

**An Overview of**  
**Real Estate Transactions**  
**under Income Tax Act, 1961**

**Presentation by**

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## *The Real Estate transaction includes :-*

- ▶ Purchases
- ▶ Sales
- ▶ Development

*of land (both residential and non-residential buildings).*

Note: The word 'Land' includes – the air above and the ground below and any building or structures on it. It covers residential house, commercial offices, trading spaces such as theatres, hotels and restaurants, retail outlets, industrial buildings, factories and also govt. buildings.

### ***Transaction to be reported in AIR....***

Purchase or sale by any person of immovable property valued at 30lakh rupees or more.

# *Taxability Discussed – The parties concerning to Real Estate*

- ▶ The landlords
- ▶ The builders
- ▶ The developers

# Various mode of business for conducting real estate or construction of business

An enterprise can be started as follows:

1. Proprietorship

2. Partnership

3. Companies:

a) Private Companies

b) Public Companies

4. HUF

5. Trusts

6. Co-operative societies

7. LLP's

## *Various Laws Involved in Real Estate Transactions.....*

The Indian Contract Act, 1872

Transfer of Property Act, 1882

The Registration Act, 1908

Special Relief Act, 1963

Urban Land (Ceiling and regulation) Act (ULCRA), 1976

The Land Acquisition Act, 1894

The Indian Evidence Act, 1872

The Indian Stamp Duty Act, 1899

# *Various Laws Involved in Real Estate Transactions.....*

Rent Control Act

Sate Laws Governing Property Tax

The Consumer Protection Act, 1986

The Arbitration & conciliation Act, 1996

Income Tax Act, 1961

The wealth Tax Act, 1957

The Co-Operative Society , 1912

The Multi state co-operative societies Act, 2002

Finance Act in relation to Service Tax

FEMA

SEBI norms for Real Estate Mutual Funds

**Income Tax Issues**  
**Concerning**  
**The Landowner**

Aspects pertaining to Landowner are as under:

- A. Capital gain or Business income
- B. Relevant Statutory provisions of Capital Gain under the Income Tax Act, 1961
- C. Computation of Capital Gain
- D. Exemptions available under the Income Tax Act, 1961



A. Capital gain  
or  
Business income

## A. 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 – 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).*

## 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 (Del)(2007)].*

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

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

## 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] ]

***B. Relevant Statutory provisions  
of Capital Gain  
under  
the Income Tax Act, 1961***

*B. Relevant Statutory provisions of Capital Gain under I T Act, 1961.....*

▶ **Meaning of “Capital Assets”–Sec. 2(14)**

*Any property held by assessee whether or not used for the purpose of business or profession excluding stock in trade, stores or raw materials used for the purpose of business, personal effects like furniture but includes jewellery, paintings, drawings, art work.*



- ▶ FMV of a asset is the value–Sec. 2(22B) – FMV of a capital asset is the value of the capital asset will normally fetch on a sale in an open market when the price is not ascertainable, it is determined in accordance with the rules of the act.
- ▶ Long Term Capital Asset – Sec. 2 (29A) – A capital asset is classified as long term or short term based on period for which the capital asset is held by the assessee. Where a capital asset is held for a period exceeding 36 months the capital asset is classified as a long term asset. Capital asset such as shares, securities, units and bonds held for more than 12 months are classified as long term capital asset.

- ▶ Short Term Capital Asset– Sec. 2(42A)– A capital asset is classified as short term capital asset where it is held by the assessee for a period not exceeding 36 months. In case of capital asset such as shares, securities listed in recognized stock exchange , mutual fund units or zero coupon bonds are classified as short term where they are held for a period not exceeding 12 months.
- ▶ Long Term Capital Gain–Sec.2(29B)– Gain arising from the transfer of a long term capital asset is called long term capital gain.
- ▶ Short Term Capital Gain–Sec.2(42B) – Gain arising from the transfer of a short term capital asset is called a short term capital gain.

## Section 45(2) Capital asset converted into Stock-in-trade

“Notwithstanding anything contained in sub-section (1), the profits or gains arising from the transfer by way of conversion by the owner of a capital asset into, or its treatment by him as stock-in-trade of a business carried on by him shall be chargeable to income-tax as his income of the previous year in which such stock-in-trade is sold or otherwise transferred by him and, for the purposes of section 48, the fair market value of the asset on the date of such conversion or treatment shall be deemed to be the full value of the consideration received or accruing as a result of the transfer of the capital asset.”

- ▶ 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 development, it was entitled to benefit of section 45(2) in respect of aforesaid conversion.

[Vidhyavihar Containers Ltd. v. DCIT 15 Taxmann.com 286 (ITAT-Mum.)  
[2011]

## Taxability of gain on account of transfer of Capital Asset – Sec. 45.....

- ▶ Transfer of capital asset
- ▶ Damage to capital asset
- ▶ Conversion of capital asset into stock in Trade
- ▶ Contribution of capital asset of the partner or member to be firm /AOP/BOI
- ▶ Transfer of capital by way of distribution on dissolution of firm.
- ▶ Transfer of capital asset by way of compulsory acquisition.

