Taxation of Development Agreement - Select Issues under Income-tax

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Synopsis

- What is a Development Agreement?
  - Development potential of land
  - Loading rights which have arisen as a result of amendment to Regulations
  - Types of Development Agreement
    - Plain vanilla DA;
    - Area sharing agreement
    - Revenue Sharing Agreement
- What is TDR?
- Is transfer of development rights akin to transfer of land, in law?
- Head of income under which gains arising on transfer of development rights need to be taxed - profits & gains of business or profession / capital gains / other sources
- In an area sharing development agreement is it a case of one transfer or two transfers?

Synopsis

- Year of transfer
- Full value of consideration – is section 50C applicable?
- Cost of acquisition
- Holding period qua flats received under area sharing agreement
- Effect of amendment to section 55 by the Finance Act, 2023
- Section 45(5A) –
  - Object of introduction
  - Prospective / Retrospective
  - Differences between charge under section 45(1) and 45(5A)
    - Year of transfer
    - Full value of consideration
- Section 54 / 54F qua gains arising on transfer of development rights
- TDS under section 194IC qua monetary consideration in an area sharing agreement entered with a land owner other than an individual or an HUF

General Background

Position prior to insertion of s. 45(5A)

- Parties to the Development Agreement - the Landlord and the Builder / Developer.
- The issue qua Builder / Developer - Section 56(2)(vii) / 56(2)(x) and also as regards the cost of the flats constructed pursuant to the JDA.
- The Landlord may hold land as capital asset or as stock-in-trade.
- Land held as stock-in-trade could be
  - acquired as stock-in-trade or
  - capital asset but has been converted into stock-in-trade.
- Types of DA –
  - Consideration is monetary
  - Area sharing with or without monetary consideration
  - Revenue sharing agreement
- Section 45(5A) w.e.f. AY 2018-19
  - Object of introduction – prospective / retrospective
  - Overview of the provision

S. 45(5A) is not retrospective

- In the following decisions, Tribunals have held that the provisions of Section 45(5A) are prospective in nature and not retrospective –
  - Smt. G. Sailaja v. ITO [ITA Nos. 51 & 570/Hyd/2016 and Others; Date of Order 30.11.2017];
  - DCIT v. Agamati Ram Reddy [ITA No. 1774/Hyd/2017; AY 2008-09; Date of Order : 31.1.2019]
  - Adinarayana Reddy Kummeta v. ACIT [(2018) 91 taxmann.com 360 (Hyd. – Trib.)] – Newly amended section 45(5A) being substantive provision, cannot be applied to development agreement entered into during the year 2008-09 in which Section 2(47)(v) would certainly get attracted.

What is a development agreement? When does it constitute a joint venture?

What is a Development Agreement?

- Development Agreements are agreements where the developer agrees to put up construction on owner's plots in consideration of his parting with a part of the plot.
- **ITO v. Ronak Marble Industries [ITA No. 3318/Mum./2015; AY : 2009-10; Date of Order : 14.3.2017]**
  - coming together of two parties
  - business agreement whereby the owner of land allows the developer to enter and exploit the land for the limited purposes of developing the said land. –
- **Faqir Chand Gulati v. Uppal (SC)**
  - A development agreement is one where the land-holder provides the land. The Builder puts up a building. Thereafter, the land owner and builder share the constructed area. The builder delivers the "owner's share" to the land-holder and retains the "builder's share'. The land-holder sells / transfers undivided share/s in the land corresponding to the Builder's share of the building to the builder or his nominees. The land-holder will have no say or control in the construction or have any say as to whom and what cost the builder's share of apartments are to be dealt with or disposed of.

What is a Development Agreement?

- **Madgul Udyog v. CIT [(1990) 184 ITR 484 (Cal.)]** - such agreements are in the nature of business agreements and not agreements of sale.
- Other decisions where the concept of development agreement is explained in the context of Specific Relief Act are –
- **Sushil Kumar Agarwal v. Meenakshi Sadhu & Ors**. **[MANU/SC/1144/2018; (2019)2SCC241] -**
  - *But in various other categories of development agreements, the developer may have acquired a valuable right either in the property or in the constructed area. The terms of the agreement are crucial in determining whether any interest has been created in the land or in respect of rights in the land in favour of the developer and if so, the nature and extent of the rights*. [Para 16]
  - An essential incident of ownership of land is the right to exploit the development potential to construct and to deal with the constructed area. In some situations, under a development agreement, an owner may part with such rights to a developer. This in is essence is a parting of some of the incidents of ownership of the immovable property.

When does Joint Development Agreement constitute a Joint Venture?

- An agreement between the owner of a land and a builder, for construction of apartments and sale of those apartments so as to share the profits in a particular ratio may be a joint venture, if the agreement discloses an intent that both the parties shall exercise joint control over the construction / development and be accountable to each other for their respective acts with reference to the project.

- The title of the document is not determinative of the nature and character of the document, though the name may usually give some indication of the nature of the document. The use of the words “joint venture” or “collaboration” in the agreement will not make the transaction a joint venture, if there are no provisions for shared control and losses. - **Faqir Chand Gulati v. Uppal (SC)**

Ingredients for income to be charged to tax as `capital gains'

Ingredients required for income to be charged to capital gains?

- The following ingredients are required to charge an amount to tax under the head `Capital Gains' –
  - (i) there is a capital asset;
  - (ii) there is a transfer of such capital asset;
  - (iii) the transfer is for a consideration;
  - (iv) profits and gains arise as a result of transfer
- Upon satisfaction of the above mentioned conditions cumulatively, capital gains are charged to tax in the year of transfer.

Capital asset

Development rights are a capital asset

- If land is capital asset, development rights in land are capital assets.

- In the case of **ITO v. Bharat Raojibhai Patel [(2016) 70 taxmann.com 401 (Mum.)]**, The Tribunal held that the gains on sale of development rights over property are capital in nature and come within definition of capital asset under section 2(14) and therefore, are taxable as capital gains. Since gains are capital gains, consequential deductions / exemptions under Section 54, etc would also be allowable.
- TDR is a capital asset, because it is inextricably linked with immovable property and also from transfer of immovable property. When, TDR is considered to be an immovable property / asset within the meaning of section 2(14) of the Act, then any right in such TDR also needs to be considered as an asset within the meaning of section 2(14) of the Act - **Adi D. Vachha v. ITO [ITA No. 2755/Mum/2011; AY: 2005-06; Date of Order : 9.8.2019]**.

Income from sale of flats received under a development agreement constitutes "capital gains"

- In the case of **DCIT v. Jai Trikanand Rao [(2013) 37 taxmann.com 125 (Mum. – Trib.)]**, The Tribunal held that the income earned by the land owner on sale of two flats out of the constructed flats received by him from Developer would be assessed as capital gains.
- Income attributable to sale of land would be chargeable as long term capital gain and income from sale of building part would be chargeable as short term capital gain.
- Right to load TDR FSI is a capital asset and consequently consideration received by assessee for transfer of rights over such capital asset would clearly fall within provisions of section 45 – **ITO v. Mrs. Chetana H. Trivedi [(2012) 24 taxmann.com 175 (Mum. – Trib.)]**
- Purchase of an asset with knowledge of encumbrances and development not being feasible means that the asset is capital asset and not stock-in-trade - **ACIT v. Dattani Development [ITAT Mumbai]**
- Section 50C applies to development agreements if the effect of development agreement read with the conveyance deed is that the entire land with ownership rights are transferred **– ACIT v. Dattani Development [ITAT Mumbai]**

Period of holding

Period of Holding

- For TDR - from the date of acquisition of property by the municipal authorities – **Adi D. Vachha v. ITO [ITA No. 2755/Mum/2011; AY: 2005-06; Date of Order : 9.8.2019]**
- Date of entering into Development Agreement taken to be the date from which the assessee held the flats to be allotted to it under the Development Agreement – **ITO v. Vikash Behal [(2010) 131 TTJ 229 (Kol. – Trib.)]**
  - As held in the case of Jasbir Singh Sarkaria, In re [(2007) 212 CTR (AAR) 107], where an agreement results in the conferring upon the developer the rights of management, control and supervision in relation to the land being developed, then such agreement amounts to transfer of the land in favour of the developer. The completion certificate issued by the municipality was a certificate indicating that the building was complete and fit for habitation. Therefore, the said date could not be held to be the date of acquisition of the said asset. The date of acquisition of an asset was the date on which the title of the said asset was passed on to the individual concerned. The actual date on which physical possession was acquired by an individual was of no consequence in the determination of the date of acquisition of the said asset.

