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Real Estate

In Pursuit of Knowledge

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Editorial

Dear DTPAians,

Let me start my editorial with words of a Scottish financial journalist, B. C. Forbes: Without self-respect, there can be no genuine success. Success won at the cost of self-respect is not success. For what shall it profit a man, if he gains the whole world and loses his own self-respect?

We hope our last journal on **"Limited Liability Partnership (LLP)"** has satisfied you on terms of its design and content. Likely, for this month we have tried to cover comprehensively the subject of **"Real Estate"**. Our Journal's focus is to investigate and expand the frontiers of knowledge that cover business decision-making applications through scholarly real estate research. The real estate market has been among the sectors worst hit by the economic downturn which, coupled with high interest rates in the face of persistent inflation and delays in securing mandatory government approvals, has kept wary homebuyers away for the last couple of years. The journal covers the issues regarding Real Estate Development faced in today's world. We have tried our best to cover most critical aspects of real estate like structuring of transaction, joint development agreement, service tax implications, stamp duty, adverse impact of litigations etc. securing articles from the best of professionals of our fraternity across India. I sincerely express my gratitude to all those professionals who have contributed to this journal.

For the benefit of members we have created a section of latest updates from the areas of Service Tax, Companies Act, Direct Tax, International Tax and Exchange Control Regulations. In addition, the readership will also gain access to all information relating to past and forthcoming programme of the Association. A membership form is also included in the revamped Journal, so as to facilitate new membership.

Sharing knowledge has helped mankind survive and evolve into the intelligent and productive species he is today. Here I will quote a thought of the Founding Fathers of the United States, Mr. Benjamin Franklin." An investment in knowledge always pays the best interest". Under the shadow of this quote I would request all the members to share their observation and feedback on this issue which will help us to improve the construction and contents of the Journal and will also serve as a tool for continued learning. We welcome contributions from all the members who intend to share their knowledge and experience with us for publication in the Journal. March 2016 issue shall be based on the theme **"Bank Audit and Budget 2016"**. You can email us your article(s) on email id dtpajournal@gmail.com by 31st March, 2016. We have also requested our IT committee to upload the copy of Journal on our website and to share on Facebook so that you all can share the same with your colleagues. We wish to encourage more contributions/ suggestion/feedback from the members to ensure continued success of this initiative.

Thank you. We hope you will find this issue informative.

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20th February, 2016

FROM THE DESK OF THE President - DTPA

Dear Members,

The chill of the winter has gone and we are now in the warmth of the Spring season awaiting the Budget and as always are expectations are really high from our Finance Minister. The coming month of March is fully action packed with time barring scrutiny assessments for assessment year 2013-14 and filing of returns for the assessment year 2015-16 and 2014-15. I urge all our members to advice their clients to pay their advance tax in full in a timely manner as it will help in nation building, deduct taxes at source wherever required and at higher rates in case of debatable issues so that the deductee can claim the refund easily in his return of income which is now being issued in no time after filing of the return. In this way, we can also help the Government in its efforts in reducing litigation and collection of more taxes.

The CBDT has issued important Notification no. 95 of 2015 dated 30/12/2015 wherein Rules 114B, 114C & 114D relating to quoting of PAN in certain specified transaction has already come into force w.e.f. 01/01/2016 and Rule 114E relating to furnishing of statement of financial transaction will come into force w.e.f 01/04/2016. The notifications are appended to this journal. It has also specified procedures, formats and standards for ensuring secured transmission of electronic communication on 03/02/2016 which are also annexed in this part.

I on behalf of DTPA congratulate all the elected leaders of the Central Council and Regional Council of the Institute of Chartered Accountants of India. We hope that in these challenging times for the profession, they would keep the flag of the Institute fluttering high. We have also been awarded the Highly Commendable Study Circle Award by Eastern India Regional Council of ICAI.

From the judicial front, all the section 263 cases pertaining to share capital are now being heard by the High Court at Kolkata. The ITAT also celebrated its 75th year of service to the nation at Hotel Ashok, New Delhi on the 24th & 25th January, 2016 which was inaugurated by our President Sri Pranab Mukherjee and Justice T.S.Thakur, Hon'ble Chief Justice of India.

In this journal we have tried to cover all the issues relating to taxation aspects of real estate. Moreover, all the relevant circulars / instructions relating to taxation have also been incorporated in this journal including select orders of ITAT Kolkata relating to real estate matters. I am grateful to our Advisor-Journal Sub-Committee Shri P.R.Kothari ji and congratulate our Chairman Shri Niraj Harodia ji and his team for publishing the journal.

Jai Hind!

CA. Sunil Surana, President DTPA
16th February, 2016.

ADVERSE POSSESSION AND RECEIPTS RELATING THERETO

S M Surana, Advocate

What is Adverse possession.

Possession of property without any lawful authority is called adverse possession. Adverse possession may be forcible possession of an immoveable property, continuing possession of the property after expiry of the lease or unauthorised occupation after legal termination of tenancy.

For the purpose of understanding let us assume an issue:-

There was an indenture of lease made on 1910 for 99 years, between A as lessor and B as lessee, the lease rent fixed at @ 200/- per month without any option for renewal The lessee put up a factory thereon immediately thereafter and put up construction of factory shed and building. The lessee however could not run the said factory and another person Mr C purchased the said factory 1930.Accordingly A stepped into the shoes of the along with all the buildings, erections standing thereon and all plant and machineries , fixtures and fittings free from all encumbrances . No consideration was paid for the lease hold rights. However the vendor B also assigned the lease hold interest in the said land for the remaining period Accordingly the said C became the lessee of the said land for the remaining period of the lease. As there was no cost of acquisition of the said lease hold land nor any payment was made for assignment of the lease to the assessee no portion of the consideration amount paid for assignment of lease hold rights was debited or shown under the head leasehold land nor any such amount under the head leasehold land appeared in the balance sheet of C

Immediately before the expiry date of the said lease, A the land lord served a notice on C to quit vacate and deliver the peaceful vacant possession of the land to them. The said C however did not vacate the said land and continued in occupation/ possession though not as a lawful tenant nor they had any tenancy right after expiry of the said period of lease and did not accept the lease rent any further. C however continued depositing the lease rent of Rs. 200/- per month with the rent controller, but the same was not withdrawn by the landlord. Therefore the said C was not in legal possession of the property after expiry of the lease period. The provisions of Transfer of property Act may be referred. Section 108(B) deals with regard to the rights and liability of the lessee which is as per section 108(B) (q) of the Transfer of Property Act as under:-

"on the determination of the lease, the lessee is bound to put the lessor in possession of the property"

Therefore B was under an obligation to vacate the property and deliver vacant possession to the lessor. Section 108(B) (m) of the Transfer of Property Act also casts duty of the lessee to deliver vacant possession to the lessor. Similarly section 111(a) says that the lease is determined by efflux of time limited thereby. Therefore the lessee C had no legal right to remain in the property and was possessing the property land without any legal or valid title and remained in adverse possession of the said land.

It has been held in the case of SHANTI PRASAD DEVI AND ANOTHER, APPELLANTS v. SHANKAR MAHTO AND OTHERS, RESPONDENTS reported in 2005-(005)-SCC -0543 –SC/ 2005-(092)-AIR -2905 -SC that the lessee after expiry of lease is bound to vacate the property and not only that the lessor is also entitled to mesne profit which have been defined in s. 2(12) of the CPC, 1908 as under :

"(12) 'mesne profits' of property means those profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received there from, together with interest on such profits, but shall not include profits due to improvements made by the person in wrongful possession."

The above statutory definition, clearly takes within its scope any receipt against wrongful possession of property. Even such mesne Profits received by the lessor for wrongful or unlawful possession of the property by the lessee have been held to be capital receipt by the Special Bench of the ITAT in the case of Narang Overseas reported in 114 TTJ page 433.

The present write up is to look into the receipt by the person who is in adverse possession like Mr C. Needless to mention that the adverse or illegal possession is neither a tenancy right nor a capital asset, and there was or could be no cost of acquisition for such illegal occupation. Therefore when there is no cost of acquisition the computation provisions u/s. 45 fails in view of the Judgement of the Hon'ble Supreme Court in the case of B.C.Srinivasa Setty reported in 128 ITR page 294. If there was no cost of acquisition the amount cannot be taxed under the head capital gain.

An amendment was made in section 55(2)(a) of the Income tax Act 1961 whereby the certain assets have to be treated as capital assets and the cost of acquisition of such assets is to be taken at nil so as to apply the computation provisions for the purpose of capital gains. Such assets are specifically mentioned being (l) Goodwill of the business, (2) Trade Mark or Brand Name Associated with the business, (3) Right to manufacture, produce or process any article or thing, (4) right to carry on any business, (5) Tenancy rights stage carries permits or loom hours.

The assessee's illegal possession /occupation cannot be considered as tenancy right since such right was duly extinguished on the date of expiry of lease and the occupant had no lawful right of any nature in the said land. Therefore B was not a tenant so as to treat the said occupation as any right not to speak of any tenancy right. Any amount received for vacation of such illegal occupation cannot be taxed as capital gain. The said amount cannot also be treated as income from other sources even if computation provision for capital gain fails

The issue with regard to the receipt on adverse possession has been elaborately considered by Hon'ble, D- Bench, Mumbai Tribunal in the case Star Chemicals Bombay Pvt Ltd reported in 110 TTJ 753. The head lines of the Judgement are mentioned hereunder:

"In favour of Assessee : Capital gains - Chargeability-Sale of land acquired by adverse possession- assessee producing sufficient evidence on record to establish that the lands in dispute were acquired by adverse possession which remained un-rebutted by Department- Thus the lands were acquired by assessee without any consideration and their cost of acquisition was nil-Legal expenses incurred for defending the title would not constitute cost of acquisition for purposes of capital gains tax- Objection of Revenue that there cannot be a title by adverse possession unless declared by the Court of Law is off the point as the issue under consideration is whether the land sold had any cost of acquisition- Capital receipts not taxable under sec. 45(1) cannot be brought to tax under sec. 10(3)- There being no cost of acquisition of lands acquired by adverse possession, sale thereof did not give rise to capital gains".

In so deciding the Hon'ble bench has considered a number of Judgement on the issue and held that the amount cannot be taxed as capital gain nor as income from other sources. The Hon'ble Tribunal also considered various contentions of the department including the contention that the cost incurred in the litigation by the person in adverse possession cannot also be considered as cost incurred for acquisition of such property. Needless to state that in case of adverse possession litigation cost has to be incurred by the person in adverse possession.

Therefore receipts on surrender of the adverse possession of the property, in my view is capital receipt not liable to tax.

A creative man is motivated by the desire to achieve, not by the desire to beat others.

– Ayn Rand

STRUCTURING OF TRANSACTIONS IN REAL ESTATE

CA Ashok Raghavan, Bangalore

INTRODUCTION:

The topic "Structuring of transactions in Real Estate" is very vast in nature and requires a thorough understanding of the provisions of Section 45 –Section 55A, Section 2(47) which defines the term "transfer", Section 2(14) which defines the term "Capital Asset", Section 2(29A) which defines the term "Long Term Capital Asset" and Section 2(42A) which defines the term "Short Term Capital Asset", "Long Term Capital Gain" as enumerated under Section 2(29B) and "Short Term Capital Gain" as defined in Section 2(42B) of the Income Tax Act 1961, relevant provisions of the "Transfer of Property Act 1882, The Indian Easements Act 1882, The Registration Act 1908, the Stamp Acts of various States, VAT provisions of each State and the provisions of the Finance Act with regard to Service is required to enable effective structuring of real estate transactions .

The transactions in real estate are suffering from the cascading effect of a plethora of taxes. Under the present law there is stamp duty and registration chares payable on the Transfer of Immovable Property, VAT on "transfer of property in goods" in the execution of a works contract which is arising out of sale of immovable property (in most states), Service Tax on the service provided by the builder/contractor on the land owner/ purchaser, property tax for retention of the immovable property and tax on business profits or capital gains as the case may be on the transfer of immovable property. With the cost of inputs in the form of steel, cement, sand, jelly etc., and the cost of services related to construction increasing with every passing day, the only way of being competitive in the real estate industry would be by evolving methods of reducing **the impact of the cascading effect of taxes through effective tax structuring and planning within the parameters of law** which has gained judicial benediction based on the decisions of the apex court in the case of **Union of India and Another v. Azadi Bachao Andolan and Another 263 ITR 706 (SC) and Vodafone International Holdings B.V. v. Union of India and Another 341 ITR 1 (2012) (SC).**

Tax planning may be legitimate provided it is within the framework of law. The intention of the legislature in a taxation statute is to be gathered from the language of the provisions particularly where the language is plain and unambiguous. In a taxing statute, it is not possible to assume any intention or governing purpose of the statute more than what is stated in a plain language. Therefore, as long as the arrangement of the assessee to avoid payment of tax does not contravene any statutory provision and is achieved within the four corners of the law, it cannot be found fault with. In each case, the transaction in the question and the material on record has to be carefully examined to find out whether the transaction is "sham" or "unreal" or "colorable device" to evade payment of tax.

A clear understanding of the definition of the term "Transfer" under Section 2(47) of the Income tax Act and the definition of the term "Immovable Property" under Section 269UA(d) of the Income tax Act becomes essential to understand the consequences arising out of the retention and transfer of immovable property and the tax incidence thereon.

"**Transfer**" under Section 2(47) which is in relation to a capital asset includes:

i) the 'sale', exchange or relinquishment of the asset; or

ii) the extinguishments of any rights therein; or

Giving up the right to claim specific performance of conveyance of an immovable property as per the agreement is a relinquishment of the capital asset and compensation received is therefore liable to be taxed as Capital Gain.

- **CIT & Anr Vs H Anil Kumar (2011) 242 CTR (KAR) 537.**

The exclusive right of possessing, enjoying and disposing of a thing comes within the meaning of the term "property". The term "property" encompasses in its ambit a bundle of rights. The advance given for a property which gives a right to the assessee to possession was a "Capital Asset" within the definition of Section 2(14) of the Income Tax Act and transfer of such as asset was liable to be taxed as "Income from Capital Gains"

- **Asstt CIT Vs Shabnam Sachdev(2013) 141 ITD 730, 155 TTJ 258(Del "G" Trib)**

- **Gulshan Malik V CIT (2014) 223 Taxman 243 (Del).**

The Supreme Court has in the case of Sanjeev Lal, Smt Shail Moti Lal v CIT and Another (2014) 365 ITR 389 (SC) held that there is an extinguishment of right when an agreement to sell is entered into and when the intending purchaser transfers that right to someone else, it amounts to transfer of a capital asset as understood u/s 2 (47) of the Income Tax Act.

iii) the compulsory acquisition thereof under any law; or

iv) in a case where the asset is converted by the owner thereof into, or is treated by him as, stock-in-trade of a business carried on by him, such conversion or treatment; or the maturity or redemption of a Zero Coupon Bond; or

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

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

Explanation: For the purposes of sub-clauses (e) and (f), "Immovable Property" shall have the same meaning as in clause (d) of Section 269UA of the Income Tax Act.

"Immovable Property" under Section 269 UA (d) means:

i) any land or 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;

The said definition has been linked to the explanation under Section 2(47) of the Income tax Act as mentioned above.

Based on the definition of Immovable Property U/s 269 UA(d) as above, the Supreme Court has in the case of **Unitech Limited and Another vs. Union of India and Another (Civil Appeal No.430 of 2007 rendered on 04/11/2015** held that the provisions of Chapter XX-C would apply even in the case of a Joint Development Agreement. While rendering the decision, the Apex Court has referred to the judgment of **Ashis Mukerji vs. Union of India and Others (1996) 222 ITR 168(Patna).**

The Supreme Court has observed while rendering the above judgment that " in fact the Parliament has defined "transfer", deliberately wide enough to include within its scope such agreements or arrangements which have the effect of transferring all the important rights in land for future considerations such as part acquisition of shares in buildings to be constructed, vide sub-clause (ii) of clause(f) of sub section (2) of Section 269UA.

It is well settled that a definition of a term in one Section of the same statute cannot be imported for the purpose of interpreting another Section unless the context justifies it or if the context indicates otherwise.

- **CIT Vs Venkateswara Hatcheries 237 ITR 174(SC)**
- **CIT Vs G S Atwal and Co 254 ITR 592(Cal)**
- **CIT Vs Dredging Corporation of India 174 ITR 682 (AP)**

Immovable properties have been defined u/s 3(26) of the General Clauses Act, 1897, to include benefits arising out of land. Therefore development rights, TDR etc would fall under the above definition and be regarded as immovable properties. Similarly a right to obtain conveyance of an immovable property is a Capital Asset

- **Ref: CIT vs Tata Services Ltd (1980) 122 ITR 594 (Bom) &**
- **CIT vs Vijay Flexible Containers (1990) 186 ITR 693 (Bom)**

However, it is interesting to note that the Bombay High Court has in the case **of CIT – 18 v. Sambhaji Nagar Co-op Hsg. Society Ltd. ITA No. 1356 of 2012 rendered on 11/12/2014 (Bombay HC),** held that there no capital gains on the transfer of TDR as there is no cost of acquisition to acquire the TDR and in the absence of a specific provision to tax the same as provided in other cases under Section 55. The decision is based on the earlier decisions in the case **of New Shailaja Co-op Housing Society Limited (2009) 121 TTJ 0062 (Mum Tribunal).**

Further, the Supreme Court has in the case of **Hill Properties Ltd V Union of India and Others (Civil Appeal No 7939 of 2013)** rendered on 11-9-2013 held that even an Occupancy Right in an apartment is equal to Ownership.

I have listed below a few issues on taxation of real estate transactions with tax planning opportunities and need for structuring-

1. SALE OF LAND AND BUILDING UNDER COMPOSITE AGREEMENT

It is often observed that both the land and building are sold under one composite agreement for a lump sum consideration without assigning the individual values for each of them. Further in case where the land is considered as a long term capital asset and the building as a short term capital asset due to the respective periods for which such assets were held, it becomes difficult to ascertain the amount taxable as long term and short term capital gains respectively. Therefore in all such cases, it is always better to clearly mention the value for land and building separately in the instrument of conveyance. It has clearly been held in the cases mentioned below that where the land has been held for the period of more than 36 months and the building for less than 36 months, the capital gains will be taxed as long term and short term respectively and that there has to be bifurcation of the consideration on some basis if the same is not ascertainable from the agreement or deed as the case may be. The necessity to ascribe distinct values to land and building is also advisable to address issues relating to VAT and Service Tax where there could be an aspect of these levies when super built up area is involved.

2. INDIVIDUAL OR CO-OWNERS CONTRIBUTING IMMOVABLE PROPERTY INTO A FIRM AND THEN ENTERING INTO DEVELOPMENT

In the case of an individual or co-owners of a property held by them which is intended for development either on their own or through a developer the following methodology could be adopted:

i) The property in question could be contributed by the Individual or co –owners as the case may be to a partnership firm as his/their capital contribution.

ii) The amount recorded in the books of the firm could be determined by the Individual or co-owners based on the value of house property he/each of them are willing to invest to claim exemption under Section 54F

iii) The property is converted and treated as stock-in-trade in the books of the firm after its introduction as capital contribution and recital to this effect is also made in the partnership deed.

iv) A joint development agreement to be entered into only post conversion to stock in trade with clear mention of the status of the property in the joint development agreement.

v) The tax on sale/ transfer of the property post development would arise as and when the risks, rewards and ownership are transferred.

Conclusion- By adopting the above method the Individual or co-owners enjoy the benefit of exemption under Section 54F of the Income Tax Act and also are able to reduce the tax on sale/ transfer of the property as **"**Business income**"** by recording the value of the property at a higher value at the point of introduction.

It is to be noted that Section 45(3) is a specific provision for taxing the capital gains arising out of introduction of an immovable property by a partner into a firm and therefore the provisions of Section 50 C would have no application to determine the deemed value of consideration for the purposes of transfer especially in cases where there is no requirement for registration and payment of stamp duty, and in such cases the value recorded in the books of the firm will be the deemed value of consideration for the purpose of transfer.. Reference in this regard can be made through the decision of the **Lucknow Trib** in the case of **Carlton Hotels Pvt Ltd v. Asstt CIT (2009) 122 TTJ 515.**

It is relevant to note that the **Authority of Advance Ruling(AAR) has in the case of the Canoro Resources Limited vide its ruling dated 23/04/2009 (AAR 779 of 2008)** held that the transfer pricing provisions and the provisions of Section 45(3) when read in harmony would lead to an inference that Section 45(3) would not apply to international transactions and hence in such cases the transfer pricing provisions prevail over the provision of Section 45(3) and consequently the value of the immovable property contributed into the firm by the partner cannot be the one recorded in the books of the firm.

Further, the Mumbai "F" Bench Tribunal has in the case of **Income Tax Officer 22(3)(4) Mumbai vs United Marine Academy ITA NO 968/Mum/2007** reported in (2011) 130 ITD 113, 138 TTJ 129, 9 ITR(Trib) 639 rendered on 25-4-11, held that deeming fiction created under Section 50C would not be in conflict with the deeming fiction under Section 50(2) as both the said sections are not conflicting and could coexist. Consequently the tribunal has held that the provisions of Section 50C would be applicable even to a transfer of an immovable property being a depreciable asset under Section 50.

However, in another interesting decision in the case of **Bhaidas Cursondas and Company v Addl CIT, Range 12(1), Mumbai (2015) 59 taxmann.com 373 (Mum- Tribunal**) rendered on 11-3-2015, it has been held that the deeming fiction u/s 50C would apply for the limited purpose of computing Capital gains under section 48 and not for recomputing the written down value for the purpose of computing capital gains under Section 50 of the Income Tax Act. While rendering the decision the tribunal has distinguished the decision in the case of United Marine Academy (supra).

It is pertinent to note that legal fictions are created for a definite purpose and are therefore to be limited for the purpose for which they are created and should not be extended beyond their limited field. Reference in this regard can be made to the following decisions to enunciate the above principle

- **CIT V T S Rajam (1980) 125 ITR 207 (Mad)**
- **Cambay Electric Supply Industrial Co V CIT (1978) 113 ITR 84 (SC)**
- **Smt. Radhadevi Mohatta V CWT (1981) 129 ITR 229 (Bom).**

3. TRANSFER OF PROPERTY THROUGH RECONSTITUTION OF A FIRM:

Transfer of immovable property contributed into the firm as capital can be done through reconstitution of the firm i.e., by introducing new partners (Buyers) and retiring existing partners (sellers). However it is be noted that the Karnataka High Court has in the decision **of CIT Vs Gurunath Talkies rendered on 7-7-2009 reported in 328 ITR 59(2010)** held that in case where the partners who contributed the property of the Firm retire from the firm leaving behind the property in the firm, it amounts to a transfer of immovable property by the retiring partners in favour of the continuing partners and amounts to “transfer” as understood u/s 45(4) of the Income Tax Act. The decision though unfortunate is bound to be used by the Assessing Authorities in all cases where property was transferred through this methodology. The Decision of the Mumbai Tribunal in the case of **Shri Sudhakar M Shetty Vs ACIT (supra)** also appears to have adopted the same view.

The Ahmedabad Tribunal in the case of **Bharat Ginning and Pressing Factory v ITO (2013) 155 TTJ 343** has also followed the decision of Gurunath Talkies (supra).

It is therefore prudent to ensure that the original partners are retained in the firm with minor shares. To support this proposition reference can be made to the decision of the Karnataka High Court in the case of **CIT Vs Shri P N Panjwani (2012) 21 Taxmann.com 458 rendered on 12-3-2012 (ITA Nos 1317, 1316 and 1318 of 2006)** wherein the court has held that dilution of the share of a partner in a firm as a result of admission of new partners does not result in relinquishment of rights in the properties of the firm by the existing partners in favour of the admitted partners. This view confirms the analogy that there are no specific rights to specific properties in a firm vis-à-vis the partners. While rendering this judgment the Court has also distinguished the judgment of **Gurunath Talkies** (supra).

It is be noted that the Karnataka High Court has in the case of **B Raghuram Prabhu Estate Vs Jt CIT (2011) 335 ITR 394(Kar)** has held that the amounts received by the erstwhile partners of a dissolved firm would be liable to be taxed as Capital Gains as the amount were received by them towards the value of their shares of assets in the firm which amounted to a transfer of a **“capital asset”**. The above decision indicates that the share of a partner in a firm by itself is a **“capital asset”** as held by the Mumbai Tribunal in Sudhakar M Shetty’s case (supra), although the context and facts in the case before the Karnataka High Court was substantially different from that of the Mumbai Tribunal.

However it is heartening to note that the Division Bench of the Karnataka High Court has in the case of **CIT vs M/s Dynamic Enterprises ITA No 1414/2006 rendered on 16/9/2013(2013) (2013) 359 ITR 83 (Kar)(FB**) held that on a cash settlement made to a retiring partner, the provisions of Section 45(4) have no application and while rendering the decision has clearly held that the decision in the case of Gurunath Talkies (supra) is not good law while reaffirming the principles laid down in the case of **CIT vs Mangalore Ganesh Beedi Works (2004) 265 ITR 658 (Kar) .**

This decision would go a long way to negate the consequences arising out of the analogy laid down in the decision of Gurunath Talkies (supra).

4. DISTRIBUTION OF CAPITAL ASSETS ON THE DISSOLUTION OF THE FIRM OR OTHERWISE {SECTION 45(4)}.

a) The Distribution of a capital asset to a retiring partner will come within the ambit of the term “otherwise” as appearing under Section 45(4) of the Income Tax Act.

- **Refer: CIT Vs. A.N. Naik Associates and another (2004) 265 ITR 346 (Mum).**
- **Gujarat Tin Printing Works vs ITO (2011) 128 ITD 182 (Ahd)**

The Mumbai Tribunal has in the case of Burlingtons' Exports, 45 ITD 424 held that the term **'otherwise'** will not include withdrawal of assets by a partner for consideration. Therefore if a partner buys an immovable property of the firm, from the firm the provisions of Section 45(4) will not be attracted.

However, it is interesting to noted that the Madras Tribunal in the case of **Asst CIT Vs Goyal Dresses** reported in **126 ITD 131(2010)** held that the provisions of Section 45(4) would apply only when the distribution of capital assets of the firm are made to more than one partner as the term **'distribution'** would necessarily mean the parting of the firm's capital assets to more than one partner.

b) Retirement of a partner from a firm does not amount to transferring any immovable property of the firm in favour of the surviving partners because there is no specific right to specific property. It is also important to note that when a partner retires from a firm he does not transfer any right in the immovable property in favour of the surviving partners because he has no specific rights with respect to the properties of the firm. Therefore when a partnership is reconstituted by adding a new partner, there is no transfer of assets within the meaning of Section 45(4).

- **Ref: CIT vs. Kunnamkulam Mill Board (2002) 257 ITR 544 (Ker).**
- **B T Patil and Sons V Commissioner of Gift Tax (2000) 247 ITR 588 (SC) affirming the decision of the Karnataka High Court in the said case(1997) 224ITR 431**

However the Mumbai Tribunal in the case of **Shri Sudhakar M Shetty Vs ACIT ITA No – 1515/ Mum/ 2010** rendered on **09/09/2010 reported in (2011) 9 taxmann.com 274, 130 ITD 197** has taken a contrary view on a similar set of facts.

c) Where the firm continues after dissolution for the limited purpose of winding up its affairs without distribution of capital assets, no capital gains would arise in the year of dissolution.

- **Refer: B.Raghuram Prabhu Estate vs JCIT (Assessment), 264 ITR 124 (Kar)**
- **CIT vs. Mangalore Ganesh Beedi Works 265 ITR 658 (Kar)**

In other words, if the dissolution of the firm happens in a year in which there is no transfer of assets to the partners which may have happened earlier, the provisions of Section 45(4) may not be applicable.

- **Ref: CIT vs Vijayalakshmi Metal Industries (2002) 256 ITR 540 (Mad).**

However, the judgement of **BT Patil and Sons** (supra) is contrary to the above judgement.

Further the High Court of Karnataka in its judgement in the case of **CIT Vs Gokuldas Exports (2012) 18 Taxmann.com 266 order dated 8-11-2011** as held that there would be a transfer as understood u/s 45(4) in case the assets are distributed to the partners by book entries and the firm is subsequently registered as a joint stock company. The Court has distinguished the judgement of **CIT Vs Unity Care and Health Services** (supra) while rendering this judgement.

d) The transfer of property of the firm to a partner by a book entry in a year when there is no dissolution of the firm and where such partner is not retiring, without a duly executed deed of conveyance is a not a "transfer" as contemplated u/s 45(4) of the Income Tax Act.

- **CIT Vs Kedarnath Poddar & Co (1993) 201 ITR 639(Cal)**
- **Opposite View- CIT Vs J M Mehta & Bros (1995) 214 ITR 716(Bom).**

(e) Amounts received by a partner in excess of his balance in the capital and current account , cannot be taxed under Section 45 as it is a settlement of mutual rights between the partners.

- **Refer: CIT Vs Mohanbhai Pamabhai – 165 ITR 166 (SC) (1987)**
- **Tribhuvandas G.Patel Vs CIT – 236 ITR 515 (1996) (SC)**
- **CIT Vs L.Raghu kumar – 141 ITR 674 (AP), 247 ITR 801(SC)**
- **CIT v. Seshagiri Rao- 213 ITR 304 (AP)**
- **CIT Vs P H Patel (1987) 171 ITR 128 (AP) ITO Ward (1) Gulbarga v. Prabhuraj B. Appa (2006) 006 SOT 415 Bangalore Tribunal**
- **ITO 37(1) New Delhi v. Amitabh Singh IT Appeal No. 3996 (Delhi) of 2006 rendered on 15th June 2007 016 SOT 0453**
- **Smt Durdana Khatoon v. Dy. CIT, IT (S.S.) Appeal No. 11 (Hyd) of 2004 rendered on 29/10/2004, 93 ITD 15 and also in 93 TTJ 753.**
- **ACIT V P Sivakumar (HUF) (2014) 43 taxmann.com 211 (Chennai-Trib)**
- **ACIT Circle 16(2) Hyderabad vs N Prasad Executive Chariman, Matrix Laboratories Ltd, Secundarabad ITA No 1200/Hyd/2010(Hyd ITAT "B" Bench) pronounced on 27-1-2014 after considering all the above decisions.**

Opposite View

- **Smt Girija Reddy v. ITO 52 SOT 113 ITAT Hyd Bench (2013) 52 (II) ITCL 199**
- **Sudhakar M. Shetty v. ACIT (130 ITD 197) Mum Tribunal** - relating to transfer of partnership interest for consideration.

- **Shevanthibhai C Mehta Vs ITO 83 TTJ 542 (Pune).**
- **CIT Bombay City II, Bombay vs H.R. Aslot 115 ITR 255-** relating to transfer of partnership interest for consideration.
- **N. A. Mody v CIT 162 ITR 420(1985) (Bombay HC)**- relating to transfer of partnership interest for consideration.

Some of above case laws were rendered based on the provisions of Sec 47(ii) of the Income Tax Act which was in force till 1.4.1988 .However the principles enunciated in the said decisions continue to have relevance even as on date in the absence of a specific provision to tax the amount the excess amount received by the partners as mentioned above.

However the Mumbai Tribunal in the case of **Shri Sudhakar M Shetty Vs ACIT ITA No – 1515/ Mum/ 2010 rendered on 09/09/2010 reported in (2011) 9 taxmann.com 274** has taken a contrary view on a similar set of facts.

The Delhi High Court in the case of **Bishan Lal Kanodia V CIT 257 ITR 449 (2001)** has held that the amount received by a partner in excess of the balance in his capital account on his retirement is taxable as capital gains u/s 45 of the Income Tax Act.

Therefore, if the firm sells the immovable property belonging to it and distributes the cash to the partners even if it is in excess of the amounts due to them towards their capital and current accounts, will the same be treated as capital receipt in the hands of the partners?

Further reference may be made in this regard to the following case laws which have held that the amount received by a partner on the relinquishment of his share in the firm is a capital receipt and therefore not liable to tax.

- **CIT Vs Tahir Hussain 217 ITR 869 (Allahabad) 1995**
- **Kettlewell Bullen And Co Ltd V CIT (1964) 53 ITR 261 (SC)**
- **Prashanth S Joshi Vs ITO 324ITR 154(Mum).**

Tax Planning

In the case of sale of an immovable property being land and building which is owned and held by a partnership firm, there would be an incidence of Long Term Capital Gains under Section 45 on land if held for more than 36 months and Short Term Capital Gains on buildings if it is a depreciable asset or of it is less than 36 months and further the avenues for minimizing tax are limited for the firm with only the option of investing in bonds under Section 54EC available. In such cases based on the decisions rendered in the case of **Sudhakar M Shetty and Girija Reddy (supra)** the buyers could be admitted as partners into the firm and the sellers could retire from the firm post admission of the buyers as partners. The buyers can bring in as capital into the firm the amount of money equivalent to the credit lying in the capital and current account of the existing partners (sellers) which can be drawn by the said partners. The said drawings by the partners are capital receipts in their hands and not liable to tax. The differential consideration for the immovable property of the firm can be paid to the partners towards relinquishment of their interest in partnership which by itself has been held as a “Capital asset” in the aforesaid decisions.

By adopting this method the surplus derived on sale of the immovable property has now been diverted to the partners instead of accruing to the firm and consequently the impact of Capital Gains arsing on the partners could be reduced by exploring the avenues under Section 54F and Section 54EC of the Income Tax Act.

SECTION 45 (4) VIS-À-VIS SECTION 50 C

Section 45(4) of the Income tax Act 1961 states that “The profits or gains arising from the transfer of a capital asset by way of distribution of capital assets on the dissolution of a firm or other association of persons or body of individuals (not being a company or a co-operative society) or otherwise, shall be chargeable to tax as the income of the firm, association or body, of the previous year in which the said transfer takes place and, for the purposes of section 48, the fair market value of the asset on the date of such transfer shall be deemed to be the full value of consideration received or accruing as a result of the transfer”.

As can be seen from the aforesaid provisions, it is the fair market value of the asset on the date of transfer which is deemed as the full value of consideration received or accruing as a result of the transfer for the purpose of Section 45(4), whereas as per the provisions of Section 50C it is the consideration received or accruing as a result of the transfer, the value adopted by the stamp valuation authority, or the value ascertained by the Valuation Officer of the Income tax Department as the case may be which will be deemed to be the full value of consideration received or accruing as a result of the transfer.

