TDS Obligations in case of Real Estate Transactions

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Preamble and Rational behind inserting Section 194-IA:

Under section 195, on transfer of immovable property **by a non-resident**, tax is required to be deducted at source by the transferee. However, prior to 01-06-2013 there being no such requirement on transfer of immovable property by a resident except in the case of compulsory acquisition of certain immovable properties u/s 194LA, Finance Act, 2013 has inserted new section 194-IA to introduce TDS on consideration on transfer of immovable properties **by a resident transferor.**

The objects of this as explained by Explanatory Memorandum are as under:

"There is a statutory requirement under section 139A of the Income-tax Act read with rule 114B of the Income-tax Rules, 1962 to quote Permanent Account Number (PAN) in documents pertaining to purchase or sale of immovable property for value of ` 5 lakh or more. However, the information furnished to the department in Annual Information Returns by the Registrar or Sub-Registrar indicate that **a majority** of the purchasers or sellers of immovable properties, valued at ` 30 lakh or more, during the financial year 2011-12 **did not quote or quoted invalid PAN** in the documents relating to transfer of the property. In order to have a reporting mechanism of transactions in the real estate sector and also to collect tax at the earliest point of time, it is proposed to insert a new section 194-IA .."

The Finance Minister in his speech explained the objects of new section 194-IA as under:

"145. Transactions in immovable properties are usually undervalued and under reported. **One-half** of the transactions do not carry the PAN of the parties concerned. With a view to improve the reporting of such transactions and the taxation of capital gains, I propose to apply TDS at the rate of one per cent on the value of the transfer of immovable property where the consideration exceeds ` 50 lakhs. However, agricultural land will be exempt."

Section 194-IA:

This section was made applicable from 1.6.2013. Where the **'immovable property'** was acquired before 1.6.2013 but any instalment has been paid on or after 1.6.2013 TDS will have to be deducted subject to satisfaction of other conditions.

Any person, being **a transferee**, responsible for paying (other than the person referred to in section 194LA, relating to compensation in case of compulsory acquisition of property) **to a resident transferor any sum** by way of consideration for **transfer of any immovable property** being any land (other than agricultural land) or any building or part of a building shall be liable to deduct tax **@ 1%** at the time of credit of such sum to the account of the transferor, or at the time of payment of such sum in cash or by issue of a cheque or draft or by any other mode, whichever is earlier.

Provision Illustrated:

TDS on any sum by way of consideration for transfer of any immovable property is required to be deducted by the transferee on the total amount in case the value of the property sold is more than Rs.50 Lakhs. For example, if the property sold is worth Rs.90 Lakhs, the TDS would be deducted on Rs.90 Lakhs and not on Rs.40 Lakhs. TDS on property in this case @1% would be Rs.90,000.

No surcharge or health and education cess shall be added to the above rates. Hence, tax will be deducted at source at the basic rate. The rate of TDS will be 20% in all cases, if PAN is not quoted.

Assume in the above example assume out of Rs 90 Lakhs, Rs 70 Lkahs have been paid before 01-06-2013, then TDS is to be deducted only on Rs 20 Lakhs.

While this position may appear to be quite obvious interpretation of the provision, if an authority is required for this proposition a reference can be made to the order dated 3rd June, 2015 of the Karnataka High Court while deciding the Writ Petition in the case of Shubhankar Estates Private Limited vs. The Senior Sub-Registrar, The Union Bank of India and the Chief Commissioner of Income-tax (Writ Petition No. 57385/2013). The Karnataka High Court in this case directed the Registrar to complete the registration without insisting on the deduction of tax at source and to release the document to the petitioner. The Court has, in para 5 of the order, held as under – "5. In that light, if the provision contained in Section 194-IA as extracted above is noticed, the obligation on the transferee to deduct 1% of the sale consideration towards TDS had come into effect only on 1.6.2013. If that be the position, as on 2.3.2012 when the petitioner in the instant case as the transferee had paid the amount to the transferor, there was no obligation in law on the petitioner to deduct the said amount. If this aspect of the matter is kept in view, even though the provision had come into force as on the date of presentation of the sale certificate for registration, the petitioner having parted with the sale consideration much earlier, was not expected to deduct the amount and produce proof in that regard to the Sub-Registrar. It is no doubt true that in respect of the said amount the third respondent would have the right to recover the taxes due. But, in the instant case, the communication as addressed from the third respondent to the first respondent could not have been held against the petitioner in the circumstances stated above. In the peculiar circumstances of the instant case, where the petitioner being an auction purchaser had paid the entire sale consideration much earlier to the provision coming into force, the endorsement dated 4.12.2013 requiring the petitioner to deduct the income-tax and indicating that the registration would be made thereafter cannot be sustained."

Transferee:

The section applies even to a non-resident buyer or even to a buyer who is an agriculturist. Other conditions being satisfied, **the section will apply even when the purchaser / transferee is a family member / relative of the seller / transferor. However, the purchaser / transferee should not be a person referred to in section 194LA.** If the purchaser / transferee is a person referred to in section 194LA, such a person is not required to deduct tax under this section.

