• TAX PROVISIONS RELATING TO RECEIPT AND FORFEITURE OF EARNEST MONEY

Introduction

The provisions of section 51 of the Income-tax Act deal with advance money received for transfer of a capital asset. As per the old provisions where any capital asset was on any previous occasion the subject of negotiations for its transfer, any advance or other money received and retained by the assessee in respect of such negotiations shall be deducted from the cost of acquisition of the asset or the WDV or Fair Market Value as the case may be. As such the effect is that if an assessee receives some advance money which is forfeited without the asset being actually transferred, the cost of acquisition in the hands of the assessee gets reduced and as such the amount forfeited gets taxed in the year when the asset is actually transferred in an indirect manner by reducing the cost of acquisition. This is for the obvious reason that though the advance money has been received by the assessee, it cannot be taxed under the head of capital gains in absence of "transfer" which is essential for invoking the provisions of section 45 of the Act. But the provisions of sec 51 have changed w.e.f. 01.04.2014 and the amount forfeited cannot be taxed under any other head as the nature of receipt is capital received. In order to ensure that amount does not escape taxation, section 51 of the Income tax Act 1961 provides for reducing the same amount from the cost of acquisition of the asset. However, a new section 56(2)(ix) was introduced, which provides for taxing the amount so forfeited under Income from other sources. Effectively, therefore the said amendments seek to prepone the taxability of the advance money forfeited to the year of receipt of the money as against the current provision where the same is taxed in an indirect manner in the year of transfer of the capital asset. Since in the year of receipt of advance money, the essential element of transfer is missing, it cannot be taxed as Capital Gains and hence the government has put to tax it as Income from other sources in the year of receipt of the money.

Provisions of Sec. 51 (applicable if advance money received and retained upto 31.3.2014)

Sec. 51. Advance money received: *Where any capital asset was on any previous occasion the subject of negotiations for its transfer, any advance or other money received and retained by the assessee in respect of such negotiations shall be deducted from the cost for which the asset was acquired or the written down value or the fair market value, as the case may be, in computing the cost of acquisition :*

***Provided** that where any sum of money, received as an advance or otherwise in the course of **negotiations for transfer of a capital asset, has been included in the total income of the assessee** for any previous year in accordance with the provisions of clause (ix) of sub-section (2)*

of section 56, then, such sum shall not be deducted from the cost for which the asset was acquired or the written down value or the fair market value, as the case may be, in computing the cost of acquisition.

Analysis:

According to the provisions of Sec. 51, an advance or other **money received and retained by an assessee** against a negotiation for transfer of a capital asset shall be reduced from the cost of acquisition of the capital asset. However, the reduction of the said advance or other money shall be reduced from the cost of acquisition only in the year in which the transfer materializes. It is also to be noted that if the advance money is forfeited by the previous owner, then the same will not be reduced from the cost. In this case, the Indexed Cost of Acquisition of the capital shall be calculated only from the reduced value of cost of acquisition.

Provisions of Sec. 56(2)(ix) [applicable if advance money received and retained on or after 1.04.2014]

Income from other sources.

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

ix) *any sum of money received as an advance or otherwise in the course of negotiations for transfer of a capital asset, if,—*

(a) such sum is forfeited; and

(b) the negotiations do not result in transfer of such capital asset;

Analysis:

Section 56(2)(ix) was inserted by the Finance (No.2) Act 2014, with effect from assessment year 2015-16. It provides for taxability as Income from Other Sources of any sum of money received as an advance or otherwise in the course of negotiations for transfer of a capital asset, if such sum is forfeited and the negotiations do not result in transfer of such capital asset. Section 51 has now been amended to provide that any amount taxed under section 56(2)(ix) shall not be deducted from the cost or written down value.

The effect of the above amendment shall be that the assessee may now take the entire cost of the capital asset for the purpose of cost of acquisition; thereby the tax exposure on the gains computed in accordance with the Act at the time of transfer of capital asset get reduced.