## Advance money received–Sec. 51

- ▶ Where there is a transfer of a capital asset, "advance or other money" had been received and retained by the assessee.
- ▶ Such amounts will in effect be added to the value of the capital asset impacting on the ultimate assessment of capital gains. For this purpose, no distinction is made between money received and retained by way of 'advance' and 'other money'. The phrase 'other money' would cover, for example, deposits made by the purchaser for guaranteeing due performance of the contracts and not forming part of the consideration.
- ▶ The monies received on the previous occasions and retained by the vendor/assessee cannot, therefore, be treated as a revenue receipt. Section 51 to the extent stated thus preserve the rule in *Tattersall's case*.
- ▶ In respect of Sec.51, phrase 'other money' covers advance amount received under sale agreement and excess amount forfeited over cost of acquisition is a capital receipt not eligible to tax.

*[Travencore Rubber & Tea Co. Ltd. v. CIT 109 Taxman 250 (SC) [2000]]*

# Issues–Sec 51

## 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 123 ITR 441 (Bom)(1980)]***

- 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 186 ITR 693(Bom) (1990)]***

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

*Relevant Statutory Provision & Issues of*

*Sec. 2(47) of I.T. Act, 1961*

*&*

*53A of Transfer of Property Act, 1882*

Sec. 2(47) – What Transfer means in relation to Capital Asset – Immovable Property

- ▶ 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]



## Contd....

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

# *Judicial Pronouncements*

- ▶ 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)]*.

# *Judicial Pronouncements*

- ▶ Where assessee having entered into a joint venture (JV) for development of a property, contributed a piece of land to be developed by joint venture, it was not a case of transfer of land under section 2(47)

[Vijaya Productions (P.) Ltd. v. ACIT 17 taxmann.com 223 (ITAT-Chennai)(TM) [2012]]

# Judicial Pronouncements

Suresh Kumar D. Shah v. DCIT 16 taxmann.com 324 (ITAT-Hyd.) [2011]

- ▶ Held that
- ▶ Where assessee sold a piece of land which was barren surrounded by rocky mountains and not fit for agricultural operations and purpose of sale of said land was construction of flats thereon, it was to be held that land in question was not an agricultural land.
- ▶ **Section 2(47)** – Assessee transferred certain land to a builder for development purpose. AO took a view that since possession of land was already handed over, said transaction came within purview of sec 2(47). It was apparent from records that assessee had entered into an agreement for development of property and certain rights were assigned to developer who in turn had made substantial payments and, thereupon entered into property.
- ▶ In this circumstances, if transferee had taken any steps in relation to construction of flats, then it was to be considered as transfer within meaning of sec 2(47)(v).

## **Sale / Agreement to Sale / Contract for sale**

- 1) **Sale** – Possession or Execution of Conveyance deed.
- 2) **Agreement to Sale** – Possession should be handed over. [it involves fear of non performance.
- 3) **Contract for sale** – Transfer on terms and conditions being settled between the parties.

## Judicial Pronouncements – Different Situation leading transfer

- 1) Where Conveyance deed is registered – It is the date of execution of registered document and not the date of delivery of possession or the date of registration of document which is relevant.

*[CIT v. Poddar Cement (P) Ltd. & Ors. 226 ITR 625 (SC) (1997)]*

- 2) Where Conveyance deed is not registered – Capital gain on actual Possession.

*[CIT V Geeta Devi Pasari 17 DTR 280 (Bom)(2009)]*

## Meaning of Word Property

- ▶ Property means the highest right to do anything being – Ownership, estates, and interest in Corporeal things and also rights personem capable of Transfer or transmission, especially with reference to transfer or succession and to their capacity of being insured.

*[Cooper (RC) v UOI AIR (SC) 564 (1970)]*

- ▶ Property does not mean merely physical property but also means right, title, or interest in it, if the property is mortgaged or leased than the owner would possess only those rights which are not transferred. The transferee would get the property subject to the rights created by the previous owner in favour of others.

*[CIT v Daksha Ramanlal 197 ITR 123 (Guj) 1992].*

- ▶ Right to obtain conveyance of Immovable property is a capital asset.

*[CIT v. Vijay Flexible containers 186 ITR 693 (Bom) [1990] see also CIT v. Tata Services Ltd. 122 ITR 594 (Bom) [1980]*

## Statutory provision – Sec. 53A Part performance—

- ▶ *“Where any person contracts to transfer for consideration any immoveable property by writing signed by him or on his behalf from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty,*
- ▶ *and the transferee has, in part performance of the contract, taken possession of the property or any part thereof, or the transferee, being already in possession, continues in possession in part performance of the contract and has done some act in furtherance of the contract, and the transferee has performed or is willing to perform his part of the contract,*
- ▶ *then, notwithstanding that where there is an instrument of transfer, that the transfer has not been completed in the manner prescribed therefore by the law for the time being in force, the transferor or any person claiming under him shall be debarred from enforcing against the transferee and persons claiming under him any right in respect of the property of which the transferee has taken or continued in possession, other than a right expressly provided by the terms of the contract:*
- ▶ *Provided that nothing in this section shall affect the rights of a transferee for consideration who has no notice of the contract or of the part performance thereof.”*



## Person who has acquired property under a power of attorney transaction.....

When a person acquired a property under a “power of attorney transaction” by satisfying the conditions u/s 53A of the T.P. Act, then such person is deemed as owner of the property, although he may not be the “registered owner” of the property.

