduced by any court, Tribunal or other authority.
- **The AO shall amend the order taking the reduced consideration or EC or FC as full value of Consideration.**
- Period of 4 years shall be reckoned from the end of the P.Y. in which the order reducing the compensation was passed by the court, tribunal or other authority.

Relaxation regarding time for acquiring new Asset - S. 54H **Contd...**

- 54H introduced through S.21 of Finance (No.2) Act, 1991, a new section 54 H was added in the statute providing for the extension of time for acquiring a new asset or for depositing or investing the amount in case of compulsory acquisition.
- Where the consideration against compulsory acquisition is not received by the assessee on the date of transfer, then the period of acquisition of new asset or period available to the assessee for depositing or investing as referred in S. 54, 54B, 54D, 54EC and 54F shall be reckoned from the date of receipt of compensation.

Issue - In case Assessee dies

Contd...

- Where assessee dies before receiving original compensation even – then capital gain shall be chargeable in the hands of deceased, however the legal heir will keep responsible for filling return of income as representative assessee.
- But in case, assessee dies after receiving original compensation but before enhanced compensation – the enhanced compensation shall be taxable in the hands of recipient i.e. the legal heir and not the deceased assessee.

Issues

Contd...

- The Supreme Court in the case of *CIT V Hindustan Housing and Land Development Trust (1986) 161 ITR 524* has held that :
 - Where additional compensation awarded to the assessee has been made subject matter of appeal by the Government then such amount shall be taxable as capital gain only :
 - In the year in which additional compensation is received.
 - In the year in which the dispute is finally settled.

Whichever is later.

[*New friends Co-operative House Building Society Ltd. v CIT (2010) 327 ITR 0039 (P&H)* also see *CIT vs. Ghanshyam (HUF) [2009] 315 ITR 0001 (SC)*, *Chandi Ram v CIT [2009] 312 ITR 0139*, *Anil Kumar Forma (HUF) V. CIT [2007] 289 ITR 0245 (Mad)*, *G.M. Omar Khan V. Addl CIT (1992) 196 ITR 269 (SC)*].

- If any amount is received after stay of the award, in pursuance of any interim order, as a payment subject to the final result, it will not be an amount received as 'enhanced compensation' contemplated u/s 45(5)(b), but only an interim payment received subject to final decision.

[*CCIT & Anr v. Smt. Shantavva (2004) 267 ITR 67 (Karn.)*.]

Issues

Contd...

Taxability of Interest on enhance compensation

- Interest on enhanced compensation is taxable on accrual basis but only if it is undisputed.
[ITO vs. Amarlal (2007) 14 SOT 239 (Del-Trib)].

- Interest received on delayed payment of compensation is determined and taxable under the head income from other sources on year to year basis.
[CIT v Ghanshyam (HUF) (2009) 315 ITR 1 (SC)].

- Interest on enhanced compensation is not taxable on lumpsum basis under mercantile system, however spread over on annual basis over the period starting from the date of compulsory acquisition to the date on which court makes an order for enhanced compensation.

[Rama Bai V CT (1990) 181 ITR 400 (SC), see also CIT vs Hardwari Lal, HUF [2009] 312 ITR 0151 (P&H)].

- Where assessee follows cash system of accounting, interest on enhanced compensation on acquisition of land shall be taxable in year of receipt.

[CIT v Smt Burfi [2011] 331 ITR 001 (P&H)]

Issue**Contd...***Date of transfer will depend upon provisions of enactment under which property is acquired.*

- If property acquired under Requisitioning and Acquisition of Immovable Property Act, 1952 – Date of publication of the notification for acquisition would be the date of Transfer.

[G.M. Omer Khan v CIT (1992) 196 ITR 269 (SC) see also Omar khan (G.M.) v Addl CIT (1992) 195 ITR 269 (SC)]

- If property acquired under Land Acquisition Act, 1894 (The Central Act) or any other state Act – Date of transfer would be the date of actual possession by declaring it to do so.

[CIT v Shaggy Abdulla (Smt) (2000) 108 Taxman 249 (Ker)]

- In case of emergency acquisition, effective date of transfer is the date of taking possession under section 17 of the Land Acquisition Act, 1894 and not the date of award of compensation.

[BC Gupta & Sons Ltd. v CIT (1996) 221 ITR 53 (Gau.) also see Alexander George V CIT (2003) 128 Taxman 851 (Ker)]

Other Issues

Contd...

- Solatium awarded by competent authority constitutes part of consideration for compulsory acquisition.
- [CIT v. Smt. Subaida Beevi (1986) 160 ITR 557 (Ker) see also Vadilal Soda Ice Factory v CIT (1971) 80 ITR 711 (Guj), K.C. Mahajan (1998) 234 ITR 235 (P&H).
- Expenses for realization of enhanced consideration is allowable in terms of S. 48(1).

[Chakiri Ashok Kumar v ITO (2002) 80 ITD 410 (Hyd).].

- The compensation due to injurious effect on the unacquired portion is also taken in to account, the amount awarded for such compensation shall also be a part of the full consideration price for computing the capital gain for the portion acquired.
- [P. Mahalakshmi and Others v CIT (2002) 255 ITR 647 (SC).

Issues - Enhanced compensation 45(5)

Hari Kishan v. Presiding Officer(2008) 172 Taxman 219 (P & H)

- Enhanced compensation received by assessee during pendency of dispute before Court cannot be deemed to be his income for purpose of computation of capital gain in year of receipt, in terms of provisions of sec. 45(5)

Section 48(1) - Mode of Computation

- **Short term Capital Gain** = Full value of consideration
 - expenses of transfer.
 - cost of acquisition of the asset and
 - cost of improvement.

Less : Exemption if available u/s
54B/54D/54G/54GA.

Capital gains in case of NR for certain assets (proviso 1 to sec-48)

Contd.....

- Where assessee who is a **non resident**, the capital gain arising from the transfer of shares or debentures in an Indian Company, shall be computed by converting
 - COA
 - Expenditure on transfer.
 - Sale Consideration.
- In to the same foreign currency, in which the asset was purchased.
- The capital gain so computed in the foreign currency shall be reconverted in to Indian Currency.

Note:

- I. Debentures includes bonds
- II. Shares, debentures and bonds of Government company are also covered by the first proviso. However the bonds of CG, SG and RBI are not covered.
- III. Proviso shall not apply to units of UTI and Mutual Funds.
- IV. Application of proviso is mandatory under respective circumstances.
- V. This proviso is applicable for computing both STCG and LTCG.

Note: 1st proviso is not optional

Assessee should be NR (may be foreign or Indian citizen, corporate or non corporate assessee) in the year the shares or debentures are sold.

Rule 115A : Method of Conversion.

Contd.....

- COA (conversion) – Average of **Telegraphic Transfer Buying Rate** (TTBR) and the **Telegraphic Transfer Selling Rate** (TTSR) as on the date of acquisition of shares / debentures.
- Expenditure on Transfer (conversion) – **Average** of TTBR and TTSR as on the date of transfer.
- Sale Consideration (conversion)– **Average** of TTBR and TTSR as on the date of transfer.
- Capital Gain (Conversion) – TTBR **as on date of Transfer.**

Second proviso to section 48 Indexation

- This proviso is not applicable where the first proviso applies.
- where the capital gains arises from the transfer of a **long term capital asset**, then for the purpose of computing capital gains:
 - (a) “Indexed cost of acquisition” shall be taken instead of “Cost of acquisition” and
 - (b) “Indexed cost of any improvement” shall be taken instead of “cost of any improvement”

Benefit of Indexing is not available in the following cases

- An assessee mentioned u/s 115AB,115AC,115AD & 115D
- benefits of indexing is not available for transfer of bonds and debenture of any company whether public or private or govt. co. or bonds of govt. [however, benefit is available to capital indexed bonds issued by govt.]
- no indexation in case of slump sale
- no indexation in case of depreciable asset
- No indexation incase of STCA

Third proviso to Sec. 48(1)

Contd.....

- No Indexation for calculating LTCG on transfer of long term capital asset being bond or debenture other than capital indexed bonds issued by the Government.

Fourth proviso to S.48(1), Mode of Computation

- Where shares, debentures or warrants referred to in the proviso to Sec. 47(iii) are transferred under a gift or an irrevocable trust – FMV on the date of such transfer shall be deemed to be the full value of consideration.

Fifth proviso to S. 48(1)

- No deduction of STT paid, shall be allowed while calculating income under the head “Capital Gains”.

Issues

- Benefit of Indexation- in case assessee made payment in installments after issuance of allotment letter

Where after issuance of allotment letter of a plot, assessee made payments from time to time in installments, in view of fact that assessee sold said plot after holding it for more than three years, long term capital gain was to be calculated taking into account indexed cost of acquisition as per payment schedule.

[Nirmal Kumar Seth v. CIT 17 taxmann.com 127 (All) [2012]]

- **Amount paid to tenant for vacating the property is a expenditure incurred wholly and exclusively in connection with the agreement of sale** which preceded the transfer and in fulfillment of a condition of sale. Therefore, the same will be treated as expenditure u/s 48(i).

[CIT v . A. Venkataraman, [1982] 10 Taxman 298 (Mad.). See also Seventh Income-tax Officer v. L.K.M. Hussain Beevi 1988] 26 ITD 17 (MAD.)]

Section 55 - "Cost of Acquisition" for the purpose of section 48 & 49

- In case of capital asset being –
 - Goodwill of a business.
 - Trade mark or brand name.
 - Tenancy rights
 - Stage carriage permits or route permits.
 - Loom hours.
 - A right to manufacture, produce or process any article of thing,
 - A right to carry on any business.

Cost of acquisition means :

(i) Acquired by assessee by purchase - The amount of purchase price.

(ii) In any other case – NIL

(Self generated)

{As held by Supreme Court in CIT V. BC Srinivas Shetty}

Note : Option to take COA as FMV as on 01/04/1981 is not available if such assets acquired before 01/04/1981.

S.55 "Cost of Acquisition" - Additional shares

- Where additional shares are allotted without any payment then Cost of Acquisition of
 - Original shares – Amount actually paid for acquiring the original shares / security.
 - Additional shares – Equalize the cost (i.e. cost of original shares/ No. of total shares)
 - In case of Renunciation of right – COA of such right to subscribe to additional share/security shall be taken to be NIL.
 - In case of additional shares acquired after renunciation – COA of additional share will be:
 - Price paid to the person renouncing such right.
 - Amount paid for acquiring additional share / security.

Note : The option to take FMV as on 01/04/81 is available.

Any other capital asset.

Option to take the FMV as on 1-4-81 as the Cost of Acquisition

- ✓ Where the assessee receives the capital asset before 1st April ,1981 or
- ✓ where the transferor received the asset under a mode referred to u/s49(1) ,and the previous owner received it before 1st April 1981

Then, it is the option of the assessee to take the COA as

- Actual cost to him or the actual cost to the previous owner (where the asset is acquired in modes refer to u/s 49(1))

Or

- FMV as on 1st April 1981

Section -55

Cost of Acquisition of Bonus Shares.....

Cost of acquisition of bonus shares in case :

(i) Where bonus shares are allotted before 1st April 1981

Cost of acquisition = FMV as on 1st April 1981

(ii) Where bonus shares are allotted after 1st April 1981

Cost of acquisition = NIL

Issue....

- Where assessee purchased a property and on same day mortgage it to raise loan to pay part consideration of property, mortgage expenses incurred in connection with the acquisition of the property and the interest payable on the mortgage amounts, which had been utilised as part of the consideration, would form **part of the COA** of the property for the purpose of computation of CG.

