

Session on:

TAXATION OF REAL ESTATE TRANSACTIONS



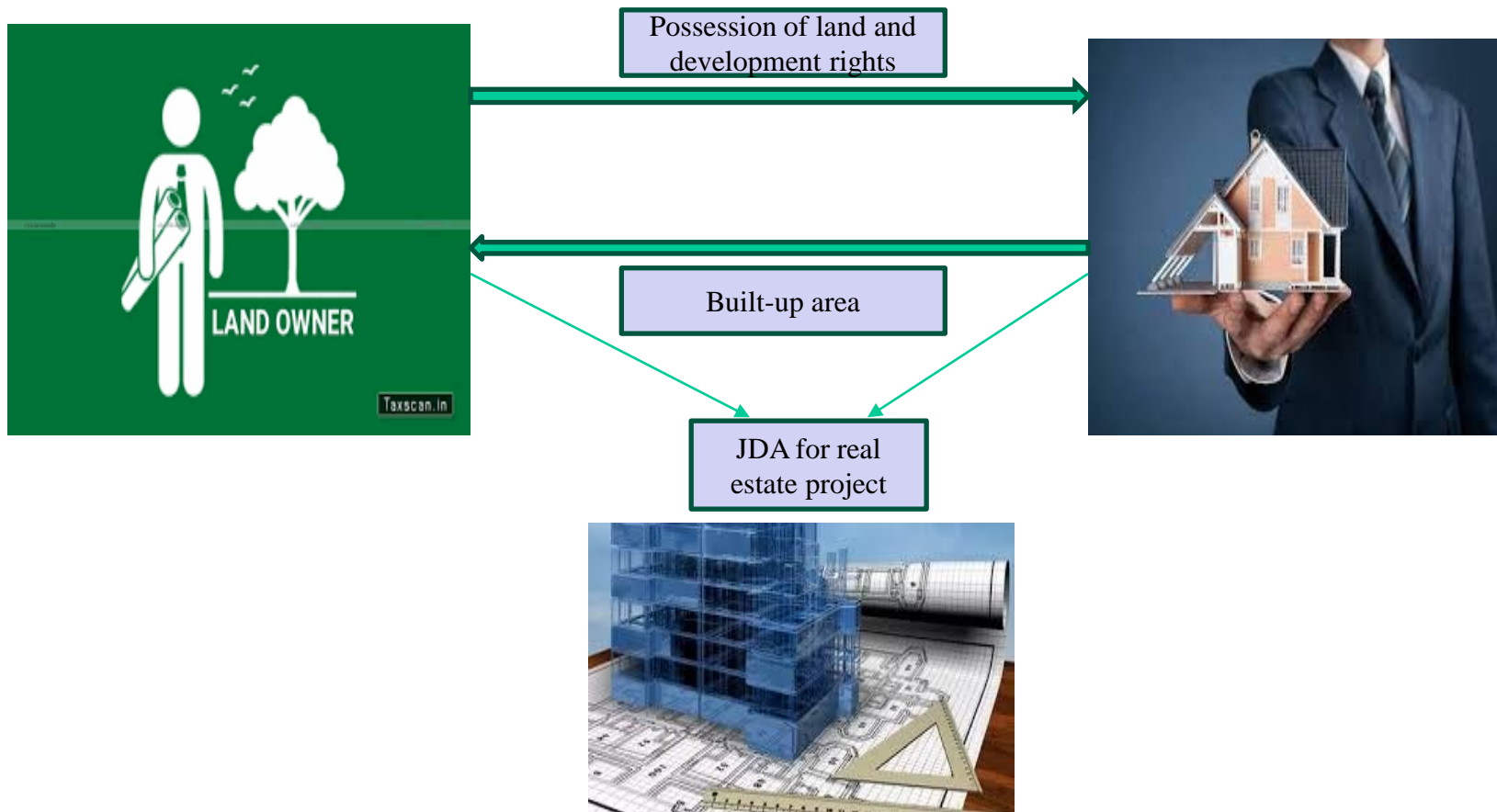
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16th June 2023



JOINT DEVELOPMENT AGREEMENT OF IMMOVABLE PROPERTY

Joint Development Agreement- The Concept



Joint Development Agreement- The Concept



- ❖ Joint Development Agreement (JDA) is an agreement which largely includes following contours:
 - Parties involved: Landowner and Developer
 - Objective: A real estate project for development
 - Obligations of parties: Landowner to contribute land while Developer undertakes construction/ development at its own cost
 - Right: Landowner grants development rights to the Developer for construction of the project.
 - Consideration: Landowner is allotted/ gets (a) share in the constructed area and/ or (b) cash consideration; and/or (c) share in sales/revenues; Developer gets balance constructed units along with corresponding land underneath.

❖ Taxation is to be examined in the hands of:

I. Developer:

- Income earned from sale of constructed units/ area
- Taxed under the head Profits and Gains of Business and Profession

II. Landowner

- Receives share in constructed area/ units and/ or cash consideration
- Taxed under the head ‘Capital Gains’ or ‘Profits and Gains of Business and Profession’ depending on facts of each case – depending on whether land is held as capital asset/ investment or business asset/ stock in trade

Taxability prior to introduction of section 45(5A) by Finance Act, 2017

Prior to introduction of section 45(5A)



- ❖ Section 45 provides for taxation of capital gains on 'transfer' of a 'capital asset' in the 'year of transfer'
- ❖ Capital gains are computed as per mechanism laid down in section 48
- ❖ 'Transfer' under section 2(47), inter alia, include:—
 - (a) sale, exchange, relinquishment of asset [clause (i)];
 - (b) extinguishment of any right therein [clause (ii)];
 - (c) transaction involving the allowing of possession of any immovable property to be taken or retained in part performance of a contract **of the nature referred to in section 53A of the Transfer of Property Act, 1882** ('TOPA') [clause v];
 - (d) transaction which has the effect of transferring, or enabling the enjoyment of, any immovable property [clause vi].

