

Western India Regional Council of ICAI



Taxation of Real Estate transactions including Issuance of Remittance Certificate for transactions with Non-Residents



20 July 2013

- Rajesh S. Athavale

Content

- Section 45 – Taxability of Capital Gains
- Section 48 – Computation of Capital Gains
- Section 2(14) – Capital Asset
- Section 2(47) – Transfer
- Capital Asset – Issues
- Agricultural Land – Issues
- Transfer – Issues
- Cost of Acquisition and Sale Consideration
- Redevelopment of Property
- Deduction – Reinvestment Scheme
- Section 194IA – TDS on Sale of Immovable Property
- Case Study on Sections 45 and 195

Section 45 – Taxability of Capital Gains

- Any profits or gains
- arising from the transfer of a capital asset effected in the previous year shall,
- save as otherwise provided in Sections 54, 54B, 54D, 54E, 54EA, 54EB, 54F, 54G and 54H
- be chargeable to income- tax under the head "Capital gains",
- and shall be deemed to be the income of the previous year in which the transfer took place

Section 48 – Computation of Capital Gains

- Net amount = Capital Gains/Loss
- Full value of the consideration received or accruing as a result of the transfer of the capital asset
- Deduction :-
 - (i) expenditure incurred wholly and exclusively in connection with such transfer;
 - (ii) the cost of acquisition of the asset and the cost of any improvement thereto

Section 2(14) – Capital Asset

“Capital asset” means property of any kind held by an assessee, whether or not connected with his business or profession, but does not include –

- (i) any stock-in-trade, consumable stores or raw materials held for the purposes of his business or profession;
- (ii)
- (iii) agricultural land in India, not being land situate -
 - (a) in any area which is comprised within the jurisdiction of a municipality (whether known as a municipality, municipal corporation, notified area committee, town area committee, town committee, or by any other name) or a cantonment board and which has a population of not less than ten thousand according to the last preceding census of which the relevant figures have been published before the 1st day of the previous year; or

Section 2(14) – Capital Asset

- *(b) in any area within such distance, measured aerially, -
- (I) not being more than two kilometers, from the local limits of any municipality or cantonment board referred to in item (a) and which has a population of more than 10,000 but not exceeding 1,00,000
 - (II) not being more than six kilometers, from the local limits of any municipality or cantonment board referred to in item (a) and which has a population of more than 1,00,000 but not exceeding 10,00,000
 - (III) not being more than eight kilometers, from the local limits of any municipality or cantonment board referred to in item (a) and which has a population of more than 10,00,000

* Amendment by Finance Act, 2013 (with effect from AY 2014-15)

Section 2(47) - Transfer

“Transfer”, in relation to a capital asset, includes, -

(i) Sale, exchange or relinquishment

(ii) Extinguishment of any rights therein

(iii) the compulsory acquisition thereof under any law

(iv) Conversion of capital assets into stock-in-trade

(v) Possession of any immovable property 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)

(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

Capital Asset - Issues

- Right to obtain conveyance of immovable property is a capital asset :
 - ✓ CIT v. Tata Services Ltd. (122 ITR 594) (Bom)
 - ✓ CIT v. Vijay Flexible Containers (186 ITR 693) (Bom)
- Tenancy rights – Capital Asset
 - ✓ CIT v. D.P. Sandu Bros Chembur (P) Ltd (273 ITR 1) (SC)
- Development rights – Capital Asset
 - ✓ CIT v. Lokhandwala Construction Inds. Ltd. (260 ITR 579)(Bom)
- FSI/TDR - immovable property
 - ✓ Chheda Housing Development Corpn., a Partnership firm vs. Bibijan Shaikh, Farid & Ors. (2007) (3) MHLJ 402 (Bom)

Agricultural Land - Issues

- All areas whether notified or not
- Limits
- Measurement of distance
 - ✓ CIT v. Lal Singh (195 Taxman 420)(P & H)
 - ✓ Laukik Developers v. DCIT (105 ITD 657)(Mum)
- Population
- Land should be Agricultural at the time of transfer
 - ✓ Kalpetta Estates Ltd. v. CIT (185 ITR 318)(Ker)
- Recent Judgements under the Old Law:
 - ✓ CIT v. Rani Tara Devi (Smt.) (2013) 214 Taxman 321 (P&H)
 - ✓ ITO v. Amrutilal B. Shah(2013) 22 ITR 668(Mum) (Trib)

