



**WESTERN INDIA  
REGIONAL  
COUNCIL OF ICAI**

**RECENT  
DEVELOPMENTS  
IN CAPITAL GAINS  
PROVISIONS**

**CA VYOMESH PATHAK**

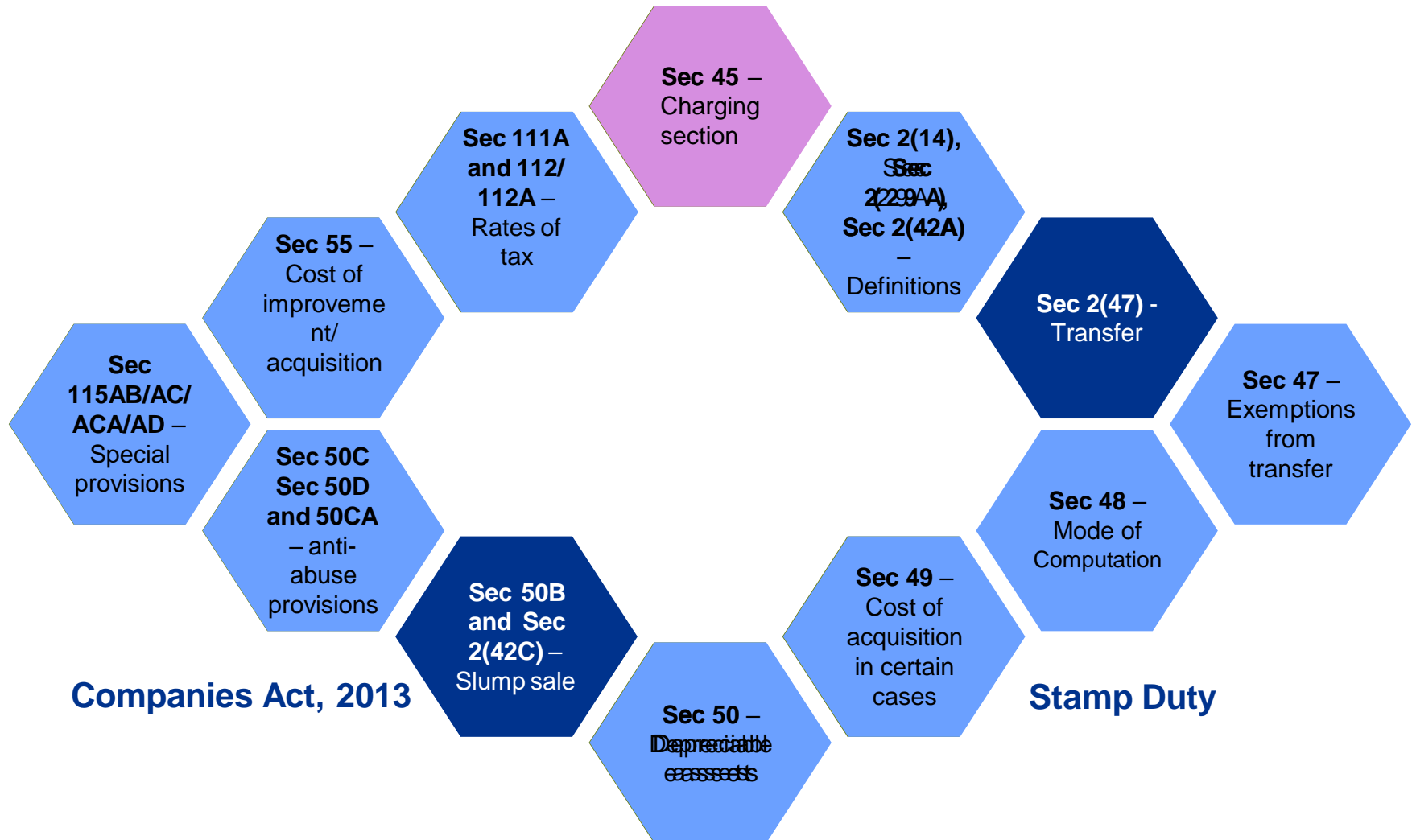
**25 JULY 2023**



# SCHEME OF CAPITAL GAINS TAX

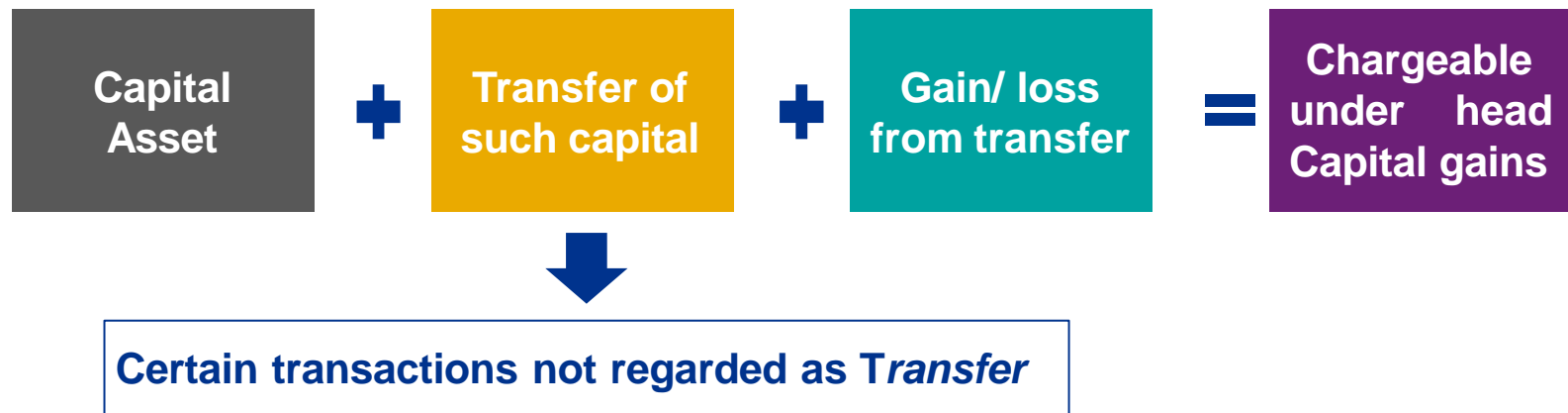
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# Scheme of capital gains tax under the Act



# Section 45 – Charging Section

Any **profits or gains** arising from the **transfer** of a **capital asset** effected in the PY, shall be chargeable to income-tax under the head “Capital Gains” and shall be deemed to be **income of the PY** in which the **transfer took place**.