Section 2(47) of IT Act



- ❖ **Under section 53 of the TOPA** immovable property above Rs.100 in value could be transferred only by execution of a registered instrument [refer **Alapati Venkatramiah v CIT: 57 ITR 185 (SC)**]
- ❖ Similarly for relinquishment/ extinguishment of rights in immovable property, registered conveyance was necessary and capital gains were brought to tax only in the year of execution of registered conveyance [refer **ACIT V. Mercury General Corporation Ltd: 133 ITR 525 (Del.)**]
- ❖ Clause (v) of section 2(47) legislatively incorporates the provisions of section 53A of the TOPA as one of the modes of “transfer” of immovable property

Section 53A of TOPA/ Section 2(47)(v)



53A. Part performance.-- Where any person contracts to transfer for consideration any immoveable property by writing signed by him or on his behalf from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty,

and **the transferee has. in part performance of the contract, taken possession of the property or any part thereof, or the transferee,** being already in possession, continues in possession in part performance of the contract and has done some act in furtherance of the contract,

and **the transferee has performed or is willing to perform his part of the contract,**

then, notwithstanding that ^{2***}, or, where there is an instrument of transfer, that the transfer has not been completed in the manner prescribed therefor by the law for the time being in force, the transferor or any person claiming under him shall be debarred from enforcing against the transferee and persons claiming under him any right in respect of the property of which the transferee has taken or continued in possession, other than a right expressly provided by the terms of the contract:

^{2***} The words "the contract though required to be registered, has not been registered, or" omitted by Act 48 of 2001, s. 10 (w.e.f. 24-9-2001).

Registered v. Unregistered JDA



- ❖ Section 53A of TPA amended and section 17(1A) inserted in the Indian Registration Act, 1908 (in short ‘the 1908 Act’) by the Registration and Other Related Law (Amendment) Act, 2001 w.e.f. 24.09.2001, to make registration of “contract to transfer” any immovable property mandatory.
- ❖ Section 17(1A) of 1908 Act as inserted in 2001 read as under:

“(1A) The documents containing **contracts to transfer for consideration, any immovable property for the purpose of section 53A of the Transfer of Property Act, 1882, shall be registered if they have been executed on or after the commencement of the Registration and Other Related Laws (Amendment) Act, 2001, and if such documents are not registered on or after such commencement then, they shall have no effect for the purposes of the said section 53A.**”

Registered v. Unregistered JDA



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- ❖ In 2001, pursuant to amendments made in TOPA and the Indian Registration Act, if agreements like JDA are not registered, they shall cease to have effect in law for purposes of section 53A of TOPA
 - ❖ To summarize, post the 2001 amendments:
 - **Unregistered JDA** does not have any sanctity in the eyes of law;
 - **Registered JDA** is a legally enforceable contract/ agreement.

Registered v. Unregistered JDA



Issues:

- ❖ What is the effect of non-registration of JDA for the purpose of taxation of “capital gains”?
- ❖ Whether JDA, per se, results in “transfer” as contemplated under section 2(47)(v)/(vi) of the IT Act?
- ❖ Principle of legislation by incorporation/ reference – whether amendment in provisions of TOPA/ Registration Act have to be read into the provisions of section 2(47)(v) of the IT Act?
- ❖ Can merely transfer of development right be taxed considering it to be a ‘capital asset’ separate from underlying land?

CIT v. Balbir Singh Maini: 398 ITR 531 (SC)



- Assessee was member of PCHBS Ltd. which had 95 members and owned 21.2 acres of land.
- Tripartite agreement entered between PCHBS Ltd., HASH and THDC - the latter two parties to develop the land belonging to members/ PCHBS - cash and certain constructed flats to paid to each member (landowners)
- **The aforesaid agreement/ JDA was not registered.**
- Lands to be transferred and cash consideration to be paid in installments:

Date	Installment	Land to transferred	Amount paid in cash
25.2.2007	Advance	-	3.87 crores
2.3.2007	1 st	3.08 acres	14.48 crores
25.4.2007	2 nd	4.62 acres	23.22 crores
6 months from grant of license	3 rd	6.36 acres	31.93 crores
2 months from 3 rd installment	4 th	7.14 acres	31.93 crores

- Advance, 1st and 2nd installments received, and corresponding land conveyed- the said amount was offered to capital gains tax in AYs 2007-08 and 2008-09
- Subsequently, since no permissions/ licences were granted, **JDA did not take off**
- AO computed capital gains qua entire consideration received/ to be received, holding that handing of physical possession under JDA tantamount to transfer u/s 2(47)(v)/ (vi)
- Appeals before CIT(A) and ITAT were dismissed.

- ❖ **P&H High Court (378 ITR 244)** deleted addition holding, inter alia, as under:
 - ✓ No possession given by the transferor to the transferee of the entire land in part performance of JDA so as to fall within the section 53A of TOPA
 - ✓ Possession, if any, was as a licensee for development of the property and not in the capacity of a transferee
 - ✓ Section 53A of TOPA stood embodied in section 2(47)(v) by incorporation and all the essential ingredients of that section were to be thus fulfilled
 - ✓ In absence of registration, necessary requirement u/s 53A of TOPA was not fulfilled and consequently section 2(47) does not apply
 - ✓ No real income accrued to the landowner in respect of land not transferred and no gain accrued to be taxed
 - ✓ Thus, addition of capital gains with deleted

- ❖ The **Supreme Court** upheld the decision of the High Court holding as under:
 - ✓ After 2001, if JDA is not registered, the same shall have no effect in law u/s 53A of TOPA. Consequently, it cannot be construed as transfer clause (v) of section 2(47) [**Registration of JDA necessary to constitute transfer**]
 - ✓ As regards clause (vi) of section 2(47), the apex Court held that "enabling the enjoyment of" takes color from the earlier expression "transferring"; thus, transaction which enables enjoyment of property must be enjoyment as a purported owner thereof. Simply, the idea is to tax transactions where though legal title may not be transferred in law, there is, in substance, a transfer of title in fact [**Possession and enjoyment must be as Owner and not mere licensee**]
 - ✓ Expounding the real income theory, the Apex Court held that capital gain on a transaction which never materialized is, at best, a hypothetical income which cannot be taxed u/s 45 r.w.s 48 [**Real Income theory applied**]

❖ Illustratively:

- Landowner [L] owns land admeasuring 10,000 sq. feet – acquired in FY 2002-03 for a cost of Rs. 1 crore [Rs.1,000 per sq. feet]
- Unregistered JDA between ‘L’ and Developer [‘D’] in FY 2020-21
- Construction Cost - Rs.6,25,00,000
- Total constructed area = 1 lakhs sq. feet [Completion in FY 2023-24]
- 2:3 Division of Constructed area = L (40,000 sq.ft) & D (60,000 sq.ft)
- Stamp Value: (i) Land Rs.5,000 per sq. ft; and (ii) Building Rs.500 per sq. ft

Taxation of Income under JDA – Computation?