Scenario where the Provision is not applicable:

In the following cases tax is not to be deducted at source under section 194-IA:

a. The immovable property transferred is a rural agricultural land.
b. The immovable property has been compulsory acquired under any law.
c. The total amount of consideration for the transfer of immovable property is less than Rs.50,00,000/-
d. Where the transferor is a Non-Resident. In this case section 195 will be attracted.

Meaning of Immovable Property:

The terms have been defined at various places.

Section 194-IA of The Income Tax Act, 1961

"Immovable property" **means** any land (other than agricultural land) or any building or part of a building ~~situated in India~~

Section 269UA of The Income tax Act, 1961

"Immovable property" means—

i. any land or any building or part of a building, and includes, where any land or any building or part of a building is to be transferred together with any machinery, plant, furniture, fittings or other things, such machinery, plant, furniture, fittings or other things also.

Explanation.—For the purposes of this sub-clause, "land, building, part of a building, machinery, plant, furniture, fittings and other things" include any rights therein ;

ii. **any rights in or with respect to any land or any building** or a part of a building (whether or not including any machinery, plant, furniture, fittings or other things therein) which has been constructed or which is to be constructed, accruing or arising from 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 of whatever nature), not being a transaction by way of sale, exchange or lease of such land, building or part of a building ;

Section 3(26) of General Clauses Act, 1897

"Immovable property" shall include land, **benefits to arise out of land**, and things attached to the earth, or permanently fastened to anything attached to the earth;

Based on above. one can conclude that the definition of Immovable Property as per Section 194-IA is a **restrictive definition** and very specific with its intent and not an inclusive definition. The above definition is also significantly different from the definition of immovable property under Section 269UA (d) r/w Section 2(47) (v) and (vi) of the Income Tax Act wherein the term immovable property would include rights in or with respect to such immovable property

Therefore, there would be no requirement of deducting Tax at Source under section 194-IA on payments made by a transferee to a **'Confirming Party',** as he is **not the transferor** of "immovable property" as defined under section 194-IA.

Further it may be noted that in Dy. CIT v. Tejinder Singh [2012] 19 taxmann.com 4/50 SOT 391 (Kol. - Trib.), the Tribunal held that the phrase 'land or buildings or both' will not include rights in land or buildings or both such as tenancy rights. In ITO v. Yasin Moosa Godil [2012] 20 taxmann.com 424 (Ahd. - Trib.), it was held that transfer of 'booking rights' in a flat is not transfer of 'land or buildings or both'. It appears that transfers of interest as above shall not attract TDS.

In the case of **Shree Laxmi Estate (P.) Ltd. [2019] 108 taxmann.com 195 (Mumbai – Trib)**. It washeld that the provisions of section 43CA are applicable only when there is transfer of land or building or both. **In the instant case, neither of those had happened pursuant to registration of agreement with the stamp duty valuation authorities. In respect of allotment of offices made prior to 31-3-2013, it is found from the documents enclosed in the paper book that the assessee and the prospective buyer of flats had specifically agreed that till such time the agreement of sale is executed and registered, no right is being created in favour of the flat buyer and that the allotment letter is just a confirmation of booking subject to the execution of the agreement which is to be drafted at a later point of time. The said allotment letter also specifies that the relevant office has been allotted to the flat buyer with rights reserved to assessee to amend the building plan as it may deem fit.** Accordingly, the flat buyer is bound to accept unconditionally and confirm that any kind of increase or decrease in the area of the said office or shift in the position of the said office, if arises, due to amendment in the plan etc. and in case of variation of the area, the value of the office shall be proportionately adjusted. All these documentary evidences clearly go to prove that the assessee had not completed the construction of the office during the relevant year. It could also be inferred that pursuant to registration of agreement with the stamp duty valuation authorities, a right is created in favour of the flat buyer. Hence what the assessee had transferred pursuant to registration of the agreement was only the rights in the flat/office (which is under construction) and not the property *per se*. Hence it could be safely concluded that there was no transfer of any land or building or both by the assessee in favour of the flat buyers pursuant to registration of the agreement in the year under appeal. Hence the provisions of section 43CA cannot be made applicable to the same.

Where assessee held mere **'Kashtkar' right** in a land allotted by State Government, it could not be equated with ownership of land and, thus, in case of sale of said piece of, land, long term capital gain could not be calculated by invoking deeming provisions of section 50C. Tara Chand Jain [2015] 63 taxmann.com 286 (Jaipur - Trib.)

The section **does not mention** that the **immovable property should be situated in India**. Therefore, a literal interpretation would be that the immovable property could be situated any where may be in India or may be outside India. Further, the term **`agricultural land' has been defined to mean agricultural land situated in India.** The fact that agricultural land in India is excluded from immovable property could be understood in two ways – one that from the immovable property in India exclusion is to be made of agricultural land in India and the other could be that from the immovable property **wherever situated** only the agricultural land in India is excluded. Thus, two interpretations are possible. However, if a view is taken that the section applies even in respect of immovable property situated outside India then the position will be that a buyer who is outside India and who is neither a citizen of India nor a resident of India who is buying immovable property located outside India from a resident of India, will be required to deduct income-tax under the provisions of the Act. **Therefore, it would mean that it is expected of every person dealing with a resident of India to be aware of the provisions of the Indian laws.** Assuming that such a buyer is aware of these provisions and decides to comply with the provisions of this section, he will have to obtain a PAN so as to be able to make payment of the amount of TDS. **A question would arise as to whether the Government of India can cast an obligation on a non-resident to deduct tax from payments made by him for purchase of a property which is situated outside India.** The only nexus which such a transferor has with India being that he is buying immovable property from a person

who is a resident of India. In case of default in complying with the provisions of this section, the buyer would be regarded as an assessee-in-default and would be liable to pay interest and penalty as well. Such an interpretation may not be upheld by Courts. **Therefore, it appears that the section would apply to only immovable property situated in India.**

Agricultural land:

'Agricultural land' means agricultural land in India, not being a land situate in any area referred to in items (a) and (b) of section 2(14)(iii).