[CIT V. K. Raja Gopala Rao 252 ITR 459 (MAD) (2001)]

Sec. 55-Cost of Improvement.....

- Cost of Improvement in relation to below mentioned shall be taken to be nil.
 - Goodwill.
 - Right to manufacture, produce or process any article or thing.
 - Right to carry on any business.
- Any other capital asset.
 - In case asset acquired before 01/04/1981 – Cost of Improvement incurred since 01/04/1981 either by previous owner or assessee.
 - In case asset acquired after 01/04/1981 – All cost incurred by previous owner and assessee.

Note : Expenditure deductible under the head “Income from house property”, Income from other sources”, “PGBP” will not be included in cost of improvement.

Issue.....

Contd....

- Compensation paid for eviction of hutment dwellers from land which is sold would be allowable as Cost of improvement .

[CIT V. Miss Piroja C. Patel 242 ITR 582 (BOM) (2000)]

*Capital gain on Transfer of
Depreciable Assets*

Contd...

SECTION 50(1): WHERE ONE OR MORE ASSETS (NOT ALL) ARE TRANSFERRED FOR A VALUE MORE THAN THE 'COST OF THE BLOCK'

Then, the value of the block shall be reduced to nil (even if there are certain assets in the block). In such a situation there shall be STCG. In such a situation there cannot be any STCL.

SECTION 50(2): WHERE ALL ASSETS OF THE BLOCK ARE TRANSFERRED

Then, the value of the block shall be reduced to NIL. In such a case where the assets are transferred for a value higher than the 'cost of the block 'then there shall be STCG and where they are transferred for a value less than the 'cost of the block',there shall be STCL

Issue: Assets on which no depreciation was ever claimed, could not be assessed u/s 50

CIT v. Santosh Structural & Alloys Ltd. [2012] 20 taxmann.com 501 (P & H)

- During relevant A.Y., assessee sold certain plant & machinery (not in use) which was partly acquired in year 1997-98 and partly in year 1998-99. AO, by applying section 50, assessed gain arising on transfer of aforesaid plant and machinery as short-term capital gain. On appeal, Tribunal held that section 50 did not apply and plant and machinery (not in use) had to be regarded as long-term capital assets, when they were sold because no depreciation on those assets was ever claimed by assessee.

Issue: 'Block of assets' for purpose of section 50 would mean assets of all units of assessee having same rate of depreciation and not assets of one division or unit having same rate of depreciation

CIT v. Ansal Properties & Infrastructure Ltd. [2012] 20 taxmann.com 770 (Delhi)

- Section 2(11), which defines term 'block of assets,' does not make any distinction between different units or different type of businesses, which may be carried on by an assessee. only requirement is that in respect of assets which form block of assets, same percentage of depreciation should be prescribed.
- All assets, which may be of different types, but in respect of which same percentage of depreciation is prescribed, are to be treated and form part of block of assets.

Issue-Applicability of Section 50 in case of Sale of Land

- Since land is not a depreciable asset & it cannot form part of block of assets in absence of rate of depreciation having been prescribed **therefore, provisions of section 50 cannot be invoked in case of sale of land.**
- Land, having been held for a period of more than 36 months, surplus of sale price over indexed cost of acquisition of land was to be taxed as long-term capital gain.

[CIT v. I.K. International (P.) Ltd. [2012] 20 taxmann.com 197 (Delhi)]

*Special provision for Full Value of
Consideration in certain cases*

Section 50C

Special provision for full value of consideration in certain cases-Sec. 50C

Sub-sec (1)

- Where on transfer of a capital assets
- value so adopted or assessed [or assessable]

Where the consideration received or accruing as a result of the transfer by an assessee of 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 (stamp valuation authority) for the purpose of payment of stamp duty in respect of such transfer,

shall, for the purposes of sec 48, be deemed to be the full value of the consideration received or accruing as a result of such transfer.

Amendment in Sec. 50C made by the Finance (No.2) Act, 2009.

With a view to preventing the leakage of revenue, section 50C has been amended by the Finance (No.2) Act, 2009. the amended version provides that where the consideration received or accruing as a result of the transfer of land and/or building is less than the value adopted or assessed or assessable by an authority of the state govt. for the purpose of payment of stamp duty in respect of such transfer, the value so adopted or assessed or assessable shall be deemed to be the full value of the consideration received or accruing as a result of such transfer for computing capital gain.

Note: *for the purpose of this section, the expression “assessable” means the price which the stamp valuation authority would have (notwithstanding anything to the contrary contained in any other law for the time being in force) adopted or assessed, if it was referred to such authority for the purpose of the payment of stamp duty.*

Effective date: w.e.f.1st October ,2009 and shall, accordingly, apply in relation to the transactions undertaken on or after such date”

- ▶ Su-Sec. (2) of Sec. 50C- Without prejudice to the provisions of sub-section (1), where—
 - (a) the assessee claims before any Assessing Officer that the value adopted or assessed [or assessable] by the stamp valuation authority under sub-section (1) exceeds the fair market value of the property as on the date of transfer;
 - (b) the value so adopted or assessed [or assessable] by the stamp valuation authority under sub-section (1) has not been disputed in any appeal or revision or no reference has been made before any other authority, court or the High Court,

- ▶ The AO may refer the valuation of the capital asset to a Valuation Officer and where any such reference is made, the provisions of sub-sections (2), (3), (4), (5) and (6) of section 16A, clause (i) of sub-section (1) and sub-sections (6) and (7) of section 23A, sub-section (5) of section 24, section 34AA, section 35 and section 37 of the Wealth-tax Act, 1957 (27 of 1957), shall, with necessary modifications, apply in relation to such reference as they apply in relation to a reference made by the Assessing Officer under sub-section (1) of section 16A of that Act.

Explanation 1.—For the purposes of this section, “Valuation Officer” shall have the same meaning as in clause (r) of section 2 of the Wealth-tax Act, 1957 (27 of 1957).

Explanation 2.—For the purposes of this section, the expression “assessable” means the price which the stamp valuation authority would have, notwithstanding anything to the contrary contained in any other law for the time being in force, adopted or assessed, if it were referred to such authority for the purposes of the payment of stamp duty.]

As per F. Act 2010, cases of transfer of immovable property for **inadequate consideration** are no longer covered by the provisions of sec. 56(2) i.e. **taxability in the hands of buyer as deemed income**. The transactions would fall squarely within the ambit of sec. 50C

(3) Subject to the provisions contained in sub-sec (2), where

the value ascertained
under **sub-sec(2)**

is less than

the value adopted or
assessed [or assessable] by
the **SVA** referred to in sub-
sec(1)

then, the value so adopted or assessed [or assessable] by such authority
shall be taken as the full value of the consideration received or
accruing as a result of the transfer.

Section 155(15) - Rectification

- If the Stamp duty value is subsequently revised in any appeal or revision.
- The AO shall amend the order of assessment taking the value so revised as full value of consideration for the computing CG.
- Provision of S. 154 shall apply.
- Period of 4 years shall be reckoned from the end of the P.Y. in which the order of appeal or revision is passed.

Sec. 50C has no application for determination of sale price of stock-in-trade/Business assets

- Where there was no dispute as to fact that property owned by assessee was its inventory and as such forming part of its stock-in-trade, profit on sale of said stock-in-trade was assessable u/s 28 and AO could not make addition on ground that its sale consideration was understated.

[Asst. CIT v. Excellent Land Developers (P.) Ltd. 1 ITR 563 (DELHI-ITAT) [2010]]

- where property is treated as business asset and not as capital asset, s 50C cannot be invoked.

[CIT v. Thiruvengadam Investments (P.) Ltd 320 ITR 345 (Mad.) [2010]]

Section 50C does not apply to transfer of "leasehold rights" as it is not "land or building".

- Lease right in a plot of land can not be included within scope of 'land or building or both' and, thus, in case of transfer of leasehold rights in land, provisions of section 50C cannot be invoked.

[Atul G. Puranik vs. ITO [2011] 11 taxmann.com 92 (ITAT-Mum.)]

Issues- Sec. 50C

Contd....

- In absence of any material to effect that assessee had received any amount over and above value on which stamp duty was payable, Full value of consideration would be value adopted for purpose of stamp valuation.

[ITO v. Ms. Namita Singh 15 taxmann.com 19 (ITAT-Delhi) [2011]]

- While computing capital gains u/s 45, FVC has to be taken as per circle rates prescribed by the State Government for the purpose of stamp valuation unless the AO has material in his possession to prove that the assessee had received higher amount than the circle rates.

Adoption of the DVO's report without providing opportunity of being heard is also against the principles of natural justice.

[ADIT v. Ranjay Gulati -TIOL -528 (ITAT-Delhi)(2011)]

- Value adopted or assessed by any authority of the State Government for purpose of payment of stamp duty in respect of land or building at the time of execution of the transfer deed cannot be taken as sale consideration received for the purpose of section 48.

[CIT v. Smt. Shweta Bhuchar 192 Taxman 67 (P&H) [2010]]

Issues- Sec. 50C

- The deeming fiction of Sec. 50-C could not be applied for ascertaining the undisclosed investment of assessee under Sec. 69-B. Further, in absence of any evidence for applying s 69B, difference b/w value for purpose of stamp duty and value shown in sale deed cannot be added in the income of assessee.

[ITO v. Fitwell Logic System (P.) Ltd. 1 ITR (TRIB.) 286 (Delhi) [2010]]

[CIT-II Vs Harley Street Pharmaceuticals Ltd TIOL-391-(Ahm) (2011)]

- Where the assessee objects to stamp duty valuation, the AO is required to call for report of DVO, and even if the valuation report is received after the assessment, the value determined may be rectified u/s 154.

[Mrs. Nandita Khosla v. ITO Taxman 344 (ITAT-Mum.)[2011]

[Kanai Lal Sharma Vs ACIT TIOL-324-ITAT-(Kol) (2011)]

Issues- Sec. 50C is applicable to depreciable assets **Contd....**

- The harmonious interpretation of sec 50 and sec 50C it is clear that there is no exclusion of applicability of one fiction in a case where other fiction is applicable. Thus, provisions of sec 50C can be applied to the transfer of depreciable capital assets covered by sec 50 and in computing the capital gain arising from the transfer by adopting the stamp duty valuation.

[ITO v. United Marine Academy 9 ITR 639 (Mum. ITAT) (2011)]

Issues- Sec. 50C

Legal fiction created by sec. 50C is limited to purposes of sec. 48 alone and does not displace legal fiction created by sec. 69, 69A & 69B

Subash Chand v. ACIT 18 taxmann.com 149 (ITAT-Chandigarh) [2012]

The **consideration, which is deemed by sec. 50C** to have been received by the transferor, **is for the limited purpose of computation of capital gain u/s 48 and for no other purpose.** It cannot and does not mean that the said amount of consideration has been actually received by the assessee or actually paid by the transferee to him so as to be available in his hands for investments or for meeting the expenses. "Deemed consideration" u/s 50C for computation of capital gain u/s 48 is quite different from actual consideration or actual availability of money for the purpose of making investments or for meeting the expenses. Deemed consideration within the meaning of sec. 50C cannot and does not mean that the amount of deemed consideration has actually been paid by the transferee or actually received by the assessee.

Issues.....

- Where there is nothing on record to show that the assessee received consideration for the sale of the property in excess of that which has shown in the agreement to sell. Thus the actual sale consideration recorded in the agreement to sell and received by the assessee could not be substituted by the value as adopted by the District Valuation Officer u/s 55A for the purpose of computing the capital gains chargeable to tax.