Under the circumstances where an immovable property is distributed to a partner on dissolution of the firm or on his retirement, only the market value of the property on the date of distribution will have to be considered as deemed to be the full value of consideration received or accruing as a result of the transfer and Section 50C will have no application in such a case.

It is important to note that the Madras Tribunal in the

case of **Swamy Studio Vs. ITO (1998) 66 ITD 276** has held that Section 45(4) itself is a charging provision and therefore Section 2(47) need not be looked into to decide whether the transaction amounts to a "transfer" or not.

It is also to be noted that immovable property distributed to partners on dissolution of the firm does not require registration as it is only a settlement of pre existing right.

- **Ref: S.V.Chandra Pandian Vs. S.V.Sivalinga Nadar and Others (1995) 212 ITR 592 (SC)**
- **CIT Vs Bankay Lal Vaidya (1971) 79 ITR 594 (SC)**

Further in the case of distribution of depreciated assets of the firm to the partners it has been held that the provisions of Section 45(4) and not Section 50(1) would be applicable as what is contemplated under Section 50 is the sale of depreciated assets and not its distribution of assets.

- **Refer-CIT Vs Kumbazha Tourist Home (2010) 328 ITR 600 (Ker).**.

5. DISTRIBUTION OF PROPERTIES OWNED AND HELD BY A FIRM BETWEEN THE PARTNERS

In a case where a firm has several immovable properties and where the partners have decided to discontinue carrying on business in partnership with each other and have also amicably identified the immovable properties to be allotted/ distributed to each of them on dissolution, there would be an incidence of tax under Section 45 (4) or Section 43 CA in the hands of the firm as the case may be and further the partners would also be liable on payment of stamp duty on the transfer of the immovable properties from the firm to the respective hands as it would amount to a shared interest becoming an exclusive interest. In order to avoid the rigours of taxation in such cases the following methodology could be adopted –

a. The firm should be converted into an LLP in accordance with the provisions of Section 55 r/w the Second Schedule to the LLP Act. This is because a partnership firm by itself cannot become a partner in another firm whereas an LLP is a distinct legal entity incorporated under the LLP Act 2008. It is to be noted that on a conversion of a firm into an LLP all tangible (movable or immovable) and intangible property vested in the firm or the company, as the case may be, all assets, interests, rights, privileges, liabilities, obligations relating to the firm or the company, as the case may be, shall be transferred to and shall vest in the LLP without further assurance, act or deed, as per the specific provisions of Section 58 (4) (b) of the LLP Act. As the properties stand vested with the LLP, there is no "transfer" as understood under Section 45 (4) of the Income Tax Act has been held in the identical circumstances in the case of the firm being registered as joint stock company under Part IX of the Companies Act, 1956 (now Chapter XXI of the Companies Act, 2013) in several discussions cited below-

- **Texspin Engineering and Manufacturing Works (2003) 263 ITR 345 (Bom)**
- **Wellpack Packaging v. CIT 78 TTJ 448 (Ahd –** Trib)
- **ACIT v. M/S Unity Care and Health Services** ITA 611/Bang/2005-AY 2001-02 order dated 17/06/2005 reported in 286ITR (AT) 121 (Bang) of the tribunal which was confirmed by the Karnataka High Court by its judgement dated 05/07/2010 in ITA no. 3170/2005.
- **Sachdeva & Sons (EOU) v. Dy CIT (2004) 82TTJ (Assam Trib) 847**
- **Chetak Enterprises (P) Ltd. v. Asst. CIT (2006) 281ITR (AT) 162(Jodh – Tribunal)**
- **CIT v. Rita Mechanical Works (2011) 38(I) ITCL7 (P & H – HC).**
- **CIT vs United Fish Nets (2015) 228 Taxman 302(AP).**

Further there would be no applicability of stamp duty (unless there is a specific article in the stamp act of the state where the property is situated) on transfer of the immovable properties from the firm to the LLP as its clearly discernible from the language of Section 58 (4) (b) of the LLP Act and as held in identical circumstances in the cases mentioned below-

- **Vali Pattabhirama Rao and Another v. Sri Ramanuja Ginning and Rice Factory P Ltd.** and others reported in Volume 60, Company Cases, Page 569 (Andhra).
- **LKG Gold Palace Case 122 Company Cases 896 (Mad HC).**

b. On conversion of the firm into a LLP, all the immovable properties of the firm stand transferred to & vest with the LLP.

c. Once these immovable properties vest with the LLP, the properties identified by each of the partners as their share are contributed by such LLP into respective partnership firms formed by each of the partners in which the said partners also become partners either in their individual capacities or through entities controlled by them. The value of the immovable properties would be recorded in the LLP.

d. The LLP after such contribution of properties is then only left with the assets in the form of Share Capital invested in Firm A belonging to one partner and Firm B belonging to another partner.

e. The LLP could be kept alive for some time and its share in the respective partnerships be diluted periodically

and then dissolved by allotting the Share Capital in the respective partnership firms to the partners A and B based on the firms which have been formed by each of them respectively.

Conclusion – By this convoluted method, the properties which belong to one firm can be distributed to the partners without the incidence of Income Tax and also without the incidence of Stamp Duty in certain states.

6. PROPERTIES ACQUIRED THROUGH VOLUNTARY LIQUIDATION OF THE COMPANY.

There is a distinct possibility of tax planning in cases where immovable properties are owned by closely held companies which are proposed to be sold or otherwise transferred.

In the case of the company not having any business losses in the year where the property is proposed to be transferred nor has a carry forward unabsorbed depreciation, the company would have to bear the Income tax on the entire gain arising out of transfer and further it would be liable to pay Dividend Distribution Tax for distributing surplus to the shareholder in the form of dividend.

It is to be noted that under the general law, distribution of assets to a shareholder on liquidation is not a transfer. The Supreme Court had in the case of **CIT, Madras Vs Madurai Mills CO. Ltd (1973) 89 ITR 45** held that:

"The act of each of the liquidators in distributing the assets of the company which had gone into voluntary liquidation did not result in the creation of new rights. It merely entailed recognition of legal rights which were in existence prior to the distribution. When a shareholder receives money representing his share on distribution of the net assets of the company in liquidation, he receives that money in satisfaction of the right which belonged to him by virtue of his holding the shares and not by operation of any transaction which amounts to sale, exchange, relinquishment or transfer".

Consequently, there is no stamp duty payable on transfer of an immovable property of a company to a shareholder on liquidation through a "Deed of Allotment" of the liquidator. The mutation is done in the revenue records based on such deed of allotment.

In such cases the following methodology could be adopted:-

i. The company by adopting the various procedures under the Companies Act with could opt for voluntary liquidation.

ii. The assets of the company including its immovable property would be distributed to the shareholders in proportion to the shares held by then as on the date of liquidation as per the provisions of Section 511 of the Companies Act 1956 and presently under Chapter XX of the Companies Act 2013. .

iii. The property would then get transferred by operation of law through the order of the court and the deed of allotment by the liquidator in favour of the shareholders who would then own and hold the property as co-owners.

The distribution of the property to the shareholders would not be regarded as a "transfer" under the Income Tax Act as far as the company is concerned as per the specific provisions of Section 46(1).

iv. The shareholders who receive the property would however be chargeable to Income Tax under the head Capital Gains on the market value of the property received on liquidation less the amount assessed as dividend in their hands u/s 2(22) (c) of the Income Tax Act, as per the specific provision of the Section 46(2) of the Act.

It is to be noted that by adopting the above method the incidence of the Capital Gains is shifted from the company to the shareholders. In such cases the attendant question would be what should be considered as the period of holding to be reckoned in the hands of shareholder when he sells /transfers the asset received on liquidation subsequently?

It is to be noted that Section 49 which deals with the cost with reference to certain modes of acquisition has specifically included the "distribution of assets on liquidation of the company" in sub section (iii) (c) of the said Section. Further explanation (b) to Section 2(42A) which defines short term capital asset provides that while the capital asset becomes the property of the assessee in circumstances mentioned in Section 49(1), the period of holding by the previous owner should be reckoned. In other words, a harmonious reading of section 2 (42A) and Section 49 of the Income Tax Act would enable us to come to a conclusion that the period of holding of the asset in the hands of the shareholder who receives such asset on liquidation should include the period where such asset was held by the company.

In case of there being losses in the same year or carry

forward unabsorbed depreciation loss as the case may be from the business carried on by shareholders in their proprietary concerns, the same would be eligible for set-off against the Capital Gain arising on the sale of such immovable property in the hands of the shareholders.

Further if the shareholder holds the immovable property for more than 36 months including the period held by the company and then transfers it, he would be liable to taxes on the same as a "Long Term Capital Gain" and in the case of an individual he could then seek exemptions by making the appropriate investments under Section 54, 54F or 54EC as the case may be.

In the case of the company being a shareholder it could set off the short term or long term capital gain as the case may be against the business losses of the same year or the unabsorbed depreciation of the earlier years.

Conclusion- This would be the ideal structure in a case where the immovable property of the subsidiary company has been kept as collateral for the borrowings of the holding company for its own business and the property of the subsidiary company would have to be sold or commercially exploited to redeem the liabilities of the holding company.

7. CAPITAL GAIN IN THE CASE OF SALE OF ENTIRE BUSINESS (Slump Sale)

This structure is ideal in cases where any person or entity desires to acquire only a branch or division of an undertaking which is distinct in its functioning and location.

The definition of Slump Sale under 2(42C) of the Income Tax Act means the transfer of one or more undertakings as a result of the sale for a lump sum consideration without values being assigned to the individual assets and liabilities in such sale.

Further the definition of undertaking for the above purpose is defined under explanation 1 to section 2 (19AA) which is reproduced below:-

"Undertaking" shall include any part of an undertaking, or a unit or division of an undertaking or a business activity taken as a whole, but does not include individual assets or liabilities or any combination thereof not constituting a business activity"

The advantages of transferring properties including immovable properties through a Slump Sale arrangement would be as follows:-

a) The period of existence of the undertaking as a whole and not the individual assets would determine whether the sale would be considered as a long term or short term Capital Asset. Consequently, certain individual assets which could have been held for less than 36 months could also be entitled the benefit of being treated as a Long Term Capital Asset by virtue of being part of the transfer of the entire undertaking which has been in existence for more than 36 months.

b) As the undertaking or division as a whole is being sold along with the business carried on by it there would be no incidence of tax under Karnataka Value Added Tax Rules 2005, as per the specific provisions of Section 2(34) of the KVAT Act 2003 which defines taxable turnover r/w with Rule 3(2)(g) of the said rules, which provides that a deduction will be allowed for all amounts realised by sale by a dealer of his business as a whole for computing taxable turnover and it is likely that similar provisions exist in the corresponding Acts of other States. This exemption would probably be available under the similar enactment of other states as well. The judicial decisions to be referred to which support of the aforesaid analogy-

- Sri Ram Sahai vs. CST 14 STC 275 (Allahabad)

- DCCT, Coimbatore vs. K Behanan Thomas 39 STC 325(Mad)

- Monsanto Chemicals of India (P.) Limited Vs. State of Tamil Nadu 51 STC 278.

c) There is a specific exemption for services provided by way transfer of a going concern as a whole or an independent part thereof as provided in Entry 37 of the Mega Exemption Notification 25 of 2012 and hence there is no levy of service tax on slump sale.

It is imperative to ensure that the "Slump Sale" agreement does not provide for individual assets thereby deviating from the concept of slump sale to an itemized sale of assets.

It is pertinent to note that even though a consideration would have to be attributed to the immovable property being sold/ transferred as part of the division for the purpose of payment of stamp duty and registration it would not violate the definition of Slump Sale as Explanation 2 to section 2(42C) clearly provide for the said exception.

Further it is to be noted that even prior to the insertion of Explanation 2 as above, the courts had held that attributing a consideration for the immovable property which is part of Slump Sale should not affect the transaction being treated as slump sale.

Case Laws:

i. **Premier Automobiles Ltd Vs ITO (2004) 264 ITR 193**

ii. **CIT Vs Artex Manufacturing Co. (1997) 227 ITR 260(SC)**

iii. **CIT Vs Electric Control Gear Manufacturing Co. (1997) 227 ITR 278 (SC)**

iv. **Kwality Ice Cream (India) Ltd Vs CIT (2011) 336 ITR 434 (P& H)**

v. **ACIT Vs Raka Food Products (2005) 277 ITR 261.**

vi. **Marudhar Hotels Pvt Ltd Vs Jt.CIT (2013) 156 TTJ 729 (Jodh-Trib)**

Conclusion - As stated above this structure is ideal in cases where any person or entity desires to acquire only a branch or division of an undertaking which is distinct in its functioning and location.

8. TRANSFER OF IMMOVABLE PROPERTY BEING LAND BY INTERSE GIFTS AMONG RELATIVES PRIOR TO ITS SALE/ DEVELOPMENT/ TRANSFER.

In the case of a property being land held by an individual who does not own a residential house or owns only one residential house, and who intends to sell/ transfer the said property, the following method could be adopted to reduce/ eliminate tax burden

i. The individual gifts the land to his wife or children or any other relative as defined under the explanation (e) to Section 56 (2) (vii) (e) of the Income Tax Act.

ii. The Donee who then becomes the co-owner of the land in divided or undivided state as the case may be would also hold the property as “a long term capital asset” by virtue of the provisions of Section 49 (1) (ii) r/w explanation (b) to Section 2 (42A) of the Income Tax Act.

iii. The Donor and the Donee i.e. the transferor and the transferee could then invest in one residential property each to claim exemptions under Section 54F of the Income Tax Act and only the Capital gains in the hands of the Donor.

Conclusion - By adopting the above method the tax incidence could be spread among several assesses and exemptions available to each of them claimed so as to minimise/eliminate tax incidences.

It is also to be noted that there is a concessional rate of stamp duty for gift of immovable property between relatives as defined under the Stamps Act of the respective States, for example under Article 33 (1) of Schedule 1A of the Stamp Act applicable in West Bengal, the stamp duty for gift between relatives (members of the family) as defined is only 2% of the market value of the property.

iv. In the case of a Joint Development Agreement where the Owner is to receive three or Four flats as his share of development, the method of inter se gifts as detailed above could be adopted before entering into the Joint Development Agreement where into to enable each of the Donee’s to claim exemption in respect of one apartment each which accrues to them as per the Joint Development Agreement.

It is relevant to note that the Mumbai tribunal has in the case of **Tata Power Co Ltd V Addl CIT Range 2(1) Mumabi (2010) ITA No 3382/Mum/2010 rendered on 31-5-2011** held that the net income from Capital Gains after considering exemptions u/s 54, 54 F, 54EC etc alone should be reckoned for giving effect to the set off of carry forward losses. The analogy of the said decision would equally apply to the above proposition as the clubbing provisions under Section 64 which are part of Chapter V of the Income Tax Act would apply only after determining the net income from each “head of income”.

9. DEVELOPMENT OF AN IMMOVABLE PROPERTY BY A PERSON- CONVERSION TO STOCK IN TRADE:

In the case of an individual who owns a fairly large piece of land and wishes to develop the same into a residential or commercial development intended for sale or through a developer by entering into a joint development or a revenue sharing agreement as the case may be, the following methodology could be adopted to minimize and postpone the incidence of tax -

i. In the case of self development as the individual would be undertaking an organized systematic activity of development and sale, the individual could be construed as having undertaken an activity which is an “adventure in the nature of trade” and the entire income arising from the activity could be taxed under the head “ profit and gains from business”.

In order to minimize and postpone the tax burden the following steps should be adopted by the individual:

a) The immovable property in question hitherto held as investment asset (capital asset) and recorded as such by him in his books of account should be converted and treated by him as a business asset i.e. as stock-in-trade in his books of accounts and financial records. This act of conversion and treatment as stock-in-trade should be substantiated/ supported by a self declaratory affidavit duly notarised.

b) The market value of the immovable property on the

date of conversion as above should be determined at the maximum value possible duly supported by a valuation certificate of an approved valuer.

c) The taxation in the case of individual would arise on the development as and when and in the year in which the immovable property held as stock-in-trade is sold or otherwise transferred under the explicit provisions under Section 45 (2) of the Income Tax Act. As per the provisions of the said Section the difference between the market value of the immovable property less indexed cost would be taxed under the head "Capital Gains" and the difference between the sale price and the indexed cost would be taxed under the head "Profits and Gains from Business and Profession" and such tax incidence would arise only in the year of sale or transfer of such stock-in-trade.

It is pertinent to note that the Kolkata Tribunal in the case of **Octavius Steel and Company limited Vs. ACIT (2002) 83 ITD 87** has held that Section 45(2) supersedes all the provisions including Section 45(1) and provides for charging of Capital Gains in the year when such converted stock in trade is sold or otherwise transferred.

ii. In the case where the individual intends to enter an agreement for joint development with the Builder on an area sharing or an agreement for revenue sharing, such an agreement should be entered into by the said individual only after the said immovable property is converted and treated as stock-in-trade in his books of accounts and financial statements. This would eliminate the applicability of the incidence of capital gains tax on the individual as on the date of entering the joint development agreement itself as has been held by a catena of decisions given below-

- **Charturbuj Dwarakadas Kapadia Vs CIT (2003) 260 ITR 491 (Bom)**
- **CIT Vs Ved Prakash Rakhra (2012) 210 Taxman 605 Karnataka: (2013) 256 CTR (Karn) 285**
- **Smt. Prameela Krishnan vs. Income Tax Officer (2014) 221 Taxmann 418(Kar)**
- **ACIT Vs A Ram Reddy (2012) 23 Taxmann.com 59**
- **Dr Maya Shenoy (2009)124 TTJ 692(Hyd)**
- **Krishnakumar D Shah (HUF) Vs DCIT(2012) 23 taxmann.com 111**
- **Mrs Durdana Khatoon Vs ACIT(2013) 24 ITR 55(Hyd B Bench)**
- **Potla Nageswar Rao Vs DCIT(2014) 365 ITR 249 (AP)**
- **Jasbir Singh Sarkaria (2007) 294ITR 196(AAR)**
- **Azad Zubarchand Bhandari Vs Asst CIT(2013) 58 SOT 347 (Mum 'A" Trib)**
- **Taher Alimohammed Poonawala v. Addl. CIT [2009] 124 TTJ (Pune) 387- ITAT Pune Bench**
- **Ms Rubab M Kazerani Vs Jt CIT(2005) 2(II) ITCL 456(Mum-Trib)(TM)**
- **ITO Vs Vikash Behal (2010) 34(II) ITCL 73 (Kol "C" Trib)**
- **G Sreenivasan V Dy CIT (2013) 140 ITD 235 (Coch-Trib)**
- **R Kalanidhi Vs ITO (2009) 314 ITR (AT) 266 (Chennai-ITAT)**
- **DCIT Vs Jai Trikanand Rao (2014)149 ITD 112 (Mum J Trib)**
- **ITO Ward 7(2) Bangalore Vs M S Nagaraj (2014) 52 taxmann.com 511 (BloreTrib)**
- **Kushal Kumar Kankaria vs ACIT Central Circle I Hyderabad (2015) 59 taxmann.com 177 (Hyd Tribunal) rendered on 10-4-2015-** Date of entering into the development agreement is the date of "transfer".

It is respectfully submitted that the above decisions have emanated purely as a result of faulty documentation and lack of proper representation before the judicial authorities. The critical aspect that there has to be a definite value for the consideration as on the date of transfer has not been put forth properly and effectively during the proceedings.

It is to be noted that all the above decisions have been rendered on the analogy that there is a "transfer" of a " capital asset" as understood under Section 2 (47) (v) and/ or 2 (47) (vi) of the Income Tax Act. It is to be noted that the definition of "transfer" under Section 2 (47) does not apply to a transfer of stock-in-trade as it is purely in relation to a transfer of a "capital asset" and in the absence of a specific or deeming provision, the transfer of such stock-in-trade would occur only when the risks and rewards of ownership is being transferred under the general law. The above analogy is supported by the decisions of:

- **R Gopinath (HUF) v. ACIT (2010) 5 Taxmann.com ITA Nos. 29 & 30/ MDS/2008 rendered by the ITAT Chennai 'A' Bench on 24th July, 2009 also reported in 133 TTJ (Chennai) 595.**
- **Ramesh Abaji Walavalkar v. Addln CIT 150 TTJ 725 Mum Trib. (D Bench)**
- **Vidyavihar Containers Ltd v. Dy. CIT (2011) 133 ITD 363 (Mum. Trib)**
- **DCIT vs Crest Hotels Ltd (2001) 78 ITD 231 (Chennai Bench).**
- **Fardeen Khan Vs ACIT 11(1) Mumbai- ITA No 1588/1589 of 2013 (ITAT F Bench Mumbai) rendered on 25-2-2015 and reported in 169 TTJ 398 and in (2015) 58 taxmann.com 186.**
- **Dheeraj Amin Propreitor J V Builders Vs ACIT Circle 2(1) Mangalore ITAT NO 1709/Bang/ 2013 rendered on 30-6-2015.**

Once the capital asset gets converted and treated as stock-in-trade in the hands of the individual, firm, LLP, Company as the case may be, care should be taken to insert the following clauses in the agreement for joint development or revenue share as the case may be –

a) The fact of the immovable property being held as a business asset and disclosed as stock-in-trade in the books of the owner.
b) The fact that the legal ownership, domain and control continue to vest in the owner till such time it is transferred to the prospective buyers of apartments, villas etc in the project.
c) The fact that the licence given to the developer to enter and commence the development is in the nature of a licence referred to under Section 52 of Indian Easements Act, 1882 and cannot be construed as a possession given by the Owner to the Developer in part performance of the agreement of the nature referred to under section 53A of the Transfer of Property Act, 1882
d) The Development contemplated in the Agreement is not in the nature of a Partnership as contemplated either under the Indian Partnership Act, 1932, or under the Income Tax Act, 1961.
e) The fact that the owner should be allowed uninterrupted and unhindered right to inspect the development without the prior permission of the developer during normal working hours.
f) The Developer will be given the power to do all acts. deeds and things for the development of the property including the right to enter into agreements for sale and raise finances on the developers share in the development but his power to execute the deeds of sale in favour of the purchasers of the developers share can be invoked only after the Developer hands over the Owners Share in a habitable condition.

Conclusion - The above modus operandi with explicit clauses as stated above would only strengthen the case of the assessee that there could be no incidence of capital gain on the date of entering into the joint development agreement. As the development agreement is purely a contractual agreement between the owner and the developer who are normally unrelated parties, the terms agreed to between them are sacrosanct and cannot be read down or interpreted differently by the tax authorities unless they are able to prove that the arrangement is not that entered into between two persons with a fair degree of commercial sense.

10. TRANSFER OF IMMOVABLE PROPERTY HELD BY A COMPANY

In the case of an immovable property owned by a closely held company which has other assets which are negligible, the modes of acquisition of such property by a prospective buyer could be as follows –

a. Acquiring a property through a conventional sale deed with the purchaser paying the appropriate stamp duty and the Vendor (in this case the company) paying income tax either on the capital gain or as business profit as the case may be.
b. By acquiring the entire share capital of the company directly from its shareholders by paying them the consideration for transfer of shares equivalent to the consideration which would otherwise had been payable for transfer of property directly.

Although the alternative (b) above looks prima facie more beneficial, the disadvantage in the above method is that the purchaser is not able to leverage the value of the consideration paid for the property as it is shown as investment in shares in his name or in the name of the company which has been used by him for acquiring shares of the company which owns the immovable property. This situation gets further complicated if the purchaser wishes to develop the immovable property acquired in the company which owns it. In certain cases the purchasers are wary to acquire the entire share capital of a company fearing hidden and contingent liabilities in the company which it may be forced to deal in future. In order for it to be a win-win situation for both the parties the following method is suggested:

i) Company (A) which owns the Immovable Property contributes the property as Capital Contribution into a Partnership Firm namely XYZ Builders and Developers. The title of the Immovable Property of the firm would flow by virtue of the provisions of the Section 14 of the Partnership Act, 1932. Further in a few States including the State of West Bengal, Stamp Duty is payable on such Capital Contribution of Immovable Property into the firm at the normal rate equal to conveyance. It is to be noted that in certain states such as Karnataka there is no stamp duty applicable at the point of introduction of the immovable property as capital contribution by a partner into the firm whereas in certain states such as Andhra Pradesh, West Bengal etc there is stamp duty applicable when immovable property is being contributed by a partner into the firm. The Company A will also be liable

to pay Capital Gain under Section 45(3) of the Income Tax Act based on the amount recorded as the value of Immovable Property contributed into the firm which would normally be equivalent to the sale consideration agreed upon between the parties.

ii) The Purchaser who should be atleast two persons are admitted as partners into the firm XYZ Builders and Developers by bringing in as their capital the funds equivalent to the value of immovable property recorded in the books of the firm.

iii) Company (A) then retires from the firm drawing the money introduced as capital by the purchasers to the extent of amounts available to its credit in the capital account of the firm which would be equivalent to the value of Immovable Property recorded in the books of the firm. It is to be noted that the drawings of Company A would be out of its capital and therefore not taxable. Further as there is no distribution of Immovable Property but only cash settlement to Company A on its retirement, there is no incidence of stamp duty in the absence of a specific provision under the Stamp Act applicable in the acts adopted by certain states (although it is applicable in few other States like Karnataka) and neither is the firm subjected to tax under Section 45 (4) of the Income Tax Act.

iv). The purchaser then continue to invests into the firm for development of the property and sell the development to the end customer, by converting the immovable property and treating the same as stock-in-trade in the books of the firm.

Conclusion - By this method the purchasers are able to leverage on the entire consideration paid as the immovable property acquired by them is shown at the value of sale consideration further the seller would also pay capital gains on the same value on which it would have otherwise been subjected to had it sold the immovable property directly in a conventional method. This method would be ideal where the entire consideration is payable in stages by the Purchaser to the Vendor and will also save stamp duty to the purchaser in the states where there is no stamp duty on introduction of an immovable property by a partner to a firm. Further the immovable property would be owned by a new entity without any legacy issues.

11. POINT OF CONVEYING IMMOVABLE PROPERTY CRITICAL FOR DETERMINING TAXES APPLICABLE

As explained in the preamble to the paper, there are a plethora of taxes which are leviable at various points during the course of and at the point of construction and transfer of Immovable Property. After the much awaited judgment of the Supreme Court in the case of **M/s Larsen & Toubro Ltd. & Anr. V. State of Karnataka & Anr. Civil Appeal No. 8672 of 2013** rendered on 26th Sep 2013, where the constitutional validity of the sales tax/ works contract tax was upheld, the point at which the transfer of "Immovable Property" takes place is all the more relevant, important and critical to determine. In the said judgment, the Apex Court has clearly enunciated & upheld the principle that there will be no levy of Works Contract Tax if the property in question is an Immovable Property at the point of transfer. For instance, where an agreement is entered into between the vendor and the purchaser after the completion of construction of the Immovable Property, there will be no cause for levy of Works Contract Tax on the Transfer of "Property in Goods" embedded in the construction.

Based on the above, established proposition of law, there are distinct planning possibilities.

In the case of an intended purchase of a built-to-suit premise on a land identified for the purpose, where the transfer of land and superstructure is contemplated post completion of construction, the impact of the following taxes & levies would arise during the course of construction at the point of transfer.

i) Levy of VAT on Works Contract on the consideration payable for the Super Built up Area.

ii) Levy of Service Tax on Works Contract on the consideration payable for the Super Built up Area.

iii) Stamp Duty on both the land & superstructure as per the rates prescribed under the provisions of the relevant Act.

iv) **To minimize the impact of the complementary effect of such taxes, the following methodology could be adopted for the above arrangement:**

a. The Purchaser could enter into a lease agreement with the Vendor for leasing the Immovable Property post construction and could pay a substantial amount of Lease Deposit and also incur Stamp duty as applicable to leases which would normally be much lower than that of the conveyance. It is to be noted that there would be no applicability of VAT or Service Tax on the lease deposit given.

b. The lease agreement or a separate MOU entered into for the purpose could provide foe a unilateral right to the lessee to exercise the option to

purchase the property at a pre-determined value on or after a date when the lease becomes operational.

c. The Vendor (Lessor) would then construct the superstructure with the lease deposit received from the lessee and from his internal accruals.

d. Once the building is fully completed, possession is delivered to the lessee at which point the lease rentals trigger. It is to be noted that service tax would be levied only for the limited period when the lease commences till the date of execution of sale deed on the lease rentals payable.

e. At the date on which the option is given to the lessee to purchase the property, an agreement for sale and consequently a sale deed is executed for the land and completed superstructure as immovable property.

Conclusion - Under this methodology, the purchaser incurs only stamp duty on the total consideration payable for acquisition of immovable property and does not incur VAT or service tax on the consideration payable for the superstructure which could be a substantial saving especially where the Purchaser intends to retain the property for his own use.

12. TAX INCIDENCE IN THE CASE OF DEVELOPMENT AGREEMENTS

The transfer of immovable property by owners of land through the developers and/or his nominees through the mechanism of a Development Agreement (popularly known as a Joint Development Agreement) has been rampant especially in prime urban areas where the Owners but do not have the time or expertise to develop the and market the property on their own and therefore enter into as arrangement of mutual benefit with reputed builder known as a Developer for developing and marketing the development to various buyers of individual units.

A. **Broad Features of Development Agreements:**

i. Owner of lands:

A Single Owner being an individual or an entity or a group of co-Owners own certain lands.

ii. **Conversion:**

Such lands may be agricultural in nature and they get 'converted' by suitable orders of the competent statutory authorities for use for non agricultural purposes i.e, for the development of sites, flats, apartments, townships etc.

iii. **Offer of developer:**

A Property Developer approaches the Owners and offers the following:-

a. To construct for the Owners certain specified extent of built up area of flats / apartments together with the right to use certain common areas, facilities and amenities.

b. In return for the same, the Owner agrees to sell a specified share / percentage of undivided interest in the land to the prospective buyers nominated by the Developer.

iv. Acceptance and execution of development agreement:

The aforesaid terms are accepted by the Owners and in pursuance thereof the Development Agreements are entered into between the Owners and the Developers. Under these agreements the Developer by himself does not purchase any immovable property from the Owner and it is the prospective buyer who buys a specified share of undivided interest in the land from the Owner. Therefore these agreements between the Owners and the Developer are purely contractual and commercial in nature and hence logically the provisions of Section 53-A of the Transfer of Property Act, 1882 should not apply since the Developer by himself is not a transferee / purchaser of any immovable property. Further the development agreement is more in the nature for a "contract for sale" and not a "contract of sale".

v. Popularly known as Joint Development:

Even though it is only the Developer who develops the property and constructs the super structure, the above arrangement is popularly known as "Joint Development".

vi. Developer to nominate buyers:

The Developer is authorized to exclusively nominate the prospective buyers for his share of super built area known as "Developers Share", and enter into agreements with them fixing the sale prices and considerations payable by them.

vii. G.P.A to Developer:

The Developer is empowered through a General Power of Attorney (GPA) by the Owner to act on Owner's behalf and agree to sell certain specified shares of undivided interests in the land to the prospective buyers at the aforesaid prices fixed for this purpose. A General Power of Attorney given by the Owner to a Developer constitutes only an authority given to a Developer to act for and on behalf of and in the name of the Owner. No right or interest in the immovable property or right to have possession of the property is conferred on the Developer in any manner whatsoever.

viii. No power given to Developer to execute Sale Deeds and possession to prospective buyers before sale:

The Developer is not given any power to execute sale deeds/ lease deeds/mortgage deeds etc in favour of the prospective buyers but only given the power to enter into agreements and collect advances from the prospective customers.. Such power to execute sale deeds etc is conferred on the Developer on completing the construction of the specified built up area of flats / apartments for the Owner as per the agreed specifications and dimensions, and on handing over the same to the Owner with 'occupancy' rights (being granted by the competent statutory authorities). At this stage the sale deeds are executed by the Owner himself in favour of the prospective buyers or in the alternative, only at this stage the Owner gives a separate General Power of Attorney to the Developer to execute and register the sale deeds on Owner's behalf to and in favour of the prospective buyers. At no stage before the actual sales are effected , the prospective buyers are put in possession of the flats / apartments sold to them.

ix. Developer's right to entry is only 'License' – not possession:

It will be specifically provided that the development and construction and such right of entry is only a License coming within the purview of the provisions of Section 52 of the Indian Easements Act 1882. It will be clearly provided and recorded that the legal domain, control and physical possession of the property shall be vested with and remain with the Owner till the same or parts thereof are sold to the prospective buyers.

The Developer is only permitted to enter the property for the limited purpose of development. The Developer not being the purchaser or a transferee, the provisions of Section 53-A of the Transfer of Property Act 1882 should have no application and the aforesaid right of entry to the Developer constitutes only a 'License' coming within the meaning of the term under the aforesaid Section 52 of the Indian Easements Act 1882.

x. Separate agreements for flats / apartments:

The Developer enters into separate agreements for construction with the prospective buyers fixing the consideration payable by them for the super built area in respect of the Developers share which devolves upon the Developer as per the development agreement. These agreements are entered into by the Developer on his own and not as a G.P.A holder for the Owner. Further the Developer also enters an agreement of sale of undivided share of right, title and interest in land in favour of the prospective buyers of apartments where he acts in the capacity of the GPA holder for and on half of the Owner and also himself joining the said agreement as a confirming party.

xi. Registration of Agreements – Benefits Available:

The Development Agreements entered into by the Owners with the Developers can be registered with the appropriate registration authorities of the State Government under the Registration Act 1908, and they will get the benefit of entry into Book-I maintained in the Registrar's Office. Such entry will ensure that there is 'public notice' to these documents and their contents. Whenever any encumbrance certificates are obtained on the concerned immovable properties, there will be entries recording the execution of the Development Agreement. The General Power of Attorney (GPA) given to a Developer by the Owner can also be registered in the same manner and the same will be entered in Book IV maintained at the Sub Registrar's office. When the fact of this G.P.A is recorded in the Development Agreements, there will be 'Public Notice' to the G.P.A also. As the G.P.As are given to the Developer for 'consideration', these G.P.As will become irrevocable as it will be treated as creating an agency coupled with interest to come within the purview of the provisions of Section 202 of the Indian Contract Act 1872. There will be a suitable clause in the G.P.A to indicate that the same is irrevocable. The total cost of stamp duty and registration fee payable on these documents is very nominal in most of the States of India whereas in Karnataka the schedule to the Karnataka Stamp Act provides as follows-

- As per Article 5(f) of the Schedule to the Stamp Act, the stamp duty leviable for registration of the development agreement would be at 2% of the market value of such undivided share or portion of land or immovable property, consideration and money advanced if any or the market value of such share or portion or developed building or immovable property, consideration and money advanced, if any whichever is higher.
- As per Article 41 (ea) of the Schedule to the Stamp Act, the stamp duty leviable for registration of the GPA given to the Developer in pursuance of the development agreement would be 2% of the market value of the undivided share or portion of land or immovable property, consideration and money advanced if any.