Items (a) and (b) of section 2(14)(iii) are as under:

"Agricultural land situate—

> **in any area which is comprised within the jurisdiction of a municipality** (whether known as a municipality, municipal corporation, notified area committee, town area committee, town committee, or by any other name) or a cantonment board and which has a population of not less than ten thousand; or
> in any area within the distance, measured aerially,—
> not being more than two kilometres, from the local limits of any municipality or cantonment board referred to in item (a) and which has a population of **more than ten thousand but not exceeding one lakh**; or
> not being more than six kilometres, from the local limits of any municipality or cantonment board referred to in item (a) and which has a population of **more than one lakh but not exceeding ten lakh**; or
> not being more than eight kilometres, from the local limits of any municipality or cantonment board referred to in item (a) and **which has a population of more than ten lakh.**

Meaning of Consideration:

The Finance (No. 2) Act, 2019 has amended the Explanation to section 194-IA to provide that the term "consideration for transfer of any immovable property" shall **include** all charges o**f the nature of:**

a. club membership fee,
b. car parking fee,
c. electricity and water facility fees,
d. maintenance fee,
e. advance fee, or
f. any other charges of similar nature,

which are incidental to transfer of the immovable property.

In the context, the definition of consideration for transfer of any immovable property **is inclusive** and it includes **'all charges of the nature of ……';** therefore, it would include all charges similar in nature which are specifically included in the definition**. 'Of similar nature'** could mean **charges having some resemblance but not same**.

Having regard to the object, it can be said that the definition seeks to cover:

a. Price paid or payable for the transfer of immovable property;
b. Chargers for additional facilities
c. Other Charges such as Processing fee, preference charges, external development charges, , fire fighting charges, generator charges refer **Praveen Gupta [2012] 20 taxmann.com 308 (Delhi) (ITAT)**

Thus it can be concluded that along with the transfer of immovable property, if the transferee makes any other payment as consideration for or enjoyment and use of the property including the common property and other facilities/amenities and benefits which may be conferred, such payment or consideration would be part of the consideration for transfer of immovable property.

This definition has been inserted by the Finance (No. 2) Act, 2019, w.e.f. 1-9-2019. As this section does not contain any provision as in other sections falling under Chapter XVII-B where TDS is required to be deducted even when the amount is credited to suspense account or any other account and further, the transferee may not be required to keep books of account, so he may not credit the sum to the account of transferor. However, the obligation to deduct tax cannot be postponed beyond date of payment of consideration. Therefore, it appears that even if the transaction is completed before 1-9-2019, if the account of the transferor is not credited in the books of transferee, then the TDS is required to be deducted under the amended provision in respect of the sum payable on or after 1-9-2019 as consideration for transfer of immovable property.

Multiple buyers vs Multiple Sellers:

One Seller and Multiple Buyers

Honourable Delhi ITAT in the case of Vinod Soni v ITO (2019) 101 taxmann.com 190 (Del - Trib) has held that where assessee purchased an immovable property alongwith three other members of family for Rs.1.50 crores, in view of fact that share of each co-owner came to Rs.37.50 lakhs which was under threshold limit prescribed by section 194-IA, assessee was not required to deduct tax at source while making payment in question.

In this case, the Honourable tribunal Observed that provisions of section 194-IA (2) of the Act state that **" no deduction under sub-section(1) shall be made where the consideration for the transfer of an immovable property is less than fifty lakh rupees".** The Tribunal further observed as under;

"The law cannot be interpreted and applied differently for the same transaction, if carried out in different ways. The point to be made is that, the law cannot be read as that in case of four separate purchase deeds for four persons separately, section 194-IA was not applicable, and in case of a single purchase deed for four persons section 194-IA will be applicable."

Finally the tribunal gave its verdict in favour of the Assessee.

One Buyer and Multiple Sellers:

Honourable Jodhpur ITAT in the case of M/s. Oxcia Enterprises Private Limited, ITA No.291/Jodh/2018 has held that the sale consideration has to be divided equally into two by virtue

of sec. 46 of the Transfer of Property Act which prescribed that where immovable property is transferred for a consideration by persons having distinct interest therein, the transferors are, in the absence of a contract to the contrary, entitled to share in the consideration equally. So, in this case, since there is no contract to the contrary could be pointed out by the Ld. DR for Revenue, in this case consideration for each transferor comes to Rs.30,06,000/- each, which is below the prescribed limit of Rs.50 lacs given by the statute as aforesaid and, therefore, in the light of the same, we are of the opinion in the facts as discussed, supra, that the provisions of sec. 194- IA of the Act are not applicable in the instant case and, therefore, provisions of section 194-IA of the Act are not attracted.

