

SUBJECT: PROGRAMME STRUCTURE OF THE INTENSIVE WORKSHOP ON
PROCEDURE REDEVELOPMENT OF SOCIETY

ORGANISED BY: WIRC OF ICAI

VENUE: J.S. LODHA AUDITORIUM, ICAI BHAVAN, CUFFE PARADE

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1. DEVELOPMENT RIGHTS:

DEVELOPMENT RIGHTS - WHO ARE ENTITLED - SOCIETIES OR MEMBERS?

In respect of Tenants co-partnership co-operative societies, which are of the nature of "Flat Owners Societies" in which the flats are acquired by the society from the builder on ownership basis and thereafter Society is formed, and land is conveyed to the society and individual members acquire ownership rights over the building and underneath the development rights.

This concept has been recognized under Bombay stamp Act as on the conveyance in favour of the housing societies, stamp duty paid by the purchasers of flats on ownership agreements is deducted from the stamp duty payable on the market value of the property transferred in favour of the society as per proviso to article 25 of schedule 1 of Bombay Stamp Act.

Circular No. F.N. 4 / 28 / 68 – WT DT. 10.0.1969 AND 27.01.1969 explaining the provisions of section 5(1)(iv), the Board clarify that flats

vest with individual members of society and wealth tax exemption will be available to individual members.

I] Additional Area expected at Redevelopment

Liability of Income/Capital Gain Tax, if any, on:-

(A) Additional area in the hands of individual members.

Ans. As per Section 54 of the Income Tax Act, 1961, if any residential property which was held for a period of more than 3 years is sold or given for redevelopment and the new flat is purchased or acquired within a period of 1 year before or 2 years after the sale or constructed within 3 years after the sale then capital gain arising on the transfer of the old flat will be exempt to tax u/s. 54 of the Income Tax Act, 1961 to the extent of the cost of such new flat.

In the case of redevelopment, the new flat to be acquired is treated as constructed for the purpose of the Section 54. Thus, if the new flat is acquired by the owner within a period of 3 years from the surrender of the original flat then the capital gain arising from the sale of the original flat can be claimed to be exempted u/s. 54 of the Income Tax Act.

If the new flat is not acquired by the owner within a period of 3 years then the Assessing Officer at his discretion can disallow the same at any time during the assessment.

However, allotment of a flat or a house by a cooperative society, of which the assessee is the member, is also treated as construction of the house [Circular No. 672, dated 16-12-1993]. Further, in these cases, the assessee shall be entitled to claim exemption in respect of capital gains even though the construction is not completed within the statutory time limit. [*Sashi Varma v CIT*

(1997) 224 ITR 106 (MP)]. Delhi High Court has applied the same analogy where the assessee made substantial payment within the prescribed time and thus acquired substantial domain over the property, although the builder failed to hand over the possession within the stipulated period. [**CIT v R.C. Sood (2000) 108 Taxman 227 (Del)**].

Hence, relying upon the above judgments, even if in the case of development, the new flat is acquired by the owner after a period of 3years from the surrender of the old flat, an assessee can claim exemption u/s. 54.

If the new flat acquired to claim exemption u/s. 54 is sold within a period of three years from the date of purchase then the capital gain exemption claimed earlier would become taxable in the year the new flat is transferred.

Thus, in your case, the Receipt of extra carpet area over and above the existing area could be claimed as exemption u/s. 54 of the Income Tax Act, 1961.

Further, we would like to state that under the definition of "Transfer" according to Sec 2(47) Income Tax Act, 1961, transfer, in relation to a capital asset, includes sale, exchange, or relinquishment of the asset or the extinguishment of any rights therein or the compulsory acquisition thereof under any law.

An exchange involves the transfer of property by one person to another and reciprocally the transfer of property by that other to the first person. There must be a mutual transfer of ownership of one thing for the ownership of another. Hence, the acquisition of new flat would be considered as exchange and would be considered as transfer for the purpose of capital gain.

Argument could not be made that no cost is incurred by any member for the acquisition of the new flat and hence capital gain cannot be computed and the case does not fall within the ambit of Section 55(2). The member is forgoing his rights in the old flat. And hence, it would be considered as the cost of acquisition of the new flat.

However, if the residential flat is held for a period of less than 3 yrs than the receipt of extra area by the individual members would be taxable in the hands of the individual members.

(B) Cash compensation received upon surrender of entitled additional area, in part or in full, by an individual member.

Ans. If the Individual member is surrendering a part of the existing area then the Individual member would be liable to pay Capital Gain Tax. The sale consideration would be calculated as per **Section 50C of the Income Tax Act**, which is as follows:

“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 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 section 48, be deemed to be the full value of the consideration received or accruing as a result of such transfer.”

However, if the Individual member is surrendering a part of the additional area then the Individual member would not be liable to pay any income tax or capital gain tax on the same

- (C) The Society for receiving amenities and facilities for the common use of its members and their families.

Ans. If the Society is receiving for amenities and facilities for the common use of its members and their families then the same is not taxable in the hands of the Society or the Individual members as there is no cost of acquisition of the same.

In deciding the case of **JETHALAL D.MEHTA V. DY. CIT [(2005) 2 SOT 422 (MUM.)**, Hon. Income Tax Appellate Tribunal mainly relied upon Supreme Court decision in the case of **CIT V. B.C.SRINVASA SHETTY 128 ITR 294** in which it was decided that if there is no cost no capital gain can be worked out hence amount received is to be treated as exempt receipt.

II] Corpus Money expected at Redevelopment

Liability of Income/Capital Gain Tax, if any, on:-

- (A) Corpus Money received by the individual members from the Developer in lieu of surrender of part entitlement of FSI/Development rights.

Ans. If the Individual member is receiving an area which is same or more than the present area then the Individual member is not liable to pay capital gain tax on the same.

If however, Individual member is receiving an area which is less than the present area than the Individual member is liable to

pay Capital Gain Tax as per Section 50C of the Income Tax Act, 1961 as already explained above.

- (B) Corpus Money received by the Society from the Developer in lieu of surrender of part entitlement of FSI/Development Rights, such funds being invested by the Society to earn interest income to meet/subsidize the maintenance costs of its Redeveloped premises and property.

Ans. If at the time of Redevelopment, the Society was in not in possession of unutilized FSI/Development Rights, then the Society would not be liable to pay any Capital Gain Tax on the receipt of the Corpus Money on surrender of a part of FSI/Development Rights.

Further, if the Society has unutilized FSI/Development Rights in its possession at the time of Redevelopment, then the receipt of the Corpus Money on surrender of the part of FSI/Development Rights would be taxable in the hands of the Society.

Also, in the case of (1) ***New Shailaja CHS v. ITO (ITA NO. 512/M/2007. BENCH B dated 2nd Dec, 2008 (mum.)*** and (2) ***ITO v. LOTIA COURT CO- OP. HSG. SOC. LTD. (2008) 12 DTR (MUMBAI)(TRIB) 396*** it was held that *where the assessee, a Co-op. Hsg. Soc. Ltd. Became entitled, by the virtue of Development Control Regulations, to Transferable development Rights (TDR) and the same was sold by it for a price to a builder , the question arose whether the transaction of sale receipt could be taxed. It was held that though the TDR was a Capital Asset, there being no 'cost of acquisition' for the same, the consideration could not be taxed.* The same is held in the cases of **NEW SHAILAJA CHS LIMITED (ITA NO. 512/MUM./2007), OM SHANTI CO-OP. HSG. SOC. LTD. (ITA**

**NO.2550/MUM./2008) & LOTIA COURT CO-OP. HSG. SOC. LTD.
(ITA NO. 5096/MUM./2008).**

Further, in the case of **MAHESHWAR PRAKASH 2 CHS LTD. 24 SOT 366 (MUM.)**, it was held that *the assessee-society acquired the right to construct the additional floors by virtue of DCR, 1991 which could not be available to the assessee on expenditure of money. Prior to DCR, 1991, no society had any right to construct the additional floors, so it was not a tradable commodity. Suddenly by virtue of DCR, 1991, the right was conferred by the Government on the assessee. Such right exclusively belonged to the building owned by the society. It could not be transferred to any other building.*

Similarly, similar right belonging to other societies could not be purchased by the assessee for the purpose of constructing additional floors in its own building. Therefore, such right had no inherent quality of being available on expenditure of money and, therefore, cost of such asset could not be envisaged. Hence, the said view was fully justified in terms of the decision of the Apex Court in the case of B.C. Shrinivasa Shetty.