Sec. 53A of the Transfer of Property Act requires the following conditions:

1. There is an agreement in writing between purchaser and seller
2. The purchaser has paid the consideration or he is ready to pay the consideration (*If there is no consideration as in the case of gift then sec 53A of the transfer of Property Act is not applicable*). Actual Payment of consideration is not important. What is important is the fact that the purchaser is ready to make payment whenever the payment becomes due.

*[sushma Rani Bansal Vs. CIT (2007) 165 Taxmann 145 (Del) (Mag.)]*

3. The purchaser has taken the possession of the property. It is enough if transferee has, by virtue of that transaction, a right to enter upon and exercise acts of possession effectively.

*[AAR Vs. Jasbir Singh Sarkaria In re (2007) 164 Taxman 108 (AAR – New Delhi)]*

If the aforesaid conditions are satisfied, the purchaser becomes the deemed “owner” of the property for the purpose of the Income Tax, even if he is not the registered owner of the property.

## Written Agreement is Mandatory u/s 53A of Transfer of Property Act, 1882

- ▶ Unless there is a written agreement, section 53A of Transfer of Property Act will not come into operation; where revenue was unable to prove that assessee had put developer in possession of property by receiving consideration partly or in full and fact remained that there was no sale agreement between assessee and builder and also assessee had not received sale consideration, it could not be held there was transfer of property as contemplated u/s 2(47)(v).

*[CIT v. G. Saroja, 301 ITR 124 (Mad.) [2008]]*

Note: Amendment made in sec. 53A of TP Act, 1882, by which requirement of registration of transfer deed has been indirectly brought on statute need not be applied while construing meaning of 'transfer' with reference to sec. 2(47).

**[Sureshchandra Agarwal v. ITO 15 taxmann.com 115 (ITAT-Mum.) [2011]]**

## Willingness to perform precedes transfer u/s 53A of the Transfer of Property Act .....

- ▶ The handing over of the possession of the property is not the only conditions under section 53A of the Transfer of Property Act.
- ▶ Willingness to perform the obligation by transferee is important
- ▶ When transferee, by its conduct and by its deeds, demonstrates that it is unwilling to perform its obligations, the date of agreement ceases to be relevant.
- ▶ In such a situation, it is only the actual performance of transferee's obligations can give rise to transfer as per section 53A of the Transfer of Property Act.

Ms. K. Radhika v. Deputy Commissioner of Income-tax, Central Circle-2, Hyderabad, [2011] 13 taxmann.com 92 (Hyd.) See also General Glass Co. (P) Ltd. vs. Dy. CIT-108 TTJ (Mumbai) 854.

## *Judicial Pronouncement on Deemed Transfer*

- ▶ Once the possession is handed over to the buyer and consideration is paid – Transfer of immovable property is complete.

*[CIT v. Rajasthan Mirror Mfg. Co. 125 Taxmann 1 (Raj) (2002)]*

- ▶ Possession of land not given to developer of property under property development agreement – Not amount to transfer.

*[Dy. CIT v. Asian distributors Ltd. 70 TTJ 88 (Mum.-Trib) (2001)]*

- ▶ Where the transferee had taken over the possession of plot, constructed the building thereon, paid a sum of Rs.20 lakhs to the assessee in cash and had also undertaken to allot a flat in the building so constructed then the case was covered under section 2(47)(v) accordingly gains arising on such transfer were taxable.– *Vide Bertha T. Almeida v. Income Tax Officer (2012) 44 (II) ITCL 307 (Mum 'B'-Trib)*

- ▶ Property sold and possession given but registration effected later on – Date of transfer to be date of agreement.

*[M. Syamala Rao Vs. CIT 234 ITR 140(AP) (1998) ]*

*Tax incidence*  
*of*  
*Development Agreement*



## Other Issues–Sec. 53A of TP Act, 1882

- ▶ The lease deed was a transaction by way of arrangement having the effect of enabling the enjoyment of immovable property. The transaction in question is clearly a transfer of capital asset and any profit or gain arising out of such transfer would definitely generate capital gains, even if the instrument is not registered by virtue of sec.17(1)(d) of registration Act, 1908 and sec. 107 of the Transfer of Property Act, 1882.

*[CIT Vs. C.F. Thomas 284 ITR 557 (Ker)(2006)]*

- ▶ Assessee in possession of property under agreement to sale – Since 1976.

Sale deed executed in favor of assessee – July 1986.

Sale deed registered – 26/09/1986.

Property subsequently sold – 30/09/1986.

Held: assessee held property since 1976, gain on sale of property assessable as long term capital gains.

*[Madathil Brothers v DCIT 301 ITR 0345 (Mad)[2008]]*

# *Development Agreements*

1. What is a Development Agreement
2. Incidence of capital gains – Development
3. Considerations while executing GPA.
4. Other Issues on Development Agreement

**Note: Conveyance** -A document transferring title to the land from one person to another

# 1. *Development Agreement*

- ▶ Development activities perused by constructing buildings for residential as well as commercial purposes.
- ▶ Developer makes investment in the venture and constructs the building, and the owner of the land obtains certain portion of the project.
- ▶ Developer pays lumpsum amount to land owners to obtain license to enter upon the land and get the power of attorney executed. On completion of the building work the developer receives a substantial portion of the building project as his remuneration – which the developer can sell to derive profit or retain as investment.