  However, it has been provided that in case of both the above documents being executed between the

same parties in respect of the same property, then the stamp duty payable on the GPA or the development agreement would be the maximum of Rs 200/- only provided the full stamp duty has been paid on either of the documents mentioned above. It has also been clarified in both cases that the term "money advanced would include refundable and non refundable deposit given by the Developer to the Owner.

It is interesting to note the following facts about the stamp duty and registration of Development Agreements in the State of West Bengal

- Stamp Duty as per Article 5(f) would depend on the market value of the property and the maximum duty stipulated is Rs. 75,000/- where the market value of the property exceeds Rs. 3 Crores.
- The stamp duty payable as per Article 48(g) in respect of the Power of attorney given to a Promoter or a Developer in pursuance of the Joint Development agreement would be a maximum of Rs. 25,000/- where the market value of the property exceeds Rupees Three Crores. However, in the explanation below this Article it is clearly provided that if proper stamp duty is paid under Article 5(f) between the same parties for the same property, the stamp duty under this clause shall be only Rs. 50/-.

B. Main Points Relating To Taxation Highlighted:

i. The Developer is not a Transferee / Purchaser coming within the meaning of Section 53-A of the Transfer of Property Act 1882.

ii. The Developer does not buy any land or property from the Owners.

iii. The right to develop the property granted to a Developer as provided in the Development agreement does not constitute a contract to a transfer of any immovable property as between the Owner and the Developer, to attract the provisions of Section 53-A of the Transfer of Property Act 1882 between them.

iv. The Development agreement is a "contract for sale" and not" a contract of sale" and hence there is no interest created on the property per se in favour of the Developer.

v. The Developer only nominates the prospective buyers for his share.

vi. The Developer enters the property only for the purposes of development of the property under a licence issued which is of the nature prescribed u/s 52 of the Indian Easements Act 1882 and not as a purchaser / transferee.

vii. The G.P.A given to a Developer is only to enter into agreements with the prospective buyers for and on behalf of the Owner and not for executing the sale deeds. There will be a restrictive clause in the G.P.A to this effect.

viii. Only the prospective buyers are the purchasers / transferees in respect of the flats / apartments purchased by them together with the corresponding shares of undivided interests, rights and titles in the land.

ix. The prospective buyers of flats / apartments are never put into possession of their apartments before the sale deeds are executed and registered in their favour and hence there is no scope for invoking the provisions of Section 2(47)(v) read with Section 45 of the Income tax Act 1961 and the provisions of Section 53-A of the Transfer of Property Act 1882.

x. It is only the Developer who develops the lands by the construction of flats/ apartments together with common ways, infrastructure, amenities and facilities both for the Owners of lands as well as for the prospective buyers of flats / apartments and his profit margins is assessable as business income.

xi. **In the hands of the Owners, the chargeability to tax the gains made by them will be treated as follows:-**

a. Normally only as and when the flats / apartments constructed by the Developer on the Developers share of land are sold/transferred to the prospective buyers, the chargeability to tax on capital gains will arise on the Owners in the years in which such sale/transfer takes place. The consideration for the sale of the Developers share of land will be equal to the cost of the flats / apartments built by the Developer for the Owners. On the occupancy of these flats / apartments being given to the Owners after the completion of the construction of the same as per the specifications and dimensions mutually agreed to between the Owners and the Developer, the consideration to be given to the Owners becomes fully /discharged.

b. When the Owners get more flats / apartments than what they can personally use and occupy, they affect sales of such additional flats / apartments. When such sales are made the following position will emerge.

c. If the sales are made within three years from the date when occupancy was given to the Owners, the further gains made by them on sale of the super

built up area will be treated as short term capital gains and if the sale of the super built up area is effected after a period of three years after taking possession, the gains will be treated as long term capital gains. However, it is to be noted that the consideration for the sale of undivided share of land relating to the Owners share of apartments will be taxed as long-term capital gains only as the same were always held by the Owners and transferred at any time to the Developer or his nominees.

Where the Owners retain one flat each out of the total number of apartments allotted to them towards their share, each of them will be entitled to claim exemption under Section 54F of the Income tax Act on the cost of construction of such retained apartment, subject however to other conditions under Section 54F being fulfilled by them.

C. **Owners can convert the lands into Stock-In-Trade:**

i. It is possible for the Owners to treat their lands as stock-in-trade of a business in property transactions carried on by the Owners before they enter into development agreements with the Developers as explained elsewhere in this paper. It is to be noted that the assessee should do a positive act to evidence the conversion of a capital asset and its treatment as stock in trade as held by the Allahabad High Court in the case of **Amrit Corp Limited Vs Addl CIT (2014) 226 taxmann 1(All HC).**

ii. In such cases only the provisions of Section 2(47) (iv) read with Section 45(2) come into operation and there is no scope for invoking provisions of Section 2(47)(v) and (vi) or any reference being made to Section 53-A of the Transfer of Property Act 1882 through Section 2(47)(v). The profits and gains arising out of such conversion into stock-in-trade will be governed by the provisions of Section 45(2). This would mean that the capital gains arising to the Owners on the date of such conversion to stock-in-trade will get quantified at that stage itself but its chargeability to tax will arise only when sales or transfers otherwise of such stock-in-trade take place subsequently. It should be clearly noted that such subsequent sales or transfers otherwise will be of stock-in- trade only and provisions of Section 2(47) cannot be invoked for such subsequent sales or transfers of stock-in-trade.

iii. The profits and gains earned on subsequent sales affected by the Owners of their surplus flats / apartments (other than what are kept for their own use) will be taxed as business income only. In the normal course, these sales would have been made within a period of three years from the date of completion of the project and they would have been subjected to tax as "short term capital gains" only and the tax incidence would have been the same on the Owners.

It is to be noted that the above treatment of lands of the Owners as stock-in-trade will avoid all the risks and problems arising out of such interpretations that an agreement to sell and/or a development agreement by itself constitutes a 'transfer' within the meaning of Section 2(47)(v) read with Section 45 of the Income tax Act 1961 as held by the **Bombay High Court in the case of Charturbuj Dwarakadas Kapadia Vs CIT (2003) 260 ITR 491 (Bom).** There will be no scope for invoking the provisions of Section 2(47)(v) and (vi) in such cases as they will be governed by the provisions of Section 2(47)(iv) read with Section 45(2) only.

Applicability of Section 50C to transfer of Development Rights

It has been held by the Mumbai Tribunal in the case of **Sri Akhatar Hussain Vs ITO ITA No 541 of 2010 and ITA No 706 of 2010 reported in (2011) 140 TTJ 413** that the provisions of Section 50C are applicable to transfer of Development Rights also as they fall within the deeming provisions of Section 2(47) relating to transfer. A similar ruling has been given by the **Mumbai Tribunal in DCIT vs Jai Trikanand Rao (2014) 149 ITD 112 (Mum J Trib)**, in the case of **Chiranjeev Lal Khanna v ITO (2011) 132 ITD 474, (2012) 144 TTJ 607 (Mum)** and in the case of **Arlette Rodriques vs ITO (2011) 39(II) ITCL 328.**

However, in a recent decision of ITO Vs Balkawade Sadanand Dhanaji 2015 66 (II) ITCL 410 (Pune A Trib), the Tribunal has held that Section 50C will not apply to development rights but will apply only to sale of land or building.

The law is therefore not clear on this aspect.

D. Alternate Structures to be evolved

Taking into consideration the various factors including the levy of stamp duty on Developments agreements and the Power of Attorney incidental thereto, the ineligibility for set off on subsequent sales to the ultimate customers, the various judicial decisions referred to above which seek to pre-pone the incidence of tax on the land Owner even before he receives the consideration for development of land, the incidence of service tax and VAT on the Owners Super Built Area being constructed by the developers in lieu

of the undivided/divided share of land being conveyed to the Developers and/or their nominees, it is for professionals like us to put on the thinking caps and evolve a suitable structure which could minimise the impact of the above.

I am detailing below a few options which could be explored in the case of potential Joint Development/s.

I. Formation of a partnership firm between the Land Owner and a Developer

The above methodology could be adopted ideally in cases where a development is conceptualised on a revenue sharing model that is where there is no identifiable area between the Land Owners and Developer post development and where the agreement is to share the gross revenues other than taxes and deposits between the land Owner and Developer in an agreed ratio.

This scheme is conceptualised as follows:

i. The land Owner contributes the immovable property in to partnership firm at a value which is equivalent to the indexed cost of the immovable property based on the Cost Inflation Index. On such value being recorded in the books of the firm there would be no incidence of Capital Gain tax on the land Owner. The contribution of immovable property into the firm would be in accordance with Section 14 of the Indian Partnership Act 1932 and would therefore be recognised and treated from thereon as the firm's property.

It is to be noted that the act of contribution of an immovable property in to the firm does not require registration as mentioned earlier elsewhere in this article. However as a matter of prudence and practicality it would be preferable to make the payment of registration fee of 1% as prescribed under the table of registration fees issued under Section 78 of the Registration Act, 1908 and register the property in the favour of the firm so as to enable and entry in Book 1 maintained by the Sub-Registrars under the Registration Act, 1908. This would help in securing a better title to the property and in getting the Khata of the property transferred in the name of the firm.

ii. The Developer should also become a partner in the said firm by making his initial financial contribution as agreed upon.

iii. It is to be clearly provided in the partnership deed that the entire cost of construction of the development would be borne by the Developer.

Further the clause on profit sharing would be worded in a manner so as to ensure that the land Owner would be entitled to draw as profits, a fixed percentage of the gross revenue exclusive of VAT and Service Tax and deposits less the proportionate Income Tax to be borne by him. Similarly it would be provided that the Developer would be entitled to draw as profits, a fixed percentage of the gross revenue less the construction cost less the proportionate Income Tax payable borne by him excluding VAT and Service Tax and deposits.

iv. The Developer would be giving an unbridled right as a partner of the firm to all acts, deeds and things necessary for the purpose of development as he would have done as a power of attorney holder under conventional development agreement.

v. The firm would have a common bank account referred to as the principal bank account for the collection of revenue i.e. the instalments towards consideration from the buyers including moneys towards taxes and deposits.

The share of revenues attributed to the Owner excluding the amounts received towards Service Tax and VAT, Deposits etc will be transferred under standing instructions to the bank to another bank account opened in the name of the firm to be exclusively operated by the owners from which the Owner would be entitled to draw his share of revenue/profits as the case may above.

The Developer would either continue to spend for the development of the property from the said principal bank account or transfer his share of revenues to an another designated bank account opened in the name of the firm from which the entire construction cost and other relevant expenses would be defrayed.

The VAT, Service Tax and deposits collected from time to time would be left in the principal bank account of the firm and paid to the respective statutory authorities and bodies as per time lines prescribed.

vi. The Partnership deed would also have a specific indemnity clause between the partners indemnifying each other of possible ill effects on the firm in the event of their partnership share being attached or affected due to losses incurred by them in business/es other than that of the firm.

vii. The clause on dissolution would be worded in a manner so as to ensure that the land reverts back to the partner who has originally contributed it as capital contribution on dissolution until a threshold limit of cost incurred on development is reached by the Developer. The rights on the land at various stages of development in the event of dissolution can be detailed in the partnership deed.

viii. The firm would then convert and treat the immovable property introduced by the Owner which was a Capital Asset in his hands as capital contribution into the firm as mentioned above into stock in trade in its books. This

event could be timed to be simultaneous with the approval of sanction plans, other permissions, clearances, etc obtained for the project.

This would ensure that the tax on the profits out of the development would get taxed as Capital Gains and Business income only at the point when such stock in trade is sold or otherwise transferred under the specific provisions of Section 45(2) of the Income Tax Act.

This would also be in line with the revenue recognition as mandated under AS 9 issued by Institute of Chartered Accountants of India.

It is to be noted that in the case of Developers developing housing projects on their own account as a commercial venture wherein the construction activity it outsourced to contactors, it has been held that the recognition of revenue as per the principles laid down in AS 9 issued by the ICAI is in order. Reference in this regard can be made to the following decisions-

Dy. CIT V Sudhir V Shetty (2014) 35 ITR (Trib) 115 (Mum "H" Tribunal)

S N Builders and Developers Vs ACIT 4(1) Bangalore ITA No 487/Bang/2013 rendered on 11-4-2014

Prestige Estate Projects Ltd V DCIT ITA 218/Bang/2009 (ITAT Bangalore)

CIT Vs Rema Country Holdings Pvt Ltd ITA No 1041 and 1042/2006 order dated 29-9-2011 (Kar HC)

Case referred- CIT Vs Hyundai Heavy Industries Company Ltd (2007) 161 Taxman 191 (SC)- assessee has a choice to select project completion or percentage completion method for recognising revenue.

Under the above scheme as there is no transfer or deemed transfer of immovable property by the Owner in favour of Developer during the period of development and as there is no necessity for a Power of Attorney to be given to the Developer as would have otherwise been done in a conventional development agreement, the ramifications arising out of the change in stamp duty law and the adverse judicial tax decisions mentioned above would be practically eliminated.

II. Formation of a Limited Liability Partnership between the Owner and the Developer

As a partnership suggested above could involve the effect of unlimited liability being foisted on the firm and possibly its other partners, in case the Owner and Developer do not have a credible knowledge of each other's background it would be preferable to form a Limited Liability Partnership as against a Partnership firm suggested above.

However, as a Limited Liability Partnership is different legal entity and although there is an enabling provision for a partner to contribute tangible, movable, immovable or intangible property or other benefit u/s 32(1) of the LLP Act 2008, it could be possible only through a registered conveyance thereby involving stamp duty and registration charges. It is significant to note that the stamp act of various states do not have a specific article dealing with the applicability of stamp duty on the immovable properties owned by the firm when the firm is converted to and registered as an LLP and in the absence of such article, it is anybody's guess as to what rate of stamp duty would become applicable when an immovable property is contributed by a partner into an LLP as his/its capital contribution. It should be examined as to whether an LLP would be treated as a firm under the Stamp Act and Rules of the States which do not have a specific article for this purpose.

It is relevant to note that Article 40A has been introduced by Act No. 16 of 2015, w.e.f 1-4-2015 in the Schedule to the Karnataka Stamp Act which is reproduced below:

A. Constitution of Limited Liability Partnership, or conversion of firm/private company/unlisted public limited company into limited liability partnership. -

(a) where the capital does not exceed Rupees Ten Lakhs	Rupees one thousand
(b) where the capital exceeds rupees ten lakhs for every Rupees five lakh of part thereof exceeding rupees ten lakhs.	Rupees Five hundred
B. Reconstruction or amalgamation of Limited Liability Partnership -	Two percent on the consideration or market value of the property whichever is higher of the transferor limited liability partnership located within the State of Karnataka.

As can be seen from the above article, the stamp duty payable on the formation or conversion of a firm/private limited company/unlisted company into an LLP would squarely depend on the quantum of capital and not on the market value of the immovable property owned by the firm as on the date of the conversion to the LLP and the provision as framed presently would result in a substantial reduction of stamp duty payable thereby benefiting the entities which intend to convert themselves into an LLP.

The other aspects which could affect the scheme evolved as in the case of a Limited Liability Partnership suggested above would be as follows:

i. Under the Limited Liability Partnership Act, the value of the property brought in as capital contribution by the partners to be recorded in the books of Limited Liability Partnership would be described under the Limited Liability Partnership Rules as specifically provided u/s 32(2) of the Limited Liability Partnership Act.

   As per Rule 23 (2) of the Limited Liability Partnership Rules, 2009 the value of contribution of the immovable property would be as determined by a practicing Chartered Accountant/Cost Accountant/ Approved Valuer from the panel maintained by the Central Government. Consequently, there could be incidence of capital gains u/s 45(5) of the Income tax Act, 1961 in the initial stage itself. It is to be noted that the definition of "Firm" u/s 2(23) of the Income Tax Act includes a Limited Liability Partnership as defined in the Limited Liability Partnership Act, 2008 (6 of 2009) and definition of a "Partner" shall include a partner of a Limited Liability Partnership..

ii. There is no specific provision to register a Limited Liability Partnership under Part IX of the Companies Act, 1956 and the possibility of this method is being evaluated and yet to evolve, but on a plain reading of the relevant enactments is eminently possible.

   The other steps mentioned in the case of a firm in Para A above would equally be applicable to a Limited Liability Partnership.

iii. There could also be an impediment for immediate conversion of a firm into an LLP as although there is no stipulation in the LLP Act or LLP Rules, there is a mention in Form No 17 which is a part of the procedure for conversion of a firm to an LLP, that the firm should have been in existence for atleast one financial year and that a no objection certificate should be obtained from the Income Tax Authorities along with the application.

III. Developer to act as a Contractor

Under this method the land owner would bestow the construction of the entire super built area to the builders through a construction contract. The builder/ Developer would be performing his/its role as a contractor and not as a developer although such contractor would perform the same functions as that of a developer.

The agreement would state that the contractor would recover the fee due to him for construction by way of a right to sell a specified percentage of undivided share of land and super built area which will be referred to as "contractor's share".

The entire land would continue to be owned by the owners and the entire receipts including that of the contractor's share would be disclosed as sales revenue in the owner's hand. From the said revenue the owner will reduce the fee paid to the contractor towards construction including the Service tax and VAT charged by him, which will be equal to the sale proceeds derived from transfer of the contactor's share. The contractor shall declare the contract receipts as his income and reduce the actual cost of construction incurred by him to arrive at his profit.

The VAT and Service Tax from the buyers would be collected in the name of the owner and deposited to the respective authorities accordingly.

A Power of Attorney would be given to the contractor to do all acts, deeds and things as would normally have been done by a developer and such Power of Attorney would confer the status to the contractor as "an agent coupled with interest" as understood under Section 202 of the Indian Contract Act, so that the owner would not be able to revoke such Power of Attorney during the period of construction except for specific circumstances mentioned therein.

It is to be noted that as the owner would continue to hold the legal and possessory right on the property till it is ultimately transferred to the buyers, the revenue from such sales would be recognized only as and when transfer of property takes place.

In such an arrangement the Developer being a contractor will declare his/its revenue under the percentage of completion method while the Owner can declare his/its revenue as per the principles laid down in AS 9 issued by the ICAI. It is be noted that even as per the income computation and disclosure standards relating to construction contracts issued by the CBDT to be effective from 1-4-2015, the said standard applies only to the income for a construction contract of a contractor.

13. Tax incidence in the case of Revenue Sharing Agreements/Arrangements:

There is the emerging trend in the Real Estate Industry wherein the Land Owners and Developers enter into a Revenue Sharing Agreement/ Arrangement to share the proceeds arising from the development of immovable property belonging to the Land Owner. Under these agreement/ arrangements

i. The Land Owner and Developer agree to share the "distributable revenue" in a specified percentage. The term "distributable revenue" is specifically defined in the development agreement apart from other terms and conditions.
ii. The Land Owner and the Developer join together in a tripartite agreement with the ultimate purchaser of the apartment wherein the Land Owner agrees to convey undivided right, title and interest in land to and in favour of the prospective purchaser of apartments and the Developer agrees to convey the specified super built up area being constructed on the land in favour of ultimate purchaser of the apartments.
iii. A General Power of Attorney is executed by the Land Owners in favour of the Developer giving him the powers to do all acts, deeds and things in pursuance to the Revenue Sharing Agreement/Arrangement including the power to sell the UDI in land in favour of the prospective purchasers.
iv. The agreement could be worded in a manner to indicate that the revenue share accruing to the Land Owner is in essence only for the transfer of the undivided share of right, title and interest in land and the revenue share of the Developer is for transfer of specified super built up area.
v. The insurable interest of the super built up area being constructed on the land would be on the Developer during the period of construction and till the date of its transfer.
vi. The legal ownership, domain and control of the land remains vested with the Land Owner and no portion of it will be transferred to the Developer or his nominees as the case maybe.
vii. There is no allocated area designated as Owner's share and Developer's share as the case maybe.

If the agreement is drafted keeping the above principles in mind, it can be ensured that the Land Owner pays tax as " Business Profits" only at the point of transfer of risks and rewards of ownership in favour of the transferees i.e., the purchaser of apartments, which event would occur either at the point of execution of Sale Deed or handing over possession of the apartment whichever is earlier.

Further by entering into Revenue Sharing Agreement/Arrangement the possibility of levy of VAT and Service Tax on the Owner's share of revenue does not arise. Whereas, in the case of Joint Development Agreement based on area share, there is a need for the Developer to levy VAT and Service Tax on the Owner's share of super built up area as mandated by circulars issued by the relevant authorities.

14. Conclusion:

This article attempts to bring about various issues with regard to Tax Issues relating to transactions in Real Estate and tax planning measures which can be used to ensure least tax incidence by effective structuring of the transactions. The same could be achieved through systematic planning, proper documentation and execution based on the facts of each case.

It is critical to understand that each case should be thoroughly analysed keeping in mind the objectives of the parties concerned and the plethora of taxes which could affect the transaction.

It does not matter how slowly you go as long as you do not stop.

– Confucius

Analysis of section 43CA, 50C & 194-IA of the Income tax Act, 1961

CA P.R. Kothari

1. Introduction :

Section 43CA & section 50C of Income tax Act, 1961 are deeming provisions in respect of taxation of certain real estate transactions and were inserted by Finance Act, 2013 w.e.f. asst. yr. 2014-15 and by Finance Act 2002 w.e.f. asst. Yr. 2003-04 respectively. There is no change till date in section 43CA since its insertion whereas section 50C was amended by Finance (No. 2 Act) 2009 w.e.f. 01.10.2009 to insert the word 'assessable' in that section at certain places. Section 194-IA is a provision for deduction of tax at source from consideration credited / paid to real estate transferor and was inserted by Finance Act, 2013 w.e.f. 01.06.2013. This section has also not been changed since its insertion.

In this article, the provisions as they stand presently are analysed and section 50C is discussed first as it is older than section 43CA and enough time has passed for development of law on that section. Further more, the law relating to section 50C may be applicable to section 43CA also in most of the cases as both the sections are having many common features. The Sections referred in this article are of Income tax Act, 1961 unless specified otherwise. The technical aspects of section 194-IA have been avoided and only legal aspects of that section has been discussed.

2. Section 50C:

2.1. The bare text of section 50C is as under :

[85][**Special provision for full value of consideration in certain cases.**

50C. (1) Where the consideration received or accruing as a result of the transfer by an assessee of a capital asset, being land or building or both, is less than the value adopted or assessed [86][or assessable] by any authority of a State Government (hereafter in this section referred to as the "stamp valuation authority") for the purpose of payment of stamp duty in respect of such transfer, the value so adopted or assessed [86][or assessable] shall, for the purposes of section 48, be deemed to be the full value of the consideration received or accruing as a result of such transfer.

(2) Without prejudice to the provisions of sub-section (1), where—

a) the assessee claims before any Assessing Officer that the value adopted or assessed [86][or assessable] by the stamp valuation authority under sub-section (1) exceeds the fair market value of the property as on the date of transfer;

b) the value so adopted or assessed [86][or assessable] by the stamp valuation authority under sub-section (1) has not been disputed in any appeal or revision or no reference has been made before any other authority, court or the High Court, the Assessing Officer may refer the valuation of the capital asset to a Valuation Officer and where any such reference is made, the provisions of sub-sections (2), (3), (4), (5) and (6) of section 16A, clause (*i*) of sub-section (1) and sub-sections (6) and (7) of section 23A, sub-section (5) of section 24, section 34AA, section 35 and section 37 of the Wealth-tax Act, 1957 (27 of 1957), shall, with necessary modi-fications, apply in relation to such reference as they apply in relation to a reference made by the Assessing Officer under sub-section (1) of section 16A of that Act.

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

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

(3) Subject to the provisions contained in sub-section (2), where the value ascertained under sub-section (2) exceeds the value adopted or assessed [86][or assessable] by the stamp valuation authority referred to in sub-section (1), the value so adopted or assessed [86][or assessable] by such authority shall be taken as the full value of the consideration received or accruing as a result of the transfer.]

85 *Inserted by the Finance Act, 2002, w.e.f. 1-4-2003.*

86. Inserted by the Finance (No. 2) Act, 2009, w.e.f. 1-10-2009.

87. *Explanation* renumbered as *Explanation 1* by the Finance (No. 2) Act, 2009, w.e.f. 1-10- 2009.

88. Inserted by the Finance (No. 2) Act, 2009, w.e.f. 1-10-2009.

The enactment of section 50C is not beyond legislative competence and is not violative of Article 14 of the constitution.

See K.R. Palaniswamy Vs. UOI

(2008) 306 ITR 61 (Mad.)

Bhatia Nagar Premises Co-operative Society Ltd. Vs. UOI

(2011) 334 ITR 145 (Bom.)

2.1.1. Section 50C(1) shows the applicability of deeming fiction to the transferor in following situations:

i) There should a 'transfer' as defined in section 2(47) coupled with a 'consideration'. To avoid unnecessary lengthening of the article and to focus on special provisions, these two terms are not analysed in this article.

ii) The transfer should be of land or building or both held as capital asset.

iii) The value adopted or assessed or assessable by State Government's stamp valuation authority for the purpose of payment of stamp duty for such transfer is higher than the 'consideration' and in that case for the purposes of finding out income chargeable under the head 'capital gains' as per section 48, the full value of consideration shall be deemed to be the value so adopted, assessed or assessable by stamp valuation authority.

2.1.1.1. There is a view that, despite no such clear provision in section 50C, where the difference between stamp duty valuation and assessee's consideration is less than 10% of the consideration, the provision of section 50C should not be applied.

See **Order dated 07.10.2015 passed by Kolkata Bench of Hon'ble ITAT in C.O No. 29/Kol/2013 relating to ITA No. 267/Kol/2013 in the case of LGW Limited Vs. ITO**

Order dated 29.10.2010 passed by Hyderabad Bench of Hon'ble ITAT in ITA No. 743/Hyd./2009 in the case of ACIT Vs. S. Suvaranrekha.

2.1.1.2. What is meant by land or building or both:

Land or building are different from limited or certain rights in respect of land or building. These rights may be covered by the expression 'immovable property' but section 50C(1) does not cover all immovable properties. It covers only land or building or both and nothing else. Even the land, building or both held by transferor as capital assets only are covered u/s 50C(1). In other words, certain agricultural lands which are excluded from the ambit of 'capital asset' as per section 2(14), are also not covered u/s 50C.

Accordingly, following assets are not covered in the expression 'land or building or both':

i) Leasehold rights in a land

See **Atul. G. Puranik Vs. ITO**

(2011) 132 ITD 499 (Mum.)

(2011) 11 taxmann.com 92(Mum.- Trib.)

Kancast(P) Ltd. Vs. ITO

(2015) 55 taxmann.com 171(Pune- Trib.)

However, in certain cases of transfer of leasehold rights, section 50C was held to be applicable.

See **Shavo Norgren (P) Ltd. Vs. DCIT**

(2013) 58 SOT 23(Mum.)

ii) Tenancy Rights

See **DCIT Vs. Tejinder Singh**

(2012) 19 taxmann.com 4 (Kol. -Trib.)

Fleurette Marine Novelle Hatam

(2015) 61 taxmann.com 362 (Mumbai-Trib.)

iii) Flat booked but transferred before completion or before taking of possession

See **ITO Vs. Yasin Moosa Godil**

(2012) 20 taxmann.com 424 (Ahd. -Trib.)

However, where agreement for purchase of flat to be constructed subjected to stamp duty payment, section 50C was held to be applicable.

See **Prakash Shantilal Parekh Vs. ITO**

(2015) 37 ITR (Trib.) 119 (Mumbai)

iv) Shares of a company owning an apartment

See **Irfan Abdul Kader Fazlani Vs. ACIT**

(2013) 56 SOT 12 (Mum.)

v) An encumbered property where transferor is not full owner and have limited right only

See **D. Anitha (Smt.) Vs. ITO**

(2015) 68 SOT 266 (Hyd.)

vi) Right of 'Kasthkar' only in land

See **ITO Vs. Tarachand Jain**

(2015) 63 taxmann.com 286 (Jaipur-Trib.)

vii) Agricultural land which are excluded from the ambit of 'capital asset' as specified in section 2(14)

2.1.1.3. 'For the purpose of section 48':

Section 48 provides for computation of income chargeable under the head 'capital gains'. It means where there is no eventuality of any income being chargeable under the head 'Capital gain' from the subject transfer, the provisions of section 50C shall not be applicable. In other words, in following circumstances, section 50C shall not be applicable as in these cases, there is no need of computation u/s 48 :

i) In the case of an institution eligible for exemption u/s 11, there are special provisions for computation and application of capital gain as embodied in section 11(1A). In that case, computation under section 48 is not required at all as many ingredients of section 48 are there in section 11(1A) itself. However, in that case indexing of cost is not available as the same is available u/s 48 only. Moreover, where due to any reason, the institution is not found eligible for exemption of income u/s 11, then Sec.48 will be applicable instead of s. 11(1A) and in that case, application of section 50C cannot be ruled out.

ii) Where the transferred land or building or both is/are part of 'block of assets' and there is no eventuality as envisaged in section 50 i.e. either the concerned block of assets is still existing despite such transfer or transfer consideration is not more than the opening w.d.v. of concerned block of assets plus addition to said block of assets during the year under consideration, there is no need for computation of any chargeable capital gain u/s 48 in such case. Here, section 50C would not be applicable and actual consideration and not deemed consideration would be reduced from the actual cost /w.d.v. of the concerned block of assets.

See Bhaidas Cusondas & Co. Vs. Addl. CIT
(2015) 59 taxmann.com 373 (Mumbai-Trib.)
ACIT Vs. Roger Pereira Communications P.Ltd.
(2009) 34 SOT 64 (Mum.)

However, where capital gain is to be computed u/s 50 in case of depreciate assets, the provisions of section 50C had been held to be applicable i.e. where all assets of the concerned block of assets are transferred or transfer consideration is more than the total w.d.v./actual cost of the concerned block of assets, deemed consideration u/s 50C would be considered while working out capital gain as per provisions of section 50.

See ITO Vs. United Marine Academy
(2011) 130 ITD 113 (Mum.)(SB)
Smita Conductors Ltd. Vs. DCIT
(2014) 41 taxmann.com 514 (Mum. Trib.)

iii) Where entire capital gain is eligible for exemption u/s 54, 54EC, 54F etc., there is no need for any computation u/s 48 and section 50C cannot be applied in such cases. However, in such situation, eligibility for exemption of entire capital gain has to be tested with reference to capital gain before any indexing of cost of acquisition as indexing is allowed u/s 48 only and assesse is claiming inapplicability of section 48 provisions.

See Nandlal Sharma Vs. ITO
(2015) 61 taxman.com 271 (Jaipur Trib.)
(2015) 40 ITR (Trib.) 518 (Jaipur)
Gyanchand Batra Vs. ITO
(2010) 8 taxmann.com 22 (Jaipur- Trib.)
(2010) 6 ITR (Trib.) 147 (Jaipur)
(2010) 133 TTJ (JP) 482
Prakash Karnavat Vs. ITO
(2011) 16 taxmann.com 357(Jaipur - Trib)

However, there may be a situation where entire capital gain is not eligible for exemption and only partial exemption is allowable due to inadequate investment in new assets/Bonds etc.. This situation has not been tested in aforesaid cases. In such type of situation, exemption provisions and provisions of section 48 both are applicable and therefore altogether exclusion of section 50C cannot be claimed. In author's opinion, application of section 50C and extent of exemption allowable may be worked out by proportionment of deemed consideration as well as cost of acquisition for the purposes of section 48 but for calculating exemption u/s 54/54EC/54F, deemed consideration is to be ignored.

iv) Difference between higher stamp duty valuation & recorded consideration cannot be taken as unexplained investment u/s 69 or 69B in the hands of purchaser merely on the basis of such higher stamp duty valuation as section 50C is a deeming provision for transferor. The valuation adopted u/s 50C does not represent actual consideration passed on to the transferor so as to enable addition in the hands of the transferee u/s 69/69B.

See CIT Vs. Chandni Bhuchar
(2010) 323 ITR 510 (P & H)
CIT Vs. Khubsoorat Resorts P. Ltd.
(2012) 211 Taxman 510 (Delhi)
DCIT Vs. Virjibhai Kalyanbhai Kukadia
(2012) 138 ITD 255 (Ahd.)

However, after introduction of section 56(2)(vii), the aforesaid proposition and case laws are not much helpful in case of individual and h.u.f. .

2.1.1.4. Adopted, assessed or assessable for the purpose of payment of stamp duty :

Before insertion of the word 'assessable' and Explanation 2 in section 50C, the law was clear that wherever there is no actual assessment/ adoption of stamp duty value by stamp duty authority, there is no question of application of section 50C. However, after insertion of that word and Explanation in section 50C w.e.f. 01.10.2009, one view is that now S. 50C is applicable even in case of notional stamp duty valuation where registration of document was not required or was not effected due to any other reason or stamp duty is not prescribed. The another view that even after amendments since 01.10.2009, earlier position prevails as 'assessable' word is subject to the words and expression 'for the purpose of payment of stamp duty' and where no stamp duty is prescribed or payble, this amendment has not brought any change in earlier position that where registration of a document is not required and no stamp duty is prescribed for registration of such document, the concerned transfer would not be subjected to section 50C. However, there cannot be two opinions on the proposition that after abovereferred amendment, section 50C is applicable where document was registrable and rate of stamp duty was also prescribed but for some reason or another document was not actually registered.