However at this stage one need to consider the Provisions of Section 230A which has been Omitted by Finance Act, 2001 (w.e.f. 1-6-2001) however the language of Section 230A and judgments delivered in relation to Section 230A are important which are discussed hereunder;

Section 230A in brief:

Section 230A provided that a Registering Officer appointed under the Registration Act, 1908 shall not register any document that purports to **transfer any property valued at Rs. 5 lakhs or more unless Income Tax Clearance Certificate issued by the Assessing Officer** of the transferor of such property is furnished. The said section has been deleted with effect from 1-6-2001. Accordingly, on or after 1-6-2001, it is not necessary to obtain such tax clearance certificate for the purposes of the Act.

The Madras High Court in the case of N.C. Rangesh v. Inspector-General of Registration [1991] 54 Taxman 12 after analysing the scope and interpretation of section 230A of the Act held that **it is only with reference to that value that the income-tax clearance certificate could be insisted upon.** The Madras High Court relied upon certain decisions of the High Courts which held similar view in the sense that **the value of each owner was more relevant in ascertaining the value of the transaction**. The similar issue came before **Honourble Gujarat high Court** in the case of Smt. Varshaben Bharatbhai Shah in relation to pre emptive purchase in relation to an immovable property situated situated in Ahmedabad. In this case the second and third respondents entered into an agreement to sell to the first respondent immovable property situated in Ahmedabad for a sum of Rs. 47 lakhs. The appropriate authority passed an order of pre-emptive purchase of the said property on the ground that the apparent consideration was less than the market value by 15 per cent or more. Filing a writ petition, **it was contended that what was transferred by the second and third respondents was their equal half share in the immovable property. The High Court, following the decision of the Madras High Court in the case of K.V. Kishore v. Appropriate Authority [1990] 51 Taxman 478 /[1991] 189 ITR 264 , held that what was agreed to be transferred was the individual undivided share in the immovable property and the value of each such share was less than Rs. 25 lakhs. The High Court held that the transferors were co-owners and as each co-owner was getting an apparent consideration which was less than the limit fixed at Rs. 25 lakhs, provisions of Chapter XX-C were not attracted**. The Honourable Supreme Court has reversing the judgment of Honourble Gujarat high Court has held that **what has to be seen for the purposes of attracting Chapter XX-C is what is the property which is the subject-matter of transfer and what is the apparent consideration for such transfer. This has to be seen in the real light with due regard to the object of the Chapter and not in an artificial or technical manner**. If the apparent consideration for the

transfer is more than the limit prescribed for the relevant area under rule 48K, what has then to be seen is whether the apparent consideration for the property is less than the market value thereof by 15 per cent or more. If so, the notice for pre-emptive purchase can be issued and it is then for the parties to the transaction to satisfy the appropriate authority that the apparent consideration is the real consideration for the transfer. Refer **Smt. Varshaben Bharatbhai Shah [2001] 115 Taxman 483 (SC)**

Though the provisions dealing with acquisition of property by appropriate authorities stood deleted with effect from 1-6-2001 by the Finance Act 2001 the principles(highlighted above) enunciated by the Supreme Court in the case of *Smt. Varshaben Bharatbhai Shah* (*supra*) have to be applied to the purpose for which provisions of section 194-IA have been enacted with effect from 1-6-2013. The purpose of introducing this section is to see that taxes are not avoided or understated in real estate transactions. Moreover, sub-section (2) of section 194-IA reads as under-

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

The section refers to an immovable property, which means that individual shares have no relevance as observed by the Supreme Court in the case of *Smt. Varshaben Bharatbhai Shah* (*supra*).

In the light of the above discussion it is submitted, with respect, that the decision rendered by the Delhi Bench of ITAT in the case of Vinod Soni (supra) requires reconsideration by a Special Bench.

In case of more than 1 buyer/1 seller, Form 26Q has to be filled in separately for each buyer-seller combination. In case of 1 buyer and 2 sellers - 2 forms have to be submitted, and in case of 2 buyers and 2 sellers - 4 forms have to be submitted for their respective share in property. For example: If there is 1 buyer (B) and 2 sellers (S1 and S2 having share 1:1) and the value of property is Rs. 60 Lakhs, then 2 Forms 26Q will be filed between B and S1 and B and S2 amounting to Rs. 30 Lakhs each.

Acquisition through Loan:

Where the lender makes the payment of the loan amount directly to the seller, he may remit 99% of the loan amount directly to the lender and balance 1% can be given to the buyer who will deposit the TDS. Alternatively, the lender may make the entire payment of the loan to the seller and the TDS may be deposited by the buyer himself.

Payment in Instalments:

The provision of Section 194-IA would apply even to payment of consideration in instalments. The argument that the Seller and Buyer do not have the status of a “Transferor” and “Transferee” till the point of transfer, is not tenable and may not hold before judicial authorities.

The credit for the TDS on instalments will be taken by the Transferor only in the year in which the income on which tax was deducted at source would be offered to tax as per Section 197 r.w. Rule 37 BA(3).

