# Taxation of Real Estate Transactions

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## Synopsis – Recent Developments

- **Recent Developments** –
  - Holding period for immovable property - amendment to section 2(42A) – [w.e.f. AY 2018-19]
  - Holding period for stock-in-trade converted into capital asset [w.e.f. AY : 2018-19]
  - Stamp duty value on date of agreement to be seen - Proviso to section 50C [w.e.f. 1.4.2017]
  - Tolerance limit introduced in section 50C – Third Proviso to section 50C [w.e.f. 1.4.2019 amended w.e.f. 1.4.2021]
  - Taxation of Joint Development Agreement – Section 45(5A) [w.e.f. 1.4.2018]

## Synopsis – Recent Developments

- **Recent Developments** –
  - Only long term capital gains arising from transfer of land or building or both to qualify for deduction under section 54EC [w.e.f. 1.4.2019]
  - Lock-in period for bonds qualifying under section 54EC to be 5 years [w.e.f. 1.4.2019]
  - Forfeiture of advance received – taxable as IFOS –Section 56(2)(ix) [w.e.f. 1.4.2015]
  - Base date shifted from 1.4.1981 to 1.4.2001 - Section 55 [w.e.f. 1.4.2018]



## Synopsis – Recent Developments

- **Recent Developments** –
  - Annual value of building or land appurtenant thereto held as stock-in-trade to be considered as Nil for a period of one year from the date of issue of completion certificate – Section 23(5) [w.e.f. 1.4.2018]
  - Conversion of stock-in-trade into a capital asset chargeable to tax – 28(via) [w.e.f. 1.4.2019]
  - Actual cost of capital asset which has been converted from stock-in-trade – Explanation 1A to Section 43(1) [w.e.f. 1.4.2019]
  - Cost of acquisition of capital asset which has been converted from stock-in-trade – Section 49(9) [w.e.f. 1.4.2019]
  - Exemption under sections 54 / 54F to be restricted to purchase / construction of one house [w.e.f. 1.4.2015]

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## Synopsis – Recent Developments

- **Recent Developments** -
  - Proviso to section 54 – if amount of capital gains is upto Rs 2 crore then assessee has been granted option to purchase / construct two residential houses instead of one [w.e.f. 1.4.2020]
  - TDS on transfer of immovable property other than agricultural land – Section 194IA [w.e.f. 1.6.2013]
  - TDS on rent paid by certain individuals or HUF – Section 194IB [w.e.f. 1.6.2017]
  - TDS on payments under specified agreements – Section 194IC [w.e.f. 1.4.2017]
  - Section 50D [w.e.f. AY 2013-14]

# Taxability of annual value of property held as stock-in-trade



## Is annual value of stock-in-trade chargeable to tax under the head `Income from House Property'.

- S. 22 is the charging section for the head `Income from House Property'. It charges annual value of the property being buildings or lands appurtenant thereto to tax under the head `Income from House Property'. Section 22 carves out an exception in respect of property occupied for the purposes of the assessee's business, profits of which are chargeable to tax.

- Section 22 reads as under:

  "22. The annual value of property consisting of 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'."

- Section 22 charges to tax annual value of the property. Section 23 lays down the manner of determination of annual value. Section 23(1) interalia states that for the purposes of section 22, the annual value of any property shall be deemed to be the sum for which the property might reasonably be expected to let from year to year; or ………

## Insertion of S. 23(5) by FA, 2017 w.e.f. 1.4.2018

- The Finance Act, 2017 has, w.e.f. 1.4.2018, inserted sub-section (5) in section 23 of the Act which reads as under –

  > *"(5) Where the property consisting of any building or land appurtenant thereto is held as stock-in-trade and the property or any part of the property is not let during the whole or any part of the previous year, the annual value of such property or part of the property, for the period up to one year [one has been substituted for two by FA, 2019 w.e.f. 14.2020] from the end of the financial year in which the certificate of completion of construction of the property is obtained from the competent authority, shall be taken to be* nil.*"*

- Section 23, captioned `Annual value how determined', is a section which provides a mechanism for computing annual value which needs to be charged to tax by virtue of the provisions of section 22 of the Act.
- While section 23 has been amended, there is not amendment to section 22.



## Rental income of stock-in-trade held to be taxable as `Income from Business'

- Rental income of units held as stock-in-trade has been held to be chargeable to tax under the head `**Profits & Gains of Business or Profession**' in the following cases–
  - CIT v. Neha Builders (P.) Ltd. [(2007) 164 Taxman 342 (Guj)]
  - Chennai Properties & Investments Ltd. v. CIT (SC) [(2015) 56 taxmann.com 456 (SC)]
  - Rayala Corporation (P.) Ltd. v. CIT [(2016) 72 taxmann.com 149 (SC)]
  - PCIT, Central-1 v. Classique Associate Ltd. [ITA No.1216 of 2016; Order dated 28.01.2019; (Bom HC)]

## Rental income of stock-in-trade held to be taxable as `Income from House Property'

- Rental income of units held as stock-in-trade has been held to be chargeable to tax under the head `**Income from House Property**' in the following cases –
  - Azimganj Estate (P) Ltd. v CIT [ITA No. 242/2003; Date of Order: 13.9.2011; (Cal HC)]
  - Mangala Homes (P) Ltd. v. ITO [(182 Taxman 55)(Bom)]
  - CIT v. Sane & Doshi Enterprises [(2015) 58 taxmann.com 111 (Bom)]
  - Raj Dadarkar & Associates v. ACIT [(2017) 81 taxmann.com 193 (SC)]



## Can ratio of decision of Supreme Court be distinguished?

- While there may not be any difficulty if the object is to acquire / construct and let out the properties but if the object is to construct and sell the properties then probably it can be argued that the facts are different from the case decided by the Apex Court. The difficulty would be further compounded if the assessee has never let out any of its properties constructed but has been selling them. Revenue may seek to distinguish the case of **Chennai Properties (supra)** on the ground that it dealt with a case of an assessee whose object is acquiring and letting out properties whereas in the case of builders the object is to construct and sell.

- The Mumbai Bench of the Tribunal in **J. V. Constructions and Developers v. ACIT [ITA No. 3282/Mum/2013; AY 2008-09; order dated 1.7.2015]** has after considering the decision of the Apex Court in the case of Chennai Properties and Investments (supra) observed that the AO has not shown that the object was acquiring and letting out property but that the AO has himself pointed out that the assessee is in the business of building construction. The Tribunal chose to follow ratio of the decision in the case of Ansal Housing and Construction Ltd. and held that rental income was to be charged under the head `Income from House Property'.

## Bombay HC considering ratio of 3 decisions of the Apex Court

- The Bombay High Court has in the case of **CIT v. E-City Project Construction Pvt. Ltd. [ITA No. 149 of 2015; Order dated 18th July, 2017]** has considered the decisions of the Apex Court in the case of Chennai Properties and Investments Ltd. v. CIT; Rayala Corporation Pvt. Ltd. v. ACIT and also the decision in the case of Raj Dadarkar & Associates.
- Having considered the ratio of all the 3 decisions of the Apex Court, the Hon'ble Bombay High Court has come to the conclusion that the facts of the case before it were similar to the case of Chennai Properties and Investments Ltd. and has held that the rental income in the said case was chargeable to tax under the head `Profits and Gains of Business or Profession'.



## CIT v. Ansal Housing Finance & Leasing Co. Ltd. (Delhi HC)

- Delhi HC in the case of CIT v. Ansal Housing Finance & Leasing Co. Ltd. [(2013) 29 taxmann.com 303 (Delhi)] held that annual value of vacant stock-in-trade is chargeable to tax under the head `Income from House Property'. This decision, however, has been rendered without considering –
  - CIT v. Neha Builders (P.) Ltd. [(2007) 164 Taxman 342 (Guj)]
  - CIT v. M. P. Bazaz [(1992) 65 Taxman 91 (Orissa)]
  - CIT v. Modi Industries Ltd. [210 ITR 1 (Del-FB)]
- SLP against the above decision of the Delhi High Court has now been dismissed on account of low tax effect – [(2020) 116 taxmann.com 322 (SC)]
- Subsequently, in Ansal Housing Finance & Leasing Co. Ltd. [(2016) 72 taxmann.com 254 (Delhi)] assessee sought to rely on the decision of SC in Chennai Properties (supra) which was rejected as assessee had in earlier case stated that it is not its intention to let out flats. SLP against this order of Delhi High Court has been admitted – [(2016) 74 taxmann.com 245 (SC)]

## CIT v. Ansal Housing Finance & Leasing Co. Ltd. (Delhi HC)

- Once again, before the Delhi HC, the assessee, in the case of CIT v. Ansal Housing Finance & Leasing Co. Ltd. [(2018) 89 taxmann.com 238 (Delhi)] relied on the proposition that its case is covered by section 23(1)(c) and consequently the annual value of vacant flats held as stock-in-trade is not chargeable to tax. This contention of the assessee was rejected by the Delhi High Court.