Meaning of `transfer', year of transfer

`transfer' under Section 2(47)

- Section 2(47) defines "transfer" as follows –
  - "transfer" in relation to a capital asset, includes –

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

(ii) the extinguishment of any rights therein ; or

(iii) and (iv) ……..

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

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

`transfer' under Section 2(47)

- Explanation 1 - ……
- Explanation 2 – For the removal of doubts, it is hereby clarified that `*transfer' includes and shall be deemed to have always included* ***disposing of or parting with*** *an asset or* ***any interest therein***, or creating any interest in any asset in any manner whatsoever, directly or indirectly, absolutely or conditionally, voluntarily or involuntarily, by way of an agreement (whether entered into in India or outside India) or otherwise, notwithstanding that such transfer of rights has been characterized as being effected or dependent upon or flowing from the transfer of a share or shares of a company registered or incorporated outside India.

Transfer

- Once capital asset is converted into stock-in-trade, provisions of Section 2(47) become irrelevant and do not apply – **R Gopinath (HUF) v. ACIT [(2010) 5 taxmann.com 80 (Chennai – Trib.)]**

- Once the character of the `capital asset' is changed on conversion as `stock-in-trade' then the definition of the transfer given in Section 2(47) has no application and we have to consider meaning of the word `transfer' under the provisions of the Transfer of Property Act **– The Hindoostan Spinning and Weaving Mills Ltd. v. DCIT [ITA No. 3820/Mum/2003; AY 1994-95; Date of Order : 13th May, 2011]**

JDAs with consideration in cash and kind are a combination of sale and exchange

- **Transactions of Joint Development Agreement where consideration is partly monetary and partly in kind are a combination of sale and exchange – ITO v. Bharat Raojibhai Patel [(2016) 70 taxmann.com 401 (Mum.)].**

- This was a case where assessee, a co-owner of a piece of land and building thereon, executed a sale-cum-development agreement in which he transferred all rights to developer to construct new building by demolishing existing building. Since assessee received consideration in two folds i.e. partly in cash and partly in kind, i.e. by way of property in shape of flats in re-developed property, such transactions were thus a combination of sale and exchange.

Exchange presupposes existence of both the properties at the time of entering into a transaction.

- To say that there is an exchange under Section 2(47)(i), both the properties which are subject matter of the exchange in the transaction are to be in existence at the time of entering into the transaction. It is to be noted that at the time of entering into development agreement on 15.12.2006, only the property i.e. land pertaining to the assessee is in existence. There is no quantification of consideration or other property in exchange of which the assessee has to get for handing over the assessee's property for development. The contention of the department is that the consideration accrued to the assessee in the form of 16 villas comprising of developed land of 9602 sq. yards and built up area of 58606 sq. feet which the assessee has to get on completion of the project. There was no progress in the development work in the assessment year under consideration as the project is only in conception stage and it is not appropriate to tax the assessee on imaginary reasons [Para 57] – **Fibars Infratech P. Ltd. v. ITO [ITA No. 477/Hyd./2013; Date of Order : 3.1.2014][(2014) 46 taxmann.com 313 (Hyd. – Trib.)]**

Year of transfer

Which is the year of transfer?

- Therefore, the question is **which is the year of transfer?**
- The answer could be the year of transfer is –
  - (i) the year in which the Development Agreement is executed;
  - (ii) the year in which the Power of Attorney has been executed by the land owner in favor of the Developer or his nominee;
  - (iii) the year in which possession of land is given to the Developer;
  - (iv) the year in which the plans are approved by the local authority;
  - (v) the year in which the ingredients of Section 53A of the Transfer of Property Act, 1882 are satisfied;
  - (vi) the year in which the land owner receives constructed areas from the Developer.

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  - (v) the year in which the ingredients of Section 53A of the Transfer of Property Act, 1882 are satisfied;
  - (vi) the year in which the land owner receives constructed areas from the Developer.

Year of transfer : Year in which DA is executed

- **Date of execution of the Joint Development Agreement –**
  - Chaturbhuj Dwarkadas Kapadia of Bombay v. CIT[(2003) 260 ITR 491 (Bom)]
  - Potia Nageshwara Rao v. DCIT [(2014) 365 ITR 249 (AP HC)]
  - CIT v. Dr. T.K. Dayalu [(2011) 14 taxmann.com 120 (Karnataka)]
  - CIT v. Smt. Shakuntala Rajeshwar [(1986) 160 ITR 840 (Del HC)]
  - ACIT v. Shri Akkineni Nagarjuna Rao [ITA No. 534/Hyd/2004, dated 13.4.2012]
  - ITO v. Sri. N.S.Nagraj [ITA No 676/Bang/2011, dated 01/12/2014]
  - ITO v. Dr. Arvind Goverdhan [(2018) 61 ITR(T) 159 (Bang. ITAT)]
  - ITO vs. P.A.Sarala [(2015) 154ITD168 (Chennai)]
  - G. Sreenivasan v. Dy. CIT [(2012) 28 taxmann.com 200 (Cochin-Trib.)]
  - Smt. Ayisha Fathima [(2016) 73 taxmann.com 78 (Chennai-Trib)]

Year of transfer : Year in which POA is granted

- **Year in which Power of Attorney is granted** –
  - Tamilnadu Brick Industries v. ITO [ITA No 744/Chny/2017, dated 11.5.2018]
  - Mr. Rameysh Ramdas v. ITO [ITA No 1399/Chny./2017, dated 07/08/2018) [TS-467-ITAT-2018(CHNY)]
  - Nancy Divakar Hospital & Research Centre Private Limited [TS-115-ITAT-2022(HYD)]

Year of transfer : Year in which plans are approved by Regulatory Authorities

- **Year in which Plans are approved by the Regulatory Authorities –**
  - Coromandel Cables (P.) Ltd. v. ACIT [(2016) 71 taxmann.com 346 (Chennai)]
  - Ito v. Shri R.J.V. Kaiwar [ITA No 1673/Mds/2016, dated 31.05.2017)(Chennai Trib)]
  - NG Balu Reddy HUF [TS-1182-ITAT-2021(Bang)]
  - CIT vs. BalbirSingh Maini [(2017) 398 ITR 531(SC)]

Year of transfer : Year in which possession of property is handed over to builder / developer

- **Year in which Possession of the property is handed over to the builder / developer** -
  - CIT v. Dr. T.K. Dayalu [ITA No 3209 of 2005 C/W ITA No 165 of 2005, dated 20/06/2011- Kar HC]
  - Coromandel Cables (P.) Ltd. v. ACIT [(2016) 71 taxmann.com 346 (chenn)]
  - CIT v. Geetadevi Pasari [TS-22-HC-2008(BOM)]
  - R. Kalanidhi v. Income-tax Officer [(2009) 122 TTJ 405 (CHENNAI)]
  - Jasbir Singh Sarkaria, In re [(2007) 294 ITR 196 (AAR)]
  - B V Kodre (HUF) v. Ito [ITA No 834/PN/2008, dated 4/10/2011]
  - Abdul Wahab v. DCIT [(2015) 68 SOT 326 (Bang)]
  - CIT v. K. Jeelani Basha [(2002) 256 ITR 282 (Mad)]
  - T. Prabhakar Rao (HUF) [TS-281-ITAT-2018(HYD)]

Year of transfer : Year in which possession of property is handed over to builder / developer

- **Year in which Possession of the property is handed over to the builder / developer -**
  - Dilip Anand Vazirani v. ITO [(2015) 57 taxmann.com 142 (Mum)]
  - Amit Murlidhar Kamthe [TS-395-ITAT-2021(PUN)]
  - Anugraha Shelters (P) Ltd. v. DCIT [(2022) 134 taxmann.com 352 (Bang)]
  - NG Balu Reddy, HUF [TS-1182-ITAT-2021(Bang)]
  - Sri Sai Lakshmi Industries Pvt. Ltd [TS-297-ITAT-2022(Bang)]
  - PCIT v. Fardeen Khan [(2019) 411 ITR 533 (Bom)]
  - *Smt. Madhu Gangwani* v ACIT [(2019) 111 taxmann.com 30(Del Trib)]
  - *Dr. Joao Souza Proenca* v. *ITO* [(2018) 90 taxmann.com 83(Bom)]
  - *Shivram Co-operative Housing Society Ltd.* v. *Dy. CIT* [(1999) 70 ITD 8 (Mum)]
  - *CIT v.* Bhatia Nagar Premises Co-op Society Ltd [(2017) 80 taxmann.com 33 (BOM)]

If developer not willing to perform?