- Capital gains in hands of L [FY 2023-24]:

Particular	Option 1	Option 2	Option 3
Full value of consideration received*	Fair value of 40,000 sq. ft. constructed area received [$\text{@stamp value of Rs.500 per sq. ft.}$]	Fair value of land [6000 sq. feet land @Rs.5000 per sq. ft - section 50C]	Construction cost of 40,000 sq. ft. super structure received [40% Construction Cost Rs.6,25,00,000]
	Rs.2,00,00,000	Rs.3,00,00,000	2,50,00,000
Less: Indexed COA [6000 sq. ft] Rs.1 cr. X 60% X CII	Rs.1,98,85,714	Rs.1,98,85,714	Rs.1,98,85,714
LTCG	1,14,286	Rs.1,01,14,286	51,14,286

- *Full value of consideration shall be subject to 50C

Amendments by Finance Act, 2017- Introduction of section 45(5A)

- ❖ Sub-section (5A) introduced w.e.f. 1.4.2018 [AY 2018-19] to specifically provide for taxation of capital gains in respect of JDA.
- ❖ Salient features of section 45(5A) - applicability:
 - Capitals gains arising to **‘individuals’** and **‘HUFs’** [Landowner]
 - who **“transfers” land** or building held as capital asset
 - under a **specified agreement [defined as registered agreement]**
 - such gains shall be chargeable to tax in the **year in which completion certificate** for whole or part of property is issued
 - Stamp Value of share in land or building or both on date of Completion Certificate + Cash Consideration deemed as consideration

Scheme of Taxation- Post Section 45(5A)



- ❖ Specified Agreement is defined to mean “*a **registered** agreement in which a person owning land or building or both, agrees to allow another person to develop a real estate project on such land or building or both, **in consideration of a share, being land or building or both** in such project, whether with or without payment of part of the consideration in cash*”
- ❖ Clause (7) in section 49 provides that cost of acquisition of the share in the project, being land or building or both, in the hands of the landowner is the amount which is deemed as full value of consideration under section 45(5A) – Relevant for subsequent sale in the hands of the Landowner
- ❖ If Landowner transfers his share/ entitlement prior to issue of completion certificate:
 - Capital gains is taxable in year of such transfer
 - Full value of consideration is determined as per other provisions of the Act

Scheme of Taxation- Post Section 45(5A)



- ❖ Summarily, section 45(5A) lays down two important aspects in respect of transfer of land/ building under JDA:

1. Year of taxability :

When completion certificate received for whole or part of the project

2. Full value of consideration :

Aggregate of stamp duty of share in project and cash consideration

- ❖ Rationale for introduction of aforesaid provision provided in the Memorandum explaining provisions of Finance Bill, 2017 is to mitigate genuine hardship which the individual landowners may face in paying capital gains tax in the year of entering of JDA, while consideration flows in later years [say 2-3 years later]

Computation u/s 45(5A)...?

- ❖ **Illustration:** Facts same as illustration given under prior to FA, 2017 regime.
- In the stated facts, capital gains could be computed as under:

Particulars	View 1	View 2
Full value of consideration	40,000 sq. ft. * Rs.500 per sq. ft	40,000 sq. ft. * Rs.500 per sq. ft + 4,000 sq. ft. land * Rs.5,000 per sq. ft
	Rs.2,00,00,000	Rs.4,00,00,000
Less: Cost of acquisition (CoA) [Ignoring indexation for sake of simplicity]	Rs.60,00,000 [Rs.1 crores*60%]	Rs.1,00,00,000
Capital gains	Rs.1,40,00,000	Rs.3,00,00,000

Computation u/s 45(5A)...?



- View 1:
 - ✓ Computation is done considering full value of consideration for built-up area actually received.
 - ✓ Sale consideration is taken based on circle rate/ stamp value of built-up area actually allotted to the landowner ignoring by stamp value of land relatable thereto to arrive at stamp value of the superstructure.
 - ✓ The aforesaid computation of sale consideration is based on the rationale that since the assessee is the owner of complete land including the portion attributable to his share in the built-up area, what has actually accrued/ received to the assessee is only the building/ construction/ superstructure.
 - ✓ For cost of acquisition, only share of land of Developer, is considered since it is only that share in land that is transferred.

Computation u/s 45(5A)...?



- View 2:
 - ✓ Computation is done considering full value of consideration for built-up area actually received alongwith corresponding land for that share.
 - ✓ Sale consideration is taken based on circle rate/ stamp value of built-up area actually allotted to the landowner including stamp value of land relatable thereto to arrive at stamp value of the superstructure.
 - ✓ The same is based on one interpretation of the phrase “*the stamp duty value....., of his share, being land or building or both in the project*”
 - ✓ Consequently, cost of acquisition is considered for the entire piece of land.
- ❖ In View 1, on subsequent sale of his share by Developer- the capital gains on land and super structure must be computed separately- nature of gain (long term/ short term), indexation etc. shall accordingly follow?

Points to Ponder



- ❖ Whether section 45(5A) applicable if JDA is not registered?
- ❖ If land is jointly owned by individual alongwith company as co-owner, is section 45(5A) applicable?
- ❖ Whether section 45(5A) can be applied to old projects/ JDAs entered prior to 1.4.2018? [refer Adinarayana Reddy Kummata v. ACIT: [2018] 169 ITD 683 (Hyd.)]
- ❖ What if Stamp Duty Value is higher than the fair value of the share received – whether reference to DVO is permissible, just like in section 50C/ 43CA?
- ❖ What would be the taxation where section 45(5A) is not applicable- like Unregistered JDA, etc.?