- Against the order of the Delhi High Court in CIT v. Ansal Housing Finance & Leasing Co. Ltd. [(2018) 89 taxmann.com 238 (Delhi)] SLP has been admitted - [(2018) 95 taxmann.com 17 (SC)]



## Notional annual value of vacant units held as stock-in-trade held to be not chargeable

- Various benches of the Tribunal have, subsequent to the decision of the Apex Court in Chennai Properties & Investments Ltd. (supra), while dealing with cases pertaining to a period prior to applicability of section 23(5), have held that annual value of vacant stock-in-trade is not chargeable to tax –
  - C. R. Developments Pvt. Ltd. v. CIT [ITA No. 4277/Mum/2012; Mumbai `C' Bench; AY 2009-10; Order dated 13.5.2015; (Mum-Trib)]
  - Kumar Beharay Rathi v. ITO [ITA No. 327/Pun/2018; A.Y.: 2014-15; Order dated 3.4.2019]
  - Shree Balaji Ventures v. ITO [ITA No. 1914/Pune/2018; A.Y.: 2015-16; Order dated 19.2.2019]

## How has the tribunal decided in favor of the assessee?

- Various decisions of the Tribunal, which have decided the issue in favor of the assessee, have considered the ratio of the decision of the Gujarat High Court in Neha Builders and also the ratio of the decision of the Delhi High Court in the case of Ansal and have, following the ratio of the decision of the Apex Court in the case of Vegetable Products, held that annual value of unsold stock which has not been let out is not chargeable to tax.
- The Tribunals have sought to distinguish the decision of the Bombay High Court in the case of Sane & Doshi by contending that the said decision dealt with a case where property was actually let out whereas in the case before them the property has not been let out. It is humbly submitted that the Gujarat High Court in the case of Neha Builders was also dealing with a case where the property, held as stock-in-trade, was actually let out.



## Section 23(5) held to be prospective

- Provisions of section 23(5) have been held to be prospective in thee following cases-
  - Ansal Housing Finance & Construction Ltd. v. ACIT [(2018) 89 taxmann.com 238 (Delhi HC)]
  - Kumar Beharay Rathi v. ITO [ITA No. 327/Pun/2018; A.Y.: 2014-15; Order datd 3.4.2019]
  - Oberoi Realty Ltd. v. DCIT [ITA No. 2711/Mum/2017; A.Y.: 2012-13; Order dated 25.2.2019]
  - DCIT v. Suryavardahan Estates Pvt. Ltd. [ITA No. 462/Mds./2017 & CO No. 36/Mds./2017; A.Y.: 2012-13]

## Observations of the Tribunal qua s. 23(5)

- Mumbai Bench of the Tribunal in Oberoi Realty Ltd. v. DCIT [ITA No. 2711/Mum/2017; A.Y.: 2012-13; Order dated 25.2.2019] has held the provisions of section 23(5) to be a measure of giving relief to real estate developers.

- Chennai Bench of the Tribunal in DCIT v. Suryavardhan Estates Pvt. Ltd. [ITA No. 462/Mds./2017 & CO No. 36/Mds./2017; A.Y.: 2012-13] has while deciding the issue of taxability of annual value of vacant flats held as stock-in-trade observed that insertion of section 23(5) providing that annual value of a house property held as stock-in-trade of his business by the assessee shall be taken at nil for a period of one year from the end of the year in which a completion certificate is obtained in that respect endorses its view that annual value of a house property held as stock-in-trade is equally assessable u/s 22 irrespective of whether the same is actually let or not.



## 23(5) is prospective - Ansal Housing Finance & Leasing Co. Ltd. – Delhi HC – [(2018) 89 taxmann.com 238 (Delhi)]

- The Court having noticed that the Finance Act, 2017 has amended Section 23 of the Act to insert sub-section (5) held that it is clear that in the assessee's factual situation, sub-section (5) would be squarely applicable, but for the fact that sub-section (5) has been inserted with effect from 1 April 2018. Moreover, sub-section (5) does not use language which would indicate that it has been inserted as a clarification (which would make clear that it was always the legal position) or by way of abundant caution. The amendment therefore clearly applies prospectively and since a separate sub-section was inserted in section 23, it is clear that the legislative intent is that the peculiar situation in sub-section (5) was not already covered by sub-section (3). That being the case, for the relevant assessment years, the properties held as stock-in-trade would be taxable on the basis of notional annual letting value under section 23.
- SLP against this decision has been granted – **Ansal Housing & Construction Ltd. v. ACIT [2018] 95 taxmann.com 17 (SC)**

## 23(5) – seen by ITAT as a relief to real estate developers

- As regards introduction of S. 23(5), Mumbai Bench of the Tribunal in the case of **Oberoi Realty Limited v. DCIT [ITA No. 2711/Mum/2017; Order dated 25.2.2019; AY 2012-13]** has held as under –
  - Thus, in order to give relief to Real Estate Developers, section 23 has been amended w.e.f. AY 2018-19 (FY 2017-18). By this amendment, it is provided that if the assessee is holding any house property as his stock-in-trade which is not let out for the whole or part of the year, the annual value of such property will be considered as Nil for a period upto one year from the end of the financial year in which a completion certificate is obtained from the competent authority.
  - In view of the above amendment to section 23, we are not adverting to other case laws relied upon by the Ld. Counsel.



## Shree Balaji Ventures v. ITO [ITA No. 1914/Pune/2018; AY 2015-16; Order dated 19.2.2019]

- Pune Bench of the Tribunal in the case of **Shree Balaji Ventures v. ITO [ITA No. 1914/Pune/2018; AY 2015-16; Order dated 19.2.2019]** while dealing with taxation of annual value of unsold units held as stock-in-trade, has made the following interesting observations –
  - "6. Even otherwise, section 5 of the Act clearly stipulates that a person who is a resident can be subjected to tax in respect of income from whatever source which is received or is deemed to be received in India or accrues or deemed to accrue or arise to him in or outside India during such year. As the instant imaginary income charged to tax by the AO is neither a deemed income under the head `Business Income' nor is received or deemed to be received or accruing or arising or deemed to accrue or arise, not falling in any of the categories given in clauses (a) to (c) of section 5(1). I hold that there is no rationale in charging it to tax. I, therefore, overturn the impugned order and direct to delete the addition of Rs. 34.35 lakh."

## Decisions of ITAT holding that annual value of stock-in-trade is not chargeable to tax as IFHP

| Sr. No. | Name of assessee | ITA No. | Date of Order |
|---|---|---|---|
| 1 | Pr. CIT v. Classique Associates Ltd. | 1216 of 2016 | 28.01.2019 |
| 2 | Chamber Construction Pvt. Ltd. v. DCIT | 6901/Mum/2017 | 19.03.2019 |
| 3 | Saranga Estates Pvt. Ltd. v. DCIT | 4420/Mum/2017 | 13.03.2019 |
| 4 | RNA Corp Pvt Ltd v. DCIT | 6903/M/2017 & 6904/M/2017 | 27.02.2019 |
| 5 | Oberoi Realty Ltd v.DCIT | . 2771/Mum/2017 | 25.02.2019 |
| 6 | Rajesndra Godshalwar v. ITO | 7470/Mum/2017 | 31.01.2019 |
| 7 | Chamber Construction Pvt. Ltd. v. DCIT | 4418/Mum/2017 | 30.11.2018 |
| 8 | Vijay Grihniramn P Ltd v.DCIT | 2002/Mum/2017 | 31.10..2018 |
| 9 | Haware Engineers & Builders Pvt Ltd v.DCIT | 7155/Mum/2016 | 10.10.2018 |



## Decisions of ITAT holding that annual value of stock-in-trade is not chargeable to tax as IFHP

| Sr. No. | Name of assessee | ITA No. | Date of Order |
|---|---|---|---|
| 10 | ACIT v. Haware Engineers & Builders Pvt Ltd | 3321/Mum/2016 and 3172/Mum/2016 | 31.08.2018 |
| 11 | ITO v.Arihant Estates Pvt Ltd | 6037/Mum/2016 | 27.06.2018 |
| 12 | Shivshankar Singh & Others v. DCIT | 5236/Mum/2016 | 23.05.2018 |
| 13 | Progressive Homes v. ACIT | 5082/Mum/2016 | 16.05.2018 |
| 14 | Runwal Construction v. ACIT | 5408/Mum/2016 | 22.02.2018 |
| 15 | A A Estates Pvt Ltd v.DCIT | 6905/Mum/2017 | 22.02.2018 |
| 16 | Kumar Beharay Rathi v. ITO | 327/Pun/2018 | 03.04.2019 |
| 17 | Anand Construction v.ITO | 1711/Pun/2018 | 03.04.2019 |
| 18 | Parmar Properties Pvt Ltd v. DCIT | 2225/Pun/2018 | 28.03.2019 |

## Decisions of ITAT holding that annual value of stock-in-trade is not chargeable to tax as IFHP

| Sr. No. | Name of assessee | ITA No. | Date of Order |
|---|---|---|---|
| 19 | Shree Balaji Ventures v. ITO | 1914/Pun/2018 | 19.02.2019 |
| 20 | Vishheram Developers v.DCIT | ITA No.1479 & 1480/Pun/2018 | 14.02.2019 |
| 21 | Gajendra D Pawar v.DCIT | 1359/Pun/2018 | 14.02.2019 |
| 22 | Raj Landmark Pvt Ltd v.ITO | 242/JP/2018 | 24.08.2018 |
| 23 | ITO v. Anil Kumar Gupta | 5911/DEL/2014 | |

- The decision of Mumbai Tribunal in the case of Palm Grove Beach Hotels Pvt. Ltd. v. DCIT [ITA No. 5248/Mum/2016; Order dated 21.3.2018] is against the assessee but the same member who has passed this order has in a subsequent decision decided the issue in favor of the assessee. The later decision should prevail over the earlier one



## Special provision for full value of consideration for transfer of assets other than capital assets in certain cases – Section 43CA.