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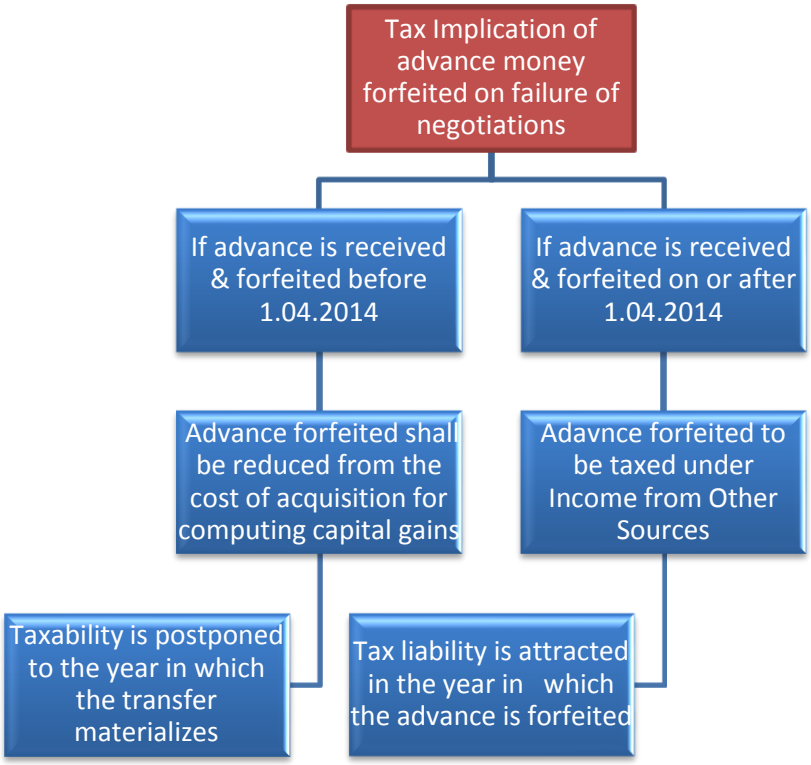
Tax Implication of advance money forfeited on failure of negotiations
If advance is received & forfeited before 1.04.2014
If advance is received & forfeited on or after 1.04.2014
Advance forfeited shall be reduced from the cost of acquisition for computing capital gains
Adavnce forfeited to be taxed under Income from Other Sources
Taxability is postponed to the year in which the transfer materializes
Tax liability is attracted in the year in which the advance is forfeited

Tax benefit to seller due to amendment in Sec.51

Earlier by virtue of section 51 forfeiture of advance received for transfer of capital asset was reduced from the cost of acquisition which result into loss to tax payer at the time of sale of capital asset. Because on sale of capital asset he loose the indexed benefit if the advance was not forfeited. Therefore, to avoid this loophole new section 56(2)(ix) was introduced vide Finance (No.2) Act, 2014 and as per new section cost will remain same and advance will be taxed under "Income from other source".

Example:- Cost of asset purchased on 15.03.2003 for RS. 2,00,000/-, Advance forfeited in A.Y. 2020-21 Rs.100,000/-, Index of F.Y.2002-03 = 105, Index of F.Y. 2020-21 = 301, Final Sale for = Rs. 20,00,000/-, Sale on 16.07.2020

OLD PROVISION		NEW PROVISION	
Income From Capital Gain		**Income From Capital Gain**	
Sales	Rs.20,00,000/-	Sales	Rs. 20,00,000/-
Less: Index Cost (2,00,000-100,000)*301/105	Rs. 2.86,667/-	Less: Index Cost 2,00,000*301/105	Rs. 573333/-
Long Term Capital Gain	**Rs. 17,13,333/-**	**Long Term Capital Gain**	**Rs.14,26,667/-**
		Other Sources Income	
		Forfeiture of advance	Rs. 1,00,000/-
Total Income	**Rs.17,13,333/-**	**Total Income**	Rs.15,26,667/-

Now a question arises that if a person has received an advance for transfer of a Capital Asset before 1.4.2014 and it has been forfeited after 1 .4 .2014, then whether it should be taxed under capital gains or income from other sources?

To resolve this issue, first of all we have to read the provision of section 56(2)(ix)

> any sum of money received as an advance or otherwise in the course of negotiations for transfer of a capital asset, if,—
>
> (*a*) such sum is forfeited; and
>
> (*b*) the negotiations do not result in transfer of such capital asset;

From above, it is clear that to tax any forfeiture of earnest money u/s 56(2)(ix) of the Act, both of the two conditions must be satisfied i.e. sum is forfeited **AND** the negotiations do not result in transfer of such capital asset. In the given case, both these conditions are fulfilled and hence the amount forfeited after 01.04.2014 will be taxable under the head Income from other sources. It does not make any difference whether earnest money has been received before 01.04.2014 or after the amendment in sec. 51 of the Act. The main point to be considered is the year of forfeiture of earnest money. Since the amount was forfeited after 01.04.2014, only at the time when the money was forfeited sec 56(2)(ix) will come in operation and not at the time of receipt of advance. Hence, advance money received before 01.04.2014 and subsequently got forfeited after 01.04.2014 will be taxable u/s 56(2)(ix) under the head Income from other sources.

Illustration 1: Mr. AC purchased a house property in the year 1995 for a sum of Rs. 120 lakhs. He negotiated with Mr. BD to transfer the property and received a sum of Rs. 5 lakhs as advance money. Mr. BD failed to pay the stipulated price fixed for the property on the due date. The sum of Rs.5 lakhs was forfeited on 1stApril 2016 and retained by Mr. AC. Mr AC sold the said property in June 2016 for sum Rs. 250 lakhs For the purpose computation of capital gains, Mr. AC took the cost of the asset at Rs. 120 lakhs. Whether Mr. AC was correct in his approach?

- With effect from 2015-16, the advance money forfeited will taxed under section 56(2)(ix) of the Income Tax Act, 1961 and will not be reduced from the cost asset.

Hence the cost of the asset will be Rs. 120 lakhs.