# What is a Capital Asset

**“Capital asset”** means:

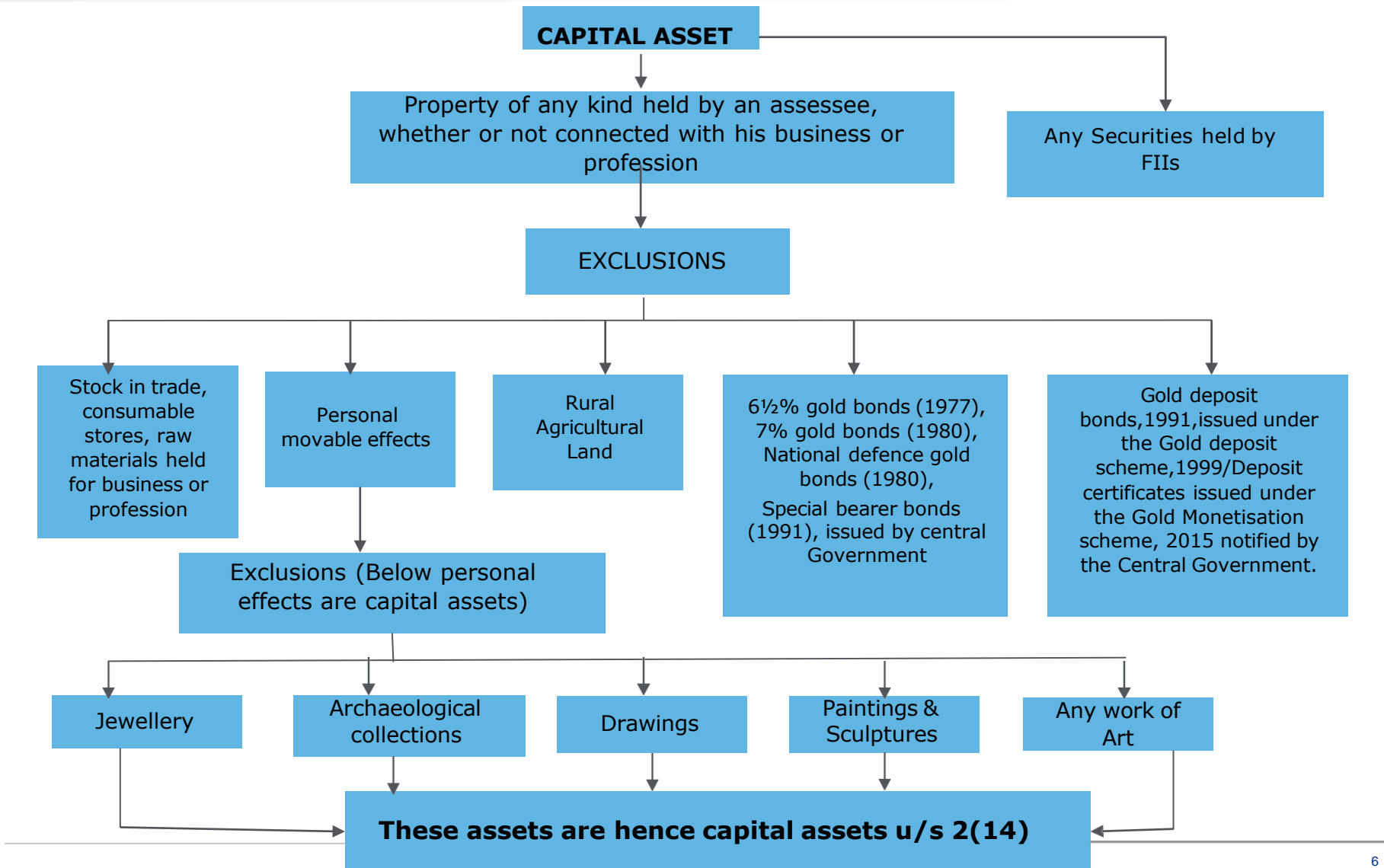
- **Property** of any kind, whether or not in connection with business/ profession;
- Securities held by a FII;

**but does not include:**

- Stock in trade, raw materials, consumable stores held for the purposes of business/ profession
- Personal effects for personal use excluding jewellery, archaeological collections, drawings, paintings, sculptures, any work of art
- Agricultural land in India (subject to exceptions)
- Gold bonds 1977
- Special bearer bonds
- Gold deposit bonds

**Property** includes rights in relation to an Indian company including rights of management or control or any other rights whatsoever – **Indirect transfer of shares/ interest**

# What is a Capital Asset- Snap Shot



# Meaning of Transfer

**Sale, exchange or  
relinquishment of  
asset**

**Extinguishment of  
right in an asset**

**Compulsory  
acquisition of an  
asset under law**

**Conversion of  
asset into stock  
in trade**

**Maturity or  
redemption of  
Zero Coupon  
Bond**

**Transaction which has  
effect of transferring/  
enabling enjoyment of  
immovable property**

**Definition of transfer expanded to include indirect transfer of shares/ interest with retrospective effect**

# Section 47- Transactions not regarded as Transfer

Transfer under a **gift, will or an irrevocable trust**

Transfer by a **holding company to its wholly-owned Indian subsidiary** and vice versa – **8 year lock-in**

**Amalgamation** - Transfer of capital assets by amalgamating company and transfer of shares in the amalgamating company subject to conditions (Amalgamated company is an Indian company) – **Similar exemption in case of indirect transfer of shares**

**Demerger** - Transfer of capital assets by the demerged company and issue of shares by the resulting company to the shareholders of the demerged company subject to conditions (Resulting Co. is an Indian Co.) – **Similar exemption in case of indirect transfer of shares**

**Transfer of shares** in an Indian company by an **amalgamating foreign company** to the amalgamated foreign company subject to conditions

**Conversion of bonds/ debentures and preference shares** into **shares/ debentures** of the same company

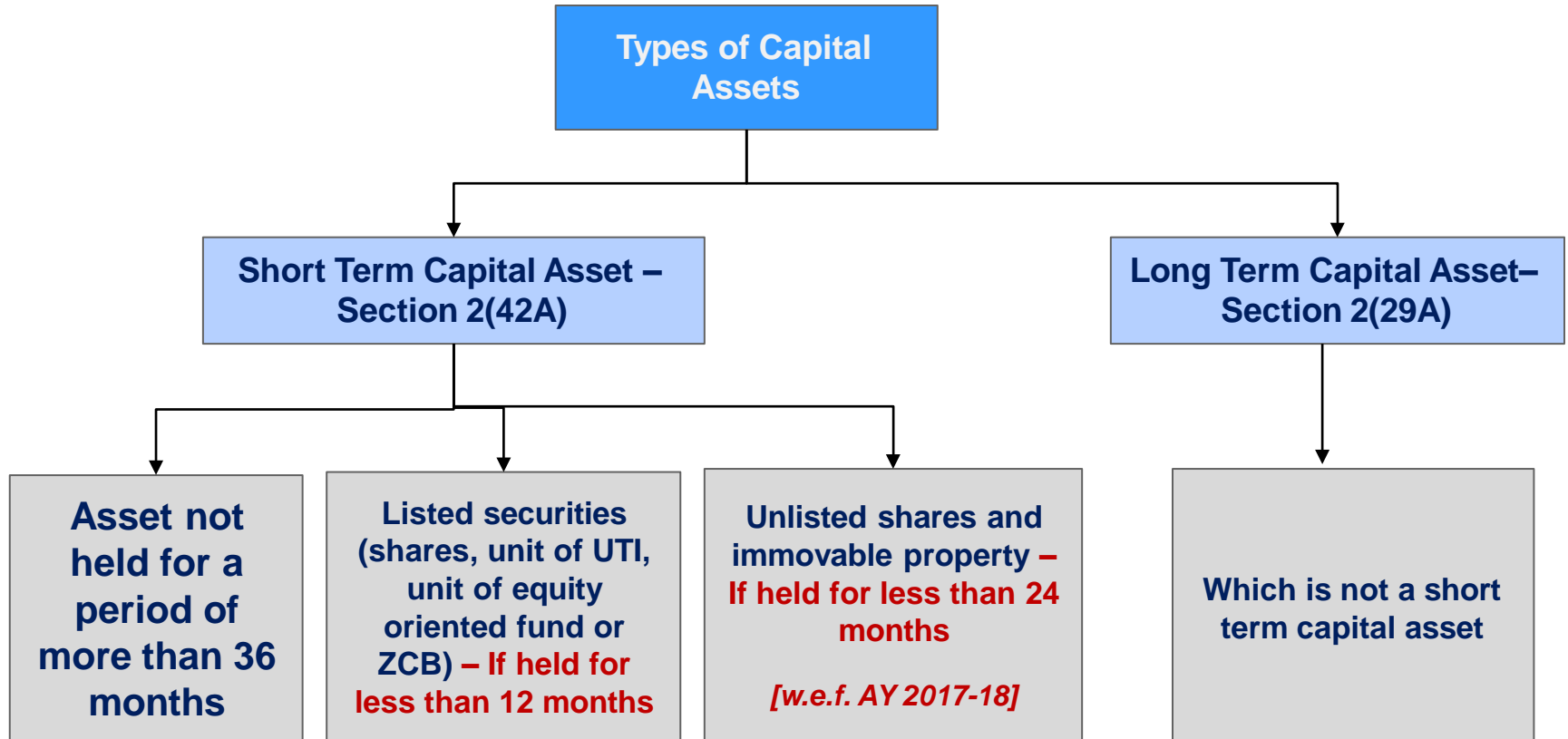
NR to NR **transfer of rupee denominated bond** of an Indian company issued outside India