## 2. Incidence of capital gains – Development.

- a) The point where the capital gains are deemed to accrue will purely depend on the terms of Joint Development Agreement.
- b) If the possession is not transferred but deferred until the construction is completed by limiting the rights of developer, the liability to capital gains tax will arise in the year in which the developer completes the construction.
- c) Where the agreement is of such nature that possession is given in part performance of a contract, the liability of capital gains tax will arise on the handing over of such possession to the builder.

## Terms of development agreement are relevant

- ▶ *Mere execution of development agreement satisfy all the conditions as are given in Section 2 (47) of the Income Tax Act - NO*

The transfer would not be complete unless the contents of the agreement give an indication that conditions laid down U/s 2 (47) together with provisions of Sec. 53A of the Transfer of Property Act have been fulfilled.

# Relevant Judicial Pronouncement

- ▶ If the terms of the development agreement enables the passing of domain and control of the immovable property by grant of an irrevocable authority or license, then the date of agreement of development will constitute the date of transfer of the capital asset.

*Chaturbhuj Dwarkadas Kapadia vs. CIT 260 ITR 491 (Bom.)(2003).*

- ▶ The assessee had never transferred 100 per cent of the right in land to the builder and in fact only a share in the leasehold land was to be transferred to the builder that is only after completion of the development of the land, and capital gain is rightly calculated by apportioning the sale proceeds between the land and building as per the valuation report submitted by the Government approved valuer.

*[The Statesman Ltd. v. ACIT 295 ITR 0388 I(TAT-Cal) [2007]]*

Irrevocable power of attorney granted followed by possession.

In Jasbir Singh Sarkaria 294 ITR 196 (AAR)[2007]

- ▶ Where the assessee had given an irrevocable GPA not only to develop the plot, but also to book and sell dwelling house units. The possession had to be inferred in the context of the power of attorney, which could not lead to the inference that the developer was only a licensee or an agent of the owner.
- ▶ *“Possession” contemplated by clause (v) of section 2(47) need not necessarily be sole and exclusive possession.*
- ▶ *Transferee is, by virtue of the possession given, enabled to exercise general control over the property so as to make use of it for the intended purpose, the mere fact that the owner has also the right to enter the property to oversee the development work or to ensure performance of the terms of the agreement does not introduce incompatibility.*
- ▶ *Clause (v) will have its full play even in such a situation.*
- ▶ *It is enough if the transferee has, by virtue of that transaction, a right to enter upon and exercise acts of possession effectively pursuant to the covenants in the contract. That amounts to legal possession.*

*If the Development agreement is an agreement for sale*

- ▶ *In Ashok Leyland Finance Ltd. v. Appropriate Authority 230 ITR 398 (Mad) [1998]] it was held that*

If the development agreement is an agreement for sale, the date of possession would determine liability for capital gains.

A development agreement was treated as an agreement for sale in the context of Chapter XX-C - Purchase by CG of Immovable Properties in certain cases of transfer.

*Possession is not transferred but deferred until the construction is completed*

- ▶ With a protective clause stated in the development agreement and with no GPA given to the builder to effect any kind of transfer. Then the date on which the building is completed and share of the developer is handed over. Transfer would be completed and the transaction would be subjected to capital gains tax.

*Order in Smt Vasavi Pratap Chand v DCIT (2004) 89 ITD 73 (Del – Trib) – Clarification on various Aspects*

- ▶ Three owners made a collaboration agreement with developer for developing land and getting flats built on it.
- ▶ Assessee to get 56% of built up area and developer to get 44% of built up area.
- ▶ Assessee sold certain portion of their share i.e. 56%
- ▶ Assessee declared loss taking COA as on 31/03/1987, being the year, (1986–87) in which the Land was received under inheritance.

## Contd....

- ▶ Cost of Acquisition to be taken as on 01/04/1981 as cost of previous owner.
- ▶ Argument of assessee – COA of flats should be taken since assessee has sold flats and not land, since the entire land was already sold when the collaboration agreement entered, hence cost of flats is the value of entire land.
- ▶ Alternative Argument – Property sold was improved property and therefore COA would be COA of 44 % of land plus cost of Improvement incurred.
- ▶ About Cost of 56% – One should assess the market value of land on the date it was released from the ambit of Urban Land Ceiling Act.



DECISION – Entire land was not sold on the day of entering in to land development agreement.

- ▶ Assessee to get 56% of the built up area after construction completed at the cost of the builder and 44 % of retained by builder.
- ▶ As per clauses of development agreement the owner of land forfeited the right to transfer land as and when required in favour of either Society, Company, AOP, firm, buyers or nominees of the assessee or builder in respect 56% share to which they were absolute owners even as per collaboration agreements.
- ▶ Therefore what was transferred under the collaboration agreement by the assessee to the builder was only 44% of the land owned in consideration of 56% of built up area

Decision – Point of time of sale of Land

- ▶ No conveyance deed executed in favour of developer in respect of 44% share.
- ▶ Assessee to transfer land after the possession of built up area.
- ▶ Possession of built up area given in 1991 – 92.
- ▶ There was simultaneous transfer of possession of 44% of land by the assessee to the builder and possession of 56% of built up area by developer to assessee in F.Y. 1991–92 in terms of S. 2(47) of IT Act and S. 53A of TP Act.
- ▶ Hence no transfer on date of collaboration agreement.