Therefore, the right acquired by the assessee did not fall within the ambit of section 45 itself. The amended provisions of section 55(2) were also not applicable, since such right was not covered by any of the assets specified in section 55(2)(a).

Therefore, the sum of Rs. 42 lakhs received by the assessee from the developer was not chargeable to tax under section 45. Therefore, the impugned orders passed by the lower authorities were to be set aside.

- (C) Corpus Money received by the Society from the Developer (as described in B above) and subsequently distributed to its members. Whether such incomes enlisted above at A, B and C, if taxable, shall be treated as Capital Gains or deemed to be income earned in the year of receipt.

Ans. As per Maharashtra Co-op. Societies Act, 1960, a Co-operative Society cannot distribute the corpus funds to its Individual member, it can only declare dividends.

However, the declaring of Dividends has lots of restrictions and formalities.

- (D) Liability of Income Tax, if any, on interest income arising from investment of such Corpus Money by the Society/individual members in the Co-operative/other Banks.

Ans. If the Society receives interest income from a Co-operative bank then the same is exempt from tax.

And, if the interest income is received from other banks than the same is taxable and the Society has to pay tax on the same.

However, as per recent Hon'ble **Tribunal Judgment** in the case of **ITO v. Sagar Sanjog C.H.S. Ltd., ITA Nos. 1972 to 1974**

and 2231 to 2233/ Mum./ 2005(BCAJ) it was held that *the interest income earned out of the fund money invested went to reduce the maintenance. According to the tribunal, the interest would have been taxable, had there been surplus left after it being adjusted against the maintenance expenses. The tribunal also noted that there was nothing on record to suggest that the interest income would be given to members on dissolution of the Society.*

Thus, even the interest income received from other than Co-operative Bank and spent on Society's work then the concept of Mutuality will apply and is not liable to tax but this view is not free from litigation.

III] Rent for Temporary Alternative Accommodation including Deposits, if any:

Rental allowance may be received by individual members in the event of need for Relocation during Redevelopment. Such amounts may be utilized in part or in full towards rent paid for alternative premises or may remain entirely unspent if the member already has his/her own alternative accommodation. Such allowance may be received for about three years, either together in one tranche in advance or in installments on a staggered basis.

Liability of Income Tax, if any, on such Rental Allowance, including Deposits, if any, received by the individual members.

Whether such income, if taxable, shall be treated as income earned in the year of receipt (if received on a staggered basis) or entirely as income in one year (if received fully in advance)

Ans. In order to get the old building redeveloped, the existing structure of the old building is required to be demolished and hence, it is necessary to vacate the same. To facilitate redevelopment and to compensate the flat owners for the hardship to be faced by them in this regard, the Developer might offer them Rent compensation which they would be paying for the temporary accommodation during the period of redevelopment.

The Rent Compensation so provided by the developer to the owner should be expended by the owners for the purpose of their temporary accommodation and other expenditure related thereto.

If the actual rent paid by the flat owners is less than the Rent compensation received by them from the redeveloper then the excess of such amount received will be taxable under the head **Income From Other Sources**, otherwise, the Rent compensation received by the flat owners from the redeveloper is not taxable.

The Rent Compensation given to the Individual Members shall be taxable in the year of receipt if the Rent Compensation is received on staggered basis and the whole is not spent by the Individual Members on their alternative accommodation.

However, if the Rent Compensation is given to the Individual Members in one tranche in advance, then the Rent Compensation received by the Individual Members would be taxable on proportionate basis if the same is not spent on the Alternative Accommodation.

IV] Hardship Allowance/ Compensation for Inconvenience.

Members opting not to be temporarily relocated during the Redevelopment may receive "Hardship Allowance" from the Developer.

Members agreeing to be temporarily relocated during Redevelopment may receive "Compensation for Inconvenience" from the Developer.

Liability of Income Tax, if any, on such Allowance/ Compensation and if taxable, mode of computation i.e. whether as income in the year of receipt or whether on a staggered basis as received.

Ans. Along with extra area and Rent compensation, the redevelopers also offer lumpsum amount to the flat owners in addition to extra area and compensation. The transfer of TDR to Builder for development of property does not attract Capital Gain Tax.

In deciding the case of **JETHALAL D.MEHTA V. DY. CIT [(2005) 2 SOT 422 (MUM.)**, Hon. Income Tax Appellate Tribunal mainly relied upon Supreme Court decision in the case of **CIT V. B.C.SRINVASA SHETTY 128 ITR 294** in which it was decided that if there is no cost no capital gain can be worked out hence amount received is to be treated as exempt receipt.

Hence, the Hardship Allowance and the Compensation for Inconvenience is not taxable in the Hands of the Individual Members as Hardship Allowance and Compensation for Inconvenience can't be worked out in monetary terms and have no cost. Since there is no cost of acquisition, as per Income Tax Act, 1961, the receipt would not be treated as a Capital Receipt and thus, is exempt from tax.

V] White Goods/ Household Amenities received by Members from Developer.

Liability of Income Tax, if any, on individual members for White Goods/Household Amenities such as Air-Conditioners, washing

machine, modular kitchen, etc. that are sometimes included by Developers in the new premises on a complimentary basis.

Ans. All the White Goods/ Household Amenities which are attached to the Flat i.e. Fixtures, Modular Kitchen, Centralized A/c, etc. are treated as a part of the Flat and thus, are exempt and not taxable in the hands of the Individual Members.

Other Movable items such as Refrigerator, Sofa Set and other furniture which are not attached to the walls of the flat and exceeds 50,000/- in value in totality are not treated as a part of the Flat and are thus taxable in the hands of the Individual Members in the year of receipt of such amenities u/s. **56(2)(vii) of the Income Tax Act, 1961**, which is as follows:

“where an individual or a Hindu undivided family receives, in any previous year, from any person or persons on or after the 1st day of October, 2009,--

(a) any sum of money, without consideration, the aggregate value of which exceeds fifty thousand rupees, the whole of the aggregate value of such sum;

(b) any immovable property, without consideration, the stamp duty value of which exceeds fifty thousand rupees, the stamp duty value of such property.

*** The following sub-clause (b) shall be substituted for the existing sub-clause (b) of clause (vii) of sub-section (2) of section 56 by the Finance Act, 2013, w.e.f. 01.04.2014.**

(b) any immovable property,-

(i) without consideration, the stamp duty value of which exceeds fifty thousand rupees, the stamp duty value of such property;

(ii) for a consideration which is less than the stamp duty value of the property by an amount exceeding fifty thousand, the stamp duty value of such property as exceeds such consideration:

Provided that where the date of the agreement fixing the amount of consideration for the transfer of immovable property and the date of registration are not the same, the stamp duty value on the date of agreement may be taken for the purposes of this sub-clause:

Provided further that the said proviso shall apply only in a case where the amount of consideration referred to therein, or part thereof, has been paid by any mode other than cash on or before the date of agreement for the transfer of such immovable property;

(c) any property, other than immovable property,--

(i) without consideration, the aggregate fair market value of which exceeds fifty thousand rupees, the whole of the aggregate fair market value of such property;

(ii) for a consideration which is less than the aggregate fair market value of the property by an amount exceeding fifty thousand rupees, the aggregate fair market value of such property as exceeds such consideration”

****Amendments made by the Finance Act, 2013- Transactions for inadequate consideration in immovable property made taxable w.e.f. assessment year 2014-15.***

The provisions of section 56(2) (vii) are amended, with effect from 01.04.2014, so as to provide that where any immovable property is received by an individual or HUF for a consideration which is less than the stamp duty value of the property by an amount exceeding Rs.50,000, the stamp duty value of such property as exceeds such consideration,

shall be chargeable to tax in the hands of the individual or HUF as income from other sources.

In other words, if the difference between stamp duty value and the purchase consideration is Rs.50,000 or less, nothing will be chargeable to tax in the hands of the recipient of property. If the purchase consideration is less than the stamp duty value of the property and such difference is more than Rs.50,000, then the difference between the stamp duty value and purchase consideration will be taxable under section 56 under the head 'Income from Other Sources'.

The following are important points to be noted:

- The immovable property received should be land or building or both.
- The immovable property is received during the previous year.
- The immovable property is received on or after 01.04.2013
- The immovable property received may be situated anywhere [whether in India or abroad].
- The immovable property should be a capital asset as defined under section 2(14).
- The immovable property so received should be for a consideration less than the stamp duty value and the difference between the two should exceed Rs.50,000. In such a situation, difference between the stamp duty value and purchase consideration will be taxable.
- Rs.50,000 limit for difference to be applied property wise, i.e. specially to each property received for consideration less than stamp duty value and not to all such properties received during the previous year.
- It would appear that the provisions would apply only if consideration is quantifiable in money terms. If not, it would appear that the provisions would not apply.

