Taxation of Development Agreement - Select Issues under Income-tax

Jagdish T Punjabi

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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)

- The two parties to the Joint Development Agreement are the Landlord and the Builder / Developer.
- The tax issues can arise in the context of both these persons viz. the Landlord and also qua the Builder / Developer.
- The issue qua Builder / Developer could be as regards applicability of Section 56(2)(vii) / 56(2)(x) and also as regards the cost of the flats constructed pursuant to the Joint Development Agreements.
- The Landlord could be entering into the Joint Development Agreement in respect of land held by him as a capital asset or as stock-in-trade.
- Land held by the Landlord as stock-in-trade could be land acquired as stock-in-trade or land which was originally held as capital asset but has been converted into stock-in-trade.

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

- This presentation covers tax issues mainly with reference to the Landlord and that too assuming that the land is held by the landlord as capital asset.

- Joint Development Agreements could be agreement where the landlord gets a certain percentage of the developed / constructed area (Area Sharing Agreement) or it could be agreement where the landlord gets a certain percentage of revenue in respect of the units constructed and sold (Revenue Sharing Agreement) pursuant to the terms of the Development Agreement. It could even be an agreement where under the landlord gets a monetary consideration in lieu of transferring development rights to the builder / developer.

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

- It is relevant to mention that with effect from Assessment Year 2018-2019, Section 45(5A) has been introduced on the statute by Finance Act, 2017. Section 45(5A) has been introduced with a view to settle the long standing controversy as regards the date of transfer by the owner in a development agreement. The provisions of Section 45(5A) specifically cover Joint Development Agreements where area is shared. Also, the provisions of Section 45(5A) apply only to an assessee being an individual or a Hindu undivided family. Therefore, if the assessee (i.e. the landlord) is a person other than an individual or a Hindu undivided family, the provisions of Section 45(5A) will not apply. Similarly, if under the Joint Development Agreement the parties do not share area then also the provisions of Section 45(5A) will not apply.

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

- As has been mentioned Section 45(5A) has been introduced on the statute w.e.f. 1.4.2018 and applies with effect from Assessment Year 2018-2019.

- Therefore, a question arises as to whether the provisions of Section 45(5A) apply prospectively or retrospectively. If the answer is prospectively, a question arises as to whether it applies only to Joint Development Agreements entered into on or after 1.4.2017 or even to Joint Development Agreements entered into earlier but the capital gain whereof has not yet been computed / charged to tax either because there has been no transfer and therefore no trigger of capital gains have been charged to tax.

- The argument in support of the contention that the provisions of Section 45(5A) are retrospective is that the provision is clarificatory and remedial in nature. We will have an occasion to deal with Section 45(5A), a little in detail, slightly later.

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.
  - K. Vijaya Lakhsmi v. ACIT [(2018) 9 taxmannn.com 253 (Hyd.)]
  - Pankaj Kumar, Mohamid Abdul Hai, Hasmat Hai & Ors v. CIT [455 ITR 583 (Patna)]

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.

- The development agreement is some sort of business agreement and it basically postulates coming together of two parties only i.e. the developer and the owner of the land. The developer does not have land to develop the land and the assessee (land owner) does not have sufficient finance to develop the land and therefore they come together i.e. land and finance for the development of project is necessarily a 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. – **ITO v. Ronak Marble Industries [ITA No. 3318/Mum./2015; AY : 2009-10; Date of Order : 14.3.2017]**

Development Agreement as explained by SC

- Supreme Court has in the case of **Faqir Chand Gulati v. Uppal** held that development agreement is not a joint venture but is a contract for services. The Apex Court has explained the Development Agreement as follows –

- 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. Such an agreement is not a "joint venture" in the legal sense. It is a contract for "services".

What is a Development Agreement?

- Appropriate Authority, acting under Chapter XX-C, construed such agreements as agreements for sale. The Calcutta High Court has in the case of **Madgul Udyog v. CIT [(1990) 184 ITR 484 (Cal.)]** in a different context pointed out that such agreements are in the nature of business agreements and not agreements of sale.

- Generally, the possession in such cases to the developer is only to fulfill his obligations under such development agreements.

Nature of a DA - Sushil Kumar Agarwal v. Meenakshi Sadhu & Ors

- Supreme Court in **Sushil Kumar Agarwal v. Meenakshi Sadhu & Ors**. **[MANU/SC/1144/2018; (2019)2SCC241]** has in the context of Specific Relief Act, 1963 held –

- The expression "development agreement" has not been defined statutorily. In a sense, it is a catch-all nomenclature which is used to be describe a wide range of agreements which an owner of a property may enter into for development of immovable property. As real estate transactions have grown in complexity, the nature of these agreements has become increasingly intricate. Broadly speaking, (without intending to be exhaustive), development agreements may be of various kinds:

Nature of a DA - Sushil Kumar Agarwal v. Meenakshi Sadhu & Ors [Manu/SC/1144/2018]