Transfer by a firm or sole proprietary concern to the company on succession (subject to conditions)

Transfer by a **private company/ unlisted public company to a LLP as a result of conversion of the company** into a LLP (subject to conditions) – **Taxability in case of breach of conditions?**



# Types of Capital Assets and Period of Holding



# Types of Capital Assets and Period of Holding

Capital Assets	Months to be checked for determining nature of Capital Asset
Listed Equity Shares/ Listed Preference Shares/ Listed Debentures	12 months
Unlisted shares/ Shares of a Private Company	24 months
Equity Oriented Mutual Funds	12 months
Debt Oriented Mutual Funds	36 months
Zero Coupon Bonds	12 months
Bonds ( Other than zero coupon bonds)	36 months
Unlisted Debentures	36 months
Units of UTI	12 months
Land / Building / Immovable Property	24 months

# Period of Holding- Residential Property

## Background

- In many cases, flats etc booked while the project is under construction
- Developer provides the allotment letter to the allottee
- Actual possession may take 2-3 years or even more at times

## Period of holding to be considered from which date

- The matter is subject to litigation
- However, a position can be taken, of course based on the facts of respective case and available documentation that period of holding can be considered from the **date of allotment** and not from the date of possession

## Judicial Precedents supporting the above view

- Anita Kanjani v ACIT [2017] ITA No. 2291/Mum/2015 (Mumbai ITAT)
- Jitendra Mohan v ITO [2007] 11 SOT 594 (Delhi Tribunal)
- ACIT v Sanjay Kumath [2014] 42 taxmann.com 38 (Indore Tribunal)

# Section 48 - Mode of Computation

## Full Value of Consideration

- Amount that the transferor receives as consideration
- If consideration is in kind, FMV value to be considered
- **Deemed consideration for Land and Building – Stamp duty value (50C)- 10% relaxation granted by Finance Act 2020**
- **Deemed consideration when consideration is not ascertainable – FMV of asset (50D)**

## Less: Cost of acquisition

- Cost of acquisition is typically “cost to the assessee”
- Cost of asset in special cases specified in Section 55 viz. Asset acquired prior to 01.04.2001 – FMV as on 2001 or COA at option of assessee
- **Benefit of Indexation - First proviso and Second proviso**

## Less: Cost of improvement

- Capital expenditure incurred for additions/ alterations to capital asset
- Does not include any expenditure deductible under any other head of income

## Less: Expenses incurred in connection with transfer

- Expenses such legal fee paid for removal of encumbrances
- STT paid is allowable as a deductible expense

## Capital gains

# Section 48 – Second proviso

## Why this proviso

- Indexation is a technique to adjust income payments by means of a price index, in order to maintain the purchasing power of the public after inflation

## Applicability

- Resident and non-residents;
- Long-term capital gains arising from the transfer of a long-term capital asset;
- Specifically excluded - Shares of an Indian Company transferred by a non-resident **and** debentures/ bonds

## Computation

If the capital asset is acquired up to 31 March 2001	If the capital asset is acquired on or after 1 April 2001
$\text{COA}^* \times \frac{\text{CII for year of transfer}}{100}$	$\text{COA} \times \frac{\text{CII for year of transfer}}{\text{CII for the first year in which the asset was held}}$

\*COA shall be original cost of acquisition or fair market value of the asset on 1 April 2001, at the option of the assessee

# Section 48 – First proviso

## Why this proviso - Mandatory

- Non-residents who invest in shares and debentures of Indian companies were being adversely affected due to the fall in the value of the Indian rupee vis-à-vis the foreign currency
- Further, indexation benefits are provided to residents and the same is not provided to non-residents for sale of shares/ debentures.

## Applicability

Applies if the following criteria is satisfied

- Assessee is a non-resident
- Transfer shares or debentures of an Indian Company; and
- Asset was purchased in foreign currency.

## Computation as per Rule 115A

- Conversion of cost of acquisition =  $(\text{SBI Telegraphic Transfer ('TT') buying rate} + \text{SBI TT selling rate}) / 2$  **on date of acquisition**
- Expenses on transfer =  $(\text{SBI TT buying rate} + \text{SBI TT selling rate}) / 2$  **on date of transfer**
- Full value of consideration =  $(\text{SBI TT buying rate} + \text{SBI TT selling rate}) / 2$  **on date of transfer**
- **Capital Gains in foreign currency** = SBI TT buying rate **on date of transfer**

# Section 49(1) – Cost with reference to certain modes of acquisition

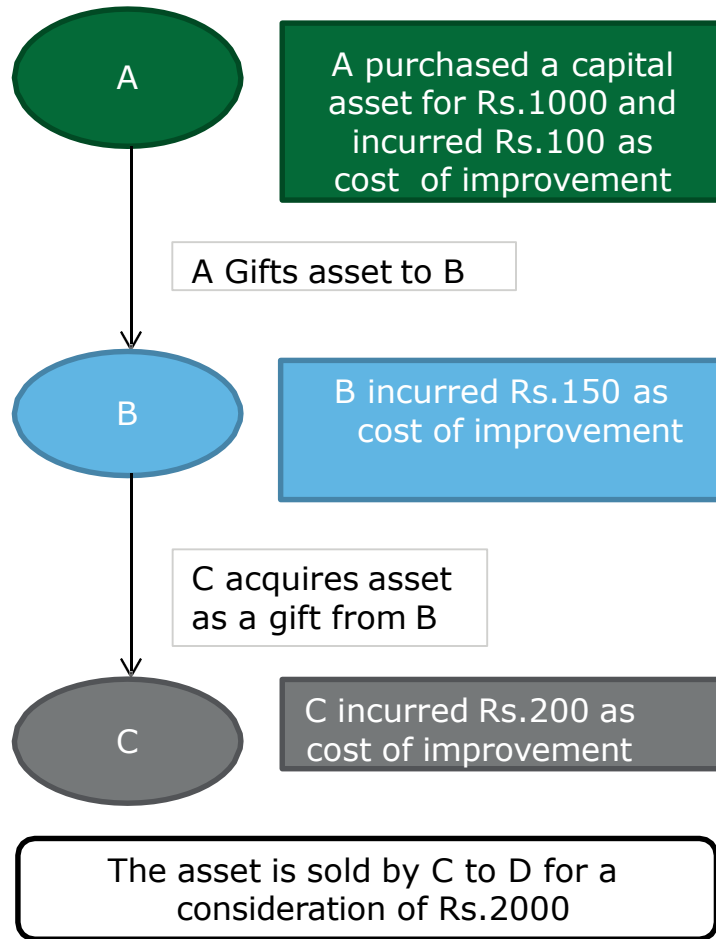
Where the capital asset becomes the property of the assessee

- on distribution of assets of HUF in case of total or partial partition;
- under gift or will;
- by succession, inheritance or devolution;
- on any distribution of assets on liquidation of company;
- on transfer to trust;
- on certain transfers covered under Section 47;
- where such asset is transferred by an individual to the common stock of HUF

Cost of Acquisition shall be

- Deemed to be the cost for which previous owner of the property acquired it
- As increased by the cost of improvement of the assets incurred or borne by the previous owner or the assessee
- “Previous owner” means the last previous owner of the capital asset who acquired asset by a mode of acquisition other than that referred to in Section 49(1)

# Section 49(1) – Case Study



Q: Before sale of asset to D, who is the owner and previous owner?

A: Owner : C

Previous Owner : A

Q: What is the cost of acquisition for C?

A: Rs.1000

Q: What is the cost of improvement for C?

A: Rs.300, i.e.,

Cost of improvement of A (previous owner)

+

Cost of acquisition of C (owner)

Q: What is the amount of capital gains in hands of A, B and C?