Transfer - Issues

- Agreement of development enables the passing of domain and control of the immovable property by grant of an irrevocable authority or license - transfer
 - ✓ Chaturbhuji Dwarkadas Kapadia v. CIT (260 ITR 491 (Bom))
 - ✓ Durdana Khatoon v. ACIT (2013) (24 ITR 55) (Hyd)
 - ✓ Mali Florex Ltd. v. DCIT (2013) (57 SOT 37)(URO) (Hyd)
 - ✓ G. Sreenivasan v. DCIT (2013)(140 ITD 235)(Coch)
- Conversion of Capital Asset into stock in trade
 - ✓ As per section 45(2), if a capital asset is converted into stock in trade, the capital gain is taxable in the year such stock is sold, and the fair market value of the asset on the date of such conversion or treatment shall be deemed to be the full value of consideration received or accruing as a result of the transfer¹⁰

Transfer - Issues

- Piecemeal Transfer
 - ✓ Ajai Kumar Sah Jagati v. ITO (55 ITD 348) (Del)
 - ✓ G. G. Dandekar Machines Works Ltd. v. JCIT (Mum)
- Conversion of Stock in trade into Capital Asset
 - ✓ Kalyani Exports & Inv. (P) Ltd.v. DCIT (78 ITD 95)(Pune)(TM)
 - ✓ CIT v. Bright Star Investments (P) Ltd (24 SOT 288)(Mum) - Holding period is to be considered from the date of acquisition
 - ✓ Splendor Constructions (P) Ltd. v. ITO (27 SOT 39) (Delhi) – Holding Period to be considered is from the date of conversion to investment
- Exchange
 - ✓ CIT v. George Henderson and Co. Ltd. (66 ITR 622) (SC)
 - ✓ CIT v. Tata Iron and Steel Company Limited (206 ITR 196)(Bom)

Transfer - Issues

- Conversion of Tenancy into Ownership
 - ✓ Dr. D. A. Irani v. ITO (1984) (7 ITD 160) (Bom)(SB)
- Family arrangement – NO Transfer
 - ✓ family partition which results in an adjustment of shares and of the respective rights in the family properties is not a “transfer” in the eyes of law
 - ✓ Kale (AIR 1976 SC 807)(SC)
 - ✓ CIT v. Kay Arr Enterprises (299 ITR 348)(Mad)
 - ✓ CIT v. R. Nagaraja Rao (2013) (352 ITR 565) (Karn)
 - ✓ CIT v. Ashwani Chopra(2013) (352 ITR 620)(P&H)

Transfer - Issues

- Year of Assessment
 - ✓ The year in which transfer takes place
 - ✓ Passing to title is decisive and not the date of payment
 - Sundaram Iyengar v. CIT (37 ITR 26)(Mad)
 - ✓ Date of Purchase of Agreement is the year of acquisition
 - Vimal Lalchand Mudha (187 ITR 0613)
 - CIT v. Anilaben Upendra Shah (262 ITR 657) (Guj)
 - ACIT V. Smt. Hansaben B. Mehta (90 ITD 710)(Mum)
 - Girish C. Bathija v. ITO (113 TTJ 521)(Mum)
 - ACIT v. Sharad Thadani(104 TTJ 567)(Luk)

Cost of Acquisition and Consideration

- In the absence of cost of acquisition, computation machinery fails
 - ✓ CIT v. B.C.Srinvasa shetty [1981] 128 ITR 294 (SC)
- Full value of consideration
 - ✓ In case of an exchange, the money's worth of the property received in exchange constitutes the consideration for the property parted in exchange - CIT v. George Henderson and Co. Ltd. (66 ITR 622) (SC)
 - ✓ Section 50D – Fair Market Value (with effect from AY 2013-14)
 - ✓ CIT v. Raman Kumar Suri (2013) (212 Taxman 411) (Bom)
- Adverse Possession
 - ✓ CIT v. Star Chemicals (Bom.) Pvt. Ltd. (Bom.) (HC) (Unreported)/ DCIT v. Star Chemicals (Bom) (P) Ltd. (110 TTJ 753) confirmed by HC

Cost of Acquisition and Consideration

- Capital gains- Cost of acquisition- Tenancy rights – Demolishing old property and construction of new property- Cost paid by assessee and not on the basis of valuation report
 - ✓ Nila V. Shah(Mrs.) v. ITO (2013) (83 DTR 218) (Mum)
- Semi-finished building – Cost of improvement of property
 - ✓ S. P. Balasubramaniam v. ITO (2013) (24 ITR 47) (Chennai)(Trib)
- Land purchased by the assessee; however cost of construction met by assessee's father
 - ✓ Smt. Kalyani Dixit [TS-290-ITAT-2013(AGR)]
 - ✓ Sonia Maria Mistry . v ITO (2013) (141 ITD 508) (Mum)