2..1.2. Section 50C(2) provides a machinery for challenging the stamp duty valuation and its provisions can be summarised as under :

i) For applicability of section 50C(2), the transferor should claim before Assessing officer (A/O) that stamp duty value referred u/s 50C(1) is higher than the fair market value as on the date of transfer and said stamp duty value has not been disputed in any appeal or revision or no reference has been made before any other authority, Court of the High Court.

ii) If above conditions are fulfilled, the A/O may refer the valuation of the subject capital asset to a Valuation Officer (V/O) as defined in section 2(r) of the Wealth tax Act, 1957 (W.T. Act) and in that case following provisions of Wealth tax Act, 1957 shall be applicable with necessary modification:

a) The V/O may call for necessary accounts, records or other documents from the transferor by serving a notice on him (Section 16A(2) of W.T Act)

b) If the value disclosed by the transferor is found correct by V/O, he shall pass on order in writing to that effect and send a copy of his order to asssessee and A/O both. (Section 16A(3) W.T. Act)

c) If V/O founds that value of the asset transferred is higher that that declared by the transferor, he shall serve a notice on the transferor to state his objections to such higher valuation and produce evidence in support of such objections (Section 16A(4) of W.T. Act)

d) After hearing transferor's objections and appraising the evidences, produced by transferor as well as those gathered by him, the V/O shall pass an order in writing estimating the value of the subject asset and send a copy of his order to assessee and A/O both. (Section 16A(5) W.T. Act).

e) On receipt of order of V/O, the A/O shall take the Value of subject asset as per valuation made by V/O (Section 16A(6) of W.T Act). However, this provision of Wealth tax Act shall apply subject to provisions of section 50C(3) which has been explained in paragraph no. 2.1.3. hereinafter.

f) An appeal to Commissioner of Income tax (Appeals) [CIT(A)] may be filed by the transferor objecting to the V/O's order rectifying any mistake apparent from record which may result in enhancement of the valuation made by him or rejecting the claim of transferor to rectify any mistake apparent from record in V/O's order [Clause i) to section 23A(1) of W.T. Act].

It may be noted here that transferor can challenge the correctness of V/O's valuation in normal appeal filed u/s 246A(1)(a) against the addition u/s 50C made in an order of assessment.

g) When valuation made by V/O is under challenge in any appeal before CIT(A), an opportunity of being heard shall have to be given to the V/O also by CIT(A) (Section 23A(6) of W.T. Act)

h) The CIT(A) can make any further enquiry as he may think fit or cause further enquiry to be made by V/O where an appeal has been filed before CIT(A) in which valuation made by V/O or order of enhancement of valuation by V/O or rejection of transferor's claim for rectification of mistake, are under challenge. CIT(A) can allow the transferor to go into any ground of appeal not specified in the grounds of appeal. (Section 23A(7) of W.T Act.)

i) In an appeal before Hon'ble Appellate Tribunal (ITAT) against the order of CIT(A) in which valuation of any asset by V/O is under challenge, the opportunity of being heard shall have to be given to V/O also (Section 24(5) of W.T Act)..

j) In an appeal before CIT(A) or Hon'ble ITAT relating to valuation of an asset, the transferor who is entitled to attend or who is required to attend before those appellate

authorities, he may attend by a registered valuer unless he is required to attend personally. (Section 34AA W.T. Act)

k) The V/O can rectify any mistake apparent from record in his order either at its own motion or at the instance of the transferor or A/O or CIT(A) or Hon'ble ITAT, within four years from the end of the financial year in which the order sought to be amended has been passed. Certain procedural conditions and safeguards against enhancement are also specified (Section 35 of W.T. Act).

It may also be noted that CIT(A) and ITAT can also rectify any mistake apparent from the record in their order subject to procedural formalties and safeguards against enhancement (Section 35 of W.T. Act).

l) V/O shall have vide powers when reference by A/O is made to him (Section 37 of W.T. Act).

2.1.2.1. Transferor assesse should claim before A/O against stamp duty valuation :

There is no particular form for the claim to be made by the transferor assessee before A/O to the effect that stamp duty valuation is higher than fair market value(FMV).

Accordingly, such claim may be inferred from the conduct of the transferor assessee e.g. requesting to accept documented consideration or requesting not to apply provisions of section 50C(1) etc. However, it will always be better to make a specific claim before the A/O that stamp duty valuation is higher than fair market value of the subject asset on the date of transfer.

Hon'ble Calcutta High Court in a landmark judgement in Sunil Kumar Agarwal Vs. CIT (2015) 372 ITR 83(Cal.) held that where assesse claims in the conveyance deed that the agreed price was the highest in the market, it cannot be said that the assessee had accepted the higher stamp duty valuation. The Hon'ble High Court further held that in such case, even if no formal prayer before A/O to refer the matter to valuation officer was made, it was burdened duty of the A/O to act fairly and to give a fair treatment by giving the assese an option to follow the course provided by law under section 50C(2).

2..1.2.2. Stamp duty valuation should not have been disputed before other forums :

The most crucial condition, for eligibility of transferor assesse to avail the machinery of section 50C(2) to challenge stamp duty valuation, is that the said stamp duty valuation should not have been disputed in any appeal or revision or no reference should not have been made before any authority, Court or the High Court. It means where transferee has already challenged the valuation before any other forum, transferor assesse cannot claim reference to V/O even if he claims that such stamp duty valuation is higher than FMV.

However, a reference by Registrar under stamp duty provisions to stamp duty authority is not a reference to any authority or Court and in such a case there is no bar for reference by A/O to V/O u/s 50C(2).

See **B.N. Properties Holdings P.Ltd. Vs. ACIT**

(2011) 9 taxmann.com 180 (Chennai- Trib.)

2..1.2.3. A/O may refer the valuation to V/O :

If the conditions of clauses (a) and (b) of section 50C(2) are fulfilled, the A/O may refer the valuation of subject asset to V/O. The use of word 'may' creates confusion that A/O has discretion not to refer the matter to V/O and it is not compulsory for him to approach V/O even after claim by the transferor assessee as per clause (a) of section 50C(2) and even though there is no disqualification envisaged under clause (b) of section 50C(2). However, judgements in this respect have negated this confusion and some of these judgements are discussed hereunder :

i) The A/O is bound to refer the matter of valuation to V/O, if conditions are fulfilled and he has no discretion in the matter.

See **S. Muthuraja Vs. CIT**

(2014) 369 ITR 483(Mad.)

Appadurai Vijay Raghavan Vs. JCIT

(2014) 369 ITR 486(Mad.)

Manjula Singhal Vs. ITO

(2011) 46 SOT 149(Jodh.)

ii) The use of word 'may' in section 50C(2) be read as 'shall' in all cases where assessee objects to stamp duty valuation as section 50C(2) is a remedial measure.

See **Meghraj Baid Vs. ITO**

(2008) 114 TTJ(Jodh.) 841

Sarwan Kumar Vs. ITO

(2014) 45 taxmann.com 16 (Delhi- Trib.)

iii) Even CIT(A) can direct the reference to V/O u/s 50C(2) if conditions are fulfilled and A/O even if has not made such reference to V/O.

See **ITO Vs. Smt. Manju Rani Jain**

(2008) 24 SOT 24 (Del.)

iv) When stamp duty valuation is objected to by the assessee and a regd. Valuer's report is filed by him, A/O

should either accept said report or refer the matter to V/O and in both the cases, he should record his reasons.

See CIT Vs. Chandra Narain Choudhari

(2013) 219 Taxman 60 (All.)

2.1.3. Section 50C(3) provides that where the value ascertained by V/O u/s 50C(2) is higher than stamp duty value, the stamp duty value shall be taken as deemed consideration for section 50C(1). However, this proposition of section 50C(3) is subject to provisions of section 50C(2) i.e. appeal provisions etc.. In other words, despite applicability of provisions of section 16A(6) of W.T. Act which mandates that A/O is bound to follow the valuation made by V/O, the valuation made by V/O is to be ignored for section 50C(1) if that valuation is higher than stamp duty valuation and in that case stamp duty value is to be deemed as full value of consideration.

However, where valuation made by V/O is less than stamp duty value, V/O's valuation is to be taken as deemed consideration despite silence of section 50C(3) in this regard.

See CIT Vs. Dr. Indra Swaroop Bhatnagar

(2012) 349 ITR 210(All.)

ITO Vs. Gita Roy

(2012) 135 ITD 345(Kol.)

Jalan Chemical Industries P.Ltd. Vs. ITO

(Order dated 06.02.2014 of Kolkata Bench of Hon'ble ITAT in ITA No. 1306/ Kol /2012)

Though valuation made by V/O which is lesser than stamp duty valuation is binding on A/O but the same is not binding on CIT(A) and CIT(A) can further modify the same.

See Suresh C. Mehta Vs. ITO

(2013) 144 ITD 427(Mum.)

2.1.4. Other issues

2.1.4.1. Valuation as of which date - the date of agreement to sell or any subsequent date when sale deed is executed or possession is given :

Section 50C has been introduced to prevent undervaluation of property under transfer done to avoid legitimate tax or duty on such transfers. The value of a property is fixed at the time of initial agreement and purchaser and seller both remain bound by such agreed price, unaffected by any upward or downward fluctuation during the period between initial agreement date and actual transfer date. Accordingly, any comparison of real value and agreed value should be with reference to the initial agreement date and deviation from this line may defeat the real purpose of section 50C and may result in unnecessary harassment and hardship to the tax payer apart from distorted results.

See Mohd. Imran Baig & Ors. Vs. ITO

(2016) 175 TTJ (Hyd.) 319

following

Sanjeev Lal Vs. CIT

(2014) 365 ITR 389(SC)

Also see DCIT Vs. S Venkat Reddy

(2013) 32 taxmann.com 324(Hyd. – Trib.)

ITO Vs. Modipon Ltd.

(2015) 154 ITD 369(Delhi)

(2015) 57 taxmann.com 360 (Delhi – Trib.)

2.1.4.2. Whether sec. 50C applies to development agreements :

Section 50C have been held to be applicable to development agreements when payment in full or part is recd. and possession of property is handed over to developer as that transfer is taken as transfer of land or building or both.

See Arif Akhatar Hussian Vs. ITO

(2011) 45 SOT 257 (Mum.)

However, in case of development agreements, provisions of section 50C is to be applied only to the area actually transferred i.e. area reserved by landowner as his share is not transferred and therefore be excluded from the application of section 50C.

Mrs. Arlette Rodrigues Vs. ITO

(2011) 10 taxmann.235 (Mum.- Trib.)

2.1.4.3. Whether section 50C is applicable to computation of capital gain upon conversion of immovable property held as capital asset into stock in trade as contemplated u/s 45(2):

Both section 45(2) and section 50C contain deeming provisions and none of them is having non-obstante clause to have overriding effect. In view of this and as S.45(2) is a special provision whereas section 50C is a general provision, section 45(2) should prevail over section 50C keeping in mind the principle of *'generalia specialibus non derogant'* (a special provision will prevail over the general provision) as propounded by Hon'ble Apex Court in CIT Vs. Shahzada Nand and Sons AIR 1966 SC 1342. Accordingly, in case of conversion of capital asset into stock in trade, the FMV as on the date of conversion is to be deemed as consideration as

per provisions of section 45(2) for computation of capital gain on conversion of capital asset into stock in trade and no recourse of section 50C is warranted.

2.1.4.4. On the same reasoning as explained above in respect of section 45(2), in other situations also as contemplated u/s 45(3) (introduction of property by a partner in his firm as capital contribution or otherwise) and u/s 45(4) (distribution of property to partner/member upon dissolution of firm/ AOP), section 50C should not apply and respective deeming provisions of section 45(3)/ 45(4) shall apply.

2.1.4.5. Whether section 50C is applicable to distribution of immovable property to shareholders upon liquidation of company as contemplated u/s 46(2) :

Due to the same reasons as explained above for non-applicability of provisions of section 50C to transfer referred in section 45(2), section 50C is not applicable to distribution of immovable property to shareholders upon liquidation of company and FMV of subject immovable assets as on date of distribution reduced by the amount treated as dividend u/s 2(22)(c) against said distribution of immovable property, shall be deemed as consideration as per provisions of section 46(2).

2.1.4.6. Section 50C would be applicable to computation of capital gain relating to transfers exempted u/s 47 but subsequently becoming taxable u/s 47A due to violation of any condition specified for such exemption.

2.1.4.7. Whether section 50C is applicable to transfer of immovable property in a case of slump sale contemplated u/s 50B:

Section 50C should not be applicable in the case of slump sale u/s 50B as Explanation – 2 to section 2(42C) specifically provides that individual value taken by stamp duty authority for levy of stamp duty on transfer of immovable property involved in slump sale will not amount to assigning of any value to any individual asset and section 50B being the special provision, it will prevail over general provision of section 50C.

2.1.4.8. Whether transfer of property at lesser consideration to close relatives is outside the purview of section 50C :

Section 56(2)(vii) excludes the transferees who are close relatives of transferor, from addition on account of transfers at lesser amount of consideration but no such clear exclusion is there to the transferor under section 50C. It may be noted that the transfers without any consideration at all are out side the purview of section 50C, the same being not treated as transfers in view of provisions of section 47. It shows that transfers to relatives without consideration at all is safer from the point of view of transferor instead of transfer at lesser consideration.

2.1.4.9. The assessment completed on the basis of stamp duty valuation without waiting for V/O's report as the case was getting time barred. The Court set aside the order to do assessment of capital gain afresh after receipt of V/O's report. For this purpose, limitation provided u/s 153 for completion of assessment was extended as the same already expired.

See N. Meenakshi Vs. ACIT

(2010) 326 ITR 229 (Mad.)

2.1.4.10. Provisions of section 155(15) :

When stamp duty value is disputed before stamp duty authority or Court as envisaged in clause (b) of section 50C(2) and same is revised, such revised valuation is to be adopted by way of rectification u/s 154 and the limitation period of four years for that purpose will start from the end of the year in which such revised valuation order is received.

Whether stamp duty valuation is disputed before any authority or Court as envisaged under clause (b) of section 50C(2), the income tax assessment cannot be kept pending for final order of court as because capital gain would be rectified u/s 154 read with section 155(15) if any relief is granted in respect of stamp duty valuation by authority or Court.

See Rajini Venugopal Vs. Addl. CIT

(2009) 221 CTR (Mad.) 199

2.1.4.11. Penalty u/s 271(1)(c) :

The penalty u/s 271(1)(c) is not leviable merely on the basis of addition u/s 50C. Hon'ble Calcutta High Court in its order dated 14.05.2013 in ITAT No. 62 of 2013 in the case of CIT Vs. Madan Theatres Ltd. held that when revenue could not produce an iota of evidence to show that the assessee actually received even one paisa more than the amount shown to have been received by it, there is no scope to admit revenue's appeal against ITAT's order which dismissed revenue's appeal against CIT(A)'s order which deleted penalty imposed u/s 271(1)(c) by A/O merely on the basis of addition u/s 50C.

See also Bhavya Anant Udeshi Vs ITO

(2015) 43 ITR (Trib.) 487 (Hyderabad)

Neeraj Kumar Vs. ITO

(Order dated 09.12.2015 in ITA No. 1983/Del/2012.

3. Section 43CA:

3.1. The bare text of section 43CA is as under :

[51][**Special provision for full value of consideration for transfer of assets other than capital assets in certain cases.**

43CA. (1) Where the consideration received or accruing as a result of the transfer by an assessee of an asset (other than a capital asset), being land or building or both, is less than the value adopted or assessed or assessable by any authority of a State Government for the purpose of payment of stamp duty in respect of such transfer, the value so adopted or assessed or assessable shall, for the purposes of computing profits and gains from transfer of such asset, be deemed to be the full value of the consideration received or accruing as a result of such transfer.

(2) The provisions of sub-section (2) and sub-section (3) of section 50C shall, so far as may be, apply in relation to determination of the value adopted or assessed or assessable under sub-section (1).

(3) 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.

(4) The provisions of sub-section (3) shall apply only in a case where the amount of consideration or a part thereof has been received by any mode other than cash on or before the date of agreement for transfer of the asset.]

51. Inserted by the Finance Act, 2013, w.e.f. 01.04.2014.

3.1.1. Most of the provisions of section 43CA and 50C are common and therefore the analysis made in above paragraphs in respect of section 50C will hold good *mutatis mutandis* for section 43CA also except a few distinguishing features of two sections which are discussed hereunder:

i) Section 43CA applies to transfer of assets other than capital assets whereas section 50C applies to transfer of capital assets only.

As section 2(14) excludes certain agricultural lands from the ambit of 'capital assets', section 50C is not applicable to such excluded agricultural lands even if they are held as investment and not as stock in trade. But as because section 43CA is applicable to all assets excluding capital assets, it means that it applies to those agricultural lands also which are excluded from ambit of 'capital assets' as per section 2(14) even if they are held as investment and not as stock in trade.

ii) The definition of 'transfer' u/s 2(47) is applicable to 'capital assets' only and therefore relevant for section 50C only and not for section 43CA as 'capital assets' are outside the ambit of section 43CA. Accordingly, the popular meaning of the word 'transfer' is to be applied for section 43CA and the 'Transfer' as understood under Transfer of Property Act shall be relevant for section 43CA.

iii) The provisions similar to provisions of sub section (3) and (4) of section 43CA are not there in section 50C. Sub section (3) of section 43CA provides that where date of agreement fixing the value of consideration for transfer of asset and the date of registration of such transfer of asset are not same, the value assessable by stamp duty authority for the purpose of payment of stamp duty in respect of such transfer on the date of the agreement which fixed the value of the transfer of the asset is to be taken as deemed consideration under section 43CA(1). Sub section (4) of section 43CA provides that the aforesaid provision of sub-section (3) of section 43CA will be applicable only if the full or part consideration has been received by any non-cash mode on or before the date of agreement for transfer of the asset. It means that any non-cash receipt of consideration even after one day of the agreement will disqualify the transferor from taking recourse to section 43CA(3).

4. Section 194-IA

4.1 The bare text of section 194 –IA is as under :

[40][**Payment on transfer of certain immovable property other than agricultural land**[41]**.**

194-IA. (1) Any person, being a transferee, responsible for paying (other than the person referred to in section 194LA) to a resident transferor any sum by way of consideration for transfer of any immovable property (other than agricultural land), shall, 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, deduct an amount equal to one per cent of such sum as income-tax thereon.

(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.

(3) The provisions of section 203A shall not apply to a person required to deduct tax in accordance with the provisions of this section.

Explanation.—For the purposes of this section,—

(a) "agricultural land" means agricultural land in India, not being a land situate in any area referred to in items (*a*) and (*b*) of sub-clause (*iii*) of clause (*14*) of section 2;

(b) "immovable property" means any land (other than agricultural land) or any building or part of a building.]

40. Inserted by the Finance Act, 2013, w.e.f. 1-6-2013.

41. *See* rules 30, 31, 31A, 31AB and 37BA and Form Nos. 16B, 26B, 26QB, 26AS and 27A.

4.1.1. The salient features of section 194-IA can be summarised as under :

i) The said section casts an obligation to deduct income tax.

ii) The said obligation is upon all the transferees including non-residents of any immovable property being a land (other than certain agricultural land in India) or a building or a part of a building. A literal reading of section shows immovable property situated outside India is also covered under this section. However, practical difficulties may arise in respect of transfer of land or building situated outside India by a resident transferor to a non-resident transferee. In such a case, how the provision of this t.d.s. section can be complied by and enforced upon the non-residents not having any Indian PAN having no income taxable in India.

iii) The said transferee should be responsible for paying to person (other than whose immovable property has been acquired compulsorily as envisaged in section 194LA), any sum as a consideration for transfer of immovable property.

iv) The said transferor should be a resident.

v) The deduction of tax has to be made at the time of credit of any sum of consideration to the account of the transferor or at the time of payment of such sum in cash or by issue of a cheque/draft or by any other mode, whichever is earlier.

vi) The rate of deduction of tax is 1% of such sum of consideration credited/paid.

vii) No such deduction of tax is required where the consideration of transfer of immovable property is less than Rs. 50 lakhs.

viii) The deductee is not required to have any tax deduction account no. (TAN) u/s 203A for the tax deducted u/s 194-IA though he should have PAN otherwise the payment of tax deducted to the credit of Central Government would not be possible. No quarterly statements/returns are required to be submitted by the deductor.

4.1.1.1. 'Transfer', Transferee', 'Transferor' and 'consideration' :

As section 194-IA relates to the tax deduction from the consideration paid/payable to a transferor who may not be holding the subject immovable property as a capital asset and therefore the definition of 'transfer' as encompassed in section 2(47) shall not be applicable for section 194-IA. Accordingly for section 194-IA, the 'transfer' as understood generally is to be applied and therefore 'Transfer' envisaged under the 'Transfer of Property Act' should be relevant. The term 'transferor' and 'transferee' would naturally take colour from the word 'transfer' only. The analysis of term 'transfer' is not covered in this article to avoid unnecessary lengthening.

4.1.1.2. 'Immovable property' and 'Agricultural land':

The 'immovable property' covered in this section is land (other than certain agricultural land in India) or building or part of a building. What is 'land' or 'building' has already been discussed in the analysis here in above related to section 50C hence not repeated here.

So far as exclusion of 'agricultural land' from the purview of this section is concerned, the excludible land should first be agricultural land that too at the time of transfer and secondly it should be rural agricultural land not being the land envisaged in items (a) and (b) of sub clause (iii) of section 2(14). What is 'agricultural land' will depend on facts and circumstances of each case considered collectively and may differ from case to case.

4.1.1.3. The threshold limit of Rs. 50 lakhs is with reference to the total consideration of the property under transfer and even in case of joint transfers whether with respect to more than one transferor or more than one transferee, the respective share of each or concerned transferor / transferee being less than Rs. 50 lakhs would be immaterial for the purposes of this section.

4.1.1.4. Time and mode of payment tax deducted :

The tax deducted under this section has to be paid to the credit of Central Government within a period of 7 days from the end of the month in which deduction is made and such payment shall be accompanied by a challan cum statement in Form No. 26QB. This payment to the credit of Central Government shall be by way of remittance made electronically into the Reserve Bank of India or the State Bank of India or any other authorised bank through internet

banking facility of respective bank or through debit card (and not credit card) according to the procedures, formats and standards specified by DGIT (Systems) [See Rule 30(2A), (6A), (7) and (8) of Income tax Rules, 1962].

The t.d.s. certificate shall be furnished by the transferee to the transferor within 15 days from the due date of furnishing challan cum statement in form no. 26QB after generating and downloading the same from web portal specified by DGIT (system) or any person authorised by him. The paid t.d.s. amount shall be reflected in Form 26AS and credit for t.d.s. shall be allowed in accordance with Rule 37BA of I.T. Rules, 1962.

4.1.2. Issues :

1. Whether this t.d.s. provision applies to the payments / credits in relation to agreement for transfer executed before 01.06.2013 ?

Here, two situation may be visualised. One is where agreement to transfer resulted in transfer of land or building before 01.06.2013 and credit of consideration to transferor was already made before 01.06.2013 though payment might be travelling beyond 01.06.2013. In this case, as transferor's account has been credited with the consideration amount before 01.06.2013, the date on which section 194-IA come into operation, it will be quite plausible to take a view that section 194-IA does not apply to the payments made after 01.06.2013 against such agreements. The reason for this view is based on the premise that section 194-IA casts liability to deduct tax at the time of credit or payment of consideration, whichever is earlier.

In other agreements, where credit of consideration to transferor is not before 01.06.2013, the t.d.s. under this section has to be deducted on payments or credit made on or after 01.06.2013.

2. No nil t.d.s. deduction declaration u/s 197 or nil or lower rate deduction certificate by A/O u/s 197A is permissible for t.d.s. under this section.

3. The tax deduction is required with reference to consideration paid / credited by the transferee and stamp duty valuation as contemplated u/s 43CA or 50C is not relevant for this section.

4. Consideration paid in advance where transfer is yet to take place is also liable for t.d.s. under this section.

5. The limit of Rs. 50 lakhs is for total consideration of the subject property. Hence, individual payments even if less than Rs.50 lakhs is liable for deduction of tax under this section if aggregate consideration exceeds Rs. 50 lakhs.

6. Though theoretically in absence of PA No. of transferor, t.d.s. @ 20% is applicable in view of provisions of section 206AA but practically in absence of PA No. of transferor, payment through form no. 26QB is not possible as system does not allow or accept such payment. Thus, indirectly, PA No. of transferors and transferees both are must for complying with this section.

7. If tax is borne by the transferee then grossing up of tax with consideration has to be made and tax is to be deducted on such grossed up consideration.

8. Where more than one transferor or more than one transferee is involved in the transfer, each transferee has to deduct tax and made payment separately in respect of each transferor. For example, if there are two transferees A and B and two transferors C and D, A shall have to deduct and pay tax through form no. 26QB in respect of C and D both separately on their respective share of the consideration credited/paid after obtaining their respective PA Nos. . Similarly, B shall also have to deduct and pay tax in respect of C and D separately on their respective share in consideration. It means four challans cum statement in form 26QB shall have to be filed and all the four persons i.e. both transferees and both transferors shall be required so have their PA No. .

9. As per CBDT circular no. 1 of 2014, t.d.s. under this section shall not be leviable on service tax component if the same is indicated separately. Here, a question may arise whether the S. 194-IA shall at all be applicable where consideration with service tax is above threshold limit of Rs. 50 lakhs but without service tax it is less than Rs. 50 lakhs. In the light of the above referred circular, it can be safely opined that as tax is not deductible at source on service tax component, the said tax should also not be taken into consideration while computing threshold limit of Rs. 50 lakhs.

5. Disclaimer :

The author does not accept any liability whatsoever in respect of the views expressed and information furnished in this article and any person acting on the basis of the said views and information will do so at his own risk and responsibility.

Knowing is not enough; we must apply. Willing is not enough; we must do.

– Johann Wolfgang von Goethe

REAL ESTATE TRANSACTIONS AND PRECAUTIONARY STEPS

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A vital and a prominent investment that a person makes in his life is acquiring a real estate, either for its own consumption or for investment purpose. Either way be the objective the investment outlook is substantial and significant. Hence it is important to ensure that the real estate purchased as a clear legal title and there's not embargo or any encumbrance with respect to either the title or the possession of the real estate.

It has also often lately that a lot of this real second actions goes off the hook just because it doesn't have a clear and valid legal title or the documents available for substantiating the title are not complete or there is any legal encumbrance or hindrance with respect to the particular property. It is not only the individuals who are interested in acquiring the property, but also their various other corporate, financial institutions, banks et cetera who are in some way or the other creative to be real state of the actions. Particularly in the case of banks and financial institutions with the introduction of loan against property (LAP), it is essential for them to look into the legality of the property in question.

The law in force that governs the real estate transaction is primarily "The Transfer of Property Act 1882". The act came into force with effect from 1 July 1882 and governs the transactions with regard to the properties, both movable and immovable. The law is substantive and covers the various aspects of the transaction in detail.

From an individual standpoint there are certain aspects which should be looked into while acquiring a property. Some of the factors are:

1. Title of the Property- this is part of most important point that these two taken care of while purchasing any property. The title of the property is the key element of the property question and until and unless there is a valid title of the Seller, a good title cannot be passed on to the purchaser. It is well settled law that a person cannot transfer anything that he doesn't have. In other words a person cannot transfer a better title than what he has. In this scenario it becomes important to ensure and verify the title of the person selling the property i.e. the Seller. Due diligence of the title should be undertaken. By the examination of the various title deeds and other relevant supporting documents conclusion should be drawn whether the seller establishes a good and valid title. This exercise should be done irrespective of the monetary consideration involved and the size of the property.
2. Documents- Secondly it should be seen that there are relevant and sufficient documents to justify the title of the property. Having sufficient and relevant documents are something which are indispensable and cannot be compromised with. It is ultimately the documents are available and present which forms the Nexus of a valid title and ownership. Apart from the documents pertaining to the present one of, proper documents with respect from the previous posters should also be looked into. If the property is being passed on from one person to another then all the chain deeds should be obtained. Moreover, when the transaction is concluded it is essential that all the original deeds and documents are obtained.
3. Legal Searches- the reason of legal searching and title verification assuming a pivotal role in a transaction is because of the existence of doctrine "Caveat Emptor". The doctrinal holds that the purchaser buys at his or her own risk. It is one of the tribe of Latin maxims that pervade our law. It is an ordinary rule of contract. A vendor is under no duty to communicate the existence even of a latent defect unless by act or implication he represents such defect not to exist. Modern statutes and cases have limited the implication and importance of this doctrine, nonetheless it is not completely rule out. As a result the doctrine is very much in existence and due to this it becomes important to ensure that sufficient verification process are initiated and completed.

4. Authority- One more aspect that is relevant is the authority of the person entering into the transaction. A proper and a valid authority provided to a person entering into the transaction is a must in cases where the party is being represented by someone. Before concluding a transaction should be ensured that the person representing a particular party has a proper authority to represent it.
5. Agreement and Conveyance- once the commercial have been fixed and other terms and conditions of the transaction have been finalised it should be properly documented. Depending upon the understanding of the parties and the mode of operation appropriate agreements and the conveyance deeds should be drawn up. All the important terms and conditions should be clearly mentioned in the agreements and it should be drawn up articulately leaving no doubts and ambiguity upon the understanding of the parties and the terms of the transaction. Furthermore, the party should endeavour to get the agreement and the conveyance registered.

From the banks and financial institutions standpoint in addition to the above certain other aspects should be given proper consideration. Some of which are as follows:-

1. Enforceability- the introduction of Securitisation and Reconstruction of Financial Assets and Enforcement of Securities interest Act (SARFAESI) 2002, has provided a new dimension to the enforcement of security interest and has turned out a catalyst for banks in lending business. With the introduction of SARFAESI Act 2002, a rise in corporate lending and especially lending against property has been observed. The primary reason being in case of non-payment of borrowings or loans the banks and financial institutions can take recourse to the provisions of the act and enforce the security interest, that is the properties and realise their outstandings. Though the primary objective of the act is the enforcement of security interest, there are certain exceptions to the definition of security interest and as such all types of land are not covered in the ambit of security interest for example agricultural lands are exempted form the provisions of the SARFAESI Act. Hence it becomes important to evaluate the enforceability aspect of property in question, specifically when the property is been given as a primary security.
2. Existence of prior charge and interest- it is quite often seen that the property in question is subject to joint charge or paripasu charge. In India and of it being subject to joint charge it becomes important to evaluate whether the property being considered as a security is sufficient enough to cover the exposure given to the borrower and accordingly based on the evaluation of the present an existing charge necessary steps and decisions can be made to ensure that the financial assistance provided is well covered and sufficiently protected.
3. Physical Location- From the banks and financial institution point of view it becomes important to evaluate the marketability of the property being offered as security since in the remote circumstances if a situation arises due to which the banks and financial institutions are constrained to invoke the provisions of the SARFAESI Act, then liquidating the property becomes a concern. The physical location of the property plays a crucial factor in the marketability and as such it should not be ignored.

These are the basic considerations that are required to be evaluated in any real estate transaction and thereafter depending upon the nature and type of transaction additional steps can be taken up.

Another area which is crucially important in any real estate transaction pertains to stamp duty and registration fees and the taxation part of it. For giving a transaction a legal effect and making it binding on the parties it is essential that the terms and conditions of the transaction are captured clearly and the document is registered. A document is with the concerned registry office and upon payment of Stamp duty and registration fees. As far as the stamp duty and registration fees are concerned, it being a subject matter of state, and as such each States has its own stamp rates and duties. In the state of West Bengal the stamp duty is governed by the Indian Stamp Act 1899 as modified an amended in the state of West Bengal.

Presently, the Stamp duty is charged on the market value of the property. The market value of any particular property is determined on the basis of circle rates fixed by the State. The circle rates are the rates as applicable in respect of a

particular area, and these rates are fixed by the State keeping into account various factors. In addition to this the market value of the property is also dependent on various other factors such as the proposed use of the property, the age of construction of the property, or location of the property, encumbrances on the property etc.

The rate of stamp duty on conveyance, at present can be enumerated as follows:

Description	Location	Market Value of Property	Rate of Stamp Duty
Immovable Property on Conveyance	Property Situated in Areas where Kolkata Improvement Act 1911 or Howrah Improvement Act 1956 extends	Less than Rs. 40 Lacs	6%
		More than Rs. 40 Lacs	7%
	Property Situated in Areas covered by Municipal Corporation, or Municipality or other notified areas	Less than Rs. 40 Lacs	6%
		More than Rs. 40 Lacs	7%
	Property Situated in any other area	Less than Rs. 40 Lacs	5%
		More than Rs. 40 Lacs	6%

A special consideration needs to be taken while evaluating the word "Conveyance". Conveyance in the state of West Bengal has been given a wide meaning, and probably is among the most exquisite definition provided by various States. Essentially conveyance includes a conveyance on Sale and every instrument by which property, whether movable or immovable is transferred inter vivos and which is not specifically provided for in Schedule I of the Stamp Act.

Over the years the expression "every instrument" has been broadened and presently the term covers the following:

1. Every instrument and every decree or final order of any Civil Court or every order made by the High Court under Sec. 394 of The Companies Act 1956, in respect of amalgamation, merger, reconstruction or de merger of companies, other than amalgamation, merger, reconstruction or de merger of two banking companies or a banking company with a non-banking company.
2. Any instrument whereby a co-owner of a property having defined share therein transfers such share or part thereof to another co-owner of the property or divide such property among co-owners.
3. Any instrument whereby a partner transfers his share in the property of the partnership business to another partner or to other partners, whether separately or together with transfer of other business assets on retirement or dissolution, or whereby he contributes to the capital of the partnership firm by transferring his right and title to or interest in any property.

Since the word conveyance also includes instruments such as order and decrees of the courts in cases of amalgamation, merger, reconstruction etc. the stamp duty on such instruments is levied on the same rate as that of Conveyance, however the amount on which the duty is levied is the aggregation of the market value of the shares allotted and/or issued and the amount of consideration paid. Apart form this especially for these instruments there is a capping on the stamp duty. The Stamp Duty is limited to:

1. 2% of the true market value of the immovable property located in the state of West Bengal.