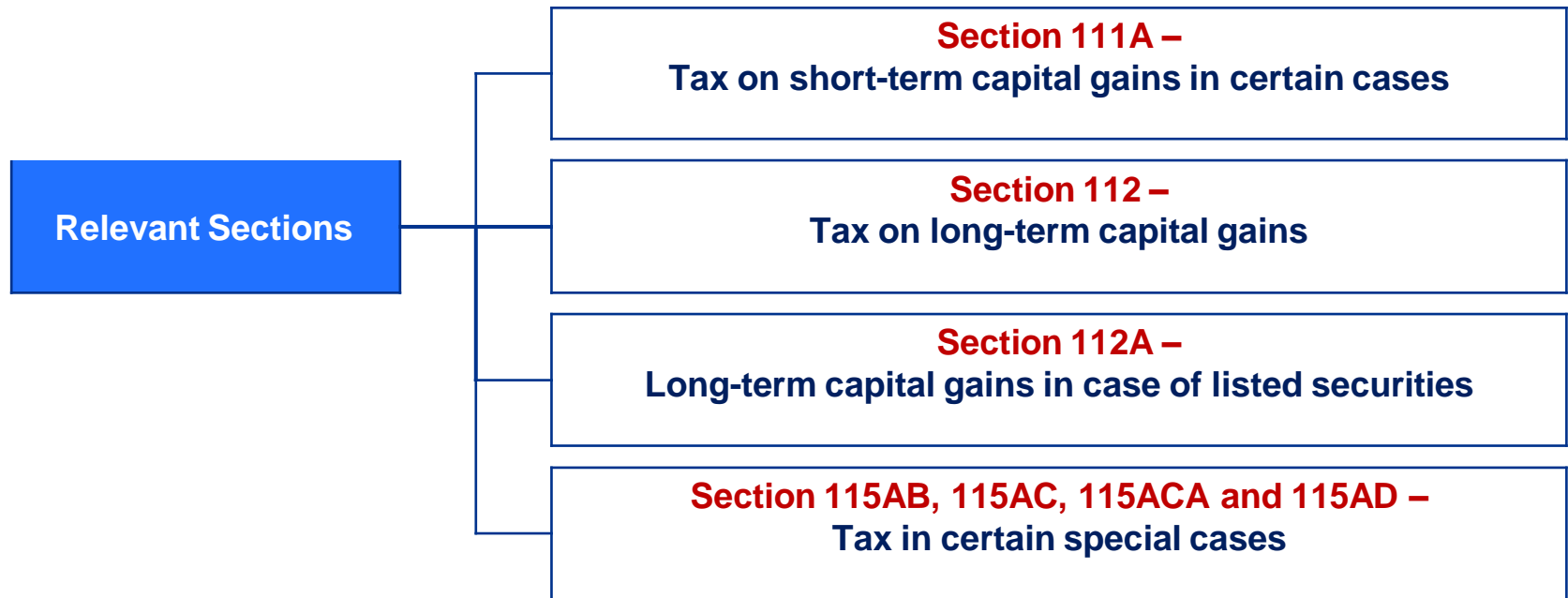
A: In the hands of A – Nil

In the hands of B – Nil

In the hands of C – Rs.700 (2000-1000-300)



# Capital Gains Tax Rates



**In case of non-residents, subject to beneficial tax rates under the respective tax treaties**

# Short Term Capital Gains Tax Rates

PARTICULARS	RESIDENT COMPANY*	NON-RESIDENT COMPANY*
Equity Shares, Units of Equity Oriented MF, Units of UTI, Zero Coupon Bonds	<ul style="list-style-type: none"> <li>Equity Shares and Units of Equity Oriented MF-15% if STT paid</li> <li>Non STT – 30%</li> </ul>	<ul style="list-style-type: none"> <li>Equity Shares and Units of Equity Oriented MF-15% if STT paid</li> <li>Non STT – 40%</li> </ul>
Bonds, Debentures and Government Securities/ Units of other than Equity Oriented MF	30%	40%
Other Assets, viz. Residential house	30%	40%

\* Tax rates are exclusive of surcharge and education cess

# Long Term Capital Gains Tax Rates

PARTICULARS	RESIDENT COMPANY*	NON-RESIDENT COMPANY*
Listed equity shares sold off market (purchase in foreign currency or a case of reinvestment)	20%	First proviso available – Tax @ 10% <i>[Cairn UK Holdings - Delhi HC]</i>
Listed equity shares sold off market (purchase in Indian currency)	20%	<ul style="list-style-type: none"> <li>• Second proviso is available</li> <li>• 10% without indexation or 20% with indexation, whichever is lower</li> </ul>
Unlisted equity shares <i>[public as well as private companies]</i>	20%	10% [No benefit of first and second proviso] - <b>MANDATORY</b>
Units of Equity Oriented Mutual Funds/ Other Mutual Funds in which no STT paid	20%	Benefit of second proviso is available – Tax @ 20%
Listed debentures and bonds (purchase in foreign currency or a case of reinvestment)	20% [no indexation]	First proviso available – Tax @ 10%
Listed bonds and debentures (purchased in Indian currency)	20% [no indexation]	10% [No benefit of first and second proviso] - <b>MANDATORY</b>
Unlisted bonds and debentures	20% [no indexation]	10% [No benefit of first and second proviso] - <b>MANDATORY</b>
Other assets	20%	20%

\* Tax rates are exclusive of surcharge and education cess

# AMENDMENTS BY FINANCE ACT, 2020

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# Amendments by Finance Act, 2020



## TRANSFER OF MF UNITS

No TDS on capital gains derived by Resident taxpayers on transfer of mutual fund units



## SECTION 43CA, 50C AND 56(2)(X)

Increase in tolerance limit from **5 percent** to **10 percent**



## SEGREGATION OF MF SCHEMES

Cost of acquisition to be allocated- allocation similar to acquisition of shares on demerger



## COST OF ACQUISITION FOR LAND OR BUILDING AS ON 1 APRIL 2001

Cannot be greater than **Stamp Duty Value** as on that date

# Cost of Acquisition in the case of land or building as on 1 April 2001- Amendment by Finance Act, 2020

## Existing Provisions under section 55

- Presently, section 55 provides that where capital asset became property of the assessee before 1.4.2001, the assessee has an option to adopt fair market value of the asset transferred as on 1.4.2001 to be its cost of acquisition.
- Similarly, where the capital asset has been received by the assessee in a mode mentioned in section 49(1) i.e. by way of gift, inheritance, will, etc., and the capital asset became property of the previous owner before 1.4.2001 then the assessee has an option to adopt fair market value of the asset as on 1.4.2001 to be its cost of acquisition.

## Amendment by Finance Act, 2020

- If the capital asset transferred is land or building or both then its fair market value on 1.4.2001 cannot be greater than its stamp duty value on that date, wherever available.

LONG TERM CAPITAL  
GAINS ON LISTED  
SECURITIES- AMENDMENT  
BY FINANCE ACT 2017

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# Long Term Capital Gains on Listed Securities

## Exemption Granted by Finance Act 2014

- ▶ Exemption Granted w.e.f. AY 2015-16 for LTCG on transfer of Equity Shares or Units of an Equity Oriented Mutual Funds on which Securities Transaction Tax (STT) was paid.
- ▶ In case of listed shares and securities on which STT is not paid, option was available to pay tax at 10 percent without claiming indexation benefit.

## Amendment by Finance Act 2017

- ▶ Exemption denied on LTCG is case of Equity Shares if at the time of purchase of shares, STT was not paid.
- ▶ Amendment intended to curb the malpractices of penny stocks to claim the exemption of LTCG.

*Notification No. 43/2017- Exclusions provided for transactions like ESOP, transfers which are not regarded as transfer under Section 47 of the Act, shares issued pursuant to Scheme of Arrangement approved by Court, NCLT, SEBI or RBI etc.*



# Section 10(38)- Notification No. 43/2017

## Notification No. 43/2017

- ▶ The Notification provides the list of transactions which are not exempt under section 10(38), unless provided under exception.
- ▶ Applicable to acquisition on or after 1 October 2004.