Redevelopment of Property

- Where Society transfers additional entitlement (development right) to the Developer for development
 - ✓ CIT v. B.C.Srinvasa shetty [1981] 128 ITR 294 (SC)
 - ✓ New Shailaja CHS Ltd. v. ITO (2009-TIOL-58-ITAT-MUM)
 - ✓ Jethalal D.Mehta v. DCIT (2005) 2 SOT 422 (Mum)
 - ✓ Shakti Insulated Wires Ltd v. JCIT (2003) 87 ITD 56 (Mum) – Contrary
- The assignment of TDR to the developer and in turn the additional floor to be constructed and also repair / renovation of building to be carried out
 - ✓ ITO v. Lotia Court Co-op. Housing Society Ltd.(12 DTR 396)(Mum)

Redevelopment of Property

- Compensation received by the society or by the member for allowing the developer(rightful owner of TDR/FSI) to develop or construct the property is liable to be tax in the hand of the society or members
 - ✓ CIT v. B.C.Srinvasa shetty [1981] 128 ITR 294 (SC)
 - ✓ Om Shanti Cooperative Society (ITA 2550/Mum/2008)(Mum)
 - ✓ In case of flat owner society Legal ownership lies with the individual member and therefore individual members are entitled to receive consideration and claim exemption under section 5(1)(iv) of the Wealth Tax
 - ✓ Deepak S.Shah v. ITO (2009) (29 SOT 26) (Mum)
 - ✓ Land Breeze Co. Operative Hosing Society Ltd. v. ITO (2013) (55 SOT 103)(Mum)

Redevelopment of Property

- Where in the redevelopment, all the members hand over the possession of the flats occupied by each member in the said buildings possessed by the Society to the Developer in consideration of another flat in the redeveloped property, equivalent to the same area which was occupied by the members earlier, together with the amenities and common areas and facilities, free of cost within a specified period
 - ✓ Exchange of assets – Transfer
 - ✓ Technically the land and building is owned by the Society but in a fact each member of the Society has a corresponding right in the land and building in relation to the investment made by him in the flat
 - ✓ Deduction u/s. 54 - CIT v. Hilla Wadia (216 ITR 376)(Bom)

Redevelopment of Property

- Surrender of Tenancy rights in consideration of new flat
 - ✓ Exchange of assets – Transfer
 - ✓ Deduction u/s. 54F

Deduction – Reinvestment Scheme – Section 54

Capital Gains on Sale of	Type of Capital Gain	Reinvestments of gains in	Period and restrictions
Residential House Property [Section 54]	Long term	Residential house Property	Within 1 year before or within 2 years after date of transfer or construct within three years.
Any long term capital asset [Section 54EC]	Long term	NHAI or REC bonds	Within 6 months of date of transfer. Max investment limit = 50 lac rupees

Deduction – Reinvestment Scheme – Section 54

Capital Gains on Sale of	Type of Capital Gain	Reinvestments of gains in	Period and restrictions
Any long term capital asset (other than residential house) [Section 54F]	Long term	Net consideration to be invested in residential house (not capital gains)	Purchase 1 year before or within 2years or construct within 3 years. No additional property should be constructed or purchase within 3 years of date of transfer

Leena J. Shah v. ACIT (6 SOT 721)(Ahd) – Reinvestment in house property outside India – not eligible for deduction under section 54F
Prema P. Shah v. ITO (100 ITD 60)(Mum) – Reinvestment in house property outside India – eligible for deduction under section 54

Section 194IA – TDS on Sale of Immovable Property

- Any person, being a transferee, responsible for paying (other than the person referred 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 time of credit of such sum to the account of the transferor or at time of payment of such sum in cash or by issue of cheque or draft or by any other mode, whichever is earlier,
- deduct an amount equal to 1% of such sum as income tax thereon
- No deduction of tax at source where the consideration for the transfer of an immovable property is less than INR 50 lakhs
- 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 situated 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.