- **Where developer not willing to perform, ingredients of section 53A of TOPA NOT SATISFIED and therefore 2(47)(v) not applicable in the said year -**
  - CIT vs. BalbirSingh Maini [(2017) 398 ITR 531(SC)]
  - K. Radhika [TS-533-ITAT-2011(HYD)]
  - CIT v. Chemosyn ltd [(2015) 371 ITR 427 (Bom)]
  - C.S. Atwal v. CIT [(2015) 378 ITR 244 (P&H)]
  - Aarti Sanjay Kadam v. ITO [(2018) 97 taxmann.com 284(Mum)]
  - Coromandel Cables (P.) Ltd. v. ACIT [(2016) 71 taxmann.com 346 (chenn)]
  - ACIT v. Jawaharlal L. Agicha [(2016) 75 taxmann.com 121 (Mum)]
  - FibarsInfratech (P.) Ltd. v. ITO [(2014) 64 SOT 313 (Hyd)]
  - Binjusaria Properties (P.) Ltd v. ACIT [(2014) 149 ITD 169 (Hyd trib)] [even after executing JDA, GPA it was held it is not a transfer]

If developer not willing to perform?

- **Where developer not willing to perform, ingredients of section 53A of TOPA NOT SATISFIED and therefore 2(47)(v) not applicable in the said year -**
  - Smt. Lakshmi Swarupa v. ITO [(2018) 100 taxmann.com 148 (Bang)]
  - Appasaheb Baburao Lonkar v. ITO [(2019) 176 ITD 115 (Pune)]
  - K. Vijaya Lakshmi v. ACIT [(2018) 169 ITD 597 (Hyd)]
  - Smt. P. Prathima Redd v. Ito [(2012) 54 SOT 409 (Hyd)]

Year of transfer : Year in which possession of constructed property is received by land owner

- **Year in which final possession of constructed property is received by land owner -**
  - PCIT v. Infinity Infotech Parks Ltd [(2018) 407 ITR 137 (Cal)]
  - CIT v. Smt Najoo Dara Deboo [(2013) 8 taxmann.com 258 (All. HC)]
  - N.A.Haris v. ACIT [(2021) 124 taxmann.com 354 (Bang.-Trib.)]
  - Aarti Sanjay Kadam v. ITO [(2018) 97 taxmann.com 284(Mum)]

Amendment in S. 53A of TOPA and also in Ss. 17 and 49 of the Indian Registration Act

- Amendments to section 53A of TOPA and Sections 17 and 49 of Registration Act by The Registration and Other Related Laws (Amendment) Act, 2001 – registration of the document is necessary ingredient for claiming protection under s. 53A
- **CIT v. Balbir Singh Maini [(2017) 86 taxmann.com 94 (SC)] -** The HC held that the Tribunal and the authorities below were not right in holding the assessee to be liable to capital gains tax in respect of land for which no consideration had been received and which stood cancelled and incapable of performance due to various orders passed by the Supreme Court and the High Court in PILs. Therefore, the assessee's appeal was allowed. On revenue's appeal to the Supreme Court, HELD - the expression `of the nature referred to in section 53A' refers to the ingredients of applicability of section 53A to the contracts mentioned therein. It is only where the contract contains all the six features mentioned in ***Shrimant Shamrao Suryavanshi* v. *Pralhad Bhairoba Suryavanshi* [2002] 3 SCC 676**, that the section applies, and this is what is meant by the expression 'of the nature referred to in section 53A'

Conditions for applicability of Section 53A' – SC in Shrimant Shamrao Suryavanshi v. Pralhad Bhairoba Suryavanshi [(2002) 3 SCC 676]

- There are certain conditions which are required to be fulfilled if a transferee wants to defend or protect his possession under Section 53A of the Act.
- The necessary conditions are –
  - 1) there must be a contract to transfer for consideration any immovable property;
  - 2) the contract must be in writing, signed by the transferor, or by someone on his behalf;
  - 3) the writing must be in such words from which the terms necessary to construe the transfer can be ascertained;
  - 4) the transferee must in part performance of the contract take possession of the property, or of any part thereof;
  - 5) the transferee must have done some act in furtherance of the contract; and
  - 6) the transferee must have performed or be willing to perform his part of the contract.

Seshasayee Steels (P.) Ltd. v. ACIT [(2020) 115 taxmann.com 5 (SC)]

- The Supreme Court in **Seshasayee Steels (P.) Ltd. v. CIT [(2020) 115 taxmann.com 5 (SC)]** was dealing with a case where an assessee had entered into an agreement to sell in May 1998, executed a power of attorney, in July 1998, authorising the buyer to execute sale agreements / sale deeds in respect of the property under consideration after developing the same into flats. The power of attorney also enabled the builder to present before all competent authorities such documents as were necessary to enable development on the property and sale thereof to persons. Under the agreement to sell, both the parties were entitled to specific performance. Clause 16 of the agreement stated that the landlord is giving permission to the developer to start **advertising, selling and construction on land.** Advertisements, sales catalogues and leaflets were to be approved by the land owner / seller before publication or circulation.

Seshasayee Steels (P.) Ltd. v. ACIT [(2020) 115 taxmann.com 5 (SC)]

- The builder did not carry out the obligations under the agreement and therefore, subsequently in July 2003 a deed of compromise had to be entered into. The assessee in this case contended that the transfer happened on or about the date of agreement to sell. The Tribunal agreed with the commissioner (appeals) and found that on or about the date of the agreement to sell, the conditions mentioned in section 2(47)(*v*) could not be stated to have been complied with, in that, the very fact that the compromise deed was entered into on 19-7-2003 would show that the obligations under the agreement to sell were not carried out in their true letter and spirit. As a result of this, section 53A of the Transfer of Property Act, 1882, could not possibly be said to be attracted.

Seshasayee Steels (P.) Ltd. v. ACIT [(2020) 115 taxmann.com 5 (SC)]

- The Supreme Court held –
  - grant of mere license to the developer does not amount to transfer even in a case where the land parcel is held as a capital asset;
  - no transfer had arisen in the year of entering into the Joint Development Agreement in terms of section 2(47)(v) of the Act, when the license was given by the assessee (land-owner) to the Developer for developing the land and constructing flats thereon and selling the same;
  - the term `possession' in section 53A of the Transfer of Property Act, 1882 is a legal concept that denotes control over the land and not the actual physical occupation of the land;
  - clause 16 of the JDA led to the position that a license was given to another upon the land for the purpose of developing the land into flats and selling the same. such a licence cannot be said to be `possession' within the meaning of section 53A, which is a legal concept, and which denotes control over the land and not the actual physical occupation of the land;
- For this reason alone, the court held that section 2(47)(v) is not attracted.

Seshasayee Steels (P.) Ltd. v. ACIT [(2020) 115 taxmann.com 5 (SC)]

- As regards applicability of section 2(47)(vi) of the Act, the SC noted that –
- This Court in *Commissioner of Income-tax* v. *Balbir Singh Maini* [2017] 86 taxmann.com 94/251 Taxman 202/398 ITR 531 adverted to the provisions of this section 2(47)(*vi*) and held that the object of section 2(47)(*vi*) appears to be to bring within the tax net a *de facto* transfer of any immovable property.
- The expression 'enabling the enjoyment of' takes colour from the earlier expression 'transferring', so that it is clear that any transaction which enables the enjoyment of immovable property must be enjoyment as a purported owner thereof.
- The idea is to bring within the tax net, transactions, where, though title may not be transferred in law, there is, in substance, a transfer of title in fact.