- (i) An agreement may envisage that the owner of the immovable property engages someone to carry out the work of construction on the property for monetary consideration. This is a pure construction contract;
- (ii) An agreement by which the owner or a person holding other rights in an immovable property grants rights to a third party to carry on development for a monetary consideration payable by the developer to the other. In such a situation, the owner or right holder may in effect create an interest in the property in favour of the developer for a monetary consideration;
- (iii) An agreement where the owner or a person holding any other rights in an immovable property grants rights to another person to carry out development. In consideration, the developer has to hand over a part of the constructed area to the owner. The developer is entitled to deal with the balance of the constructed area. In some situations, a society or similar other association is formed and the land is conveyed or leased to the society or association;

Nature of a DA - Sushil Kumar Agarwal v. Meenakshi Sadhu & Ors [Manu/SC/1144/2018]

- (iv) A development agreement may be entered into in a situation where the immovable property is occupied by tenants or other right holders. In some cases, the property may be encroached upon. The developer may take on the entire responsibility to settle with the occupants and to thereafter carry out construction; and

- (v) An owner may negotiate with a developer to develop a plot of land which is occupied by slum dwellers and which has been declared as a slum. Alternately, there may be old and dilapidated buildings which are occupied by a number of occupants or tenants. The developer may undertake to rehabilitate the occupants or, as the case may be, the slum dwellers and thereafter share the saleable constructed area with the owner.

Nature of a DA - Sushil Kumar Agarwal v. Meenakshi Sadhu & Ors [Manu/SC/1144/2018]

- When a pure construction contact is entered into, the contractor has no interest in either the land or the construction which is carried out. ***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]

Nature of a DA - Sushil Kumar Agarwal v. Meenakshi Sadhu & Ors [Manu/SC/1144/2018]

- In a construction contract, the contractor has no interest in either the land or the construction carried out on the land. But, in other species of development agreements, the developer may have acquired a valuable right either in the property or the constructed area. There are various incidents of ownership of in respect of an immovable property. Primarily, ownership imports the right of exclusive possession and the enjoyment of the thing owned. The owner in possession of the thing has the right to exclude all others from its possession and enjoyment. The right to ownership of a property carries with it the right to its enjoyment, right to its access and to other beneficial enjoyments incidental to it. (B. Gangadhar v. BG Rajalingam MANU/SC/0212/1996 : (1995) 5 SCC 239 at para 6). Ownership denotes the relationship between a person and an object forming the subject matter of the ownership. It consists of a complex of rights, all of which are rights in rem, being good against the world and not merely against specific persons.

Nature of a DA - Sushil Kumar Agarwal v. Meenakshi Sadhu & Ors [Manu/SC/1144/2018]

- There are various rights or incidents of ownership all of which need not necessarily be present in every case. They may include a right to possess, use and enjoy the thing owned; and a right to consume, destroy or alienate it. (Swadesh Ranjan Sinha v. Haradeb Banerjee MANU/SC/0305/1992 : (1991) 4 SCC 572). **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 essence is a parting of some of the incidents of ownership of the immovable property.** There could be situations where pursuant to the grant of such rights, the developer has incurred a substantial investment, altered the state of the property and even created third party rights in the property or the construction carried out to be carried out.

Nature of a DA - Sushil Kumar Agarwal v. Meenakshi Sadhu & Ors [Manu/SC/1144/2018]

- There could be situations where it is the developer who by his efforts has rendered a property developable by taking steps in law. In development agreements of this nature, where an interest is created in the land or in the development in favour of the developer, it may be difficult to hold that the agreement is not capable of being specifically performed. For example, the developer may have evicted or settled with occupants, got land which was agricultural converted into non-agricultural use, carried out a partial development of the property and pursuant to the rights conferred under the agreement, created third party rights in favour of flat purchasers in the proposed building. In such a situation, if for no fault of the developer, the owner seeks to resile from the agreement and terminates the development agreement, it may be difficult to hold that the developer is not entitled to enforce his rights. This of course is dependent on the terms of the agreement in each case. There cannot be a uniform formula for determining whether an agreement granting development rights can be specifically enforced and it would depend on the nature of the agreement in each case and the rights created under it. [Para 17]

Nature of a DA - Sushil Kumar Agarwal v. Meenakshi Sadhu & Ors [Manu/SC/1144/2018]

- In **Chheda Housing Development Corporation v. Bibijan Shaikh Farid** MANU/MH/0070/2007 : (2007) 3 Mah LJ 402, a Division Bench of the Bombay High Court while dealing with the question of whether specific performance should be granted of a development agreement held as follows:
- In our opinion from a conspectus of these judgments, what is relevant would be the facts of each case and the agreement under consideration. Agreements considering what is discussed, amongst others, could be:
- (a) an agreement only entrusting construction work to a party for consideration.
- (b) an agreement for entrusting the work of development to a party with added rights to sell the constructed portion to flat purchasers, who would be forming a Co-operative Housing Society to which society, the owner of the land, is obliged to convey the constructed portion as also the land beneath construction on account of statutory requirements.
- (c) a normal agreement for sale of an immovable property.