VI] Reimbursement of Expenses from Developer.

Liability of Income Tax, if any, on the Society/ individual members for Reimbursement from Developer of Expenses such as Stamp Duty, Fees of Consultants (Architect, Lawyers, Chartered Accountants, etc.) cost of updating members and holding General Body meetings, Administrative Expenses towards the Redevelopment Process, etc. incurred/ to be incurred.

Ans. Anything amount which is reimbursed by the Developer is not taxable either in the hands of the Society or the Individual Members, provided that the entire amount of reimbursement is been spent on the expenses it is reimbursed for.

Thus, if excess amount is reimbursed by the Developer than the amount which is actually spent for the purpose than the excess amount would be taxable on the receipt of the same.

However, in the case of a Society, if excess amount is reimbursed to a Society by the Developer than actually spent by the Society, and the excess amount so received is been used by the Society for payment of expenses which are for the welfare of the Society or the Individual Members than the excess amount received by the Society would not be taxed and hence, would be exempt. Otherwise the excess amount received by the Society would be taxable.

VII] Liquidation & Disbursement of Existing Sinking Fund.

Liability of Income/Capital Gain Tax, if any, on the Society/ individual members upon liquidation and disbursement to existing members (with permission from Registrar/any other authority) of existing, unutilized Sinking Fund (generated by annual contributions from members and

bank interest earned thereon.) prior to induction of new members arising from saleable portion of Redeveloped premises.

Ans. In our view, the Sinking Fund is to be used on the property itself either for the purpose of development or Heavy Repair.

However, if the Registrar gives permission then the Sinking Fund could be distributed amongst the Individual Members which again has a number of restrictions.

This distribution of Sinking Fund after the permission of the Registrar would be taxable in the hands of the Individual Members to the extent of the interest on such a fund. The distribution of the principal amount would not be taxable in the hands of the Society or the Individual Members.

VIII] TDS on receipt.

Whether tax shall be deducted at Source (TDS) from Corpus Money, Allowances, Compensations, Reimbursement of Fees of Consultants and other Expenses, Rent for Temporary Alternative Accommodation and Deposits or any other form of receipt in the hands of the hands of the Society/ its individual members.

Ans. As per the Income Tax Act, 1961, no TDS is to be deducted on the amount reimbursed by the Developer to the Society or the Individual Members or on other items such as Corpus Money, Allowances, Compensations, Reimbursement of Fees of Consultants and other Expenses, Rent for Temporary Alternative Accommodation and Deposits or any other form of receipt.

However, when the Society makes payments such as Professional Fees, Contractor, etc, the Society is to Deduct Tax at Source at the rate given herebelow and pay the same to the Income Tax Department and file the Quarterly Returns:

Contractor- 1% in the case of individual/HUF

194C - 2% in the case of others u/s

Rent - 10% u/s 194I

Professional Fees - 10% u/s 194J

Commission & Brokerage - 10% u/s 194H

IX] Tax Planning (Saving) Instrument.

Recommendation of umbrella of designated schemes, funds, securities, etc. under which the Society/ its individual members may invest taxable proceeds, if any, to minimize the impact of Income/ Capital Gain Tax.

Ans. In our view, whether there would be any capital gain tax liability arising on account of such transactions of Redevelopment, is not free from litigation, in view of the fact that various litigations are going on in various courts in our country and the issue would finally be settled when the Supreme Court decides the matter.

It is also to be noted that even the Supreme Court changes its view from time to time depending on the frequent amendments in the Income Tax Laws.

Further we would like to state that Income Tax Department have filed appeal before Hon. High Court and, if the court allows them against the assesseees then the same would be taxable for the Society otherwise till now it is tax free. Even assuming that Hon High Court decide the case against the assessee then assessee will be liable to pay tax with interest but no penalty can be charged in view of recent decision of Supreme Court decided in the case of **Reliance Petro products Pvt. Ltd. Vs. CIT 92010) 322 ITR 158 (SC)** on the principle that if assessee give all particulars of income in return and claim certain wrong deduction due to ignorance of highly technical law then that will not attract penalty u/s 271(1)(c) of the Income Tax Act, 1961.

Further we would like to say that based on the above, till now the Corpus received by the Society and the individual members is tax free but in case the High Court decides the case against the Society then to be on the safer side and to avoid litigation with the Income Tax Department, we suggest that recipient can invest the same in Specified Bonds to claim exemption u/s. 54EC of the Income Tax Act. One can earn interest by investment in the Bonds for 3 yrs which would be an added benefit. The interest so earned would be taxable. Section 54EC of the Income Tax Act, 1961, is produced here below:

“Where the capital gain arises from the transfer of a long-term capital asset and the assessee has, at any time within a period of six months after the date of such transfer, invested the whole or any part of capital gains in the long-term specified asset, the capital gain shall be dealt with in accordance with the following provisions of this section,

(a) if the cost of the long-term specified asset is not less than the capital gain arising from the transfer of the original asset, the

whole of such capital gain shall not be charged under [section 45](#) ;

(b) if the cost of the long-term specified asset is less than the capital gain arising from the transfer of the original asset, so much of the capital gain as bears to the whole of the capital gain the same proportion as the cost of acquisition of the long-term specified asset bears to the whole of the capital gain, shall not be charged under [section 45](#):

Provided that the investment made on or after the 1st day of April, 2007 in the long-term specified asset by an assessee during any financial year does not exceed fifty lakh rupees.

"long-term specified asset" for making any investment under this section during the period commencing from the 1st day of April, 2006 and ending with the 31st day of March, 2007, means any bond, redeemable after three years and issued on or after the 1st day of April, 2006, but on or before the 31st day of March, 2007, -

- (i) by the National Highways Authority of India constituted under [section 3](#) of the National Highways Authority of India Act, 1988 (68 of 1988); or
- (ii) by the Rural Electrification Corporation Limited, a company formed and registered under the Companies Act, 1956 (1 of 1956),

and notified by the Central Government in the Official Gazette for the purposes of this section with such conditions (including the condition for providing a limit on the amount of investment by an assessee in such bond) as it thinks fit

X] Implications of VAT/Service Tax.

Whether all receipts in the hands of the Society/ its individual members shall be net of Vat and Service Tax

Responsibility/ liability of Society/Its Members towards the same for services rendered to it by professionals/consultants.

Ans. As Society is not providing any Services to the Developer, the Society is not liable to pay Service Tax or VAT on any of the payments receipt by the Society in the form of reimbursements or Corpus Money or Compensations, etc.

If the Society is making any payment of Fees to the Professionals or Contractors, then the Society is liable to pay Service Tax @10.3% to the Professionals and Service Tax or Vat to Contractors on such a payment.

The professionals and the Contractors would in turn pay the same to the respective Central Government or State Government as applicable.

XI] Responsibility/ Liability towards stamp duty.

Responsibility/Liability of the Society/its individual members towards Stamp Duty, if any, in transition from surrender of existing premises to the Develop to the occupation and registration of the Redeveloped premises

Ans. Normally, in the cases of Redevelopment, the Stamp Duty and the Registration Charges on surrender of the existing premises to the Developer for the purpose of Redevelopment would be paid by the Developer.

Whereas, when the Individual Members receives the Redeveloped Premises from the Developer, he is liable to pay Stamp Duty and Registration Charges on the same. The Stamp Duty payable would be on the cost of construction of the present area of the Premises and on the market value for the extra area received as per the Ready Reckoner Value published by the Government of Maharashtra every year on 1st January.

XII] Restructuring of Society.

Whether the composition of the Society may need to be restructured in any manner so as to facilitate minimization of the tax liability.

Whether admission of new members (from saleable portion.) in the existing Society or their Accommodation as an independent new Society would have any bearing on the tax liability of the Society/its individual members.

Ans. No, the composition of the Society need not be restructured in any manner so as to facilitate minimization of the tax liability.

The admission of the new members to the existing Society or their accommodation to the new Society would not make much difference to the tax liability of the Society or its Individual Members.

However, it would be advisable to admit the new members to the existing Society because due to increase in the number of the Members of the Society, the Fixed charges or expenses of the Society like maintenance, etc would be distributed amongst the Members.