Section 194IA – TDS on Sale of Immovable Property

- 1% Tax to be deducted from the consideration payable
- Due date of payment – 7th of next month
- Payment challan-sum-statement in Form 26QB
- Form 16B to be issued within 15 days

Notification dated 31 May 2013

Section 194IA – TDS on Sale of Immovable Property

Issues:

- Definition of “Transfer”
- Capital Assets v. Stock-in-trade
- Land and Building – whether it include tenancy rights, TDR, FSI, booking rights, JDA, Long term lease, Slump Sale
 - ✓ DCIT v. Tejinder Singh (50 SOT 391)(Kol)
 - ✓ ITO v. Yasin Godil (20 taxmann.com 424)(Ahd)
- Should the tax be deducted on payment made on or after 1 June 2013 pursuant to a transfer agreement executed before 1 June 2013?
- Should taxes be withheld only on the amount paid only on or after 1 June 2013 or on the entire amount of transaction?
- Whether transaction exempted under section 47 excluded?
- In case of jointly owned property, is the threshold of INR 50 lakhs applicable per property or per property owner?

Section 194IA – TDS on Sale of Immovable Property

Issues:

- Would the consideration include charges for various components such as premium for view, flow rise, development charges, service tax/VAT, interest for late payments, membership fees, deposits for various facilities, documentation and legal charges?
- Does this regime apply in case of a restructuring arrangement like amalgamation, demerger, slump sale, etc. and more importantly how and when need tax withholding be done?
- Where stamp value is higher than agreement amount, whether the same should be considered as amount of consideration as provided in Section 50C?
- Applicable to without consideration transfers or barter transactions?

Section 194IA – TDS on Sale of Immovable Property

Issues:

- Applicable where consideration is not ascertainable? How to ascertain the consideration? Is section 50D applicable?
- Can the transferor obtain a nil / lower withholding certificate form Income-tax Authorities?
- In case where the buyer uses a housing loan from a bank, would the bank be required to comply with the withholding tax requirements as an agent of the buyer on direct disbursements to the developer?
- How will the developer be eligible to use credit for the tax withholding amount, given that the developer generally follows the “percentage completion method” for accounting and tax purposes – would the tax credit be available in the year of deduction or in proportion to the yearly income offered to tax?

Case Study on Sections 45 and 195

Facts:

- Mr. Rajdatta Kulkarni, an Indian resident, intends to purchase a residential house property from Mr. Shekhar Oak, a non-resident Indian
- The property is located in Thane. This property was transferred to Mr. Shekhar Oak under a will on 15 March 2011 after the demise of his father
- The cost of acquisition of this property in the financial year 2000-01 was INR 50 lakhs. The sale proceeds have been fixed at INR 2.5 crores and the property is proposed to be sold on 31 July 2013
- Mr. Shekhar Oak has been working in London since last 15 years and has been filing his income tax return in UK. He is a tax resident of UK. He does not have any other source of Income in India. Mr. Shekhar Oak has short listed two house properties, out of which he would buy only one property out of the sale proceeds realised from Thane property. One property is located in London whereas other one is in Delhi

Case Study

Facts:

- Mr. Shekhar Oak has a saving bank account (NRO Account) in Thane Bharat Sahakari Bank, Naupada branch in Thane. He has requested Mr. Rajdatta Kulkarni to deposit the sale proceeds of the property in the said bank. Mr. Shekhar Oak is going to open a bank account under Capital Gains Account Scheme, 1988 and would like to transfer the said sale proceeds to such Capital Gains Account. He would utilise the said sale proceeds in purchasing the new property in August 2013. The cost of acquisition of the new property would be INR 2.5 crores
- Mr. Rajdatta Kulkarni and Mr. Shekhar Oak have now approached CA Arvind Karandikar, a practising Chartered Accountant in Thane for the advice on capital gains tax and remittance of sale proceeds to London (if he reinvests in London property). Mr. Shekhar Oak has agreed to provide all the information/documents for determining his capital gains tax liability. Mr. Shekhar Oak does not mind if he is required to pay advance tax in India, if any payable, on the realisation of capital gains

Case Study

Issues:

- CA Arvind Karandikar has to take a holistic view of the matter and advise his clients covering the following issues:
 - ✓ Whether the capital gains realised on sale of property will be taxable as short-term capital gains or long-term capital gains?
 - ✓ Since Mr. Shekhar Oak is a non-resident in India, whether the cost inflation index benefit is available to him? If yes, what is the cost inflation index applicable for him to determine the indexed cost of acquisition?
 - ✓ Eligibility of claiming deduction under section 54 of the Income tax Act in respect of reinvestment in new house property
 - ✓ As the sale proceeds is not remitted outside India, whether provisions of section 195 of the Income tax Act are applicable? If yes, what is a role of a Chartered Accountant in issuing the certificate in Form 15CB
 - ✓ Capital gains tax liability, if any
 - ✓ As Mr. Shekhar Oak has been regularly filing his income tax return in UK, does he require to file his income tax return again in India?

Thank You



CA.Rajesh S. Athavale