Nature of a DA - Sushil Kumar Agarwal v. Meenakshi Sadhu & Ors [Manu/SC/1144/2018]

- An Agreement of the first type normally is not enforceable as compensation in money is an adequate remedy. An Agreement of the third type would normally be specifically enforceable unless the contrary is proved. A mere agreement for development, which creates no interest in the land would not be specifically enforced. [Para 18]

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 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. AO treated entire consideration as Income from Other Sources. 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 – Adi D. Vachha v. ITO (Mum. – Trib.)

- 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.)]**, during assessment year 2007-08, the assessee entered into a development agreement with a builder to construct multi-storied building on his land by demolishing old structure. In terms of the agreement, the developer had to bear the cost of construction and in lieu thereof, would get 50 per cent of constructed area / flats in the said building. Out of his share of constructed area, the assessee sold two flats. The Tribunal held that the income earned on such sale would be assessed as capital gains.
- Since 50 per cent area of building had been transferred by assessee to developer, 50 per cent of market value of total land in question together with value of additional FSI, if any, on date of agreement was held to be deemed to be cost of construction of constructed area which fell in share of assessee as per development agreement and assessee would be entitled to proportionately claim deduction for cost of construction while taxing capital gains arrived from sale of two flats.
- 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

- **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.)]**

- The Tribunal, in this case for assessment year 2005-06, was dealing with the case of an asseessee co-owner who transferred land under a development agreement. Availability of higher FSI on plot enabled developer to load TDR and construct additional floors. Those floors were sold to outsiders and outsiders did not own any interest over land.

Right to load TDR FSI is a capital asset

- On these facts, the AO concluded that it was an arrangement done to facilitate developer to load TDR on plot of land and, hence, transfer by assessee was not a transfer falling within provisions of section 45 and was a case where assessee was getting a compensation for loading and developing TDR by new structure and therefore, proceeds received by assessee were in nature of income from other sources.
- The Tribunal noted that the right to construct building on plot of land by consuming FSI and right as a receiving plot owner to load TDR over and above normal FSI accrued to assessee by virtue of development control regulations for area in which property was located.
- The Tribunal held that these rights were rights in property, which were capital assets falling under definition of capital assets under Section 2(14) and consideration received by assessee for transfer of rights over such capital asset would clearly fall within provisions of Section 45.

Purchase of an asset with knowledge of encumbrances - asset is capital asset and not stock-in-trade?

- **Can purchase of an asset with knowledge of encumbrances and development not being feasible mean that the asset is capital asset and not stock-in-trade?**
- Land purchased by a builder with the knowledge that there are encumbrances on it and development is not feasible is a “capital asset” and not “stock-in-trade”.
- The gains on transfer of such land is assessable as capital gains and not business profits.
- 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 the purpose of determination of period of holding, the period of holding of the asset (TDR) from the date of acquisition of property by the municipal authorities has to be considered, but not from the date, when MOU was cancelled in the year 2004 – **Adi D. Vachha v. ITO [ITA No. 2755/Mum/2011; AY: 2005-06; Date of Order : 9.8.2019]**

Computation of holding period of flats

- **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.)]**

- In this case, assessee, on 31.10.2000, entered into a development agreement with developer in respect of land owned by him and as per agreement, upon development of premises, developer was to retain with himself as his share, 67.5 per cent of land and constructed area and balance 32.5 per cent land and constructed area was to be allotted to all five owners of land, transfer took place when development agreement was entered into. The Tribunal held that the AO was not right in holding that assessee became owner of flats on such land on getting completion certificate from municipality on 2.6.2004 and flats having been sold in a year 2004-05, capital gain arising to assessee was short term capital gain.

Computation of holding period of flats

- The Tribunal noted that the co-owners did not realise any cost for such transfer of 67.5 per cent of land to the developer and in lieu thereof, they were entitled to get back 32.5 per cent constructed area with land and common place, etc. It was evident that value of 32.5 per cent constructed area was the consideration for the transfer of 67.5 per cent of land to the developer. The construction started on 7.11.2000 and the completion certificate from the concerned authority was granted on 2.6.2004. On receipt of such certificate and physical possession of 32.5 per cent of the constructed property, the assessee owner sold certain flats under his ownership to the purchasers during the financial year 2004-05, relevant to the assessment year under appeal. On such sale, the assessee received consideration of his 1/5th share amounting to Rs. 15,25,000.

Computation of holding period of flats

- The assessee, thus, claimed the same as long-term capital receipt arising out of sale of long term capital asset, being the built-up area comprising 32.5 per cent of constructed property inclusive of proportionate land and treated the same as long term capital gain.
- The stand of the Department was that the assessee had received the consideration on sale of his share of property in the assessment year 2005-06 on getting completion certificate from the municipality on 2.6.2004 and possession thereof after receipt of such certificate, which was a new asset of the assessee; the period of holding of such asset was nine months and, hence, there was short term capital gain on such sale of flats owned by the assessee and benefit of Section 54EC could not be allowed to the assessee.
- The Tribunal held that a perusal of the various clauses of the agreement showed that on the date of agreement 31.10.2000, the assessee and co-owners had, in fact, transferred to the developer the rights and privileges of ownership of 67.5 per cent land, without executing the deed of conveyance.