2. CAPITAL GAIN

CAPITAL ASSET

Capital asset means any property of any kind held by an assessee, whether or not connected with his business or profession

However, agricultural land in India is not a capital asset provided it is not situated:-

1. In any area wherein the territorial jurisdiction of Municipality or contonment board having a population of 10,000 or more;
2. In any area within 8 Km. from a municipality stated above.

Note: In order to qualify for agricultural land in India, it is not necessary that the land was once agricultural land. It must be an agricultural land at the time of sale. In order to determine whether a particular land is agricultural land or not, it is first necessary to ascertain what is the use to which the land is been actually put. If it is been used for agricultural purposes or even if the agricultural use has ceased but it is apparent that the land is meant to be used for agricultural purpose, it would be an agricultural land.

Ranchhodbhai Bhaijibhai Patel V. Cit (1971) 81 Itr 446 (Guj.)

13.2 TRANSFER IS A PRE-REQUISITE FOR TAXING CAPITAL GAIN

Capital gain arises only when there is a *transfer* of capital asset. If the capital asset is not transferred or if there is any transaction which is not regarded as transfer, there will not be any capital gain. However w.e.f. assessment year 2000-2001 section 45(1A) has been inserted to provide that in case of profits or gains from insurance claim due to damage or destruction of property, there will be capital gain on such deemed transfer although no asset has been actually transferred in such case.

Judicial pronouncements — Whether a transaction constitutes transfer or not?

Where an assessee gives up the right to claim specific performance for purchase of immovable property it is relinquishment of a capital asset and thus transfer:

The assessee had entered into an agreement to purchase certain property. Both parties reserved the right to specific performance of the agreement. Nearly four years thereafter, again another agreement was entered into in the nature of deed of cancellation, by which the assessee agreed for termination of the earlier agreement and allowed the owner of the land to sell the said property to any person and at any price of his choice. As a consideration for this, the assessee was paid a sum of Rs. 6,00,000 apart from being refunded the advance of Rs. 40,000. The question that arose for consideration was as to whether the amount of Rs. 6,00,000 received by the assessee from the vendor could be treated as

capital gains in the hands of the assessee.

K.R. Srinath v Asstt. CIT (2004) 268 ITR 436 (Mad)

There is no transfer in family settlement:

Where a family settlement/ arrangement is arrived at in order to avoid continuous friction and to maintain peace among the family members, the family arrangement is governed by the principles which are not applicable to dealing between strangers. So, such *bona fide* realignment of interest, by way of effecting family arrangements among the family members would not amount to transfer. **CIT v A.L. Ramanathan (2000) 245 ITR 494 (Mad)** In this case the court followed the decision of the Supreme Court in general law laid down in the case of **Kale v Deputy Director of Consolidation (1976) AIR 1976 SC 807.**

Giving up the right to obtain conveyance of immovable property amounts to transfer of a capital asset:

Where the assessee had paid the earnest money and acquired right to obtain conveyance of immovable property, such earnest money paid shall be cost of acquisition of such right and if such right is given up, there is a transfer of a capital asset and the compensation received for giving up such right is the consideration price. **CIT v Vijay Flexible Container (1990) 186 ITR 693 (Bom)**

In case of litigation pending, no capital gain tax unless the case is decided:

The AO hold that the income accrues on the date when an enforceable debt is created in favour of the Assessee. However, the Court held to consider the issue as to whether the income would accrue even when the very existence of the income is under doubt and a subject matter

of litigation. Further, the subject matter of litigation cannot be a subject matter of tax avoidance.

ITO v. M/s. S. P. BUILDERS, CIT(A) XII/ 12(3)(4)/ IT – 184/07-08.

13.3 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 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 transfer.

13.4 CONVERSION OF STOCK – IN – TRADE INTO CAPITAL ASSET

It was held that there is no provision similar to section 45(2) with respect to Conversion Of Stock – In – Trade Into Capital Asset. It was further held that holding period is to consider from the date of acquisition.

CIT V. BRIGHT STAR INVESTMENTS (P) LTD (2008) 24 SOT 288 (BOM.)

KALYANI EXPORTS & INV (P) LTD & ORS. V. DY. CIT (2001) 78 ITD 95 (PUNE) (TM)(139 AND 140)

*However in **SPLENDOR CONSTRUCTIONS (P) LTD VS. ITO (2009) 27 SOT 39 (DELHI)**. It was held that the period to be considered from the date of conversion to investment. This decision has not considered the decision of the Mumbai Tribunal in Bright Star (supra).*

13.5 PIECEMEAL TRANSFER

In **AJAI KUMAR SHAH JAGATI V ITO (1995) 55 ITD 348 (DEL.) AND M/S G. G. DANDEKAR MACHINES WORKS LTD V. JCT, ITA NO. 181/MUM/2001, BENCH - F, DATED 28TH FEBRUARY, 2007,** possession of only a part of property was transferred against proportionate consideration received during the relevant assessment year. It was held that capital gains arising only on the said proportion amount of consideration could be charged in the relevant year and not on the entire consideration stipulated in the sale agreement.

13.6 CAPITAL ASSETS CAN EITHER BE SHORT-TERM CAPITAL ASSET OR LONG-TERM CAPITAL ASSET

- (A) Short-term capital asset: A capital asset held by an assessee for not more than 36 months *immediately preceding the date of its transfer* is known as a short term capital asset.
- (B) Long-term capital asset: It means a capital asset which is not a short-term capital asset. In other words, if the asset is held by the assessee for more than 36 months or 12 months, as the case may be, such an asset will be treated as a long-term capital asset.

Thus, period of holding of a capital asset is relevant for determining whether capital asset is short-term or long-term.

Exclusion/inclusion of certain period for computing the period of holding

of an asset:

<i>Case</i>	<i>Exclusion/Inclusion of period</i>
(ii) Property acquired in any mode given under section 49(1) (e.g. by way of gift will, etc.)	Include the holding period of previous owner also.

Judicial decisions for determining period of holding

Property constructed on a land purchased earlier: In case of property is constructed on a site purchased much earlier, the question arises whether the period of holding the asset i.e., the property, should be reckoned from the date of completion of the construction of the property or from the date of acquisition of the land.

The correct position is that the asset consists of two components: (1) Land and (2) Building. When the property is sold, the period of holding has to be reckoned separately for the land and the building. The consideration received can also be split into two parts relating to each component.

In **CIT v Vimal Chand Golecha (1993) 201 ITR 442 (Raj)**, the land was purchased in 1962 and building was constructed thereon in the accounting years relevant to assessment years 1968-69, 1969-70 and 1970-71. The building was sold in 1970. It was held that the gains attributable to land were assessable as long-term capital gains. The gains attributed to the building were however, short-term capital gains. Similar decision was held in the cases of **CIT v Lakshmi B. Menon (2003) 264**

ITR 76 (Ker) and CIT v C.R. Subramanian (2000) 242 ITR 342 (Kar).

Agreeing with the above Rajasthan High Court view, it has been held that land can be considered a separate capital asset even if a building is constructed thereon. Thus, where the land is held for more than a prescribed period, the gains arising from the sale of the land can be considered as long-term capital gains even though the building thereon, being a new construction, is held for a period less than the prescribed one

CIT v Dr. D.L. Ramachandra Rao (1999) 236 ITR 51 (Mad)

CIT v Citibank N.A. (2004) 260 ITR 570 (Bom)

In the above cases, the burden will be on the assessee to satisfy how much of the sale proceeds should be apportioned for the land and how much of the sale proceeds pertained to the structure.

CIT v Estate of Omprakash Jhunjhunwala (2002) 254 ITR 152 (Cal)

Period of holding of share in the co-operative housing society: While computing the capital gain tax in case of transfer of his shares by a person who is a member of cooperative housing society, the relevant date would be date on which the member acquires the shares in the cooperative housing society and the date on which member had sold his shares therein. Thus, where the assessee acquired shares in the society on 6-9-1979 and was allotted flat on 15-11-1979. He was given possession of flat in October 1981, and sold the shares of the society along with the flat, on 4-12-1982, the capital gains arising from the sale were long term capital gains, shares having been held for more than 36 months.

CIT v Anilben Upendra Shah (2003) 262 ITR 657 (Guj)

Similarly, the assessee became a member in Venus Apartments (Galaxy Co-operative Housing Society). He was allotted a flat in the building of the society by resolution dated 4-11-1980, passed by the managing committee of the society. On the date of allotment, i.e., 4-11-1980, the property was under construction and came to be completed on 12-9-1983. Physical possession was handed over to the assessee on 12-9-1983. On 30-4-1984, the flat was sold by the assessee for a consideration of Rs. 3,75,000. The assessee worked out long-term capital gains at Rs. 1,59,395. The Assessing Officer did not accept the stand of the assessee that the assessee had become the owner of the property as per resolution dated 4-11-1980.