Illustration 2: Mr. Mehta purchased house property in the year 1991 for sum of Rs. 4,50,000. He negotiated with Mr. Batra to transfer the property and received sum of Rs. 1,00,000 earnest money in the year 1997. Mr. Batra failed to pay the stipulated price fixed for the property on the due date. The sum of Rs. 1,00,000 was forfeited and retained by Mr. Mehta. Mr. Mehta gifted the above property his friend Mr. Oberoi on 1st April 2008 (stamp valuation 25 Lakhs). Mr. Oberoi entered in to sell this property to Mr. R on April 2015 receiving an advance of Rs. 1,00,000. Since Mr. R could not pay the balance consideration the advance money was forfeited. Mr. Oberoi eventually sold the said property March 2017 for a sum of Rs. 100 lakh. Discuss how the advance money forfeited will treated for tax purposes?

- Section 56 of the 1961 Act has been amended by Finance (No. Act, 2014 inserting a new clause in sub-section (2) the aforesaid section. The said new clause provides that where any sum of received advance otherwise in the course of the negotiations for transfer of capital

asset, forfeited and the negotiations do not result in transfer of such capital asset, then, such sum shall be chargeable to under head "Income from other sources". This amendment will apply in relation to the assessment year 2015-16. Consequential amendments have been made to definition of income under section 2(24) and section 51 of the 1961 Act.

As per section 51 of the 1961 Act, any advance or other money received for negotiations for transfer and retained by the assessee shall be reduced from the cost of the asset.

However, the provisions of section 51 will not apply the amount already taxed under Income from other sources.

The effect of the above provisions are the advance money forfeited before 1st April 2014 the same will be reduced from the Cost and is forfeited after April 2014 the same will be taxable under the head Income from Other Sources.

Based on the above, amount received and retained by Mr. Mehta in 1997 will not be taxable. However, will be reduced from the cost, subsequently transfers the asset. In the present problem since Mr. Mehta has subsequently gifted the asset, cost of acquisition will not reduced

Amount received and retained by Mr Oberoi on Ist April 2015 will be taxable under IOS

Since Mr. Oberoi has acquired the asset by way of gift. Cost of acquisition will be as Cost to the previous owner or value considered under Section 56(2)(vii) of the Act depending upon whether the gift is subject to Income from other or not. Since the date of gift is before 1st October 2009, section 56(2)(vii) will not apply. Hence the Cost will be taken as cost to the previous owner, i.e. to Mr. Mehta - Rs 4,50,000. Advance money forfeited by the previous owner will not be reduced from the cost. Advance money forfeited by him will not be reduced from the cost of asset as the same has been taxed under income from other sources.

TAXABILITY OF AMOUNT FORFEITED IN THE HANDS OF BUYER IN CASE THERE IS A DEFAULT BY BUYER

Where the buyer fails to fulfill the negotiations and advance given by the prospective buyer has been forfeited by the seller then such amount is a capital loss for the buyer which has no treatment (a dead loss). This is because he did not acquire any capital asset by giving advance. On forfeiture it cannot be said that the assessee has transferred any capital asset. Also it cannot be said that he has acquired any capital asset against such amount. This will not amount to relinquishment of a right in the asset. Accordingly such amount will not be allowed as a capital

loss under the head capital gains. The same view has been held in **CIT vs Sterling Investment Corporation.Ltd(1980)123ITR441.**

Assessee entered into an agreement with power of attorney holder of land owners and paid certain amount as advance. Sale deed was required to be executed within six months from the date of agreement. As the assessee could not manage fund within the prescribed period, agreement was cancelled and amount paid by assessee was forfeited. Assessee claimed that amount forfeited represented short term capital loss which could be set off against long term capital gains. The tribunal held that essential requirement for charging capital gains (or allowing capital loss) is that a transfer of capital asset should be affected in the relevant previous year. In the instant case, by paying advance money assessee did not get any right which could be termed as capital asset within meaning of section 2 (14), and which was transferred within the meaning of section 2 (47), therefore the assessee claim was not allowable.
Dinesh Babulal Thakkar v Asst CIT (2010) 39 SOT 332(Ahd.)

WHERE AN ASSESSEE GIVES UP THE RIGHT TO CLAIM SPECIFIC PERFORMANCE FOR PURCHASE OF IMMOVABLE PROPERTY, IT IS RELINQUISHMENT OF A CAPITAL ASSET AND THUS TRANSFER:

There may be cases where the seller fails to honor the deal and pays the buyer double the compensation, this will be treated as capital gain because it amounts to relinquishment of a right by the buyer.