Computation of holding period of flats

- 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. Thus, the transfer of the property in question took place during the assessment year 2001-02 when the development agreement was entered into. As such, sale of flats in 2005-06 gave rise to long term capital gain eligible for exemption under Section 54EC.

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?

- 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 the plans are approved by the local authority;
  - (iv) the year in which possession of land is given to the Developer;
  - (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

- An agreement of sale which fulfilled the ingredients of section 53A was not required to be executed through a registered instrument. This position was changed by the Registration and Other Related Laws (Amendment) Act, 2001. Amendments were made simultaneously in section 53A of the Transfer of Property Act and sections 17 and 49 of the Indian Registration Act.
- By the aforesaid amendment, the words 'the contract, though required to be registered, has not been registered, or' in section 53A of the 1882 Act have been omitted. Simultaneously, sections 17 and 49 of the 1908 Act have been amended, clarifying that unless the document containing the contract to transfer for consideration any immovable property (for the purpose of section 53A of 1882 Act) is registered, it shall not have any effect in law, other than being received as evidence of a contract in a suit for specific performance or as evidence of any collateral transaction not required to be effected by a registered instrument.

Meaning of `of the nature referred to in Section 53A' – SC in CIT v. Balbir Singh Maini [(2017) 86 taxmann.com 94 (SC)]

- Supreme Court in the case of **CIT v. Balbir Singh Maini [(2017) 86 taxmann.com 94 (SC)]** was dealing with the case of an assessee who had an agreement which was not registered. For the relevant AY, 2007-08, the assesssee filed return declaring certain income. The AO held that since physical and vacant possession had been handed over under the JDA, the same would tantamount to `transfer' within the meaning of Section 2(47)(ii), (v) and (vi).
- The Tribunal confirmed the order of the AO.
- The High Court 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

Meaning of `of the nature referred to in Section 53A' – SC in CIT v. Balbir Singh Maini [(2017) 86 taxmann.com 94 (SC)]

- All that is meant by this expression `of the nature referred to in section 53A' is to refer 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'.
- As has been stated above, there is no contract in the eye of law in force under section 53A after 2001 unless the said contract is registered. This being the case, and it being clear that the said JDA was never registered, since the JDA has no efficacy in the eye of law, obviously no 'transfer' can be said to have taken place under the aforesaid document.
- Since sub-clause (*v*) of section 2(47) is not attracted on the facts of this case, there is no need to go into any other factual question. [Para 20]

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)]**
- Where assessee entered into a joint development agreement of land owned by it in terms of which a part of constructed area was to be given to assessee and remaining portion was to be kept by builder, no transfer within meaning of section 2(47)(v) would take place until builder constructed said property and handed over a portion of same to assessee as per terms of agreement.

- The assessee entered into an agreement with a developer on 7-12-2006 for development of land owned by it. In terms of agreement, assessee had to retain 39 per cent of constructed area whereas balance 61 per cent area would be allotted to developer. The assessee filed its return wherein no capital gain was disclosed from aforesaid transaction. The Assessing Officer completed the assessment without raising any objection.

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 Commissioner took a view that in view of section 2(47)(v), read with section 45, capital gains tax ought to have been paid in assessment year 2007-08 *i.e.*, when joint development agreement was executed. He thus passed a revisional order under section 263 directing Assessing Officer to reframe the assessment.
- The Tribunal, however, set aside the revisional order.
- On revenue's appeal to the High Court, Held :

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)**
- When the owner of a land enters into an agreement with a developer for the purpose of developing the land, 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. The matter may be viewed from another perspective. Merely because *de facto* possession of the land is made over to a mason or a civil engineer for the purpose of making a construction thereon, it would not imply that possession is made over to the mason or the civil engineer for their enjoyment of the property. Such persons would be in *de facto* possession under the *de jure* possession of the owner and only for the purpose of undertaking the construction at the land in question. [Para 17]

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)**
- In terms of the agreement of 7-2-2007, the developer was to get 61 per cent of the land and the proportionate share in the constructed area whereas the assessee was to get the balance 39 per cent of the land and the proportionate constructed area thereupon. Till such time that the construction came up and 39 per cent of the constructed area was made over to the assessee, it could not be said that possession of the balance land, in the sense that the expression carries in section 2(47)(v) of the Act, had been made over by the assessee to the developer. [Para 18]

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)**
- It is the undeniable position that under the agreement of 7-2-2007, the land and the construction thereon were to be divided in a certain ratio as between the developer and the assessee. It was also the developer's obligation under the agreement to make the construction or cause such construction to be made on the land. The possession that was made over by the assessee to the developer was not of the developer's share as envisaged in the agreement, but of the entirety of the land for the construction to be made thereon. It is true that the developer could have retained possession of the land and declined to return possession thereof to the assessee since the developer was in physical control thereof. But such resistance of the developer would not have been protected under section 53A of the Transfer of Property Act 1882.