   OR

2. half percent of the aggregate of the market value of the shares allotted and/or issued and the amount of consideration paid.

Whichever is higher.

Thus these are the basic aspects that should be kept in mind while dealing with any real estate transaction.

JOINT DEVELOPMENT AGREEMENTS – SERVICE TAX LIABILITY AND INTERFACE WITH STAMP DUTY

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- Joint Development Agreements (JDAs)have become the recent trend in the real estate sector. The JDAs are a convenient option not just for the builders, but also the landowners. For the landowners there is convenience since they do not have to work upon conceptualization of project or undertake the menace of construction, while the same is done by experts instead, i.e. the developers or builders. The builders on the other hand, get to do the construction work without having to own the land and related costs thereof. The buyers in this scenario benefit as well, indirectly though, owing to market expansion thereby resulting in healthy competition and better prices.
- The peculiar practice being followed here is somewhat like this: for construction of flats on the land owned by the landowner, the developers are given "development rights" wherein they are entrusted with the right to *develop* and also sell the Developer's share under the agreement. The landowner in return secures himself and receives a portion of flats that are so developed (or some monetary consideration in addition, which may vary from agreement to agreement).
- In doing so, while each of the parties hassecured their interests, lot many complexities have emanated from the same. Principally, there are two transactions involved in a typical JDA, namely: (1) Activity of construction by the Developer for the Owner, and (2) Transfer of Development Rights by the Owner to the Developer.
- The various transactions arising from this arrangement are discussed hereinafter from the perspective of charge ability to service tax.

A. Construction by Developer for Land Owner

- As part of its obligation under the JDA, the Developer constructs for the Land Owner so much of the building as is agreed under the JDA enuring to the share of the Land Owner. In so far as this transaction is concerned, the taxability is rather straight forward. Being construction done by the Developer for the Land Owner, the same is to be taxed as construction activity. This has also been clarified in the Education Guide dated 20.06.2012 issued by Central Board of Excise and Customs (CBEC) wherein it has reiterated its stand taken under Circular 151/2/2012-ST issued on 10.02. 2012. It has been stated at Para 6.2.1 of the Education Guide referred above that where by way of a collaborative agreement for construction of flats, certain flats are transferred by the developer to the land owner in lieu of *development rights*, the transfer of developed flats is subject to service tax as long as the same is transferred before the issuance of completion certificate. Therefore, the Department's stand seems to be clear on this point (and in our view rightly so) that service tax is leviable even on the flats, constructed by the developers for the landowners.
- The difficulty however arises in determining the value and the time when tax is to be paid, on account of the fact that this is like a barter transaction where money is not paid by the Land Owner rather development rights are given by the Land Owner in return for construction services provided by the Developer. In our view, the Point of Taxation Rules, 2011 has to be resorted to for this purpose. Tax is payable when the consideration, namely the Development Rights, is paid by the Land Owner to the Developer. This would essentially be a question of fact and is to be determined based upon the terms of the Agreement. For example if at the time of entering into the Agreement, the Land Owner irrevocably places the Developer in the possession of the land and allows him to make sales / bookings of the Developer's share, it may be stated that consideration by the Land Owner passes then and there and therefore tax becomes immediately payable. Needless to say, value is also to be determined for the point in time when the Point of Taxation is determined as above.
- <u>In our view the value of the work undertaken by the Developer for the Land Owner should be determined on the basis of the value of construction appearing in the books of the Developer. This is so because the Developer is only doing construction work for the Land Owner and</u>

is not transferring any land/ rights in land to the Land Owner. In case proper books are not maintained by the Developer, then resort may be taken to the other methods as prescribed in the Valuation rules for valuing the work undertaken for the Developer for the Land Owner

- Here we would like to point out that the Circular 151/2/2012-ST issued on 10.02.2012 created some confusion in this regard by stating that tax is to be charged when the flats are transferred to the Land Owner whereas the value is to be taken of the value of similar flats as are sold nearer to the date on which land is being made available for construction. However Education Guide dated 20.06.12 in Para 6.2.1 has taken a different position by saying – "Value, in the case of flats given to first category of service receiver will be the value of the land when the same is transferred and the point of taxation will also be determined accordingly". In our view the position taken in the Education Guide is correct and logical. However a recent Order-Instruction F. No. 354/311/2015-TRU dated 20 January 2016 has stated that the view taken by the earlier Circular dated 10.02.2012 is correct. In the said Order it is further stated that the education guide is merely an educational aid based on a broad understanding of a team of officers on the issues. It is neither a "Departmental Circular" nor a manual of instructions issued by the CBEC and the circulars issued by CBEC would prevail over the Education Guide.

B. Development Rights: by Land Owner to the Developer

- *Whether they qualify to be an immovable property*
- The more interesting issue is whether transfer of development rights by the Land Owner is chargeable to Service Tax. In so far as the Department is concerned, it has taken a stand (Both in Circular 151/2/2012-ST issued on 10.02.2012 as also the Education Guide dated 20.06.12) that the same amounts to sale of land and is therefore exempt from payment of service tax. The same has not been substantiated and it seems that the transaction as such has been assumed to be a sale of land. However, such a view of the Department as expressed by way of a Circular, cannot be said to be the law and needs careful analysis.
- The issue at handboils down to the question that whether the activity of transfer of development rights can be said to be amenable to service tax. The levy of service tax is on provision of *service* and the definition of *service* under the Act, specifically excludes a *transfer of title in goods or immovable property, by way of sale, gift or in any other manner.* It is also true that the definition of immovable property is very wide and it includes within its ambit *benefits arising out of land.* On the other hand, *development rights* have been recognized time and again to be a *benefit arising out of land* so as to be covered within the definition of immovable property[1]. It has been held in ***Chheda Housing*** (supra) that Transferable Development Rights (TDR) being a benefit arising from the land must be held to be an immovable property. In***Sadoday Builders***(supra)the Hon'ble Bombay High Court was dealing with Section 36(1)(c) of the Bombay Public Trusts Act, 1950 wherein it was necessitated taking permission of the Charity Commissioner for sale of immovable property. The Court in this case held that transferable development rights are benefits arising out of land and must be considered to be an immovable property. Therefore, without any doubt, *development rights* can be said to be immovable property.

"Title" and its implication:

- Though the above judgments establish that Development Rights are immovable property, the same is to be seen in a context. To discuss further, the implication of the word *title* must be seen. Though *title* has not been defined by the Legislature even in the Transfer of Property Act, the same has been discussed in a few judgments. In one such decision it was observed *the person in whom the interests are vested, has 'title' to the interests, whether he holds them for his own benefit or for the benefit of another.*[2]
- In another decision, while commenting upon the word *title* it was held *in law, 'title' means a bundle of rights. There may be number of types of rights which may fructify into title. For instance, even perfection of title by adverse possession is one of the species of title… Every legal right has a title, that is to say, certain facts or events by reason of which the right has become vested in its owner*[3]*.*
- The definition of *service,* as noticed above, excludes a transfer of *title* in an *immovable property*. The judicial pronouncements on interpretation of the word *title* also bring about that every legal right has a *title* and also person in whom an interest is vested, has *title* to the interest. In my view, the concept of title would

necessitate acquiring of title in Development Rights by the Developer and parting of the title in development rights by the Land Owner. In my view therefore, the transfer of development rights can be said to be amounting to a*t ransfer of* <u>*title in immovable property*</u> and a transaction involving transfer of development rights falls out of the ambit of a *service* as defined under the Act and therefore not chargeable to service tax.

Word of caution

- A word of caution is however inevitable. There are cases where the Agreement is only a commercial agreement and does not as such contemplate transfer of title in immovable property. Therefore, it is to be kept in mind that Service tax would not be chargeable only when the Agreement contemplates transfer of title in 'Development Rights'. Transfer of title would mean that the transferor i.e. the Land Owner would, upon such transfer, be divested of title in the Development Rights so transferred. The key lies in the terms of the Development Agreement.

Stamp Duty pertaining to JDAs:

- As discussed above, agreement for development rights may be contemplated in two possible ways i.e. either by way of conveyance or by way of a contractual arrangement. While the former would attract stamp duty as conveyance of immovable property, it would be outside the ambit of service tax, as demonstrated above. The latter on the other hand is a mere contractual arrangement and being not a conveyance will save the parties from bearing stamp duty as conveyance though the same will attract service tax under the negative list.
- However, with regard to the latter scheme it must be noted that various States such as the state of Haryana has made an amendment to the Indian Stamp Act vide its Notification dated 01.10.2013 to the effect that any instrument *if relating to giving authority or power to a promoter or a developer, by whatever name called, for construction on, development or, sale or transfer (in any manner whatsoever) of, any immovable property* would be subject to stamp duty equivalent to the duty in case of *conveyance* instruments. Therefore, even in the second scenario Stamp Duty might be attracted depending upon the State Stamp Duty enactment.

In Sum

- <u>**Construction by the Developer for the Land Owner**</u>**:** Being construction done by the Developer for the Land Owner, the same is to be taxed as construction activity. The time and value for payment of service tax would be the point in time and the value (at that point of time) when the Land Owner transfers the Development Rights to the Developer. This would essentially be a question of fact and is to be determined based upon the terms of the Agreement.
- <u>**Development Rights by the Land Owner to the Developer**</u>**:** As discussed above, agreement for development rights may be contemplated in two possible ways i.e. either by way of conveyance or by way of a contractual arrangement. While the former would attract stamp duty as conveyance of immovable property, it would be outside the ambit of service tax.
- The latter on the other hand is a mere contractual arrangement and being not a conveyance will save the parties from bearing stamp duty as conveyance though the same will attract service tax under the negative list. However, even in the second scenario Stamp Duty might be attracted depending upon the State Stamp Duty enactment. As can be seen from the discussion, the key would lie in the terms of the Agreement entered into between the Parties.

You don't have to be great to start, but you have to start to be great.

– Zig zagler

SERVICE TAX IMPLICATION ON REAL ESTATE TRANSACTIONS

CA Anshuma Rustagi

CONSTRUCTION SERVICE

Basic Law

❖ Construction is a *declaredservice* under Section 66E of the Finance Act, 1994 and hence, construction activities are subject to service tax

❖ Following Construction is *taxable(defined u/s 66E(b))*:

- ❊ Complex
- ❊ Building
- ❊ Civil Structure
- ❊ Additions/ alterations/ replacements or remodelling of existing civil structure

❖ Construction includes building intended for sale to buyer. Therefore, all construction done by a developer for *ultimate sale* to a buyer is also subject to service tax

Exclusion

❖ Entire consideration for sale of the constructed property is received *after issuance of completion-certificate* by

- ❊ Government / Authorised Authority
- ❊ Architect/ Chartered Engineer/ Licensed Surveyor

❖ Construction of *single* residential unit (which is not a part of a residential complex) – *Sl. No. 14(b) of Notification No 25/2012*

❖ Construction service provided to

- ❊ *Government*
- ❊ Local Authority
- ❊ Government Authority

for following purposes

- ❊ Civil structure/ original works not used for business/ commerce
- ❊ Historical Monument/ Archaelogical Site
- ❊ Structure for use in (i) education (ii) clinic (iii) art/ cultural establishment

o Canal, Dam, Irrigation Works

- ❊ Pipeline, Conduit, Plant for water supply/ treatment or sewage treatment
- ❊ Residential complex for self-use, use of employees or ministers

(*Sl. No. 12 of Notification No 25/2012)*

❖ Road, Bridge, Tunnel, Terminal used for *roadtransportation* by general public - (*Sl. No. 13a of Notification No 25/2012)*

❖ Civil structure/ original works to a scheme under Jawaharlal Nehru National Urban Renewal Mission/ Rajiv Awaas Yojana - (*Sl. No. 13b of Notification No 25/2012)*

❖ Building owned by entity

- ❊ registered under section 12 AA of the Income Tax Act
- ❊ meant predominantly for *religious* use by general public

(*Sl. No. 13c of Notification No 25/2012)*

❖ *PollutionControl*/ Effluent Treatment Plant except when part of factory - (*Sl. No. 13d of Notification No 25/2012)*

❖ Structure for *funeral*, burial or cremation of deceased - (*Sl. No. 13e of Notification No 25/2012)*

❖ An *airport/ port/ railways*, including monorail or metro - (*Sl. No. 14a of Notification No 25/2012)*

❖ Low-cost houses under the '*Scheme* of Affordable Housing in Partnership' framed by the Government of India - (*Sl. No. 14c of Notification No 25/2012)*

❖ *Post- harveststorage* infrastructure for agricultural produce including a cold storages - (*Sl. No. 14d of Notification No 25/2012)*

Rate of Tax

Rate	Value	Conditions
(Sl. No. 12 of Notification No 26/2012)		
14.5%	Value of Services	* Proper records should be available to segregate value of services, value of land and value of goods included in total sales * Value of Land and Stamp duty will be excluded(*Circular No B1/6/2005 – TRU dated 27.7.2005)*
3.625%	Total Sales Value	* Only for residential units having Carpet Area < 2000 sq ft andConsideration less than Rs. 1 crore * Value of Land will be included* VAT/ Sales Tax to be excluded(*Explanation (C) to Notification No 26/2012)*
4.35%	Total Sales Value	* For all commercial premises * For residential units not falling above * Value of Land will be included * VAT/ Sales Tax to be excluded

CENVAT Credit

- When abatement is availed – i.e., tax is paid at reduced rate
  - No Credit available on *inputgoods*
  - Credit available on *inputservices* and *capitalgoods*
- Works contract/ construction service availed by contractor is eligible for input credit (even though CENVAT credit on such services is not available otherwise - *Rule 2(l)(A) amended vide Notification No 28/2012 -CE)*

KEY POINTS

Advance Received

Advance money received for mobilization of construction or for booking of premises is taxable on payment basis, i.e., as soon as the advance is received.

Surrender/ Cancellation of Booking

- Service tax on amount returned to investor/ buyer shall be eligible for input credit when the amount is returned along with service tax
- Amount retained on cancellation of booking shall be subject to service tax at full rate (14.5%) – not abated rate.

(Circular No 151/2/2015-ST)

Position of tax on Services availed by Builder when his construction service is exempt

In some cases like construction of religious buildings for registered trusts or school for the Government, the construction service is exempt from service tax. In such cases, some input service used for such construction are also exempt from tax.

- Works Contract service provided to developer/ builder is exempt if the builder is exempt – *(Sl. No. 29h of Notification No 25/2012)*
- Other input services like architect service, consulting engineer service or pure labour work shall not be eligible for exemption

Works Contract vis-à-vis Construction

Construction has been defined under section 66E(b) as "construction of complex, building, civil structure or part thereof including addition, alteration, replacement and remodeling of existing civil structure".

Works Contract has been defined under section 65B(54) as "a contract for the purpose of *construction*, erection, installation, commissioning, completion, fitting out, maintenance, repair, alteration, renovation etc.."

Therefore, the scope of works contract is much wider and encompasses construction within itself. Therefore, unless specifically mentioned or defined in the Act, construction contracts shall be governed by the provisions applicable to the works contract service.

Service Tax Implication on Re-sale of Flat

A number of times, the buyer resells the flat to another customer.

Situation 1: The flat is still under construction and is sold while it is incomplete.

In such cases, the Party A pays service tax to the builder who charges the service tax on all amounts collected from the Party A. Party A in turn will have to charge service tax from Party B on the amount received by it from Party B even though Party A is not doing any construction activity. Party A while discharging its liability to the department, takes input credit of the amount of service tax paid to the Builder.

Situation 2: The Party A has received the completed flat from the builder and then sells the same to party B, but completion certificate *has been* obtained.

Since, the flat is sold after obtaining completion certificate, the same is not subject to service tax and Party A will not charge any service tax from Party B.

Situation 3: The Party A has received the completed flat from the builder and then sells the same to party B, but completion certificate has *not* been obtained.

The Party A has to charge service tax on the sale to party B as completion certificate has not been obtained and pay the same to the Government. However, Party A has also paid service tax to the builder while paying the installments when the flat was being constructed.

It usually takes 2-3 years for big projects to get completed. So, assuming the payments were made by Party A between April, 2013 to February, 2015, the last payment being in February, 2015. The project was almost completed by October, 2015 though completion certificate was not obtained. Meanwhile, Party A decides to sell the flat to Party B in October, 2015. As discussed above, since flat is sold prior to obtaining completion certificate, Party A charges service tax from Party B on the sale amount. (In practical situations, issue of completion certificate usually takes anywhere between 8-12 months after paying last installment to the builder depending on the project.)

Ideally, Party A should be eligible for input credit of the service tax paid to the Builder to be set off against his service tax liability.

However, the situation which arises here is that w.e.f. 1st September, 2014, as per CENVAT Credit Rules, 2004, input credit can be availed only within a period of six months from the date of the document on the basis of which the credit is taken. W.e.f 1st March, 2015 this period has been increased to 1 year.

In the present case, the relevant document is the allotment/ demand letter issued by the builder to Party A. Since, Party A had no intention of reselling the flat and is an individual who is not otherwise subject to service tax, Party A has no service tax registration and has not availed any input credit while making payments to the builder from April, 2013 to February, 2015. Since, the transaction of second sale takes place in October, 2015 the time for taking input credit even on the last installment paid is over as 6 months have passed since the date when the invoice/ demand letter was issued.

In such cases, there is unnecessary loss of huge amount of input credit for the Party A which necessitates that either every individual purchasing flat should either obtain registration under service tax and start availing CENVAT credit as soon as they start paying the installments for the flats purchased or wait for the completion certificate to be issued to resell the flat!!

We know what we are, but know not what we may be.

– William Shakespeare

FEMA and International Taxation

CA Puja Borar
CA Aayush Gupta

Revised framework for ECB

The RBI has vide Circular No. 32 dated 30th November, 2015 provided the revised framework for ECB based on the following principles

- It provides that ECB shall comprise of the following three tracks: -
  a. Track I: - Medium term foreign currency denominated ECB with Minimum Average Maturity (MAM) of 3/5 years.
  b. Track II: - Long term foreign currency denominated ECB with MAM of 10 years.
  c. Track III: - Indian Rupee denominated ECB with MAM of 3/5 years.
- The eligible borrowers & all in cost under each track are specified therein.
- Entities raising ECB under extant framework can raise the said loans by March 31, 2016 provided the agreement in respect of the loan is already signed by the date the new framework comes into effect.
- For raising of ECB under the following the borrowers will, however, have time up to 31st March, 2016 to sign the loan agreement & obtain the Loan Registration Number (LRN) from the RBI by this date:
  a. ECB facility for working capital by airlines companies
  b. ECB facility for consistent foreign exchange earners under the USD 10 billion Scheme; &
  c. ECB facility for low cost affordable housing projects (low cost affordable housing projects as defined in the extant Foreign Direct Investment policy)

Amendment in Schedule I & II of the FEM (Borrowing & Lending in Foreign Exchange) Regulations

The RBI vide Notification No. FEMA 358/2015-RB/GSR 920(E) dated 2nd December, 2015 amended Schedule I & II on borrowings under automatic & approval route respectively to provide that it may in consultation with the GOI prescribe any provision or proviso regarding various parameters listed or any other parameter as prescribed by the RBI & prescribe the date from which any or all of the existing proviso will cease to exist, in respect of borrowings from overseas, whether in foreign currency or Indian Rupees, such as addition/deletion of borrowers eligible to raise such borrowings, overseas lenders/investors, purposes of such borrowings, change in amount, maturity & all-in-cost, norms regarding security, pre-payment, parking of ECB proceeds, reporting & drawal of loan, refinancing, debt servicing, etc.

Amendment to Regulation 21 of the FEM (Transfer or issue of any foreign security) Regulations

As per the provisions of Regulation 21 of the FEM (Transfer or issue of any foreign security) Regulations, a person resident in India, being an Indian Company/ body Corporate created by an Act of Parliament, may issue FCCBs/ FCEBs to a person resident outside India subject to limits & conditions specified therein. The RBI has vide Notification No. FEMA.359/2015-RB/GSR 921(E) dated 2nd Dec., 2015 amended the Regulation, to provide that it may in consultation with the GOI, change/prescribe for the automatic & approval route of FCCBs, any provision or proviso for issuance of FCCBs. It may also *change/prescribe any provision or proviso for issuance of FCEBs*.

Amendment to Regulation 5 of FEM (Manner of Receipt & Payment) Regulations, 2015

The RBI has vide Notification No. 357/2015-RB/GSR 935(E), dated 7th December, 2015, amended Regulation 5 of FEM (Manner of Receipt & Payment) Regulations, 2000 to permit in respect of imports into India, any other mode of payment in accordance with the directions issued by the RBI to authorised dealers from time to time.

Guidelines on Trading of Currency Futures & Exchange Traded Currency Options in Recognized Stock Exchanges

In order to enable direct hedging of exposures in foreign currencies & facilitate execution of cross-currency strategies by market participants, the RBI has vide **A.P. (DIR Series 2015-16) Circular No. 35, dated 10th Dec. 2015** decided, as announced in the Fourth Bi-monthly Monetary

Policy Statement 2015-16 (Para 38), to permit the recognized stock exchanges to offer *cross-currency futures contracts & exchange traded option contracts* in the currency pairs of EUR-USD, GBP-USD & USD-JPY. Recognized stock exchanges are also permitted to offer *exchange traded currency option contracts* in EUR-INR, GBP-INR & JPY-INR in addition to the existing USD-INR option contract, with immediate effect. Accordingly, Market Participants, i.e., residents & FPIs, are allowed to take positions in the cross-currency futures & exchange traded cross-currency option contracts without having to establish underlying exposure subject to the position limits of USD 15 million for USD-INR contracts & USD 5 million for non USD-INR contracts, all put together, per exchange.

Foreign Contribution (Regulation) Amendment Rules, 2015

The CG has vide Notification No. NO. GSR 966(E) dated 14th Dec., 2015 inter-alia made the following key amendments: -

- *An application for registration/ obtaining prior permission* by a person under section 11, for acceptance of foreign contribution, shall be made electronically online in Form FC-3
- A person who has been *granted a certificate of registration/ prior permission* shall place the audited statement of accounts on receipts & utilization of the foreign contribution, including income & expenditure statement, receipt & payment account & balance sheet for every financial year beginning on 1st April within 9 months of the closure of the financial year on its official website/ on the website as specified by the CG.
- A person *receiving foreign contribution in a quarter* of the financial year shall place details of foreign contribution received on its official website/ on the website as specified by the CG within 15 following the last day of the quarter in which it has been received clearly indicating the details of donors, amount received & date of receipt.
- A person who has been granted a certificate of registration/ prior permission u/s 11 of the Act shall *intimate electronically online in Form FC-6 within 15 days, of any change* in the following, namely: -Name, address, nature, aims & objects & registration with local/ relevant authorities, key members of the association if at any point of time such change causes replacement of 50% or more of the original key members as reported in the application for grant of registration/prior permission/ renewal of registration under the Act.

Amendment to Foreign Exchange Management (Transfer or issue of Security by a Person Resident outside India) Regulations

The RBI has vide Notification No. FEMA.360/2015-RB GSR 983(E) dated 17th Dec., 2015 amended Schedule 5 of the Regulations to provide that a registered FII, registered FPI & long term investors like Sovereign Wealth Funds (SWFs), Multilateral Agencies, Endowment Funds, Insurance Funds & Pension Funds & Foreign Central Banks registered with SEBI may purchase on repatriation basis *security receipts issued by securitization companies subject to conditions as specified by RBI &/or SEBI.*

Purchase of foreign exchange from post office

The RBI has vide notification no. FEMA 18(R)/2015-RB [F.NO.1/31/EM-2015]/GSR 1009(E), dated 29th December 2015 permitted purchase of foreign exchange by any person from any post

Definition of Currency

RBI has vide notification NO.FEMA 15(R)/2015-RB [F.NO.1/31/EM-2015]/GSR 1008(E) dated 29th December 2015 has amended the term "currency" to include debit cards, ATM cards and any other instruments that can be used to create a financial liability.

Amendment to the FEM (POSSESSION AND RETENTION OF FOREIGN CURRENCY) REGULATIONS, 2015

RBI has vide notification no. FEMA 11(R) /2015-RB[F.NO.1 /31 /EM-2015] /GSR 1006(E) dated 29th December, 2015 notified the FEM (Possession and Retention of Foreign Currency) Regulations, 2015. Following limits have been prescribed for possession of foreign currency and coins: -

- Authorised person can possess foreign currency and coins without any limit.
- Foreign coins may be kept by any person without any limits.
- Persons Resident in India can retain foreign currency notes, bank notes and foreign currency travellers' cheques not exceeding US$ 2000 provided that the same was acquired by them while on a visit to any place outside India by way of payment for services not arising from any business in or anything done in India or from

any person not resident in India and who is on a visit to India as honorarium or gift or for services rendered in settlement of any lawful obligation or represents unspent amount of foreign exchange acquired by him from an authorised person for travel abroad or was acquired by him by way of honorarium or gift while on a visit to any place outside India.

- A person resident but not permanently resident in India (means a person resident in India for a job or specific assignment, duration of which shall not exceed 3 years) may keep any amount of foreign currency if such was owned by him when resident outside India and which was brought to India according to the regulations made under the act.

Amendment to the FEM (REALISATION, REPATRIATION AND SURRENDER OF FOREIGN EXCHANGE) REGULATIONS, 2015

The RBI has vide notification no. FEMA 9(R)/2015-RB [F.NO.1/31/EM-2015]/GSR 1005(E) dated 29th December, 2015 amended the FEM (Realization, repatriation and surrender of foreign exchange) Regulations: -

- A person resident in India shall take all reasonable steps to realize and repatriate to India the foreign exchange that has accrued or is due to him and
  a. sell it to an authorized person in India, or
  b. retain or hold it in account with an authorized dealer in India or
  c. use it for discharge of debt or liability denominated in foreign exchange to the extent and in the manner specified by RBI.
- A person being an individual resident in India shall surrender the received /realized /unspent /unused foreign exchange whether in the form of currency notes, coins and travelers-cheques, etc. to an authorised person within a period of 180 days from the date of such receipt /realization /purchase /acquisition or date of his return to India, as the case may be.
- A person not being an individual resident in India shall sell the realized foreign exchange to an authorised person in case of foreign exchange due or accrued as remuneration for services rendered, whether in or outside India, or in settlement of any lawful obligation, or an income on assets held outside India, or as inheritance, settlement or gift, within seven days from the date of its receipt; In all other cases within 90 days from the date of its receipt.
- Any person not being an individual resident in India who has acquired or purchased foreign exchange for any specific purpose does not use the foreign exchange for such purpose declared by him to the authorized person then the same is to be surrendered within a period of 60 days from the date of purchase. In case of purchase by such person for the purposes of travelling abroad the time limit prescribed for returning the unused currency is 90 days from the date of return to India in case of currency notes & coins and 180 days in case of travelers-cheques.
- Nothing in these regulations shall apply to foreign exchange in form of currency of Nepal or Bhutan.

Appointment of Specified Commissioners as Competent Authority u/s 37A Of FEMA, 1999 - Special Provisions Relating to Assets held outside India

The CG has vide notification no. GSR 10(E) [F.NO.A-12011/02/2014-AD.ED.] on 6th January, 2015 appointed the Commissioner of Customs (Appeals) of Delhi, Mumbai, Kolkata and Chennai as a Competent Authority under the said Act.

Amendment to the FEM (Export and Import of Currency) Regulations, 2015

The RBI has vide NOTIFICATION NO.FEMA 6(R)/RB-2015 [F.NO.1/31/EM-2015]/GSR 1004(E), dated 29-12-2015 amended the Regulations to provide that: -

- A person resident in India may take outside India or may bring into India from any place outside India (while on a temporary visit) currency notes of GOI and RBI not exceeding Rs. 25000 per person or such amount as may be notified by RBI from time to time. The resident person may take or send outside India, commemorative coins not exceeding 2 each.
- A person not resident in India (other than residents of Pakistan or Bangladesh) may take outside India or may bring into India from any place outside India, currency notes of GOI and RBI not exceeding Rs. 25000 per person or such amount as may be notified by RBI from time to time
- A person may send to or bring from Nepal or Bhutan the currency notes (other than denominations greater than Rs. 100) issued by GOI or RBI. No restrictions for bringing

or sending the currency notes of Nepal or Bhutan. When a person is travelling to these specified places then he may take denominations of Rs. 500 or Rs.1000 of Indian currency notes subject to a maximum of Rs. 25000.

- No person shall take or send out of India the Indian coins which are covered by the Antique and Art Treasure Act, 1972.
- No restriction on sending into India foreign exchange in form other than currency notes, bank notes, travelers-cheques and brought into India foreign exchange (other than unissued notes). In case of bringing foreign exchange a CDF form is required to be filled, but when the aggregate value of the foreign exchange in the form of currency notes, bank notes or travellers' cheques brought in by such person at any one time does not exceed US$10,000 (US Dollars ten thousands) or its equivalent and/or the aggregate value of foreign currency notes brought in by such person at any one time does not exceed US$ 5,000 (US Dollars five thousands) or its equivalent, then no such form is required to be filled.

FEM (Insurance) Regulations, 2015

The RBI has vide notification no.12(R)/2015-RB [F.NO.1/31/EM-2015]/GSR 1007(E) on 29th December 2015 has amended Notification No. FEMA.12/2000-RB, dated May 3, 2000, and made the following regulations-

- A person resident in India may take or continue to hold a health insurance policy issued by an insurer outside India provided the aggregate amount of remittance including the amount of premium does not exceed the limits as prescribed under the liberalized remittance scheme.
- No person shall take out or renew any policy of insurance in respect of any property in India or any ship or other vessel or aircraft registered in India with an insurer whose principal place of business is outside India, except with the prior permission of the Insurance Regulatory and Development Authority of India (IRDA).
- A person resident in India may take or continue to hold a general insurance policy other than those discussed above, or a life insurance policy issued by an insurer outside India, provided that, the policy is held, under a specific or general permission of the Central Government.
- A person resident in India may continue to hold any general insurance policy or a life insurance policy issued by an insurer outside India when such person was resident outside India.
- When the premium due has been remitted from India then the policy holder shall remit the maturity proceeds or amount of any claim due on the policy within a period of 7 days from the receipt thereof

Recent updates in International Tax

Amendments to Rule 37BB

The provisions of Rule 37BB have been amended w.e.f 1st April, 2016 vide Notification No. 978E [No.93/ 2015] dated 16th December, 2015 to provide that

- Part A of Form 15CA is required to be furnished in case of sum chargeable under the provisions of the Act and where each payment or aggregate of such payments during the financial year does not exceed INR 5,00,000.
- In respect of other sums chargeable under the provisions of the Act, Part B of Form 15CA is required to be furnished in case a certificate from AO u/s 197 or an order from AO u/s 195(2) or 195(3) has been obtained.
- Part C of Form 15CA after obtaining a certificate from a Chartered Accountant in Form 15CB.
- In respect of sums not chargeable to tax Part D of Form 15CA is required to be furnished. However, no information is required to be furnished if the following sums are not chargeable to tax, namely
  a. remittances specified in ***Explanation 2 of Rule 37BB,*** and
  b. payments specified in Section 5 of FEMA read with Schedule III of FEM(Current Account Transactions) Rules,
- The list of remittances specified in ***Explanation 2 of Rule 37BB have been amended to include,***

S0101	Advance payment against imports
S0102	Payment towards imports-settlement of invoice
S0103	Imports by diplomatic missions
S0104	Intermediary trade
S0190	Imports below Rs.500,000 (for use by ECD offices)

Draft Place of Effective Management (POEM) Guidelines

For the benefit of the taxpayers as well as tax administration

a set of draft guiding rules had been issued by the CBDT on **23rd December, 2015. The key points have been summarized as hereunder: -**

- The draft guidelines provide that the process of determination shall primarily be based on the fact as to whether the Company is engaged in active business outside India. The draft guidelines provide that a company is said to be engaged in active business outside India, if passive income is not more than 50% of its total income and
  - Less than 50% of total assets are situated in India;
  - Less than 50% of total number of employees are resident or situated in India.
  - Less than 50% of payroll expenses spent on such payroll employees.
- The Average data of previous year and 2 years prior to that shall be taken for determining whether the company is engaged in active business outside India.
- Place of effective management in case of a company engaged in active business outside India shall be presumed to be outside India if majority of the board meetings are held outside India. However, in case the powers of management are in substance being exercised by the holding company resident in India or such other person resident in India instead of the Board of Directors, then the Place of Effective Management shall be considered to be India. Thus, the guidelines highlight the significance of the Board of Directors, their role in the managerial decision making as also the place where they meet.
- In case of companies which are not engaged in active business outside India, the guidelines suggest the identification of the persons who make the key managerial and commercial decisions and determination of the place where such decisions are taken for the purpose of determining the POEM.
- Other guiding principles include identifying the location of the Company's head office since it often represents the place where the key commercial decisions are taken. In case the senior management is operating from varying locations, then the place where the highest level of management and their direct support staff are located will help in identifying
- In case the members of the senior management are so decentralized that it is not possible to determine the head office with reasonable certainty the location of the head office will not hold much significance.

If you believe in yourself and have dedication and pride - and never quit, you'll be a winner.
The price of victory is high but so are the rewards.

– Paul Bryant

Message from Chief Commissioner, Service Tax, Kolkata

Dear Members,

We place on record our deep appreciation for Chief Commissioner, Service Tax, Kolkata Shri S. K. Panda for his wholehearted effort for making 'ease of doing business' a reality in the Service Tax Sector at Kolkata.

We urge all our members to avail this opportunity and approach his office (address mentioned below) on any working day during working hours if they are facing any problem related to Service Tax matters.

