

CAPITAL GAIN –RECENT AMENDMENTS & CASE LAWS

CA VIPIN GUJARATHI



Recent Amendments- S 2(14)(iii) (a)

- S. 2(14) (iii) sub clause (a) amended by the Finance Act 2013 w. e. f. 1st April 2014
- Sub clause (a) has been amended to clarify that the land falling within the jurisdiction of Municipality having population of not less than 10000 shall not be agricultural land. The clause has been amended to clarify that population shall be as per the last preceding census the figures of which are published before the 1st day of the previous year.

Recent Amendments- S 2(14)(iii) (b)

- Section 2(14) (iii) sub clause (b) substituted the existing sub clause (b) by the Finance Act 2013 w. e. f. 1/4/2014
- Clause (b) provides that the lands situated in the distances mentioned below shall not be considered as agricultural land.
Population more than ten thousand but not exceeding one lac – 2 km

Recent Amendments- S 2(14)(iii) (b)

Population more than one lac but not exceeding ten lac – 6 km

- Population more than ten lac – 8 km
- Distance shall be measured aerially

Recent Amendments- Expl. S 2(47)

- Explanation 2 to Section 2(47) inserted by the Finance Act 2012 w. e. f 01/04/1962
- Expl. 2 has widen the scope of the definition of transfer to include transaction/agreements whether entered into India or outside India and also to cover the transfer of shares of a company registered and incorporated outside India. This has been done obviously to counteract the Judgment of Vodafone

Recent Amendments- S 43CA

- S.43CA inserted by the Finance Act 2013 w.e.f. April 2014—
- Full Value Consideration for Transfer of Assets other than Capital Assets (Current Assets)
- The amendment is intended to cover the transactions in relation to land and building held by the transferor as stock in trade. This amendments is going to seriously affect the real estate sector.

Recent Amendments- S 50D

- S. 50D inserted by the Finance Act 2013 with effect from 1st April 2013 –Fair Market Value Deemed to be Full Value Consideration
- Capital Gains are calculated by deducting cost of acquisition from consideration received/receivable. In some of the recent rulings it was held that where the consideration on transfer of capital assets is not determinable then the machinery provision fails and gains arising from transfer of such asset is not taxable.

Recent Amendments- S 50D

- Section 50D has been inserted w.e.f. 1.4.2013
- Where the consideration received or accruing as a result of transfer of a capital assets by an assessee is not ascertainable or can not be determined, then, for the purpose of computing income chargeable to tax as capital gain, the fair market value of the said asset on the date of transfer shall be deemed to be full value consideration received or accruing as a result of such transfer.

Recent Amendments- S 54B

- Amendment to Section 54B by the Finance Act 2012 w. e. f. 1st April 2013
- Amendment extends the benefit to Hindu Undivided Family of exemption of capital gain arising from the transfer of agricultural land which was being used by HUF for agricultural purposes

Recent Amendments- S 54GB

- The Finance Act 2012 has inserted new section 54GB with effect from 1st April 2013 to exempt capital gain on transfer of residential property not to be charged
- The capital gain arising from transfer of long term capital asset being residential property – a house or plot of land to the assessee being “Individual” or “Hindu Undivided Family” shall be exempt if the net consideration is utilized for subscribing in equity share of eligible company

Recent Amendments- S 54GB

- Eligible company within a period of one year from the date of subscription by the assessee utilizes the said amount in purchase of plant and machinery.
- Eligible company means a company incorporated in India during the period from 1st day of April relevant to the assessment year in which the capital gain arises to the date of furnishing of the return u/s 139(1)
- The company is engaged in the business of manufacture of an article or thing

Recent Amendments- S 54GB

- The assessee has more than 50% of share capital or more than 50% of voting rights after the subscription in shares by the assessee.
- The company qualifies to be a small or medium enterprises under the Micro, Small and Medium Enterprises Act 2006.

Capital Gain V Business Income

- Whether a particular asset is a stock in trade or capital asset does not depend on the nature of asset but the manner in which it is held.
- It will mainly depend on intention at the time of purchase and the conduct of the assessee supported by direct and circumstantial evidence.