Seshasayee Steels (P.) Ltd. v. ACIT [(2020) 115 taxmann.com 5 (SC)]

- As regards applicability of section 2(47)(vi) of the Act, the SC HELD :
- Given the test stated in paragraph 25 of the decision in the case of Balbir Singh Maini, it is clear that the expression 'enabling the enjoyment of' must take colour from the earlier expression 'transferring', so that it can be stated on the facts of a case, that a *de facto* transfer of immovable property has, in fact, taken place making it clear that the *de facto* owner's rights stand extinguished.
- It is clear that as on the date of the agreement to sell, the owner's rights were completely intact both as to ownership and to possession even *de facto*, so that this Section equally, cannot be said to be attracted.

No transfer until builder constructs and hands over constructed area to the owner -Pr. CIT v. Infinity Infotech Parks Ltd.

- **Pr. CIT** v. **Infinity Infotech Parks Ltd. [(2018) 96 taxmann.com 274 (Calcutta)] -** The terms of the contract would indicate when the transfer would take place. There could be rare situations where the transfer may be simultaneous with the execution of the agreement, but where the owner retains any right in the constructed area that may come up in future, it would scarcely be a case of a transfer taking place at the time of the execution of the agreement. [Para 17]
- In any view of the matter, the right of the developer to retain possession and protect such possession under section 53A of the Act of 1882 could never have arisen prior to the construction being completed and the apportionment effected. [Para 19]
- In terms of Section 45(1), the expression 'chargeable to income tax under the head 'Capital gains'', operates on 'Any profits or gains arising from the transfer of a capital asset …'. There can be no tax payable unless there is any profit or gain that has arisen. ***It could never have been the revenue's case that there was any monetary profit or gain that accrued to the assessee at the time of the execution of the agreement of 7-2-2007***. [Para 20]

Can capital gains be charged to tax in a case where no consideration has been received?

- In the case of **Smt. Najoo Dara Deboo [(2013) 38 taxmann.com 258 (All.)]**, the Hon'ble Allahabad High Court held that "Capital gains would be charged only on receipt of sale consideration and not otherwise". "***How can a person pay the capital gain if he has not received any amount. In the instant case, the assessee has honestly disclosed the capital gain for the assessment years 1998-99 to 2000-01, when the flats / areas were sold and consideration was received.*** – **Quoted in ITO v. Ronak Marble Industries [ITA No. 3318/Mum./2015; A.Y.: 2009-10; Date of Order : 14.3.2017]**
- **Aarti Sanjay Kadam v. ITO[(2018) 97 taxmann.com 284(Mum)] -** until the project is complete and the assessee receives 35% of the built up residential area as per the terms of the development agreement, it cannot be said that the assessee has received consideration towards transfer of immovable property.

Aarti Sanjay Kadam v. ITO[(2018) 97 taxmann.com 284(Mum)]

- Merely because the assessee has entered into a development agreement, it does not presuppose transfer in terms of Section 2(47)(v) of the Act. ***As per Section 53A of the Transfer of Property Act, 1882, which has been referred to in Section 2(47)(v) of the Act, one of the conditions of transfer is that the developer should also by willing to perform his part of the contract.*** In the present case it appears from the record that the developer has not fulfilled his part of the contract. Therefore, the conditions of Section 53A of the Transfer of Property Act are not fulfilled.
- In any case of the matter, ***since the assessee has not received the consideration in terms of the development agreement in the impugned assessment year, question of accrual of capital gain in the year under consideration does not arise***.
- **N. A. Haris v. ACIT [(2021) 124 taxmann.com 354 (Bang.)]** - We are not in agreement with the argument of the learned AR that the transfer took place in the assessment year 2005-2006 and has been rightly brought to tax by the AO in the year 2012-2013, since the assessment in the year 2012-2013 the assessee received duly developed and constructed area into his possession out of his share of constructed area

Full value of consideration

What is full value of consideration in case of an area sharing JDA?

- In the case of **Mohammed Farooq v. ITO [(2015) 60 taxmann.com 212 (Hyd. – Trib.)]**, - the issue was set aside with a a **direction to adopt value of constructed area of flats in view land parted with, after giving due opportunity to the assessee**.
- In the case of **Essae Teraoka Ltd. v. DCIT [(2016) 67 taxmann.com 147 (Bangalore – Trib.)] –** AO considers cost of construction as per books of developer to be full value of consideration. The Tribunal held that the cost recorded by the developer in its books of account might also include some expenditure which had not been directly related to construction activity but might have been incurred in relation to general administration and other business expenditure and, therefore, that part of expenditure recorded by developer which had no direct nexus with construction could not be adopted as sale consideration for transfer of land for purpose of computing capital gain in hands of assessee.

What is full value of consideration in case of an area sharing JDA?

- In the case of **ITO v. N. S. Nagaraj [(2014) 52 taxmann.com 511 (Bang.-Trib.)]**, the Tribunal observed that full value of consideration was cost of construction incurred by the builder on assessee's share of constructed area, because the assessee would receive constructed area in lieu of the land share. Whatever is the expenditure incurred for constructing that area was a consideration in kind to the assessee.
- **Smt. Vasavi Pratap Chand v. DCIT [(2004) 89 ITD 73 (Del.-Trib.)]** It was held that consideration for transfer of 44% was cost of construction of 56% built-up area, which was to be incurred by the builder]
- **In the case of Dy CIT v. Jai Trikananad Rao [(2013) 37 taxmann.com 125 (Mum.-Trib.)]** the Tribunal held the Market value of property to be constructed by the Developer on behalf of the Society is the consideration.

What is full value of consideration in case of an area sharing JDA?

- **Prabhandam Prakash v. ITO [(2008) 22 SOT 58 (Hyd.-Trib.)] -** The promoter was to give 43% of built-up area to the assessee in new complex and 57% of this area was to be owned by the promoter. It was held that cost of construction of 43% of built-up area was to be total sale consideration for the assessee transferring land and existing structure.

- **CIT v. Khivraj Motors [(2015) 62 taxmann.com 305 (Kar.)**] - The assessee arrived at consideration by taking cost of construction at Rs. 800 per sq. feet which was agreed upon between parties. However, cost of construction at Rs. 800 per sq. feet was substituted by the AO by project cost. It was found that builder paid non-refundable amounts to landlord and tenant to acquire vacant possession of property. Further, advertisement cost had been incurred by him. It was held that these amounts could not be taken as part of cost of construction.

What is full value of consideration in case of an area sharing JDA?

- In the case of **DDIT v. G. Raghuram [(2010) 39 SOT 406 (Hyd. – Trib.)]** – The Tribunal in this case held that "by applying the ratio of the order of the Delhi Bench of the Tribunal in the case of *Smt. Vasavi Pratap Chand* (*supra*) is only the cost of construction of proposed building to the extent of which were falls to the assessee in the ultimately constructed area and not the market value of such share of constructed area which may be after the completion of the construction."
- Capital gain tax has to be paid on total consideration arising on transfer, including consideration already received as well as on consideration due and to be received later – **Smt. Binder Khokher v. ACIT [(2013) 36 taxmann.com 503 (Chandigarh – Trib.)]**
- The AP HC, in **Potla Nageswara Rao v. DCIT [(2014) 50 taxmann.com 137 (AP)],** held that when transfer of capital asset is complete, automatically, consideration mentioned in the agreement for sale has to be taken into consideration for purpose of assessment of income; it cannot be deferred to a future date on ground that payment of consideration was deferred till other assessment year.

Does section 50C apply to a transfer under a development agreement

Scope of land or building or both

However, in the following cases it was held that the provisions of S. 50C are applicable to Development Agreements.

- Chiranjeev Lal Khanna v. ITO [(2012) 66 DTR 260 (Mum.)(Trib.)]
- Mrs Arlette Rodrigues v. ITO [ITA No. 343/Mum/2010)] - When development rights are transferred, it is nothing but right to exploit said property in favour of developer, and same is covered under sub-clause (i) of section 2(47) and, therefore, provisions of Section 50C were applicable when rights to develop property was transferred.
- Smt. Myrtle D'Souza v. ITO [ITA No. 3168/Mum/2011)]
- Arif Akhtar Hussain v. ITO [(2011) 59 DTR 307 (Mum.)(Trib.)]

Scope of land or building or both

Provisions of S. 50C are not applicable to transfer of land development rights.