According to the Assessing Officer the assessee had held the property for a period of less than 36 months and as such was liable to short-term capital gains tax, it was held that the assessee in the present case was allotted a share by the co-operative housing society on 4-11-1980, and the sale of the same took place on 30-4-1984, i.e., after a period of 36 months. The Tribunal was therefore justified in holding that the capital gains arising were long-term capital gains and the assessee was entitled to deduction from such gains as per law.

CIT v Jindas Panchand Gandhi (2005) 279 ITR 552 (Guj)

Right to acquire any house property: Where a flat is booked with a builder under a letter of allotment or an agreement for sale, this would represent only a right to acquire a flat and if such right is acquired more than 36 months back, it becomes a long-term asset. However, when the possession of the flat is taken, the period of holding would once again

commence from the date of the possession of the flat as the small right to acquire a flat merged into larger right and small right upon a merger would lose its existence.

13.7 COST OF ACQUISITION

Cost of acquisition of an asset is the value for which it was acquired by the assessee. Expenses of capital nature for completing or acquiring the title of the property are includable in the cost of acquisition.

Judicial decision on cost of acquisition:

Cost of acquisition of an asset acquired from the previous owner in any mode given u/s 49(1): In this case, the cost of acquisition is taken as the cost to the previous owner and it is this cost which will have to be indexed. For the purpose of indexation the year in which the asset was *first held* by the assessee (not the previous owner) is to be considered. The indexation will be done as under:

$$\frac{\text{Cost of acquisition to the previous owner}}{\text{CII of the year of transfer}} \times \text{CII of the year in which the asset is first held by the assessee}$$

However, in the case of *Mrs. Pushpa Sofat (2002) 81 ITD 1 (Chd)(SMC)*, the indexation of cost was allowed from the date of acquisition of the asset by the previous owner and not the date when the asset was acquired by the assessee from the previous owner under any mode given under section 49(1).

13.8 VALUATION AS ON 1.4.1981

Reference to the DVO can be made u/s 55A only when the AO is of the opinion that the value of the capital asset claimed by the assessee is less than the fair market value and not when he was of the opinion that the fair market value of the property as on 01.04.1981 as shown by the assessee was more than its actual fair market value.

**Cit V. Daulat Mohta Huf Ita No. 1031 Of 2008 Dt. 22.09.2008
(Bombay High Court)**

Ito V. Smt. Lalitaben B. Kapadia (2008) 115 Ttj 938 (Mum.)

Patel India (P) Ltd. V. Dy. Cit (1999) 63 Ttj 19 (Mum.)

13.9 NO REGISTRATION – 50C NOT APPLICABLE

In **NAVNEET KUMAR THAKKAR VS. ITO (2007) 112 TTJ 76 (JD)** it was held that section 50C embodies the legal friction by which the value assessed by the stamp duty authorities is considered as the full value of consideration for the property transferred. It does not go beyond the cases in which the subject transferred property has not become the subject – matter of registration and the question of valuation for stamp duty purposes has not arisen.

13.10 EXEMPTION OF CAPITAL GAINS UNDER VARIOUS SUB-CLAUSES OF SECTION 10, SECTION 11(1A) AND SECTION 13A

Exemption of capital gains on compensation received on compulsory acquisition of agricultural land situated within specified urban limits:

With a view to mitigate the hardship faced by the farmers whose agricultural land situated in specified urban limits has been *compulsorily acquired*, the Finance (No. 2) Act, 2004 has inserted a new clause (37) in section 10 so as to exempt the capital gains (whether short-term or long-term) arising to an *individual or a Hindu undivided family* from transfer of agricultural land by way of *compulsory acquisition* where the compensation or the enhanced compensation or consideration, as the case may be, is received *on or after 1-4-2004*.

The exemption is available only when such land has been used for agricultural purposes during the preceding two years *by such individual or a parent of his or by such Hindu undivided family*.

Where the compulsory acquisition has taken place before 1-4-2004 but the compensation is received after 31-3-2004, it shall be exempt. But if part of the original compensation in the above case has already been received before 1-4-2004, then exemption shall not be available even though balance original compensation is received after 31-3-2004.

However, enhanced compensation received on or after 1-4-2004 against agricultural land compulsorily acquired before 1-4-2004 shall be exempt.

13.11 EXEMPTION OF CAPITAL GAINS U/s. 54, 54B, 54EC & 54F

a) *Profit on transfer of house property used for residence [Section 54]:*

Benefit of section 54 is confined to sale of a residential house after 36 months and reinvestment in a residential house. Reinvestment

benefits are available both for purchase and construction of the house. Purchase has to be either one year before or two years later. Construction has to be completed within three years of the sale of the asset in respect of which benefit of reinvestment is claimed. There have been many decisions on purchase/construction of the house. Further, certain clarifications have also been issued in this regard. These have been summarized as under:

- i. House include part of the house: House property does not mean a complete independent house. It includes independent residential units also, like flats in a multi-storeyed complex. The emphasis is not on the type of the property, but, on the head under which the rental income is assessed. [*CIT (Addl.) v Vidya Prakash Talwar* (1981) 132 ITR 661 (Del)].
- ii. Release deed may also be treated as purchase: Where a property is owned by more than one person and the other co-owner or co-owners release his or their respective share or interest in the property in favour of one of the co-owners, it can be said that the property has been purchased by the releasee. Such release also fulfils the condition of section 54 as to purchase so far as releasee-assessee is concerned [*CIT v T.N.Aravinda Reddy* (1979) 120 ITR 46 (SC)]
- iii. Addition of floor to the existing house eligible for exemption under section 54: The assessee sold his residential property and invested the capital gain within the stipulated time in the construction of a new floor on another house owned by

him by demolishing the existing floor, it was held that he was entitled to exemption under section 54. [*CIT v Narasimhan (PV)* (1990) 181 ITR 101 (Mad)].

- iv. No exemption under section 54 if land only is sold: The house property concerned must be building or land appurtenant to building. The basic test was whether the land appurtenant to building could be used independent of the user of the building. If so, it cannot be said to be land appurtenant to building. Further, the basic requirement is that the capital gain should arise from the transfer of building or land, the income of which is chargeable under the head Income from house property. If the land alone is sold, the provisions of section 54 will have no application inasmuch as the income from land is not chargeable under the head Income from house property. [*CIT v Zaibunnisa Begum* (1985) 151 ITR 320 (AP)].

- v. Successor is entitled to benefit of exemption in case of death of the assessee: In case of assessee's death during the stipulated period, benefit of exemption under section 54(1) is available to legal representative if the required conditions are satisfied by the legal representative. [*Ramanathan (CV) v CIT* (1980) 155 ITR 191 (Mad)].

- vi. Purchase of limited interest in the house eligible for exemption under section 54: Where an assessee had sold the residential house and acquired only 15% interest in another house and

such other house was already used for residence prior to purchase, it was held that the benefit should be available to the assessee. [*CIT v Chandaben Maganlal* (2000) 245 ITR 182 (Guj)]. In coming to the conclusion, the High Court followed its own earlier decision in *CIT v Tikyomal Jasanmal* (1971) 82 ITR 95 (Guj). In that case, what was purchased was a unit of house property, while in the present case before the High Court, it was a limited interest in the property.

- vii. *Construction in another property not eligible for exemption:* An assessee gifted some land to his wife. He, thereafter constructed a building on the said land. The Government acquired the land and building and paid compensation for land to the wife and for the building to the assessee (husband). It was held that capital gain on land was assessable in the hands of the husband by virtue of section 64 but he was not entitled to exemption under section 54 in respect of capital gain on the acquisition of the land of the wife as the capital gain to the wife did not arise on transfer of a residential house. [*T.N. Vasavan v CIT* (1992) 197 ITR 163 (Ker)].

- viii. *House of the firm used by partners:* Where a firm's property is used for residence of partners and thereafter distributed to the partners upon dissolution of the firm and the partner sells the same, exemption can be claimed by the partner under section 54. For this purpose, period for which this property was held by the firm shall also be taken into account for determining the question whether the house

property in exemption was a long-term capital asset or not. [*CIT v M.K. Chandrakanth* (2002) 258 ITR 14 (Mad)].