[Dev Kumar Jain V ITO 309 ITR 0240 (Del) [2009] see also CIT v Smt. Nilofer I. Singh 309 ITR 0233 (Del) [2009]].

Reference to Valuation Officer u/s 55A....

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Reference to Valuation Officer u/s 55A....

Contd....

With a view to ascertaining the FMV of a capital asset for the purposes of this Chapter, the AO may refer the valuation of capital asset to a Valuation Officer—

(a) in a case where the value of the asset as claimed by the assessee is in accordance with the estimate made by a registered valuer, if the AO is of opinion ***that the value so claimed is at variance with its fair market value.***” (amendment by Finance Act. 2012)

(b) in any other case, if the AO is of opinion—

(i) that the fair market value of the asset exceeds the value of the asset as claimed by the assessee by more than such percentage of the value of the asset as so claimed or by more than such amount as may be prescribed in this behalf ; or

(ii) that having regard to the nature of the asset and other relevant circumstances, it is necessary so to do,

Where any such reference is made, the provisions of sub-sec. (2), (3), (4), (5) and (6) of sec. 16A, clauses (ha) and (i) of sub-sec. (1) and sub-sec. (3A) and (4) of sec. 23, sub-sec. (5) of sec. 24, sec. 34AA, sec. 35 and sec. 37 of the Wealth-tax Act, 1957 (27 of 1957), shall with the necessary modifications, apply in relation to such reference as they apply in relation to a reference made by the AO under sub-sec. (1) of sec. 16A of that Act.

*Explanation.—*In this section, “Valuation Officer” has the same meaning, as in clause (r) of section 2 of the Wealth-tax Act, 1957 (27 of 1957).

Issues-Sec. 55A

- Where valuation report of approved valuer submitted by assessee suffered from grave infirmity, inasmuch as it did not take into account a number of items used by assessee for construction of property, AO can adopt the value determined by DVO.

[Krishan Kumar Jhamb v. ITO 179 Taxman 141 (P& H) [2009]]

New Section 50D shall be inserted to provide that FMV of capital asset to be considered where sales consideration cannot be determined. [w.e.f. 1st April, 2013]

- ***“Where the consideration received or accruing as a result of the transfer of a capital asset by an assessee is not ascertainable or cannot be determined, then, for the purpose of computing income chargeable to tax as capital gains, the fair market value of the said asset on the date of transfer shall be deemed to be the full value of the consideration received or accruing as a result of such transfer.”***

Brief of Amendment

In the case of transfer of capital asset, where value of consideration is not determinable; FMV of the asset shall be taken to be full value of consideration received for the purpose of computing capital gains.

Section-51

Treatment of advance money received.....

Where on any capital asset, on any previous occasion, for the subject of its transfer, any advance or other money received and retained by the assessee in respect of such negotiations, shall be deducted from the COA

✓ Advance or other money will be deducted from COA only if it was received and retained or forfeited by the assessee himself and not by the previous owner

✓ If the advance money forfeited was received by the assessee before 1-4-1981 and the assessee has assumed the FMV of the asset as on 1-4-1981 as the COA, such advance will still be deducted from FMV

Where advance money forfeited is more than the cost of acquisition

In such a case the excess of the advance money forfeited over the cost of acquisition of such asset shall be a capital receipt not taxable

[Travancore Rubber & Tea Co. Ltd v. CIT (2000)243 ITR 158 (SC)]

Treatment in the hands of Buyer:

- Forfeiture of earnest money by the vendor if due to default on the part of vendee, will not amount to relinquishment of a right in that asset .Therefore the amount forfeited will not be allowed as a capital loss under the head capital gains

[CIT V. Sterling Investment Corporation Ltd (1980)123 ITR 441 (BOM)]

- Due to default on the part of vendor : vendee receives some compensation besides the refund of the earnest money paid by him, such compensation shall be subject to capital gains as it will amount to relinquishment of a right by the vendee

[CIT V. Vijay Flexible Container (1990)186 ITR 693(BOM)]

[K.R.Srinath v. Asst.CIT (2004)268 ITR 436 (MAD)]

“Meaning of Slump Sale” - Section 2(42C)

- **It will be discussed later.....**

Exemption of Capital Gain

Section 10(33)

Section 10(37)

Section 10(38)

Section 54

Section 54B

Section 54D

Section 54EC

Section 54F

Section 54G/GA

Section 54GB

Exemptions from Capital Gains.....

- Exemption from capital gain is available u/s 10, 11(1A) & Section 13A, exemptions can be divided in to following two categories - Exemptions allowed to

A.

only to a specified
assessee

B.

either to all assesses or
to more than
one assesses

A. Exemptions - specified assessee

Particulars	Section
Local Authority	10(20)
Research Association	10(21)
Notified News Agency	10(22B)
Notified Institution for controlling, supervising, regulation or encouragement of the profession of law, medicine, accountancy, engineering or architecture or such other profession.	10(23A)
Institution solely for development of Khadi or village industries or both.	10(23B)
Certain Funds and Institutions	10(23C)

Exemptions - specified assessee

Contd....

Particulars	Section
Mutual Funds	10(23D)
Venture Capital Company or Fund <u>(VCC/VCF)</u>	10(23FB)
Funds established under section 10(25) & 10(25A)	10(25) & 10(25A)
Charitable or religious trust or institutions subject to certain conditions being satisfied.	11(1A)
Political Parties	10(13A)

B. Exemption allowed either to all assesses or to more than one assesses.....

Sections	Contents of the Section
10(33)	Capital gain on transfer of <u>units of US 64</u> exempt if transfer takes place on or after 01/04/2002.
10(37)	Exemption of capital gains to <u>an individual or HUF on compensation received on compulsory acquisition of agricultural land situated within specified urban limits</u> as per Section 2(14)(iii)(a) &(b).
10(38)	Exemption of long term capital gain arising from <u>sale of equity shares and units of the equity oriented fund.</u>

Exemption in respect of CG in case of units of US-64 -
Sec. 10(33)

Any income arising from the transfer of a capital asset, being a unit of the Unit Scheme, 1964 referred to in schedule I to the UTI Act, 2002 & where the transfer takes place on or after 1st day of April 2002.

Note: 1. Income arising from the transfer of unit held as Stock in trade shall be taxable as business income.

2. The capital loss arising on the transfer of such units shall not be includible in the computation of capital gains under sec. 45 and will not be available for set off or carry forward in accordance with sec. 70 and 74.

Section 10(37)-Exemption in respect of CG in case of Urban agriculture Land

In case of an assessee being an individual or a HUF

-any income chargeable under the head 'Capital Gains'

- arising from the transfer of agriculture land , where -

- i. Such land is situated in any area which is comprised within the jurisdiction of a municipality (having population of not less than 10,000) or a cantonment board,
- ii. Such land during the period of 2 years immediately preceding the date of transfer, was being used for agriculture purposes by such HUF or individual or a parent of such individual,
- iii. Such transfer is by way of compulsory acquisition under any law, or a transfer the consideration for which is determined or approved by the CG or RBI,
- iv. Such income has arisen from the compensation or consideration for such transfer received on or after 1st day of April,2004.

Explanation: For the purpose of this clause, the expression "compensation or consideration " includes the compensation or consideration enhanced or further enhanced by any court, tribunal or other authority .

Note: The date of transfer of agriculture land is not relevant. If the compensation or consideration is received on or after 1-04-2004, then the exemption is available even if the transfer of agriculture land takes place before 01/04/2004.

Exemption in respect of LTCG in case of specified securities - Sec. 10(38)

Any income arising from

- the transfer of a LTCA
- being an equity share in a company
- a unit of an equity oriented fund where-

(a) the transaction of sale of such equity share or unit is entered into on or after 1-10-2004, and

(b) such transaction is chargeable to STT.

Note: 1. Such LTCG shall be taken into account in computing the book profit and income tax payable under section 115JB


2. Exemption is available for all assessee whether R or NR, FII, etc.

Points to be noted

Contd.....

- The exemption is available to all assessee including FIIs and NR
- The exemption is available to an investor who holds the equity shares/units of equity oriented fund as capital asset not as stock-in-trade
- The exemption is not available to securities other than equity shares and units of equity oriented funds
- The exemption is available if the sale transaction is chargeable to securities transaction tax
- The acquisition may not be through a recognized stock exchange (i.e. Purchase of asset)
- Loss from sale of securities- if income from a particular source is altogether exempt, then loss from that source cannot be set off.

*Exemptions u/s 54, 54EC & 54F
of Income Tax Act, 1961*



Conditions for availing the Exemption u/s 54, 54EC & 54F

Particulars	Sec. 54	Sec. 54EC	Sec. 54F
1. Exemption claimed	Individual/ HUF	Any person	Individual/ HUF
2. POH of Capital asset	Long-Term	Long-Term	Long-Term
3. Eligible specific asset	A residential house property	Any LTC asset	Any LTC asset (<u>other than a residential house property</u>) provided on the date of transfer the tax payer do not own more than one residential house property from the A.Y. 2001-02 (except the new house as stated in 4 infra)
4. Type of asset should be acquire to get the benefit of exemption	Residential house property	Bonds of national highway authority of India or Rural Electrification Corporation.	A residential Property
5. Time limit for acquiring the asset	<u>Purchase:</u> 1 yr backward or 2 yrs forward. <u>Construction:</u> 3yrs forward	6 months forward	<u>Purchase:</u> 1 yr backward or 2 yrs forward. <u>Construction:</u> 3yrs forward

Contd....

Particulars	Sec. 54	Sec. 54EC	Sec. 54F
6. Relevant date for acquiring the new asset	From the date of transfer of house property but in case of compulsory acquisition from the date of compensation.	From the date of transfer of long term capital asset but in the case of compulsory acquisition from the date of receipt of compensation.	From the date of transfer of capital asset but in case of compulsory acquisition from the date of receipt of compensation.
7. Amount exempt	Investment in the new asset or capital gain, whichever is lower.	Investment in the new asset or capital gain, whichever is lower.	Investment in the new asset/ net sale consideration * capital gain
8. Exemption revoke in a subsequent year	If the new asset is transferred within 3 yrs of its acquisition.	If the new asst is transferred or it is converted in to money or a loan is taken on security of the new asset within 3 yrs of its acquisition.	a) If the new asset is transferred within 3 yrs of its acquisition. b) If another residential house is purchased within 2 yrs of transfer of original asset, or c) If another residential house is constructed within 3 yrs of the transfer of original asset.

Contd....

Different questions	Sec. 54	Sec. 54EC	Sec. 54F
9. when the exemption is revoked it is taxable as LTCG/STCG in the year in which the default is committed.	STCG	LTCG	LTCG
10. scheme of deposit is applicable	Yes	No	Yes

Note: “Capital Gain Deposit scheme”

If the new asset is not acquired up to the date of submission of return of income, then the tax payers will have to deposit money in “Capital Gain Deposit scheme” with a nationalized bank.

The proof of deposit should be submitted along with return of income. On the basis of actual investment and the amount deposited in the deposit account, exemption will be given to the tax payer.

Note: Where the residential house is constructed within the period specified u/s 54/54F, the cost of such residential house includes the cost of the plot also.

[Circular no. 667, dt 18-10-1993]

Can assessee acquire more than one house for claiming exemption u/s 54

- Exemption u/s 54 can be claimed only in respect of one house provided conditions of Sec 54 are satisfied.