### Clause (a)

Acquisition of existing listed equity shares of thinly traded company by way preferential allotment

### Clause (b)

Acquisition of existing listed equity shares off the market

### Clause (c)

Acquisition of unlisted equity shares of a company post delisting but prior to relisting

# Section 10(38)- Notification No. 43/2017 – Exceptions to the negative list

## Clause (a)

Acquisition of existing listed equity shares of thinly traded company by way  
preferential allotment

### Exceptions / Carve Outs

- ▶ Approved by SC/HC/NCLT/SEBI/RBI;
- ▶ Acquisition by NR in accordance with FDI;
- ▶ Acquisition by Category I/II AIF and VCF
- ▶ Through preferential allotment not governed by Chapter VII of SEBI (ICDR), 2009-
  - ✓ To lender or debenture holder on conversion of loan or debt (subject to conversion terms provided at time of issue);
  - ✓ Under scheme approved by HC under 391-394 or 230-234;
  - ✓ In terms approved by Rehabilitation scheme (BIFR, SICA 1985, Insolvency and Bankruptcy Code

# Section 10(38)- Notification No. 43/2017 – Exceptions to the negative list

## Clause (b)

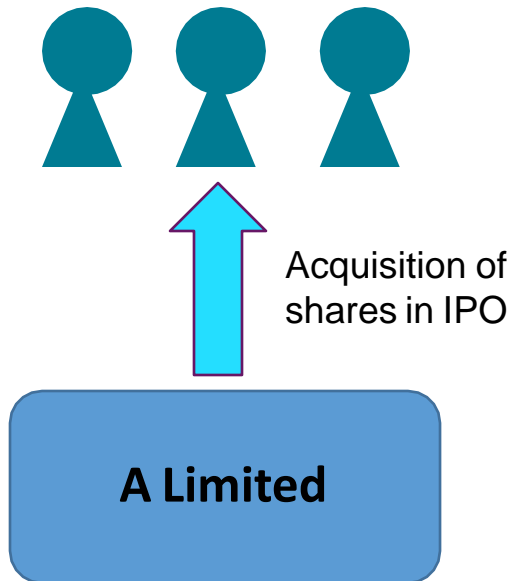
### Acquisition of existing listed equity shares off the market

#### Exceptions / Carve Outs

Following acquisitions only if made in accordance with SCRA, 1956 (if applicable):

- ▶ Through fresh issue of shares [other than thinly traded shares covered by clause (a)]
- ▶ By banks, PFIs, reconstruction or securitization company
- ▶ Approved by SC/HC/NCLT/SEBI/RBI
- ▶ Under SEBI (ESOP and ESPS) Guidelines.
- ▶ By NR in accordance with FDI
- ▶ Under SEBI (SAST) Regulations, 2011
- ▶ From Government
- ▶ By Category I/II AIF and VCF
- ▶ By mode of transfer specified in s. 47/50B provided “previous owner” was eligible to claim exemption

# Case Study- Acquisition in IPO



## Facts

- A Limited is an unlisted Company;
- The Promoters of A Limited to raise funds by listing A Limited on BSE for the first time;
- Fresh issue of shares by A Limited;
- Shares would be received by public shareholders off the market as a part of IPO (i.e. before listing)

## Issue

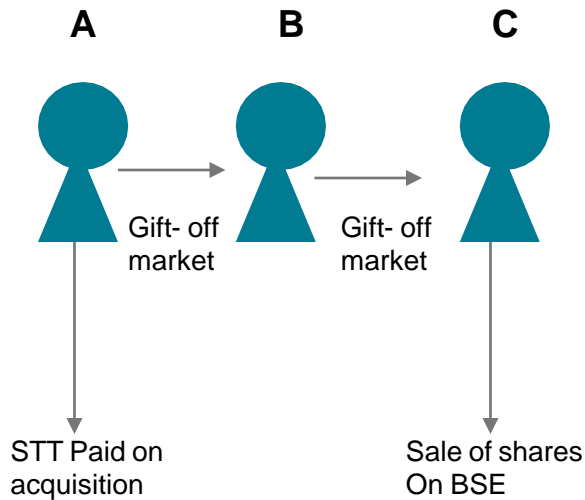
- Whether shares acquired in IPO eligible for exemption under section 10(38)?

## Comments

- Not a case of “existing listed equity shares”, hence outside clause (a) and (b) of the Notification;
- Without prejudice, acquisition by way of fresh issue protected by point (i) of proviso to clause (b) of the notification

All Bonus issues, Right issues, ESOP protected too

# Case Study- Gift of shares- Section 47(iii)



## Gift of Shares (Section 47(iii))

- Mr. C receives shares of a Company off the market without STT
- Such transaction is covered by Section 47 and can be exempted under item (ix) of clause (b)- if “Previous Owner” was eligible to claim;
- The eligibility of Section 10(38) in the hands of Mr. C to be seen qua “Previous Owner” of the shares;
- Previous Owner for Mr. C- Mr. B or Mr. A?

## Comments

- Analogy from definition of “Previous Owner” as defined in Explanation to Section 49(1);
- Under Section 49(1), cost and holding period substitution would be taken from Mr. A and consequently eligibility to be seen qua Mr.A!

Acquisition by way of inheritance-  
Same analogy as Gift

LONG TERM CAPITAL  
GAINS ON LISTED  
SECURITIES- AMENDMENT  
BY FINANCE ACT 2018

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# Long Term Capital Gains on Listed Securities- Finance Act 2018 Amendment

## Removal of exemption of LTCG

Exemption on LTCG arising on transfer of following listed LTCA (i.e. held for a period of more than 12 months) has been removed

Equity shares

Units of Equity Oriented Fund

Units of business trust

## New Section 112A r.w.s 55(2)(ac) introduced- Taxation of LTCG

- ▶ LTCG would be taxed @ concessional rate of 10% where LTCG > INR 1 lakhs
- ▶ No indexation benefit would be available
- ▶ **Grandfathering provided to capital gains accrued till 31 January 2018**
- ▶ Applicable to LTCG from transfer of equity shares, equity oriented fund or a unit of business trust wherein STT has been paid on acquisition and transfer
- ▶ LTCG up to 31 March 2018 remains exempt
- ▶ In case of units of equity oriented fund or business trust, sale should have suffered STT

*Notification No. 43/2017- Exclusions provided for transactions like ESOP, transfers which are not regarded as transfer under Section 47 of the Act, shares issued pursuant to Scheme of Arrangement approved by Court, NCLT, SEBI or RBI etc.*

# Long Term Capital Gains on Listed Securities- Finance Act 2018 Amendment

**Grandfathering  
provided to  
capital gains  
accrued till 31  
January 2018**

- ▶ The cost of acquisition in respect of such grandfathered investments shall be deemed to be the higher of-
  - a. The actual cost of acquisition of such investments; and
  - b. The Lower of-
    - i. Fair Market Value ('FMV') of such investments; and
    - ii. the Full Value of Consideration received or accruing as a result of the transfer of the capital asset.

***FMV defined to mean the highest price quoted on the recognised stock exchange on 31 January 2018.***

***In case, there is no trading of the said asset on such stock exchange, the highest price on a day immediately preceding 31 January 2018 shall be considered.***



## Long Term Capital Gains on Listed Securities- Example

Date of acquisition	1 November 2016
Purchase Price on 1 November 2016	Rs. 100
Highest Price quoted on recognised stock exchange on 31 January 2018	Rs. 180
Date of sale	2 April 2018
<b>Sale Price</b>	<b>Rs. 200</b>
Actual Gain	Rs. 100
<b>Cost of Acquisition as per section 112A [Higher of 100 or (lower of 200 or 180)]</b>	<b>Rs. 180</b>
<b>Long Term Capital Gain (LTCG) (200-180)</b>	<b>Rs. 20</b>
<b>Tax on LTCG at the rate of 10 percent (excluding surcharge and cess)</b>	<b>Rs. 2</b>

# Long Term Capital Gains on Listed Securities- Computation of Cost of Acquisition

Scenarios	Actual cost of shares acquired before 31 January 2018 <b>(A)</b>	FMV of such shares as on 31 January 2018 <b>(B)</b>	Sale value of such share on or after 1 April 2018 <b>(C)</b>	Cost of acquisition is to be higher of: • A ; and • The lower of - B -C <b>(D)</b>	LTCG/LTCL <b>(C) – (D)</b>
1	100	200	250	200	50
2	100	200	150	150	0
3	100	50	150	100	50
4	100	200	50	100	(50)
5	100	80	70	100	(30)

# Long Term Capital Gains on Listed Securities- Issues / Points for Consideration

## Whether tax payable on sale of Equity Shares between 1 February 2018 to 31 March 2018?

- ▶ The amendment is applicable prospectively from AY 2019-20
- ▶ Any Transfer on or after 1 April 2018 will be liable to LTCG @ 10%

## If LTCG on transfer of listed Equity Shares is INR 150,000, whether only 50,000 will be charged to tax or entire INR 150,000 will be charged to tax?