- ix. *There can be both purchase and construction:* Where the assessee had partly invested the capital gains on the purchase of another house and partly on the construction of additional floor to the house so purchased within the prescribed time limit, it was held that the Income-tax Officer was not justified in restricting exemption to investment on purchase only, holding that the exemption under section 54 was admissible either for purchase or for construction but not for both. [*Sarkar (B.B.) v CIT* (1981) 132 ITR 661 (Del)].

- x. *Construction can start before the sale of asset:* The construction of the new house may start before the date of transfer, but it should be completed after the date of transfer of the original house. [*CIT v J.R. Subramanya Bhat* (1987) 165 ITR 571 (Karn)]. The very fact that purchase of another house as also the construction can take place before the sale means that cost of purchase or new construction need not flow from the sale proceeds of the old property. [*CIT v H.K. Kapoor (Decd)* 1998 234 ITR 753 (All) and *CIT v M. Vasudevan Chettiar* (1998) 234 ITR 705 (Mad)].

- xi. *Allotment of a flat by DDA under the Self-Financing Scheme shall be treated as construction of the house* [Circular No. 471, dated 15-10-1986]. Similarly, *allotment of a flat or a house by a cooperative society, of which the assessee is the*

member, is also treated as construction of the house

[Circular No. 672, dated 16-12-1993]. Further, in these cases, the assessee shall be entitled to claim exemption in respect of capital gains even though the construction is not completed within the statutory time limit. [*Sashi Varma v CIT* (1997) 224 ITR 106 (MP)]. Delhi High Court has applied the same analogy where the assessee made substantial payment within the prescribed time and thus acquired substantial domain over the property, although the builder failed to hand over the possession within the stipulated period. [*CIT v R.C. Sood* (2000) 108 Taxman 227 (Del)].

- xii. As per a circular of CBDT, the cost of the land is an integral part of the cost of the residential house, whether purchased or constructed. [Circular No. 667, dated 18-10-1993].

- xiii. Where an assessee who owned a house property, sold the same and purchased another property in the name of his wife, exemption under section 54 shall be allowable. [***CIT v V. Natarajan* (2006) 154 Taxman 399 (Mad)**].

- xiv. Where the assessee utilised the sale consideration for other purposes and borrowed the money for the purpose of purchasing the residential house property to claim exemption under section 54, it was held that the contention that the same amount should have been utilised for the

acquisition of new asset could not be accepted. [*Bombay Housing Corporation v Asst. CIT* (2002) 81 ITD 454 (Bom). **Also** followed in ***Mrs. Prema P. Shah, Sanjiv P. Shah v ITO* (2006) 282 ITR (AT) 211 (Mumbai)**].

- xv. Where non-resident Indian sold property in India and purchased residential property in U.K. and claimed deduction under section 54, it was held that it was not necessary that residential property showed be purchased in India itself. [***Mrs. Prema P. Shah, Sanjiv P. Shah v ITO* (2006) 282 ITR (AT) 211 (Mumbai)**].

However, in another case, the Tribunal held that the words 'purchase/ construction of a residential house', in section 54F on plain and simple reading, mean that the purchase/construction of a residential house must be in India and not outside India.

Therefore, the benefit under section 54F is not allowable for a residential house purchased/constructed outside India.

***Leena J Shah v Asstt. CIT* (2006) 6 SOT 721 (Ahd)**

- b) *Capital gain on transfer of land used for agricultural purposes*
[Section 54B]:

Any capital gain (short-term or long-term), arising to an assessee (only individuals), from the transfer of any agricultural land which has been used by the assessee or his parents for at

least a period of 2 years immediately preceding the date of transfer, for agricultural purposes, shall be exempt to the extent such capital gain is invested in the purchase of another agricultural land within a period of 2 years after the date of transfer to be used for agricultural purpose, provided the new agricultural land purchased, is not transferred within a period of 3 years from the date of its acquisition.

Section 54B is applicable only to individuals and not to any other assessee this is because the section uses the expression used by "his or a parent of his" which clearly indicate that the "assessee" refers to an individual. [*CIT v Devarajalu (G.K.)* (1991) 191 ITR 211 (Mad)].

c) *Capital gain on transfer of long-term capital assets not to be charged on investment in certain bonds [Section 54EC]:*

Any long-term capital gain, arising to any assessee, from the transfer of any capital asset on or after 1-4-2000 shall be exempt to the extent such capital gain is invested within a period of 6 months after the date of such transfer in the long-term specified asset provided such specified asset is not transferred or converted into money within a period of 3 years from the date of its acquisition.

Exemption under section 54EC not available in respect of deemed capital gains on amount received on liquidation of a company:

Section 54E (now section 54EC) permits reinvestment benefit, if the sale proceeds/capital gains on sale of long-term capital assets are invested in the manner required by the section. Where a shareholder is made liable for deemed capital gains on amount received on liquidation of a company, is he eligible for reinvestment benefit under section 54E (now 54EC)? It was held that section 54E (now 54EC) would have application only where there is an actual transfer and not in a case, where there is only a deemed transfer. [*CIT v Ruby Trading Co. Pvt. Ltd.* (2003) 259 ITR 54 (Raj)].

Benefit under section 54EC, etc. available even on transfer of depreciable assets: Although as per section 50 the profit arising from the transfer of depreciable asset shall be a gain arising from the transfer of short term capital asset, hence short-term capital gain but section 50 nowhere says that depreciable asset shall be treated as short-term capital asset. Section 54E [or say 54EC or 54F, etc.] is in independent provision which is not controlled by section 50. If the conditions necessary under section 54E are complied with by the assessee, he will be entitled to the benefit envisaged in section 54E, even on transfer of depreciable assets held for more than 36 months. [*CIT v Assam Petroleum Industries (P.) Ltd.* (2003) 131 Taxman 699 (Gau). See also *CIT v ACE Builders Pvt. Ltd.* (2005) 144 Taxman 855 (Bom)].

On the same analogy benefit under section 54EC or 54F shall be available in the case of depreciate asset if these are held for more than 36 months.

d) Capital Gain on transfer of asset, other than a residential house [Section 54F]:

Any long-term capital gain, arising to an individual or HUF, from the transfer of any capital asset, *other than residential house property*, shall be exempt in full, if the entire net sales consideration is invested in purchase of one residential house within one year *before* or two years *after* the date of transfer of such an asset or in the construction of one residential house within three years after the date of such transfer. Where part of the net sales consideration is invested, it will be exempt proportionately.

The above exemption shall be available only when the assessee does not own *more than one residential house property on the date of transfer* of such asset exclusive of the one which he has bought for claiming exemption under section 54F.

Section 54 and 54F are comparable in many respects. Hence, the law and precedents relating to section 54 as to whether the house property on which investment is made is residential or not, the law relating to time limits, the precedent that construction could start earlier though completed within three years are all equally applicable for section 54F. Hence, for judicial decisions for section 54F, refer to the judicial decisions given under section 54.

13.12 CAPITAL GAIN ON THE TRANSFER OF LAND, FORMING PART OF BUILDING WHICH IS DEPRECIABLE, CAN BE LONG-TERM

Section 50 provides for determination of the cost of construction of superstructure and it does not apply to land as land is not a depreciable asset. Hence, if the building comprising of the land is sold, the capital gain on superstructure shall be short-term capital gain in terms of section 50 and the capital gain on land, if held for more than 36 months, shall be long-term capital gain. This is because the land is independent and identifiable capital asset and it continues to remain so even after construction of the building thereon. [*CIT v CITI Bank NA* (2003) 261 ITR 570 (Bom)].

13.13 BLOCK OF ASSETS – SECTION 2(11).

Where land and building were used for the business, an important issue arises whether the new constructed area received can be added to the block of assets. The new constructed area will not be a building used for the purpose of the business. If it is not an asset which will be used as a “Building” for the purpose of business, it may not become a part of the Block of Assets.

For the purpose of redevelopment, the old building has to be demolished. Such building may be part of the block of asset. Issue arises as to whether indexed cost of structure can be deducted to arrive at the long term capital gains on the sale of land. Indexation u/s. 48 is allowed only in respect of cost of acquisition or cost of improvement of the capital asset transferred. Therefore, one may contend that only the land is transferred and not the building, which

will be demolished to enable the development of land, hence the cost of structure cannot be taken into consideration and only index cost of land will be considered.

3. INCOME FROM HOUSE PROPERTY

The annual value of property consisting of any buildings or lands appurtenant thereto of which the assessee is the owner, other than such portions of such property as he may occupy for the purposes of any business or profession carried on by him the profits of which are chargeable to income-tax, shall be chargeable to income-tax under the head “Income from house property”.