Exchange:

It is significant to note that Section 194-IA refers to **"any sum by way of consideration"** and further refers to "credit of **such sum** to account of the transferor" or "at the time of payment of **such sum**". The qualifying word appears to be "sum". It is to be noted that the Supreme Court has in the case of **H. H. Sri Rama Verma v CIT (1990) 187 ITR 308** has held that the word **"sum"** refers to the amount of money paid taking the above analogy into consideration it could be well argued that payment of consideration in any other mode other than through a sum of money would be outside the purview of Sec 194-IA.

Section 194-IA vis as vis Section 45(3) and Section 45(4):

Scenario referred to in Section 45(3):

Revenue may forward following arguments:

a. Definition of Person as given u/s 2(31) includes Firm. Hence Firm is a separate assessee.
b. When a partner brings in his immovable property as a capital contribution to the firm, the said immovable property becomes the firm's property under the explicit provisions of Section 14 of the Indian Partnership Act, 1932.
c. Further such a transfer of immovable property is also capable of being registered under the provisions of Indian Registration Act, 1908.
d. As per Section 45(3), the profits or gains arising from the transfer of capital asset held by a person, to a firm or other association of persons or body of individuals (not being a company or a co-operative society) in which he is or becomes a partner or member, by way of capital contribution or otherwise, shall be chargeable to tax as his income of the previous year, in which such a transfer takes place and, for the purposes of computation of capital gain in the hands of the partner/member, the amount recorded in the books of account of the firm, association or body of individuals for such capital asset shall be deemed to be the full value of the consideration
e. Hence TDS is required to be deducted u/s 194-IA on the amount recorded in the books of account of the firm, association or body of individuals for such capital asset.

Arguments in Favour of Assessee:

a. The judgement of the Apex Court, in the case of *N. Khadervali Saheb Vs N. Gudu Sahib (Decd) [2003] 261 ITR 1 (SC)* is very relevant. It was held in this case that **a firm is not an independent entity. It is only a compendious name given to the partnership for convenience and the partners are the real owners of the assets of the firm.**
b. As per Transfer of Property Act, 1882, **"Transfer of Property" means an act by which a living person conveys property, in present or in future, to one or more other living persons**, or to himself, or to himself and one or more other living persons; and "to transfer property" is to perform such act.
   In this section "living person includes a company or association or body of individuals, whether incorporated or not, but nothing herein contained shall affect any law for the time being in force relating to transfer of property to or by companies, associations or bodies of individuals.

Thus in case of Firm Properties are registered in name of partners on behalf of Partnership Firm.

c. As per the judgment in the case of CIT v. B.C. Srinivasa Setty [1981] 128 ITR 294 (SC) **when his personal assets merge into the capital of the partnership firm, a corresponding credit entry is made in the partner's capital account in the books of the partnership firm, but that entry is made merely for the purpose of adjusting the rights of the partners inter se when the partnership is dissolved or the partner retires. It evidences no debt due by the firm to the partner. Indeed the capital represented by the notional entry to the credit of the partner's account may be completely wiped outof the losses which may be subsequently incurred by the firm, even in the very accounting year in which the capital account is credited.**

d. It is also a well settled proposition of law that **a partner of a firm does not have a specific right to a specific property of the firm and has only a "partnership interest"** in the firm which **by itself is movable property** and therefore it is not possible to determine the consideration received by the partner for converting his exclusive interest into a shared interest by contributing the property owned by him as his capital contribution into a firm.

e. As one of the essential requirements for applicability of the provisions of section 194-IA as mentioned in above i.e the determination of the quantum and flow of consideration between the transferor and transferee is not met, the provisions of Section 194-IA of the income tax will not be applicable in this case.

f. Assessee can also argue that Section 194-IA refers to "**any sum** by way of consideration" and further refers to "credit of **such sum** to account of the transferor" or "at the time of payment of **such sum**". The qualifying word appears to be "sum". It is to be noted that the Supreme Court has in the case of **H. H. Sri Rama Verma v CIT (1990) 187 ITR 308** has held that the word **"sum"** refers to the amount of money paid taking the above analogy into consideration it could be well argued that payment of consideration in any other mode other than through a sum of money would be outside the purview of Sec 194-IA.

Scenario referred to in Section 45(4):

It is to be noted that there is an explicit provision under Section 45(4) of the Income Tax Act, wherein the distribution of Capital assets on the dissolution of a firm/AOP/BOI or otherwise to its partners or members will be chargeable to tax as the income of the firm/AOP/BOI under the head Capital Gain. **The said provision is applicable for the limited purpose of determining the Capital Gain assessable on the firm/AOP/BOI and cannot be extended for any other purpose**.

Upon dissolution, the firm ceases to exist, then follows the making up of the accounts, then discharge of debts and liabilities and thereupon distribution, division or allotment of assets takes place inter se between the erstwhile partners by way of mutual adjustment of rights between them. The distribution, division or allotment of assets to the erstwhile partners, is not done by the dissolved firm. In this sense there is no transfer of assets by the assessee (dissolved firm) to any person.

Thus in case where there is a distribution of immovable property to a partner or member as the case may be**, post dissolution of the firm/AOP/BOI and it is done for the purpose of settlement of mutual rights amongst the partners**, **there would be an incidence of Capital Gain under Section 45**

(4) as mentioned above. However, as the firm is already dissolved there will be no "transferor" as on the date of distribution of assets to the partners and hence the provisions of Section 194-IA will not apply.