Points to Ponder

- ❖ What if 2 towers are to be built under a single JDA – whether 45(5A) shall get triggered on issuance of completion certificate of first tower, while construction of tower 2 is still pending?
- ❖ Whether unaccrued consideration taxable under section 45/ 45(5A)?
- ❖ What happens if JDA is subsequently cancelled?
- ❖ If only part of share is sold by landowner prior to completion certificate- whether application of section 45(5A) denied fully or only qua proportionate part sold [proviso to section 45(5A)]?
- ❖ Whether exemption available under sections 54/ 54F in respect of reinvestment under JDA?

**Interplay between:
Sections 45(2) [Conversion of land
into stock in trade]
&
Section 45(5A) [Taxation of JDA]**

Section 45(2) – applicability and computation



- ❖ Taxation on conversion of a capital asset into “stock-in-trade”
- ❖ Precondition of section 45(2) is that either capital asset held by the **owner** is converted **by him** into stock in trade or the capital asset is treated as stock in trade **by the owner**.
- ❖ Positive act on the part of the owner necessary to apply section 45(2) [Refer Amrit Corp Limited v. ACIT: 275 CTR 174 (All)]
- ❖ Taxation deferred to the year of transfer of “stock-in-trade” into two parts:
 - a) Capital Gains = FMV on date of conversion – Cost of acquisition
 - b) Business Income = Transfer Price – FMV on date of conversion

Conversion of land into 'stock-in-trade' before JDA

- Landowner ('L') holds land as 'capital asset' since FY 2002-03
- L converts the land into 'stock in trade' and enters into JDA with Developer ('D') in FY 2018-19
- As per JDA, developed area to be shared between L:D in the ratio of 2:3 (40%:60%) with corresponding land underneath

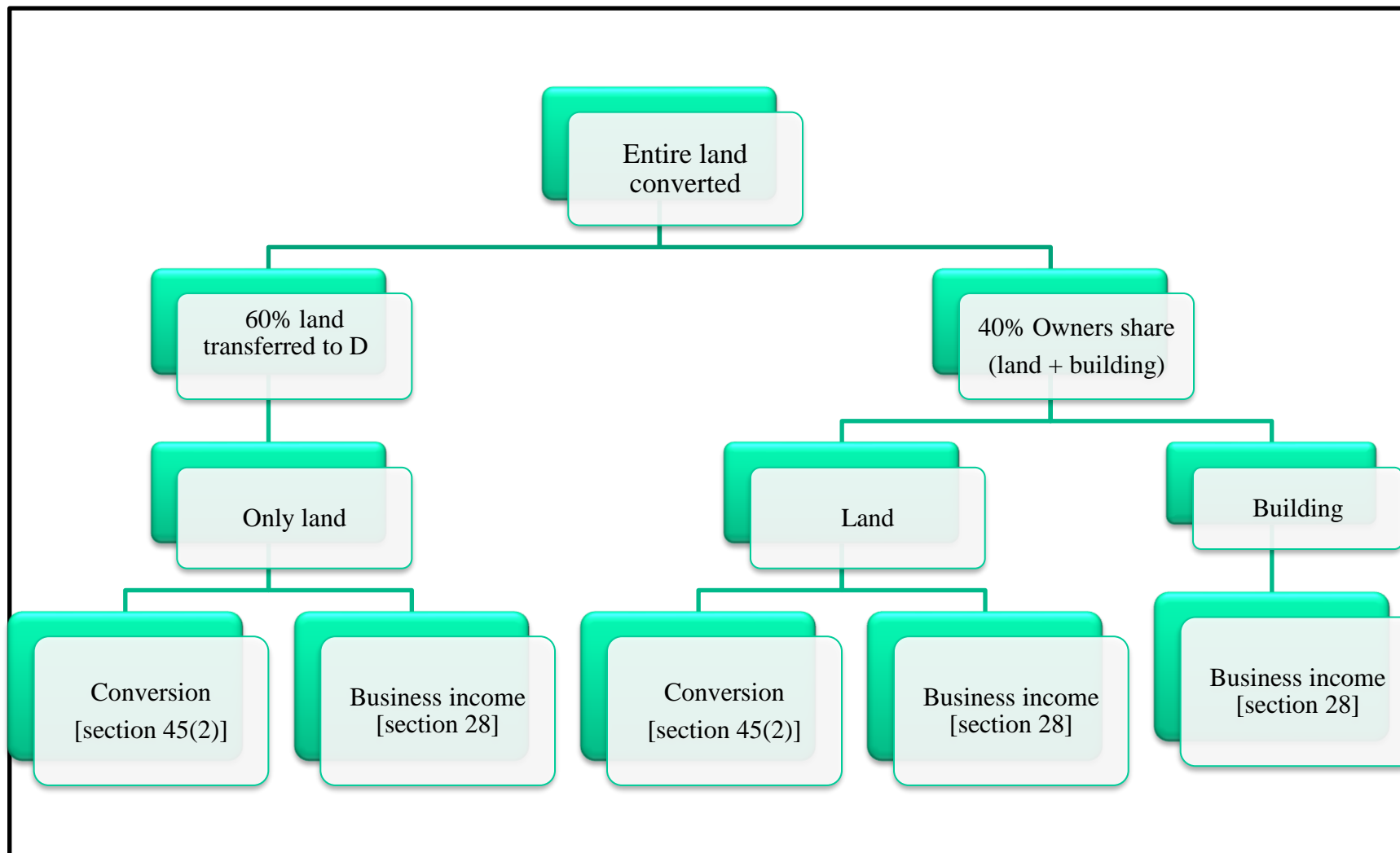


❖ **Whether section 45(5A) applicable?**

- ❖ Applicable to transfer of a 'capital asset';
- ❖ Section 45(5A) only overrides sub-section (1) of section 45
- ❖ Conversion to stock-in-trade – ceases to be capital asset

❖ **Section 45(2) shall apply – taxation in two parts**

Conversion of land into 'stock-in-trade' before JDA – taxation u/s 45(2)



Conversion of land from 'stock-in-trade' into capital asset before JDA



- Landowner ('L') holds land as 'stock in trade' since FY 2019-20
- L converts the land held as 'stock-in-trade' into 'capital asset' and enters JDA with Developer ('D') in FY 2020-21
- As per JDA, developed area to be shared between L:D in the ration 2:3 (40%:60%) with ownership in corresponding land



Conversion of land from 'stock-in-trade' into capital asset before JDA – Section 28(via) & 45(5A)



❖ On conversion of stock in trade (land) into capital asset:

- Business Income u/s **28(via)** = **FMV on conversion** – Cost of stock
- Capital Gains = As per **Section 45(5A)**

Note:

- **Cost of converted land** = FMV under section 28(via) [refer **Explanation 1A to section 43(1) and section 49(9)**]
- **Period of holding of converted land** shall commence from date of conversion

Amount held in Escrow Account- Taxability?