Example: The assessee entered into agreement of sale with a vendor to purchase immovable property and Rs. 40,000 was given as advance and balance was agreed to be paid at the time of execution and registration of sale deed. However, after six year, the assessee and the vendor entered into an another agreement in the nature of cancellation of earlier agreement. The vendor paid Rs. 6.00 lakhs to assessee apart from refund of Rs. 40,000 paid as advance. The assessee had a right to insist on specific performance, gave up the right readily and received a certain sum. There can be no doubt that by termination of the earlier agreement and by allowing the vendor to sell the said property to any person at any price, the assessee had given up or relinquished his right of specific performance and as consideration for relinquishing that right, the assessee was paid a sum, therefore, relinquishment of that right was a capital asset and thus, chargeable to capital gains tax. **K.R. Srinath v. Asstt. CIT (2004) 268 ITR 436(Mad)**

Where the assessee had paid the earnest money and acquired right to obtain conveyance of immovable property, such earnest money paid shall be cost of acquisition of such right and if such right is given up, there is a transfer of a capital asset and the compensation received for giving up such right is the consideration price. ***CIT* v *Vijay Flexible Container* (1990) 186 ITR 693 (Bom)**

WHAT IS TAX TREATMENT OF FORFEITURE OF EARNEST MONEY IN THE HANDS OF A REAL ESTATE DEALER IN THE CAPACITY OF A PURCHASER OR A SELLER ?

Treatment of Earnest Money Forfeiture in the hands of a Purchaser

Real Estate being ' Stock in trade' any forfeiture of earnest money paid by the purchaser to seller is a business loss of a trading nature.
It is obvious that business profit cannot be computed without allowing a business loss. A trading loss of business is deductible in computing the profit earned by the business even though there is no specific provision in the Act for allowance thereof. The following judgments support the above said view:

a.) A loss, other than a capital loss which is really incidental to the trade is allowable under section 28 itself on ordinary principles of commercial trading, though it may not be allowable under any of specific clauses in section 37. Refer **Badridas Daga v CIT (1958) 34 ITR 10 (SC)**. Also refer **Madnani Development Corporation Pvt. Ltd. v CIT (1986) 161 ITR 165 (SC).**

b.) If there is a direct proximate nexus between the business operation and the loss, or it is incidental to it, then loss is deductible since without the business operation and doing all that is incidental to it, no profit can be earned Refer **Commonwealth Trust (India) Ltd. v CIT 242 ITR 593 (Ker)**

c.) Loss caused by non-recovery of advances made in course of business, provided it is a trading loss. e.g. advance money paid to a supplier for supply of raw material who does not supply the goods. **CIT v Mysore Sugar Co. Ltd. (1962) 46 ITR 649 (SC).**

d.) Where a builder had given advance for purchase of land and was given partial refund as purchase did not take place, it was held that though conditions for allowance as bad debt are not satisfied, such loss can be treated as business loss. Refer **CIT v Rose Services Apartment India (P) Ltd. (2010) 326 ITR 100 (Del)**

Thus, in view of the above judicial pronouncements in my opinion, forfeiture of earnest money paid by the intending purchaser to the intending seller is an allowable business loss provided intending purchaser is a real estate dealer and he paid this earnest money to purchase the land which he was intending to buy for business purpose.

Treatment of Earnest Money Forfeiture in the hands of a Seller

Forfeiture of earnest money received from the intending purchaser of real estate by the intending seller of a real estate is taxable to him u/s 28 assuming the underlying property was stock in trade for the intending seller. Further while calculating the limit of turnover for Section 44AB, such forfeited amount is required to be considered as per 2014 Guidance Note on Tax Audit issued by ICAI

Unregistered Agreement To Buy Vacant Site With Right To Claim Specific Performance -- Subsequently Sale To A Third Party With Assessee Being A Confirming Party And Receiving Consideration -- Taxability Whether Capital Gains Or Income From Other Sources

The said issue has been dealt with in the case of Chandrashekar Naganagouda Patil v. Dy. CIT [ITA No. 1984/(Bang)/2017, dt. 29-6-2020] : 2020 TaxPub(DT) 2662 (Bang.-Trib.).

Assessee, an individual agreed to buy a plot of land in 2005 from a seller for Rs. 27.6 lakhs and paid advance of 2.75 lakhs and agreed to pay the balance with registration. One of the clauses in the agreement was right to claim specific performance from the seller. The said agreement however was not registered due to reasons unknown. Subsequently after 6 years in 2011 the seller with the consent of the assessee agreed to sell the said plot to a third person for Rs. 82.8 lakhs of which assessee was supposed to receive Rs. 48.3 lakhs and the balance was to go to the seller. This amount was offered by assessee as capital gain and reinvestment benefit under section 54F was also claimed. The assessing officer held that since no right in the property or capital asset arose to the assessee in the said vacant land the receipt should be assessed as income from other sources. Commissioner (Appeals) upheld the same. On higher appeal -Held in favour of the assessee that the income be assessed as long term capital gains.

The ITAT held that the right to specific performance was a right in a capital asset and the definition in section 2(14) of a capital asset was wide enough to cover even a right of specific performance in a vacant land under the phrase called "property of any kind" and since the said right of specific performance was extinguished there was a transfer under section 2(47)(ii) to be held as taxable under capital gains.