[K.C. Kaushik v ITO 185 ITR 499 (Bom.)(1990)]

- Section 54-Relief is available to multiple sales & purchases of residential house.

The assessee owned two flats, Both the flats had been sold, The assessee had earned income on account of long-term capital gain from sale of two flats in the assessment year 2006-07, The assessee invested the gain on sale of flats in two different flats, claimed the entire capital gain as exempt under the provisions of section 54. Assessing Officer held that the assessee was entitled to claim exemption under section 54 only in respect of sale of one flat – Held More than one house sold and purchased **Exemption only on one to one basis and each set of sale and purchase.**

[Rajesh Keshav Pillai v. ITO 7 Taxmann.com 11 (Mum.) (2010)]

- Allowed only for one flat.

[**Gulshanbanoo R. Mukhi v. JCIT 83 ITD 649 (ITAT- Mum) (2002)**]

- Several self occupied dwelling units which were contiguous and situated in the same compound and with in the common boundary having unity of structure should be regarded as one residential house.

[**Shiv Narain Choudhary v. CWT 108 ITR 104 (All)(1997)**]

- Allowable in the case of adjacent & contiguous flats.

[**ITO v. Mrs Sushila M. Jhaveri 107 ITD 327 (ITAT- Mum. SB)(2007)**]

Can assessee acquire more than one house for claiming exemption u/s 54

Exceptions:

- Two adjacent residential units but used as one single residential house, exemption allowed.

[D. Anand Basappa v. ITO 309 ITR 329 (Kar) (2009)]

- Two adjoining flats converted into single residence, exemption allowed.

[ACIT v Mrs. Leela P. Nanda 286 ITR (AT) 113 (Mum)(2006)]

- Four flats purchased in same building but on different floors because of large size of family, which maintained a common kitchen and a common ration card, exemption allowed.

[Vyas (K.G.) v ITO 16 ITD 195 (Bom.)(1986)]

- Fact that residential house consists of several independent units cannot be an hindrance to allowance of exemption u/s 54 - Held, yes

[Prem Prakash Bhutani Vs. CIT 110 TTJ (Del) 440 (2007)]

Contd....

Can assessee acquire more than one house for claiming exemption u/s 54

- However, claim for exemption u/s 54 is not admissible in respect of two independent residential house situated at different locations.

[Pawan Arya v. CIT 11 taxmann.com 312 (P&H) [2011]]

- More than one units converted into one single house allowed for the purpose of sec. 54F as well.

[Neville J. Pereira v. ITO 8 Taxmann.com 68 (Mum. ITAT)[2010]]

Whether the property not purchased in own name by the assessee is eligible for exemption u/s 54/54F

- Sec. 54F mandates that house should be purchased by assessee and it does not stipulate that house should be purchased in name of assessee.
- Property purchased by assessee in joint name with his wife for 'shagun' purpose because of fact that assessee was physically handicapped and the whole consideration was paid by assessee, assessee entitled to exemption u/s 54F.

[CIT Vs Ravinder Kumar Arora 15 taxmann.com 307 (Delhi [2011])]

- Sec. 54 clearly says that if the assessee is owner of the property, he is entitled to exemption even if the new property purchased is in the name of his wife **but** the same is assessed in the hands of the assessee.

[CIT v. V. Natarajan 154 Taxman 399 (MAD.) [2006]]

- Merely because sale deed is in joint name, assessee could not be denied benefit of deduction u/s 54.

[DIT v. Mrs. Jennifer Bhide 15 taxmann.com 82 (Kar.) [2011]]

Whether the property not purchased in own name by the assessee is eligible for exemption u/s 54/54F

- House property in the name of HUF sold but new house purchased in the name of Karta and his mother-To claim the benefit of sec. 54F the residential house which is purchased or constructed has to be of the same assessee.

[Vipin Malik (HUF) Vs CIT 183 Taxman 296 (Delhi)(2009)]

- Exemption u/s 54F is allowed only when the new residential property is purchased by the assessee in his own name and not in name of his adopted son.

[Prakash v. ITO 173 Taxman 311 (Bom.) [2008]]

Issues -Sec. 54

- ▶ **Nexus between capital gain and amount of investment u/s 54 is not necessary.**

- ▶ **Held that** the assessee had initially utilized the sale proceeds on sale of its residential flat in commercial properties and, later on, he purchased two residential flats within a period specified in sub-section (2) of section 54. The Revenue's main dispute was that the sale proceeds were utilized for purchase of a commercial property and residential house was purchased out of the funds obtained from different sources, as such, the identity of heads has been changed

Assessee is not required under the provision for sec 54 to establish the nexus between the amount of capital gain and the cost of new asset .

[Ishar Singh Chawla Vs. CIT 130 TTJ (Mum) (UO) 108 (2010) and Ajit Naswanit Vs. CIT 1127 Taxman 123 (Delhi) (Mag.) (2001)]

- ▶ **That the residential property to avail exemption u/s 54F should be acquired either out of personal funds or sale proceeds.**

If the assessee constructs or purchases a residential house out of the borrowed funds, he is not eligible for deduction u/s 54F of the Act. If it is not construed in such a manner the object of introduction of the beneficial provisions would be frustrated. The fiscal provisions are to be construed in such a manner, so that its **objects of introduction can be achieved.**

[Milan Sharad Ruparel 005 ITR 0570 (ITAT – Mum) [2010] .

- Where assessee utilized the sale consideration for other purposes and borrowed the money for the purpose of purchasing the RHP to claim exemption u/s54, it was held that the contention that the same amount should have been utilized for the acquisition of new asset could not be accepted.
- **[Bombay Housing Corporation v. Asst. CIT 81 ITD 454 (Bom) (2002)]**

Issues - Section 54

- Exemption u/s 54 cannot be claimed on the basis of a mud structure not worthy of the caption 'residential house'.

[M.B. Ramesh v. ITO 320 ITR 451 (Kar.) [2010]]

- Title to the property is transferred with the issuance of the allotment letter and payment of installments is only a follow up action and taking of the delivery of possession is only a formality.

[Vinod Kumar Jain Vs CIT TIOL-706-P&H (2010)]

- Benefit u/s 54(1) is not available in case of sale of land adjoining to the building. The land appurtenant to the building means that the ownership of building and land appurtenant should be of same person. If building is owned by one person and land is owned by another, it will be the case of land adjoining to the building and by no stretch of imagination it can be called land appurtenant to the said building.

[P.K. Lahri v. CIT 146 Taxman 349 (ALL.) [2005]]

Issues-Section 54

- Due date for furnishing the ROI as per s 139(1) is subject to the extended period provided u/s 139(4) and if the return is filed within the period specified in ss (4), deduction u/s 54 could not be denied

[CIT v. Ms. Jagriti Aggarwal 15 taxmann.com 146 (P & H) [2011]]

- There is no requirement that the assessee should file the return before the due date u/s 139(1).

[Esther Christopher Mascarenhas v. ITO 9 Taxmann.com 99 (Mum.-ITAT) (2011)]

- Property purchased in **foreign country** is also eligible for exemption u/s 54. The new house may be in India or outside India

[Prema P. Shah Vs. ITO 101 TTJ 849 (Mum)(2006)]

Issues - Section 54F

- It is not necessary that a person should reside in the house to call it a residential house. If it is capable of being used for the purpose of residence than the requirement of the sec. 54F is satisfied.

[Amit Gupta v. DCIT 6 SOT 403 (Delhi)(2006) & Mahavir Prasad Gupta 5 SOT 353 (Del)(2006)]

- For purposes of sec 54F, deemed cost of new asset is amount which has already been utilized by assessee for purchase or construction of new asset plus amount deposited as per Capital gain account scheme, 1988.

[ACIT v. Vikas Singh 16 taxmann.com 127 (Delhi) [2011]]

Issues- Section 54F -Exemption not available where builder not even allotted plot within 3 years

- Where assessee sold his agricultural land and deposited part of consideration with a builder for purchase of a plot on which no construction activity could be started within a period of 3 years because no plot was ever handed over to him, benefit of section 54F was not available to assessee - The main thrust of the section 54F is construction of a residential house; the Legislation in its wisdom has specifically provided the period of three years, it cannot be enlarged to indefinite period

[Pankaj Wadhvani v. CIT 18 Taxmann.com 33 (Indore - ITAT)[2012]]

Issues u/s 54/54F...

- Assessee purchases 15% share in the residential house property in which he was already staying, Exemption u/s 54 cannot be denied.

[CIT vs Chandan Ben Magan Lal 245 ITR 182 (Guj) (2000) see also CIT vs TN Arvinda Reddy 120 ITR 46 (SC) (1979) , ITO vs Rasik Lal N Satra 98 ITD 335 (Mum) (2006)].]

Issues u/s 54/54F...

- ▶ Construction of house property can be started before the date of transfer.

[CIT v. HK Kapoor 150 CTR 128 (All) (1998)]

- ▶ Assessee sold House property on 5-6-1967
- ▶ Construction of new house was completed on 31-3-1968
- ▶ possession was not taken till 20-3-1970.
- It could not be said that the assessee had constructed any house property within a period of two years after the date of transfer of its house property on the larger plot so as to be entitled to the benefit of section 54.

[Smt Shantaben P.Gandhi 129 ITR 218 (Guj) (1981) see also CIT v. JR Subramanya Bhat 165 ITR 571 (1987)]

- ▶ The assessee was entitled to exemption u/s 54 in respect of both the house purchased and the floor constructed thereon since he fulfilled the basic conditions laid in the said section. Benefit available for both jointly.

[BB Sarkar v. CIT 132 ITR 150 (Cal)(1981)].

Cases- Sec 54EC

- Merely because bonds are in joint name, assessee could not be denied benefit of deduction u/s 54EC.

[DIT v. Mrs. Jennifer Bhide 15 taxmann.com 82 (Kar.) [2011]]

- For the purposes of the provisions of s 54EC, the date of investment by assessee must be regarded as date on which payment was made and received by the National Housing Bank.

[Hindustan Unilever Ltd. v. DCIT 191 Taxman 119 (Bom) [2010]]

- Capital Gains in the hands of shareholder on distribution of assets by company in liquidation u/s 46(2) is a deemed transfer not an actual transfer which has specifically been taxed under that section .

However, Exemption u/s 54EC is available from gains on actual transfer and not from gains u/s 46(2).

[CIT V. Ruby Trading Co.Ltd 32 Taxman 500 (Raj) [1987]]

Issues u/s 54/54F/54EC

- In **CIT V. Assam Petroleum Industries Pvt. Ltd 131 Taxman 699 (GAU.) [2003]**
- **It was held that**, where a depreciable asset is held for more than 36 months before its transfer, than such depreciable capital asset is LTCA. However according to section 50(1)&50(2) the gains or loss on DCA shall always be short term.
- It was further held that benefit u/s 54,54F & 54EC which are available from gains of a LTCA shall be available from gains of Depreciable capital asset.