- ▶ Grey Area, where both the views are possible
- ▶ Section 112A(2)(i) provides that income-tax shall be calculated on LTCG exceeding one lakh rupees.
- ▶ Therefore, on a reading of the said provisions, it is possible to take a view that only Rs. 50,000 should be charged to tax and not the entire Rs. 150,000.

# Long Term Capital Gains on Listed Securities- Issues / Points for Consideration

## **What is the date from which the holding period will be counted?**

- ▶ The Holding Period will be considered from the date of acquisition

## **What will be the cost of acquisition in the case of bonus shares acquired before 1 February 2018?**

- ▶ Fair Market Value (FMV) on 31 January 2018 will be taken as cost of acquisition;
- ▶ Except where the sale consideration is less than the FMV as on 31 January 2018;
- ▶ Therefore, gains accrued upto 31 January 2018 will continue to be exempt.

## **What will be the cost of acquisition in the case of right shares acquired before 1 February 2018?**

- ▶ Cost of acquisition will be computed in accordance with section 55 of the Act;
- ▶ Fair Market Value (FMV) on 31 January 2018 will be taken as cost of acquisition;
- ▶ Except where the sale consideration is less than the FMV as on 31 January 2018;
- ▶ Therefore, gains accrued upto 31 January 2018 will continue to be exempt.

# CONVERSION OF CAPITAL ASSET INTO STOCK IN TRADE AND VICE VERSA

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# Capital Gains in case of conversion of Capital Asset into Stock in Trade - Section 45(2)

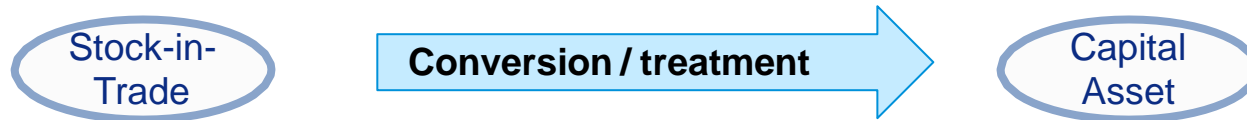


## Sec 45(2)

- ▶ Capital gains arises on “conversion”
- ▶ Income chargeable to tax in the previous year in which such stock-in-trade is transferred
- ▶ FMV as on the date of such conversion shall be deemed to be FVC
- ▶ For computing PGBP on sale of SIT, FMV as on date of conversion allowed as deduction

# Conversion of Stock in Trade into Capital Asset- Recent Amendment by Finance Act 2018

Since the existing law does not cover provisions on taxability of conversion of stock-in-trade into capital asset, the Finance Bill, 2018 has now provided for the same



## Income from business

- ▶ Business Profits arises on 'conversion/ treatment' of SIT into CA - Section 28(via)
- ▶ FMV as on the date of such conversion shall be deemed to be FVC on conversion/treatment
- ▶ **Manner to determine FMV prescribed- Rule 11UAB**

## Capital gain/loss

- ▶ FMV on the date of conversion shall be the cost of acquisition of capital asset – Sec 49
- ▶ Holding period of capital asset reckons from the date of conversion/treatment- Sec 2(42A)

**The option of taxing entire profits on conversion and transfer as 'capital gains' relying on judicial precedents\* shall no longer be available to the tax payer**

\*ACIT v. Brightstar Investment (P.) Ltd. [(2009) 120 TTJ 498 (Mumbai tribunal)], CIT v/s. Abhinandan Investment Ltd. [2015] 63 taxmann.com 263 (Delhi tribunal)

# SECTION 50C AND SECTION 50CA

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# Section 50C- Special Provisions for Transfer of Land or building or both

## Section 50C

- ▶ Provision to tax the difference between the FMV and the consideration received on transfer of capital asset being land or building or both as Capital Gains in the hands of the transferor;

### **Amendment by Finance Act 2018-**

- ▶ Where the value adopted or assessed or assessable by the stamp valuation authority does not exceed 105% of the consideration received or accruing as a result of the transfer- consideration so received or accruing shall be deemed to be Full Value of Consideration.
- ▶ Amendment applicable prospectively w.e.f. 1 April 2018 (AY 2019-20)

### **Amendment by Finance Act 2020-**

- ▶ Tolerance level increased from 5% to 10%

Tolerance level of 10% provided to consider the variation that occur in respect of similar properties in the same area because of a variety of factors, including shape of the plot or location

# Section 50CA- Special Provisions for Transfer of unquoted shares

## Section 50CA

- ▶ New section introduced by the Finance Act, 2017 w.e.f. 01.04.2018;
- ▶ Deems FVC on transfer of share other than quoted share as its FMV, if the sale consideration agreed between the parties is less than the FMV;
- ▶ Mode of determining FMV is prescribed in Rule 11UAA- Which takes us back to Rule 11UA.

Whether results in double taxation i.e. in hands of seller of unquoted equity shares u/s 50CA and also in hands of recipient u/s 56(2)(x)?

# Section 56(2)(x)- Income from Other Sources

## Section 56(2)(x)

- ▶ New section introduced by the Finance Act, 2017 w.e.f. 01.04.2018- Income from Other Sources;
- ▶ Provision to tax the difference between FMV and consideration paid for transfer of unquoted shares in the hands of the recipient / transferee;
- ▶ Also covers sum of money, immovable property, other property;
- ▶ Mode of determining FMV is prescribed in Rule 11UAA- Which takes us back to Rule 11UA.

Whether results in double taxation i.e. in hands of seller of unquoted equity shares u/s 50CA and also in hands of recipient u/s 56(2)(x)?

# Interplay between Section 50CA and Section 56(2)(x)

## Example

- ▶ Transferor / Seller : A Ltd
- ▶ Transferee / Buyer : B Ltd
- ▶ B Ltd purchased 1000 shares of a Private Limited Company from A Ltd for a price of INR 900 per share;
- ▶ Total Consideration = INR 900,000
- ▶ A Ltd had acquired such shares at INR 800 per share. Gross Amount Paid = INR 800,000
- ▶ FMV of the said shares on the date of Transfer is INR 1000 per share

What would be the tax implications in hands of the Transferor (A Ltd) u/s 50CA and also in hands of buyer / recipient (B Ltd) u/s 56(2)(x)?

# Interplay between Section 50CA and Section 56(2)(x)

## Impact Prior to the Amendment

### Impact on A Ltd (Transferor)

▶ Sale Consideration	900,000
▶ Less: Cost of Acquisition	800,000
▶ <b>Capital Gains</b>	<b>100,000</b>

### Impact on B Ltd (Transferee)

▶ No Impact

## Impact Post the Amendment

### Impact on A Ltd (Transferor) Section 50CA

▶ FMV	1,000,000
▶ Less: Cost of Acquisition	800,000
▶ <b>Capital Gains</b>	<b>200,000</b>