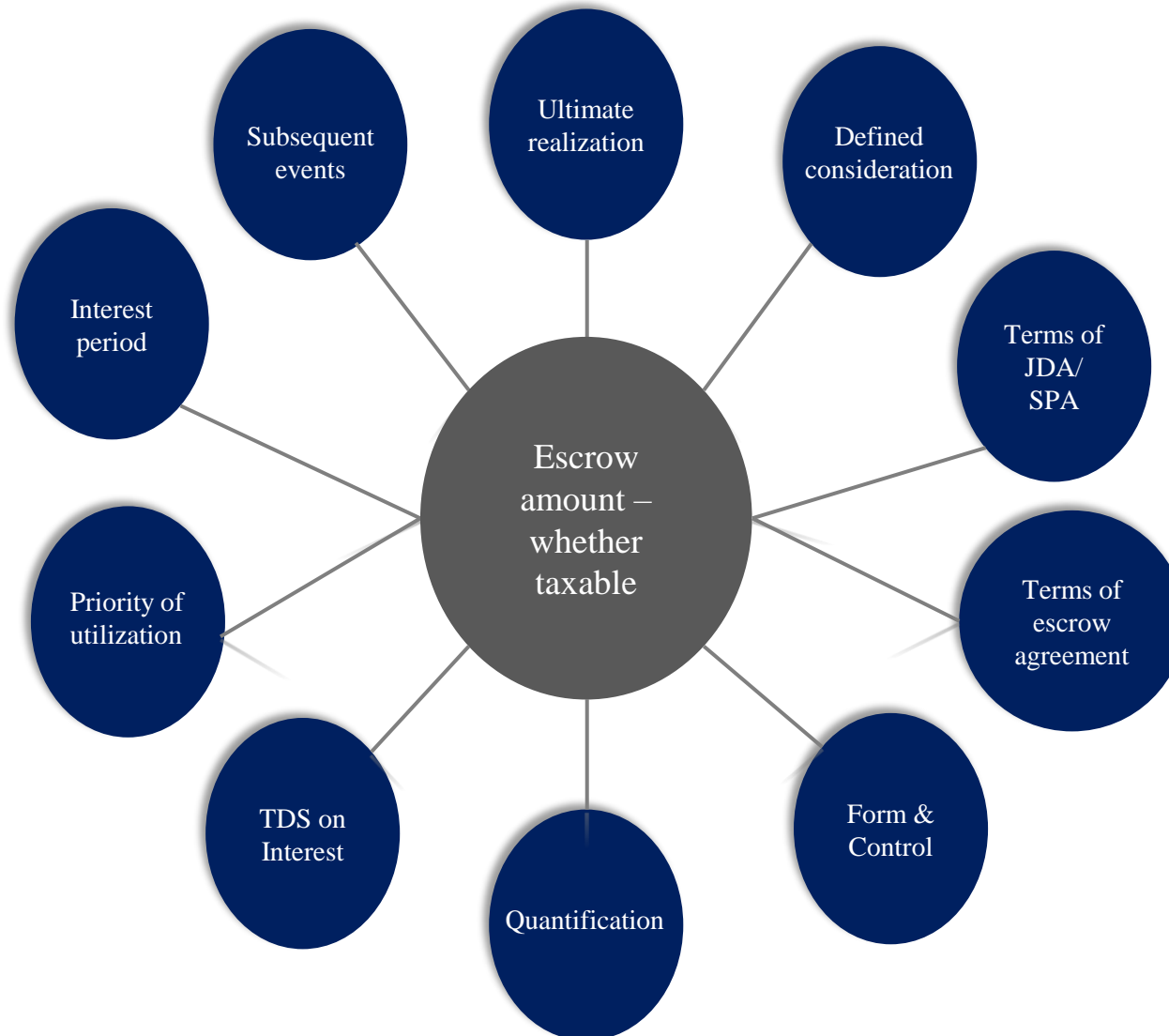
Illustration – Transfer of Shares of land-owning company:

- ❖ Enterprise Value (Consideration as per SPA) = **INR 500 cr.**
- ❖ Contingent Liabilities (no provision in books) = **INR 100 cr.**
- ❖ Amount kept in escrow (joint control) = **INR 50 cr.**
- ❖ Consideration received on the date of transfer = **INR 450 cr.**
- ❖ Terms of utilization of escrow amount
 - (a) Towards meeting contingent liabilities (say next 8 years)
 - (b) Residual amount, if any, to be released after 8 years

Issue:

- ❖ **Sale consideration = 500 cr. OR 450 cr.??**

Taxation of Income under JDA – Computation?

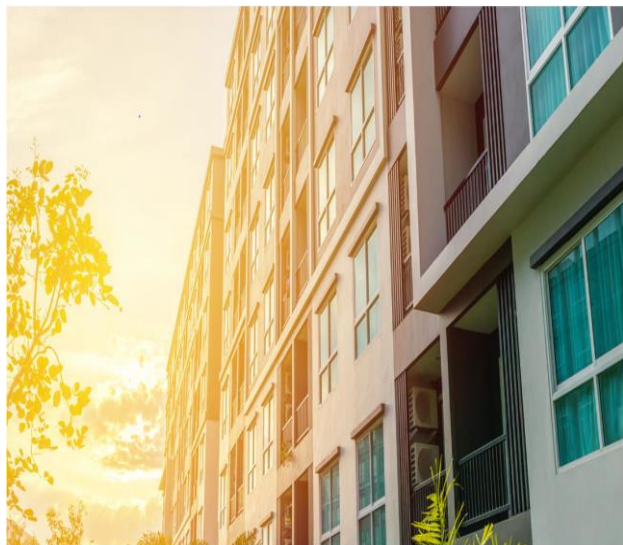


- ❖ Two Situations:
 - ❖ Case I – No amount received after 8 year
 - ❖ Case II – Part amount received after 8 year (say 25 cr.)
- ❖ Scheme of taxation of capital gains u/s 45 r.w.s. 48 is:
 - ❖ Capital Gains are taxable in year of “transfer”
 - ❖ $\text{Capital Gains} = \text{Consideration} - \text{Indexed Cost}$
- ❖ Concept of “Accrued” income explained in **E. D. Sassoon and Co. Ltd. vs. CIT: 26 ITR 27 (SC)** – **Right to receive an amount is fundamental to taxation of “income” under IT Act**