## Analysis of Section 43CA

- **Analysis of S. 43CA**
- **Conditions precedent**
  1. there is an assessee.
  2. there is a transfer by the assessee.
  3. the transfer is of an asset as defined in this section.
  4. there is consideration received or accruing as a result of such transfer.
  5. the value adopted or assessed or assessable by any authority of a State Government (stamp duty value) for the purpose of payment of stamp duty in respect of such transfer is greater than the consideration mentioned in 4 above.
- **Consequence –**
  1. For the purpose of computing profits and gains from transfer of such asset, stamp duty value shall be deemed to be full value of consideration received or accruing as a result of such transfer.
- **Exception:**
  1. The asset (i.e. land or building or both) is a capital asset of the assessee.
  2. Where the date of agreement of sale and the date of registration of transfer are not the same, the stamp duty value on the date of agreement shall be taken in place of stamp duty value on the date of registration provided the conditions mentioned in sub-sections (3) and (4) are satisfied.
- **Definition:**

  Asset means land or building or both. However, such asset should not be capital asset.



## Analysis of Section 43CA …

- **What is covered is only land or buildings or both**. S. 43CA will apply only if it is land as it is or it is building as it is and it will not apply if it is anything other than land or building or both. It may be an immovable property in its general understanding, under common law, but S. 43CA does not deal with immovable property, it deals with land or building or both.
- **Is part of a building covered by the section?** Language of S. 43CA is similar to the language in S. 50C / S. 56(2)(vii) / 56(2)(x). However, it needs to be noted that the legislature has in Ss. 27, 194IA, 194LA, 194LAA and 269AB made a specific reference to part of a building. This could mean that the section applies only when the building as a whole is transferred and does not apply to transfer of a part of a building and / or that the section applies only when 100% interest in the building is transferred. If this interpretation is correct then the section may not apply to transfer of flat (because a flat is a part of a building) and section may not apply to transfer of an undivided interest in a building e.g. transfer of 50% interest in a building. However, considering the intent with which this section is introduced, it is quite likely that such literal interpretation may not be acceptable to Courts. However, in view of the decision of the Gujarat High Court in **CIT v. Chandanben Maganlal [(2002) 120 Taxman 38 (Guj.)]** it appears that transfer of even a part of a building would be covered

## Analysis of Section 43CA …

- A building under construction may not be covered by this section because a building under construction is certainly not a building. The Hon'ble Punjab & Haryana High Court has in the case of CWT v. Smt. Neena Jain [189 Taxman 308 (P & H)] held that an incomplete building does not fall within ambit of `assets' as defined in section 2(ea) of the wealth-tax Act as it does not fall within definition of `building' nor does it fall within purview of `urban land'.

- Supreme Court has in various decisions in the context of tax levied by Municipal Corporation held that building under construction cannot be subjected to a valuation for levy of corporation tax. These decisions lay down the proposition that a building under construction is not a building.

- There are provisions in the Act e.g. Ss. 35, 35D, 54G, 54H, 269UAB which extend the meaning of the words land and building by having leasehold rights, etc into the meaning of land. However, for the purposes of S. 43CA it appears that rights which are attached to or incidental to or connected with land or building or both may not come within the scope of s. 43CA.

- In a case where the assessee transferred both land and building, the Andhra Pradesh High Court held that the transfer of both will have to be subjected to a valuation of both and not a split valuation as was suggested by the assessee.



## Scope of land or building or both

- **ITO v. Yasin Moosa Godil [(2012) 18 ITR 253 (Ahd.-Trib.] -** S. 50C does not apply to "rights in land & building". Consequently, the provisions do not apply to transfer of booking rights by the assessee.
- **Smt. Devindraben I. Barot *v. ITO* [(2016) 70 taxmann.com 235 (Ahmedabad - Trib.)]** - Section 50C would have no application where assessee has transferred only rights in impugned land which cannot be equated to land or building or both
- **ITO v. Tara Chand Jain [(2015) 63 taxmann.com 286 (Jaipur - Trib.)]** – 50C does not apply to a case where the ownership of the land is with the State Government. The land is acquired and the assessee is merely a Kashtkar, this clearly shows that the assessee is only having the limited rights in the land sold. The limited rights of Kashtkar on the land cannot be equated with the ownership of land or with building or with both. The Act clearly recognizes the distinction between the land or building or any right in the land or building under section 50C. Thus, the Act has given the separate treatment to land, building and rights in the land. [Para 6.10]

## Scope of land or building or both

**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)]
- Smt. Myrtle D'Souza v. ITO [ITA No. 3168/Mum/2011)]
- Arif Akhtar Hussain v. ITO [(2011) 59 DTR 307 (Mum.)(Trib.)]

**S. 50C is 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.)]



## Scope of land or building or both

**S. 50C is 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] and 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 in Pr. CIT v. Kancast Pvt. Ltd. [2018 (5) TMI 713 - Bombay High Court]

- Bombay High Court has in the case of Pr. CIT v. Kancast Pvt. Ltd. [2018 (5) TMI 713 - Bombay High Court] has 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 in Pr. CIT v. Kancast Pvt. Ltd. [2018 (5) TMI 713 - Bombay High Court]

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

- 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 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 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 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 on 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).

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

- 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 in Jai Hind Sciaky Ltd. v. DCIT [2017 80 taxmann.com 105 (Bombay High Court)]

- 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.

## Meaning of `transfers’

- **`Transfers’**:
- For the section to apply the assessee should transfer the asset.
- Definition of transfer u/s S. 2(47) is in relation to a capital asset. S. 43CA applies to an asset which is not a capital asset.
- Normally, an immovable property being land or building is transferred only by way of a conveyance.
- Transfer of stock-in-trade happens only when title is transferred to the buyer - CIT v. Ashaland Corporation [133 ITR 55 (Guj)]. The Court held that -
  - till such time as the sale is complete the amount received constitutes an advance. An advance received cannot be taxed as income;
  - handing over of possession in part performance of the contract may be a good defense to the buyer against the seller yet it does not confer any title on the buyer.



## Meaning of `transfers’ …

- For determining the year of chargeability, the relevant date is not the date of the agreement to sell but the date of the sale i.e., effective transfer of title as contemplated by the parties –
  - Alapati Venkataramiah v. CIT [57 ITR 185 (SC)].
  - Chidambaram Chettiar v. CIT [(1936) 4 ITR 309 (Mad)];
  - CIT v. Motilal C. Patel & Co. [173 ITR 666 (Guj-HC)] and
  - CIT v. Moghul Builders & Planners [252 ITR 488 (AP)].

However, it would be relevant to note that the Bombay High Court has in the case of **Estate Investment Co. Ltd. v. CIT [121 ITR 580 (Bom)]** rejected the contention made on behalf of the assessee that until a conveyance is executed by the vendor in favour of the purchaser, the purchaser cannot be regarded as the owner of the property. The Court held that the assessee had done everything within its power to carry out its obligations with the purchasers viz. possession was given and price was received. The Court even noticed that the price had been stated to have been received in the Balance Sheet and was carried to reserve fund. It appears that the decision rendered by the Bombay High Court was on typical facts of the assessee.

## Should the asset be in existence?

Also, **for the transfer to happen the asset has to be in existence**. For the proposition that the transfer can happen only when property is in existence, a useful reference may be made to the provisions of S. 5 of the Transfer of Property Act, 1882 (TOPA) which defines the term `Transfer of property' as under –

> "5. "**Transfer of property' defined**. – In the following sections "transfer of property" means an act by which a living person conveys property, in present or in future, to one or more other living persons, or to himself, or to himself and one or more other living persons : and "to transfer property" is to perform such act.
>
> In this section "living person" includes a company or association or body of individuals, whether incorporated or not, but nothing herein contained shall affect any law for the time being in force relating to transfer of property to or by companies, associations or bodies of individuals."



## Should the asset be in existence?

- A transfer of property not in existence operates as a contract to be performed in the future which is specifically enforceable as soon as the property comes into existence. An assignment of future or non-existent property is quite valid and the transfer becomes operative as soon as the property comes into existence [**Purna Chandra Bhowmick v. Barna Kumari Devi, AIR 1939 Cal 715 (DB)**].
- Transfers of non-existent, or as it is conveniently called after-acquired property, provided they are not of the nature contemplated in Section 6(1), Transfer of Property Act, are perfectly valid.
- **The transfer would be regarded, in a Court of justice, as a contract to transfer after the vendor has acquired title and would fasten upon the property as soon as the vendor acquires it**.
- Therefore, S. 43CA may not apply to a flat under construction since the subject matter of transfer is not in existence. However, upon the flat coming into existence the section may apply.