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)**
- It was only after the apportionment of the areas upon the construction on the land being completed that the developer could have rightfully retained possession of the developer's 61 per cent share and resisted dispossession by discharging his obligation under the agreement and seeking refuge in terms of section 53A of the Act of 1882 despite the formal conveyance pertaining to the developer's entitlement not having been executed. ***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]

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)**
- There is also a minor matter of the opening words of section 45 being given some effect while reading such provision. 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.*** During the year under consideration, only an agreement was signed. No money was received. So, there is no question to pay capital gain. When it is so, then we find no reason to interfere with impugned order passed by the Tribunal. The same are hereby sustained along with reasons mentioned therein." – **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)]

- In this case, assessee entered into a joint development agreement under which assessee was entitled to 35% of the constructed area. There was no monetary consideration to be received by the assessee. The project was to be completed in 18 months but was not so completed. The assessee had to resort to legal proceedings. The AO, based on AIR information, wanted to tax the capital gain in the year of execution of JDA. The CIT(A) upheld the action of the AO on the ground that there was a transfer in terms of s. 2(47)(v), for this he relied on the decision of the Bombay High Court in the case of Chaturbhuj Dwarkadas Kapadia vs. CIT 260 ITR 491.

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

- The Tribunal held -
- The aforesaid facts clearly reveal that the consideration to be received by the assessee in terms of development agreement on transfer of the land was 35% of the built up residential area. Therefore, ***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***. It is a matter of record that there was some dispute between the parties with regard to completion of the project and the assessee has initiated legal action against the developer. Therefore, when there is uncertainty with regard to the fact whether assessee would be receiving even 35% of the built up residential area in terms of the agreement, there is no question of accrual of long term capital gain in the impugned assessment year, particularly when nothing has happened with regard to development of project in the impugned assessment year.

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 Assessing Officer while considering the sale consideration took two amounts for consideration, one amount was 'sale consideration received under the guise of refundable deposit' of Rs. 11,00,165 and other 'value of constructed area of flats received in lieu of asset given for development' at Rs. 63,71,290 in each case, assessee contested that both the amounts cannot be taken and value of cost of construction for the builder has to be adopted and not the market price of sale value. The Commissioner (Appeals) did not adjudicate this issue at all.

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

- The Tribunal was of the opinion that Assessing Officer cannot take both the amounts into consideration as it will be a double addition. To that extent, Assessing Officer's action cannot be upheld. It was also assessee's contention that value of constructed area adopted by the Assessing Officer was on the basis of the sale price of certain apartments and assessee's were not given any opportunity to place their submissions. Since most of the orders are *ex parte*, the assessee's contentions that cost of construction of the builder should be adopted has not been examined at all. Therefore, in the interest of justice, this issue is set aside to the file of Assessing Officer with a **direction to adopt value of constructed area of flats in view land parted with, after giving due opportunity to the assessee**.

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

- In the case of **Essae Teraoka Ltd. v. DCIT [(2016) 67 taxmann.com 147 (Bangalore – Trib.)],** during assessment year 2005-06, the assessee entered into a Joint Development Agreement with a developer in terms of which 47 per cent of its land was transferred by the assessee in favour of developer against consideration in form of constructed area equivalent to 53 per cent of total super built-up area. AO computed capital gains by taking consideration for transfer at cost of construction recorded by developer in books of account. 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.)]** [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]
- **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?

- **PCIT v. CPC Logistics Ltd. [(2022(1) TMI 655 – Karnataka High Court] –** In this case, High Court noted that the AO adopted the rate of Rs. 1,250 per sq. feet merely based on the letter given by the developer which was not supported with any particulars. The Court held that "it cannot be ruled out the possibility of the developer giving an inflated figure to suit his requirements in order to gain minimum tax on his profits by inflating his costs. As such, the basis for determination of full value of consideration by the AO based on th eletter of the developer cannot be appropriate."

- As regards reliance on SDV of the land, though section 50D was not applicable in relevant assessment year, the court held "No doubt at the relevant period, no provision was available in cases where the consideration received or accruing as a result of transfer of a capital asset by an assessee is not ascertainable. Section 50D inserted by FA, 2012 w.e.f. 1.4.2013 would throw some light on the issue.

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

- The court held that "The guidance value of the land or the guidance value of the building would be appropriate mode to determine the full value of consideration in case of transfer where consideration for the transfer of a capital asset is not attributable or determinable. Hence, guidance value adopted by the Tribunal cannot be faulted with. The Tribunal having exercised its discretionary power adopted the guidance value of the land as the mode for determination of full value of consideration, the same being not perverse or arbitrary, the Court was not inclined to interfere with the impugned order.

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.)]** – In this case, assessee transferred his land to E Ltd. for development. As per terms of agreement, assessee was allocated a specified area in superstructure constructed by the developer on said land. Assessee claimed market value of land on date of transfer be taken to be full value of consideration. The Tribunal held that the AO was correct in rejecting this contention and held that since development agreement specified that certain part of constructed area would be surrendered by the builder / developer to the assessee on completion of the contract, the AO was justified in considering value of superstructure to determine full value of consideration and computing capital gains accordingly. The Tribunal held as follows -

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

In our opinion, the consideration for the transfer of capital asset is what the transferor receives in lieu of the assets he parts with and therefore, the very asset transferred or parted with and full value of consideration cannot be construed as having a reference to the market value of asset transferred and the said expression only means that full value of the asset received by the transferor in exchange for the capital asset transferred by him. Since the development agreement specifies that certain part of constructed area shall be surrendered to the owner by the builder on the completion of the contract and the value of the constructed area to be transferred to the assessee to be considered as consideration received and as such full value of consideration in the case of not 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. In view of this, we do not find any infirmity in the order of the Assessing Officer on this issue as he has followed the order of the Tribunal in the case of *Smt. Vasavi, Pratap Chand* (*supra*). Accordingly, this ground taken by the Revenue is allowed."