Other Issues

Issues-Section 54

Where the assessee purchased a house in Madras in the name of his wife after selling property at Bangalore out of money obtained by him by the sale of the property at Bangalore ,but the same was assessed in the hands of the assessee ,it was held that the assessee was entitled for exemption u/s 54

[CIT V. Natarajan (2006) 287 ITR 271 (MAD)]

Where the assessee purchased property from 2 persons, by virtue of 4 different sale instances in the shape of 4 different parcels which constitute 1 single residential unit or house ,it was held that the investment so made in the purchase of the same was eligible for deduction u/s54

[CIT V. Sunita Aggarwal (2006) 284 ITR 20(del)]

Where assessee utilized the sale consideration for other purposes and borrowed the money for the purpose of purchasing the RHP to claim exemption u/s54,it was held that the contention that the same amount should have been utilized for the acquisition of new asset could not be accepted

[Bombay Housing Corporation v. Asst. CIT (2002) 81 ITD 454(BOM)]

ISSUES

CIT V. Ruby Trading Co.Ltd it was held that Capital Gains u/s 46(2) i.e.in the hands of shareholder is a deemed transfer not an actual transfer which has specifically been taxed under that section . However ,u/s 54EC is available from gains on actual transfer i.e. exemption u/s 54EC is not available from gains of u/s 46(2)

Other Exemptions

SECTION	54B	54D	54G	54GA
Which Capital asset is eligible for exemption -LT/ST	ST/LT	ST/LT	ST/LT	ST/LT
When available	Transfer of Land used for Agricultural purposes by assessee/his parents for atleast 2 years	On compulsory acquisition of land and building forming part of an industrial undertaking	On shifting of industrial undertaking from urban area to rural area	On shifting of industrial undertaking from urban area to SEZ
Asset	Any Agriculture Land	Land/building ↓ Land/building	Land/building/p&m ↓ Land/building/ p&m	Land/building/p&m ↓ Land/building/p&m
Person	IND/HUF*	Any person	Any person	Any person
Period within which to purchase	2 years after	3years after the date of transfer	1year before or 3years after the date of transfer	1year before or 3years after the date of transfer
Deposit money before due date of return is compulsory	YES	Yes	Yes	yes

***Benefit of exemption u/s 54B shall also extended to HUF by Finance Act, 2012**

New Section 54GB- Relief from long-term capital gains tax on transfer of residential property if invested in a manufacturing small or medium enterprise. [Inserted w.e.f. 1st April, 2013]

Brief of Amendment

- Exemption of Long term Capital Gain Tax to an Individual or HUF on transfer of residential property (a house or a plot of land) on or before 31st March, 2017 upon reinvestment of sale consideration before the due date of furnishing the return of income as specified section 139 (1) in the Equity of ELIGIBLE BUSINESS (a new start up SME company in the manufacturing sector which is utilized by the company for the purchase of new plant & machinery as specified in the section in which in hold more than 50% share capital or voting rights) and The share cannot be transferred within a period of 5 years . The relief is available for any transfer of property made on or before 31.03.2017.

Issues in case of Immovable Property



Issues - Period of Holding

- Date of Transfer: where an assessee entered in to an agreement to purchase property in adverse possession of a tenant, but ultimately succeeded in taking possession from the tenant, the date of transfer is the date on which the assessee had entered in to an agreement for purchase of property. Indexation has to be given from this date. The date of the assessee getting possession from the tenant does not postpone date of ownership to date of possession.

[Ms. Nita A Patel V Income Tax Officer 007 ITR 0659 (ITAT – Mum) [2011]]

- In case where assessee acquires right to possession and right to title in a property but there was no actual possession or title, since the immovable property is not in existence, the period of holding of immovable property will be calculated since the assessee actually held the asset.

[DCIT v Kishore Kanungo 290 ITR (AT) 0298 (ITAT–Mum)(2007)]

- Date of allotment should be considered for the calculation of period of holding and not the date of payment of last installment.

[Jagdish Chander Malhotra v ITO (1998) 64 ITD 251 (Del)]

Issues - Period of Holding

- In case where Land purchased in 1991; Residential house constructed thereon in 1995; Sold in 1996, Capital gains to be determined separately in respect of both land & building on the basis of period of holding.

[CIT v. lakshmi b Menon 184 CTR 52 (Ker)(2003), CIT v Citibank N.A. 261 ITR 570 (Bom) (2003) see also CIT v Vimal Chand Golecha (1993) 201 ITR 442 (Raj)]

- Lease cum sale agreement - Where lease hold right had sunk or drowned in the larger interest and extinguished. Period of holding will be considered from the date of superior right comes in to existence and not from the date that the earlier inferior right was acquired.

[CIT v Mody (VV) 218 ITR 1 (Karn)][1996]].

Issues - Period of Holding

- POH in case of cooperative housing society shall be reckoned from the date on which the member acquires shares in the cooperative housing society.

[CIT v Anilben Upendra Shah 262 ITR 657 (Guj) (2003)]

- **Circular No. 471 dated 15/10/1986 and Circular no. 672 dated 16/12/1993**, treating payment towards allotment to housing board as reinvestment to be required for purpose of section 54, period of holding should be reckoned from the date of agreement. It may also be pointed out that it is not the title, but the beneficial right, that is considered to be relevant for the purpose of taxation.

[CIT v. Poddar Cement Pvt. Ltd. 226 ITR 625 (SC)(1997)]

Immovable Property - Issues

- Amount received by the society from the builder for permitting him to construct additional floors on existing building of the society utilizing TDR FSI belonging to him is not chargeable to tax since there is no cost of acquisition.

[Om Shanti Co-op Society Ltd. V ITO (ITA No. 2550/Mum/2008)]

- Indexations have to be done from the date of allotment of land and not on the basis of actual payments made by assessee.

[Charanbir Singh Jolly v ITO (Eighth) 5 SOT 89 (Mum-Trib) (2006) , M. Syamala Rao v. CIT 234 ITR 140 (AP) (1998), Smt. Lata G. Rohra v Dy. CIT 22 (II) ITCL 250 (Mum- Trib) (2008)]

Immovable Property - Issues

- Where a property has been transferred to the spouse under section 64(1), any capital gain arising to the spouse from such asset would be includible in the total income of the transferor.

[[Sevantilal Mankelal Sheth V CIT 68 ITR 503 \(SC\)\[1968\]](#)].

- Transfer by way of Family Arrangement do not attract capital gain tax.

[[Ram Charan Das v Girja Nandini Devi AIR 1966 SC 323](#), see also [CIT v. A.N. Naik Associates and Anr \(2004\) 265 ITR 346 \(Bom\)](#), [CIT v AL Ramanathan \(2000\) 245 ITR 494 \(Mad\)](#)].

Issues - Sale of Property mortgaged with Banks

- ▶ The assessee was a partner in a firm which took loan from the bank against mortgage of house property belonging to the assessee. The bank enforced the recovery of loan against the firm by sale of the property mortgaged. The house was auctioned by the assessee and out of the total sale consideration received, he discharged mortgaged debt and received balance amount.

The assessee was not entitled to the deduction as claimed on account of discharge of mortgage debt to the bank. In fact, the entire amount of sale consideration had been received by the assessee and thereafter part of it was applied for discharge of the mortgage debt. It was, thus, a case of application of income received.

[CIT v. Sharad Sharma, 169 Taxman 67 (All.) [2008]]

- ▶ The assessee, to avoid the sale by the Court, sold the house himself with the consent of the bank on the assurance that out of the sale proceeds, the bank loan would be paid directly by the purchaser. Therefore, it was to be held that the bank had an overriding title over the property and the real value to which the assessee was entitled was only Rs. 45,000 and not the balance of Rs. 1.50 lakhs which was directly paid to the bank.

[Kanti Swaroop Sharma v. ITO 41 ITD 246 (All.) [1992]]

Issues - Sale of Property mortgaged with Banks

- ❑ In case the mortgage is created by the assessee himself, amount paid to clear the mortgage debt cannot be said to be COA or COI.

[V.S.M.R. Jagadishchandran V. CIT 227 ITR 240 (SC) 1997]

- ❑ Where the assessee has acquired his property from the previous owner and the previous owner had taken a mortgage against the property, which was not settled at the time of transfer of property. Now if assessee pays the mortgagee & acquire a better title to the property, such amount paid will be treated as COA in the hands of assessee.

[CIT V. Arunachalam 227 ITR 223(SC) (1997)]

Other relevant provisions



Contents.....

S. No.	Section	Particulars
A.	45(1A)	Amount received on damage/destruction of <u>any Capital asset</u> from an Insurance company
B.	45(2)	Conversion of Capital Asset into Stock-in-trade
C.	45(2A)	Transfer of securities by Depositories
D.	45(3)	Transfer of a capital asset by a partner/member to Firm/AOP/BOI
E.	45(4)	Transfer of capital asset by way of distribution on dissolution of firm/AOP/BOI/ or otherwise
F.	45(6)	profit & gains arising from the re-purchase of the units U/s 80CCB(2).
G.	46	Distribution of assets by companies in Liquidation.
H.	46A	Buy back of Shares

A.

Amount received on damage/destruction of any Capital asset from an Insurance company-Section 45(1A)

Section 45(1A) has been inserted w.e.f. 1-4-2000 to nullify the Supreme Court judgement in the case of *Vania Silk Mills (p) Ltd. vs. CIT (1991) 191 ITR 647* in which it was held that asset has to exist in the process of transfer.

Section 45(1A)

- Money or other assets received under insurance on account of Damage to, or destruction of any capital asset as a result of
 - Flood
 - Typhoon
 - Hurricane
 - Cyclone
 - Earthquake
 - Convulsion of nature.
 - Riot or Civil disturbance
 - Accidental fire
 - Explosion.
 - Action taken by enemy
 - Action taken in combating an enemy
 - (Whether with or without declaration of war)

Considerations.....

- If asset is destroyed and no insurance compensation is received. **The cost of asset destroyed shall be a capital loss.**
- Capital gain shall be **deemed to be the income of the previous year in which such money or other asset was received.**
- **Date of destruction shall be construed as date of Transfer.**
- **COA of asset received against asset destructed may be the FMV of asset received on the date it is received.**

B.

Conversion of capital Asset in to Stock in Trade - Sec. 45(2)

- Any **profit or gain** arising from the **transfer** by way of **conversion** by the owner of a **capital asset** in to or its treatment by him as **Stock in Trade**.
- **Income of the previous Year** in which such stock in trade is **sold or otherwise transferred** by him. (*Year of conversion & Year of sale / Transfer may be different*)
- Full value of Consideration would be – **Fair market value** on the **date of conversion**.

Note : for the purpose of calculating income under the head PGBP. FMV on the date of conversion has to be considered. Book value is irrelevant.

Conversion of SIT in to a Capital Asset.

Contd..

- Two formulas can be evolved :
 - First Formulae :
 - $\text{Market value of the shares on the date of conversion} - \text{BV of the shares} = \text{business income}$
 - $\text{Sale price of the shares} - \text{market value of the shares on the date of conversion} = \text{Capital gain.}$
 - Second formulae:
 - $\text{Sale price of the shares} - \text{Indexed BV on the date of conversion} = \text{Capital Gain.}$
- [ACIT v Bright Star Investment (P.) Ltd. (2008) 24 SOT 288 (Mum).]

Contd..

Conversion of SIT in to a Capital Asset.

Issue

ACIT v Tata Housing Development Co. Ltd. (2010) 48 DTR 452 (Mum)(Tri.).

- Where the assessee converted the investment in shares in to stock in trade in A.Y. 1993-94 and sold said shares in the relevant A.Y. 1997-98.
- AO did not accept the genuineness of the transaction & assessed the entire gain as business income.
- It was held that AO is not justified to treat such income as business income as genuineness of the transaction can be examined only in the year of purchase.
- Genuineness of conversion of assets from investment in to stock-in-trade and calculation of capital gain can be examined only in the year of conversion.
- Therefore the AO was directed to assess the surplus as capital gain instead of business income.

Conversion of SIT in to a Capital Asset.

Issue

ACIT v Jehangir T. Nagree (2008) 23 SOT 512 (Mum-ITAT).