Shri S.K.Panda

Kendriya Utpad Shulk Bhawan,
2nd Floor, Room No. 213, 180 Shantipally,
Rajdanga Main Road, Kolkata - 700107
Ph: 033-24425066

Indirect Tax Update

Notification

F. No. 390/Misc./163/2010-JC
Ministry of Finance
Department of Revenue
Central Board of Excise & Customs
*****

New Delhi 17th December, 2015

INSTRUCTION

To,

1. All Principal Chief Commissioners/Chief Commissioners and Directors General under the Central Board of Excise and Customs.
2. CC (AR), Customs, Excise & Service Tax Appellate Tribunal.
3. All Principal Commissioners/Commissioners of Customs/Central Excise/Service Tax/All Joint Chief Departmental Representatives/Commissioners, Directorate of Legal Affairs.
4. <webmaster.cbec@icegate.gov.in>

Sub: - Reduction of Government litigation – providing monetary limits for filing appeals by the Department before CESTAT/High Courts and Supreme Court – Regarding

In exercise of the powers conferred by Section 35R of the Central Excise Act, 1944 made applicable to Service Tax vide Section 83 of the Finance Act, 1944 and Section 131BA of the Customs Act, 1962 and in partial modification of earlier instruction issued from F. No. 390/Misc./163/2010-JC dated 17.08.2011, the Central Board of Excise & Customs (hereinafter referred to as the Board) fixes the following monetary limits below which appeal shall not be filed in the Tribunal, High Court and the Supreme Court:

S.No.	Appellate Forum	Monetary Limit
1.	CESTAT	Rs. 10,00,000/-
2.	HIGH COURTS	Rs. 15,00,000/-
3.	SUPREME COURTS	Rs. 25,00,000/-

2. In para 3 of the instruction dated 17.8.11 a sub clause 'c' shall be added which shall read as "classification and refunds issues which are of legal and/or recurring nature".

3. Except for above, all other terms and condition of instruction dated 17.8.11 stands.

(Rohit Singhal)
Dy. Secretary (Review)

Direct Tax Update

Notification

F.No.354/311/2015-TRU
Government of India
Ministry of Finance
Department of Revenue
(Tax Research Unit)
20th January, 2016

To,

Principal Chief Commissioners of Customs and Central Excise (All)
Principal Chief Commissioners of Central Excise & Service Tax (All)
Principal Director Generals of Goods and Service Tax/System/CEI
Director General of Audit/Tax Payer Services,
Principal Commissioners/ Commissioners of Customs and Central Excise (All)
Principal Commissioners/Commissioners of Central Excise and Service Tax (All)
Principal Commissioners/Commissioners of Service Tax (All)
Principal Commissioners/Commissioners LTU/Central excise/Service Tax (Audit)

Sub: - Report of the High Level Committee; recommendation regarding valuation of flats for levy of Service Tax – reg.

Madam/Sir,

The undersigned is directed to say that, as announced by the Finance Minister in his Budget Speech 2014-15, the Ministry of Finance has set up a High Level Committee (HLC) to interact with trade and industry and ascertain areas where clarity on tax laws is required. It has been pointed out by the HLC that there is a divergence of view between Para 6.2.1 of the Education Guide 2012 and the CBEC Circular No. 151/2/2012-ST dated 10.2.2012 on how flats handed over to land owners are to be valued for the purpose of levy of service tax. The two views need to be reconciled. The HLC has opined that the guidelines communicated by the said Circular are more appropriate.

2. The issue has been examined. In a tri-partite construction business model, there are 3 parties involved:

i. The land owner;

ii. The builder/developer; &

iii. The contractor (who undertakes the construction).

Typically, in such a model, the land owner enters into an agreement with the builder, whereby, the land owner gives either land /development rights (to construct/develop a residential complex and sell flats/houses of such complex to buyers) to the builder. The builder/developer, in turn, agrees to assign a portion of the constructed area, in the form of

flats in favour of the land owner. The remaining flats are sold by the builder/developer to various buyers. The builder/developer receives consideration for the construction service provided by him, from two categories of service receivers:

i. from landowner, in the form of land /development rights; and ii. from other buyers, normally in the form of money.

3. According to the CBEC Education Guide on Taxation of Services, 2012 value of construction service provided to such land owner will be the value of the land when the same is transferred and the point of taxation will also be determined accordingly. However, Circular No. 151/2/2012-ST dated 10.2.2012 states that value of land / development rights in the land may not be ascertainable ordinarily and therefore, value, in the case of flats given to first category of service receiver, that is, the land owner, is determinable in terms of section 67(1)(iii) read with rule 3(a) of Service Tax (Determination of Value) Rules, 2006.

Accordingly, the value of these flats would be equal to the value of similar flats charged by the builder/developer from the second category of service receivers. In case the prices of flats/houses undergo a change over the period of sale (from the first sale of flat/house in the residential complex to the last sale of the flat/house), the value of similar flats as are sold

nearer to the date on which land is being made available for construction should be used for arriving at the value for the purpose of tax. Service tax is liable to be paid by the builder/developer on the 'construction service' involved in the flats to be given to the land owner, at the time when the possession or right in the property of the said flats are transferred

to the land owner by entering into a conveyance deed or similar instrument(e.g. allotment letter).

4. The Circular dated 10.2.2012 is in accordance with the provisions relating to valuation as laid down in the Finance Act, 1994 and the Service Tax (Determination of Value) Rules, 2006. As regards the Education Guide, it has been clearly stated in the

Education Guide, 2012 that it is merely an educational aid based on a broad understanding of a team of officers on the issues. It is neither a "Departmental Circular" nor a manual of instructions issued by the Central Board of Excise and Customs. To that extent it does not command the required legal backing to be binding on either side in any manner. The guide was released purely as a measure of facilitation so that all stakeholders could obtain some preliminary understanding of the new issues for smooth transition to the new regime. Hence, Circulars such as the present one would prevail over the Education Guide, 2012.

5. In view of the above, it is directed that in valuing the service of construction provided by a builder/developer to a landowner, who transfers his land/development rights to builder, for getting, in return, constructed flats/dwellings from builder/developer, the Service Tax assessing authorities should be guided by the said Board Circular dated 10.2.2012 and not the Education Guide.

6. All concerned are requested to acknowledge the receipt of this instruction.

Yours faithfully,
(Abhishek Verma)
Technical Officer (TRU)

GOVERNMENT OF INDIA
MINISTRY OF FINANCE
DEPARTMENT OF REVENUE
CENTRAL BOARD OF DIRECT TAXES
Notification No. 95/2015
New Delhi, the 30th December, 2015

S.O. 3545(E)– In exercise of the powers conferred by section 139A, section 271FAA and section 285BA, read with section 295 of the Income-tax Act, 1961 (43 of 1961), the Central Board of Direct Taxes hereby makes the following rules further to amend the Income-tax Rules, 1962, namely:-

1. (1) These rules may be called the Income–tax (22nd Amendment) Rules, 2015.

(2) Rules 114B, 114C and 114D shall come into force from the 1st day of January, 2016 and rule 114E shall come into force from the 1st day of April, 2016.

Must Read- 19 Changes in PAN quoting requirement for specified transactions

2. In the Income-tax Rules, 1962 (hereinafter referred to as the said rules), for rules 114B, 114C, 114D and 114E, the following rules shall respectively be substituted, namely:-

"114B. Transactions in relation to which permanent account number is to be quoted in all documents for the purpose of clause (c) of sub-section (5) of section 139A.-

Every person shall quote his permanent account number in all documents pertaining to the transactions specified in the Table below, namely:-

TABLE

Sl.No. Nature of transaction Value of transaction
(1)
(2)
(3)

1. Sale or purchase of a motor vehicle or vehicle, as defined in clause (28) of section 2 of the Motor Vehicles Act, 1988 (59 of 1988) which requires registration by a registering authority under Chapter IV of that Act, other than two wheeled vehicles.
All such transactions.

2. Opening an account [other than a time-deposit referred to at Sl. No.12 and a Basic Savings Bank Deposit Account] with a banking company or a cooperative bank to which the Banking Regulation Act, 1949 (10 of 1949), applies (including any bank or banking institution referred to in section 51 of that Act).
All such transactions.

3. Making an application to any banking company or a co-operative bank to which the Banking Regulation Act, 1949 (10 of 1949), applies (including any bank or banking institution referred to in section 51 of that Act) or to any other company or institution, for issue of a credit or debit card.
All such transactions.

4. Opening of a demat account with a depository, participant, custodian of securities or any other person registered under sub-section (1A) of section 12 of the Securities and Exchange Board of India Act, 1992 (15 of 1992).
All such transactions.

5. Payment to a hotel or restaurant against a bill or bills at any one time. Payment in cash of an amount exceeding fifty thousand rupees.

6. Payment in connection with travel to any foreign country or payment for purchase of any foreign currency at any one time. Payment in cash of an amount exceeding fifty thousand rupees.

7. Payment to a Mutual Fund for purchase of its units. Amount exceeding fifty thousand rupees.

8. Payment to a company or an institution for acquiring debentures or bonds issued by it. Amount exceeding fifty thousand rupees.

9. Payment to the Reserve Bank of India, constituted under section 3 of the Reserve Bank of India Act, 1934 (2 of 1934) for acquiring bonds issued by it. Amount exceeding fifty thousand rupees.

10. Deposit with a banking company or a co-operative bank to which the Banking Regulation Act, 1949 (10 of 1949), applies (including any bank or banking institution referred to in section 51 of that Act). Deposits in cash exceeding fifty thousand rupees during any one day.

11. Purchase of bank drafts or pay orders or banker's cheques from a banking company or a co-operative bank to which the Banking Regulation Act, 1949 (10 of 1949), applies (including any bank or banking institution referred to in section 51 of that Act). Payment in cash for an amount exceeding fifty thousand rupees during any one day.

12. A time deposit with, –

(i) a banking company or a co-operative bank to which the Banking Regulation Act, 1949 (10 of 1949), applies

(including any bank or banking institution referred to in section 51 of that Act);
(ii) a Post Office;
(iii) a Nidhi referred to in section 406 of the Companies Act, 2013 (18 of 2013); or
(iv) a non-banking financial company which holds a certificate of registration under section 45-IA of the Reserve Bank of India Act, 1934 (2 of 1934), to hold or accept deposit from public.

Amount exceeding fifty thousand rupees or aggregating to more than five lakh rupees during a financial year.

13. Payment for one or more pre-paid payment instruments, as defined in the policy guidelines for issuance and operation of pre-paid payment instruments issued by Reserve Bank of India under section 18 of the Payment and Settlement Systems Act, 2007 (51 of 2007), to a banking company or a co-operative bank to which the Banking Regulation Act, 1949 (10 of 1949), applies (including any bank or banking institution referred to in section 51 of that Act) or to any other company or institution. Payment in cash or by way of a bank draft or pay order or banker's cheque of an amount aggregating to more than fifty thousand rupees in a financial year.

14. Payment as life insurance premium to an insurer as defined in clause (9) of section 2 of the Insurance Act, 1938 (4 of 1938). Amount aggregating to more than fifty thousand rupees in a financial year.

15. A contract for sale or purchase of securities (other than shares) as defined in clause (h) of section 2 of the Securities Contracts (Regulation) Act, 1956 (42 of 1956). Amount exceeding one lakh rupees per transaction.

16. Sale or purchase, by any person, of shares of a company not listed in a recognised stock exchange. Amount exceeding one lakh rupees per transaction.

17. Sale or purchase of any immovable property. Amount exceeding ten lakh rupees or valued by stamp valuation authority referred to in section 50C of the Act at an amount exceeding ten lakh rupees.

18. Sale or purchase, by any person, of goods or services of any nature other than those specified at Sl. No. 1 to 17 of this Table, if any. Amount exceeding two lakh rupees per transaction:

Provided that where a person, entering into any transaction referred to in this rule, is a minor and who does not have any income chargeable to income-tax, he shall quote the permanent account number of his father or mother or guardian, as the case may be, in the document pertaining to the said transaction:

Provided further that any person who does not have a permanent account number and who enters into any transaction specified in this rule, he shall make a declaration in Form No.60 giving therein the particulars of such transaction:

Provided also that the provisions of this rule shall not apply to the following class or classes of persons, namely:-

(i) the Central Government, the State Governments and the Consular Offices;

(ii) the non-residents referred to in clause (30) of section 2 of the Act in respect of the transactions other than a transaction referred to at Sl. No. 1 or 2 or 4 or 7 or 8 or 10 or 12 or 14 or 15 or 16 or 17 of the Table.

Explanation.-For the purposes of this rule,-

(1) "payment in connection with travel" includes payment towards fare, or to a travel agent or a tour operator, or to an authorised person as defined in clause (c) of section 2 of the Foreign Exchange Management Act, 1999 (42 of 1999);

(2) "travel agent or tour operator" includes a person who makes arrangements for air, surface or maritime travel or provides services relating to accommodation, tours, entertainment, passport, visa, foreign exchange, travel related insurance or other travel related services either severally or in package;

(3) "time deposit" means any deposit which is repayable on the expiry of a fixed period.

114C. Verification of Permanent Account Number in transactions specified in rule 114B.-

(1) Any person being,-

(a) a registering officer or an Inspector-General appointed under the Registration Act, 1908 (16 of 1908);

(b) a person who sells the immovable property or motor vehicle;

(c) a manager or officer of a banking company or co-operative bank, as the case may be, referred to at Sl. No. 2 or 3 or 10 or 11 or 12 or 13 of rule 114B;

(d) post master;

(e) stock broker, sub-

[3/7, 12:12 PM] K Ca Surana: such currency through a debit or credit card or through issue of travellers cheque or draft or any other instrument of an amount aggregating to ten lakh rupees or more during a financial year. Authorised person as referred to in clause (c) of section 2 of the Foreign Exchange Management Act, 1999 (42 of 1999).

10. Purchase or sale by any person of immovable property for an amount of thirty lakh rupees or more or valued by the stamp valuation authority referred to in section 50C of the Act at thirty lakh rupees or more. Inspector-General appointed under section 3 of the Registration Act, 1908 or Registrar or Sub-Registrar appointed under section 6 of that Act.

11. Receipt of cash payment exceeding two lakh rupees for

sale, by any person, of goods or services of any nature (other than those specified at Sl. No. 1 to 10 of this rule, if any. Any person who is liable for audit under section 44AB of the Act.

(3) The reporting person mentioned in column (3) of the Table under sub-rule (2) (other than the person at Sl.No.9) shall, while aggregating the amounts for determining the threshold amount for reporting in respect of any person as specified in column (2) of the said Table,-

(a) take into account all the accounts of the same nature as specified in column (2) of the said Table maintained in respect of that person during the financial year;

(b) aggregate all the transactions of the same nature as specified in column (2) of the said Table recorded in respect of that person during the financial year;

(c) attribute the entire value of the transaction or the aggregated value of all the transactions to all the persons, in a case where the account is maintained or transaction is recorded in the name of more than one person;

(d) apply the threshold limit separately to deposits and withdrawals in respect of transaction specified in item (c) under column (2), against Sl. No. 1 of the said Table.

(4)(a) The return in Form No. 61A referred to in sub-rule (1) shall be furnished to the Director of Income-tax (Intelligence and Criminal Investigation) or the Joint Director of Income-tax (Intelligence and Criminal Investigation) through online transmission of electronic data to a server designated for this purpose under the digital signature of the person specified in sub-rule (7) and in accordance with the data structure specified in this regard by the Principal Director General of Income-tax (Systems):

Provided that in case of a reporting person, being a Post Master General or a Registrar or an Inspector General referred to in sub-rule (2), the said return in Form 61A may be furnished in a computer readable media, being a Compact Disc or Digital Video Disc (DVD), alongwith the verification in Form-V on paper.

Explanation.-For the purposes of this sub-rule, "digital signature" means a digital signature issued by any Certifying Authority authorised to issue such certificates by the Controller of Certifying Authorities.

(b) Principal Director General of Income-tax (Systems) shall specify the procedures, data structures and standards for ensuring secure capture and transmission of data, evolving and implementing appropriate security, archival and retrieval policies.

(c) The Board may designate an officer as Information Statement Administrator, not below the rank of a Joint Director of Income-tax for the purposes of day to day administration in relation to the furnishing of returns or statements.

(5) The statement of financial transactions referred to in sub-rule (1) shall be furnished on or before the 31st May, immediately following the financial year in which the transaction is registered or recorded.

(6) (a) Every reporting person mentioned in column (3) of the Table under sub-rule (2) shall communicate to the Principal Director General of Income-tax (Systems) the name, designation, address and telephone number of the Designated Director and the Principal Officer and obtain a registration number.

(b) It shall be the duty of every person specified in column (3) of the Table under sub-rule (2), its Designated Director, Principal Officer and employees to observe the procedure and the manner of maintaining information as specified by its regulator and ensure compliance with the obligations imposed under section 285BA of the Act and rules 114B to 114D and this rule.

Explanation 1.- "Designated Director" means a person designated by the reporting person to ensure overall compliance with the obligations imposed under section 285BA of the Act and the rules 114B to 114D and this rule and includes-

(i) the Managing Director or a whole-time Director, as defined in the Companies Act, 2013 (18 of 2013), duly authorised by the Board of Directors if the reporting person is a company;

(ii) the managing partner if the reporting person is a partnership firm;

(iii) the proprietor if the reporting person is a proprietorship concern;

(iv) the managing trustee if the reporting person is a trust;

(v) a person or individual, as the case may be, who controls and manages the affairs of the reporting entity if the reporting person is, an unincorporated association or, a body of individuals or, any other person.

Explanation 2.- "Principal Officer" means an officer designated by the reporting person referred to in the Table in sub-rule (2).

Explanation 3.- "Regulator" means a person or an authority or a Government which is vested with the power to license, authorise, register, regulate or supervise the activity of the reporting person referred to in the Table in sub-rule (2).

(7) The statement of financial transaction referred to in sub-rule (1) shall be signed, verified and furnished by the Designated Director specified in sub-rule (6):

Provided that where the reporting person is a non-resident, the statement may be signed, verified and furnished by a person who holds a valid power of attorney from such Designated Director".

3. In the said rules, in Appendix-II, for "Forms 60, 61 and 61A" the following "Forms 60, 61 and 61A" shall respectively be substituted, namely:-

Forms no "Forms 60, 61 and 62.

Government of India
Ministry of Finance
Central Board of Direct Taxes
Directorate of Income Tax (Systems)
Notification No. 2016
New Delhi, 3rd day of February, 2016

Sub-Section (1) of of Section 282 of the Income Tax Act 1961, (the Act) provides that the service of a notice or summon or requisition or order or any other communication under the Act (hereafter in this section referred to as "communication") may be made by delivering or transmitting a copy

thereof, to the person therein named,—

(a) by post or by such courier services as may be approved by the Board; or

(b) in such manner as provided under the Code of Civil Procedure, 1908 (5 of 1908) for the purposes of service of summons; or

(c) in the form of any electronic record as provided in Chapter IV of the Information Technology Act, 2000 (21 of 2000); or

(d) by any other means of transmission of documents as provided by rules made by the Board in this behalf.

Further, Sub-Section (2) of Section 282 of the Income Tax Act 1961 provides that the Central Board of Direct Taxes(' Board') may make rules providing for the addresses (including the address for electronic mail or electronic mail message) to which the communication referred to in sub-section (1) of Section 282 may be delivered or transmitted to the person therein named.

2. Accordingly, Board vide Income-tax (18th Amendment) Rules, 2015 has notified Rule 127 for Service of notice, summons, requisition, order and other communication on 2nd December 2015.

Sub-Clause (b) of Sub Rule (2) of Rule 127 states that:

For communications delivered or transmitted electronically-

(i) email address available in the income-tax return furnished by the addressee to which the communication relates; or

(ii) the email address available in the last income-tax return furnished by the addressee; or

(iii) in the case of addressee being a company, email address of the company as available on the website of Ministry of Corporate Affairs; or

(iv) any email address made available by the addressee to the income-tax authority or any person authorised by such income-tax authority."

3. Sub Rule (3) of Rule 127 of the Income Tax Rules 1962, states The Principal Director General of Income-tax(Systems) or the Director General of Income-tax(Systems) shall specify the procedure, formats and standards for ensuring secured transmission of electronic communication and shall

also be responsible for formulating and implementing appropriate security, archival and retrieval policies in relation to such communication.

4. In exercise of the powers delegated by the Board as per Sub Rule (3) of the Income Tax Rules 1962, the Principal Director General of Income tax (Systems) specifies herein the procedure, formats and standards for ensuring secured transmission of electronic communication.

5. For the purposes of this notification, the expression,

i. "electronic communication" means electronic mail or electronic mail message or the display of an electronic record on the website of the Income Tax Department as may be specified.

ii. "electronic mail" and "electronic mail message" (hereinafter referred to as "email") shall have the meanings as assigned to them in Explanation to section 66A of the Information Technology Act, 2000 (21 of 2000).

iii. "electronic record" means data, record or data generated, image or sound stored, received or sent in an electronic form or micro film or computer generated micro fiche as defined in Clause (t) of Subsection (1) of Section 2 of Information Technology Act, 2000 (21 of 2000).

All other expressions shall have the meaning as defined in the Income Tax Act 1961.

6. The procedure, formats and standards for ensuring secured transmission of electronic communication is specified as under:

a. The email address of the assessee to be used for the purpose of electronic communication shall be as specified in Sub-Clause (b)(i) or(ii) or(iii) of Sub Rule 2 of Rule 127 of Income Tax Rules 1962.

b. The assessee may furnish a letter to the Assessing Officer (hereinafter referred to as "AO") providing any other email address as specified in Sub-Clause (b)(iv) of Sub Rule 2 of Rule 127 of Income Tax Rules 1962.The email address so provided shall be the primary email address for the purpose of issuing electronic communication under this notification once such letter is received by the AO. Otherwise, the existing email as per (a) above would be the primary email.

c. The email address to be used by the AO for the purpose of electronic communication under this notification shall be his official designation based email address under the domain @incometax.gov.in (hereinafter referred to as "designation email").

d. The AO shall issue all statutory notices/questionnaires including notice u/s 143(2) and notice u/s 142 (1) of the Income Tax Act 1961 from his designation email address to the assessee's email address.

e. For the purpose of electronic communication, the AO shall attach the scanned copy of the notice under section 143(2) or 142(1) bearing his/her signature in PDF format to the email being sent to the assessee.

f. In response to the notice, assessee shall, using his primary email address, submit the details called for, to the designation email address of the AO.

• All supporting documents shall be submitted as attachment in Portable Document Format (PDF) to the email being sent to the AO.

• In case the total size of the attachments exceed 10 MB then the assesse shall split the attachment and send in as many emails as may be required to adhere to the limit of attachment size of 10 MB per email. However, in each such attachment, assessee shall specifically clarify the corresponding Notice Number and date in the footer to which the attachment relates and number the pages in continuation for all attachments to ensure proper linkage.

e.g. Any email, in response to the notice issued by the AO, received from the primary email address of the assessee shall be considered as a valid response to the notice.

h. For the purpose of keeping an audit trail of notices/questionnaire issued by AO to assessee and the assessee's response with supporting documents as attachments, a copy of the email shall be marked to e-assessment@incometax.gov.in with the subject line as under:

• Subject in email From AO to assessee – should be in the format: "PAN (eg-

XXXXX1234X)- AY (eg-AY201314)- Notice u/s -N" (N is the serial number of the

notice. eg. Notice u/s -1, Notice u/s -2 etc.).

• Subject in email from assessee to AO- should be in the format: "PAN (eg-

XXXXX1234X) – AY (eg- AY201314)-Reply-N" (N is the serial number of the notice

eg.Reply-1, Reply-2 etc.).

i. In case of non-delivery of email on the primary email address, the notices shall be sent to other email addresses of the assessee available with the department as mentioned in Sub Rule (2) of Rule 127.

j. In a case where a notice is not sent by email due to any reason including technical reasons such as email failure or mailbox full etc., but sent by other valid mode of service as prescribed in the IT Act 1961, the same shall constitute valid service. The AO shall record reasons in writing for not serving notice by email.

• A copy of the email error message as received by the AO will be forwarded to the email ID e-assessment Pincometax.gov.in with the Subject line in email as: "PAN (eg- XXXXX1234X)- AY (egAY201314)-Error"

k. In a case where a reply by taxpayer is not sent by email due to technical reasons such as email failure or mailbox full etc., but sent or delivered physically to the AO, the same shall be treated as adequate compliance.

• A copy of the email error message as received by the taxpayer will be forwarded to the email ID e-assessment@incometax.gov.in with the Subject line in email as: "PAN (eg-XXXXX1234X)- AY (egAY201314)- Error"

I. All emails sent or received as per this procedure shall be stored in the ITD database and the communication status shall be displayed the assesse's "My Account" on the E-filing portal – https://incometaxindiaefiling.gov.

Instruction No. ..01.../2016

Government of India
Ministry of Finance
Department of Revenue
Central Board of Direct Taxes

North Block, New Delhi, the 15th of February, 2016

Subject: Following the prescribed time-limit in passing order under sub-section (8) of section 154 of Income-tax Act, 1961-regd.-

Sub-section (8) of section 154 of the Income-tax Act, 1961 ('Act') stipulates that where an application for amendment is made by assessee/deductor/collector with a view to rectify any mistake apparent from record, the income-tax authority concerned shall pass an order, within a period of six months from the end of the month in which such an application is received, by either making the amendment or refusing to allow the claim. It has been brought to the notice of the Board that the said time-limit of six months has not been observed in deciding some applications. In such cases, the field authorities often take a view that since no action was taken within the prescribed time-frame, the application of the taxpayer is deemed to have lapsed, thereby not requiring any action.

2. The matter has been examined by the Board. In this regard, the undersigned is directed to convey that the aforesaid time-limit of six months is to be strictly followed by the Assessing Officer while disposing applications filed by the assessee/deductor/collector under section 154 of the Act. The supervisory officers should monitor the adherence of prescribed time limit and suitable administrative action may be initiated in cases where failure to adhere to the prescribed time frame is noticed.

3. The contents of this Instruction may be brought to the notice of all for necessary compliance.

4. Hindi version to follow.

Rg
(Rohit Garg)
Deputy Secretary to the Government of India

(F.No. 225/305/2015-ITA.II)

Copy to:

1. Chairman and all Members of CBDT
2. PS/OSD to Secretary (Revenue)
3. O/o Pr.Director General of Income Tax (Systems) with request for uploading on official website in public domain
4. All Pr.Chief-Commissioners/Directors-General of Income-tax
5. All Officers and Technical Sections of CBDT
6. ITCC Division of CBDT (3 copies)
7. Addl./Jt. CIT Database Cell for uploading on IRS Officers website
8. ADG(PR,PP&OL) with request to post a tweet on official handle of the Department
9. Guard File

Rg
(Rohit Garg)
Deputy Secretary to the Government of India

Instruction No. 02/2016

Government of India
Ministry of Finance
Department of Revenue
Central Board of Direct Taxes

North Block, New Delhi, the 15th of February, 2016

Subject: Passing rectification order under section 154 Income-tax Act, 1961 -regd.-

Instances have come to the notice of the Board that in some cases rectification order under section 154 of the Income-tax Act, 1961 ('Act') is being passed by the Assessing Officer on AST System without giving copy of the order to the taxpayer concerned. This is causing grievance to the taxpayers as they remain unaware of such orders and consequentially, are unable to pursue the matter further, either in appeal or rectification, if required.

2. Sub-section (4) of section 154 of the Act mandates that rectification order shall be passed **in writing** by the Income-tax authorities. Therefore, on consideration of the matter, the Board hereby directs that all rectification applications must be disposed of after passing an order in writing, to be duly served upon the taxpayer concerned and not by merely making necessary rectification on the AST System.

3. The contents of this Instruction may be brought to the notice of all for necessary compliance.

4. Hindi version to follow.

Rg

(Rohit Garg)
Deputy Secretary to the Government of India

(F.No. 225/305/2015-ITA.II)

Copy to:

1. Chairman and all Members of CBDT
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Rg

(Rohit Garg)
Deputy Secretary to the Government of India

भारत सरकार / Government of India
प्रधान मुख्य आयकर आयुक्त का कार्यालय, पश्चिम बंगाल एवं सिक्किम
Office of the Principal Chief Commissioner of Income Tax, West Bengal & Sikkim
आयकर भवन, पी-7, चौरंगी स्क्वायर, कोलकाता- 700 069
Aayakar Bhawan, P-7, Chowringhee Square, Kolkata-700 069
Tele Fax : 033-2213-6678

फा.संख्या : DCIT/Hqrs/Tech/Make In India/ 2015-16/ 5294 दिनांक: 14/01/2016

सेवा में/To,

The Principal Officer,
DIRECT TAXES PROFESSIONAL ASSOCIATION
3, Govt. Place(West), Ground Floor, Kolkata-700001.

महाशय/ महोदया,
Sir/Madam,

विषय/Sub: Information regarding organization of **"Make In India Week"** in Mumbai during 13-18 February, 2016 to be inaugurated by Hon'ble Prime Minister of India - matter regarding.

कृपया उपर्युक्त विषय का अवलोकन करें / Please refer to the above.

This is to inform that the Govt. of India is going to organize "Make in India Week" in Mumbai during 13-18 February, 2016 which is to be inaugurated by Hon'ble Prime Minister of India.

In this connection, you may note that the "Make in India Week" would showcase the people, policies and partnership that are driving India's new manufacturing revolution. Set against the vibrant backdrop of India's commercial capital-Mumbai, this week long calendar would offer unprecedented access, insights and opportunities to connect and collaborate with India and global Industry leaders/visionaries, academicians, central and state administration. A number of events have been planned around the themes of innovation, design and sustainability on the larger canvas of manufacturing during this week long event.

The information is being disseminated for creating awareness amongst your members.

विश्वासभाजन/Yours faithfully,

(ए. के. सिंह / A.K. SINGH)
प्रधान मुख्य आयकर आयुक्त, पश्चिम बंगाल एवं सिक्किम
Principal Chief Commissioner of Income Tax, West Bengal & Sikkim.

Direct Tax - Case Law

Income Tax Appellate Tribunal - Kolkata
Lgw Ltd., Kolkata vs Department Of Income Tax on 7 October, 2015
IN THE INCOME TAX APPELLATE TRIBUNAL, BENCH "B", KOLKATA
[Before Shri N.V.Vasudevan, JM & Shri Waseem Ahmed, AM]
ITA No.267/Kol/2013
Assessment Year : 2009-10

(APPELLANT)		(RESPONDENT)
I.T.O., Ward-2 (3) Kolkata	-versus-	M/s. LGW Limited Kolkata (PAN:AAACL 4670 N)

C.O.No.29/Kol/2013
A/o ITA No.267/Kol/2013
Assessment Year : 2009-10

M/s. LGW Limited Kolkata (PAN AAACL 4670 N)) (CROSS OBJECTOR)	-versus-	I.T.O., Ward-2(3), Kolkata (RESPONDENT)

For the Department : Shri Sachidananda Srivastava, CIT(DR)
For the Assessee : Shri A.K.Tibrewal, FCA & Shri Amit Agarwal,Advocate

Date of Hearing : 08.09.2015.
Date of Pronouncement : 07.10.2015.

ORDER

Per Shri N.V.Vasudevan, JM ITA No.267/Kol/2013 is an appeal filed by the revenue against order dated 07.12.2012 of CIT(A)-I, Kolkata relating to A.Y.2009-10. The Assessee has filed a Cross Objection against the very same order of CIT(A).

ITA No.267/Kol/2013 (Revenue's appeal) :

2. Ground No.1 raised by the revenue reads as follows :-

" (i)That on the facts and in the circumstances of the case, the Ld. CIT(A)-I, Kol has erred in deleting the addition of Rs.1,95,360/- u/s 14A as made by the A.O. in the assessment order."

3. The assessee is a company engaged in the business of manufacture export and trading of goods. The assessee was in receipt of exempt income of Rs.84,154/-. The Assessee computed the disallowance of expenses incurred in relation to income which does not form part of the total income u/s 14A of the Act r.w. Rule 8D (2)(iii) of the ITA No.267/Kol/2013 & C.O.No.29/Kol/2013 M/s. LGW Ltd.

A.Yr.2009-10 Rules, a sum of Rs.91,360/-. The AO on perusal of the aforesaid computation noticed that the assessee while working out the average value of investments for the purpose of application of Rule 8D (2)(iii) of the Rules had not considered the share application money to the extent of

Rs.2,08,00,000/- . According to the Assessee share application money cannot be considered as investment made by the assessee in earning tax payer income. The AO, however was in the view that share application money ought to have been considered while determining the average value of investment.

4. The AO accordingly determined the disallowance u/s 14A of the Act as follows :-

" Hence revised calculation u/s 14A read with Rule-8D(2)(iii) is being invoked as under :

Average Value of Investment as claimed by assessee Rs.1,82,71,923/-

```
Add: Share Application Money                                Rs.2,08,00,000/-
                Revised average value of investment         Rs.3,90,71,923/-
                An amount equal to one half per cent of the
         Average value of investment, income of which does
  Not form part of total income.
  0.5% of Rs.3,90,71,923/-                                  Rs. 1,95,360/-
  Total disallowance u/s 14A                                Rs. 1,95,360/-"
```

5. On appeal by the assessee, the CIT(A) agreed with the submissions of the assessee that share application money cannot generate any exempt income and therefore need not be considered for computing average investment under Rule 8D(2)(iii) of the Rules. CIT(A) also observed that the share application money was refunded to the Assessee at a later period. Aggrieved by the order of the CIT(A) revenue has raised ground no.(i) before the Tribunal.

6. We have heard the submissions of the ld. DR, who relied on the order of AO. The ld. Counsel for the assessee brought to our notice the decision of ITAT, Chennai Bench in the case of MSA Securities Services Pvt. Ltd. vs ACIT in ITA Nos.1523- 1524/Mds/2012 dated 17.10.2012 and in the case of Rainy Investments P.Ltd vs ACIT in ITA No.5491/Mum/2011 dated 16.01.2013. The Honourable benches have taken the view that the share application money gets converted into shares only on allotment by the company. Till such time the share application money is converted into shares, the applicant does not have any rights of a shareholder/member. The share applicant ITA No.267/Kol/2013 & C.O.No.29/Kol/2013 M/s. LGW Ltd.

A.Yr.2009-10 see was not entitled to any dividend. Therefore share application money cannot be considered as investment which is likely to earn tax free dividend income. Hence, there can be no disallowance u/s 14A of the Act.

7. We have given a careful consideration to the rival submissions. We are of the view that order of CIT(A) on this issue has to be upheld. As rightly contended by the ld. counsel for the assessee, share application money is only in the nature of an offer to buy shares made by the assessee. It is only after the offer is accepted by the company resulting in a concluded contract, the Assessee becomes the shareholder in a company. Till this time the Assessee becomes a shareholder, the assessee

cannot have any rights to claim any dividend that may be declared by the company. In such circumstances we are of the view that while working out the average value of the investments u/r 8D(2)(iii) of the Rules the share application money should not be included. We hold accordingly and dismiss ground no.(i) raised by the revenue.