### Impact on B Ltd (Transferee) Section 56(2)(x)

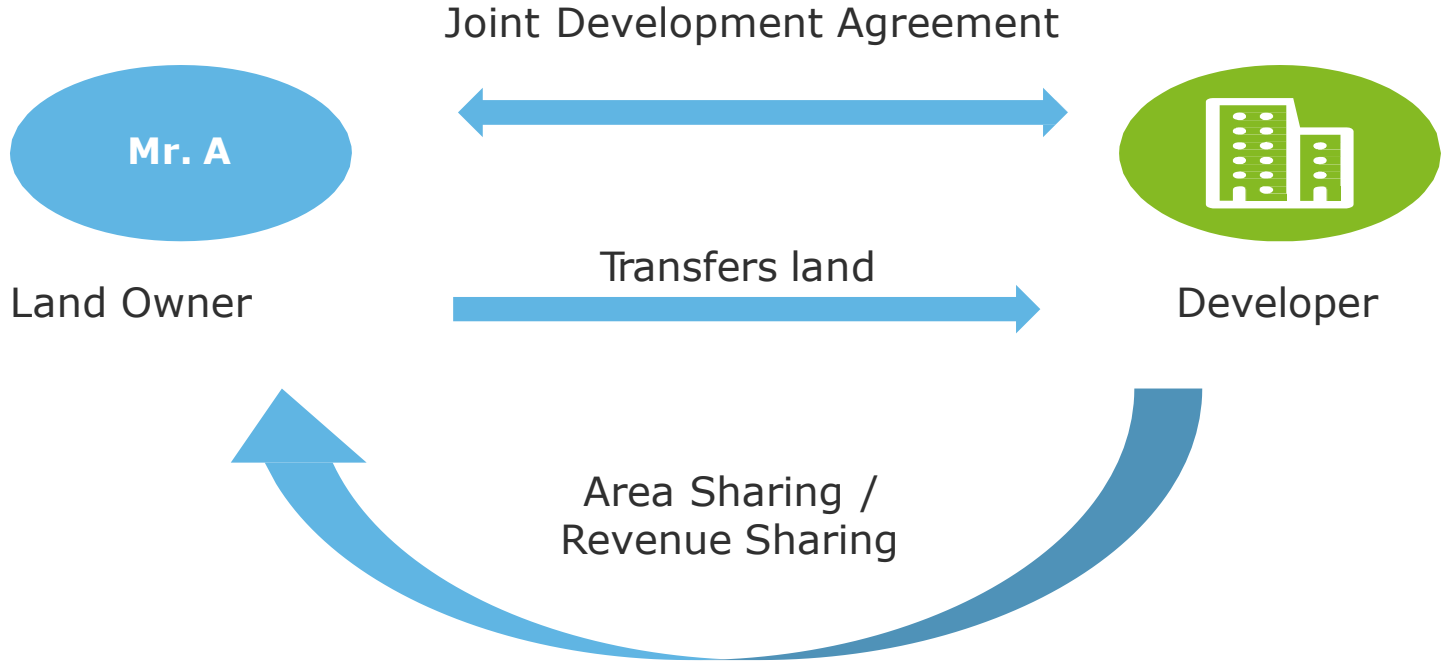
▶ FMV	1,000,000
▶ Less: Actual Consideration	900,000
▶ <b>Income from Other Sources</b>	<b>100,000</b>

When B Ltd will sell the shares, its cost of Acquisition will be 1,000,000 u/s 49(4)

AMENDMENTS IN  
RELATION TO JOINT  
DEVELOPMENT  
AGREEMENTS (JDA)

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# Joint Development Agreement- Concept



# Joint Development Agreement- When it results in Transfer- Timing

## Guiding principles for JDA to trigger Transfer

- Transfer is recognized when possession is handed over
- Granting power to dispose property in absolute discretion to developer is significant factor to determine transfer
- Not mere possession but effective control over the property should be assumed by the Developer to constitute transfer
- Developer should be willing to perform his obligation before 2(47) is invoked
- Possession handed over in the capacity as licensee
- Transfer when sale consideration is received in kind

The terms of the JDA Agreement are critical in determining when it triggers transfer- Due care to be taken while drafting of the same



# Joint Development Agreement- Litigation aspects

<b>DEPARTMENT CONTENTION</b>	<b>ASSESSEE / LAND OWNER'S CONTENTION</b>
<ul style="list-style-type: none"><li>• Taxation arises at the time of execution of JDA along with POA</li></ul>	<ul style="list-style-type: none"><li>• CG arises only when built up area is in his/her possession</li></ul>
<ul style="list-style-type: none"><li>• Execution of POA constitutes “part performance u/s 53A under TP Act” (or) can be construed to “enable enjoyment of property” by Developer - hence is Transfer u/s 2(47)(v) &amp; 2(47)(vi) of IT Act</li></ul>	<ul style="list-style-type: none"><li>• Execution of POA does not hand over possession : part performance under TP Act requires possession</li></ul>
<ul style="list-style-type: none"><li>• POA allows Developer to enter property, alienate his share, obtain money by mortgaging etc.</li></ul>	<ul style="list-style-type: none"><li>• Mere JDA and POA does not constitute transfer; permissive possession is not possession with respect to S.53A of TP Act and does not constitute ‘Transfer’</li></ul>

# Joint Development Agreement- Litigation aspects

<b>DEPARTMENT CONTENTION</b>	<b>ASSESSEE / LAND OWNER'S CONTENTION</b>
<ul style="list-style-type: none"><li>• Registration (Sale Deed) is not mandatory for transfer – possession is enough</li></ul>	<ul style="list-style-type: none"><li>• No income has been realised – No question of CG</li></ul>
<ul style="list-style-type: none"><li>• Transfer of land to developer complete via POA - estimated cost of construction of owner's built up area to be taken as sale consideration for calculating owner's CG</li></ul>	<ul style="list-style-type: none"><li>• Permissive possession i.e., to obtain approvals and enter property does not constitute possessory right envisaged as Transfer under IT Act</li></ul>

# Joint Development Agreement- Key Judicial Precedents

Citation	Summary of the Ruling
Chaturbhuj Dwarkadas Kapadia v. CIT 260 ITR 491 (Bom)	In the case of a development agreement, if the contract, read as a whole, indicates passing of or transferring of complete control over the property in favour of the developer, then the <b><u>date of the contract</u></b> would be relevant to decide the year of chargeability of capital gains and the substantial performance of the contract would be irrelevant
Saamag Developers P. Ltd v. ACIT [2018] 168 ITD 649 (Delhi)	Where assessee had entered into an agreement for transfer of development right in a land and handed over said land for development, in view of fact that <b>such agreement was unregistered, there was no transfer of land as per provision of section 2(47)(v).</b>
Dr. Joao Souza Proenca v. ITO [2018] 401 ITR 105 (Bom.)	Effective date of transfer is the <b>date of transfer of possession of property</b> and <b>not date of execution of power of attorney</b> giving access to developer to do certain jobs.

# Joint Development Agreement- Key Judicial Precedents

Citation	Summary of the Ruling
<p>Mangilall Estates Pvt. Ltd. V. DCIT [2018] 91 taxmann.com 266 (Kolkata-Trib.)</p>	<p>Where transfer of property was completed in terms of Section 2(47) by giving possession of property on date of sale agreement, but registration was delayed due to some problem related to title of property, capital gains was subjected to tax <b>in year of transfer of property and not in year of its registration.</b></p>
<p>PCIT v. Fardeen Khan 96 taxmann.com 398 (Bombay)</p>	<p>Where assessee, owner of piece of land, entered into a development agreement with developer for specific purpose to develop land, <b>and possession of land continued to be with assessee, there was no transfer in terms of section 2(47)(v).</b></p>
<p>Mrs. Aarti Kadam v. ITO [2018] 97 taxmann.com 284 (Mumbai-Trib.)</p>	<p>Where, as per terms of development agreement entered between assessee, owner of land, and developer, for construction of a housing project, assessee would not be paid any monetary consideration <b>but would receive built-up residential area</b> on completion of project, <b>it could not be said that capital gain had accrued in year of agreement.</b></p>

# Section 45(5A)- Joint Development Agreement

## Section 45(5A)

- ▶ New section introduced by the Finance Act, 2017 w.e.f. 01.04.2018 (AY 2018-19) prospectively;
- ▶ Applicable to Land Owners only being **Individuals** and **HUFs**;
- ▶ Capital Gains taxable only in the year in which the Certificate of Completion (CC) is issued by the Competent Authority;
- ▶ Stamp Duty Value of the Land Owner's share on the date of issuance of CC as increased by the monetary consideration (if any) shall be deemed to be the Full Value of Consideration
- ▶ If the Land Owner transfers his share in the project before the date of issue of CC, this section will not apply and normal provisions will apply;
- ▶ Corresponding Amendment in TDS provisions- Section 194-IC introduced- TDS @ 10% on the consideration not being in kind at the time of credit or payment whichever is earlier

- Assesseees other than Individuals and HUFs not covered- Controversy to continue;
- Prospective amendment- Will aggregate the issue of taxability of JDA arrangements for earlier years

# OTHER RECENT AMENDMENTS

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# Ceiling limit for Section 54 and 54F

## Erstwhile Provisions of section 54 and section 54F

- Section 54 and section 54F provides for deduction against LTCG for investment made in residential house property.
- There is no threshold ceiling limit provided for amount of such deduction claimed.