- The Conversion of Investment in shares and securities into stock in trade would be valid under sec. 45(2) even if the business of trading of shares is not carried all by an assessee before such conversion.

Vidhyavihar Containers Ltd v. DCIT (2011) 15 taxmann.com 286 (Mum.)

- Where assessee having discontinued its business of manufacturing of containers, converted its factory land into stock-in-trade as to carry on new business of real estate, it was entitled to benefit of section 45(2) in respect of aforesaid conversion.

C.

Transfer made by the depository participants of beneficial interest in respect of securities- Sec. 45(2A)

- Section 45(2A) is applicable is Shares/securities are transferred in DMAT form.
- Beneficial owner of shares/securities is chargeable to tax.
- COA & POH shall be determined on the basis of FIFO (refer Circular No. 768 dated 24th June, 1998).

D.

Transfer by way of Capital Contribution-Sec 45(3)

- Any **profit / gain** from **transfer** of a capital asset **by a person** to a **firm** or other **AOP** or **BOI**, by way of **capital contribution**.
- Chargeable in **P.Y.** in which such **transfer took place**.
- Full value of consideration – **amount recorded in the books** of firm / AOP / BOI as value of capital asset.

Note : Sub section don't apply to company or cooperative society.

ISSUES

- Stock in trade introduced as capital contribution, it no more retain its character as SIT, and therefore provision of section 45(3) shall apply. Consequently, the gains on such transfer are taxable u/s 45(3).

[DLF Universal Ltd. v DCIT (2010) TIOL 16 ITAT –D – L – SB]

- Assessee having converted his proprietary concern into a partnership firm, revalued the assets and straightway credited the capital accounts of the partners by the revalued figures at the end of the same previous year, section 45(3) is clearly applicable and the said value has to be taken to be the full value of consideration and not the amount credited to the capital account of the assessee.

[Dharamshibhai B. Shah v ITO (2009) 32 DTR (Ahd 'B') TM 106, [2010] 001 ITR (Trib) 0536 (ITAT – Ahd)]

No capital gains on consideration received by a partner for reduction of his share in partnership firm on inclusion of new partners

- **CIT v. P.N. Panjwani [2012] 21 taxmann.com 458 (Kar.)**
- **There is no provision in Income Tax Act for levying capital gains tax on consideration received by a partner for reduction of his share in partnership firm on inclusion of new partners.**

Fact:

- On reconstitution of firm, new partners were inducted, who contributed cash as their capital contribution and erstwhile partners withdrew money brought in by incoming partners as drawings. However they continued to be the partners of firm. Only, their share got reduced by almost 50%.
- *since property was not owned by erstwhile partners, it could not be said that they transferred 50% in favour of incoming partners and any amount represented consideration received for such transfer and as such it was liable for payment of capital gains under section 45(1) because they did not transfer capital assets*

E.

Distribution of capital asset on dissolution of firm / AOP / BOI- Sec 45(4)

- Profit / Gains from transfer of capital asset on dissolution of firm / AOP or BOI or otherwise.
- Capital gain chargeable in the hands of firm / AOP / BOI.
- FMV on the date of transfer shall be the full value of consideration.

Note: Sub section don't apply to company or cooperative society.

Issues

- Capital gain shall arise on the date of distribution of capital asset and not on the date of dissolution.

[CIT v Mangalore Ganesh Beedi Works (2004) 265 ITR 658 (Kar).]

- No capital gain where firm dissolves by operation of law, but not followed by transfer of capital assets by way of distribution of such assets.

[CIT v Vijaya Metal Industries (2002) 256 ITR 540 (Mad)]

- Revaluation of asset or realignment of share ration on introduction of new partner does not attract capital gain.

[ITO v Smt. Paru D. Dave and Deviprasad L Dave (2008) 303 ITR (AT) 469 (ITAT - Mum.)]

- Cash settlement to a partner on his retirement from the firm cannot be considered as a distribution of assets to him for the purpose of section 45(4) of the Income Tax Act, 1961.

[CIT v Naik Associates (AP) (2003) 265 ITR 346 (Mum.)]

Issues

- No capital gain u/s 45(4), if a firm became limited company under part IX of Companies Act, 1956.

[[CIT v Texspin Engineering & Manufacturing Works \(2003\) 263 ITR 345 \(Bom\)](#) also see [CIT v Rita Mechanical Works \(2010\) 46 DTR 133 \(P&H\)](#).]

- Where the assessee revalued its assets and subsequently converted the firm in to a limited company under chapter IX of the Companies Act, 1956 and Tribunal held that conversion of firm in to limited company, which had taken over such asset at enhanced value, would not result into any capital gain liability under the Act. The Apex court set aside the order of High Court and directed to record its finding on those questions.

[[CIT v Well Pack Packaging \(2008\) 174 Taxmann 102 \(SC\)](#)].

Issues

- Distribution of stock in trade amongst partners at the time of dissolution will not attract capital gain u/s 45(4) as SIT is not a capital asset. [A.L.A Firm v CIT (1991) 189 ITR 285 (SC)].
- Firm is liable to capital gains tax on firms assets taken out by partners by books entries and transferred by them. [CIT v J.M. Mehta & Bros. (1995) 214 ITR 716, 719 – 20 (Bom)]
- The word otherwise covers the transfer other than dissolution also. [New Gujarat Tin Printing Works v ITO (2011) 128 ITD 182 (Ahd)]
- The transactions resulting in dissolution of the firm with one of the partners getting rights over the immovable property. The subsequent reconstitution of the firm did not affect the liability u/s 45(4) of the Act which was a liability of the Act. The transaction in both the cases was transfer within the meaning of S. 2(47)(vi) of the Act. [CIT v Southern Tubes [2008] 306 ITR 0216 (Ker)].

Issues

- Where the land and building was brought to the firm as capital by the partners and based on the ownership claimed by the firm, it claimed depreciation for all the years it was carrying on the lodging business using the land and building. Admittedly, on dissolution the land and building were distributed among the partners of the dissolved firm. This was a clear case falling u/s 45(4) attracting liability for capital gains.

[CIT v Kumbazha Tourist Home (Dissolved) [2010] 328 ITR 0600 (Raj.)]

- Transfer of capital asset through Memorandum of understanding prepared in lieu of dissolution deed – S. 45(4) will apply attracting liability for capital gains.

[ACIT v G.H. Reddy & Associates [2009] 308 ITR (AT) 0025 ITAT (Chen)].

Issues.....

Contd....

Excess amount received by a partner on retirement from the firm is not assessable to capital gains.

[CIT V. R. Lingmallu Raghukumar 247 ITR 801 (SC) (2001)]

Where on dissolution following death of one partner, assessee-firm was reconstituted with remaining partners without discontinuation of business, closing stock of firm was to be valued at cost or market price whichever was lower

[Sakthi Trading co. v.CIT 250 ITR 871/118 taxman 301 (SC) (2001)]

Issues

- When there were only four partner, first change in June 1994 when two partners retired and two new partners inducted. Second change in 2004 when remaining two partners also retired and two more partners, who have brought the capital. The court held that the provisions of section 45(4) is applicable as it amounts to transfer. Hence capital gain is applicable.

[CIT v Gurunath Talkies (2010) 214 Taxation 729 (Kar)].

- Period of holding of asset acquired by the partner on dissolution : where the assessee sold building which he got on dissolution of firm, it was held the period of holding of such asset shall be considered from the date of dissolution of firm and it cannot be reckoned from the date when he was a co-owner of the building in capacity of partner of firm.

[P.P. Menon V CIT (2009) 183 Taxman 246 (Ker)].

F.

S. 45(6) -profit & gains arising from the repurchase of the units U/s 80CCB(2).

- Notwithstanding anything contained in S. 45(1).
- The difference between the repurchase price of the units referred to in S.S. (2) of S. 80CCB and the capital value of such units shall be deemed to be the capital gains.
- Of the P.Y. in which such repurchase takes place or the plan referred u/s 80CCB is terminated.

Explanation : Capital value of such units means any amount invested by the assessee in the units referred to in S. 80 CCB (2).

G.

Sec. 46- Capital Gains on distribution of assets by companies in Liquidation.

- No capital gain in the hands of company on transfer of capital assets to shareholders at the time of Liquidation.
- Capital gain shall be chargeable in the hands of shareholder.
- Dividend attributable u/s 2(22)(c) shall be allowed to shareholder.
- Full value of consideration will be:
 - Amount of money received
 - FMV of asset distributed.
 - ✓ as reduced by dividend u/s 2(22)(c).

Issue - When Capital gain shall be charged in the hands of company.

In the hands of the company

Case 1. Where the co.in liquidation transfer the asset as such to the shareholders : in such a case there will be no capital gains tax in the hands of the co.

Case 2. Where the co.first sell the assets and then transfer the cash to the shareholders : In such a situation the co.shall be liable to pay capital gains tax on such a transaction

Considerations..

- Period of holding – Period subsequent to the date on which the company goes in to liquidation shall be excluded.
- Cost of acquisition – FMV on the date of distribution. [as per S.55(2)(iii) provided asset is chargeable to capital gain tax levy].
- Cost of acquisition where asset distributed is not suffered by capital gain levy – Cost of acquisition shall be the cost to previous owner and further increased by COI incurred or borne by the company. [S.49(1)(iii)(c)]

Issue

- In case the liquidator sells the asset of the company resulting in a capital gain and distributes the funds so collected, the incidence of accrual of capital gains in the hands of the company makes it liable to pay tax on such gains.

[Sri Kannan Rice Mills Ltd. v CIT (1954) 26 ITR 351 (Mad)].

- Where a shareholder on the liquidation of a company, receives any money or other asset from the company in lieu of the shares held by him, such share holder shall be chargeable to income tax under the head capital gains in respect of the excess money and the assets received over the cost of shares held by him.

[CIT V. Ruby Trading Co. Pvt. Ltd. (2003)259 ITR 54 (Raj)].

- Where a shareholder receives on liquidation amount less than what he has invested, he entitled to loss under the head capital gain under section 46(2) of the Act.

[CIT v Jaikrishna Harivallabhdas 231 ITR 108 (Guj).]

Issue

- In case the payment from liquidator is received in installments, the COA cannot be deducted at every point of time of receipt of money. It should be deducted from the earlier payments and once the COA is wiped out, any further sum received would be completely liable to tax as capital gains.

[CIT v Inland Agencies P. Ltd. (1983) 143 ITR 186 (Mad)].

- The year in which the ownership of the capital asset or money is transferred is the previous year for the assessment of capital gain in the hands of the shareholder. The taxable event of taxing capital gain does not await the final distribution to be made by the liquidator.

[Cable and wireless Ltd. V H. Gangal (1973) 90 ITR 84 (Bom)].

- S. 46(2) is a charging section independent of S. 45. therefore even if a particular income cannot be brought to charge u/s 45, the same can be brought to charge u/s 46(2), if the conditions specified therein are satisfied.

[CIT v Chidambaram (M.A) (1984) 147 ITR 180 (Mad)].

Issue

- The AO has a duty to determine the market value of the asset received by the shareholder on liquidation of the company on the date of distribution and this determination may be independent from what the liquidator has evaluated.

[CIT v Vijay Kumar Budhia (1975) 100 ITR 380 (Pat)].

- There is nothing in the provision of S. 46(2) which excludes the applicability of provisions dealing with set off and carry forward of losses.

[CIT v Jaykrishna Harivallabhdas (1998) 231 ITR 108, 118 (Guj).]