Total consideration received or accruing has to be assessed to capital gain tax in the year of transfer

- **Value of flat on estimated basis held to be taxable, though not received**
- In the case of **Sukhdev Singh v. ITO [(2013) 38 taxmann.com 156 (Chandigarh – Trib.)],** the Tribunal was dealing with the case of an assessee who, in assessment year 2008-09, was a member of a co-operative housing society. He was owner of a plot. As per development agreement he was entitled to a monetary consideration and one furnished flat measuring 2250 sq. feet. Since land was transferred to developer, the AO applied whole consideration i.e. monetary consideration and value of flat, to capital gain tax. Assessee contended that taxing of entire amount was against the law and that cost of flat could not be included on estimation basis which could not be ascertained as no construction or other activity had been commenced by the developer till that time. The Tribunal, following the decision of co-ordinate Bench in the case of Charanjit Singh Atwal v. ITO [(2013) 36 taxmann.com 10 (Chd. – Trib.)] held that total consideration received or accrued has to be assessed in the year of transfer, AO was justified in bringing whole consideration to capital gain tax.

Total consideration received or accruing has to be assessed to capital gain tax in the year of transfer

- 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.)]**

Can liability of capital gains be deferred on the ground that payment of consideration was deferred till a future assessment year?

- The Andhra Pradesh High Court has, in the case of **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.

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. During the year under consideration, only an agreement was signed. No money was received. So, there is no question to pay capital gain. When it is so, then we find no reason to interfere with impugned order passed by the Tribunal. The same are hereby sustained along with reasons mentioned therein." – **Quoted in ITO v. Ronak Marble Industries [ITA No. 3318/Mum./2015; A.Y.: 2009-10; Date of Order : 14.3.2017]**

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

Does S. 50C apply to transfer under JDA

Provisions of S. 50C do not apply to "rights in land & building".

- **ITO v. Yasin Moosa Godil [2012] 18 ITR 253 (Ahd.)(Trib.)**
- **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 section50C. 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

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.
- Assessee, owner of land, entered into a development agreement with a developer wherein it transferred a share in land to a developer and in return developer agreed to develop and handover certain percentage of area of land to the assessee along with rent deposit and rent free accommodation to the assessee till construction gets over. Development agreement made it abundantly clear that there would be no adjustment of payments received by assessee on account of rent free accommodation as against consideration payable under development agreement. In this factual situation, the Court 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.

Is rent for alternate accommodation a capital receipt

- **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.)]**
- In this case, the assessee apart from receiving cash consideration, was also entitled to receive a tenement constructed over a portion of land and such construction was to be undertaken by developer at his own cost. While undertaking construction, developer was to provide an alternative accommodation to assessee for his use. The developer incurred a sum of Rs. 2,25,000 on leave and license of flat provided to the assessee as an alternative accommodation. The AO was of the view that this sum of Rs. 2,25,000 formed part of consideration while computing capital gains. Alternatively, he held that this amount was received without a corresponding liability and therefore it was a revenue receipt. The Tribunal held that rent paid by developer for alternate accommodation was part and parcel of transaction resulting in assessee getting possession of constructed tenement from developer. It also held that the Assessing Officer's decision to treat such rent as part of consideration for transfer of land was unjustified.

Is rent for alternate accommodation a capital receipt

- **The decision of the Tribunal was as under –**
- The taxability of the aforesaid sum has to be seen as a part and parcel of the transaction resulting in assessee getting possession of the constructed tenement from the developer. **Ostensibly, there is no justification for the revenue to say that it is a revenue receipt because it is nobody's case that the arrangement with the developer undertaken by the assessee is in the course of any business activity.** Therefore, in our considered opinion, the Assessing Officer shall re work the total income of the assessee on the impugned aspect in the aforesaid light. Accordingly, assessee succeeds on this ground for statistical purposes.

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'.

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

- In the case of **Lawrence Rebello v. ITO [2021 (10) TMI 63 – Indore],** the Tribunal has considered rent for alternate accommodation to be akin to hardship allowance and therefore held it to be a capital receipt. Tribunal took note of the decisions of Mumbai Bench of the Tribunal in the following cases –
  - Smt. Delliah Raj Mansukhani [2021(3) TMI 252 – ITAT – Mumbai]
  - Jitendra Kumar Soneja [2016 (8) TMI 1087 – ITAT – Mumbai] – corpus fund received towards hardship caused to flat owner on redevelopment is a capital receipt. In this case the Tribunal held that such amount would end up reducing cost of acquisition of the asset and would get captured when the asset is sold
  - Kushal K. Bangia [2012 (2) TMI 29 – ITAT – Mumbai]
  - Devshi Lakhamshi Dedhia v. ACIT [ITA No. 5350/Mum./2012] – hardship compensation, rehabilitation compensation and for shifting are not liable to tax.