- Shakti Insulated Wires Pvt. Ltd. v ITO (Mum)(URO) [(ITA No. 3710/Mum/07. Assessment Year 2003-04; Mumbai E-1 Bench, Order dated 27.4.2009)]
- Voltas Ltd. v. ITO [(2016) 74 taxmann.com 99 (Mum.-Trib.)]
- ITO v. Ronak Marble Industries [ITA No. 3318/Mum./2015; AY : 2009-10; Date of Order : 14.3.2017] – application of provisions of section 50C is also bad in the present scenario as no transfer of land or building has taken place.

Scope of land or building or both

Provisions of S. 50C are not applicable to transfer of tenancy rights / leasehold rights.

- Kishori Sharad Gaitonde [(Mum SMC)(URO)]
- DCIT v. Tejinder Singh [(2012) 50 SOT 391 (Kol.)(Trib.)]
- Atul G. Puranik v. ITO [(2011) 58 DTR 208 (Mum.)(Trib.)]
- Fleurette Marine Novelle Hatam V. ITO (International Taxation) [(2015) 61 taxmann.com 362 (Mumbai - Trib.)]
- Kancast (P.) Ltd. v. ITO [(2015) 55 taxmann.com 171 (Pune - Trib.)]
- ITO v. Pradeep Steel Re-Rolling Mills (P.) Ltd. [(2013) 39 taxmann.com 123 (Mumbai - Trib.)]
- **CIT v. Greenfield Hotels & Estates (P.) Ltd. [(2017) 77 taxmann.com 308 (Bom.)]** - This decision was allowed as the Tribunal had decided the matter following decision in Atul G. Puranik [2011 (5) TMI 576 – ITAT, Mumbai] and the Revenue could not in the High Court point out any distinguishing features either in facts or in law in the present appeal from that arising in the case of Atul Puranik

Decision of Bombay High Court in CIT v. Heatex Products Pvt. Ltd. [2016 (7) TMI 1393 – Bombay High Court]

- CIT v. Heatex Products Pvt. Ltd. [2016 (7) TMI 1393 – Bombay High Court]
  - In this case the revenue contended that Section 50C would apply also to transfer of leasehold interest in land and is not limited to only to transfer of land and building or both. The Court held that the impugned order of the Tribunal allowed the respondent assessee's appeal by following its own decision in Atul G. Puranik V. ITO [2011 (5) TMI 576 - ITAT, Mumbai] as held that Section 50C of the Act would apply only to a capital asset being land or building or both and it cannot apply to transfer of lease rights in a land. No substantial question of law.

Decision of SC in UOI v. Satish P. Shah [2000 (12) TMI 5 – Supreme Court]

- Supreme Court in the case of UOI v. Satish P. Shah [2000 (12) TMI 5 – Supreme Court] has laid down salutary principle that where the Revenue has accepted the decision of the Court / Tribunal on an issue of law and not challenged it in appeal, then a subsequent decision following the earlier decision cannot be challenged.

Decision of Bombay High Court in Pr. CIT v. Kancast Pvt. Ltd. [2018 (5) TMI 713

- Bombay High Court has in the case of Pr. CIT v. Kancast Pvt. Ltd. [2018 (5) TMI 713 - Bombay High Court] admitted the following substantial question of law –
- (i) Whether on the facts and in the circumstances of the case and in law, the Tribunal was justified in holding that the provisions of Section 50C of the Act does not come into operation where leasehold rights in land are transferred?

Decision of Bombay High Court in Pr. CIT v. Kancast Pvt. Ltd. [2018 (5) TMI 713

- As no appeal had been filed by the Revenue for the order of the Tribunal in the case of Atul Puranik [2011 (5) TMI 576 - ITAT, Mumbai] which had held that section 50C of the Act will not apply to transfer of leasehold rights in land and buildings. However, at the time when both aforesaid decisions in Greenfield Hotels and Estates [2016 (12) TMI 353 – Bombay High Court] and Heatex Products Pvt. Ltd. [2016 (7) TMI 1393 - Bombay High Court] were not entertained by this Court, the decision of this Court in Pradeep Steel Re-Rolling Mills Pvt. Ltd. [2011 (7) TMI 1101 - ITAT MUMBAI] admitting the Appeal on this very question was not brought to our notice.

Decision of Bombay High Court in Keki Bomi Dadiseth v. CIT [2017 (3) TMI 1055 – Bombay High Court]

- The Bombay High Court has in the case of Keki Bomi Dadiseth v. CIT [2017 (3) TMI 1055 – Bombay High Court] was dealing with objection of the assessee to the action of the AO in reopening the assessment. The assessee contended that in view of the decision of the Bombay High Court in Greenfield Hotels & Estates (P) Ltd., the AO could not have reason to believe that the income chargeable to tax has escaped assessment, the Court held as under –

Decision of Bombay High Court in Keki Bomi Dadiseth v. CIT [2017 (3) TMI 1055 – Bombay High Court]

- So far as the submission on behalf of the petitioner that the Assessing Officer *could* not have any reason to believe that income chargeable to tax has escaped assessment in view of the decision of this Court in Greenfield Hotels & Estates (P) Ltd. (2016 (12) TMI 353 - BOMBAY HIGH COURT) is concerned, it is observed that the aforesaid decision of this Court did not independently rule appropriate interpretation of Section 50C of the Act. The Court refused to entertain the Revenue's appeal for the reason that the impugned Order of the Tribunal had followed its earlier decision in case of Atul G Puranik vs ITO [2011 (5) TMI 576 - ITAT, Mumbai]. The Revenue had accepted the same and in appeal from the Order of the Tribunal in Atul G. Purnaik (supra) was preferred. In the aforesaid background the Court refused to interfere with the Order of the Tribunal as there were no distinguishing features either on facts or in law as reiterated in Green Field Hotels & Estates (P) Ltd. (supra) from that existing in Atul G. Puranik (supra).
- In the present facts, the petitioner had not brought any decision of the Tribunal on the issue of law while filing its objections which the Assessing Officer could have dealt with bearing in mind facts involved. -Decided against assessee

Decision of Rajasthan High Court in Ram ji Lal Meena v. ITO [2018 (5) TMI 1792 – Rajasthan High Court]

- Further, Rajasthan High Court has in the case of **Sh. Ram Ji Lal Meena s/o Sh. Bachu Ram Meena v. ITO, JAIPUR [2018 (5) TMI 1792 - Rajasthan High Court]**
- The appellant has referred judgment of Bombay High Court in M/s. Greenfield Hotels & Estates Pvt. Ltd. [2016 (12) TMI 353 - Bombay High Court] where it was held that Section 50C of the Act of 1961 would not be applicable on transfer of lease hold rights of the land. Bare perusal of Section 50C of the Act of 1961 does not show that transfer of capital asset for consideration should be other than of lease hold property or khatedari land.
- The court cannot re-write the provision. If analogy taken by the Bombay High Court in the case (supra) is applied in general then Section 50C would not be applicable in majority of the cases as not it is allowed as lease hold property. Section 50C is applicable to transfer of capital assets for consideration. The Bombay High Court has not referred as how the land was in the balance-sheet. It is as a capital asset or not thus we are unable to apply the judgment of Bombay High Court in the case of M/s. Greenfield Hotels & Estates Pvt. Ltd. (supra). - No substantial question of law.

Decision of Bombay High Court in Jai Hind Sciaky Ltd. v. DCIT [2017 80 taxmann.com 105]

- Section 40 of the Finance Act, 1983 levied wealth-tax on net wealth of a closely closely held company on a valuation date.
- Section 40(3) of the Act defined assets inter alia as **land other than agricultural land.**
- The assessee had taken a plot of land on lease from MIDC, a part of which was open land and the balance was used for constructing a factory building.
- In its return of wealth, the assessee had in computing its net wealth, not taken into account its leasehold interest in the said plot or any part thereof.
- The AO included the open land in the net wealth of the assessee by regarding the open land to be an `asset'.