## Are the provisions applicable to transfers happening post AY 2013-14 but agreements whereof were entered into in AY 2013-14 or earlier years

- The provisions of Section 43CA are effective Assessment Year 2014-15. The Bombay High Court has held that the provisions of Section 43CA are prospective and apply w.e.f. AY 2014-15.
- Therefore, a question which arises is whether the provisions are applicable to
  - transfers on or after 1.4.2013; or
  - agreements entered into on or after 1.4.2013
- While a better view appears to be that the provisions need to be effective in respect of agreements entered into on or after 1.4.2013, the Tribunal has in the following cases held the provisions to be applicable in the year in which the registration was effected / profits offered -
  - Indexone Tradecone Pvt. Ltd. v. DCIT [ITA No. 470/JP/2018; Assessment Year : 2014-15]
  - Faber Construction v. ACIT [ITA No. 198/Mum./2019; A.Y.: 2015-16; Order dated 12.3.2020 (Mum – SMC)]
  - Spytech Realtors Pvt. Ltd. v. ACIT [ITA No. 254/Jp./2019; A.Y.: 2014-15; Order dated 2.1.2020]



## Are the provisions applicable to transfers happening post AY 2013-14 but agreements whereof were entered into in AY 2013-14 or earlier years

- Mumbai Bench of the Tribunal has in the case of **Shree Laxmi Estate Pvt. Ltd. v. ITO [ITA No. 798/Mum./2018; A.Y.: 2014-15; Order dated 5.7.2019; (Mum.-Trib.)]** has held the provisions of section 43CA to be not applicable to the assessment year under consideration as in the said assessment year the units were under construction. The Tribunal observed that upon registration of the agreement the assessee has transferred only the rights in the flat and not property per se. The Tribunal held that, on facts, it can be safely concluded that **there was no transfer of any land or building or both by the assessee in favour of the flats buyers pursuant to registration of the agreement in the year under appeal**.

## Is the tolerance limit provided prospectively / SDV on date of agreement

- In the following cases, proviso providing for tolerance limit has been held to be prospective –
  - Faber Construction v. ACIT [ITA No. 198/Mum./2019; A.Y.: 2015-16; Order dated 12.3.2020 (Mum – SMC)]
  - Welfare Properties Pvt. Ltd. v. DCIT [ITA No. 4934/Mujm//22018; A.Y.: 2015-1y6; Order dated 29.11.2019]

- In the following cases, it has been held that consideration has to be compared with the stamp duty value as on the date of agreement and not with the stamp duty value as on the date of registration -
  - Gurukrupa Developers v. PCIT [ITA No. 3353/Mum./2019; A.Y.: 2014-15; Order dated 14.1.2020; (Mum.-Trib.)]
  - Panchwati Promoters Pvt. Ltd. v. DCIT [ITA No. 109/Ran/2018; A.Y.: 2014-15; Order dated 23.1.2020; (Ranchi Trib.)]



## Is the ratio of the decisions rendered in the context of s. 50C applicable to s. 43CA

- The provisions of Section 43CA are pari materia the provisions of Section 50C except that section 50C applies to transfer of capital asset being land or buildings or both whereas section 43CA applies to transfer of an asset (other than capital asset) being land or building or both.
- The provisions of Section 43CA are effective from AY 2014-15 whereas the provisions of Section 50C are in force since Assessment Year 2003-04.
- A question arises as to whether the ratio of the decisions rendered in the context of Section 50C would also apply to similar issues arising in the context of Section 43CA. Pune Bench of the Tribunal in the case of Buttepatil Properties v. ITO SMC Bench Pune [ITA No. 682/PUN/2018; Assessment Year : 2014-15] has held that - "*Section 50C deals with special provision for full value of consideration in certain cases with regard to capital asset. Section 43CA is also special provision for full value of consideration for transfer of assets other than capital assets in certain cases. In this context,* ***the application of the case laws with regard to Section 50C is applicable to Section 43CA as well***."

# Fair market value of inventory on the date of its conversion or its treatment as a capital asset – taxable under section 28(via)



## In respect of inventory converted into capital asset, FMV on date of conversion to be cost of acquisition – 49(9)

- Finance Act, 2018 has inserted section 28(via) to provide that any profits or gains arising from conversion of inventory into capital asset or its treatment as capital asset shall be charged to tax as business income.
- Consequently, section 49(9) has been inserted with effect from assessment year 2019-2020 to provide that for the purpose of computation of capital gains arising on transfer of such capital asset, the fair market value on the date of conversion, taken into account for the purpose of section 28(via), shall be regarded as cost of acquisition.
- To illustrate, if
  - Actual cost of asset is Rs. 5000
  - Fair market value on date of conversion is Rs. 15000
  - Sale consideration of converted asset is Rs. 50000

  Capital gains will be computed at Rs. 35000 being the difference between sale consideration of Rs. 50000 and FMV on date of conversion of Rs. 15000.

## Can FMV on date of conversion be taken to be cost of acquisition for conversions upto AY 2018-2019?

- Section 49(9) has been inserted with effect from Assessment Year 2019-2020.
- Section 49(9) applies only if Fair Market Value has been taken into account for the purposes of section 28(via) which section has been inserted with effect from assessment year 2019-2020.
- If conversion has been effected upto AY 2018-2019 then even if FMV as on date of conversion has been considered for computing business income, the said FMV cannot be taken as cost of acquisition of capital asset under section 49(9).
- However, in such a case reliance may be placed on **CIT v. Abhinandan Investment Ltd. [2015] 63 taxmann.com 263 (Delhi HC) [SLP accepted / granted in Abhinandan Investment Ltd. v. CIT [2017] 77 taxmann.com 120 (SC)]** wherein it was held that in case of conversion of stock-in-trade into investment, difference between value at which the asset was held as stock-in-trade and market value on date of its conversion as investment would have to be treated as business income/loss and difference between market value of asset as on date of conversion



## Can FMV on date of conversion be taken to be cost of acquisition for conversions upto AY 2018-2019?

- and value at which it is sold would be in nature of capital gains. Further, one can also argue on general principles as laid down in following cases that same income cannot be taxed twice unless such double taxation is expressly provided. See following cases-
  - Laxmipat Singhani v. CIT [(1969) 72 ITR 291 (SC)]
  - Jain Brothers v. UOI [(1970) 77 ITR 107 (SC)]
  - Govindaraju Chetty & Co. Pvt. Ltd. v. CIT [(1964) 51 ITR 731 (Mad.)]
  - Tata Iron & Steel Co. Ltd. v. UOI [(1970) 75 ITR 676 (Pat.)]
  - Ramanlal Madanlal v. CIT [(1979) 116 ITR 657 (Cal.)]
  - CIT v. Maskara Tea Estate [(1981) 6 Taxman 191 (Gau.)]
  - CIT v. R. Dalmia [(1981) 6 Taxman 47 (Delhi)]
  - CIT v. Nagarjuna Fertilizers & Chemicals Ltd. [(2014) 52 taxmann.com 397 (A.P.)]

## Indexation in case of capital asset which was held as inventory and has been converted into capital asset

- In case of transfer of capital asset, the assessee should be entitled to indexation from the date of its conversion if the gains are long term. To illustrate, if land held as inventory is converted into capital asset in financial year 2018-2019 and such land is sold in financial year 2024-2025 then indexation will be available with reference to financial year 2018-2019.



## Immovable property being land or building or both to qualify as long term capital asset if held for a period of 24 months or more before the date of transfer – S. 2(42A)

## Issues qua 2(42A)

- Different computation mechanism applies depending upon whether the capital asset transferred is a long term capital asset or a short term capital asset. Similarly the rate of tax applicable to long term capital gain is different from the rate of tax applicable to short term capital gain.
- Certain exemptions are available in case the capital gain is long term capital gain.
- Prior to the amendment of s. 2(42A) by the FA, 2017, land or building qualified as a long term capital asset if it was held for a period of more than 36 months before the date of transfer.
- FA, 2017 has amended third proviso to section 2(42A) to provide that a capital asset being land or building or both shall not be regarded as a short term capital asset if it is held for a period of more than 24 months before the date of transfer.



## Issues qua 2(42A)

- The amendment is effective from assessment year 2018-19 and consequently will be applicable to all transfers made on or after 1.4.2017.
- The amendment applies to all assessees irrespective of their legal and/or residential status.
- For the applicability of the amended holding period, the date of acquisition of the asset is immaterial.
- On a plain reading the amendment applies to any type of land viz. agricultural land, industrial land, farm house land, etc. and to any type of building viz. residential, commercial, hospital, theatre, etc.

## Text of Section 2(42A)

- **2.** In this Act, unless the context otherwise requires,—
  - (*42A*) [46]["short-term capital asset" means a capital asset held[47] by an assessee[47] for not more than [48][thirty-six] months immediately preceding the date of its transfer
  - **Provided** that in the case of [50][a security (other than a unit) listed in a recognized stock exchange in India] [51][or a unit of the Unit Trust of India established under the Unit Trust of India Act, 1963 (52 of 1963) or [52][a unit of an equity oriented fund]] [53][or a zero coupon bond], the provisions of this clause shall have effect as if for the words "thirty-six months", the words "twelve months" had been substituted:



## Text of Section 2(42A)

- **Provided also** that in the case of a share of a company (not being a share listed in a recognised stock exchange in India), **[56][*or an immovable property, being land or building or both*,]**the provisions of this clause shall have effect as if for the words "thirty-six months", the words "twenty-four months" had been substituted.
- [*Explanation 1*].—(*i*) In determining the period for which any capital asset is held by the assessee—
  - (a) in the case of a share held in a company in liquidation, there shall be excluded the period subsequent to the date on which the company goes into liquidation ;
  - (b) ……

## Issues qua 2(42A)

- The amendment is prospective and not retrospective and therefore will not apply to transfers which are made prior to 1.4.2017 but the assessment whereof is being completed on or after 1.4.2017. For this proposition reliance can be placed on the decision in the case of **Analjit Singh [2018] 92 taxmann.com 310 (Delhi-Trib.)**.
- The term "immovable property" is not defined in the Act. However, section 3(26) of the General Clauses Act, 1897 defines the term `immovable property' as follows –

  > "In this Act, and in all Central Acts and Regulations made after the commencement of this Act, unless there is anything repugnant in the subject or context, …
  >
  > "immovable property" shall include land, benefits to arise out of land, and things attached to earth, or permanently fastened to anything attached to earth."