Capital Gain V Business Income

- Intention at the time of purchase
- Use of own funds or borrowed funds for purchase
- Whether main business or incidental activity
- Solitary transaction or series of transactions
- Method of valuation and disclosure in account
- Circular no. 4 of 2007

Capital Gain V Business Income

- Whether surplus arising on selling of own/inherited land after dividing it in smaller plot and making provision for road etc to secure better price is capital gain or business activity?
- It is necessary to find out intention at the time of purchase of land
- An isolated transaction can not be part of business activity.

Capital Gain V Business Income

- Absence of regular, systematic activity.
- CIT Vs Sushila Devi Jain 259 ITR 671 (P & H)
- CIT Vs Suresh Chand Goyal 298 ITR 277 (MP)
- CIT Vs Mohammed Mohideen 176 ITR 393 (Mad)

Consolidated Consideration

Whether the assessee who receives consolidated consideration for land and building is entitled to bifurcate the consideration for capital gain?

- CIT Vs Vimal Chand Gholecha 201 ITR 442(Raj)
- CIT Vs Lakshmi B Menon 264 ITR 76 (Ker)
- C.R. Subramanian 242 ITR 342 (Ker)
- CIT Vs D.L. Ramchandra Rao 236 ITR 51 (Mad)
- CIT Vs Citibank N.A. 261 ITR 570 (Bom)

Right to Acquire Property – Capital Asset

- Whether right to acquire any property is a capital asset?
- A flat booked with a builder under a letter of allotment or an agreement to sale represents only right to acquire a flat and if such right is held more than 36 months it becomes long term capital asset. If such right is transferred it will result in long term capital gain. However, when the possession of flat is taken the holding period would once again commence. Vinod Kumar Jain Vs CIT 344 ITR 501 (P & H)

S. 54E- Meaning of the term “Month”

- The term “month” in s. 54E, 54EA, 54EB & 54EC does not mean “30 days” but the “calendar month”. So, the expression “within a month” means “before the end of the calendar month”
- The term ‘month’ is not defined in the Income-tax Act. Therefore, its meaning has to be understood as per the General Clauses Act, 1897 which defines the word “month” to mean a month reckoned according to the British calendar
- Alkaben B Patel V ITO ITA No 1973/Ahd/2012 (SB)

S. 54EC- Limit of 50 Lacs

S. 54EC limit of Rs. 50L does not apply to the transaction but financial year.

- Aspi Ginwala V ACIT ITA no.3226/Ahd/2011
- Chanchal Kumar Sircar Vs ITO ITAT Kolkatta
- Mahesh Nemichandra Ganeshwade 594 PN/10 ITAT Pune
- ACIT Vs Rajkumar & Sons (HUF) 153 TTJ 49 (Jaipur) Against

S. 54EC- Time Limit of investment

- S. 54EC investment time limit begins from date of receipt of consideration. If investment within 6 months of transfer is impossible, then relief available if investment made within 6 months of receipt of consideration. Delay in investing within 6 M owing to non-availability of bonds to be excused
- Aspi Ginwala V ACIT ITA no.3226/Ahd/2011
- Chanchal Kumar Sircar Vs ITO ITAT Kolkatta

Section 50C-Deemed Capital Gain

- AO must refer the valuation to Valuation Officer for determining FMV-Not Optional- Mohd Shoib Vs DCIT 29 DTR 306 (Lucknow) & Kalptaru Industries vs ITO 5540/Mum/2007
- Assessment Order passed by AO accepting the stamp duty value without waiting for report of DVO is liable to be set aside. N. Minakshi Vs ACIT 326 ITR 229 (Mad)
- Value accepted for registration purposes can not be replaced by valuation fixed by DVO 120 TTJ 1113 (Asr)

Profit on Transfer of House Property S 54

- Investment in residential house outside India
Mrs. Prema P. Shah, V. ITO 101 TTJ 849 (Mum)
- identification of sale proceeds of the with investment in new house purchased is not necessary- CIT Vs H. K. Kapoor 234 ITR 753 (All), CIT Vs Vasudevan Chettiar 234 ITR 705 (Mad), Dr. D. S. Pasricha Bombay High Court ITA No 1825 of 2009

Period of holding of share in Co-Op Society

- As per S.27 (iii) a Member of society is deemed owner of the flat allotted to him. Section 27(iii) has not made any reference to handing over possession because the possession is never considered to be sine qua non of ownership.
- The member of the co-op society only owns shares in that society and the right to enjoy any land or building is merely incidental right flowing from ownership of shares.