Decision of Bombay High Court in Jai Hind Sciaky Ltd. v. DCIT [2017 80 taxmann.com 105]

- The substantial question of law for consideration of the Court was –
  - Whether on the facts and in the circumstances and on a proper interpretation of Lease Deed dated 29/9/1978, the tribunal was right in law in holding that for the purposes of S. 40 of Finance Act 1983, **the expression "land" will include any interest in land also**?
- The assessee submitted to the Court that a lease hold interest in open land is not includable in net wealth under Section 40(2) of the Act as it is not an asset in terms of Section 40(3) of the Act.
- The Court held that that leasehold interest in open land will for purposes of Section 40 of the Act would be an asset as on the valuation date for A. Y. 1998-99

Rent for alternate accommodation

Is rent for alternate accommodation a capital receipt

- Madras High Court in the case of **P Madhusudhan v. ACIT [(2019) 109 taxmann.com 103 (Mad.)],** reversing the decision of the Tribunal, held that payments received by assessee on account of rent free accommodation could not be included to income of assessee as long term capital gains.

- TDR is improvement of land and if it has no cost, then, even if the land has a "cost", no part of the gain on transfer of land is taxable **– Ishverlal Manmohandas Kanakia v. ACIT [ITAT Mumbai]**

- Rent paid by builder towards alternate accommodation given to assessee land owner in course of business activity, could not be held as part of consideration paid to assessee for transfer of assets **– Dr Arvind S. Phadke v. Addl CIT [(2014) 46 taxmann.com 335 (Pune - Trib.)]**

Is rent for alternate accommodation taxable under the head `Income from Other Sources'?

- In the case of **Jatinder Kumar Madan v. ITO [(2012) 21 taxmann.com 316 (Mum. – Trib.)],** the assessee, existing flat owner, received, as per development agreement, certain amount of compensation from builder for alternate accommodation. During the period of construction of building the assessee received Rs. 7,01,460 and after deducting rent paid by the assessee during the period of construction, net amount of Rs. 2,05,766 had been taxed by the AO as income from other sources. The Tribunal noted that displacement compensation was not related to any capital asset rather it was paid in connection with alternate accommodation given to assessee to facilitate construction of flat. The Tribunal held that having regard to fact that actual rent paid by assessee for alternate accommodation was lower than amount received net income of assessee was rightly taxed as `Income from Other Sources'.

Cost of acquisition

What is cost of acquisition of development rights?

- In the case of **Mohammed Farooq v. ITO [(2015) 60 taxmann.com 212 (Hyd. – Trib.)],** assessee entered into development agreement in respect of a land occupied by unauthorized hutments. The Tribunal held that while determining cost of acquisition, cost of buildings on land to be demolished, amounts paid to tenants / unauthorized hutment dwellers and litigation expenses for clearing title of land should also be taken into consideration.

- When right to develop property is transferred it cannot be said that it is an independent right not attached to ownership of the property and, hence, there is no cost of acquisition **– Mrs. Arlette Rodrigues v. ITO [(2011) 10 taxmann.com 235 (Mum. – Trib.)]**

Cost of improvement

- Compensation paid to tenants for getting vacant possession would amount to cost of improvement and assessee was entitled for indexation benefit on that account **– CIT v. Spencers and Co. Ltd. (No. 1) [(2015) 55 taxmann.com 105 (Mad.)]**

- TDR is improvement of land and if it has no cost, then, even if the land has a “cost”, no part of the gain on transfer of land is taxable **– Ishverlal Manmohandas Kanakia v. ACIT [ITAT Mumbai]**

- The contention that the right to load TDR FSI is a no cost asset and therefore not chargeable to tax will not be available qua transfers happening post 1.4.2023 in view of the amendment to section 55 by the Finance Act, 2023 which will deem such cost to be Nil.

Section 45(5A)

Position prior to insertion of s. 45(5A)

- Section 2(47) defines “transfer” as follows –
  - “transfer” in relation to a capital asset, includes –

    …..

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

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

Decisions holding transfer happens when the transferee is allowed possession in part performance or transferee begins enjoyment of the property

- In view of the above, Courts have held that there is a transfer when the transferee is allowed possession in part performance or the transferee begins enjoyment of the property:
  - (a) Chatrabhuj Dwarkadas Kapadia v. CIT [(2003) 129 Taxman 497 (Bom.)]
  - (b) CIT v. Dr. T. K. Dayalu [(2011) 14 taxmann.com 120 (Kar.)]
  - (c) Jasbir Singh Sarkaria, In re [(2007) 64 Taxman 108 (AAR-New Delhi)]
  - (d) B. V. Kodre (HUF) v. ITO [ITA No. 834 of 2008, dated 4.10.2011, Pune-Trib].
  - (e) ACIT v. Akkineni Nagarjuna Rao [(2012) 22 taxmann.com 69 (Hyd.Trib.)]
  - (f) ACIT v. A. Ram Reddy [(2012) 23 taxmann.com 59 (Hyd.Trib.)]
  - (g) Krishna Kumar D. Shah (HUF) v. DCIT [(2012) 23 taxmann.com 111 (Hyd.-Trib.)]
  - (h) Durdana Khatoon v. ACIT [(2013) 33 taxmann.com 311 (Hyd.-Trib.)]

Decisions contrary to the earlier proposition

- On the other hand
  - (a) **In Shivram Co-operative Housing Society Ltd. v. DCIT [(1999) 70 ITD 8 (Mum.-Trib.)]**, it was held that since the transfer has taken place in various stages the computation of capital gains has to be worked out on the basis of sale consideration actually received during the year in respect of the portion of the land transferred in that year only;

  - (b) In **G. Sreenivasan v. DCIT [(2012) 28 taxmann.com 200 (Cochin-Trib.)]**, it was held that where the development agreement was entered into on 14.4.2002 and possession was given only on 21.4.2004, the capital gains was assessable for assessment year 2003-04 that is the year in which the development agreement was entered into;

Decisions contrary to the earlier proposition ...

(c) In **Chemosyn Lt.d v. ACIT [(2012) 25 taxmann.com 325 (Mum.-Trib.)]**, the Tribunal applied the doctrine of real income and held that consideration in the form of constructed area of 18,000 sq. feet as agreed in the development agreement was not actually accrued to the assessee. The assessee had argued that the constructed area was not actually received by reason of subsequent events and developments and therefore the consideration in the form of constructed area never accrued. The Tribunal took on record the actual fact of the plot themselves being sold as such subsequently and the differential income being offered for capital gains in the subsequent years to hold that there was no capital gain on the assumed market value of the constructed area.

Object of the amendment as explained in the Memorandum

- The objective behind the amendment is explained in the Memorandum explaining the provisions of the Finance Bill as follows:
  - "Under the existing provisions of section 45, capital gain is chargeable to tax in the year in which transfer takes place except in certain cases. The definition of 'transfer', inter alia, includes any arrangement or transaction where any rights are handed over in execution of part performance of contract, even though the legal title has not been transferred. In such a scenario, **execution of Joint Development Agreement** between the owner of immovable property and the developer **triggers the capital gains tax liability in the hands of the owner in the year in which the possession of immovable property is handed over to the developer for development of a project**.
  - With a view to minimise the genuine hardship which the owner of land may face in paying capital gains tax in the year of transfer, it is proposed to insert a new sub-section (5A) in section 45 so as to provide that in case of an assessee being individual or Hindu undivided family, who enters into a specified agreement for development of a project, the capital gains shall be chargeable to income-tax as income of the previous year in which the certificate of completion for the whole or part of the project is issued by the competent authority."

Text of section 45(5A)

- **Following sub-section (5A) shall be inserted after sub-section (5) of section 45 by the Finance Act, 2017, w.e.f. 1-4-2018 :**
  - *(5A) Notwithstanding anything contained in sub-section (1), where the capital gain arises to an assessee, being an individual or a Hindu undivided family, from the transfer of a capital asset, being land or building or both, under a specified agreement, the capital gains shall be chargeable to income-tax as income of the previous year in which the certificate of completion for the whole or part of the project is issued by the competent authority; and for the purposes of section 48, the stamp duty value, on the date of issue of the said certificate, of his share, being land or building or both in the project, as increased by the consideration received in cash, if any, shall be deemed to be the full value of the consideration received or accruing as a result of the transfer of the capital asset :*

Text of section 45(5A)

- **Provided** *that the provisions of this sub-section shall not apply where the assessee transfers his share in the project on or before the date of issue of said certificate of completion, and the capital gains shall be deemed to be the income of the previous year in which such transfer takes place and the provisions of this Act, other than the provisions of this sub-section, shall apply for the purpose of determination of full value of consideration received or accruing as a result of such transfer.*

Text of section 45(5A)

- Explanation.—*For the purposes of this sub-section, the expression—*

  (i) "competent authority" means the authority empowered to approve the building plan by or under any law for the time being in force;

  (ii) "specified agreement" means a registered agreement in which a person owning land or building or both, agrees to allow another person to develop a real estate project on such land or building or both, in consideration of a share, being land or building or both in such project, whether with or without payment of part of the consideration in cash;

  (iii) "stamp duty value" means the value adopted or assessed or assessable by any authority of Government for the purpose of payment of stamp duty in respect of an immovable property being land or building or both.