- Thus, the definition in General Clauses Act includes benefits arising out of land, things attached to earth, etc.



## Issues qua 2(42A)

- Since the third proviso consciously uses the expression immovable property, being land or building or both, the expressions "immovable property" and "being" have to be given some meaning.
- According to one view, "being" would mean "which" or "namely" and would consequently cover only the items mentioned after `being'. This view is supported by-
  - (a) **"being" means "which"** [B. Mookerjee v. State Bank of India, AIR 1992 Cal 250] – for the purpose of section 18A of the Industries (Development and Regulation) Act, 1951.
  - (b) **The term "being"** is more like **"namely" and covers only the specific categories enumerated after the word "being" is mentioned** [Industrial Development Corporation of Orissa Ltd. v. CIT [2004] 137 Taxman 556 (Orissa) – for the purpose of Appendix I, Part III of the Income-tax Rules, 1962; CIT v. Adar Tea Products Company [2009] 178 Taxman 126 (Mad) – for the purpose of Entry III(8)(ix) in Appendix I to the Income-tax Rules, 1962.

## Issues qua 2(42A)

- According to the other view, the items mentioned after the word `being' are only illustrative. In **CIT v. Shree Synthetics Ltd. [1986] 162 ITR 819 (MP)** – for the purpose of section 35D of the Income-tax Act, 1961, it was held that "the dictionary meaning of the word "being" is "such as, especially, also, etc.". Therefore, it is illustrative and must be read with reference to the context in which the words are used".



## Issues qua 2(42A)

- While the matter is not free from doubt, **a safer view would be that the amendment should be confined to land or building or both and should not be made applicable to other immovable property** covered by section 3(26) of the General Clauses Act, 1897.

- The amendment will apply only to land or building or both and not to rights in land or building or both. Therefore, while the amendment will apply to a bungalow, it could be debatable as to whether or not it will apply to a flat in a co-operative housing society.

- The amendment will not apply to tenancy rights, lease, development rights, etc.

- The amendment will also not apply to a capital asset which has been converted into stock-in-trade and the said asset upon conversion is being sold as stock-in-trade.

## Separate holding period for land and building – S. 2(42A)

- While the holding period has been reduced from 36 months to 24 months, there is no corresponding amendment in the provisions of section 54 of the Act which require that the new house property purchased / constructed should be held for a period of 3 years from the date of its purchase / construction.

- While the holding period has been reduced from 36 months to 24 months, there is no corresponding amendment in the provisions of section 54 of the Act which require that the new house property purchased / constructed should be held for a period of 3 years from the date of its purchase / construction.

- One needs to consider whether the long term capital gains arising on transfer of new residential house after a period of two years but before expiry of three years will qualify for exemption under section 54 of the Act?



## Separate holding period for land and building – S. 2(42A)

- Clauses (i) and (ii) of sub-section (1) of section 54 deal with consequences of transfer of new residential house within a period of three years from the date of its purchase / construction. These clauses read as under –
  - 54 (1) Subject to the provisions of sub-section (2), where, ……..
  - ….instead of capital gain being charged to income tax as income of the previous year in which the transfer took place, it shall be dealt with in accordance with the following provisions of this section, that is to say, -

    (i) if the amount of the capital gain [57][is greater than the cost of [58][the residential house] so purchased or constructed (hereafter in this section referred to as the new asset)], the difference between the amount of the capital gain and the cost of the new asset shall be charged under section 45 as the income of the previous year; and ***for the purpose of computing in respect of the new asset any capital gain arising from its transfer within a period of three years of its purchase or construction***, as the case may be, the cost shall be *nil*; or

## Separate holding period for land and building – S. 2(42A)

(ii) if the amount of the capital gain is equal to or less than the cost of the new asset, the capital gain shall not be charged under section 45; and for the purpose of computing in respect of the new asset any capital gain arising from its transfer within a period of three years of its purchase or construction, as the case may be, the cost shall be reduced by the amount of the capital gain.

- **Sub-section (3) of section 54F reads as under -**
  - 54F (3) Where the new asset is transferred within a period of three years from the date of its purchase or, as the case may be, its construction, the amount of capital gain arising from the transfer of the original asset not charged under section 45 on the basis of the cost of such new asset as provided in clause (*a*) or, as the case may be, clause (*b*), of sub-section (1) **shall be deemed to be income chargeable under the head "Capital gains" relating to long-term capital assets** of the previous year in which such new asset is transferred."



## Is flat in a co-operative society an immovable property?

- **Whether the term immovable property in section 2(42A) includes a flat in a co-operative society?**

- In Veena Hasmukh Jain v. State of Maharashtra, AIR 1999 SC 807, the Supreme Court held that a flat covered by the Maharashtra Ownership Flats (Regulation and Promotion of Construction, Sale, Management and Transfer) Act, 1963 was immovable property within the meaning of Explanation I to Article 25 of Schedule I to the Bombay Stamp Act.

## Is flat in a co-operative society an immovable property? …

- Subsequently in Hanuman Vitamin Foods Pvt. Ltd. v. State of Maharashtra, AIR 2000 SC 2571, in the context of an office premises in a co-operative society, the Supreme Court observed as follows:
  - “The question whether or not a transfer of shares in a co-operative society is subject to levy of stamp duty on the basis that it is conveyance has already been answered by this court in the case of Veena Hasmukh Jain v. State of Maharashtra reported in (1999) 1 SCR 302. In this case it has already been held that such agreements would be covered by Article 25 of the Bombay Stamp Act, 1958. It is held that stamp duty would be leviable as if it is a conveyance. This Court has held that these are in effect agreements to sell immovable property as possession of such property is transferred to the purchaser before or at the time of or subsequent to the execution of the agreement. It is held such an agreement to sell must be deemed to be a Conveyance. It is fairly conceded that this Judgment fully covers question (a) set out hereinabove.”
- In view of the above, whether a flat in a co-operative society should be regarded as immovable property for the purposes of amendment in section 2(42A) will depend upon the view taken for meaning of `being'..



## What has been held to be `land or building or both' under s. 50C

- Section 50C provides for substitution of “stamp duty value” in place of consideration received or accruing as a result of a transfer. The said section is applicable to land or building or both. In the context of section 50C, Courts / Tribunals have held as follows –
- (a) Transfer of rights under agreement to purchase are not a transfer of land [Smt Devindraben I. Barot v. ITO [2016] 70 taxmann.com 235 (Ahd.-Trib.)];
- (b) Leasehold rights are not land or building [Shavo Norgren (P.) Ltd. v. DCIT (2013) 33 taxmann.com 491 (Mum.-Trib.); Atul G. Puranik v. Ito (2011) 11 taxmann.com 92 (Mum.-Trib.); ITO v. Pradeep Steel Re-Rolling Mills (P.) Ltd., (2013) 39 taxmann.com 123 (Mum.-Trib.); CIT v.Greenfield Hotels & Estates (P.) Ltd. (2017) 77 taxmann.com 308 (Bom.);

## What has been held to be `land or building or both' under s. 50C …

- (c) Rights of a buyer of a flat under construction [ITO v. Yasin Moosa Godil (2012) 20 taxmann.com 424 (Ahd.-Trib.)];

- (d) Tenancy rights are not land or building for the purposes of section 50C [DCIT v. Tejinder Singh (2012) 19 taxmann.com 4 (Kol.-Trib.)]

- (e) If the assessee has transferred development rights in the land to the developer and not the land itself, provisions of section 50C are not applicable [Voltas Ltd. v. ITO (2016) 74 taxmann.com 99 (Mum.-Trib.)]



## Capital assets not covered by amended s. 2(42A)

- In view of the above, since the amended section 2(42A) uses an identical expression "land or building or both", it appears that the following capital assets may not be covered by the amendment:
  - Leasehold rights;
  - Rights of a buyer of land or building under an agreement to sell;
  - Tenancy rights;
  - Transferable Development Rights (TDR);
  - Development rights in land.

## Does `land' include land appurtenant to a building / Is building under construction `a building'

- Land appurtenant to a building : The term "land" will include land appurtenant to a building.

- In the context of section 2(e) of the Wealth-tax Act, 1957, in CIT v. Smt. Neena Jain (2010) 189 Taxman 308 (Punj. & Har.), the Court observed as follows :
- "The word "building" has to be interpreted to mean a completely built structure having a roof, dwelling place, walls, doors, windows, electric and sanitary fittings, etc. If one or more such components are lacking, then it cannot possibly be said that the building is a complete structure for the purpose of section 2(ea) of the Act."

- Again, in terms of section 2(42A), it is the building which has to be held for more than two years to be regarded as not falling in the definition of short term capital asset.



## Does `land' include land appurtenant to a building / Is building under construction `a building' …

- In view of the above, it appears that the term "building" in section 2(42A) refers to a completed structure and will not apply to a property under construction. In such a case, the building would come into existence after it is constructed and it must be "held" for more than two years from the date of construction. Similarly, in case of redevelopment project also, the flat may have to be held for more than two years, after the flat is constructed.