Is Hardship Compensation a capital receipt?

- Other decisions relevant for the proposition that hardship compensation is a capital receipt –
  - **Ajay Parasmal Kothari v. ITO [2023 (5) TMI 59 - ITAT MUMBAI]**
  - **Amitabha Sanyal v. ITO [2023 (3) – TMI 1224 – ITAT – Kol]**
  - **Vinod Murlidhar Chawla v. ITO [2023) (2) – TMI – 923 – ITAT – Mum]**
  - **Sunil Manktala v. ACIT [2015 (7) – TMI – 1368 – ITAT – Mum]**

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 assessee was owner of land acquired in 1963. Pursuant to the Development Control Regulations, 1991, the assessee was entitled to construct upto 1 : 1 FSI on the property. The assessee was also entitled to load Transferable Development Rights ("TDR") on the property.

Cost of improvement

- The assessee entered into a development agreement with a developer pursuant to which the developer agreed to develop on the said land by utilizing the FSI & TDR and paid compensation to the assessee. The assessee claimed that the TDR was an "improvement" of the land and as a "cost of improvement" of the land could not be determined, no capital gains was chargeable. In appeal, the CIT(A) held that the FSI and TDR were separate and distinct assets and that while the TDR did not have a cost, the FSI did and if both were transferred together, there was a "cost" for the "asset" and capital gains was chargeable.

- On appeal by the assessee, HELD allowing the appeal:

Cost of improvement

- On appeal by the assessee, HELD allowing the appeal:

- The assessee transferred "Development Rights" being the FSI and the "right to load TDR" on the land. While the right to construct on the land by consuming FSI was a capital asset which was acquired at a cost, the right to load TDR arose pursuant to the DC Regulations, 1991 without payment of any cost. The said right to "load TDR" was an improvement to the capital asset held by the assessee. If the "cost of improvement" of an asset is not determinable, capital gains are not chargeable. The result was that even the consideration attributable to the FSI (which had a cost) was not assessable to tax (Principle laid down in Jethalal D. Mehta 2 SOT 422 (Mum.) & Maheshwar Prakash CHS 24 SOT 366 (Mum.) in the context of only TDR followed).

Upto AY 2023-24 - Cost of right to load TDR not ascertainable, no CG

- Prior to amendment of section 55 by the FA, 2023 it was possible to contend that right to load TDR being an asset which does not have an inherent quality of being available on expenditure of money, gain arising on transfer thereof is outside the scope of section 45 by following the ratio of the decision of the SC in *CIT* v. *B.C. Srinivasa Shetty* [1981] 128 ITR 294/5 Taxman 1.
  - **CIT v. Sambhaji Nagar Co-operative Housing Society Ltd. [(2015) 370 ITR 325 (Bombay)]**
  - **PCIT v. Manohar H. Kakwani [(2019) 416 ITR (Stat) 125] -** S. L. P. (C) No. 18498 of 2019 - *Transfer of development rights whether chargeable in absence of cost of acquisition* 2-8-2019 : SC has *dismissed* the Department's SLP against judgment dated January 7, 2019 of the Bombay High Court in I. T. A. No. 822 of 2016 whereby the High Court held that the Tribunal was right in holding, following 370 ITR 325, that in the absence of the cost of acquisition of the development rights, they could not be taxed as capital gains :

Upto AY 2023-24 - Cost of right to load TDR not ascertainable, no CG

- The contention of the assessee before the HC in Manohar Kakwani was that land and building have not been transferred but it is only right of further development accruing by virtue of development control regulations which has been transferred.

- Post amendment to s. 55 by FA, 2023 this contention will not be available since now cost of any other right is to be taken to be Nil for the purposes of sections 48 and 49.

- Allocation of consideration for transfer of house / land / rights accruing by virtue of development control regulations will make a difference to claim of deduction under sections 54 / 54F. Therefore, in appropriate cases, in spite of the amendment to section 55 it may be advisable to have separate consideration for transfer of these rights.

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.

Is S. 45(5A) 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.

- Since section 45(5A) has been introduced to remove unintended consequences of earlier provisions for computation of capital gains, relying on the ratio of the following decisions can it be held to be retrospective in operation –
  - **Godrej & Boyce Mfg Co. Ltd v. DCIT [(2010) 43 DTR 177 (Bom HC)]**
  - **Allied Motors(P) Ltd. Etc v. CIT [(1997) 224 ITR 0677 (SC)]**
  - **CIT v. Alom Extrusions Limited [(2009) 319 ITR 306 (SC)]**
  - **CIT v. Essar Teleholdings Ltd. [(2018) 401 ITR 445(SC)]**

S. 45(5A) is not retrospective

- In the following decisions, it has been held that the provisions of Section 45(5A) are prospective in nature and not retrospective –
  - Pankaj Kumar, Mohamid Abdul Hai & Others v. CIT [(2023) 455 ITR 583 (Patna)]
  - 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.