HOW TO COMPUTE INCOME FROM HOUSE PROPERTY

	Rs.
Gross Annual Value	xxxx
Less: Municipal Taxes	<u>xxxx</u>
Net Annual Value	xxxx
Less: Deduction u/s 24	
- Standard Deduction @ 30%	xxxx
- Interest from Borrowed Capital	<u>xxxx</u>
Income From House Property	<u>xxxx</u>

Points to remember:

- Annual value of property is chargeable under the head ‘*Income from house property*’. In order that the annual value be charged under this head, it is *irrelevant* whether the actual income from such house property has accrued or has been received by the assessee.

- Property should consist of any buildings or lands *appurtenant* thereto.
- Section 22 is not confined only to house property, but extends to all buildings whether used as dwelling house or for other purposes {*CIT v. Chennai Properties & Investments Ltd.* [2004] 136 Taxman 202 (Mad.); [2002] 266 ITR 685 (Mad.)}.
- The manner in which the building is used by the assessee is not relevant. It can be used by him for letting out on rent, leasing it out, using it for his own residence, etc. However, the building should not be occupied by the assessee for his business or profession. Similarly, the person to whom the building has been let out may use it for any purpose, say, for his own residence or for his business or profession, etc. Further, building may take any form, e.g., a cinema theatre, an auditorium or even an amphitheatre (which does not have a roof).
- Annual value of a building situated *outside India* is also taxable under this head. In the case of a resident but not ordinarily resident or a non-resident, annual value of such a building is charged to tax in India only if income from such property is received or is accrued in India during the previous year.
- Land appurtenant to a building consists of such portions of land that are taken to be a part and parcel of the building in order to *enable the enjoyment* of the possession of such building. Therefore, garden attached to the building, approach roads, etc., form part of the building.

- 'Building' does not include *vacant land*. Thus, income from vacant land is charged either under the head 'Profits and gains of business or profession' or under the head 'Income from other sources', as the case may be.
- The assessee should be the owner of such property.
- The house property should not be *occupied* by the assessee for the purposes of his business or profession, the profits of which are *chargeable* under the head 'Profits and gains of business or profession'
- Income received from giving the building to other person on hire or by license *need not always* be treated under the head 'Income from house property'. Each case has to be looked at from a businessman's point of view to find out whether the letting was the *doing of a business* or the *exploitation of his property* by an owner {*Sultan Brothers (P) Ltd. v. CIT* [1964] 51 ITR 353 (SC)}. If it is the doing of a business, the relevant income will be charged under the head 'Profits and gains of business or profession'.
- Interest on Borrowed Capital (of the current year and pre-construction period) is deductible. However, the maximum deduction available if the capital is borrowed on or after 1999 is Rs. 150000 and Rs. 30000 if capital is borrowed before 1.04.1999.
- If the actual rent being in excess of Municipal Corporation/standard rent, all the expenses and outgoings have to be excluded from the rent receivable and the net of the amount

should be considered to be the income of the Assessee. (*ITO V. GOPICHAND P. GODHWANI (2005) 1 SOT 374 (MUM.)*)

- *Where assessee, co – owner of house property, claimed deduction on account of salary and bonus of sweepers, pumpman and liftman and electricity charges being expenses incurred for electric burning for pump motor and common passage, assessee was not entitled to deduction u/s 24; however, annual value of assessee’s house property should be assumed at reduced value, i.e., after deducting impugned amounts from rental, being only in relation to expenditure required to be necessarily incurred for enjoyment / user of relevant property.*

J.B. PATEL CO. V.S DY. CIT (ASST.) (2009) 118 ITD 556 (AHD.)

- In the case of **M.V. SONAVALA V. CIT, 177 ITR 246 (BOM)**, it was held that “*the income from house property has to be computed on the basis of the sum of which the property might reasonably be let from year to year to the annual Municipal rateable value. The word “or” is disjunctive as such it is possible to take the sum for which property might reasonably let from year to year or the Municipal rateable value. It is pertinent to note that while deciding this issue the Hon’ble jurisdictional High court took into consideration the decisions of the Apex Court rendered in the case of Devan Daulat Rai Kapoor Vs. New Delhi Municipal Committee, 122 ITR 700 (SC) and in the case of Sheila Kaushish vs. CIT, 131 ITR 435 (SC).*”

4. RECENT AMENDMENTS IN THE BUDGET 2013-2014

- a. Section 56(2)(vii) has been amended w.e.f. 01.04.2014 as already discussed earlier.

- b. Section 43CA, a new provision has been inserted after Section 43C by the Finance Act, 2013, w.e.f. 01.04.2014;

SECTION 43CA OF THE INCOME TAX ACT, 1961:

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 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 purpose of computing profits and gains from such 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 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 of transfer of the asset.

Existing provision in respect of the above amendment:

The White paper on Black Money presented by the Government of India points out that very high levels of stamp duty (over 5%) in many

states create incentives for tax evasion through under reporting of consideration in sale deed.

To combat tax evasion through under reporting of sale consideration in sale deed , section 50C was inserted in the Act by the Finance Act, 2002 w.e.f. 01.04.2003.

In cases of transfer of capital asset being land or building or both, the said section deems stamp duty value as the full value of consideration where the consideration shown in the sale deed is less than the stamp duty value.

Currently, when a capital asset, being immovable property, is transferred for a consideration which is less than the value adopted , assessed or assessable by any authority of a state government for the purpose of payment of stamp duty in respect of such transfer, then such value (stamp duty value) is taken as full value of consideration under section 50C. These provisions do not apply to transfer of immovable property, **held by the transferor of stock in trade.**

Loopholes/Problems:

In CIT vs. Kan Construction and Colonizers (P) Ltd. [2012 20 taxmann.com 381] , the Allahabad High Court held that Section 50C is not applicable to sale of plots by a builder since plots are his stock in trade and not capital assets in view of the following:

- Section 50C uses the word “capital asset”. For applicability of section 50C, one of the essential requirements is that land or buildings sold should be capital asset. Stock in trade has been excluded from the definition of capital asset by section 2(14).
- Investment in purchase and sale of plots by a builder who is indulged in selling buildings is ancillary and incidental to his business activity. ‘Stock in trade’ includes all such chattels as

are required for the purpose of being sold or let to hire on a person's trade.

To overcome the judicial decision in Kan Construction (supra), the Finance Act, 2013 inserted new section 43CA with effect from assessment year 2014-2015.

c. SECTION 194-IA OF THE INCOME TAX ACT, 1961

Another amendment is in respect of payment on transfer of certain immovable property other than agricultural land.

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 apply to a person required to deduct tax in accordance with the provisions of this section.

Explanation.- For the purpose 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.

Under Section 195, on transfer of immovable property by a non-resident, tax is required to be deducted at source by the transferee. However, there is no such requirement on transfer of immovable property by a resident except in case of compulsory acquisition of certain immovable properties (section 194LA).

The Finance Act, 2013 inserted new section 194-IA to introduce TDS on consideration on transfer of immovable properties.

The objects of this have been explained by Explanatory Memorandum as under:

“There is a statutory requirement under section 139A of the Income Tax Act read with rule 114B of the Income Tax Rules 1961 to quote Permanent Account Number (PAN) in documents pertaining to purchase or sale of immovable property for value of Rs.5 lakh or more. However, the information furnished to the department in Annual Information Returns by the Registrar or Sub-Registrar indicate that a majority of the purchasers or sellers of immovable properties, valued at Rs.30 lakhs or more, during the financial years 2011-2012 did not quote or quoted invalid PAN in the documents relating to transfer of property. In order to have a reporting mechanism of transaction in the real estate sector and also to collect tax at the earliest point of time, it is proposed to insert a new section 194-IA...”

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

“145. Transactions in immovable properties are usually under valued and under reported. One-half of the transactions do not carry the PAN of the parties concerned. With a view to improve the reporting of such transactions and the taxation of capital gains, I propose to apply TDS at the rate of one percent on the value of transfer of immovable property

where the consideration exceeds Rs.50 lakhs. However, agricultural land will be exempt.”

Section 194-IA provides that every transferee (purchaser or buyer), at the time of making payment or crediting of any sum as consideration for transfer of immovable property (other than agricultural land) to a resident transferor, shall deduct tax, at the rate of 1% of such sum. In order to reduce the compliance burden on small taxpayers, no deduction of tax shall be made where the total amount of consideration for the transfer of an immovable property is less than Rs.50, 00,000. The provisions of section 203A [regarding obligation of deductors to obtaining tax deduction and collection account number (i.e. TAN) shall not apply in respect of tax deducted under this section. This amendment will take effect from 01.06.2013.