## Is part of a building covered by the amendment

- There are various sections, which specifically refer to part of a building, e.g. section 27, section 194-IA, Chapter XX-C, etc. Unlike these sections, the amendment in section 2(42A) does not explicitly cover part of a building. Does this mean that part of a building (say, a flat) or only one floor of a building is not covered in section 2(42A)? In this connection, the judgments under section 54 are relevant:
- In **CIT v. Chandanben Maganlal [(2002) 120 Taxman 38 (Guj.)]**, the assessee, after selling her house property, purchased, out of its sale proceeds, 15% interest in a house property co-owned by her husband and her son. The AO held that purchase of some interest in house property did not constitute a house property within the meaning of section 54. The High Court held that purchase or construction of a portion of the house should also enable the assessee to claim exemption. Thus, 15% undivided interest was held to constitute house property for section 54.
- In view of the above, it appears that the term "building" for the purpose of section 2(42A) also covers part of a building.



## `building' is an asset distinct from `land' on which it is constructed

- Courts have held that the building and the land on which it is constructed are two different capital assets –
  - CIT v. Vimalchand Golecha [(1993) 201 ITR 442 (Raj.)]
  - CIT v. Dr. D. L. Ramachandra Rao [(1999) 236 ITR 51 (Mad.)]
  - CIT v. Citibank NA [(2004) 134 Taxman 467 (Bom.)]
  - CIT v. Smt. Lakshmi B. Menon [(2003) 132 Taxman 197 (Ker.)]

Hence, in case of transfer of a land which is owned for more than 24 months but a building whose construction has just begun, the land could be a long term capital asset while the building under construction would be a short term capital asset.

# Period of holding qua stock-in-trade converted into a capital asset



## Period of holding qua stock-in-trade converted into a capital asset

- Explanation I (i)(ba) has been inserted by the Finance Act, 2018 with effect from assessment year 2019-2020 to provide that in case of a capital asset which is held upon conversion of inventory, the period for which it is held shall be reckoned from the date of its conversion or treatment.
- To illustrate, if a developer acquired land on 1st June, 2018 and was holding this land as its inventory and on 1st October, 2019 it is decided to convert this land into a capital asset and upon conversion the land so converted is transferred on 1st April, 2020 then the period of holding of such land shall be computed with reference to its date of conversion viz. 1st October, 2019 and not with effect from its date of acquisition viz. 1st June, 2018. Since the period of holding from 1st October, 2019 to 31st March, 2020 is less than 24 months, land will be regarded as short term capital asset.
- The amendment is effective for conversions on or after 1st April, 2018. In respect of conversions prior to this date the controversy as to period of holding will continue.

## Period of holding qua stock-in-trade converted into a capital asset

- Property is acquired only once. Mere change in its character does not make it a separate [second] acquisition. For this proposition, reliance can be placed on –
  - Rachhodbhai Bhaiji Patel v. CIT [81 ITR 446 (Guj. HC)]
  - Keshavji Karsondas v. CIT [207 ITR 737 (Bom. HC)]
- In the context of indexation, the Pune Tribunal in the case of **Kalyani Exports and Investments (P.) Ltd. [76 ITD 95][TM]** held that the period for which indexation would be allowed was to begin from the year of acquisition of the asset even though such asset was acquired as stock-in-trade.
- **Contrary Views:**
- **CIT v. Abhinandan Investment Ltd. [2015] 63 taxmann.com 263 (Delhi)** – when stock-in-trade is converted into capital asset, holding period for purpose of classifying it as long-term or short-term capital asset shall be reckoned excluding the period for which it was held as stock-in-trade prior to the date of conversion.
- **ACIT v. B. K. A. V. Birla [1990] 35 ITD 136 (Cal.-Trib.)** – period for which the shares were part of stock-in-trade could not be taken into account for determining whether those shares were held as long term capital assets.



# Whether long term gain on sale of multiple houses when invested in purchase / construction of a new residential house qualifies for exemption under section 54

## Whether restriction under section 54 on investing gains from sale of 'multiple' houses

- **Section 54**
- The provisions of section 54 grant exemption from long term capital gains if, subject to satisfaction of conditions mentioned in these sections, the assessee purchases or constructs a new house within the time period mentioned in the said sections and if the other conditions are satisfied.
- However, it was not uncommon for assessees, as a practice, to invest in two houses and claim the benefit of deduction under section 54 of the Act in respect of both the houses so purchased. This, indeed lead to lot of litigation on this issue.
- An amendment was made vide Finance (No. 2) Act, 2014 in the provisions of sections 54 and 54F to provide that the exemption will be available if the investment is made in one residential house in India. This amendment was made applicable from AY 2015-16 and subsequent assessment years.



## Does gain of several houses qualify for exemption u/s 54 upon being invested in purchase /construction of one house

- **Section 54**
- However, a question arises as to what happens in a reverse case where there are gains from sale of multiple houses and such gains are invested in one residential house?

## Many to one – ratio of ACIT v. Bipin N. Sagar [ITA No. 1507/M/2017 (Mum.)]

- **ACIT v. Bipin N. Sagar [ITA No. 1507/M/2017 (Mum.)]**
- **Facts:**
- The assessee sold 3 residential flats, and claimed long term capital gain arising on such transfer to be exempt under section 54 of the Act.
- The assessee contended that all the 3 flats were located on the same floor when purchased and therefore constituted one house.
- Since the vendor had purchased it under 3 separate agreements the same were sold to the assessee and were purchased by him vide 3 separate agreements and consequently were also sold vide 3 separate agreements.
- There were 3 separate maintenance bills issued by the Society. There were 3 share certificates in respect of each of these flats. However, there was a common electricity meter.



## Many to one – ratio of ACIT v. Bipin N. Sagar [ITA No. 1507/M/2017 (Mum.)]

- **ACIT v. Bipin N. Sagar [ITA No. 1507/M/2017 (Mum.)]**
- **Treatment by the AO**
- The AO rejected the contention of the assessee that the three flats constituted one house on the ground that there were 3 separate agreements for purchase/sale of flats and the assessee was paying maintenance charges for each of the three flats.
- The AO disallowed the exemption under section 54 to the extent it pertained to two flats and held that exemption under section 54 is allowable only in respect of long term capital gain arising on transfer of one flat.

## Many to one – ratio of ACIT v. Bipin N. Sagar [ITA No. 1507/M/2017 (Mum.)]

- **Treatment by the CIT(A)**
- The CIT(A) allowed assessee's claim for the following reasons –
  - Relying on the decision of the Bombay High Court in the case of **CIT v. Devdas Naik [(2014) 49 taxmann.com 30 (Bom.)]** for the proposition that
    - Generally, it may be possible to find a bigger residential unit and that requires combining two or more adjoining flats into one unit. However, that does not mean that each flat is in itself a separate residential unit. What is to be seen is whether the adjoining flats were actually united and used as a common single unit or not. Execution of separate agreements cannot decide this issue. The flats were constructed in such a way that adjustment units of flats can be combined into one. The acquisition of flats may be done independently but eventually there is a single unit and house for the purpose of residence.



## Many to one – ratio of ACIT v. Bipin N. Sagar [ITA No. 1507/M/2017 (Mum.)]

- **Treatment by the CIT(A):**
- The CIT(A) allowed assessee's claim for the following reasons –
  - Relying on the decision of the Allahabad High Court in the case of **Shiv Narain Choudhary v. CIT [108 ITR 104 (All. HC)]** for the proposition that
    - *"self contained dwelling units which are contiguous and situated in the same compound and within a common boundary and having unity of structure could be regarded as one house"*

## Many to one – ratio of ACIT v. Bipin N. Sagar [ITA No. 1507/M/2017 (Mum.)]

- **Treatment by the CIT(A):**
  - Relying on the decisions of the Mumbai Bench of the Tribunal in the case of **DCIT v. Ranjit Vithaldas [(2012) 23 taxmann.com 226 (Mum. – Trib.)]** and also **Rajesh Keshav Pillai v. ITO [(2011) 44 SOT 617 (Mum. – Trib.)]** for the propositions that –
    - LTCG arising on transfer of multiple residential houses can be invested in purchase / construction of one residential house – **Ranjit Vithaldas (supra)**
    - No restriction is placed in section 54 that the exemption is allowable only in respect of sale of one residential house. Even if assessee sells more than one residential houses in the same year and the capital gain is invested in a new residential house, the claim for exemption cannot be denied if the other conditions of section 54 are fulfilled – **Rajesh Keshav Pillai (supra)**



## Many to one – ratio of ACIT v. Bipin N. Sagar [ITA No. 1507/M/2017 (Mum.)]

- **Decision of the CIT(A):**
    - Exemption under Section 54 will be available in respect of transfer of any number of long term capital assets being residential houses if other conditions are fulfilled - **Rajesh Keshav Pillai (supra)**
  - There is no restriction placed in section 54 that exemption is allowable only in respect of sale of one residential house.
  - There is an inbuilt restriction that capital gain arising from sale of residential house cannot be invested in more than one residential house. However, there is no restriction that capital gain arising from sale of more than one residential flat cannot be invested in one residential house.
  - The CIT(A) allowed the appeal filed by the assessee.

## Many to one – ratio of ACIT v. Bipin N. Sagar [ITA No. 1507/M/2017 (Mum.)]

- **Decision of the Tribunal:**
- The CIT(A) has given a detailed finding and passed a very reasoned order after following the Hon'ble Bombay High Court on this issue.
- The Tribunal upheld the order of the CIT(A) as the assessee was using all the 3 flats as compact unit and has only one electricity bill for all the three flats.
- The issue is covered by the decision of the Bombay High Court in the case of **CIT v. Devdas Naik [(2014) 49 taxmann.com 30 (Bom. HC)]** as relied by the Learned CIT(A).