In view of the above set of arguments, one may conclude that this issue may invite a lot of litigations in future if not adequately clarified by the CBDT. The compiler of this document is however of the opinion that TDS is not applicable in the scenarios covered u/s 45(3) and even also u/s 45(4).

Section 194- IA vis a vis Section 50C:

Section 50C of The Income tax Act states that where the consideration received or accrued as a result of transfer of land or building or both is less than the stamp duty value declared by the State Government then in such cases **for the purposes of computation of capital gains under section 48** of shall be the value so accepted by the State Government.

The question here may arise that what will happen to the provisions of section 194-IA relating to deduction of tax at source? Whether TDS would be deductible on the actual consideration or will be deductible on the value stipulated under section 50C?

Where the actual consideration price is less than the stamp duty value referred to in section 50C, tax will have to be deducted on the actual consideration price and not the stamp duty value as the reference of the stamp duty value is only for the purpose of computation of capital gain.

TDS Obligation in case of Dual Agreements vs Composite Agreement for purchase and construction of immovable property194-IA, vis a vis 194C and 194M:

There is a prevalent practice in the Real Estate industry especially in projects for construction of apartments or villa development, for the transferor and the transferee to enter into dual agreements, one for sale of divided/ undivided share of land and the other for construction of the super built area as an apartment or villa as the case may be.

In such cases, as far as the consideration for divided/undivided share of land is concerned the provisions of Section 194-IA would be squarely applicable if such consideration is Rs.50,00,000/- (Rupees Fifty Lakhs only) or more. As far as the payment towards construction of the super built up area is concerned the said arrangement would amount to a works contract and the provisions of Section 194C of the Income Tax Act would be squarely applicable.

As per amended provisions of Section 194C, w.e.f. 1.4.2020, individuals and HUF whose total sales/turnover/receipts from the business/profession exceed Rs.1 crore in case of business or Rs.50,00,000 in case of profession shall be required to deduct tax at source. However no individual or Hindu undivided family shall be liable to deduct income-tax on the sum credited or paid to the account of the contractor where such sum is credited or paid exclusively for personal purposes of such individual or any member of Hindu undivided family. However at this juncture it may please be noted that Finance (No. 2) Act, 2019, w.e.f 01-09-2019, has inserted a new provision, namely, section 194M, in Chapter XVII-B, to provide that any person being an individual or HUF (other than those to whom provision of section 194C or 194H or 194J applies) is responsible for paying any sum to a resident for carrying out any work or fees for professional services or as commission or brokerage, deduct tax @ 5% of such amount, if such payment exceeds Rs. 50,00,000 during a

financial year. However, such person is not required to obtain Tax Deduction Account Number for the purpose. In other word, TDS can be deposited on basis of his PAN.

Scenario illustrated:

A combined reading of the above could lead to an inference that where there is a dual agreement for purchase of land for say Rs.40 Lakhs and an agreement of construction of house for residence for say Rs 45 Lakhs between an individual/HUF and the owner/developer/builder, there is no requirement for deducting Tax at Source under the provisions of Section 194-IA, 194 C and Section 194M of the Income Tax Act.

The issue which needs clarity is in the case where the transferee/buyer has discharged his obligation towards TDS by making the deduction u/s 194C/194M on payments being made towards construction, would he be liable to deduct tax at source again at the point of the super built area being conveyed to him as an immovable property u/s 194-IA. In view of the **CBDT Circular No 720 dated 30-8-1995**, it appears that as the buyer/transferee has already discharged his obligation towards the entire payment for construction which represents the consideration for the super built area u/s 194C/194M during the construction period, he cannot be called upon to deduct tax once again on the same consideration under the provisions of Section 194-IA.

In the case of a composite agreement for sale being entered into between the Owner/Developer/Builder i.e., the Resident transferor for the sale of undivided/divided share of land and Super Built Area as an immovable property, the transferee would have to deduct Tax at Source under provisions of Section 194-IA on the combined value of consideration if the same is Rupees Fifty Lakhs and above.

A clarification is awaited from CBDT to remove undue litigations in future.

Section 194-IA vis a vis 194-IC and Joint Development Agreement:

Under the existing provisions of section 45, capital gain is chargeable to tax in the year in which transfer takes place except in certain cases. The definition of 'transfer', inter alia, includes any arrangement or transaction where any rights are handed over in execution of part performance of contract, even though the legal title has not been transferred. In such a scenario, execution of Joint Development Agreement between the owner of immovable property and the developer triggers the capital gains tax liability in the hands of the owner in the year in which the possession of immovable property is handed over to the developer for development of a project.

When case falls u/s 45(5A):

With a view to minimise the genuine hardship which the owner of land may face in paying capital gains tax in the year of transfer, the Act has inserted a new sub-section (5A) in section 45 which can be explained as under:

Section 45(5A) has been inserted with effect from assessment year 2018-19 to provide for a special provision for computation of capital gains in case of an assessee transferring a capital asset pursuant to a joint development agreement.