Decision – Consideration for which land is transferred

- ▶ Value of 44 % of Land

=

Cost of Construction of 56% of Built up area

=

COA of flats superstructure for assessee.

- ▶ Cost of acquisition of Flats for the purpose of computing capital gain at the time of their sale. – What was Sold was improved asset and therefore COA would include cost of flats as well as that of land.
- ▶ COA of Land = Value of Land as on 01/04/1981.

## *Transfer only after property being came in Existence.*

### *CIT v. Atam Prakash & Sons, 175 Taxman 499 (Delhi) [2008]] Facts*

- ▶ The assessee was 1/6th co-owner of a leasehold property.
- ▶ Entered into an agreement for sale of to 'SSPL' on 24-6-1977.
- ▶ The parties had given up their rights under the said agreement for sale and substituted same with two agreements, namely, agreement to sale and collaboration agreement, both dated 6-10-1981.
- ▶ It was agreed that a multi-storeyed commercial building would be erected, in lieu of the assessee transferring his undivided share in the said property, he would get in return 6,000 square feet of built-up area and three garages along with proportionate open area in the proposed multi-storeyed building out of which 4,000 square feet of the built up area along with two garages and proportionate open area would be conveyed by the assessee to 'SSPL' for a consideration.
- ▶ The AsO assessed capital gains on the said transactions. The Commissioner (Appeals) upheld that order. However, the Tribunal allowed the appeal of the assessee holding that there was no transfer of capital assets in the transactions in question.

# Contd...

- ▶ *that the said property, was neither transferred nor conveyed by the assessee in favour of the SSPL.*
- ▶ *The law in India recognizes only a legal estate.*
- ▶ *What the collaboration agreement envisaged was that SSPL had bought for itself the permission to build a multi-storeyed building SSPL had in a sense merely got a right to occupy the land to construct a building thereupon.*
- ▶ *there was no extinguishment of the rights of the assessee as a perpetual lessee of the land.*
- ▶ *As regards payment of consideration, all payments received by the assessee were to be treated as security and/or advance and could only be appropriated towards the payments envisaged under the sale agreement only upon the collaboration agreement being performed.*
- ▶ *The building never got constructed. There was, thus, no opportunity for the assessee to transfer out of the allocable area of 6,000 sq. ft. and 3 garages along with proportionate open area, a covered area equal to 4,000 sq. ft. and 2 garages along with the proportionate open area, to SSPL.*
- ▶ *The rights conferred upon the parties to the contract would crystallize only if and when the proposed multi-storeyed building would come into existence.*
- ▶ *therefore, no consideration received by the assessee for transfer of property, as such an eventuality would have arisen only if the property was in existence.*

Exceptional Circumstances – Capital gain when registration effected in the name of prospective buyers.

▶ *In R. Vijayalakshmi v. Appu Hotels Ltd. 257 ITR 4 (Mad) [2002]*

The assessee would like to infer transfer on the date on which the developer fulfils his obligation under the agreement by handing over the constructed portion on the part of the plot retained by the owner after completion. There may be intervening registration of undivided interest in land to prospective flat owners, so that liability cannot be postponed beyond the date of registration, at least, for the proportionate part of the plot so registered.

*The agreement is of such nature that possession is given in part performance.*

- ▶ Where the agreement is of such nature that possession is given in part performance of a contract, the liability of capital gains tax will arise on the handing over of such possession to the builder, being deemed section 2(47)(v) r.w.s. 53A of Transfer of Property Act will come in to play.

## Non-registration of document has no effect on transfer

CIT v. S. Rajamannar 329 ITR 0626 [Kar][2010]

### Facts

- ▶ A owned 2 acres and 29 guntas of land in Bangalore. A entrusted to assessee the work of developing the land and converting it into residential sites and to secure prospective buyers.
- ▶ A had agreed to give 30,000 sq. ft. of land to the assessee and assessee became the owner of such land even though regular registration was not effected.
- ▶ Assessee offered the capital gain in accordance with the income earned by selling the 30,000 sq. ft. of land.
- ▶ AO rejected the case of assessee and treated the sale consideration received by the assessee as an income from business.



Decision:

- ▶ The assessee had spent amounts of Rs. 7 Lacs for the formation of lay out and A in turn had delivered 30,000 sq. ft. of land in terms of the contract. Since such activities were not his regular business, the acquisition of land by spending Rs. 7 Lacs, had to be treated as sale consideration and assessee had become absolute owner.
- ▶ When the sale consideration was fully paid by the assessee to A and he had delivered possession to the assessee, the sale was complete in all respects under the provisions of the I.T Act.
- ▶ Though such a thing was not recognised under the Transfer of Property Act. For the purpose of taxation, such transaction ought to be treated as a sale transaction and when the assessee had sold the property, any profit earned out of such transaction had to be treated as a capital gain.

*Power of attorney is executed in consideration of newly constructed premises coupled with some amount*

- ▶ Where power of attorney was executed by assessee in favour of developer on 08/08/1995 transferring property for certain consideration as initial payment and balance in form of newly constructed premises, in such a case capital gains arising from such a transaction was assessable in the assessment year 1996–97 which was relevant to previous year 1995–96 transaction being taken place on 08/08/1995.