## Many to one – ratio of DCIT v. Ranjit Vithaldas [(2012) 137 ITD 267 (Mum.)]

- **DCIT v. Ranjit Vithaldas [(2012) 137 ITD 267 (Mum.)]**
- **Facts:**
- The assessee held 25% in two flats. Both the flats were sold by the assessee along with his three brothers in two different years and invested the capital gains earned in respect of the transfer of two houses in the construction of one residential house.
- The assessee treated both the flats sold by him as one residential house and submitted that the two flats were in proximate buildings in Worli and the same constituted one residential house as the four brothers were using both the flats for residential purpose. The assessee also submitted that though the flats were not contiguous, both had been used as one residential house and therefore the same should be treated as one house in view of the decision of the Allahabad High Court in the case of **Shiv Narain Chaudhary v. CWT [108 ITR 104 (All.)]**.

## Many to one – ratio of DCIT v. Ranjit Vithaldas [(2012) 137 ITD 267 (Mum.)]

- **Treatment by the AO:**
- The AO did not accept the claim of the assessee that both the flats (sold by the assessee along with his brothers) constituted one residential house as the two flats were located in different buildings and were situated on different roads.
- The AO also observed that the assessee, in respect of one of the flats claimed exemption in one year i.e. the assessee treated the same as self occupied property. In respect of the other flat the assessee did not offer any income under the head income from house property and treated the said house as used for the purpose of business and therefore exemption in respect of this flat could not be allowed under section 54 of the Act.
- **Decision of the CIT(A):**
- On assessee's appeal, the CIT(A) observed that the flats were not contiguous they were part of one and the same residential house and which was accepted as one house by the CIT(A) in the case of assessee's brother.



## Many to one – ratio of DCIT v. Ranjit Vithaldas [(2012) 137 ITD 267 (Mum.)]

- **Decision of the Tribunal:**
- The Tribunal held that the two flats could not be treated as one residential house. However, as regards claim of exemption, the Tribunal held that there is no restriction under section 54 that exemption is allowable only in respect of sale of one residential house. Even if the assessee sells more than one residential house in the same year and the capital gain is invested in a new residential house, the claim cannot be denied if the other conditions are fulfilled. Observations of the Tribunal as follows:
  - *The exemption u/s 54 is available if capital gain arising from transfer of a residential house is invested in a new residential house within the prescribed time limit. Thus there is an inbuilt restriction that capital gain arising from the sale of one residential house cannot be invested in more than one residential house. <u>However, there is no restriction that capital gain arising from sale of more than one residential houses cannot be invested in one residential house.</u>*

## Many to one – ratio of DCIT v. Ranjit Vithaldas [(2012) 137 ITD 267 (Mum.)]

- *In case, capital gain arising from sale of more than one residential houses is invested in one residential house, the condition that capital gain from sale of a residential house should be invested in a new residential house gets fulfilled in each case individually because the capital gain arising from sale of each residential house has been invested in a residential house. Therefore,* ***even if two flats are sold in two different years, and the capital gain of both the flats is invested in one residential house, exemption u/s 54 will be available in case of sale of each flat provided the time limit of construction or purchase of the new residential house is fulfilled in case of each flat sold.***



## Many to one – ratio of Rajesh Keshav Pillai v. ITO [(2011) 44 SOT 617 (Mum.)]

- **Rajesh Keshav Pillai v. ITO, [(2011) 44 SOT 617 (Mum.)]**
- **Facts of the case:**
- The assessee, an individual, owned two flats, both of which were purchased on 05-01-2001. During previous year 2005-06 i.e. on 29-05-2005 and 16-06-2005 sold both the flats and earned long-term capital gains therefrom.
- The assessee invested the gain on sale of flats in two different flats. Since the total investment in two flats was more than the total gains on sale of two flats, the assessee claimed the entire capital gains as exempt under the provisions of section 54 of the Act.
- **Treatment by the AO:**
- The assessing officer held that the assessee was entitled to claim exemption under section 54 only in respect of sale of one flat and the corresponding investment in one flat.

## Many to one – ratio of Rajesh Keshav Pillai v. ITO [(2011) 44 SOT 617 (Mum.)]

- **Decision of the CIT(A):**
- The CIT(A) upheld the view of the assessing officer.
- **Decision of the Tribunal:**
- *There is no restriction placed any where in the section 54 that exemption is available only in relation to sale of one residential house. Therefore, in case the assessee has sold two residential houses, being long-term assets, the capital gain arising from the second residential house is also capital gain arising from the transfer of a long-term assets being a residential house. The provisions of section therefore will also be applicable to the sale of second residential house and similarly to a third residential house and so on. Whenever the exemption available to restricted to one asset, a suitable provision is incorporated in the relevant section itself. For instance section 23(2) exempts income from a property consisting of a house or a part of house which is in occupation of the assessee or*



## Many to one – ratio of Rajesh Keshav Pillai v. ITO [(2011) 44 SOT 617 (Mum.)]

- *which could not be occupied by the assessee because of his employment/business/profession being carried on at some other place. Based on such provisions contained in section 23(2), income from any number of properties being residential houses which are self-occupied will have to be treated as exempt. But a restriction has been placed in section 23(4) which provides that where the property referred to in sub-section (2) consists of more than one residential houses, exemption would be available only in respect of one house and other self-occupied residential houses will be treated as let out.*

## Many to one – ratio of Rajesh Keshav Pillai v. ITO [(2011) 44 SOT 617 (Mum.)]

- *There is no such provision in section 54 to restrict the exemption of capital gain only to sale of one residential house. The authorities below have taken the view that whenever more than one option is given to the assessee the word used is "any". The reference has been made to the provisions of section 54E etc. We find from perusal of the said sections that the word "any" has been used because the assessee has option to invest in any of the assets mentioned therein. For instance, section 54E provides exemption in respect of capital gain arising from transfer of a long-term capital asset if whole or any part of the net consideration is invested in any specified assets within six months from the date of transfer. Since the specified assets were more than one, the word "any" has been used because the exemption will be available if the investment is made in any of the specified assets. The situation in section 54 is different.*
- *Considering the language used in section 54(1), in our view exemption will be available in respect of transfer of any number of long-term capital assets being residential houses if other conditions are fulfilled.*



## Many to one – ratio of Venkat Ramana Umareddy v. DCIT [ITA No. 522/Hyd./2012]

- **Venkat Ramana Umareddy v. DCIT (ITA No. 522/Hyd/2012)**
- **Facts of the case:**
- The assessee earned capital gains on sale of land and house property and utilised the same in purchase of new residential house and claimed exemption under sections 54 and 54F of the Act.
- **Treatment by the AO:**
- The AO rejected the claim of the assessee and held that for claim of exemption under section 54 and 54F of the Act, the assessee has to invest in two houses.
- **Decision of the CIT(A):**
- The CIT(A) dismissed the appeal of the assessee

## Many to one – ratio of Venkat Ramana Umareddy v. DCIT [ITA No. 522/Hyd./2012]

- **Decision of the Tribunal:**
- *At the cost of repetition, we would like to reiterate that sec. 54 and 54F apply under different situations. While sec. 54 applies to long- term capital gain arising out of transfer of long-term capital asset being a residential house, sec. 54F applies to long term capital gain arising out of transfer of any long-term capital asset other than a residential house. However, the condition for availing exemption under both the sections is purchase or construction of a new residential house within the stipulated period. There is also no specific bar either u/s 54 and 54F or any other provision of the Act prohibiting allowance of exemption under both the sections in case the conditions of the provisions are fulfilled. In the facts of the present case, since long term capital gain arises from sale of two distinct and separate assets viz., residential house and plot of land and the assessee has invested the entire capital gain in purchase of a new residential house, in our view, he is entitled to claim exemption both u/s 54 and 54F of the Act.*



## Many to one – ratio of Venkat Ramana Umareddy v. DCIT [ITA No. 522/Hyd./2012]

- **Decision of the CIT(A):**
- The Commissioner upheld the action of the AO.

- **Decision of the Tribunal:**
- The Tribunal held that since the details regarding claim of exemption under section 54F were not examined at the time of original assessment, the re-opening of assessment was justified.
- As regards, assessee's claim that gains were long-term in nature and eligible for exemption, the Tribunal observed that on 22.02.2006, the assessee had merely paid advance to the builder for booking of the flat.
- The Development/Permission Certificate was granted by the Municipal Commissioner only on 17.11.2006 which meant that even the construction had not commenced till such date.

## Many to one – ratio of Venkat Ramana Umareddy v. DCIT [ITA No. 522/Hyd./2012]

- Further, the occupancy certificate was granted on 18.02.2009 meaning thereby that the assessee had not acquired the right to occupy the flat.
- The assessee had therefore not held the capital asset for more than 3 years.
- Even the construction had not started upto 17.11.2006 and the property was sold on 28.0.2009.
- Based on the above, the Tribunal held that the gains were short-term capital gains



# Deposit in Capital Gains Account Scheme – whether mandatory?

## Background of provisions dealing with requirement to deposit amount in Capital Gains Account

- Subject to satisfaction of conditions mentioned in sections 54 and 54F, long term capital gains arising on transfer of a long term capital asset of the nature specified in these sections is exempt if the assessee has within a period of one year before the date of transfer or two years after the date of transfer purchased a new residential house or has within a period of three years after the date of transfer of original asset constructed a new residential house.