Period of holding of share in Co-Op Society

- The period of holding for capital gain tax shall be the date on which member acquired share and the date of which shares are sold irrespective of the fact that the assessee did not get possession at the time of allotment of shares.
- CIT Vs Anilaben Upendra Shah 262 ITR 657 (Guj)
- CIT Vs Jindas Panchand Gandhi 279 ITR 552 (Guj)

Section 51- Advance received forfeited

- Section 51 - Advance money received
- Advance money received by the assessee only is deductible from the cost of acquisition. Advance received and forfeited by previous owner is not to be deducted.
- Advance money forfeited more than the cost of acquisition is a capital receipt not taxable.
- Travancore Rubber & Tea Co Ltd Vs CIT 243 ITR 158(SC)

Section 51- Advance received forfeited

- If due to default on the part of purchaser it will not amount to relinquishment of right in the assets. Therefore not allowed as capital loss under the head “Capital Gain”. CIT Vs Sterling Investment 123 ITR 441 (Bom)
- Giving up right to obtain conveyance amounts to transfer of capital assets & compensation received for giving up such right is the consideration price.
- CIT Vs Vijay Flexible Container 186 ITR 693 (Bom)
- K.R. Srinath Vs ACIT 268 ITR 436 (Mad)
- CIT Vs Laxmidevi Ratani 296 ITR 363 (MP)

S.54 – Purchase of residential house

- Whether exemption under section 54 is available to an assessee for investment in more than one house?
- Expression “a residential house” should be understood in a sense that the building should be of a residential nature and “a” should not be construed to indicate a singular number
- CIT Vs D. Anand Basappa 309 ITR 329 (kar)

S.54 – Purchase of residential house

- CIT Vs Syed Ali Adil 352 ITR 418 (AP)
- CIT Vs SMT K G Ruminiamma 331 ITR 211 (Kar)
- CIT Vs Gita Dugal 357 ITR 153 (Delhi)
- Sushila M Javeri 107 ITD 327 (Mum) (SB)

Time limit - Purchase of Residential House

- Whether the time limit u/s 139(1) or 139(4) will be applicable for purchasing the housing for claiming deduction u/s 54 or 54F?
- CIT Vs MS Jagriti Aggarwal 339 ITR 610 (P&H)
- CIT Vs Jagtar Singh Chawla 87 DTR 217 (P&H)
- Dr Xavier J Pullikal (Ker) ITA No 10 of 2014
- In this case Kerala High Court has held against the assessee.

Time limit -Deposit in Capital Gain Account

- As per S 54(2) the time limit for making deposit of unutilized amount is the due date of furnishing return u/s 139. S 54(2) mentions only section 139. S.139 can not mean only S 139(1) but means all subsection of S 139. Therefore the assessee can fulfill the requirement of s. 54 by depositing the unutilized portion of capital gain up to expiry of time limit for filing return under s. 139(4)
- Fathima Bai Vs ITO 32 DTR 243 (Kar)
- CIT Vs Rajesh Kumar Jalan 286 ITR 274 (Gauhati).
- CIT Vs MS Jagriti Aggarwal 339 ITR 610 (P & H)

Period of holding by previous owner

- Expl. 1 to S 2(42A) in determining the period for which the asset has been held by the assessee there shall be included in the period for which the asset is held by previous owner in the circumstances mentioned in S 49(1)
- While computing capital gains on capital asset acquired under a gift, the indexed cost of acquisition has to be calculated with reference to the year in which previous owner first held the asset and not the year in which assessee became the owner of the asset. CIT Vs Manjula J Shah 355 ITR 474 (Bom)