- In case the company sold the agricultural land, it is not liable to capital gain tax, but to the extent such amount reaches the hands of the shareholder on liquidation the shareholder would be assessable.

[N. Bagavathy Ammal v CIT (2003) 259 ITR 678 (SC)]

H.

Section 46A - Capital Gain on Buy Back.

- Difference of value of consideration received and cost of acquisition of shares / specified securities shall be liable to capital gain.
- Chargeable in the Year in which such shares or other specified securities were purchased by the company.

Explanation – **“Specified securities shall have the meaning assigned to it in Explanation to section 77A of the Companies Act, 1956.**

Determination of Tax in certain cases -Computation Part

- ❑ **Sec. 111A – Tax on Short Term Capital Gains**
- ❑ **Sec. 112 – Tax on Long Term Capital Gains**

Rate of tax for short term capital gain in certain cases u/s 111A ...

1. Where the total income of an assessee included any income chargeable under the head "Capital Gain" arising from the transfer of a short term capital asset, being an equity share in a company or a unit of an equity oriented fund **and**
 - a) The transaction of sale of such asset is entered on or after 1-10-2004, and
 - b) Such transaction is chargeable to STT

The tax payable by the assessee on the total income shall be aggregate of -

- i.the amount of income-tax calculated on such STCG at the rate of 15% (as amended by F. Act, 2008) **and**
- ii.the amount of income-tax payable on the balance amount of the total income as if such balance amount were the total income of the assessee.

Contd....

- **Amendment made by Finance Act, 2012 in proviso to Section 111A(1) [w.e.f 1st April 2009]**
- *“Provided that in the case of an individual or a Hindu undivided family, being a resident, where the total income as reduced by such short-term capital gains is below the maximum amount which is not chargeable to income-tax, then, such short-term capital gains shall be reduced by the amount by which the total income as so reduced falls short of the maximum amount which is not chargeable to income-tax and the tax on the balance of such short-term capital gains shall be computed at **the rate of fifteen per cent.**”*

Brief of Amendment

Clerical error pertaining to rate of tax in the Proviso rectified.

- Section 111A retrospectively amended w.e.f 1st April 2009 to provide in case of equity shares / units on which STT is paid, short term capital gains tax rate is 15%. In the Proviso, the rate is erroneously mentioned as 10%. Accordingly, the said Proviso is amended.

Section 112

Tax on Long term Capital asset.....

1) Where the total income of an assessee includes any income, arising from the transfer of a LTC asset, which is chargeable under the head “Capital Gain”, the tax payable by the assessee on the total income shall be the aggregate of :

(a) In case of an individual or HUF, being a resident :

- i. the amount of income tax payable on the total income as reduced by the amount of such LTCG, had the total income as so reduced been his total income, and
- ii. 20% of LTCG included in total income.

Note: Income from LTCG shall be adjusted against minimum assumption slab.

(b) In case of a domestic company

- i. the amount of income tax payable on the total income as reduced by the amount of such LTCG, had the total income as so reduced been his total income, and
- ii. 20% of LTCG included in total income

(C) In case of a NR or a Foreign company :

- i. the amount of income tax payable on the total income as reduced by the amount of such LTCG, had the total income as so reduced been his total income, and
- ii. 20% of LTCG included in total income

Note: In case of NR individual income from long term capital gains can not be adjusted against minimum assumption slab

(d) In any other case of a resident:

- i. the amount of income tax payable on the total income as reduced by the amount of such LTCG, had the total income as so reduced been his total income, and
- ii. 20% of LTCG included in total income

*Tax on long term capital gains
from listed securities or units
-Proviso to section 112
(Applicable for R as well as NR)*

Contd....

The tax on capital gains from listed securities or units or zero coupon bonds being long term shall be the lower of the following :

- (i) tax on capital gains computed normally @20%
- (ii) Tax on capital gains computed normally but without giving the benefit of indexation , @10%

Contd....

After introduction of exemption u/s10(38) by Finance Act, 2004, the proviso to section 112 applies in following cases:

- i. where listed equity shares are sold on or after 1-10-2004 other than through recognized stock exchange
- ii. where units of equity oriented fund are sold on or after 1-10-2004 other than through recognized stock exchange or other than to mutual fund
- iii. Where listed debentures/bonds are sold since exemption under section 10(38) is not available for listed debentures/bonds.
- iv. Where units of a mutual fund other than equity oriented fund are sold since exemption under section 10(38) is not available to units of a mutual fund other than equity oriented fund

Amendment of Section 112(1) by Finance Act, 2012.
[w.e.f. 1st April, 2013]

- **Brief of amendment**
- Currently, long term capital gain (LTCG) arising from sale of unlisted securities in the case of Foreign Institutional Investors is taxed at the rate of 10%.
- other non-resident investors, including Private Equity Investors are taxed at the rate of 20%.
- In order to provide parity to such investors, the rate is reduced from 20% to 10 % on the same lines as applicable to Foreign Institutional Investors.

b. What "Transfer" means in relation to Capital Asset- Sec. 2(47).....

- Transfer, in relation to a capital asset, includes,—
 - i. The sale, exchange or relinquishment of the asset ; or
 - ii. The extinguishment of any rights therein; or
 - iii. The compulsory acquisition thereof under any law ; or
 - iv. In a case where the asset is converted by the owner thereof into, or is treated by him as, stock-in-trade of a business carried on by him, such conversion or treatment , or
 - iva) the maturity or redemption of a zero coupon bond; or

- v. Any transaction involving the allowing of the possession of any immovable property to be taken or retained in part performance of a contract of the nature referred to in section 53A of the Transfer of Property Act, 1882 (4 of 1882) ; or

- vi. Any transaction (whether by way of becoming a member of, or acquiring shares in, a co-operative society, company or other association of persons or by way of any agreement or any arrangement or in any other manner whatsoever) which has the effect of transferring, or enabling the enjoyment of, any immovable property.

Explanation to section 2(47):

- ▶ For the purposes of sub-clauses (v) and (vi), “immovable property” shall have the same meaning as in clause (d) of sec. 269UA.

Sec. 2(14): Capital assets -Controlling interest can not be treated as capital asset(S.45)

Vodafone International Holdings B.V. v. UOI (2012)341 ITR 1/247 CTR 1/66 DTR 265/ 204 Taxman 408 (SC)

- Controlling interest is not an identifiable or distant capital asset independent of holding of shares and therefore does not satisfy definition of a 'capital asset' within the meaning of section 2(14).On the facts extent of 'control' of parentis no more than a persuasive position, it is not being a legally enforceable right cannot be treated as a 'capital asset' within the meaning of section 2(14).

Income deemed to accrue or arise in India

Amendment to Section 2(47) - Explanation 2 to Clause 47 of Section 2. [Newly Inserted, w.e.f.1st April, 1962]

- ***“For the removal of doubts, it is hereby clarified that “transfer” includes and shall be deemed to have always included disposing of or parting with an asset or any interest therein, or creating any interest in any asset in any manner whatsoever, directly or indirectly, absolutely or conditionally, voluntarily or involuntarily, by way of an agreement (whether entered into in India or outside India) or otherwise, notwithstanding that such transfer of rights has been characterised as being effected or dependent upon or flowing from the transfer of a share or shares of a company registered or incorporated outside India.”***

*Amendment brought in order to combat the effect of pronouncement of Hon'ble Supreme Court in the case of Vodafone International.

Income deemed to accrue or arise in India

Contd...

Amendment to Section 2(47) - Explanation 2 to Clause 47 of Section 2. [Newly Inserted, w.e.f.1st April, 1962]

Brief of Amendment

- What the explanation does is to widen the scope of transfer to include every mode and the manner of entering of the transaction in which the types of transactions mentioned in the main section will also get covered. The mode and manner of the transfer of the kinds mentioned in the main section is now being sought to be included are (i) directly or indirectly (ii) absolutely or conditionally (iii) voluntarily or involuntarily (iv) by way of agreement or otherwise (v) it is characterized as being effected or dependent upon or flowing from the transfer of a share or shares of a company registered or incorporated outside India.

Issues - Where family members of assessee were holding shares in different business concerns & assessee under a family arrangement had transferred his share held in a firm in favour of a family member, there was no transfer.

CIT v. R. Nagaraja Rao [2012] 21 taxmann.com 101 (Kar.)

- Family members of assessee were holding apart from personal properties, family properties and shares in different business concerns. Disputes arose between assessee and other family members. Thereupon a family arrangement was made between assessee and other family members, whereby assessee had resigned from a partnership firm and transferred his share of profit and loss in said firm to a family member for a consideration of Rs. 35,000 being capital balance of firm. Assessee claimed that in instant case there was no transfer, which gave rise to any capital gain. AO held that there was a transfer in instant case and consequently there was a capital gain in hands of assessee.
- since (i) it is well-settled that a partition is not a transfer, and (ii) what is recorded in a family arrangement is nothing but a partition, there was no transfer in instant case.

Issues-Transfer.....

Contd....

- Giving up by an assessee of right to claim specific performance to get conveyance of immovable property, in lieu of receiving consideration, **would result in extinguishments of right in property.**

[CIT V. Smt. Lakmidevi Ratani (2005)147 Taxman 642(MP)]

- Expenditure incurred by assessee to remove encumbrance created by assessee himself on property which was acquired by assessee without any encumbrance is not allowed deduction u/s 48.

[Roshanbabu Mohammed Hussein Merchant (2005) (BOM)]

Issues-Transfer.....

- The definition of transfer under section **2(47)** is merely inclusive and **does not exhaust** other kind of transfer.

[Sunil Siddharthbai V CIT 156 ITR 509 (SC)(1985)].

- For levy of tax on a Capital Gain, **there must be a disposal of an asset in any one of the modes referred** to in the definition of transfer in section.

[C.A. Natarajan v CIT 92 ITR 347 (Mad) (1973)].

- **Redemption of mutual fund** scheme on maturity **does not constitute transfer**, the surplus could only be treated as income from other sources.

[Bharatiya Janta Party v Dy CIT (2002) 258 ITR (AT) 1 (Del). [Circular No. 2 of 2002, dated 15/02/2002 for deep discount bonds, when it advised that sale prior to maturity would be treated as transfer liable for capital gains, while the surplus, if any, on redemption would be treated only as interest]

Issues-Transfer.....

Contd....

- This includes all those goods or commodities which are dealt in, in the sense of buying and selling in the course of business activity, but it cannot be said to include a commodity which is acquired for the purpose of being let to hire.

[H. Mohammed & Co. v CIT 107 ITR 637 (Guj) (1977) .

- Where a property has been transferred to the spouse under section 64(1), any capital gain arising to the spouse from such asset would be includible in the total income of the transferor.

[Sevantilal Mankelal Sheth V CIT 68 ITR 503 (SC) (1968)

].

Section 47

Transaction Not regarded as Transfer.....

Section	Transaction not regarded as Transfer	COA in the hands of Transferee	Period of holding by Previous owner to be included.
47(i)	Distribution of capital asset on total or partial partition of HUF [Mrs. P Sheela V ITO [2009] 308 ITR (A.T.) 0350 ITAT (Bang), see also CIT v Kay Arr Enterprises [2008] 299 ITR 0348 (Mad) SLP pending].	Cost to Previous owner	Yes.
47(ii)	Transfer of capital asset under a gift or will or an irrevocable trust.	Cost to Previous owner	Yes.
47(iii)	Transfer under a scheme of amalgamation of a capital asset by the amalgamating company to the amalgamated provided amalgamated company is an Indian company.	Cost to Previous owner	Yes.
47(iv)	Transfer of Capital asset by company to its 100% Subsidiary.	Cost to Previous owner	Yes
47(v)	Transfer of capital asset by 100% subsidiary company to its holding company.	Cost to Previous owner	Yes

Section 47A(1) - Exceptions - Cases where transfer would be liable to capital gain.....