Taxation of escrow amount - conflicting judicial precedents:

- ❖ Consideration received can only be regarded as having accrued or arisen to the seller for the purpose of taxation u/s 45/48 [refer Mrs. Hemal Raju Shete: 239 Taxman 176 (Bom), PCIT v. Mahipinder Singh Sandhu: ITA No.368/2018 (P&H), Dinesh Vazirani vs. Principal CIT : [2022] 445 ITR 110 (Bom)]
- ❖ Entire amount, including amount kept in escrow account, taxable [refer Shri Ajay Guliya vs. ACIT: [2012] 209 Taxman 295 (Delhi), Caborandum Universal Ltd. vs. ACIT: 130 taxmann.com 133 (Mad)]

- ❖ Whether unrealized consideration (even after 8 years) shall get taxed?
- ❖ Whether cognizance of subsequent events (non-realization of amount from escrow account) can be taken?
- ❖ Unrealized Sale Consideration after 8 years:
 - (a) Whether concept of real income v. notional/ hypothetical income applicable? [Refer Shoorji Vallabhdas & Co: 46 ITR 144(SC), CIT vs. A. Raman And Co.: 67 ITR 11(SC), Godhra Electricity Co. Ltd. v. CIT: 225 ITR 746 (SC), UCO Bank v. CIT: 237 ITR 889 (SC) & Balbir Maini (supra)]
 - (b) How to seek exclusion of unrealized sale consideration?



Section 50C & Section 43CA

Taxation of deemed underpriced transactions

Section 50C & Section 43CA



- ❖ Section 50C was inserted by the Finance Act, 2002, w.e.f. 01.04.2003
- ❖ Applicable on transfer of **‘land’ or ‘building’ or ‘both’**
- ❖ Stamp Valuation deemed as ‘full value of consideration’ for capital gains u/s 48
- ❖ Objective to check proliferation of black money in property transactions
- ❖ If stamp value at time of Agreement-to-Sell (ATS) fixing amount of consideration and Registration of Deed is different, value on the date of ATS (former) considered if full or part consideration is received prior to date of agreement in modes other than cash [refer 1st & 2nd proviso to section 50C(1)]

Section 50C & Section 43CA



- ❖ Safe harbor of 10% provided- if stamp value is not more than 110% of actual consideration, actual consideration shall be taken as full value of consideration [3rd proviso to section 50C(1)]
- ❖ Finance Act, 2013, with effect from 01.04.2014 (AY 2014-15), has inserted section 43CA to cover sale of immovable property held as stock-in-trade [provisions are pari-materia to section 50C]

Reference to DVO

- ❖ If the assessee claims FMV to be lower than stamp value, and the value adopted by stamp authority is not disputed before any Court, AO may refer valuation to DVO [refer section 50C(2) r.w.s. 55A]
- ❖ Illustration:

Particulars	Case-I	Case-II	Case-III	Case IV
Sale Consideration	80	80	100	100
Stamp valuation	150	100	80	80
Fair value determined by DVO	100	150	90	120
Full value of consideration ?	80 OR 100?	100	100	100

*If FMV < Stamp value, FMV to be adopted [*Sri Pattabhiram vs ITO: 45 taxmann.com 141 (Vish)*]

*If FMV > Stamp value, then Stamp value to be adopted [**Refer 50C(3)**]

- ❖ What value should be adopted for the purpose of reinvestment as per sections 54 and 54F - actual consideration or deemed value?
 - Section 54 provides for exemption of capital gains as under:
 - (a) If capital gains \leq Cost of new asset, then entire capital gains
 - (b) If capital gains $>$ Cost of new asset, then upto cost of new asset
 - Section 54F provides for exemption of capital gains as under: :
 - (a) If Net consideration \leq Cost of new asset, then entire capital gains
 - (b) If Net consideration $>$ Cost of new asset, then proportionate capital gains

Practical Issues and Challenges



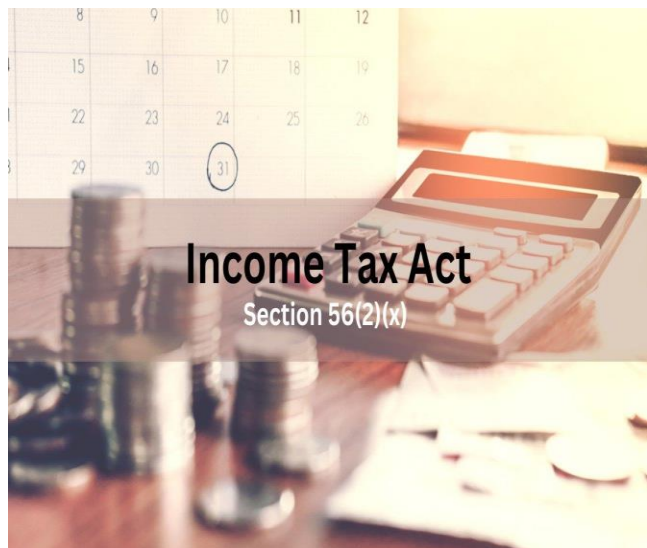
Particulars	Amount (Rs. In Crores)
Cost of house property sold	10
Actual sale consideration	50
Stamp value	70
Capital gains (Based on Stamp value) [70-10]	60
New property	40
Exemption u/s 54 would be	40? OR
	48 $[(60/50) * 40]?$