## Amendment by Finance Act 2023

- Maximum eligible amount for the purpose of calculating deduction under these sections would be restricted to Rs. 10 Crore.
- Similarly, the maximum amount which can be deposited in Capital Gain Account Scheme would be Rs. 10 Crore.

# Ceiling limit for Section 54 and 54F

Section 54			Section 54F				
Particulars	Existing	Proposed	Particulars	Existing		Revised	
				Scenario 1	Scenario 2	Scenario 1	Scenario 2
Sale Consideration	25	25	Sale Consideration	25	15	25	15
Less: Indexed cost of acquisition	5	5	Less: Indexed cost of acquisition	5	6	5	6
Long Term Capital Gain (LTCG)	20	20	Long Term Capital Gain (LTCG)	20	9	20	9
Cost of new residential house	25	25	Cost of new residential house	25	15	25	15
Less: Exemption	20	10*	Less: Exemption  <b>Existing:</b> Scenario 1: $(25 \times 20)/25 = 20$ Scenario 2: $(15 \times 9)/15 = 9$ <b>Revised:</b> Scenario 1: $(10 \times 20)/25 = 8$ Scenario 2: $(10 \times 9)/15 = 6$	20	9	8	6
<b>Taxable LTCG</b>	<b>Nil</b>	<b>10</b>	<b>Taxable LTCG</b>	<b>Nil</b>	<b>Nil</b>	<b>12</b>	<b>3</b>



## Cost of Acquisition – Intangible Assets

- Section 55 inter-alia provides for value of Cost of Acquisition and Improvement:
  - Various judgment: if COA is not determinable- No CG; as computational mechanism fails.
- Now, Finance Act, 2023 provides that Cost of Acquisition and Improvement to be taken as Nil for Intangible Assets.

### **Notification NO. 21/ 2023 dated 12 June 2023**

- The Central Government has notified Cost Inflation Index (CII) for FY 2023-24 at **348** just 2 days before the last date of payment of first installment of Advance Tax for AY 2024-25

# Amendment to Section 54EC

## Erstwhile Provisions of section 54EC

- Exemption u/s 54EC was available against long term capital gains **arising from any asset:**
- Taxpayer had to invest the amount of capital gains in specified bonds within 6 months of asset transfer;
- The bonds had a lock in period of **3 years**, before which if transferred the exemption is withdrawn;
- Upper limit for exemption – Rs.50 lakh per financial year.

## Amendment by Finance Act 2018

- Exemption restricted only to capital gains arising from long-term capital assets, **being land or building or both**
- Investment on or after the 1 April 2018 to be made in bond issued by the NHAI / RECL / notified by Central Government **redeemable after 5 years** (instead of 3 years earlier)

# OTHER PROVISIONS OF CAPITAL GAINS

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# Capital Gains on Depreciable Assets – Section 50

Capital gains will be attracted on sale of depreciable assets if the sale consideration received exceeds the aggregate of:

- WDV of block of assets at beginning of year;
- Actual cost of any asset falling within block of assets acquired during the year; and
- Expenditure incurred wholly and exclusively in connection with such transfer.

This excess shall be charged to tax as “short term capital gains”

- Short term capital gains will also be computed as aforesaid if all the assets in the block have been transferred during the year

# Capital Gains – Slump Sale – Section 50B

- Slump sale defined in section 2(42C) - Applicable to transfer of '**undertaking**' on going concern basis for lump sum consideration without values being assigned to individual assets / liabilities
- Undertaking is defined to '*include any part of the undertaking or a unit or division.... or **business activity taken as a whole but does not include individual assets and liabilities....***'

## Computation of capital gains under Slump Sale:

Lump sum consideration for Slump Sale	XXX
Less: <b>Net Worth</b> of the undertaking ( <b>benefit of indexation not available</b> )	XXX
<b>Capital gains</b>	XXX

## Computation of net worth:

Aggregate value of assets (Tax WDV in case of depreciable assets, book value for rest)	XXX
Less: Value of liabilities of the undertaking	XXX

# Capital Gains – Slump Sale – Section 50B



## Issues

- 50C applicable to land or building transferred as a part of undertaking?
- Whether revaluation of asset to be considered in the Net Worth?
- What treatment to be given in case net worth is negative?\*
- Whether Section 50B apply in case of slump exchange?#
- If part consideration against slump sale is directly received by shareholders?^

\**Summit Securities* [2012] 135 ITD 99 (Mum) (SB)

# *SREI Infrastructure Finance Ltd. vs. ITO* (207 Taxman 74) (Delhi HC) and *Bharat Bijlee Ltd. vs ACIT*(45 Taxmann.Com 104) (BOM HC)

^*Salora international* – (Delhi high court)

# Income from sale of shares- whether capital gains/ PGBP?

- Subject matter of dispute as no general rule applicable
- Depends on facts of each case
- **Circular 6/2016 dated 29.02.2016** introduced by CBDT to curb litigation:
  - Assessee having income from sale of listed share has been given a choice to treat such income as capital gains or PGBP
  - The stand adopted by assessee needs to be consistently followed year-on-year
- Guidelines issued by CBDT for assessing officers on tests for distinction between shares held as stock-in-trade and shares held as investment **vide office memorandum**, dated 13.12.2005 [F. No. 149/287/2005-TPL
- **CBDT's Circular No. 4/2007, dated 15-6-2007** states that the nature of transactions, the manner of maintaining books of accounts, the magnitude of purchases and sales and the ratio between purchases and sales and the holding as points to be considered
- **Judicial pronouncements on the issue:**
  - CIT v. Associated Industrial Development Co. (P.) Ltd. [1971] 82 ITR 586 (SC)
  - CIT v. H. Holck Larsen [1986] 160 ITR 67/26 Taxman 305 (SC)



# Indirect Transfer of Shares



- ▶ Indirect transfer taxation provisions Introduced vide Finance Act 2012 w.e.f 1 April 1962
- ▶ Transfer of shares or interest in a foreign company/ entity, shares or interest which **derive**, directly or indirectly, **their value substantially from assets located in India is taxed in India**
- ▶ Benefit of tax treaties is still available
- ▶ Specific small shareholder exemptions have been prescribed under the Act
- ▶ Taxation of gains arising on such transfer will be on a **proportionate basis** -Method of determining proportionality notified in Income-tax Rules

*[Income from the transfer of shares as if such shares are located in India] X [FMV of assets located in India] / [FMV of all assets of the company or entity]*

# Indirect Transfer of Shares

## *Meaning of the word 'substantial' –*

- Share or interest is deemed to derive its value substantially from assets located in India, if the value of the assets on the specified date
  - Exceeds INR 10 crore rupees; AND
  - Represents at least 50 percent of the value of all the assets owned by such company/ entity (assets shall not be reduced by any related liabilities, if any)

# Indirect Transfer of Shares

## Reporting requirements

- **Transferor** of the shares/ interest to obtain and furnish along with the return of income a report in Form 3CT duly signed and verified by an accountant providing the basis of the apportionment in accordance with the formula and certifying that the income attributable to assets located in Indian has been correctly computed
- **Indian company**, whose shares are proposed to be transferred is required to –
  - maintain and furnish information as prescribed [Form 49D] within 90 days from the end of FY in which the transfer shall take place;
  - maintain extensive documentation for a period of 8 years - To be produced to the revenue authorities as and when called for
  - Penalty for failure to report to be levied at the rate of 2% of the value of transaction to be levied where transaction



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