***[Mavany Brothers v. DCIT 112 TTJ (Panaji - Trib) 82 (2007)].***

Where substantial consideration paid at the time of entering in to development agreement and legal ownership continued with owner...

- ▶ Where owners (assessee) had entered into an agreement for development of property and certain rights were assigned to developer who in turn had made substantial payment and, consequently, entered upon property and constructed flats, fact that legal ownership continued with owners to be transferred to developer at a future distant date really would not affect applicability of sec. 2(47)(v) and capital gain would arise in year in which agreement for development of property was entered into.

*[Taher Alimohammed Poonawala v. ACIT 124 TTJ 3 87 (Pune) [2009]]*

Where substantial consideration paid at the time of entering in to development agreement and legal ownership continued with owner...

**CIT v. Dr. T.K. Dayalu 14 taxmann.com 120 (Kar.)[2011]**

- ▶ The contents of the agreement dated 26-1-1996, the second supplementary agreement dated 14-10-1998, the third supplementary agreement dated 26-11-1999 and also the affidavit filed by the assessee stated that the actual possession of the schedule property was handed over on 30-5-1996.
- ▶ The question to be decided is the year in which Rs. 45 lakhs received by the assessee under the agreement dated 26-1-1996 as modified by the subsequent agreements to be taxed.
- ▶ It is not disputed that the assessee had received capital gain in the year 1997-98 and having regard to the finding of fact that the possession of the property has been handed over on 30-5-1996, the appropriate assessment year in which the capital gain is to be taxed is 1997-98.
- ▶ There is no merit in the contention of the assessee that since the entire project has been completed in the year 2003-04, the tax on capital gain has to be made in that year.
- ▶ It is now well-settled that the date on which possession was handed over to the developer is relevant and in the instant case, it is not disputed that the assessee has already received a sum of Rs. 45 lakhs in addition to the structures which would enable to put up construction.

*Exceptional Circumstance – Where substantial consideration is not paid at the time of entering into development agreement.*

- Only mearge amount of 10 % paid as earnest money on date of agreement.
- Sec 53A clearly speaks of handing over of possession in part performance.
- Date of agreement not relevant in this case for chargeability of capital gains since only 10 % was paid and it cannot be said that developer had complete control over the property.
- *Unless the developer has existing possession and other controlling rights under the contract ,there is no question of transfer which is necessity for chargeability of capital gains.*

*[ACIT vs. Mrs. Geeta Devi Pasari 104 TTJ 375(Mum)]*

### 3. Considerations while executing GPA to developer for postponing applicability of capital gain

- ▶ Where the landowner and builder execute joint development agreement, if the consideration is receivable in built-up area to be constructed and handed over by the builder to the landowner, it is advisable to avoid the applicability of sec. 53A of the Transfer of Property Act. This can be achieved by mentioning in the agreement “that license is granted to the builder to enter the premises and construct the building. The possession is retained by the landowner, which will be handed over as and when the built-up area is constructed and delivered. By this stipulation, the transfer will take place only in the year in which the built-up area is received and not before.”
- ▶ By this stipulation, the transfer will take place only in the year in which the built-up area is received and not before.
- ▶ A GPA given by owner to developer constitutes only an authority given to a developer to act for and on behalf of and in the name of the owner.

## *Development Agreement under GPA....*

- ▶ Under the GPA/development agreement, the developer should not be given any power to execute sale deed in favour of the prospective buyers.
- ▶ It should be specifically provided that the development and construction and such right of entry is only a license coming within the purview of provisions of section 52 of the Indian Easement Act 1882.
- ▶ The development agreement can be registered under the Registration Act 1908,

# Recent Development

- ▶ SUPREME COURT of India recently in Suraj Lamp & Industries (P.) Ltd. V. State of Haryana [2011] 14 taxmann.com 103 (SC)
- ▶ has held that,
- ▶ SA/GPA/WILL transaction does not convey any title nor create any interest in an immovable property.
- ▶ Immovable property can be legally and lawfully transferred/conveyed only by a registered deed of conveyance.
- ▶ Transactions of the nature of 'GPA sales' or 'SA/GPA/WILL transfers' cannot be recognized a valid mode of transfer of immovable property
- ▶ The courts will not treat such transactions as completed or concluded transfers or as conveyances as they neither convey title nor create any interest in an immovable property. They cannot be recognized as deeds of title, except to the limited extent of section 53A.



## Contd.....

- ▶ However, if the documents relating to 'SA/GPA/WILL transactions' has been accepted and acted upon by the DDA or other developmental authorities or by the Municipal or revenue authorities to effect mutation, they need not be disturbed, merely on account of this decision.
- ▶ Aforesaid observations are not intended to in any way affect the validity of sale agreements and powers of attorney executed in genuine transactions. For example, a person may give a power of attorney to his spouse, son, daughter, brother, sister or a relative to manage his affairs or to execute a deed of conveyance
- ▶ person may enter into a development agreement with a land developer or builder for developing the land either by forming plots or by constructing apartment buildings and in that behalf execute an agreement of sale and grant a Power of Attorney empowering the developer to execute agreements of sale or conveyances in regard to individual plots of land or undivided shares in the land relating to apartments in favour of prospective purchasers. In several States, the execution of such development agreements and powers of attorney are already regulated by law and subjected to specific stamp duty. Aforesaid observations regarding 'SA/GPA/WILL transactions' are not intended to apply to such bona fide/genuine transactions.