Elaborating, the section 45(5A) applies if all the following conditions are fulfilled:

a. The assessee is an individual or an HUF;
b. Capital gains arise to the assessee from transfer of a capital asset;
c. The capital asset is a land or building or both;
d. The transfer is made under a specified agreement;
e. Such land or building or both are transferred to the developer by an individual or an HUF;and
f. The assessee has **not** transferred his share in the project on or before the date of issue of the certificate of completion ("CC") for the whole or part of the project as issued by the competent authority.

If the aforesaid conditions are satisfied, then—

a. the full value of the consideration received or accruing as a result of the transfer of the capital asset shall be equal to
    i. the stamp duty value of the above referred share in land or building or both on the date of issue of the completion certificate; plus
    ii. consideration received in cash, if any
b. the capital gains shall be chargeable to income tax as income of the previous year in which the above referred certificate of completion is issued by the competent authority.

Thus if the above conditions are satisfied, the capital gains shall be chargeable to income-tax as income of the previous year in which the certificate of completion for the whole or part of the project is issued by the competent authority and under such scenario the transfer is said to have taken place u/s 2(47)(v) in the year on execution of the Joint Development Agreement.

TDS Obligation on Developer:

W.e.f 01-06-2017 as per Section 194-IC, notwithstanding anything contained in section 194-IA, any person responsible for paying to a resident any sum by way of consideration, not being consideration in kind, under the agreement referred to in sub-section (5A) of section 45, shall at the time of credit of such sum to the account of the payee or at the time of payment thereof in cash or by issue of a cheque or draft or by any other mode, whichever is earlier, deduct an amount equal to 10% of such sum as income-tax thereon.

If the PAN is not provided by the recipient of the consideration, the rate of TDS as per section 206AA shall be 20% instead of 10%.

It may be noted that in the above case, tax will be deducted at source under the specified agreement at the time of credit of such sum to the account of the payee or at the time of payment thereof in cash or by issue of a cheque or draft or by any other mode, whichever is earlier, but the credit of such tax deducted at source will be available to the individual or HUF, as the case may be, at the time when the capital gain is computed as per section 45(5A)(i.e. previous year in which the certificate of completion for the whole or part of the project is issued by the competent authority). In this case, the deductee will have to carry forward such tax deducted at source and claim the credit of the same in the previous year in which the capital gain becomes taxable.

TDS Obligation on Buyer towards Developer:

The buyer is required to deduct TDS u/s 194-IA to the extent of the amount paid by the buyer for undivided share of land which is conveyed by the developer to the buyer of an apartment subject to satisfaction of the other conditions.

When case does not fall u/s 45(5A):

But assume a scenario where the case does not fall in the scope of Section 45(5A). In such as case, if we assume that the developer has been given limited rights in the form of licence to develop the property then no TDS u/s 194-IA is required to be deducted on the amount paid to a developer by a buyer of an apartment pertaining to the developer's share in a development agreement, to the extent of the amount paid by the buyer for undivided share of land which is conveyed by the developer to the buyer of an apartment by using the general power of attorney given by the Owner of the property to execute deeds of conveyance on his behalf in favour of such buyers, as **the developer is conveying only his development rights on the property**. However **there will be TDS obligation u/s 194-IA** in case of the view being taken that the immovable property has already been transferred in favour of the Developer to the extent of the Developer's Share as on the date of entering into the development agreement.

This may invite litigations in future if adequately not clarified by CBDT.

Does Consideration include GST?

Consideration for the purpose of section 194-IA should be for the transfer of an immovable property and amounts charged towards GST are statutory obligations mandated by law which arise in the course of construction of the immovable property and are not in any way a part of the consideration for transfer of immovable property.

The CBDT has clarified by issuing Circulars from time to time that tax is not required to be deducted on Service tax/GST component [*Circular No. 4/2008, dated 28-4-2008, Circular No. 1/2014, dated 13-1-2014, Circular No.23/2017 dated 19-7-2017*]. Rajasthan High Court has held that tax is not required to be deducted in such cases [*CIT (TDS) Jaipur* v. *Rajasthan Urban Infrastructure* [2013] 37 taxmann.com 154/218 Taxman 10 (Mag.) (Raj.)]. Hence, it can be said that tax is not required to be deducted on GST component, if the amount of consideration and GST are separately reflected in the Tax invoice.

Application for certificate for lower deduction of tax or no deduction of tax under section 197:

It is noted that section 197 of the Income Tax Act has not been amended to include section 194IA within its ambit and neither is there any change incorporated in Form No.13. Under the circumstances, the transferor cannot obtain relief under section 197of the Income Tax Act with regard to the tax to be deducted at source by the Transferee under section 194IA.

Time Limits and Procedure of depositing TDS and Issue of TDS Certificate:

Both transferee and transferor must have Permanent Account Number (PAN). Transferee is not required to hold/obtain TAN for payment of TDS.

Online payment of TDS is mandatory. Online payment of challan is available on TIN NSDL website.

Any sum deducted under section 194-IA shall be paid to the credit of the Central Government within a period of 30 days w.e.f. 1.6.2016 (earlier it was 7 days) from the end of the month in which the deduction is made and shall be accompanied by a challan-cum-statement in Form No. 26QB.