- One of the conditions for claiming exemption under sections 54 and 54F is that the amount of capital gain which has not been appropriated or utilised for the purposes of purchase / construction of a new residential house should be deposited in a Capital Gains Account. Such deposit has to be made by due date of filing return of income under section 139(1) of the Act.



## Non-deposit in Capital Gains Account is a mere technical / venial breach

- A question arises as to whether the provisions of section 54 / 54F requiring deposit in Capital Gains Account are a mandatory provision or is non-deposit in such capital gains account a mere technical / venial breach of the provisions.
- In the following cases, it has been held that non-deposit in Capital Gains Account is a mere technical / venial breach of the provisions and if the assessee has within the time period mentioned in section 54/54F purchased / constructed a new residential house then the claim for deduction under these sections should not be denied –
  - Ajeet Kumar Jaiswal v. ITO [(Hyd) (Pg Nos. 51 to 59)]
  - Kishore H. Galaiya v. ITO [137 ITD 229 (Mum.) (Pg Nos. 8 to 13)]
  - Mrs. Seema Sabharwal v. ITO [169 ITD 319 (Chandigarh) (Pg Nos. 60 to 65)]
  - Jagan Nath Singh Lodha v. ITO [85 TTJ 173 (Jodhpur) (Pg Nos. 66 to 69)]
  - Ashok Kapasiawala v. ITO [155 ITD 948 (Ahd.) (Pg Nos. 70 to 75)]
  - Sunayna Devi v. ITO [167 ITD 135 (Kol.) (Pg. Nos. 76 to 81)]

## Non deposit in Capital Gains Account fatal to claim of exemption

- However, it needs to be noted that in the following cases it has been held that the provisions dealing with deposit of amounts in Capital Gains Account Scheme are substantive provisions and non compliance with these provisions will result in denial of claim of deduction under sections 54/54F –
  - Humayun Suleman Merchant v. Chief CIT [(2016) 73 taxmann.com 2 (Bom.)]
  - "**Failure to deposit the amount of consideration not utilized** towards the purchase of new flat **in the specified bank account before the due date** of filing return of income **u/s 139(1) is fatal to the claim for exemption**. The fact that the entire amount has been paid to the developer/builder before the last date to file the ROI is irrelevant. Therefore, the claim of exemption u/s. 54F was prima-facie not in accordance with law".
  - Rasiklal M. Parikh v. ACIT [(2017) 88 taxmann.com 732 (Bom.)]
  - Smt. Basaribanu Modi Rafiq. Latiwala v. ITO [(2017) 81 taxmann.com 62 (Mum.-Trib.)]
  - R. Jayabharathi v. ITO [(2017) 81 taxmann.com 6 (Chennai-Trib.)(SMC)]
  - Sushil Kumar Bafna v. ITO [(2017) 81 taxmann.com 50 (Indore-Trib.)]



# Extensions / Difficulties on account of Covid-19

## Extension of date for compliance of Ss. 54 to 54G

- Section 3(1)(c)(i)(I) of the Taxation and Other Laws (Relaxation of Certain Provisions) Ordinance, 2020 [hereinafter referred to as `the Ordinance'] read with Notification dated 24th June, 2020 issued by CBDT provides that for the purposes of claiming any exemption under the provisions of sections 54 to 54GB of the Act, if the date of making of investment, deposit, payment, acquisition, purchase, construction or such other action by whatever name called falls during the period from 20th March, 2020 to 29th September, 2020 then the date for completion of compliance stands extended 30th September, 2020.

- Accordingly, for the purposes of sections 54, 54EC and 54F of the Act where the date by which the investment in specified bonds was required to be made or the new residential house was to be purchased or constructed falls within the period from 20th March, 2020 to 29th September, 2020, the compliance can be made by 30th September, 2020.



## Extension of date for deposit under Capital Gains Account Scheme

- Sections 54 and 54F require an assessee to deposit the unutilized amount of capital gains in a Capital Gains Account to be opened under Capital Gains Accounts Scheme. Such deposit is required to be made on or before due date of furnishing return of income under section 139(1). By virtue of the Ordinance read with the Notification dated 24th June, 2020, the due date of filing return of income for Assessment Year 2020-2021 stands extended to 30th November, 2020.

- Therefore, deposit required to be made under provisions of Sections 54 and/or 54F, in an account under Capital Gains Account Scheme, can be made by 30th November, 2020.

## Difficulties which need to be addressed

- Sections 54 and 54F grant exemption from capital gains even if the purchase of new house was made one year before the date of transfer of the house / asset giving rise to long term capital gains.

- An assessee who has purchased the house in anticipation of the long term capital gain to arise on transfer of the house / asset which was to happen within one year of the purchase of the new house shall face difficulty in the event that the transfer of new house does not happen due to lock down. One may contend that if the time period of one year falls in the lock down period, then the lock down period needs to be excluded for calculating the time period of one year.

- Does the period of one year mentioned in section 23(5) get extended by the period of lock-down?



## Difficulties which need to be addressed

- An assessee who had received advance for sale of house before lock-down, tax under section 194IA was deducted by the buyer; assessee planned to invest a part of capital gains in bonds specified under section 54EC and pay tax on the balance amount of capital gains, had even paid advance tax but because of the lock down the transfer did not happen [neither was the agreement executed nor was possession given]. What are the options before such an assessee?

- Consider the following –
  - Sanjeev Lal v. CIT [(2014) 46 taxmann.com 300 (SC)]
  - Explanation 2 to section 2(47) inserted by FA, 2012 w.r.e.f. 1.4.1962

## Decision of the Apex Court - Writ Petition (Civil) No. 3/2020

- Supreme Court has in Suo Motu Writ Petition (Civil) No. 3/2020 has taken suo motu cognizance of the challenge faced by the country on account of Covid-19 Virus and resultant difficulties that may be faced by the litigants across the country in filing their petitions / applications / suits / appeals / all other proceedings within the period of limitation prescribed under the general law of limitation or under Special Laws (both Central and/or State).
- With an intention to obviate such difficulties and to ensure that lawyers / litigants do not have to come physically to file such proceedings in respective courts / Tribunals across the country including the SC, the Court ordered as under
  - "a period of limitation in all such proceedings, irrespective of the limitation prescribed under the general law or Special Laws whether condonable or not shall stand extended w.e.f. 15th March, 2020 till further orders to be passed by the Court in present proceedings."
- The Court exercised its power under Article 142 read with Article 141 of the Constitution of India and has declared this order to be binding order within the meaning of Article 141 on all Courts / Tribunals and authorities.



## Decision of the Apex Court - Writ Petition (Civil) No. 3/2020

- Subsequently, an application was made to the Apex Court to issue appropriate directions qua (i) arbitration proceedings in relation to section 29A of the Arbitration and Conciliation Act, 1996; and (ii) initiation of proceedings under section 138 of the Negotiable Instruments Act, 1881.
- The Court disposed of the above mentioned interlocutory application by passing the following order –
  - "..... all periods of limitation prescribed under the Arbitration and Conciliation Act, 1996 and under section 138 of the Negotiable Instruments Act 1881 shall be extended with effect from 15.03.2020 till further orders to be passed by this Court in the present proceedings. ***In case the limitation has expired after 15.03.2020 then the period from 15.03.2020 till the date on which the lockdown is lifted in the jurisdictional area where the dispute lies or where the cause of action arises shall be extended for a period of 15 days after the lifting of lockdown***."

## Order dated 15th April, 2020 passed by Bombay High Court

- The Bombay High Court, in an order dated 15th April 2020, has, besides extending the validity of all interim orders, has also observed that, *"**It is also clarified that while calculating time for disposal of matters made time-bound by this Court, the period for which the order dated 26th March 2020 continues to operate shall be added and time shall stand extended accordingly**", and also observed that "**arrangement continued by an order dated 26th March 2020 till 30th April 2020 shall continue further till 15th June 2020**".*
- Government of India has, vide notification dated 19th February 2020, taken the stand that, the coronavirus "should be considered a case of natural calamity and FMC *(i.e.* ***force majeure*** *clause)* maybe invoked, wherever considered appropriate, following the due procedure…".
- The Covid-19 epidemic has been notified as a disaster under the National Disaster Management Act, 2005.



## DCIT v. JSW Limited (successor company on amalgamation of JSW Ispat Ltd (Mum. – Trib.)

- Mumbai Bench of the Tribunal in DCIT v. JSW Limited (successor company on amalgamation of JSW Ispat Ltd) [ITA No. 6264/Mum/2018; A.Y.: 2013-14; Order dated 14th May, 2020; (Mum.)] pronounced the order much after a period of 90 days from the date of conclusion of the hearing. Hearing was concluded on 7th January, 2020 whereas order was passed on 14th May, 2020. The Tribunal was conscious of the fact that Rule 34(5) requires an order to be ordinarily pronounced within a period of 90 days from the date of conclusion of the hearing.

- The Tribunal considering the Order passed by the Supreme Court and also the Order passed by Bombay High Court extending the period of validity of all interim orders came to a conclusion that while computing the time limit within which the order is to be pronounced by the Tribunal the period during which lockdown was in force is to be excluded.

*Jagdish T Punjabi*

*B.Com., B.G.L., FCA.*