8. Ground nos.(ii) to (vi) raised by the revenue read as follows :-

> " (ii) That on the facts and in the circumstances of the case, the Ld. CIT(A)-I, Kol has erred in deleting the addition of Rs.15,50,779/- as disallowance of commission expenses made by the A.O. in the assessment order.
>
> (iii) That on the facts and in the circumstances of the case, the Ld. CIT(A)-I, Kol has erred in deleting the addition of Rs.3,93,618/- u/s 41 as made by the A.O. in the assessment order.
>
> (iv) That on the facts and in the circumstances of the case, the Ld. CIT(A)-I, Kol has erred in deleting the addition of Rs.32,11,437/- as disallowance u/s 43B made by the AO in the assessment order.
>
> (v) That on the facts and in the circumstances of the case, the Ld. CIT(A)-I, Kol has erred in deleting the addition of Rs.5,618/- as disallowance of Prior Period Expenses as made by the AO in the assessment order.
>
> (vi) That on the facts and in the circumstances of the case, the Ld. CIT(A)-I, Kol has erred in directing the A.O. to treat the loss to the tune of Rs.21,01,52,576/- as Normal Business Loss instead of Speculation Loss."

9. According to the revenue the relief given by the CIT(A) which are challenged in ground nos. (ii) to (vi) as above were based on the additional evidence filed by the assessee before CIT(A). According to the revenue the additional evidence was admitted by CIT(A) in violation of Rule 46A of the Rules and therefore the additions made by the AO were deleted by the CIT(A) and which are the subject matter of ITA No.267/Kol/2013 & C.O.No.29/Kol/2013 M/s. LGW Ltd.

A.Yr.2009-10 challenge in ground nos. (ii) to (vi) should be set aside and the AO should be afforded an opportunity of examining the fresh evidences filed by the assessee before CIT(A). The revenue has raised ground no.(vii) in this regard, which reads as follows :-

" (vii) That on the facts and in the circumstances of the case, the Ld. CIT(A)-I, Kol has erred in violating the provisions of Rule 46A by admitting fresh evidences."

10. We deem it appropriate to decide ground no. (vii) before we proceed to decide ground nos. (ii) to (vi) raised by the revenue. As far as ground no.(vii) raised by the revenue is concerned the facts that emanate from the record are that the assessee filed four volumes of paper book with the request to treat the contents and documents in the said paper book as additional evidence with a request to

admit the additional evidence in terms of Rule 46A(1) of the Rules in a hearing before CIT(A) on 07.11.2012. The CIT(A) directed the AO to file his objections on additional evidence filed by the assessee. The AO vide report dated 21.11.2012 objected to admission of additional evidence by the CIT(A). The objection of the AO was that none of the conditions mentioned in clauses (a) to (d) of Rule 46A (1) were satisfied in the case of the assessee so as to admit additional evidence. It is pertinent to mention that the AO had not raised any objections with regard to the veracity of the additional evidences filed by the assessee before CIT(A) nor any objections with regard to the relevance of those documents to the various issues raised by the assessee before CIT(A). A copy of the objection of the AO in this letter dated 21.11.2012 is placed at pages 623 and 624 of the assessee's paper book. In the said letter the AO has also not made a request for liberty to file his objections on veracity of the additional evidence and its relevance to the case of the assessee at a later date.

11. The CIT(A) after considering the objections of the AO was of the view that the AO had not asked for any of the evidence that were sought to be filed by the assesee before CIT(A) and that the additional evidence sought to be filed before CIT(A) by the assessee are relevant and essential for adjudicating the issue before CIT(A).The CIT(A) admitted the additional evidence filed by the assessee.

ITA No.267/Kol/2013 & C.O.No.29/Kol/2013 M/s. LGW Ltd.

A.Yr.2009-10

12. The submission of the ld. DR on ground no.(vii) was that the CIT(A) called upon the AO to file his objections only with regard to the admission of additional evidence. The CIT(A) having come to the conclusion that the additional evidence required to be admitted, ought to have called upon the AO to file his objections with regard to the admissibility, veracity and relevance of the additional evidence to the various issues raised by the assessee before CIT(A).

13. The ld. Counsel for the assessee, on the other hand, submitted before us that Rule 46A(3) only mandates an opportunity to the AO for examining the additional evidence filed before CIT(A) or to produce evidence or documents in rebuttal to the additional evidence produced by the assessee. According to him in the light of the admitted position that the additional evidence filed by the assessee was confronted to the AO and opportunity having been given to the AO to examine the evidences or documents there was no further requirement of specifically calling upon the AO to file objections on the admissibility, veracity and relevance of the additional evidences. He also placed reliance on the decision of the Hon'ble Gujarat High Court in the case of Rajesh Babubhai Damania vs ITO (2002) 122 Taxman 614 (Guj) wherein the Hon'ble Gujarat High Court took the view that the Tribunal should not restore back to the AO to give one more innings.

14. We have given a careful consideration to the rival submissions. We are of the view that under Rule 46A (3) of the Rules, the CIT(A) is only required to afford reasonable opportunity to the AO to examine the evidence or documents produced by the assessee as additional evidence before CIT(A). In the present case admittedly all the documents filed by the assessee as additional evidence were

confronted to the AO. The AO has thus been afforded reasonable opportunity to examine the additional evidence or documents produced as additional evidence by the assessee. Rule 46A of the Rules does not contemplate the procedure whereby the CIT(A) should call for objections regarding admissibility of additional evidence first and when such additional evidence are admitted again called for objections with regard to the veracity and relevance of the additional evidences filed by the assessee before CIT(A). It is ITA No.267/Kol/2013 & C.O.No.29/Kol/2013 M/s. LGW Ltd.

A.Yr.2009-10 also clear from the decision of the CIT(A) that the AO had not asked for the additional evidence filed by the assessee before CIT(A) in the course of assessment proceedings and therefore the admissibility of the additional evidence in terms of Rule 46A(1) of the Rules cannot be found fault with. Therefore, we are of the view that there is no merit in ground no.(vii) raised by the revenue. Consequently the same is dismissed.

15. We will now deal with ground nos. (ii) to (vi) raised by the revenue. As far as ground no.(ii) is concerned, the facts are that the assessee claimed to have paid Shri .Laxmikant Joshi a sum of Rs.15,50,779/- as commission as per the assessee's books of accounts. In response to notice u/s 133(6) of the Act by the AO, Shri Laxmikant Joshi sent a copy of the ledger of the assessee as per his books of accounts which indicated that he had not received any payment from the assessee during the previous year. The AO therefore disallowed commission expenses to the tune of Rs.15,50,779/. Before CIT(A) the assessee pointed out that Shri Laxmikant Joshi(HUF) vide letter dated 15.12.2011 sent by registered post to the AO informed the AO that they had in fact received commission of Rs.15,50,779/- from the assessee and that the assesse had also deducted TDS at Rs.1,69,962/- in respect of the commission paid to the assessee. Relevant copy of the Income tax acknowledgement of Shri Laxmikant Joshi for A.Y.2009-10 and his bank statement was also enclosed along with the letter. The AO had passed order of the assessment on 27.12.2011. This letter was apparently not taken cognizance by the AO. After taking notice of the aforesaid letter of Shri Laxmikant Joshi(HUF), CIT(A) deleted the addition made by the AO.

16. The grievance projected by the revenue in ground no.(ii) is that the reply of Shri Laxmikant Joshi (HUF) in response to notice u/s 133(6) of the Act alone ought to have been considered. In our view the submission made by the revenue cannot be accepted. This is because the payment in question has been made by cheques and TDS has also been made by the assessee. The annexures to the letter of Shri Laxmikant Josh (HUF) dated 15.12.2011 which is at pages 91 to 93 of the assessee's paper book clearly demonstrates the claim of the assessee. We, therefore dismiss ground no.(ii) of the revenue.

ITA No.267/Kol/2013 & C.O.No.29/Kol/2013 M/s. LGW Ltd.

A.Yr.2009-10

17. As far as ground no.(iii) is concerned, the AO noticed from column no.20 of the Tax Audit Report that the tax auditor had reported a sum of Rs.3,93,618/- was chargeable to tax u/s 41 of the Act (benefit accruing to an Assessee on account of ceasation of liability). Based on the Tax Audit Report the AO added the aforesaid sum to the total income of the assessee. Before CIT(A) it was pointed out

that a sum of Rs.3,93,618/- was already offered to tax in the profit and loss account under the head miscellaneous receipt in Schedule-O. The break-up of miscellaneous receipt has been given which contains other miscellaneous receipts which is referable to the insurance claim by the assessee from National Insurance Company Ltd. The auditors also certified that the Tax Auditors Report contains wrong statement. These documents are available at pages 94 to 98 of the assessee's paper book -(1). The CIT(A) taking note of the aforesaid evidence deleted the addition made by the AO. The limited request of the ld. DR before us is to set aside the order of CIT(A) and direct the AO to verify the claim made by the assessee as made before CIT(A).

18. We have already held while deciding ground no.7 that the AO already had an opportunity of examining the additional evidence filed by the assessee and therefore request made by the ld. DR cannot be accepted. Consequently ground no.(iii)raised by the revenue is dismissed.

19. As far as ground no.(iv) raised by the revenue is concerned the facts are that on perusal of Col.21 of the Tax Audit Report, the AO noticed that the assessee failed to pay import duty of Rs.31,90,837/- and service tax of Rs.20,600/- before the due date of furnishing the return of income u/s 139(1) of the Act. Invoking the provision of section 43B of the Act, the AO added a sum of Rs/.32,11,437/- as disallowance u/s 43B of the Act to the total income of the assessee.

20. Before CIT(A) assessee pointed out that no duty of service tax was outstanding. The assessee furnished certificate of the auditors in this regard which is at page 99 of the assessee's paper book-1. The said certificate clarifies that the import duty and service tax were not outstanding as on 31.03.2009. It was also clarified that the whole ITA No.267/Kol/2013 & C.O.No.29/Kol/2013 M/s. LGW Ltd.

A.Yr.2009-10 amount of service tax was paid on 23.04.2009. Similar evidence with regard to import duty was also filed by the assessee. The same are at page nos.100-120 of the assessee's paper book. The CIT(A) on perusal of the aforesaid documents was of the view that the claim made by the assessee was justified and therefore the addition made by the AO is deleted. The request of the ld. DR before us was that fresh opportunity be given to the AO to examine the additional evidence filed by the assessee.

21. We have also decided ground no.7 that the AO had enough opportunity to look into the additional evidence filed by the assessee before CIT(A). In these circumstances the plea of the revenue for a fresh opportunity to the AO cannot be accepted. Accordingly ground No.(iv)4 is hereby rejected.

22. As far as ground no.(v) raised by the revenue is concerned, the AO found that in the Tax Audit Report the auditor reported that a sum of Rs.5,618/- was prior period expenses which was inadmissible for deduction. The AO accordingly added back a sum of Rs.5,618/- to the total income of the assessee.

23. Before CIT(A) the assessee pointed out that a sum of Rs.5,618/- was professional fee paid to Shri B.P.Agarwal for preparation and uploading of annual returns for the financial year 2006-07. The bill

dated 31.10.2008 which is at page 123 of the assessee's paper book shows that the liability accrued to the assessee only on 31.10.2008 on receipt of the aforesaid bill. The CIT(A) taking note of the evidence deleted the addition made by the AO. We are of the view that the order on this issue does not call for any interference. Consequently the same is dismissed.

24. As far as ground no.(vi) raised by the revenue is concerned the facts are that the assessee claimed as deduction on account of forex forward contracts of Rs.23,66,02,947/-. Out of the above loss to the tune of Rs.2,66,32,552/- and another sum of Rs.1,82,181/- was a loss on account of forex derivatives and gain on account of gold. The remaining loss of Rs.21,01,52,576/- was loss on account of forex forward contracts consequent to cancellation of export orders. This was treated by the ITA No.267/Kol/2013 & C.O.No.29/Kol/2013 M/s. LGW Ltd.

A.Yr.2009-10 AO as speculation loss u/s 43(5) of the Act and was accordingly carried forward to be set off against speculative income in future. As a result a sum of Rs.21,01,52,576/- which is part of Rs.23,66,02,947/- was added to the total income of the assessee.

25. On appeal by the assessee the CIT(A) held as follows :-

> "After careful consideration of assessment order and A/R's written submission it is noticed that ground no.9 relates disallowance of Rs.23,66,02,947/- on account of forex forward contracts which was treated as speculative loss by the AO as against normal business expenditure/loss claimed by assessee. As per audited accounts submitted by assessee continued to be in the business of exports of raw-cotton, handicrafts, and other miscellaneous items. The export sales in this financial year were for Rs.187.88 crores mainly to Bangladesh. As per audited Profit and Loss A/c assessee had debited a business loss of Rs.23,66,02947/- on account of forward forex contract transactions. This loss figure included loss of Rs.2,66,32,552/- on account of forex derivatives and a gain of Rs.1,82,181/- on account of gold as mentioned in page 4 of the assessment order as under :-

Euro Booking	Rs.4,11,29,143/-
Point Booking	Rs.4,81,16,647/-
JPY (Profit)	Rs. 17,19,818/-
Swiss Frank	Rs. 28,79,030/-
Normal Forward Contract-SBI	Rs.10,46,38,183/-
Normal Forward Contract-Federal Bank	Rs.1,51,09,391/-
Derivatives	Rs.2,66,32,552/-
Gold (Profit)	Rs. 1,82,181/-
Total	Rs.23,66,02,947/-

> The AO issued a notice u/s 142(1) along with the questionnaire on 14.07.2011 which was responded by assessee on various dates and AO asked to clarify forward contract loss claimed by assessee as per order sheet entry on 02.12.2011 which was clarified by assessee vide letter dated 16.12.2011. The AO passed the order u/s 143(3) on 27.12.2011 after the hearing on 08.12.2011, 16.12.2011 and 22.12.2011 when he sought certain clarification from the assessee on matters other than the above forex loss. The

AO never asked for the detailed evidences of export contract cancelled vis-à-vis forex contract cancelled and made additions of Rs.23,66,02,947/- as he treated the above loss as speculative loss u/s 43(5) of Income Tax Act by relying upon CBDT instruction dated 23.03.2010 and the AO held that nexus between losses suffered due cancellation of forex forward contracts with corresponding value of export contracts which got cancelled could not be established. During the appellate proceedings assessee filed a paper book containing pages 1 to 621 and requested for fresh evidence in its petition dated 07.11.2012. The relevant portion relating to ground no.9 is as under :

Forward Forex Contract Loss On course of assessment proceedings, the authorized representatives of the Assessee- company had appeared before the Assessing officer and had furnished/filed/produced various documents, evidences and explanations raised and/or requisitioned from time to time. We had debited a sum of Rs.23,66,02,947/- under the head "Forward Forex Contract in the Profit & Loss Account and the same was claimed as business loss. For the first time on 2nd December 2011, the Assessing Officer asked us to clarify "why ITA No.267/Kol/2013 & C.O.No.29/Kol/2013 M/s. LGW Ltd.

A.Yr.2009-10 Forward Forex Contract Loss has been claimed as Business Expenditure". On 8th December, 2011 our authorized representative appeared before Assessing officer and explained the aforesaid matter and produced before him the relevant documents and evidences relating to aforesaid claim. The explanation was also filed in letter dated 07.12.2011. Having been satisfied no further query was raised nor any evidences were asked to be filed or furnished upto the date of last hearing 22.12.2011. The ld. Assessing Officer, however, passed the assessment order by alleging that the assessee failed to furnish the details or export contracts which were cancelled by the foreign buyers to establish a nexus between export contracts cancelled vis-à-vis Forward contracts cancelled.

During the course of hearing the authorized representation appeared and explained and produced the details and evidences of export contracts cancelled by the buyers. Such details and evidences were never asked by the Assessing officer to be filed before him. It is only in the assessment order Assessing Officer has alleged that such details were not filed. We enclosed the Xerox copy of the order sheet in respect of assessment proceedings, which would reveal all the aforesaid facts. In these circumstances, we submit that there was reasonable cause for not filing the evidences relating to claim of aforesaid loss as business loss, which have now been filed with a request to accept the same under Rule 46A of the Income Tax Rules, 1962.

Sl.No.	Paper Book identification No.	Nature of documents	PB Page nos.
6	11	Statement of Profit & Loss on Forward Forex Contract during the previous year relevant to the Assessment Year 2009-10	132-150
7	12	Samples of documentary	151-595

		evidences in respect of major amount of losses incurred of Forward Forex Contract with reference to Sale invoices and Banks advices	
8	13	Statement of gains in Forex Exchange Fluctuation include din Sales Account	596-606
9	14	Statement of month-wise inventory of Stock of Cotton	607-621

We submit that the aforesaid additional evidences are vital and essential for rendering justice and in deciding the instant appeal and therefore the same may be admitted under Rule 46A of the Income Tax Rules, 1962. We refer to the decision of Hon'ble Third Member of Patna Income Tax Appellate Tribunal in the case of Abhay Kumar Shroff vs Income Tax Officer reported in 63ITD 144 (Pat) TM. We refer to the following observations made by Hon'ble Tribunal in the said decision :

"It was that the assessee as a matter of right could not file or filed them before the Tribunal as a matter of course. If the assessee produces some documents at the appropriate time, they have to be taken into consideration subject of course to all just exceptions, such as their relevance, etc. if not done at the assessment stage, the admission of documents has to be governed by rule 46A of the I.T.rules 1962., if produced for the first time before the first appellate authority. Having missed the bus ITA No.267/Kol/2013 & C.O.No.29/Kol/2013 M/s. LGW Ltd.

A.Yr.2009-10 and the matter having travelled to the Tribunal, the admission of documents is to be governed by Rule 29 of the Appellate Tribunal Rules. Hence, if the documents sought to be admitted even at the second appellate stage are of nature and quantitatively such that they render assistance to the Tribunal in passing orders or are required to be admitted for any other substantial cause', it would rather be the duty of the Tribunal to admit them. Therefore, if the receipt or admission of additional evidence is vital and essential for the purpose of consideration of the subject matter of appeal and to arrive at a final and ultimate decision, the Tribunal is amply empowered to admit additional evidence under rule 29. Therefore, the Tribunal had to admit additional evidence produced by the assessee since that was vital and essential for rendering justice and in deciding appeals. However, it was necessary to give the department a reasonable opportunity of rebutting it according to the principle of nature justice and for that purpose the matter was restored to the file of the AO.

The AO was confronted with the additional evidences on 07.11.2012 and AO filed written submission vide letter dated 21.11.2012 with a request not to admit the additional evidences as per Rule 46A. The paper book pages 132 to page 621 are relating to forex forward contract with reference to export orders and the relevant bank advices along with the month-wise inventory of stock of cotton. Since AO never asked for these evidences and disallowed the losses claimed in the assessment order, the principle of natural justice requires that these evidences should be admitted as per Rule 46A and moreover these evidences are relevant and essential to the matter under consideration as these evidences go to the root of matter therefore these additional evidences are admitted in terms of Rule 46A.

In the financial year under consideration assessee-company had exported raw cotton mainly to Bangladesh with export turnover of Rs.187.88 crores. In the paper book assessee had filed a summary statement of loss made on the forward booking at page 132 to 147 of the paper book and assessee also furnish a details statement about the contract number, date, foreign currency booked and cancellation of the contract (due to cancellation or original export order) with the banks viz. SBI and Federal Bank along with the date and amount of loss debited by the respective banks. It is pertinent to mention that the above statement summary contains the details of many contracts which have in fact resulted in profits due to cancellation of export orders and are duly reflected in the books account of assessee. In assessment year 2008-09 there was a net gain in cancellation of foreign exchange contracts with the banks due to cancellation of export orders and the net gain was assessed under the head income from business and profession as per order u/s 143(3).

The net losses (after setting of the profits on account of cancellation of export orders) debited due to cancellation of export with the SBI and Federal Bank were to the tune of Rs.23,66,02,947/- minus Rs.2,66,32,552/- plus Rs.1,82,181/- = Rs.21,01,52,576/-. The page 147 to 150 of paper book contain the statement of profit and loss on account of foreign exchange derivatives and statement of gold booking for Rs.2,66,32,552/- (loss) and profit of Rs.1,82,181/- respectively. These transactions are not related to assessee's business of export of raw cotton and other miscellaneous products while the other transactions incurring the loss of Rs.21,01,52,576/- were related to the cancellation of export orders. Therefore addition made by the AO for Rs.21,01,52,576/- is deleted as cancellation of export orders and resulting loss on cancellation foreign exchange contracts with the banks was normal business expenditure. The foreign exchange ITA No.267/Kol/2013 & C.O.No.29/Kol/2013 M/s. LGW Ltd.

A.Yr.2009-10 derivative loss for Rs.2,66,32,552/- with no supporting of export orders is treated as speculative loss u/s 43(5) of the Income Tax Act and can only be set off against speculative profits of gold in the financial year for Rs.1,82,181/- and the addition made by AO for net amount of Rs.2,64,50,371/- is confirmed. Therefore ground no.9 is partly allowed."

Aggrieved by the order of CIT(A) the revenue is in appeal before Tribunal.

26. We have heard the rival submissions. The learned DR relied on the order of the AO. According to him it was incumbent on the part of the Assessee to establish correlation between each of the forward contract with export orders and only then can it be said that the loss was incidental to the business of the Assessee. According to him, such correlation has not been established by the Assessee before CIT(A) nor has the CIT(A) given such a finding before deleting the addition made by the AO. He therefore prayed that the addition made by the AO be restored. In the alternative it was prayed that the order of the CIT(A) be set aside and the issue may be remanded to the AO for fresh consideration in the light of the additional evidence filed by the Assessee before the CIT(A). The learned counsel for the Assessee reiterated submissions made before CIT(A) and the order of the CIT(A). It is seen from the evidence on record that in A.Y. 2008-09 gain on account of forex forward contract on cancellation was offered as income by the assessee and the same was brought to tax by the AO which is placed at pages 128 to 131 of the assessee's paper book. The statement of profit/loss on forex forward contract during the previous year relevant to A.Y.2009-10 and the sample of

documentary evidence in respect of major amount of loss incurred on forex forward contracts with reference to sale invoice and bank at pages 151 to 595 of the assessee's paper book. The statement of gains in forex forward contract included in the sales account is at pages 596 to 606 of the assessee's paper book. The statement of month-wise inventory of stock of cotton is at pages 607- 621 of Assessee's paper book.

27. We have considered the rival submissions. We shall as a test case consider one of the contract for export of contract and the forward contract entered into by the Assessee in connection with such export contract. Page 134 of the Assessee's paper ITA No.267/Kol/2013 & C.O.No.29/Kol/2013 M/s. LGW Ltd.

A.Yr.2009-10 book contains the list of contract in which forward contract in Euro currency were booked. KS-0000026 is a forward contract dated 17.7.2008 entered into by the Assessee with State Bank of India Trade Finance CPC, Kolkata. The Assessee had an export order for Indian Raw Cotton of 4409200 LBS of the value of 31,74,624 US $ equivalent to 10,00,000 Euros, to supply to one M/S.Nassa Spinning Ltd., Bangladesh. The contract was cancelled by HB Cotton who was agent of M/S.Nassa Spinning Ltd., Bangaldesh on 21.10.2008. The period of the contract for supply of cotton to Bangaldesh was upto 22.1.2009. Since the contract was cancelled by communication dated 24.10.2008, the Bank intimated the Assessee that in view of the adverse fluctuation of Euro currency, the Assessee had to bear the loss of Rs.1,56,80,527 because the booking rate as on 17.7.2008 was 1.5711 the cancellation date was 22.1.2009 on which date the rate was 1.2613. Thus the Assessee suffered a loss on the forward contract in question. From the sample case set out above it is clear that the forward contract in question was purely hedging transactions entered into by the Assessee to safeguard against loss arising out of fluctuation in foreign currency. Such transactions have been held in the following cases to be not speculative transactions falling within the ambit of Sec.43(5) of the Act, CIT Vs. Soorajmull Nagarmull (1981) 5 Taxman 289 (Cal), CIT Vs, Badridas Gauridu (P) Ltd., (2004) 134 Taxman 376 (Bom), CIT Vs. Friends and Friends Shipping Pvt.Ltd., Tax Appeal No.251 of 2010 dated 23.8.2011 and CIT Vs. Panchmahal Steel Ltd. Tax Appeal No.131 of 2013 dated 28.3.2013 by the Hon'ble Gujarat High Court. The conclusions of the CIT(A) on this issue, in our view therefore deserve to be upheld. Accordingly, the ground of appeal raised by the revenue in this regard is rejected.

28. In the result the appeal of the revenue is dismissed.

C.O.No.29/Kol/2013 (by the assessee)

29. As far as Cross Objection is concerned ground no.1 raised by the assessee in the Cross Objection reads as follows :-

> "1. That the Learned Commissioner of Income tax (Appeals) erred in confirming the assessment of Capital gains on sale of land at Rs.30,08,799 made by the Assessing Officer by adopting the sale consideration of Rs.61,22,330 relying on the provisions of ITA No.267/Kol/2013 & C.O.No.29/Kol/2013 M/s. LGW Ltd.

A.Yr.2009-10 sec.50C of the Income tax Act, 1961 ignoring the amount of sale consideration of Rs.60,00,000 actually received by the assessee company."

30. The assessee sold the property on which long term capital gain was declared by the assessee. The actual sale consideration received on transfer was a sum of Rs.60,00,000/-. The sale consideration adopted by the assessee for the purpose of registration and stamp duty was a sum of Rs.61,22,330/-. The AO computed the long term capital gain by adopting the sale consideration at Rs.61,22,330/- resulting in addition to the capital gain declared by the assessee amounting to Rs.61,22,330/-/. CIT(A) confirmed the order of AO taking note of the provision of section 50C of the Act. Before us the ld. Counsel for the assessee relied on the decision of ITAT, Hyderabad Bench in the case of ACIT vs S.Suvarna Rekha in ITA No.743/Hyd/2009 dated 29.10.2010 wherein the Hon'ble ITAT, Hyderabad took the view that if difference between valuation for the purpose of stamp duty and the sale consideration actually received by the assessee is 10% or less then the value actually received by the assessee should be adopted for the purpose of computing the long term capital gain.

31. We have considered the submissions made on behalf of the ld. Counsel for the assessee. Though section 50C of the Act does not speak of any such variation in terms of percentage between value adopted for the purpose of stamp duty and the registration and the actual consideration received on transfer, keeping in view of the decision of the Hon'ble ITAT, Hyderabad Bench referred to above and keeping in view of the fact that the difference between the valuation for the stamp duty and the actual consideration received by the assessee is less than 2% we are of the view that addition sustained by CIT(A) should be deleted. Accordingly ground no.1 raised by the assessee in cross objection is allowed.

32. Ground No.2 raised by the assessee in the Cross Objection reads as follows :-

"2. That the learned Commissioner of Income Tax (Appeals) erred in confirming the disallowance of loss of Rs.5,00,160 incurred by the assessee company on sale of Long Term investment in shares."

ITA No.267/Kol/2013 & C.O.No.29/Kol/2013 M/s. LGW Ltd.

A.Yr.2009-10

33. The assessee incurred a loss of Rs.5,00,160/- on sale of listed shares. This was claimed as deduction in the computation of the total income. The AO was of the view that in section 10(38) of the Act any income arising from the long term capital assets being equity shares is exempt from tax. The AO was of the view that even where there is loss in view of section 10(38) of the Act the loss will not enter the computation of total income of an Assessee. The CIT(A) confirmed the order of AO.

34. Before us the submission of the ld. Counsel for the assessee was that section 10(38) of the Act used the expression "any income" and therefore loss on sale of long term capital asset being equity shares should be allowed as deduction. The ld. DR relied on the order of CIT(A).

35. We are of the view that the stand taken by the Assessee is not acceptable. In Commissioner of Income-tax v. Harprasad and Co. P. Ltd. 99 ITR 118 (SC)., the assessee claimed capital loss on sale of shares of Rs.28,662 during the previous year relevant to assessment year 1955-56. The Income-tax Officer disallowed the loss on the ground that it was a loss of a capital nature. The CIT(A) confirmed the order of the ITO. Before Tribunal the Assessee modified its claim and sought that the loss which had been held to be a " capital loss " by the authorities below, should be allowed to be carried forward and set off against profits and gains, if any, under the head " capital gains " earned in future, as laid down in sub-sections (2A) and (2B) of section 24 of the Act. The Tribunal accepted the contention of the assessee and directed that the " capital loss " of Rs. 28,662 should be carried forward and set off against " capital gains ", if any, in future. On further appeal the Hon'ble Delhi High Court confirmed the order of the Tribunal. On further appeal by the Revenue, the following question was considered by the Hon'ble Supreme Court:

> "Whether, on the facts and in the circumstances of the case, the capital loss of Rs. 28,662 could be determined and carried forward in accordance with the provisions of section 24 of the Indian Income-tax Act, 1922, when the provisions of section 12B of the Income-tax Act, 1922, itself were not applicable in the assessment year 1955-
>
> 56. "

The Hon'ble Supreme Court held :

> ITA No.267/Kol/2013 & C.O.No.29/Kol/2013 M/s. LGW Ltd.
>
> A.Yr.2009-10 "Under the Income Tax Act, 1922 capital gain was not included as a head of income and therefore capital gain did not form part of the total income. Certain important amendments were effected in the Income-tax Act by Act XXII of 1947. A new definition of " capital asset " was inserted as Section 2(4A) and " capital asset " was defined as " property of any kind held by an assessee, whether or not connected with his business, profession or vocation ", and the definition then excluded certain properties mentioned in that clause. The definition of " income " was also expanded, and " income " was defined so as to include " any capital gain chargeable according to the provisions of Section 12B ". Section 6 of the Income-tax Act was also amended by including therein an additional head of income, and that additional head was " capital gains, " Section 12B, provided that the tax shall be payable by an assessee under the head " capital gains " in respect of any profits or gains arising from the sale, exchange or transfer of a capital asset effected after 31st March, 1946, and that such profits and gains shall be deemed to be income of the previous year in which the sale, exchange or transfer took place. The Indian Finance Act, 1949, virtually abolished the levy and restricted the operation of section 12B to " capital gains " arising before the 1st April, 1948. But section 12B, in its restricted form, and the VIth head, " capital gains " in section 6, and sub-sections (2A) and (2B) of section 24 were not deleted and continued to form part of the Act. The Finance (No. 3) Act, 1956, reintroduced the " capital gains " tax with effect from the 31st

> March, 1956. It substantially altered the old section 12B and brought it into its present form. As a result of the Finance (No. 3) Act of 1956, "capital gains " again became taxable in the assessment year 1957-58. The position that emerges is that " capital gains " arising between April 1, 1948, and March 31, 1956, were not taxable. The capital loss in question related to this period.

In the above background of law, the Hon'ble Supreme Court held as follows:

> "From the charging provisions of the Act, it is discernible that the words " income " or " profits and gains " should be understood as including losses also, so that, in one sense " profits and gains " represent " plus income " whereas losses represent " minus income " (1). In other words, loss is negative profit. Both positive and negative profits are of a revenue character. Both must enter into computation, wherever it becomes material, in the same mode of the taxable income of the assessee. Although section 6 classifies income under six heads, the main charging provision is section 3 which levies income-tax, as only one tax, on the " total income " of the assessee as defined in section 2(15). An income in order to come within the purview of that definition must satisfy two conditions. Firstly, it must comprise the " total amount of income, profits and gains referred to in section 4(1) ". Secondly, it must be " computed in the manner laid down in the Act ". If either of these conditions fails, the income will not be a part of the total income that can be brought to charge."

36. The Hon'ble Supreme Court thereafter took note of the fact that any " capital gains " arising between April 1, 1948, and April 1, 1957 was not chargeable to tax.

ITA No.267/Kol/2013 & C.O.No.29/Kol/2013 M/s. LGW Ltd.

A.Yr.2009-10 The Hon'ble Supreme Court therefore held that the second condition, namely, "the manner of computation laid down in the Act" which "forms an integral part of the definition of ' total income' " was not satisfied. Thus, in the relevant previous year and the assessment year, or even in the subsequent year, capital gains or "capital losses" did not form part of the "total income" of the assessee which could be brought to charge, and were, therefore, not required to be computed under the Act. The Hon'ble Supreme Court answered the question referred to it in favour of the revenue.

37. The law laid down by the Hon'ble Supreme Court clearly supports the stand taken by the Revenue. Consequently, the ground of cross-objection is without any merit and the same is dismissed.

38. Ground no.3 in the cross objection by the assessee was not pressed and the same is dismissed as not pressed.

39. Ground no.4 raised by the assessee in the cross objection is in support of the conclusion of the CIT(A) admitting and considering the additional evident under Rule 46A of the IT Rules. We have upheld the action of CIT(A) in this regard while deciding ground no.(vii) raised by the revenue. For

the reasons stated therein, this ground of Cross objection is allowed.

40. In the result the appeal of the revenue is dismissed and cross objection of the assessee is partly allowed.

Order pronounced in the court on 7th October, 2015.

Sd/-	Sd/-
[Waseem Ahmed] Accountant Member	[N.V.Vasudevan] Judicial Member

Date: 7.10.2015.

R.G.(.P.S.)