The Karnataka High Court has in the case of CIT vs. H. Anil Kumar [(2011) 242 CTR 537 (Kar.)] held that the right to obtain a conveyance of immovable property falls within the expression `property of any kind' used in section 2(14) and consequently it is a capital asset. The Tribunal held that the right acquired under the agreement by the assessee has to be regarded as 'capital asset'. Giving up of the right to claim specific performance by conveyance in respect of an immovable property amounts to relinquishment of the capital asset. Therefore, there was a transfer of capital asset within the meaning of the Act. The payment of consideration under the agreement of sale, for transfer of a capital asset, is the cost of acquisition of the capital asset. Therefore, in lieu of giving up the said right, any amount received constitutes capital gain and it is eligible to tax. It is not necessary that in all such cases there should have been a lis between the parties and in such lis the right to specific performance has to be given up. The Tribunal held that the CIT(A) erred in holding that the assessee did not file a suit for specific performance and therefore cannot claim the benefit of the ratio laid down by the Hon'ble Karnataka High Court in the case of H. Anil Kumar (Supra).The case was remanded to assessing officer for consideration of section 54F benefit.

Forfeiture of Earnest Money by a charitable trust

From the perusal of Section 11, it is clear that terminology used is income and not total income. Section 2(45) deals with total income, whereas the reference in Sec 11 is only for income.
Since the income referred to under Section 11, is not total income under Section 2 (45) many courts have interpreted the same to mean "income derived on commercial principles". The term commercial principle is not defined under the Act. Recourse should be taken to the accounting parlance and the interpretation given by the courts. The question to be answered is that, whether the income is to be computed as per the provisions of the act under Sec 2(45) or under the rules of accountancy.

Since the term used in the section is income and not total income, the rules of accountancy come into play. As per the accepted principles of accounts, the forfeited amount of earnest money being capital receipt cannot be treated as Income as referred in Section 11 .
What one can infer and it is also interpreted by various decisions of the court that the income means that which is left in the hands of the trust after meeting all expenses in earning the same.

As discussed in the above paras, Section 11 refers "income" and not "total income " and hence the provisions of Section 2(45), Section 5, and other sections dealing with computation of income under different heads do not arise and 'Income' is required to be computed as per the commercial principles.

Any profit or gain arising from the transfer of capital asset being property held under trust shall be treated as capital gain. Since such capital gain, whether short-term or long-term, is also part of the income as per section 2(24)(vi), to claim exemption under section 11 the Charitable Trust should also apply income from such capital gain for charitable purposes as per the provisions of **Section 11.**
From the above, it is concluded that any forfeiture of earnest money by a charitable trust is taxable as per the provisions of sec 11 of The Income Tax Act, 1961.

FORFEITURE OF ADVANCE MONEY RECEIVED AGAINST SALE OF RURAL AGRICULTURAL LAND IS NOT TAXABLE U/S. 56(2)(IX)

We know that under Income Tax Act, 1961 there are two types of agricultural lands i.e. urban agricultural land and rural agricultural land. It is to be noted that tax treatment of forfeiture of earnest money in case of agricultural land will depend on the nature of land.

(a) Rural Agricultural land

In this connection, first of all we have to read the provision of section 56(2)(ix)

any sum of money received as an advance or otherwise in the course of negotiations for transfer of a capital asset, if,—

(*a*) such sum is forfeited; and

(*b*) the negotiations do not result in transfer of such capital asset;

From the reading of this section, it is very clear that this section is applicable only in case of any sum of money received as an advance or otherwise in the course of negotiations for transfer of a capital asset. It is to be noted that as per the Section 2(14)(iii) of the Act, Rural agriculture land is not a capital asset and hence the provision of Section 56(2)(ix) are not applicable on the forfeiture of advance money received against the sale of rural agriculture land is not taxable.

(b) Urban Agricultural Land

In case of forfeiture of earnest money for negotiations of urban agricultural land, the forfeited amount will be taxable in the hands of the seller u/s 56(2)(ix) of the Act under the head income from other sources. This amount will be taxable even the seller's only source of income is agriculture.

IMPACT OF SEC 50C, SEC. 43CA AND SEC. 56(2)(x) ON THE AMOUNT RECEIVED AT THE TIME OF AGREEMENT BY ANY MODE OTHER THAN CASH

Stakes in transactions in immovable properties are quite high and so are the tax implications. It is not only perceived but an open secret in India that sale transactions of immovable properties are undervalued leading to leakage of tax revenue causing losses to the Government and unaccounted money is not good for the health of the society in general. Therefore, the restlessness on the part of Government to plug such leakage and attempts by assessees and tax professionals to avoid hardships to genuine assessees. The provisions of Sec. 50C, Sec. 43CA and Sec. 56(2)(x) of the Income Tax Act, 1961 specifically dealing with transactions in immovable properties have been inserted in the Act. As per the provisions of these sections, if any immovable property is sold below the stamp duty value (or circle rate) then such case will fall under Section 50C, Section 43CA, Section 56(2)(x) and double taxation shall apply on the difference in the stamp duty value and transfer price in the hands of seller and buyer. In the existing framework of the Income Tax Act, for the same income or rather the deeming income, both the seller and the buyer of land and/or building, are being taxed and as such the pressing of service of such deeming fiction of taxation both in the hands of the seller and/or buyer of land and/or building is resulting in "Double Taxation".