S. 45(5A) is not retrospective

- Section 45(5A) has been inserted with effect from AY 2018-19 to provide for a special provision for computation of capital gains in case of an assessee transferring a capital asset pursuant to a joint development agreement.
- In the following decisions, Tribunals have held that the provisions of Section 45(5A) are prospective in nature and not retrospective –
  - Smt. G. Sailaja v. ITO [ITA Nos. 51 & 570/Hyd/2016 and Others; Date of Order 30.11.2017];
  - DCIT v. Agamati Ram Reddy [ITA No. 1774/Hyd/2017; AY 2008-09; Date of Order : 31.1.2019][same Members as in G. Sailaja(supra), follows G. Sailaja, observations while dealing with CO of the assessee]
  - Adinarayana Reddy Kummeta v. ACIT [(2018) 91 taxmann.com 360 (Hyd. – Trib.)] – Newly amended section 45(5A) being substantive provision, cannot be applied to development agreement entered into during the year 2008-09 in which Section 2(47)(v) would certainly get attracted.

Conditions for applicability of Section 45(5A)]

- Section 45(5A) applies if all the following conditions are fulfilled –

  (a) the assessee is an individual or an HUF;

  (b) capital gains arise to the assessee from transfer of a capital asset;

  (c) the capital asset is land or building or both;

  (d) the transfer is made under a specified agreement;

  (e) the consideration for the assessee includes or consists of a share in the land or building or both in the project;

  (f) the assessee has not transferred his share in the project on or before the date of issue of the certificate of completion (CC) for the whole or part of the project as issued by the competent authority.

Consequences if conditions stated in S. 45(5A) are satisfied ….

- If the aforesaid conditions are satisfied, then

  (a) The full value of consideration received or accruing as a result of the transfer of the capital asset shall be equal to –

  (i) the stamp duty value of the above referred share in land or building or both on the date of issue of the completion certificate; plus

  (ii) consideration received in cash, if any.

  (b) The capital gains shall be chargeable to income-tax as income of the previous year in which the above referred certificate of completion is issued by the competent authority.

Consequences of assessee transferring his share before issue of CC

- If the assessee has transferred his share on or before the date of issue of the aforesaid certificate of completion, then,
  - (a) Capital gains shall be deemed to be the income of the previous year in which such transfer takes place, and
  - (b) The provisions of the Act other than the provisions of section 45(5A) shall apply for the purpose of determination of full value of consideration received or accruing as a result of the transfer. [proviso to section 45(5A)]
- For the aforesaid purposes, the terms "competent authority", "specified agreement" and "stamp duty value" have been defined in Explanation to sub-section (5A) of section 45 of the Act.

Analysis of the amendment ...

- The provision applies only if the assessee receives land or building or both as his share. In certain cases, the owner would receive cash consideration and the buyer would also undertake the obligation to construct a building or a part of building on behalf of the transferor, at a specified cost to be borne by the owner. In such a case, the transferor does not receive a share in the land or building as contemplated by section 45(5A) and hence section 45(5A) may not apply to him. In such a case, the taxation would be governed by the general law. Some of the relevant cases in this connection are as follows :
  - (a) **Dy CIT v. Jai Trikananad Rao [(2013) 37 taxmann.com 125 (Mum.-Trib.)]** [Market value of property to be constructed by the Developer on behalf of the Society is the consideration].

Analysis of the amendment ...

(b) **Smt. Vasavi Pratap Chand v. DCIT [(2004) 89 ITD 73 (Del.-Trib.)]** [The assessees were co-owners of a property purchased by their ancestors in 1947. They entered a collaboration agreement with builders for developing land and getting flats built on it. Under the agreement, assessees got 56% of the total built-up area and transferred 44% of land to builders. It was held that consideration for transfer of 44% was cost of construction of 56% built-up area, which was to be incurred by the builder].

(c) **ITO v. N. S. Nagaraj [(2014) 52 taxmann.com 511 (Bang.-Trib.)]** [The Tribunal observed that full consideration was cost of construction incurred by the builder on assessee's share of constructed area, because the assessee would receive constructed area in lieu of the land share. Whatever is the expenditure incurred for constructing that area was a consideration in kind to the assessee].

Analysis of the amendment ...

(d) **Prabhandam Prakash v. ITO [(2008) 22 SOT 58 (Hyd.-Trib.)] -**The promoter was to give 43% of built-up area to the assessee in new complex and 57% of this area was to be owned by the promoter. It was held that cost of construction of 43% of built-up area was to be total sale consideration for the assessee transferring land and existing structure].

(e) **Essae Teraoka Ltd. v. DCIT [(2016) 67 taxmann.com 147 (Bang.-Trib.)]**[The assessee entered into a JDA with developer in terms of which 47% of its land was transferred by the assessee in favour of developer against consideration in form of constructed area equivalent to 53% of total super-built-up area. The AO computed capital gains by taking consideration for transfer at cost of construction recorded by developer in books of account. It was held that cost recorded by the developer in its books of account might also include some of expenditure which had not been directly related to construction activity but might have been incurred in relation to general administration and other business expenditure and, therefore, that part of expenditure recorded by the developer which had no direct nexus with construction could not be adopted as sale consideration for transfer of land for purpose of computing capital gains in hands of assessee.

Analysis of the amendment ...

(f) **CIT v. Khivraj Motors [(2015) 62 taxmann.com 305 (Kar.)**]- The assessee arrived at consideration by taking cost of construction at Rs. 800 per sq. feet which was agreed upon between parties. However, cost of construction at Rs. 800 per sq. feet was substituted by the AO by project cost. It was found that builder paid non-refundable amounts to landlord and tenant to acquire vacant possession of property. Further, advertisement cost had been incurred by him. It was held that these amounts could not be taken as part of cost of construction].

- The terminal year is the year in which the certificate of completion for the whole or part of the project is issued by the competent authority. Hence, if a CC is obtained for even part of the project, the capital gains will arise in that year. In the illustration given above, suppose, a part completion certificate is issued in financial year 2019-20. In that case, the capital gains will arise in assessment year 2020-21.

Transfer before issue of certificate of completion

- **Transfer before issue of certificate of completion**
- The proviso to section 45(5A) provides that the section shall not apply where the assessee transfers his share in the project on or before the date of issue of the certificate of completion. On a literal reading, if an assessee transfers part of his share but retains the balance the proviso would not apply to him. It cannot be said that the assessee has transferred his “share” in the project. However, if this interpretation is taken the stamp duty value of the entire share including the portion sold may be liable to tax under main provision. Surely, such a consequence cannot be attributed and hence it appears that if the assessee transfers part of his share, such transfer is also covered in the proviso.

Transfer before issue of certificate of completion ...

- In case of transfer before obtainment of completion certificate the proviso states that "other provisions of the Act shall apply" for the purpose of determination of full value of consideration received or accruing as a result of the transfer. The other provisions of the Act shall include section 50C and hence, at the stage of transfer of property before obtainment of completion certificate, the value of consideration shall mean the stamp duty value under section 50C(1) on the relevant date.
- **Completion certificate for part of the project:**
- Capital gains is chargeable in the year in which the certificate of completion for the whole or part of the project is issued by the Competent Authority. A question that arises is that if the completion certificate is received for part of the project, whether entire capital gains will be taxable or capital gains only in relation to the part for which completion certificate is received, is taxable?

Transfer before issue of certificate of completion ...

- A view could be taken that at the stage where completion certificate is obtained only in respect of part of the project, the transferor should be taxed in respect of his share for which completion certificate is obtained and not on his whole share. This is because his capital gains is based on the stamp duty value of his share in land/building. It appears that such stamp duty value can be calculated reasonably only on the completion portion and not on incomplete portion. To illustrate, suppose under the JDA the transferor has to receive 25,000 sq. ft. If at the time when the part completion certificate is received, he has received possession of completed 10,000 sq. ft. In this situation, it could be argued that he should be taxed on the stamp duty value of 10,000 sq. ft. and not 25,000 sq. ft.