4. Other Issues  
on  
Development

Total value of Consideration in case where it is received partly in cash and partly in kind.....

- ▶ Generally the consideration received is two fold i.e., partly in cash and partly in kind i.e., by way of property in the redeveloped property. Hence, it becomes important to ascertain the full value of consideration. Such transactions are thus a combination of sale and exchange.

The Supreme Court held that in case of an exchange, the money's worth of the property received in exchange constitutes the consideration for the property parted in exchange.

[CIT vs. George Henderson and Co. Ltd. 66 ITR 622 (SC) (1967)]

COA of super structure is also to be considered while determining CG in respect to land transfer to developer

- ▶ While calculating the Cost of acquisition of land appurtenant to building transferred to developer, Cost of acquisition of both land and superstructure have to be taken in to consideration for the purpose of computing capital gain event if it is demolished, since the superstructure is no more remain with the assessee.

[Prabhandam Prakash v ITO 22 SOT 58 (ITAT-Hyd.) (2008)]

## *Cost of construction to be consideration*

- ▶ Only the cost of construction of proposed building allotted to the assessee in the ultimately constructed area and not the market value of such share of constructed area has to be reckoned as consideration for the purpose of computation of capital gains.

*[Dy. DITO V. G. Raghuram 39 SOT 406 (Hyd.) (2010)]*

Whether working of capital gain should be restricted to the extent share transferred to developer.....

- ▶ From the agreement, it was seen that to the extent of 4,171 sq. ft. development rights had been transferred in favour of the developer. It was also seen that the total area of the plot was 9,948 sq. ft. Though it was a composite project, at the same time, the area was to be allotted to the assessee and other co-owners had been clearly identified in terms of the location as well as the carpet area.

The assessee had retained 5760 sq.ft. which was in terms of 4,800 sq.ft of carpet area and no right in that area was transferred to the developer.

Therefore capital gain should be calculated only in respect of area transferred to developer i.e. 4,171 sq. ft.

*[Mrs. Arlette Rodrigues v. ITO 10 taxmann.com 235 (Mum.) [2011]]*

# *Development Agreement– Applicability of S. 54*

CIT v K.G. Rukminiamma (2010) 48 DTR 377 (K ar).

- ▶ Assessee entered in joint development agreement with developer.
- ▶ Assessee share – 48 % Built up area – represented by four flats
- ▶ Developer share – 52 % Built up area.
- ▶ Full value of Consideration – Consideration for selling 52% of site was four residential flats representing 48%.
- ▶ Applicability of S. 54 – Four residential flats acquired by assessee could not be construed as four residential houses but only as ‘a residential house’ for the purpose of section 54 in respect of entire value of four flats.

# Issues.....

Mrs. Bertha T. Almeida v. ITO 14 taxmann.com 171 (ITAT-Mum.)  
[2011] –Sec. 2(47), r.w. sec. 48

- ▶ Even if legal title has not passed to transferee, transaction shall still be regarded as transfer where property is handed over in part performance of agreement.
- ▶ Assessee held 10% ownership right in certain piece of land. She agreed to transfer her share along with other co-owners of said land to developer by way of an agreement. As per these agreements assessee received a sum and also became entitled to allotment of one flat in building to be constructed by developer on said land. A O charged amount received from developers under head 'Capital gains'.
- ▶ Since as per agreement, assessee handed over possession of property to developers who in mean time constructed flats thereon and paid a consideration of Rs. 20 lakh in cash to assessee, said transaction would clearly amount to transfer giving rise to charge of capital gain.



# *Issues–Need clarifications*

# *Effect of subsequent information through AIR....*

- ▶ Cases where developer execute transfer his share in property at subsequent date.
- ▶ Information of assessee will be sent to the income tax department through AIR of purchaser.
- ▶ Clarification is yet to be issued about effect of transaction in case of legal owner as per records– since capital gain has already been paid by the assessee either at the time of collaboration agreement or handing over of possession of property to developer.

## Where residential land converted in to commercial complex.....

- Case where residential land is converted into commercial complex due to its location.
- Applicability of exemption available u/s 54 to the extent to the value of share in commercial complex is allotted is yet to be clarified.

# Issues –Need Clarifications

- ▶ Where developer does not complete the construction with in the specified time limit u/s 54.

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

*If the land or property has been held for more than 3 years, the development agreement transaction will result in a long term gain and the landowner can claim benefits U/s 54, 54 EC and 54F.*

# 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.	<ul style="list-style-type: none"> <li>a) If the new asset is transferred within 3 yrs of its acquisition.</li> <li>b) If another residential house is purchased within 2 yrs of transfer of original asset, or</li> <li>c) If another residential house is constructed within 3 yrs of the transfer of original asset.</li> </ul>

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 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)]*

- ▶ 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)]*

# 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)]*

## 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) ]**

**[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] .**

# Issues –Sec. 54

- ▶ 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)]*

# 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)]*

# Section 54– Speaks of purchase.....

## Balraj v. CIT 123 TAXMAN 290 (Delhi) [2002]

- ▶ For the purpose of attracting the provisions of sec. 54, it is not necessary that the assessee should become the owner of the property.
- ▶ Moreover, the ownership of the property may have different connotations in different statutes.
- ▶ If the assessee paid a sum at time of entering into an agreement for purchase of a property within a year from sale of another property, he would be entitled to benefit provided u/s 54 even though there was no registration within said period .