Where assessee purchased 96 flats and made payments towards same after deducting tax at source under section 194IA, since assessee itself had filed separate TDS statements under section 200(3) in Form 26QB in respect of TDS deducted in respect of every individual transaction relating to purchase of each flat, Assessing Officer was justified in levying fee under section 234E on account of delay in filing statements in respect of each flat, while processing such statements under section 200A. Refer **Cornerview Construction & Developers (P.) Ltd [2019] 109 taxmann.com 68 (Mumbai - Trib.)**

Where in respect of purchase of property, assessee deposited tax at source under section 194-IA and also filed a statement to that effect **much prior to date when section 234E came into existence i.e. 1-6-2015**, impugned order levying fee under section 234E for violation of section 200(3) was to be **set aside** **Meghna Gupta [2018] 99 taxmann.com 334 (Delhi - Trib.)**

The person responsible for deduction of tax under section 194-IA shall furnish the certificate of deduction of tax at source in Form No.16B to the payee within 15 days from the due date for furnishing the challan-cum-statement in Form No.26QB under rule 31A after generating and downloading the same from the web portal specified by the Principal Director General or Director General of Income-tax (System) or the person authorised by him.Refer

'Bar against direct demand on assessee':

The purchasers paid the petitioner only Rs. 8 crores 91 lakhs retaining Rs. 9 lakhs towards TDS. The department does not argue that this amount of Rs. 9 lakhs so deducted is not in tune with the statutory requirements. It appears undisputed that the deductions did not deposit such amount in the Government revenue. Under the circumstances, the petitioner is asked to pay the said sum again, since the department has not recognized this TDS credit in favour of the petitioner.

Section 205 carries the caption 'Bar against direct demand on assessee'. The section provides that where tax is deducted at the source under the provisions of Chapter XVII, the assessee shall not be called upon to pay the tax himself to the extent to which tax has been deducted from that income.

The situation arising in the present petition is that the department does not contend that the petitioner did not suffer deduction of tax at source at the hands of payer, but contends that the same has not been deposited with the Government/revenue. As provided under section 205 and in circumstances of the instant case, the petitioner cannot be asked to pay the same again. It is always open for the department and in fact the Act contains sufficient provisions, to make coercive recovery of such unpaid tax from the payer whose primary responsibility is to deposit the same with the Government revenue scrupulously and promptly. If the payer after deducting the tax fails to deposit it in the Government revenue, measures can always be initiated against such payers

The revenue is correct in pointing out that for long after issuing notice under section 266(3), the petitioner has not brought this fact to the notice of the revenue which led the revenue to make

recoveries from the bank account of the petitioner. In that view of the matter, at the best the petitioner may not be entitled to claim interest on the amount to be refunded.

Under the circumstances, the respondents should lift the bank account attachment. Further, the respondent should refund a sum of Rs. 3.68 lakhs to the assessee.

Pushkar Prabhat Chandra Jain [2019] 103 taxmann.com 106 (Bombay)

Failure to Deduct the TDS:

Failure to deduct tax under this section may result in the person i.e. the transferee being deemed to be an assessee in default. Failure to deduct tax will attract interest and penalty. Also, provisions of section 40(a)(ia) will be attracted with effect from assessment year 2015-16.

Section 194LA

This section is effective from 1-10-2004 which provides as follows;

a. Any person responsible for paying any sum **to a resident** is required to deduct tax at source;
b. The payment must be in the nature of **compensation** or **the enhanced compensation** or **the consideration** or **the enhanced consideration** on account of **compulsory acquisition**, under any law for the time being in force, **of any immovable property**, other than agricultural land;
c. The tax must be deducted at the **rate of 10 per cent.** No surcharge or health and education cess shall be added to the above rates. Hence, tax will be deducted at source at the basic rate. The rate of TDS will be 20% in all cases, if PAN is not quoted by the deductee.
d. The tax shall be deducted at the time of payment of the sum in cash or by issue of the cheque or of draft or by any other mode, whichever is earlier;
e. No deduction is required where the amount of such payment or the total amount of such payment does not exceed **Rs. 2.5 lakh, during the financial year**; and
f. For the purpose :
    - Immovable property means **any land** (excluding agricultural land) or any building or part of a building;
    - agricultural land means agricultural land in India, **wherever** situated [i.e., including land situate in any area referred to in section 2(14)(iii)(a)/(b)]**Thus Agricultural land even if situated in urban area is excluded from the term immovable property**.;

g. The TDS is required **only** in case of **compulsory acquisition under any law**. In other words, for purchase of any immovable property, tax is **not** required to be deducted at source, where such purchase is from a resident.
h. The limit for no deduction is fixed with reference to the payments made during a financial year and not the aggregate payments in respect of the acquisition of the land. To illustrate, if the land is acquired, say, for Rs. 1,95,000 in the financial year 2019-20, no deduction is required. If the compensation is enhanced by Rs. 50,000 in the next financial year, no tax is required to be deducted since the aggregate payment during the next financial year does not exceed Rs. 2.5 lakh.
i. Finance Act, 2017 has inserted new proviso after the Explanation to provide that no deduction of tax under the section is required, if the payment is made in respect of any award or agreement which has been exempted from levy of income tax under section 96 of

"**Right to Fair Compensation and Transparency in Land Acquisition Rehabilitation and Resettlement Act, 2013**"

j. The assessee to whom compensation is payable may make an application in Form No. 13 for obtaining a certificate for deduction of tax at any lower rate or no deduction of tax, as the case may be.

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