Exemption under section 54

- Section 45(1) applies to profits and gains "save as otherwise provided in section 54, etc." Thus, the exemption under section 54, etc. is first computed and only the balance is liable to be taxed under section 45(1).
- In these circumstances, when section 45(5A) states that it is "notwithstanding anything contained in sub-section (1)", it means it overrides the profits and gains covered by section 45(1). The question of overriding the exemptions under section 54, etc. which are not even a subject matter of profits and gains under section 45(1) does not arise.
- Further, the observations of the Supreme Court in the following cases are relevant:
- **UOI v. G. M. Koli [(1984) SCR 196]**
  - "It is well known that a non-obstante clause is a legislative device which is usually employed to give overriding effect to certain provisions over some contrary provisions that may be found either in the same enactment or some other enactment, that is to say, to avoid the operation and effect of all contrary provisions."

Exemption under section 54

- **R. S. Raghunath v. State of Karnataka [AIR 1992 SC 81]**
  - "On a conspectus of the above authorities it emerges that the non-obstante clause is appended to a provision with a view to give the enacting part of the provision an over riding effect in case of a conflict. But the non-obstante clause need not necessarily and always be co-extensive with the operative part so as to have the effect of cutting down the clear terms of an enactment and if the words of the enactment are clear and are capable of a clear interpretation on a plain and grammatical construction of the words the non-obstante clause cannot cut down the construction and restrict the scope of its operation. In such cases the non-obstante clause has to be read as clarifying the whole position and must be understood to have been incorporated in the enactment by the Legislature by way of abundant caution and not by way of limiting the ambit and scope of the Special Rules."
  - "As already noted, there should be a clear inconsistency between the two enactments before giving an overriding effect to the non-obstante clause but when the scope of the provisions of an earlier enactment is clear the same cannot be cut down by resort to the non-obstante clause."

Effect of non-obstante clause

- In view of the above, the non-obstante clause overrides only a contrary provision but it does not affect an otherwise clear provision. Now, so far as section 45(1) and section 45(5A) are concerned, the only inconsistent provision in these sections is that under section 45(1), capital gains are chargeable in the previous year in which the transfer of a capital asset takes place and on the other hand, in section 45(5A), the profits and gains are chargeable in the year in which completion certificate is obtained. It is clear that the non-obstante clause in section 45(5A) is relevant only for the purpose of overriding this contrary provision in section 45(1). However, it does not apply to the other part of section 45(1) referring to section 54, etc. For which there is no inconsistent or conflicting provision in section 45(5A) and hence, the capital gains under section 45(5A) are also eligible for exemption under sections 54, 54EC, 54F, etc.

Satisfaction of condition u/s 54 regarding time limit for purchase / construction

- Satisfaction of condition in section 54, etc. regarding time limit for purchase / construction
- The assessee would be eligible to exemption under section 54 if the capital asset is residential house or land appurtenant thereto. The time limit for acquisition of new house is one year before or two year after the date on which the transfer took place or construction within a period of three year after the date of transfer. A further difficulty that would arise is on account of difference in language in section 54 and section 45(5A). Section 54 requires acquisition of house within the specified period from the date of transfer but provides for taxation in the year in which the certificate of completion is issued by the competent authority.

Satisfaction of condition u/s 54 regarding time limit for purchase / construction ...

- Now, even after insertion of section 45(5A), there is no change in the date of transfer. Hence, on a strict literal interpretation, the reinvestment in a residential house has to be made with reference to the date of transfer and not the date of chargeability. It appears that such literal interpretation is not warranted. This is because under section 45(5A), the full value of consideration under section 48 is dependent on the stamp duty value as on the date on which the completion certificate is obtained. In the absence of the stamp duty value, the consideration cannot be ascertained and without a quantified consideration, it is impossible to calculate the capital gains which is a precondition for conferment of exemption under section 54/54F. It is now well settled that legislature does not expect a person to perform impossibility [**Life Insurance Corporation of India v. CIT [(1996) 85 Taxman 313 (SC)]**. Hence, in the absence of crystallised capital gains, it would be impossible for a person to reinvest and ascertain the extent of exemption availed of by him. Further, the opening words of section 45(5A), which refer to “where the capital gain arises to an assessee…. From the transfer of a capital asset”, it is possible that the provision may be construed as equating the date of the certificate of completion with the date of transfer.

Consideration received in cash:

- In view of the above, a view could be taken that the reinvestment in a residential house for the purpose of section 54 / 54F could be made from the date of completion certificate.

- For the purposes of section 54 / 54F, one residential house received pursuant to the development agreement would qualify for relief under section 54 / 54F [**See Jatinder Kumar Madan v. ITO [(2012) 21 taxmann.com 316 (Mum-Trib.)]; Mohammed Farooq v. ITO [(2015) 69 SOT 605 (Hyd.-Trib.)]; ACIT v. Ram Mohan [(2014) 44 taxmann.com 384 (Chennai-Trib.)]**.

Is TDS to be made from payments made by Builder / Developer to the Society and/or members?

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 entered into by Society and/or its Members with the Builder / Developer 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

Jagdish T Punjabi

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