Under the provisions contained in Section 50C and Section 43CA, in case of transfer of a capital asset/stock-in-trade being land or building or both, the value adopted or assessed by the stamp valuation authority for the purpose of payment of stamp duty shall be taken as the full value of consideration for the purposes of computation of capital gains. These provisions have further been amended to provide relief to the seller who has entered into an agreement to sell the property much before the actual date of transfer of the immovable property and the sale consideration is fixed in such agreement. The government has amended the provisions of

section 50C/43CA so as to provide that where the date of the agreement fixing the amount of consideration for the transfer of immovable property and the date of registration are not the same, the stamp duty value on the date of the agreement may be taken for the purposes of computing the full value of consideration. It is further proposed to provide that this provision shall apply only in a case where the amount of consideration referred to therein, or a part thereof, has been paid by way of an account payee cheque or account payee bank draft or use of electronic clearing system through a bank account, on or before the date of the agreement for the transfer of such immovable property

Taxability in the hand of Seller

- **If the immovable property is considered as a capital asset-**

As per Section 50C, if a capital asset, being land or building or both, is transferred for a consideration below the stamp duty value, then such stamp duty value shall be the deemed value of the consideration for the purpose of calculating capital gain under Section 48. The original consideration paid for the transfer shall not be considered for the purpose of capital gain in the hands of the seller.

However, if the date of an agreement fixing the amount of consideration and the date of registration for the transfer of the capital asset is different then the stamp duty value as on date of agreement may be taken for the purpose of computing full value of consideration. **Provided that the amount of consideration or a part thereof has been received by way of an account payee cheque or account payee draft or use of electronic clearing system through a bank account *or through such other electronic mode as may be prescribed*, on or before the date of the agreement for transfer.**

Finance Act 2020 (applicable from A.Y. 2021-22) has amended the applicability of Section 50C only in those cases where the stamp duty value exceeds one hundred and ten percent (earlier 105%) of the consideration so received or accrued for the transfer of capital asset, being land or building or both.

- **If the immovable property is considered an asset other than capital asset such as stock in trade-**

As per section 43CA, if an asset (other than a capital asset), being land or building or both, is sold below the stamp duty value then such stamp duty value shall be deemed value of the consideration and used for the purpose of computing profit and gains from transfer of such assets.

Finance Act 2020 (applicable from A.Y. 2021-22) has amended the applicability of Section 43CA only in those cases where the stamp duty value exceeds one hundred and ten percent (earlier 105%) of the consideration so received or accrued for the transfer of an asset (other than a capital asset), being land or building or both.

Also, if the date of an agreement fixing the amount of consideration and the date of registration for the transfer of an asset is different then the stamp duty value as on date of agreement may be taken for the purpose of computing full value of consideration

Provided that the amount of consideration or a part thereof has been received by way of an account payee cheque or an account payee bank draft or by use of electronic clearing system through a bank account *or through such other electronic mode as may be prescribed* on or before the date of agreement for transfer of the asset.

Reference to the valuation officer (available to the seller in both option mentioned above)

Where assessee claims before any Assessing Officer that the stamp duty value exceeds the fair market value of the property as on the date of transfer and such stamp duty value 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 Assessing Officer may refer the valuation of the asset to a Valuation Officer.

- If the value assessed by Valuation officer is lower than the stamp duty value, the assessed value shall be considered as the deemed sale price.
- If the value assessed by Valuation officer is higher than the stamp duty value, the stamp duty value remains deemed sale price.

So, if the reference is made to the Valuation officer then it may be possible that the stamp duty value may decrease but it cannot be increased on the basis of the valuation officer.

Taxability in the hand of buyer

As per Section 56(2)(x), if any person receives an immovable property for a consideration which is less than stamp duty value of the property and such excess is more than:-

- the amoun***t*** of fifty thousand rupees and
- the amount equal to ten percent (earlier 5%) of the consideration

then stamp duty value of such property as exceeds such consideration shall be taxable as income in the hands of buyer and chargeable under the head Income from Other Sources.

Section 56(2)(x) shall not apply to any property received:-

- from any relative; or
- on the occasion of the marriage of the individual; or
- under a will or by way of inheritance

Where the date of an agreement fixing the value of the consideration for the transfer of the asset and the date of registration of the transfer of the asset are not same, the stamp duty value may be taken as on the date of the agreement for transfer and not as on the date of registration for such transfer. However, this exception shall apply only in those cases where amount of consideration or a part thereof for the transfer has been paid by way of an account payee cheque or an account payee bank draft or by use of electronic clearing system through a bank account *or through such other electronic mode as may be prescribed*, on or before the date of the agreement for transfer of such immovable property:

Note:- Similar option of referencing to valuation officer (as available under Section 50CA) is also available to the assessee.