- In case of Sec. 47(iv) & (v), if the transferred capital asset is converted or treated as stock in trade; or
 - Holding company ceases or cease to hold the whole of the share capital.
- The capital gain provisions of Sec. 45 shall be made applicable, in the previous year in which the original/Subsequent (word used in section as such) transfer took place.

Section 43C, Special Provision for Computation of Cost of Acquisition in certain cases.....

- In case amalgamating company transfers a capital asset as SIT to amalgamated company, which is subsequently sold, then the COA of SIT shall be the aggregate of:
 - COA to Amalgamating Co.
 - COI incurred by Amalgamating co. or Amalgamated Co.
 - Expenditure for the purpose of transfer by the amalgamating Co.
- Where a capital asset is transferred as SIT under a gift, will, irrevocable trust or on partition of HUF and such SIT is sold, then the COA of SIT shall be the aggregate of:
 - COA to Transferor.
 - COI incurred by Transferor and Transferee.
 - Expenditure incurred by Transferor to effect the transfer

Note : Option to take FMV as on 01/04/1981 is not available , further COI incurred before 01/04/1981 shall be considered.

S. 47 - Transaction Not regarded as Transfer.

Section	Transaction not regarded as Transfer	COA in the hands of Transferee	If the Period of holding by Previous owner to be included.
47(vi)	Transfer of capital assets in a scheme of amalgamation.	Cost to the Previous Owner.	Yes.
47(via)	Transfer of shares in an Indian company held by a foreign company to another foreign company under a scheme of amalgamation of the two foreign companies.	Cost to the Previous owner	Yes.
47(viaa)	Capital assets transferred in a scheme of amalgamation of a banking company with a banking institution.	Cost to the Previous owner	Yes

S. 47 - Transaction Not regarded as Transfer.

Section	Transaction not regarded as Transfer	COA in the hands of Transferee	If the Period of holding by Previous owner to be included.
47(vib)	Transfer in a demerger of a capital asset by the demerged company to a resulting company.	Cost to the Previous owner.	No
47(vic)	Transfer of shares held in an Indian Company by a demerged foreign company to resulting foreign company.	Cost to the Previous owner.	No.
47(vica)	Any transfer in a business reorganization of a capital asset by the predecessor cooperative bank to the successor cooperative bank.	Cost to the Previous owner.	No.

S. 47 - Transaction Not regarded as Transfer.

Section	Transaction not regarded as Transfer	COA in the hands of Transferee	If the Period of holding by Previous owner to be included.
47(vicb)	Any transfer of shares in a predecessor cooperative bank by a shareholder in case of a, business reorganization, if the transfer is made in consideration of the allotment to him of any share or shares in the successor cooperative bank.	Cost to the Previous owner.	No
47(vid)	Transfer or issue of shares by the resulting company, in a scheme of demerger to the shareholders of the demerged company.	Proportionate COA of shares in demerged Co.	Yes.

S. 47 - Transaction not regarded as Transfer.

Section	Transaction not regarded as Transfer	COA in the hands of Transferee	If the Period of holding by Previous owner to be included.
47(vii)	Allotment of shares in amalgamated company in lieu of shares held in amalgamating company.	Cost of shares in the amalgamating co.	Yes.
47(viia)	Transfer of a capital asset being foreign currency convertible bonds or GDR by a non resident to another non – resident.		No
47(viii)	Transfer of agricultural land in India before March 1970.		
47(ix)	Transfer of capital asset being work of art, manuscript, painting etc.) to Government / University		

S. 47 - Transaction Not regarded as Transfer.

Section	Transaction not regarded as Transfer	COA in the hands of Transferee	If the Period of holding by Previous owner to be included.
47(x)	Transfer by way of conversion of bonds or debentures in to shares.	Cost of shares would be cost of bonds / debentures.	No.
47(xa)	Transfer by way of conversion of bonds [referred to in section 115AC(1)(a) in to shares or debentures of any company.	Cost of shares / debentures would be cost of original bonds.	No
47(xi)	Transfer by way of exchange of a capital asset being membership of a recognized stock exchange for shares of a company.		No

S. 47A(2) - Exceptions to S. 47(xi)

- If before expiry of three years from the date of transfer of a capital asset u/s 47(xi), shares allotted to the transferor in exchange of a membership in a **Recognized Stock Exchange** are transferred.
- The capital gain provisions of S. 45 shall be made applicable, in the previous year in which such shares are transferred.

S. 47(x) to be read with S. 49(2A)

- Section 47(x) – Nothing contained in S. 45 shall apply to the following transfers:-
“(x) Any transfer by way of conversion of bonds or debentures, debenture stock or deposit certificates in any form of a company in to shares or debentures of that company.”
- Section 49 (2A):
“ where the capital asset, being a share or debenture in a company, became the property of the assessee in consideration of a transfer referred to in clause (x) of section 47, the cost of acquisition of the asset to the assessee shall be deemed to be that part of the cost of debenture, debenture – stock or deposit certificates in relation to which such asset is acquired by the assessee.

Issues.....

- Conversion of preference shares in to equity shares will be not be regarded as transfer as the same amounts to merely exchange and therefore no capital gain arose on such conversion.

[CIT v Goel Investment Pvt. Ltd. (1984) 149 ITR St 90]

S. 47 - Transaction Not regarded as Transfer.

Section	Transaction not regarded as Transfer	COA in the hands of Transferee	If the Period of holding by Previous owner to be included.
47(xii)	Transfer of land by a sick industrial company which is managed by its workers cooperative.		No.
47(xiii)	Transfer of a capital asset by a firm to a company in the case of conversion of firm in to company.		No
47(xiiia)	Membership right held by a member of recognized stock exchange in India for acquisition of shares and trading or clearing rights acquired by such member in that recognized stock exchange in accordance with a scheme for demutualization or corporatisation.	In case of Shares, the cost of acquisition would be cost of acquisition of original membership of the exchange. Cost of trading & clearing right would be Nil.	

Section 47(xiiiib)

Transfer of assets to a LLP - NO Capital Gain.....

- Transfer of capital asset or intangible asset by a private company or unlisted public company to a Limited Liability partnership or
- any transfer of share or shares held in the company by a shareholder as a result of conversion of the company in to LLP.
- Provided that –
 - All the assets and liabilities of the company are transferred to LLP.
 - All the shareholders become the partners in LLP.
 - Profit sharing ration of partners in LLP is in same proportion as their shareholding in company on the date of conversion.

Section 47(xiiiib)

Contd....

Transfer of assets to a LLP - NO Capital Gain.....

- No consideration or benefit to shareholders other than share of profit and capital contribution in LLP.
- Aggregate of Profit Sharing Ratio of the shareholders in the LLP shall not be less than 50% at any time during the period of five years from the date of conversion.
- The total sales, turnover or gross receipts in business of the company in any of the three previous years does not exceed 60 lac rupees; and
- No amount is paid to any partner out of balance of accumulated profit on the date of conversion for a period of three years from the date of conversion.

Section 47A(4)

Contd....

Exceptions - Cases where transfer would be liable to capital gain.

- If the conditions laid down under Section 47(xiiib) are not complied with.
- The capital gain provisions of Section 45 shall be made applicable, in the previous year in which the requirement therein in are not complied with.

Section 47(xiv)

Transfer on Succession of Sole proprietary by a company - No Capital Gain.

Contd....

- All the Assets and Liabilities are transferred to company.
- The shareholding of the proprietor should not be less than 50% of the total voting power at any time during the period of five years from the date of succession.
- That no consideration or benefit directly or indirectly, other than by way of allotment of shares in the company.

*S. 47A(3) - Exceptions - Cases where transfer***Contd....**
would be liable to capital gain.

- If the conditions laid down under S. 47(xiv) are not complied with.
- The capital gain provisions of S. 45 shall be made applicable, in the previous year in which the requirement therein in are not complied with.

Section 47(xv) & (xvi) Other Transfer - No Capital Gain.....

Contd....

- Section 47(xv) – Any transfer in a scheme of lending of any securities under an agreement or arrangement, which the assessee has entered in to with the borrower of such securities and which is subject to the guidelines issued by the SEBI established u/s 3 of SEBI Act, 1992 or RBI Act, 1934.
- **Section 47(xvi) Any transfer of a capital asset in a transaction of Reverse Mortgage under a scheme made and notified by the Central Government.**
(Amendment made by F.Act, 2008)
- Section 10(43) – any amount received by an individual as a loan, either in lump sum or in installment, in a transaction of reverse mortgage referred to in clause 47(xvi) of section 47.

whether mortgage of property for obtaining a loan under the 'Reverse Mortgage' scheme is transfer within the meaning of the I.T. Act thereby giving rise to CG.

- Sec. 2(47) provides an inclusive definition of 'transfer'. Further, 'transfer' within the meaning of the Transfer of Properties Act includes some types of mortgage. Therefore, a mortgage of property, in certain cases, is a transfer within the meaning of Sec. 2(47) of the I.T. Act. Consequently, any gain arising upon mortgage of a property may give rise to capital gains u/s 45.
- However, in the context of a reverse mortgage, the intention is to secure a stream of cash flow against the mortgage of a residential house and not to alienate the property.
- **Therefore a new clause (xvi) in sec. 47 has been inserted [F. Act, 2008] to provide that any transfer of a capital asset in a transaction of reverse mortgage under a scheme made and notified by the CG shall not be regarded as transfer and therefore shall not attract capital gains tax.**

Note: Reverse Mortgage scheme has been notified vide N. No.93/2008 {S.O No. 2310(E)} dated 30th Sept, 2008.

“Meaning of Slump Sale” - Section 2(42C)

Section 2(42C)

- **Transfer of one or more undertakings**
- **as a result of the sale for a lump sum consideration**
- **without values being assigned to the individual assets and Liabilities.**
- If the values are determined for payment of stamp duty or registration fees—same will not amount to assignment of values to individual assets and liabilities.

*Section 50B- Special provision
for cost of acquisition in case of Slump Sale.*

- Capital Gain from Slump Sale **chargeable in the year of transfer.**
- Undertaking held for less than 36 months – STCG.
- Undertaking held for more than 36 months – LTCG.
- **Net worth of the undertaking shall be deemed to be the COA and COI for the purpose of S. 48 & 49.**
- Certificate of CA to be obtained indicating the computation of net worth.
- Net Worth = Aggregate value of total assets of Undertaking
 - Value of liabilities of such Undertaking.
- Value of assets on account of revaluation of assets to be ignored.
- Value of depreciable asset – WDV of Block as per 43(6)(c)(i)(C) of IT Act, 1961.
- Other Assets – Book value

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- **When a scheme under sections 391 to 394 of Companies Act, 1956 is sanctioned by Court, it is treated as a binding statutory scheme because scheme has to be implemented and enforced but this cannot be a ground to escape tax on 'transfer' of a capital asset as per provisions of Act.**

Fact:

- Settlement Commission passed an order whereby it brought to tax certain amount received by assessee on 'slum sale' under scheme of arrangement from its subsidiary company. Assessee filed instant writ petition contending that scheme of arrangement was sanctioned by High Court u/s 391 to 394 of Companies Act, 1956 and was statutory in nature and character and in such a case, provisions of section 50B would not apply.

Thank You!!!

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