S.54- Investment not in the name of assessee

- Whether the benefit of S.54 or S.54EC can be granted if the investment in the purchase of house or in bonds is not in the name of the assessee?
- DIT Vs Mrs. Jennifer Bhide 349 ITR 80 (Kar)
- HC held that in s.54 no where it is expressly stated that the purchase to be made or construction to be put up by the assessee should be in the name of the assessee.
- CIT Vs V. Natarajan 287 ITR 271 (Mad)
- Ganta Vijay Laxmi Vs ITO ITA No 253/VIZ/2012

S 54F – Co- Ownership in two houses

- S. 54F provides exemption from capital gain arising from transfer of capital assets not being residential house provided the assessee is not owner of more than one residential house.
- Assessee Co-Owner in 2 houses. ITAT held that a residential house means complete residential house and would not include shared interest in a residential house.

S 54F – Co- Ownership in two houses

- The hon. Karnataka High Court held that merely because the words residential house are preceded by article “a” would not exclude a house shared with other person. Co-owners is the owner of a house in which he has share and his right would not be taken away without due process.
- CIT Vs Mr. M J Siwani ITA 216/2007(Kar)

S.54-Multiple Sales & Multiple Purchases

- Though s. 54 refers to capital gains arising from “transfer of a residential house”, it does not provide that the exemption is available only in relation to one house. **If an assessee has sold multiple houses, then the exemption u/s 54 is available in respect of all houses** if the other conditions are fulfilled
- However, the exemption is **not available on an aggregate basis** but has to be computed considering **each sale and the corresponding purchase** adopting a combination beneficial to the assessee.
- Pajesh Kumar Pillai ITA No 6661/M/2009 (Mumbai)

Benefit s.54EC – Depreciable Asset

- Whether benefit u/s 54EC available on transfer of depreciable asset
- S.50 the profits and gains arising on transfer of capital asset shall be gains arising from short term capital asset & hence short term capital gain
- Deemed fiction created under S.50 (1) & (2) restricted only to mode of computation contained in S.48 & 49 & does not apply to other provision.

Benefit s.54EC – Depreciable Asset

- Further S.54EC does not make any distinction between depreciable and non-depreciable assets.
- CIT vs. Assam Petroleum 262 ITR 587 (Gau.)
- CIT Vs Ace Builders 281 ITR 210 (Bom) Sec 54E
- CIT Vs Rajiv Shukla 334 ITR 138 (Del) Sec 54F
- Special Leave petition against Bombay High Court in Delite Tin Industries dismissed by SC 322 ITR (St) 8

JV Agreement & Capital Gain

- Joint Venture Agreement or Principal to Principal Basis Agreement and Capital Gain
- Now a days the Land Owner and the Developers enter into joint Venture Agreement for sharing of profit or Gross Sale Proceeds or sharing of built up area. Under such circumstances the main issue arises as to when the capital gain arises in the case of land owner

JV Agreement & Capital Gain

- The controversy started with the case of Chaturbhuj Dwarkadas Kapadia 260 ITR 491 where in the hon. Bombay High Court held that if the contract read as a whole indicates passing of or transferring complete control over the property, then the date of contract will be the date of transfer.

JV Agreement & Capital Gain

- Mrs. Duradana Khatoon Vs ACIT 33 Taxman.com 311 (Hyd)- The Hon Bench after analyzing provisions of Section 2(47) , S. 45 & Section 53A of the Transfer of Property Act held that Capital Gain was taxable in the year the development agreement giving vacant possession to the developer has taken place
- Charanjit Singh Atwal Vs ITO 448/CHD/2011 (Chd)

JV Agreement & Capital Gain

- S Ranjit Reddy Vs DCIT 35 Taxman.com 415 (Hyd)
Where no progress or construction had taken place since the date of signing of development agreement it could not be held that the developer had performed its obligation as envisaged in S 53A of the Transfer of Property Act. Therefore, no transfer of asset.
- M/s Fibars Infratech Pvt. Ltd Vs ITO 477/HYD/2012
- Potla Nageshwar Rao Vs DCIT (AP) ITA No. 245 of 2014



THANK YOU

CA VIPIN K GUJARATHI