Original consideration	SDV on date of Agreement 01/04/20	SDV on date of Registration 10/06/20	Full Value of Consideration	Taxable Income in case of buyer u/s 56(2)(x)	Reason
70,00,000 (Rs. 5 Lakh received by A/c payee cheque on 01/04/20)	**80,00,000**	**90,00,000**	**80,00,000**	**10,00,000**	SDV > 110% of consideration and amount received by A/c Payee cheque on date of Registration
70,00,000	**75,00,000**	**75,00,000**	**70,00,000**	**Nil**	SDV < 110% of consideration
70,00,000 (Rs. 5 Lakh received by A/c payee cheque on 01/04/20)	**75,00,000**	**90,00,000**	**70,00,000**	**Nil**	Amount received by A/c Payee cheque on date of Registration and SDV on date of registration<110% of consideration
70,00,000 (Rs. 5 Lakh received in cash on 01/04/20)	**75,00,000**	**90,00,000**	**90,00,000**	**20,00,000**	Amount received in cash on date of registration. Hence SDV on date of transfer applicable.

Adoption of Stamp Duty Value where token money is received in Cash but subsequent payments are received by cheque/ bank draft/ ECS

Second Proviso to Sec 50C(1) and Sub-section (4) of section 43CA state that the option to adopt stamp duty value on date of agreement shall apply only when the consideration or part thereof has been received by way of an account payee cheque or an account payee bank draft or by use of electronic clearing system through a bank account or through such other electronic mode as may be prescribed on or before the date of agreement for transfer of asset.

Let us consider a case where the assessee may have entered into an agreement for transfer of immovable property on 11.11.2019 and on that date received a sum of Rs 15,000/- in cash towards part of consideration under the said agreement as token money and one week later received further sum of Rs. 9,85,000 by cheque under the same agreement. Can the benefit of sub-section (3) be denied on the ground that the conditions prescribed by sub-section (4) are not satisfied?

- ✓ It appears that the Court in such case may take a liberal view and hold that if it is otherwise evident that the assessee is entitled to benefit of sub-section (3) the same may not be denied only on the ground that the initial amount was received by cash. Possibly the assessee may have to explain the reason for receiving the amount by cash. The intention of prescribing that the consideration should be received by account payee cheque or an account payee bank draft or by use of electronic clearing system through a bank account or through such other electronic mode as may be prescribed appears to ensure that the assessee is getting the benefit only in genuine cases and therefore if the assessing authority is convinced that the assessee's case is bonafide it may hold that the benefit should not be denied only for the reason that token money was received by cash.

Maximum cash amount that can be received for transfer of immovable property:

Sec 269SS restricts payment of specified sum of Rs. 20,000 or more by any mode other than account payee cheque/ account payee bank draft/ or ECS. As per explanation 'specified sum' means any sum of money receivable, whether as advance or otherwise, in relation to transfer of an immovable property, whether or not the transfer takes place. The payment should be for transfer of immoveable property. It is irrelevant that whether the amount is paid as advance for purchase of property or at the time of transfer of property. Therefore, for any transfer of immovable property, cash of only Rs. 19,999 can be received. Any amount received by seller in excess of Rs. 19,999 will lead to penalty u/s 271D. However, if the transaction is between two agriculturists who are having income below the basic exemption limit, the seller can receive up to Rs. 1,99,999 in cash i.e sec 269SS is not applicable in their case, but the provisions sec 269ST of the Act shall be applicable.

Where there is decrease in stamp duty value on date of registration as compared to stamp duty value on the date of agreement

In case stamp duty value as on date of registration has decreased from the stamp duty value as on date of agreement, it would be beneficial to the assessee to adopt the stamp duty value as on date of registration. The word used in this section 43CA, 50C and 56(2)(x) is "may".

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

Further the Ahmedabad Bench of ITAT in case of **Dharamshibhai Somani v. ACIT** has made the following observations which are to the effect that the amendment is optional to the assessee –

"The amendment in Section 50C was brought in to provide relief to the assessee in a situation in which the stamp duty valuation of a property has risen between the date of execution of agreement to sell and execution of sale deed, as is the norm rather than exception, but the real estate market is now traversing through a difficult phase and there can be situations in which there is a fall in the stamp duty valuation rates with the passage of time. Such a situation has actually arisen in many places in the country, such as in Gurgaon, New Delhi and even in Dehradun and some other places. It is therefore possible that, at first sight, first proviso to Section 50C may seem to work to the disadvantage of the assessee in certain situation in the event of the word `may' being construed as mandatory in application, but then one cannot be oblivious to the fact that this proviso states that "the value adopted or assessed or assessable by the stamp valuation authority on the date of agreement may be taken for the purposes of computing full value of consideration for such transfer (emphasis supplied)" making it clearly optional to the assessee and that in any event, what has been brought by the lawmakers as a measure of relief to the taxpayers cannot be construed as resulting in a higher tax burden on the tax payers"

Therefore, it is not mandatory for assessee to adopt stamp duty value as on date of agreement even if payment is by specified mode. The law has given option to the assessee and has not made it mandatory to take value as on date of agreement. It may be concluded that the assessee can take lower of the stamp duty values as assessable value, provided it is not lower than the actual consideration.