Taxability of consideration received in cash

- So far as the consideration in cash is concerned, since the section provides for taxation of consideration received in cash, it may be argued that at that stage the transferor should be taxed on the consideration actually received. Subsequently, when the completion certificate is received for the entire project, the transferor should be taxed on the stamp duty value of the balance share, that is, 15,000 sq. ft. plus additional consideration received after the date of first transfer. It may be noted that difficult questions will arise in relation to cost of acquisition of the asset transferred. Should it be full cost of acquisition at the stage of first transfer or should it be proportionate to the share received?

Consideration received in cash ...

- The section refers to consideration "received in cash". Hence, the capital gains is computed on the basis of stamp duty value on the date of issue of completion certificate plus consideration "received in cash".

- Does this mean that the consideration accrued but not received is not to be considered for the purpose of taxation?

- In **CIT v. Moon Mills Ltd. [(1966) 59 ITR 574 (SC) affirming CIT V. Moon Mills Ltd. (1962) 46 ITR 771 (Cal)]**, it was held that there is no scope for holding that the expression "received" means "receivable" and hence, only the amount of consideration received should be considered for taxation.

Consideration received in cash ...

- On the other hand, in Words & Phrases Legally Defined, 4th Edition, Volume 2, it is observed as follows:
  - "Prima facie, as a matter of ordinary English language, I think "received" means actually get into their hands. A number of cases, however, have been cited which show that the Courts have displayed an inclination to treat the word as meaning "receivable" in order to prevent the accident of whether trustees have or have not paid over money to affect the rights of beneficiaries. In some cases, the word received is construed as being equivalent to "vested in possession". Pilcher v. Logan [(1914) 15 SR (NSW) at 27, per Harvey J].
- The better and safer view is that although the word "received" may be given the meaning as in Moon Mills' case, there is no prohibition on taxation of consideration in cash received in a year subsequent to the year in which the certificate of completion is issued.

Consideration received in cash ...

- The proportion of cash vis-à-vis land/building is irrelevant. Subject to GAAR, the transferor may opt for 95% cash consideration and 5% in the form of property.
- Although the year of charge of capital gains is postponed, there is no change in the date of transfer / period of holding. Hence, whether the land or building is short term or long term would depend on principles laid out in section 2(42A) and not on the basis of postponement of taxation under s. 45(5A).
- Likewise, the indexed cost of acquisition which is linked with the year in which the asset is "transferred" will remain the same under general provisions as well as section 45(5A).

Exemption under section 54

- Exemption under section 54
- Section 45(5A) starts with the non-obstante clause, “notwithstanding anything contained in sub-section (1)”. Thus, it refers to section 45(1), which reads as follows-

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

- Thus, section 45(1) provides that capital gains shall be chargeable except to the extent of exemption under section 54, etc. A question that arises is when section 45(5A) overrides section 45(1) on account of the use of non obstante clause, does it mean that it also overrides the exemption under section 54, etc. as stated in section 45(1), with the result that the capital gains under section 45(5A) are not eligible to exemption under section 54, etc.?

Is TDS to be made from payments made qua monetary consideration paid under area sharing agreement

TDS under section 194IC

- **Payment under specified agreement.**
- **194-IC.** Notwithstanding anything contained in section 194-IA, any person responsible for paying to a resident any sum by way of consideration, not being consideration in kind, under the agreement referred to in sub-section (5A) of section 45, shall at the time of credit of such sum to the account of the payee or at the time of payment thereof in cash or by issue of a cheque or draft or by any other mode, whichever is earlier, deduct an amount equal to ten per cent of such sum as income-tax thereon.]
- **Explanation (ii) to section 45(5A) –**
- "specified agreement" means a registered agreement in which a person owning land or building or both, agrees to allow another person to develop a real estate project on such land or building or both, in consideration of a share, being land or building or both in such project, whether with or without payment of part of the consideration in cash;

TDS under section 194IC

- **Conditions precedent which need to be satisfied for s. 194IC to apply**
  - there should be a person responsible for paying (Developer is)
  - the payment is to a resident
  - payment is of a sum of money
  - payment of such sum is by way of consideration
  - under an agreement referred to in s. 45(5A)
- Upon satisfaction of above mentioned conditions, 10% of such sum is to be deducted at the time of credit or payment whichever is earlier

TDS under section 194IC

- **Is the Development Agreement a Specified Agreement? To qualify as a specified agreement it has to be -**
  - an agreement which is registered; [DA entered by Soc / members is registered]
  - person owning land or building or both [Society / Members own land]
  - allows another person [developer is allowed to develop REP on such land]
  - to develop a real estate project on such land or building or both
  - in consideration of –
    - a share being land or building ore both in such project; [society/members get flats in the building constructed which is the project being developed]
    - with or without payment of part consideration in cash

TDS under section 194IC

- Section 194IC is non-obstante provisions of section 194IA.
- Can it be contended that the requirement of TDS u/s 194IC is only in situations where the land owner is an individual or HUF as section 45(5A) applies only to an individual or a HUF.
- The reference to an agreement referred to in section 45(5A) is a case of incorporation by reference. Therefore, other requirements of section 45(5A) are not relevant.
- Payment of “corpus” or “hardship compensation” or “rent for alternate accommodation” are all payments which constitute consideration under an agreement referred to in section 45(5A). Whether it is consideration for land or building is not relevant for TDS purposes. What is required is that it has to be payment of consideration under the `specified agreement’.
- Tax needs to be deducted u/s 194IC on the entire monetary component of the consideration. Since it is non-obstante 194IA, section 194IA shall not apply

Commercial premises

Commercial Premises

- In cases where the existing flats / commercial premises (units) are depreciable assets, a question arises as to whether upon handing over of possession of the existing unit an adjustment needs to be made in the block of assets.
- When will the new asset be added to the block?
- Is it that there has to be an adjustment to the block or is it sufficient that the monetary consideration is reduced from the block?
- Is amount of rent for alternate accommodation to be regarded as a capital receipt, not chargeable to tax, when the unit is an office premises / asset held in the course of / for the purpose of business / profession of the member.
- Section 43(6) defines “written down value” exhaustively. Clause (c) deals with written down value in case of any block of assets. To the opening written down value of the block of assets, the adjustments mentioned in sub-items (A) to (C) of section 43(6)(c)(i) are to be made. Sub-item (B) is relevant for our purposes and that reads as -

Commercial Premises

- (B) by the reduction of the monies payable in respect of any asset falling within that block, which is sold or discarded or demolished or destroyed durign the previous year together with the amount of the scrap value, if any, so, however, that the amount of such reduction does not exceed the written down value as so increased; and"

- Therefore, for reduction from the block there has to be monies payable in respect of any asset falling within that block and such asset has to be sold, discarded, demolished or destroyed during the previous year.
- What is forming part of the block is the unit. That certainly is neither sold, discarded or destroyed. The question is whether it is demolished? Yes, the unit is demolished by the builder / developer but the monies payable are not in respect of the unit which has been demolished. Monies payable are in respect of the right to exploit additional development potential which stands transferred to the builder / developer. This right to exploit additional development potential did not form part of opening WDV of block.
- The above proposition is not tested and is not free from litigation.

Revenue sharing agreement

Does entering into a revenue sharing agreement mean that profits are to be taxed as Business Income?

- In the case of **Marudhar Hotels (P.) Ltd. v. JCIT [(2013) 40 taxmann.com 475 (Jodh. – Trib.)]**,
- The Tribunal held that sale consideration received by the appellant from the developer on sale of plots under development agreement was in course of realization of a capital asset held by the appellant for over 30 long years, same would give rise to income taxable under head `Capital Gains'.
- **ITO v. Sitaram Chamaria [(2006) 6 SOT 594 (Mum.)] -** Developing of lands into building sites with a view to realize best prices without anything more is consistent with realization of capital investment and in such a case surplus received by seller of building sites would not be trading or business profit **–**
- Madras High Court in the case of ***MLM Mahalingam Chettiar*** held that the developing of lands into building sites with a view to realize the best price without anything more is consistent with the realization of the capital investment and the surplus received by the assessee will not be a trading or business profit.

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