ITA No.267/Kol/2013 & C.O.No.29/Kol/2013
M/s. LGW Ltd.
A.Yr.2009-10

Copy of the order forwarded to:

1. M/s. LGW Limited, Rajarhat Gopalpur, Narayanpur, 24-Parganas-700136.

2 The D.C.I.T., Circle-II, Kolkata.
3. The CIT-IV, Kolkata,
4. The CIT(A)-XII, Kolkata.

5. DR, Kolkata Benches, Kolkata

True Copy,

By order,

Deputy /Asst. Registrar, ITAT, Kolkata Benches

Direct Tax - Case Law

IN THE INCOME TAX APPELLATE TRIBUNAL
*KOLKATA BENCH "**B**" KOLKATA*

Before **Shri Mahavir Singh, Judicial Member** and
Shri Waseem Ahmed, Accountant Member

ITA No.835/Kol/2008 &
ITA No.281/Kol/2013
Assessment Year :2003-04

Smt. Yashod Deora 2-B, Queen's Park, Kolkata – 700019 [**PAN No.ACXPD 9387 L**]	**V/s.**	Income Tax Officer, Ward-30(3), Aayakar Bhawan Dakshin, 2, Gariahat Road (S), Kolkata – 700 068
Shri Pradeep Kumar Deora 2B, Queens Park, Kolkata – 700 019 [**PAN No.ACXPD 9388 F**]	**V/s.**	DCIT, Central Circle- XXIV, Kolkata
अपीलार्थी /Appellant	..	प्रत्यर्थी/Respondent

आवेदक की ओर से/By Assessee	Shri Ravi Tulsiyan, FCA
राजस्व की ओर से/By Revenue	Shri David Z. Chawngthu, ACIT-SR-DR
सुनवाई की तारीख/Date of Hearing	05-11-2015
घोषणा की तारीख/Date of Pronouncement	11-12-2015

आदेश /O R D E R

PER Waseem Ahmed, Accountant Member:-

Both appeals filed by different assessee are arising out of separate orders of Commissioner of Income Tax (Appeals)-XIV/II Kolkata dated 27.02.2008 and 31.12.2012. Assessment was framed by ITO Ward-30(3)/ACIT,CC-XXIV Kolkata u/s 143(3)/147 of the Income Tax Act, 1961 (hereinafter referred to as 'the Act') vide their orders dated 27.12.2006 & 27.02.2006 for assessment year 2003-04 respectively.

2. These two sets of appeal of different assessee being husband and wife for the same assessment year (2003-04), common issue are involved, therefore we heard together and deem it fit to dispose of by this common order.

3. Before crept out this specific grievances of assessee, we deem fit to take note of the back ground of the case.

We take up assessee's appeal in ITA No.281/Kol/2013.

4. There was a residential flat in Mumbai bearing address Flat No. 1 Turf View, Hornby Vellard Estate, Worli, Mumbai (hereinafter) known as disputed flat. The flat was owned by M/s Mahabir Loather Boards Pvt. Ltd. (MLBPL for short) and this disputed flat was occupied by Mrs. Yashod Deora along with her husband Sri Pradeep Kumar Deora who was then Director/employee in MLBPL having address at 67/69 M.K. Mark Dariyanagar, House, marine Lines, Mumbai-400002, M/s Percept Advertising limited. (PAL in short) had purchased the disputed flat from MLBPL by virtue of a purchased deed dated 25.02.1997. Since the disputed flat was occupied by Mr. P.K.Deora therefore M/s Percept Advertising Ltd. entered into a settlement deed on 18.04.1997. By virtue of said settlement deed, Ms Percept Advertising Ltd., was to pay a sum of ₹50 lakh and Mr. P.K.Deora agreed to surrender the right of the said disputed flat. Mr. P.K.Deora agreed to vacate the disputed flat on 30.09.1998 and also agreed to pay monthly compensation of ₹5,000/- till the date of vacation of the disputed flat. However Mrs. Yashod Deora did not vacate the disputed flat even after the expiry of the agreement dated 30.09.1997 as per the deed of settlement. M/s. Percept Advertising Ltd. filed an application (No.74 of 1998) before the Competent Authority division for the eviction of the disputed flat from Mr. P.K. Deora and Mrs. Yashod Deora.

5. Mr. P.K.Deora has disclosed ₹50 lakh in the balance-sheet for A.Y 1998-99 under head 'sundry creditor' for that year, the assessment was

framed of Mr. P.K.Deora u/s.1 43(3) of the Act, wherein the AO disallowed sum of ₹50 lakh and added it to the income of assessee u/s. 68 of the Act. Mr. P.K.Deora filed an appeal before Ld. CIT(A) against the AY 1998-99 who upheld the action of Assessing Officer. Against the order of Ld. CIT(A), Mr. P.K.Deora filed an appeal before Tribunal and Tribunal deled the addition made my AO and subsequently confirmed by Ld. CIT(A) u/s.68 of the Act vide order dated 25.10.2005 in **ITA No. 306 to 310/Kol/2005** by observing as under:-

> *"Since the assessee has proved the identity, creditworthiness and genuineness of the transactions in terms of section 68 of the I.T Act and in the absence of any contrary material brought on record by the revenue to show that the assessee has filed to discharge his burden at any stage, we are of the view that the addition made by the AO u/s 68 and sustained by the Ld. CIT(A) is not sustainable in law. As regards the taxability of the amount of Rs.50 lakhs under the head capital gains, we find that since it is an advance without giving any possession and that to under dispute and also the entire amount of Rs.50 lakhs has been shown by the assessee in his capital account as on 31.03.2003 and also offered for taxation, therefore, we are of the view that from this point of view also the said amount is not taxable in the hands of the assessee for the year under consideration. Accordingly, the addition of Rs.50 lakhs made by the AO and sustained by the CIT(A) is directed to be deleted."*

Now in the relevant year under consideration assessee has transferred the sundry creditor liability of ₹50 lakh which was arising as a result of settlement with Ms/ Percept Advertisement Ltd. to its capital account. It was also found that another ₹5 lakh was also transferred to capital account of assessee which was received from M/s Percept Advertisement Ltd. for further settlement. This case was taken up for scrutiny assessment u/s. 143(3) of the Act. On question by AO to assessee regarding the source of ₹55 lakh the assessee explained the entire facts of the case as stated aforesaid and argued that said compensation received by assessee for an amount ₹55 lakh is not subject to tax under the Income Tax Act as the said disputed flat was occupied by assessee neither on account of ownership nor on account of any tenancy. The said property stand occupied by assessee under forceful possession.

Therefore, the said receipt has to be considered to be a capital nature, therefore not liable to tax. The said amount received on account of vacating the said property held under forceful possession is not covered by any provision of capital gains for charging of income tax under the Act. The said amount would have been chargeable if the same had been received in order to vacate the property if the assessee had been a tenant thereof. But the assessee had occupied the said premises forcefully and there is no provision under the Act for charging such capital receipt. However, AO has disregarded the claim of assessee stating that there was a lawful eviction notice filed by M/s Percept Advertisement Ltd. Had there been any forceful possession, then matter would have gone to police and not for a lawful settlement. The assessee was allowed to stay in the said flat in the capacity of director of MLBPL. Besides there was an agreement with certain value of ₹55 lakh for handing over the peaceful possession of said disputed flat and this is nothing but valiant question for tenancy right. In view of above, AO has held the transaction as chargeable income under the head of 'income from other sources' and added the sum of ₹55 lakh to the income of assessee by way of making protective assessment..

6. Since the husband and wife both were staying in that disputed flat therefore AO has framed the assessment by enhancing income of both couple (assessee and his wife) for an amount of ₹55 lakh each under the head 'protective assessment' concept in order to avoid any unforeseen loss to the Revenue. So the income of both couple (assessee) enhanced by an amount of ₹55 lakh respectively.

7. Aggrieved assessee preferred appeal before Ld. CIT(A) who upheld the action of AO by observing as under:-

> *"6. I have considered the submission of the appellant and perused the assessment order. I have also gone through the relevant documents filed in the course of assessment proceedings and the remand proceedings. The facts of the case have already been discussed as*

above. On careful consideration of the facts and in law, I find no force in the submission of the appellant that the receipt of Rs.55 lakhs from Percept Advertising Ltd, credited in the appellant's capital account was a capital receipt and not liable to tax. From the assessment order, it is observed that the AO held that the appellant's wife, Mrs. Yasod Deora was the licensee of the flat No 1, Turf View, Hornby Vellard Estate, Worli, Mumbai and the appellant was staying in the said flat in the capacity of her husband and director of Mahavir Leather Board Pvt. Ltd., It appears that the aforesaid observation was made by the AO on the basis of eviction petition filed by Percept Advertising Ltd., before the Competent Authority, appointed under section 31B of the Bomaby Rent Act, 1947. Otherwise, there is no evidence that Smt. Yashod Doera was a licensee of the said disputed flat. In the course of remand proceedings, the appellant filed the evidence that he was the Managing Director of the company named as Kedia Distelleries Limited, 160, Kanchan Bagh, Indore. It is stated by the appellant that the flat under disputed at Mumbai was given by the said company to reside in the capacity of a director. That, in the month of June, 1996, he resigned from the directorship of Kedia Distelleries Ltd., In the light of the above facts, I am of the opinion that, initially it cannot be said that the flat was under forceful possession of the appellant because he had occupied the flat in the capacity of director of Kedia Distelleris Ltd., and the said company allowed him to occupy the same. The owner company, i.e. Mahavir Leather Board Pvt. Ltd., sold the flat to percept Advertising Ltd., and hence thereafter the appellant was required to vacate the flat because he was no more the director of the company which allowed him to occupy the flat. However, he did no vacate the flat and hand over the possession to the present owner. In order to get the peaceful vacant possessions of the flat, the present owner entered into an agreement with Mr. & Mrs. Deora and paid a sum of Rs.50 lakhs which was deposited by the appellant in his bank account and showed the amount in his balance sheet as on 31.03.1998 under the head liabilities. Even after receiving the amount of Rs.50 lakhs and expiry of grace period allowed to them to vacate the flat, Deoras did not hand over the vacant possession to Percept Advertising Ltd., This was nothing but the breach of agreement. Therefore, the present owner approached the Competent Authority to get possession of is flat. Subsequently, Mr. and Mrs. Deora approached Percept Advertising Ltd., in writing, that they shall hand over the vacant and peaceful possession of the flat upon paying them a total compensation of Rs.55 lakh. In the said letter, Deoras confirm having earlier received sum of Rs.50 lakhs as an adhoc and advance payment. Consequently, Percept Advertising Ltd. paid another sum of Rs.5 lakhs which was deposited by the appellant in his bank account and handed over the possession of the flat to Percept Advertising. Thus, the final settlement of dispute was made in the year under consideration i.e. AY 2003-04. The appellant transferred and credited

the sum of Rs.55 lakhs in his capital account but did not offer the same for tax for the reasons that the receipt was capital in nature. It is observed that in the course of assessment proceedings as well as the appellate proceedings, the appellant has repeatedly argued that the receipt of Rs.55 lakhs was not for the surrender of tenancy right because neither the appellant nor his wife were the tenant of the flat. The sum was received to vacate the forceful unauthorized possession and under the Income tax Act there is no provision to tax the sum received to vacate forceful unauthorized possession of a capital asset. According to the appellant the sum of Rs.55 lakhs was received to extinguish a capital right i.e. the right to possessions of the property. However, I am not inclined to agree with the contention of the appellant because if he had unauthorized and forceful occupation of the flat, who created the right of possession of the flat in his favour? If, he had neither the ownership of the flat nor had the legal right to stay therein, how he may have the legal right to possessions thereof, so that to say that the receipt of Rs.55 lakhs was the capital receipt. It is not like that anyone can forcefully occupy one's property and demand compensation to vacate the illegal possession and later on say that the receipt is capital receipt. In fact, it is nothing but windfall for the appellant and the receipt is definitely liable to tax as casual receipt under the head "income from other sources", if not as capital gain. I am of the opinion that the income is taxable substantively in the hands of the appellant because he was staying in the flat in the capacity of director of Kedia Distelleries Ltd., and did not vacate the flat after resigning from that company. Further, the entire receipt of Rs.55 lakhs was received by him, deposited in his bank account and also credited in his capital account. Therefore, the receipt is taxable in the hands of app on substantive basis and not in the hands of his wife Yashod Deora. In view of above, it is held that the receipt of Rs.55 lakhs is taxable in the hands of appellant as income from other sources/capital gain. The addition of Rs.55 lakhs made by the AO is confirmed. The ground nos. 1, 2 and 3 are dismissed."

Being aggrieved by this order of Ld. CIT(A) assessee preferred second appeal before us by raising following grounds:-

"1. The orders passed by the lower authorities are arbitrary, erroneous, without proper reasoning, invalid and bad in law.

2. On the facts and in the circumstances of the case, the learned CIT(A) erred din holding that the receipt of Rs.55 lakhs is taxable in the hands of the appellant on substantive basis as income from other sources/capital gain.

3. On the facts and in the circumstances of the case, the learned CIT(A) erred in not appreciating that the receipt of the sum of Rs.55 lakhs by the appellant from M/s Percept Advertising Ltd. was for surrendering the right of forceful occupation of the flat no.1 Turf View, 3rd floor, Hornby Vellard Estate, Worli, Mumbai, and therefore, it did not come under the purview of either taxable capital receipt or income from other sources.

4. On the facts and in the circumstances of the case, the learned CIT(A) erred in passing a vague order by holding that the receipt of Rs.55 lakhs by the appellant is taxable in his hands as income from other sources/ capital gain, neglecting to take into account the fact that the rates of taxes from 'income from other sources' and 'capital gains' are different.

5. On the fats and in the circumstances of the case, the learned CIT(A) erred in confirming the addition of Rs.55 lakhs on erroneous reasoning."

Shri Ravi Tulsiyan, Ld. Authorized Representative appearing on behalf of assessee and Shri David Z. Chawngthu, Ld. Departmental Representative appearing on behalf of Revenue.

8. We have heard rival contentions of both the parties and perused the materials available. Ld. AR submitted written submissions along with paper book running pages from 1 to 28 and stated that it is clear case of adverse possession of the disputed flat by Mr & Mrs. Deora. None of them was having the right of possession of the flat neither as a Director or employee of M/s Mahavir Leather Board Pvt. Ltd. In fact the husband was allowed to reside in the flat on account of his directorship in Kedia Distilleries Ltd. The assessee and her husband have no knowledge regarding the arrangement between M/s Mahavir Leather Board Pvt. Ltd. and M/s Kedia Distilleries Ltd., Ld. AR further stated that it is correct that as his wife, the assessee was also co-occupying the said flat but she never had any legal right therein. Ld. AR submitted that so far as in the present case the assessee as alleged by AO (although without adducing any evidence in support of his claim), obtained rightful possessions of the flat concerned as a licensee holds no merit. Indeed, the purchaser of the flat viz., M/s Pecept Advertising Lt., had to bring a legal action by way o making an application before a judicial body viz., the Competent Authority,

Konkan Division, Mumbai, for recovering the said possession from the assessee. As per the true facts of the case also, the husband of the assessee had acquired the right to possess the property as a director of M/s Kedia Distilleris Ltd., and the wife acquired the right to reside in the flat on account of being her husband. Therefore, this was a valuable right acquired and also enjoyed by her which required a legal action by km/s percept Advertising Ltd., to take away the right. Finally, both the parties arrived at a mutual settlement for delivery of the possession by the assessee on payment of a sum of Rs.55 lakhs to the husband of the assessee by the other party. This settlement was also approved of and ratified by the Competent Authority. Hence, it can be seen that the right of possession of the flat was a legal right which had to be extinguished by not only a process of law but also substantial payment by the other party. Hence, it must be held that the said right of possessions was not only a 'property' as enunciated in the various judicial decisions cited above but it was also a valuable property having a substantial money value. Therefore, the right of possession must be considered to be a 'capital asset' for the purpose of Income Tax Act and especially for section 45 of the Act. Even the AO has treated the said right as a capital asset and has charged the amount received by the husband of the assessee as capital gains in the hands of the assessee. It can also be seen that under the settlement arrived at with the purchaser company, the assessee and her husband relinquished their above right of possessions of the disputed flat. There was also an extinguishment of the said right. Hence, in accordance with the different clauses of Sec.2(47) of the Act, there was a 'transfer' of the capital asset of the assessee during the year under consideration. Any profit or gain arising out of this transfer is, thus, liable to be assessed to tax under the head 'capital gains' as has been done by the AO. However, this capital gain is required to be computed for tax purpose in accordance with the computation provisions of Sec. 48 of the Act. It may, however, be clearly seen that there was no cost of acquisition of the right of possessions of the said disputed flat, as the assessee did not spend anything for obtaining the said possession. Hence, the mechanism for

Computation of capital gain with reference to 'cost of acquisition' of the asset transferred cleaerlyfails. The ultimate result is, thus, that the above mentioned 'capital gains' is not exigible to income tax, as has been held by the Hon'ble Supreme Court in the case of *Srinivasa Setty (B.C)* 128 ITR 294 (SC) and repeated by the Hon'ble Supreme Court in case of PNB Finance Ltd. 220 CTR 110. On the other hand, Ld. DR vehemently relied on the orders of authorities below.

9. We find that AO has made the protective assessment in the hands of husband-and-wife with a view to avoid the loss to the Revenue which may occur in future and AO has held the compensation received by assessee as the relinquishment of right of the property and Ld. CIT(A) has confirmed the action of AO by observing that in case it is not such a transaction which is to be taxed under the head "capital gains" but definitely income as per the provision of "income from other source" and which is chargeable to tax. However, we find that this ITAT Mumbai of "E" Bench has decided the matter in favour of assessee which was involving the same facts of the present case and the relevant extract of the ITAT Mumbai para-7-8 in ITA No. 807/Mum/2013 dated 11.09.2015 is reproduced below:-

> *"7. We have considered the rival contentions. We find that the issue is covered in favour of the assessee by a number of decisions of the Hon'ble Supreme Court as well as various High Courts of the country. The base decision is income* CIT v. B.C. Srinivasa Shetty *(1981) 128 ITR 294; (1981) 2 SCC 460 wherein the Hon'ble Supreme Court has held that all transactions encompassed by section 45 must fall within the computation provisions of section 48. If the computation as provided under section 48 could not be applied to a particular transaction, it must be regarded as "*never intended by section 45 to be the subject of the charge*". The Hon'ble Supreme Court in the case of "*PNB Finance Ltd. vs. CIT (2008) 307 ITR 75' *has reiterated the above proposition of law. In the case of CIT v. B.C. Srinivasa Shetty (supra) the court was considering whether a firm was liable to pay capital gains on the sale of its goodwill to another firm The court found that the consideration received for the sale of goodwill could not be subjected to capital gains because the cost of its acquisition was inherently incapable of being determined. The principle propounded in B.C. Srinivas Shetty (1981) 128 ITR has been followed by several High Courts with reference to the*

consideration received on surrender of inter alia tenancy rights sale of Good Will etc. It was to meet the situation created by the decision in B.C. Srinivas Shetty (1981) 128 ITR 294 (SC) and the subsequent decisions of the High Courts that vide Finance Act, 1994, Section 55(2) was amended to provide that the cost of acquisition of, inter alia, a tenancy right, good will etc. would be taken as nil.

8. Thus, it may be noted that after the amendment of 1995, certain assets like goodwill, tenancy rights etc. have been charged to tax by specifically providing that if there is cost incurred by the assessee in this respect, the cost shall be taken as nil. However, we find that vide amendment, particular asses like goodwill, tenancy rights, trade mark etc. have been brought into the ambit of charging section. However, the rights obtained by way of adverse possession have not been included in the provision neither in the charging section 45 nor in the section 48 which provides mode of computation. Here is no any provision regarding the charging of capital gains tax on an asset title to which has been acquired in recognition of rights of adverse possession. Even u/s. 49, the cost of the asset with regard to certain mode of acquisition, such as by way of gift or will, by succession, inheritance or devolution or on any distribution of assts on the dissolution of a firm, body of AOP or liquidation of company etc.; the rights attained in an asset on account of adverse possession have not been included. Though the Parliament has made an amendment that in certain type of assets like goodwill, tenancy rights etc., the cost of acquisition would be taken as actual cost incurred and if no cost incurred, the same be taken at nil, however the said deeming section is applicable to the assets which have been specifically brought within the purview of the said provision. The assets or the rights which do not find mention in the relevant provision, cannot be brought within the ambit of charging section, in the light of the decision of the Hon'ble Supreme Court. We further find that the issue is now squarely covered by the direct decision of the Hon'ble Bombay High Court in the case of CIT vs. Star Chemicals(Bombay) Pvt. Ltd. *(***Income Tax Appeal No. 1110 of 2009 & Income Tax Appeal No. 1153 of 2009,** *dated 14th August, 2009) wherein the Hon'ble court while answering the question of chargeability of capital gains in relation to an asset/title which was acquired by way of adverse possession, has held that the Tribunal was right in holding that for want of acquisition cost, capital gains tax would not arise. Since a direct decision of the Hon'ble jurisdictional court tin relation to the chargeability of capital gain on asset acquired by way of adverse possession is available, hence, the same is binding upon this Tribunal. We therefore hold that no capital gain are chargeable to tax in relation to the asset acquired by way of adverse possession. Appeal of the assessee is allowed and order of the lower authorities is set aside."*

In view of the above, we find that there was no tenancy right available with the assessee which is, in fact, chargeable under the Income Tax Act under the head "income from capital gains". However, in the present case, assessee was having adverse charge on the property and charge of tax on such transaction has nowhere been definite under the Act. Therefore, we are holding that this transaction out of purview of tax. In our considered view, we reverse the orders of authorities below and delete the addition made by Assessing Officer and subsequently confirmed by Ld. CIT(A). This ground raised by assessee is allowed.

10. In the result, assessee's appeal is allowed.

Coming to assessee's appeal in ITA No.835/Kol/2008.

11. Since the issue is common in assessee's appeal in **ITA No. 281/Kol/13** and taking a consistent view we allow assessee's appeal and this ground raised by assessee is allowed.

12. **In combine result, both the appeal of assessee are allowed.**

Order pronounced in the open court 11/12/2015

Sd/-	Sd/-
(Mahavir Singh)	(Waseem Ahmed)
(Judicial Member)	(Accountant Member)

Kolkata,

*Dkp

दिनांकः- 11/12/2015 **कोलकाता** ।

आदेश की प्रतिलिपि अग्रेषित / Copy of Order Forwarded to:-

1. आवेदक/Assessee –Smt. Yashod Deora, 2-B Queen's Park, Kolkata-700 019
   Shri Pradeep Kr. Deora, 2B, Queens Park, Kolkata-19
2. राजस्व/Revenue-ITO, Ward-30(3), Aayakar Bhawan Dakshin, 2 Gariahat Rd.(S) Kol-68
   DCIT,CC-XXIV, Kolkata
3. संबंधित आयकर आयुक्त / Concerned CIT Kolkata
4. आयकर आयुक्त- अपील / CIT (A) Kolkata
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, **कोलकाता** / DR, ITAT, Kolkata
6. गार्ड फाइल / Guard file.

By order/आदेश से,

/True Copy/

उप/सहायक पंजीकार
आयकर अपीलीय अधिकरण,
कोलकाता ।

Direct Taxes Professionals' Association

(Registered under Societies Registration Act, 1961. Registration No. S/60583 of 1988-89)
Secretariat : 3, GOVT. PLACE WEST, INCOME TAX BUILDING, KOLKATA - 700 001
Phone : 2242-0638, 3262-8487 E-mail : dtpakolkata@gmail.com Website : www.dtpa.org

Members are informed that as per the decision taken in the Executive Committee Meeting held on 15/02/2016, sending hard copies of Circulars will be discontinued w.e.f. 01/04/2016.

Henceforth all the circulars/information related to Study Circle Meetings & other events will be sent through e-mail/sms on the email address/mobile number of the members available on record of the association.

Members will also be kept updated about the study circle meetings and other events through other social media apart from hosting of the events on our website www.dtpa.org

Members who are not receiving emails or sms regarding event information, are requested to mail their updated email id and/or mobile number to dtpakolkata@gmail.com

Members are also informed that DTPA Members Directory 2016 is ready. A copy of the same can be collected either personally or through authorised representative on or after 7th March 2016 by paying a nominal charge of ₹ 100/- during Monday to Friday between 11.30 a.m. to 6.30 p.m. Additional copy will be charged @ ₹ 500/-.

CA Sunil Surana
President

CA Vikash Parakh
General Secretary

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From the desk of General Secretary
- Activities since 08.11.2015

STUDY CIRCLE MEETING & GROUP DISCUSSION

SL. No.	Date	Name of Programme	Speaker
1.	16.11.2015	S. C. Meeting on "Filing of Form AOC-4 under Companies Act, 2013" & "Filing of Form MGT-7 under Companies Act, 2013" at DTPA Conference Room	CA. KAMAL BAGRODIA & CS. ANJAN ROY
2.	20.11.2015	S. C. Meeting on "Recent Judicial Pronouncements under Income Tax" & "Stay of Demand under Income Tax" at DTPA Conference Room	Adv. S. K. Tulsiyan & CA. P. R. Kothari
3.	24.11.2015	Group Discussion on "Search Related Assessments" at DTPA Conference Room	Adv. Paras Kochar
4.	27.11.2015	S. C. Meeting on "Vat Audit & Overview of Form 88 & GST-Basic Concepts" at DTPA Conference Room	CA. Rip Das & CA. Daya Shankar Agarwala
5.	08.12.2015	Meeting on "Transparency & Integrity" at Multi Purpose Hall, Aayakar Bhawan, Kolkata - 700 069	Shri A. K. Singh , Pr, CCIT, W. B. & Sikkim
6.	10.12.2015	Group Discussion meeting on"Taxation Aspects of Private Discretionary Trusts"at DTPA Conference Room	CA. Ramesh Kr. Patodia
7.	12.12.2015	Full Day Seminar at National Library on"Paradigm Shift in Taxation Regime"	Chief Guest: Hon'ble Shri P. M. Jagtap, Sr. Member, ITAT Chairman Shri D. S.Damle & Speaker: Shri K.C. Singhal, Chairman: Shri Subodh Kr.Agarwal Speaker: Shri Pradip Kapasi, FCA,Mumbai,
8.	18.12.2015	S. C. Meeting on "Income Tax Search & Survey by Investigation Wing" at DTPA Conference Room	Shri R. S. Upadhyay, DIT(Inv,) & Adv. Paras Kochar
9.	22.12.2015	S. C. Meeting on "TDS Issues and Solutions" at DTPA Conference Room	CA. P. K. Himmatsinghka Shri Rakesh Goyal, CIT(TDS), Kolkata
10.	15.01.2016	Group Discussion on 'Compliance of e-Notices from Income Tax Department' at DTPA Conference Room.	CA. Anand Kr. Tibrewal
11.	22.01.2016	S. C. Meeting on "Penalties under Income Tax Act & Prosecution under Income Tax Act" at DTPA Conference Room	Adv. Subash Agarwal CA. Siddharth Jhajharia
12.	27.01.2016	S. C. Meeting on "Internal Financial Controls:Overview and Reporting Requirements" at DTPA Conference Room	CA Palash Lahiri
13.	29.01.2016	S. C. Meeting on "Service Tax Implications under Reverse Charge Mechanism & Reimbursement of Expenses " & "Recent Changes In Companies Act,2013 for Private & Small Companies" at DTPA Conference Room	CA. Sushil Goyal CS. Ravi Verma
14.	10.02.2016	Group Discussion "Remittance Certificate (Form 15CB) & Related matters u/s 195	CA. Sushil Kr. Pransukhka
15.	17.02.2016	S. C. Meeting on "Fraud Reporting under Companies Act, 2013 & Corporate Social Responsibility& Related Party Transactions under Companies Act, 2013"	CA(Dr.) Debashish Mitra CA. Sumit Binani
16.	23.02.2016	S. C.Meeting on "Taxation Aspects of Charitable Trusts & Taxation Aspects of Private Discretionary Trusts"	CA. K. K. Chhaparia Adv. Manoj Kataruka
17.	29.02.2016	S. C. Meeting on "Live Telecast and Discussion on Union Budget Finance Bill - 2016"	Adv. S. D. Verma CA. Ankit Kanodia

Other Events

1.	07.11.2015	Diwali & Bijaya Get-together jointly with EIRC
2.	03.01.2016	Cricket Match between DTPA & IRS Association at Sambaran Banerjee Cricket Academy, Vivekanand Park , Kolkata
3.	08.01.2016	New year Get together over Ghazal Nite cum Dinner with Pr. CITs & CITs, Income Tax at Shisha Reincarnated, Camac Street, Kolkata
4.	17.01.2016	Inter CA Study Circle Cricket tournament at Space Circle Club
5.	04.02.2016	Interactive Session jointly with MCC, EIRC & ACAE) with Shri M. K. Mirani, Chairman,Settlement Commission at Oberoi Grand, Kolkata

NEW MEMBERS ADMITTED ON 15.12.2015

Sl. No.	NAME	PROPOSED BY	QUALIFICATION	I.M.NO.	MOBILE NO.	E. MAIL ID.
1	Mr. Rohit Agrawal	Mr. Amit Kr. Agarwal	B.Com, CA, LL.B	68874	9830177778	rohit.kr.agr@gmail.com
2	Mr. Ayush Goel	Mr. Arun Patodia	B.Com(Hons), CA	303536	9903874874	ayush@basco.in
3	Mr. Kaustav Rathi	Mr. Rakesh Jain	CA	302309	9830476123	cakaustav123@gmail.com
4	Mr. Rajeev Kr. Agarwal	Mr. Niraj Harodia	FCA, FCS, M.Com	63268	9831143988	carajeev@yahoo.co.in

NEW MEMBERS ADMITTED ON 15.02.2016

Sl. No.	NAME	PROPOSED BY	QUALIFICATION	I.M.NO.	MOBILE NO.	E. MAIL ID.
1	Mr. Abhisek Bhutra	Mr. Ashok Kr. Sureka	C.A.	301481	9830126642	abhisek@rmrco.in
2	Mr. Amrish Kr. Bhuwania	Mr. Niraj Harodia	CA.	65207	9007881702	amrishbhuwania@gmail.com
3	Mr. Mayank Rungta	Mr. Sushil Kr. Rungta	CA.	308467	9830318449	rungtaco@gmail.com
4	Mr. Ishu Dudhwewala	Mr. Akkal Dudhwewala	B.Com(H), CA	308280	9748997749	ishududhwewala@gmail.com

Direct Taxes Professionals' Association

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APPLICATION FOR MEMBERSHIP

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Dear Sir,

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3. Date of Birth : ______
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5. Professional Status : ❒ In Practice ❒ In Service ❒ In Business ❒ Others (Pls. specify)
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9. Blood Group : ______ (Self) ______ (Spouse)
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Signature of the Applicant

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*2) Cheques should be drawn in favour of **"Direct Taxes Professionals' Association"***

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"Filing of Form AOC - 4 & MGT -7 under Companies Act, 2013" on 16th November, 2015

Guest Speakers

CS. Anjan Kr. Roy

CA. Kamal Bagrodia

"Recent Judicial Pronouncements & Stay of Demand under Income Tax" on 20th November, 2015

Guest Speakers

CA. P.R. Kothari

CA. S. K. Tulsiyan

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Initiator

Advocate Paras Kochar

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Advocate Paras Kochar

"TDS Issues and Solutions & Critical Issues in Withholding Tax u/s 195" on 22nd December, 2015

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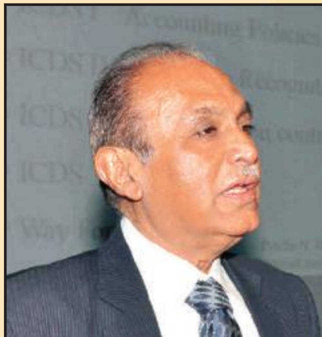
Shri Rakesh Goyal
CIT (TDS)

CA. P. K. Himmatsinghka

"Full Day Seminar at National Library on Paradigm Shift in Taxation Regime" on 12th December, 2015



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FCA,Mumbai

Shri K.C. Singhal
V.P., ITAT(Retd.)

Shri P. M. Jagtap
Sr. Member, ITAT Kolkata

CA Subodh Kr. Agrawal
Past President ICAI

GROUP DISCUSSION

"Compliance of e-Notices from Income Tax Department" on Friday, 15th January 2016

Initiator

CA A. K. Tibrewal

STUDY CIRCLE MEETINGS

"Penalties under Income Tax Act" on 22nd January, 2016

Guest Speakers

Adv. Subash Agarwal

CA Siddharth Jhajharia

"Internal Financial Controls : Overview and Reporting Requirements" on 27th January, 2016

Guest Speaker

CA PALASH LAHIRI

"Service Tax Implications under Reverse Charge Mechanism & Reimbursement of Expenses & Recent Changes in Companies Act, 2013 for Private & Small companies" on 29th January, 2016

Guest Speakers

CA Sushil Kr. Goyal

CS Ravi Verma

OTHER EVENTS

"Meeting on Transparency & Integrity by Shri A. K. Singh , Pr, CCIT, W. B. & Sikkim" on 8th December, 2015

"Cricket Match with IRS Association at Sambaran Cricket Academy, Vivekanand Park, Southern Avenue, Kolkata", on 3rd January, 2016

"New Year Get Together cum Ghazal Nite with Income Tax CCITs & CITs at Shisha Reincarnated, Camac Street, Kolkata" on 8th January, 2016

"Inter CA Study Circle Indoor Cricket Tournament at Space Club" on 17th January, 2016

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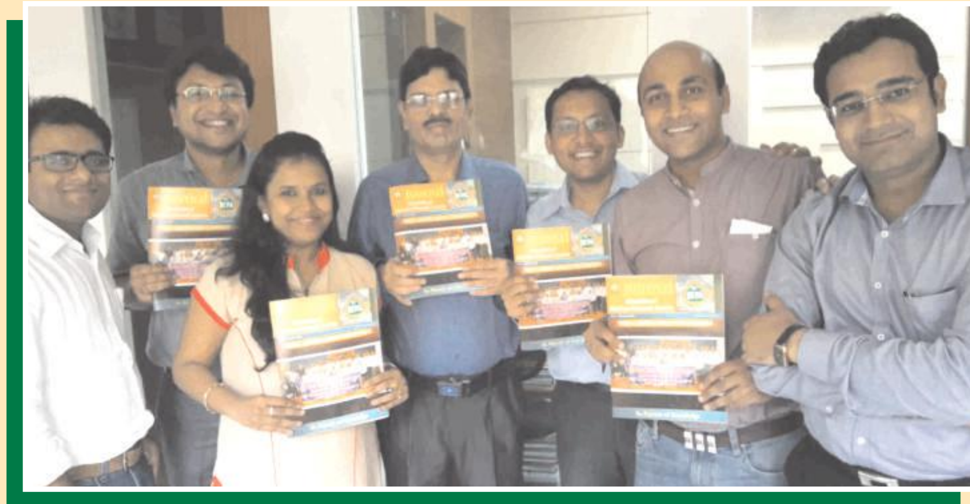

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