Applicability of Stamp Duty Value on the Date of Agreement, when Earnest Money is Received by Book Adjustments

The provisions of sec 50C and sec 43CA clearly provide that if an assessee intends to adopt stamp duty value as on date of agreement, amount of consideration should be received by way of an account payee cheque or account payee bank draft or by use of electronic clearing system through a bank account or through such other electronic mode as may be prescribed, on or before the date of the agreement. The payment by book adjustment or journal entry is not as per the specified modes. Therefore, where the consideration on or before date of agreement is received by book adjustment, the benefit of adoption of stamp duty value on date of agreement cannot be availed. In case where the seller of the property receives another property in consideration and payment is not received by account payee cheque/ account

payee bank draft/ ECS, the benefit of adoption of stamp duty value on date of agreement u/s 50C,43CA and 56(2)(x) of the Act shall not be available.

Receipt of Earnest Money and applicability of sec 269SS in case of Agriculturists

Sec 269SS imposes restrictions on acceptance of cash loans/ deposits/ specified sums in excess of Rs. 20,000

The proviso to sec 269SS provides "*Provided further that the provisions of this section shall not apply to any loan or deposit or specified sum, where the person from whom the loan or deposit or specified sum is taken or accepted and the person by whom the loan or deposit or specified sum is taken or accepted, are both having agricultural income and neither of them has any income chargeable to tax under this Act."*

It specifies that acceptance of deposit/ loan /specified sum shall not attract provisions of sec 269SS where both the parties are agriculturists and both have income below basic exemption limit

Example: Mr. Lal Singh purchased an agriculture land for Rs. 1,80,000 in cash from Mr. Nijjar Singh. Both of them are agriculturists and none of them have income exceeding the basic exemption limit. Whether sec 269SS be applicable on them and whether penalty u/s 271D will be imposed on them?

Whether the answer will remain same if the land is other than agriculture land?

Whether the answer will remain same if land is purchased for Rs. 5,00,000?

- Sec 269SS deals with receipt of specified sum. Explanation to the section provides the meaning of specified sum *"means any sum of money receivable, whether as advance or otherwise, in relation to transfer of an immovable property, whether or not the transfer takes place."* It covers not only advance related to immoveable property, but also money received at time of transfer of property.

However, as both Mr. Lal Singh and Mr. Nijjar Singh are agriculturists and both have income below basic exemption limit, sec 269SS shall not be applicable on them. Mr. Nijjar Singh have received 'specified sum' other than account payee cheque/ draft or ECS. But this will not amount to violation of sec 269SS and hence, penalty u/s 271D shall not be imposed.

The answer would remain same even if the land is other than agriculture land because the exemption provided is not related to type of property. Rather, the exemption is for the agriculturists. Therefore, sec 269SS will not be applicable in this case.

If the consideration for the land is Rs. 5,00,000 the answer will still remain same. However, in this case sec 269ST will be applicable.

Sec 269ST provides that

Provided that the provisions of this section shall not apply to—

(ii) Transactions of the nature referred to in section 269SS;

Sec 269ST is not applicable on the transactions which are covered by sec 269SS. The transaction between two agriculturists who are having income below taxable limit is not covered by sec

269SS and hence sec 269ST shall be applicable on it.
As cash received by Mr. Nijjar singh exceeds Rs. 2,00,000, provisions of sec 269ST are violated. Penalty amounting to Rs. 5,00,000 shall be imposed u/s 271DA.

What treatment would be given in the hands of the assessee to the amount forfeited by an assessee out of the advance received who was selling his property but the deal was stuck and which deal was renegotiated and ultimately sold to the same person but the amount forfeited on earlier occasion was not refunded? Whether such forfeited amount is taxable and if yes, under which head of income?

To resolve this issue, first of all we have to read the provisions of sec 56(2)(ix) of the Act.
56.(2) *In particular, and without prejudice to the generality of the provisions of sub-section (1), the following incomes, shall be chargeable to income-tax under the head "Income from other sources", namely :—*

ix) *any sum of money received as an advance or otherwise in the course of negotiations for transfer of a capital asset, if,—*

(a) such sum is forfeited; and

(c) the negotiations do not result in transfer of such capital asset

From the perusal of the above section, it is to be noted that there are two conditions to be fulfilled simultaneously for the application of this section.
I. The sum is forfeited AND
ii. negotiations do not result in transfer of such capital asset
In order to tax the forfeiture money under the head income from other source, fulfillment of both the conditions is necessary. If the assessee fulfills any one of such conditions, then such amount will not be taxable u/s 56(2)(ix) of the Act. In the present case, the assessee has forfeited the amount of earnest money , but the capital asset has been transferred ultimately. In this case the amount forfeited will be treated as part of sale consideration and will be put to tax u/h capital gains.

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