AMENDMENTS IN SECTION 2(14) OF THE INCOME TAX ACT, 1961 BY FINANCE BILL 2013-2014

By the provision of “Sec.2(14) Capital Asset”, Rural agriculture land was exempt from capital gain. For being rural agriculture land, land must be satisfied certain condition laid down in section 2(14).The Finance Minister amended this conditions through Finance Bill 2013-14. For, Simplicity we discuss effect of this amended in two part.

- A. Criteria for being rural agriculture prior to 01/04/2013
- B. Criteria for being rural agriculture after to 01/04/2013

❖ Criteria for being rural agriculture prior 1-04-2013:

Prior to 01/04/2013 this section are applicable:

2(14)(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 first day of the previous year; or
(b) in any area **within such distance**, not being more than eight kilometres, from the local limits of any municipality or cantonment board referred to in item (a), as the Central Government may, having regard to the extent of, and scope for, urbanization of that area and other relevant considerations, specify in this behalf by notification in the Official Gazette;]

Thus, if these conditions are satisfied than land will agriculture land.

- Land is situated in any within the jurisdiction of a municipality or a cantonment board having population of less than 10000.
- Land is situated outside the notified distance from jurisdiction of municipality. Govt. can notified maximum distance of 8Km.

If this condition was satisfied than land is rural agriculture land. And not liable for capital gain tax.

How to measure distance was not given in the definition. Therefore it was taken by road. And same view was followed in following judicial pronouncement.

(1) *CIT V.LAL SINGH [2010] 195 TAXMAN 420 (PUNJ. & HAR.)*

(2) CIT V. SANTINDER PAL SINGH [2010] 188 TAXMAN 54 (PUNJ. & HAR.)

(3) LAUKIK DEVELOPERS V. DY .CIT [2007] 105 ITD 657 (MUMBAI)

❖ **Criteria for being rural agriculture After 1-04-2013:**

After 01/04/2013 this section are applies as follow:

As Per Section 2(14)" capital asset" means property of any kind held by an assessee, whether or not connected with his business or profession, but does not include-

(iii) Agricultural land in India, not being a land situated-

- a) In any area which is comprised within the jurisdiction of a municipality (whether known as 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 first day of the previous year]; or
- b) In any area within the 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 ten thousand but not exceeding one lakh; or
- (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 one lakh but not exceeding ten lakh; or

- (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 ten lakh.

Explanation.—For the purposes of this sub-clause, "population" means the population according to the last preceding census of which the relevant figures have been published before the first day of the previous year;

Thus, if this condition is satisfied then agriculture land will be rural agriculture and accordingly not liable for capital gain tax.

- Land is situated in any within the jurisdiction of a municipality or a cantonment board having population of less than 10000.
- Distance of land from municipality and population limit.

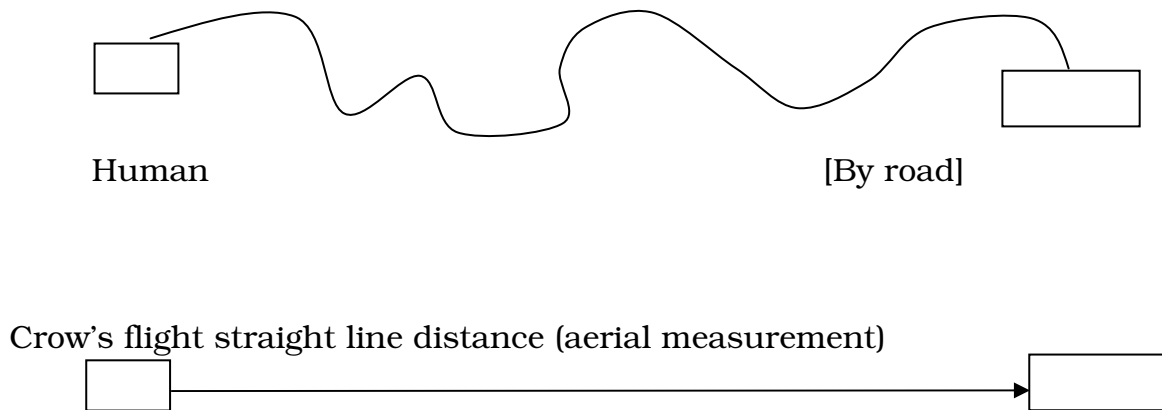
Distance	Population
Within 2 kilometers	10,000-1,00,000
2 kilometers – 6 kilometers	1,00,000-10,00,000
6 kilometers – 8 kilometers	More than 10,00,000

The distance from the Municipal Corporation measurement:

Such distance is to be measured on **straight line aerially** as crow flies. The shortest aerial distance has to be considered. Such shortest aerial distance is defined as “A straight line distance between two places.” A human would travel further to get from one point to another due to obstacles or lack of roads or trails, but a crow can go in a straight line between them. Humans have to follow roads which have their twists and turns. But, a crow does not have to face the barriers that humans face. Hence, we measure the straight line distance between two places.

“The distance as the crow flies is a way to describe the distance between two locations without considering all the variable factors. As an example, traveling

from California to Maine involves a rather indirect route around, over and through mountain ranges and so forth. The driving distance might be about 3,500 miles, but the distance as the crow flies is about 2,800 miles.



These amendments will take effect from 1st April, 2014 and will, accordingly, apply in relation to assessment year 2014-15 and subsequent assessment years.

Effect of the amendment

- a) Distance from jurisdiction or municipality or cantonment board within which agricultural land is to be considered as urban land has been changed from uniformly 8 kms to within 8 kms depending on population of municipality or cantonment board .
- b) Distance to be measured straight line aerially as crow flies and not by road method which was used by courts in various decision. This amendment overcomes above court decisions which say that distance should be measured by road.
- c) More land will be covered under the urban land because aerially distance covered more area.
- d) Earlier only notified area were covered under the distance criteria but from now any area will covered under the distance criteria.

e) **Impact on Wealth Tax**

The term agricultural land is not defined in Wealth tax act. However, it is defined in Section 2(14) of the Income tax Act. The definition for non-urban land and agricultural land is similar. Hence the above analysis will also be applicable for the purpose of determination of net wealth as per the wealth tax act. Thus a person owning land will need to re-assess on whether the land owned by him will qualify for exemption from wealth tax or not.

5. CHANGES AS PER DIRECT TAX CODE:

CHANGES IN HOUSE PROPERTY:

- Standard deduction earlier @30% is now changed to 20%
- Income from house property shall include income from the letting of any buildings along with any machinery, plant, furniture or any other facility if the letting of such building is inseparable from the letting of the machinery, plant, furniture or facility.
- In case of the let out house property, the gross rent will be the amount of rent received or receivable for the F.Y.
- Gross rent will not be computed at a presumptive rate of 6 percent of the rateable value or cost of construction/ acquisition.
- In the case of house property which is not let out, the gross rent will be nil. As the gross rent will be taken as nil, no deduction for taxes or interest, etc. will be allowed. However, in the case of one house property, which has not been let out, an individual or HUF will be eligible for deduction on account of interest on capital borrowed for acquisition or construction of such house property (subject to a maximum ceiling of Rs. 1.5 lakh) from the gross total

income. the overall limit of deduction for savings will be calibrated accordingly.

CHANGES IN CAPITAL GAIN:

- The DTC provides that gains (losses) arising from the transfer of investment assets will be treated as Capital Gain (losses). These gains (losses) will be included in the total income of the financial year in which the investment asset is transferred. The Capital Gains will be subjected to tax at the rate of 30% in the case of non-resident and in the case of residents at the applicable marginal rate.
- Under the code, the current distinction between short term investment asset and long term investment asset on the basis of the length of holding of the asset will be eliminated
- The cost of acquisition is generally with reference to the value of the asset on the base date or, if the asset is acquired after such date, the cost at which the asset is acquired. The base date will now be shifted from 01.04.1981 to 01.04.2000. as a result, all unrealized capital gains due to appreciation during the period from 01.04.1981 to 31.03.2000 will not be liable to tax as the assessee will have an option to take the cost of acquisition of these assets at the price prevailing as on 01.04.2000.
- The capital gain arising from transfer of any investment assets held for less than one year from the end of financial year in which it is acquired will be computed without any specified deduction or indexation. It will be included in the total income and will be charged to tax at the rate applicable to the taxpayer.