*Where the assessee had substantial domain over new residential house then the deduction u/s 54F is to be allowed ....*

**Chetan Vithal Tupe v. ACIT 12 taxmann.com125(ITAT-Pune) [2011]**

- ▶ Assessee derived income from capital gain on transfer of ancestral agricultural land to MTCDC on 31-3-2005. Sale proceeds were claimed to be adjusted against purchase price of a new residential bungalow which was booked with MTCDC on date of transfer of land itself. Assessee claimed deduction u/s 54F. AO denied deduction on ground that bungalow plan was sanctioned on 6-1-2007 and, thus, construction was not started prior to due date of filing return for assessment year 2005-06 (i.e., 31-7-2005) and, as such, assessee should have deposited consideration received on transfer of land in capital gains scheme in bank which had not been done.
- ▶ Since entire purchase price was adjusted against sale consideration by MTCDC on 31-3-2005 itself and same was utilized by assessee in purchasing new residential house, question of investing in capital gain scheme in bank did not arise.
- ▶ Further, entire purchase price of newly constructed property was paid by assessee to MTCDC on 31-3-2005 itself, i.e., date of transfer of agricultural land in question the assessee had substantial domain over new residential house then the deduction u/s 54F was to be allowed.

*Merely because builder failed to hand over possession of flat within specified period, assessee could be denied benefit of benevolent provision of Sec. 54....*

- ▶ **CIT v. R.L Sood 108 TAXMAN 227 (DELHI) [2000]**
- ▶ Profits on sale of property used for residence.
- ▶ On payment of substantial amount in terms of purchase agreement within four days of sale of his old house, assessee acquired substantial domain over new residential flat within specified period, it could be said that assessee complied with requirements of section 54.
- ▶ Refer: Circulars and clarifications – Circular No. 471, dated 15-10-1986

## 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]]

# 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 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 under section 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 DCA

# *Section 50C*

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

## *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 s 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.1<sup>st</sup> 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 (i) 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.



*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]]*

# Issues – Sec. 50C

- ▶ In absence of any material to effect that assessee had received any amount over and above value on which stamp duty was payable, FVC 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 SG 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 SG 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

- ▶ 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.

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

▶ 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 less than its FMV.

(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,

and where any such reference is made, the provisions of sub-sections (2), (3), (4), (5) and (6) of section 16A, clauses (ha) and (i) of sub-section (1) and sub-sections (3A) and (4) of section 23, sub-section (5) of section 24, section 34AA, section 35 and section 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-section (1) of section 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 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]].*

- ▶ 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]]*

*Accounting aspects*  
*of*  
*Construction Business*



**GUIDANCE NOTE ON RECOGNITION**  
**OF**  
**REVENUE BY REAL ESTATE DEVELOPERS**  
**(REVISED 2012) ISSUED BY ICAI**

## GUIDANCE NOTE ON RECOGNITION OF REVENUE BY REAL ESTATE DEVELOPERS.

- ▶ This Guidance Note recommends principles for recognition of revenue arising from real estate sales by the enterprises engaged in such activities (commonly referred to as ‘real estate developers’, ‘builders’ or ‘property developers’).

## GUIDANCE NOTE ON RECOGNITION OF REVENUE BY REAL ESTATE DEVELOPERS.

**Scope** – It covers all forms of transactions in real estate.

An illustrative list of transactions which are covered by this Guidance Note is as under:

- a) Sale of plots of land without any development
- b) Sale of plots of land with development in the form of common facilities like laying of roads, drainage lines and water pipelines, electrical lines, sewerage tanks, water storage tanks, sports facilities, gymnasium, club house, landscaping etc.
- c) Development and sale of residential and commercial units, row houses, independent houses, with or without an undivided share in land.
- d) Acquisition, utilization and transfer of development rights.
- e) Redevelopment of existing buildings and structures.
- f) Joint development agreements for any of the above activities.

## Contd....

- ▶ The Guidance Note primarily provides guidance on application of percentage of completion method as per Accounting Standard (AS) 7, *Construction Contracts*, in respect of transactions and activities of real estate which have the same economic substance as construction-type contracts.
- ▶ In respect of transactions of real estate which are in substance similar to delivery of goods, AS 9, *Revenue Recognition*, is applicable.

## Contd....

- ▶ Real estate transactions of the nature covered by AS 10, Accounting for Fixed Assets, AS 12, Accounting for Government Grants, AS19, Leases, and AS 26, Intangible Assets, are outside the scope of this Guidance Note.
- ▶ This Guidance Note should be applied to all transactions in real estate which are commenced or entered into on or after April 1, 2012.
- ▶ An enterprise may choose to apply this Guidance Note from an earlier date provided that it applies this Guidance Note to all transactions which commenced or were entered into on or after such earlier date. This Guidance Note supersedes the Guidance Note on Recognition of Revenue by Real Estate Developers, issued by the Institute of Chartered Accountants of India in 2006, when this Guidance Note is applied as above.

**Thank You**

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