- Deeming provisions u/s 50C not applicable to section 54F – only actual consideration to be reinvested to claim exemption [refer **Gyan Chand Batra V. ITO: 133 TTJ 482 (Jaipur)**, **Seema Sabharwal v. ITO: ITA No.272/Chd./2017 (Chd Trib.)**, **Sunil Miglani v. DCIT: [2020] 115 taxmann.com 91 (Delhi - Trib.)**, **Smt. Sabita Devi Agarwal v. ITO [2019] 104 taxmann.com 12 (Kol. - Trib.)**].
- **Contrary View**: If actual sale consideration is Rs.20 lakhs; stamp value for section 50C is Rs.36 lakhs; and investment in new house is made at Rs.24 lakhs, i.e., more than actual consideration- Exemption u/s 54F could be claimed for Rs.24 lakhs [refer **Gouli Mahadevappa V. ITO: 356 ITR 90 (Kar.)**]

Points to Ponder

- ❖ Whether deemed consideration u/s 50C can also be applied to substitute actual consideration in monitored cases?
- ❖ Illustrative cases - **Open auction/ public bidding; Sale by liquidator under regulation 32 of IBBI Rule/ IBC laws**
- ❖ **Inland Revenue Commissioner v Clay and Buchanan (1914) 3 KB 466, 471:** Held when in a market/ sale / auction of any kind the intention to sell exists and the offer to purchase is not made to a limited party, where any willing purchaser can openly bid or take part in the sale then the price that is thus obtained in the sale shall be the fair market value.
- ❖ Section 50C not applicable in exceptional cases of distress sale [refer **CIT vs. Velankani Information Systems (P.) Ltd.: 218 Taxman 88 (Kar) ITO vs. Hari Om Gupta: 45 ITR(T) 137 (Luck)**]
- ❖ Section 50C introduced as anti-avoidance measure to counter black money in real estate transactions [refer **K.P. Varghese v. ITO: [1981] 131 ITR 597(SC)**]

- ❖ Whether it is mandatory for AO to make a reference to DVO?
 - Expression used is “*may refer the valuation ...*”
 - Right of assessee under section 50C(2) is a valuable statutory right available to protect his interest against arbitrariness [refer *N. Meenakshi vs. ACIT : 226 CTR 625 (Mad)*, *Jitendra Mohan Saxena vs. ITO : 117 TTJ 974 (Luck. Tri.)*]
- ❖ Can DVO valuation report be challenged in appeals?
- ❖ Whether addition under section 50C in the hands of the seller shall result in taxation of “on-money” under section 69 in the hands of the buyer?
- ❖ Whether section 50C applicable on transfer of development rights or leasehold rights associated with immovable property?



Section 56(2)(x)

**Receipt of property
for less than fair market value**

Section 56(2)(x)- Receipt at lower consideration

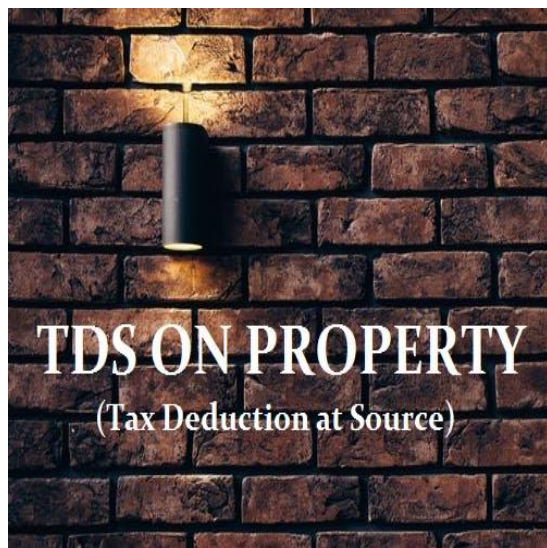


- ❖ Inserted vide Finance Act, 2017 w.e.f 1.4.2017 [receipt of property after that date]
- ❖ Applicable in the hands of recipient of the property
- ❖ Sub-clause (b) of section 56(2)(x) deals with receipt of immovable property which provides that following shall be deemed as income:
 - Stamp value of property received without consideration, if the same exceeds Rs.50,000
 - Difference between stamp value and actual consideration if former is higher than actual consideration if – (i) the difference exceeds 50,000; and (ii) 10% of actual consideration
- ❖ Provisions relating to considering stamp value on date of agreement vis-à-vis date of registration and reference to DVO are pari materia to section 50C/ 43CA

Points to Ponder

- ❖ Whether applicable to genuine transactions such as property acquired in open auction, under IBC, etc.?
- ❖ Whether double taxation is justified?
 - Firstly, in hands of seller by substituting sale value for computing capital gains u/s 50C;
 - Secondly, in the hands of acquirer/ buyer u/s 56(2)(x);
- ❖ Whether 56(2)(x) can be applied to tax excess of stamp value vis-à-vis actual consideration where property is acquired as stock in trade in the regular course of business?

Eg.: Purchase of land for INR 100 cr (Stamp Value INR 125 cr.)?



Sections 194IA, 194IC and 195

TDS on sale of property

TDS– Comparative regimes under various sections



❖ Following sections are relevant:

Particulars	Section 194IA	Section 194IC	Section 195
Obligation of	Payer/ buyer of immovable property	Developer	Payer
Payment to/ status of payee	Resident	Resident	Non-Resident
Payment of	Consideration for transfer/ acquisition of immovable property	Cash component under specified agreement [JDA]. Not applicable on consideration in kind [share in areas]	Any amount chargeable to tax in the hands of non-resident
Rate	1%	10%	Rates in Force [under Act/ Treaty]
Threshold	>=50 lakhs	Nil	Nil

Points to Ponder



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- ❖ Whether section 194-IC applicable to unregistered JDA?
 - ❖ Subsequent sale of constructed area received by landowner under JDA – Whether TDS u/s 194-IC or under 194-IA?

Indian
Accounting
Standards



Taxation in hands of Developers

Ind AS vis-à-vis ICDS

Accounting by Developers- Ind AS-115



- ❖ MCA notified Ind AS 115-Revenue from Contracts with Customers' effective from FY 2018-19
- ❖ In terms of Ind AS 115, Revenue is recognized only when entity transfers control of goods and services to the customers at amount it expects to be entitled to
- ❖ Ind AS 115 replaced existing revenue recognition standards Ind AS 11- Construction Contracts, Ind AS 18 – Revenue, and Revised Guidance Note of the ICAI on Accounting for Real Estate Transactions for Ind AS entities issued in 2016
- ❖ Ind AS 18 and Ind AS 11 provided for recognition of income under Percentage of Completion Method (POCM)

- ❖ Section 43CB provides that profits and gains arising from a “**construction contract**” or a contract for providing services required to be determined based on percentage of completion method (POCM) in accordance with the Income Computation and Disclosure Standards prescribed u/s 145(2) of the Act
- ❖ ICDS-III defines “**“Construction contract” is a contract specifically negotiated for the construction of an asset or a combination of assets that are closely interrelated or interdependent in terms of their design, technology and function or their ultimate purpose or use and includes:**”

- ❖ Whether the aforesaid section and ICDS applicable to Developers?
 - There is distinction between ‘developer’ and ‘contractor’ [refer **opinion of Expert Advisory Commissioner (EAC) reported in The Chartered Accountant Vol 52 at page 232**]
 - Developer undertakes development as an entrepreneur on its own account and/ or in joint venture with the landowner, while the contractor undertakes activities for the customer
 - [refer **CIT vs. Radhe Developers: 341 ITR 403 (Guj HC), Awadhesh Builders vs. ITO: 37 SOT 122 (Mum), ACIT vs Paras Buildcall Pvt Ltd: 57 taxmann.com 112 (Del.)**]
- ❖ Thus, section 43CB and ICDS-III applies to ‘contractors’ and not ‘developers’

ICDS- For Computation of Income



- ❖ At present, there is no ICDS for real estate developers:
 - ✓ ICDS-III is not applicable as it is applicable to contractors; and
 - ✓ ICDS-IV-Revenue Recognition is applicable to sale of ‘goods’ and not immovable properties
 - ✓ FAQs issued by CBDT dated 23.03.2017 acknowledged that there is no specific ICDS for revenue recognition by real estate developers
- ❖ Draft ICDS was issued in 2017 for real estate developers which is yet to be notified- the draft proposed POCM method for revenue recognition
- ❖ Developers may thus choose revenue recognition policy followed in books of account (as per Ind AS 115); which would be the required to be followed consistently and regularly [section 145].

Points to Ponder



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- ❖ Is there an option available with Developer to follow POCM for tax purposes de-hors recognition of revenue as per Ind AS-115 in the books of account?
 - ❖ Whether method of recognition of income be changed in respect of projects continuing from earlier years, wherein revenue had earlier been recognized on POCM basis?



Exemption

~Section 54 and 54F

Section 54- Exemption of LTCG on residential house



- ❖ Section 54 provides:
 - exemption of **LTCG**
 - to individuals and HUF
 - on transfer of **residential house** (income of which is chargeable u/s IHP)
 - if assessee has purchased **one residential house** within one year before and two years after of transfer; or
 - or has constructed residential house in three years
- ❖ If Capital Gains > Cost of new house – exemption to extent of cost of new house
- ❖ If Cap Gains =< Cost of new house – entire gains exempt
- ❖ Option to invest in ‘**two**’ house properties if LTCG < 2 crores
- ❖ Cost of new house shall be ‘nil’ if transferred within three years of purchase/ construction
- ❖ If cost of new asset > **10 crores- excess shall be ignored**

Section 54F- Exemption of LTCG



- ❖ Section 54F provides:
 - exemption to individuals and HUF
 - on transfer of **any long-term capital asset** other than residential house
 - if assessee has purchased **one residential house** within one year before and two years after of transfer; or
 - or has constructed one residential house in three years
- ❖ If New Consideration \leq Cost of new house – entire gains exempt
- ❖ If New Consideration $>$ Cost of new house – proportionate gain exempt
- ❖ Exemption not available if owns more than one residential house or purchase/construct any other house within one/ three years from date of transfer
- ❖ If cost of new asset $>$ **10 crores- excess shall be ignored**

- ❖ Can exemption u/s 54/54F be denied if new asset is purchased in name of souse/ joint name? [refer **CIT vs Kamal Wahal; [2013] 30 taxmann.com 34 (Delhi), CIT v. Ravinder Kumar Arora; -[2011] 15 taxmann.com 307 (Del)]**
- ❖ Whether exemption is available if entire amount is paid to the builder, but construction is not completed within prescribed timeperiod? [refer **CIT vs Sambandam Udaykumar: [2012] 19 taxmann.com 17 (Kar), CIT vs Sardarmal Kothari (2008) 302 ITR 286(Mad), CIT v. Kuldip Singh: 226 taxman 133 (Del)]**
- ❖ If only agreement to sell is executed and amount is invested within the defined time for new house, but sale deed happens outside the defined timeline- will exemption be available? [refer **CIT v. Mrs. Shakuntala Devi: [2016] 75 taxmann.com 222 (Kar)]**

Points to Ponder



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- ❖ Whether exemption is available if share is purchased in the new residential house and not the entire house? [refer **CIT v. Chandanben Maganlal: [2002] 120 Taxman 38 (Guj.)**]
 - ❖ Whether section 54F exemption available for renovation of house or extended construction of old house?



Other miscellaneous issues

- ❖ **Cancellation of agreement to sell and forfeiture of advance amount**
 - Under old law (section 51), amount retained or forfeited on cancellation of negotiations for transfer of capital asset was required to be reduced from cost of acquisition of such asset
 - Section 56(2)(ix) introduced w.e.f 1.4.2015 to provide that such sum forfeited shall be taxed as income from other sources
 - Proviso inserted in section 51 to ensure that double taxation does not happen
- ❖ **Points to ponder:**
 - If cancellation of agreement/ forfeiture happens in respect of in course of business - whether taxable u/s 28(ii) or 56(2)(ix)?
 - What shall be the treatment in the hands of payer of advance forfeited- whether loss allowable?

Structure- Company vs. LLP



❖ Taxation effect in alternate structures

Particulars	Company	LLP
Sale consideration	100	100
Less: Indexed COA	40	40
LTCG	60	60
Tax @ 20% (section 112)	12	12
Amount available for distribution	88	88
Tax on amount distributed	26.4	Nil
	[assuming tax @ 30% on dividend in hands of shareholder]	[Exempt u/s 10(2A)]
Total tax exposure	114.4	88

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