

# Controversies in Taxation of Real Estate Transactions

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# Scope

- Letting out of Real Estate
- Tenancy Rights
- Issues in Development Agreements
- Sec 43 CA and Sec 194IA
- Sec 45(5A) and Sec 194IC
- Sec 50C/56
- Issues in Capital Gains
  - Quantification
  - Exemptions
- Issues of Redevelopment specific to Co-Operative Society
- Accounting Standards and ICDS

# Income from House Property

- Taxed as a consequence of ownership
- Owner - defined in 27(2) -for the purpose of Section 22 to 26
- Does not mean only legal ownership

# Concept of “Ownership” Practical Application

- In hands of lessee or a tenant of a property
- In hands of member of CHS - taxed u/s 22 –
  - Ref. No. F 4/28/68 WT dated 27th Jan 1969
  - Implications for other matters where Society sells TDR / FSI
- In the hands of builder/developer holding completed premises as stock-in-trade

# Section 23(5)

- Property consisting of building or land appurtenant thereto
- Held as stock in trade
- Property not let out during the previous year
- Annual Value for a period up to one year from the end of the financial year in which the certificate of completion of construction of the property is obtained from the competent authority shall be taken as NIL.

# Issues

- If a company, incorporated with object of developing and exploiting property, hires out premises,
  - would income be business income?
- If building to be let out is of a special nature, e.g. cold storage
  - would it make a difference to the head of chargeability?
- Property is let out & certain additional services are also rendered,
  - would it be possible to allocate the revenue between two heads or would it be taxed under one head?
- If business assets are let out for a temporary period, what would be the head of taxability?

# What is a Development Agreement?

- When a developer of the land, acquires the right in respect of the property only for a limited period and for the purpose of construction thereon he is expected to convey the property and interest in the land to the ultimate buyers of the property on or before completion of the project, the instrument devised for this type of activity is a development agreement.

# Point of Accrual of Income in the hands of Landowner

- Date of execution of the Development Agreement
- Date of handing over of possession of land to developer
- Date of handing over of possession of land to developer together with a General Power of Attorney authorizing him to transfer his share of property.
- Date on which the first sale deed is executed for undivided share in land for the developer's share.



# Issues

- If the property is a bundle rights, is it possible to transfer different parts of that bundle at different points of time?
- If the agreement of development enables the developer to obtain control of the immovable property by grant of an irrevocable authority or license, then even the date of agreement of development will constitute the date of transfer of the capital asset.

# Issues

- Is the provision of Sec 53A of Transfer of Property Act applicable to development agreements? ( CIT vs. Balbir Singh Maini) (398 ITR 531)
- What is the meaning of term “possession” in the context of Sec 2(47)(v)? Whether granting of ‘license’ to the developer to enter upon the property to carry development activity has the effect of enabling the enjoyment of property as contemplated in Sec 2 (47)(vi)?
- What is the impact of Explanation 2 to Sec 2(47) inserted by Finance Act, 2012 w.e.f. 01/04/2012?

# Issues

Owner of bungalow/ building enters into an agreement with builder - bungalow is demolished and other structure erected thereon. Owner or builder or both acquire rights to dispose of some of the flats in the newly constructed premises. 4 Flats are given to Owner for own residence.

Issues-

- Sale of Land or Bungalow ?
- Temporary Alternate Accomodation (TAA)
- Compensation
- Accrued FSI arising from amendment in Development Rules
  - Implications if sold for separate consideration Building & Development rights
  - Is it a right or merely a relaxation in restriction ?

# Transfer of Tenancy Rights

- Merger of inferior right into superior right - whether CG liability arises
  - ❖ CIT Vs. Dr. D. A. Irani 234 ITR 850 (Bom)
- Applicability where redevelopment of tenanted premises takes place - by destruction of old building
- Tenant receiving cash compensation –
  - ❖ Relief u/s 54 /54F /54EC ?
- Manner of receipt of cash compensation –
  - ❖ can whole or part of it be treated as capital receipt ?
- Tenant receiving
  - ❖ compensation + ownership premises
  - ❖ compensation + continuation of tenancy
- Tenant surrendering tenancy & given a shop of equal area in exchange and the surrendered premises is
  - residential premises
  - residential premises used for personal business by the tenant
  - commercial premises

# Transfer of Tenancy Rights...

- In normal Re-development the sequence of events is
  - Execution of the agreement & payment of part consideration / compensation
  - Tenant vacates tenanted premises & hands over possession to developer
  - Developer provides temporary alternate accommodation till re-development is over
  - On completion of the re-development tenant is allotted ownership accommodation in newly constructed property.
  - On the date of allotment of the reconstructed property, the original tenancy is determined and the ownership comes into existence. Till such date the original tenant is also responsible for making payment of rent to the original land lord.
- What would be date of the transfer of tenancy rights.?
  - Date of surrender of possession or
  - Date of allotment of re-developed property?
- What would be the period of holding
  - if tenancy is extinguished and newly constructed premises is given on ownership
  - if tenancy is initially converted into ownership and then exchanged for new flat

# Conversion

## Land converted into Plots & Sold

- Whether large piece of land converted into several small plots in an organized manner and approval of local authority obtained - is it adventure in the nature of trade ?
- CITvs. Sushila Devi Jain \_ - (2003) 259 ITR 671 (P&H)
- CITvs. Shashi Kumar Agrawal - (2003) 131 TAXMAN 823 (All)
- Conversion from Agricultural to N.A. Land
- Conversion into Stock-in-Trade
- Whether deemed conversion to stock-in – trade ? Or is it better to do so?
- Whether investment to save CGT permissible ?
- Time for investment in Bonds – from date that the stock-in-trade is sold – Cir. 791 Dt 2nd June 2000

# Section 43 CA

- Consideration received or accruing
- as a result of transfer of an asset other than capital asset
- being land or building or both
- is less than assessed or assessable stamp duty value.
- Value so adopted or assessable shall be deemed to be the value of consideration for computing profits and gains

# 43CA Contd.....

- Provisions of Sec 50C to apply to the extent applicable for purposes and determination of value adopted in assessed or assessable
- If date of agreement fixing consideration is anterior to date of registration, value assessed/assessable to be determined with reference to that date provided consideration/part is received through banking channels
- Relief if the stamp duty value assessed or assessable does not exceed 105% of the consideration.



# Issues

- Date of Application
- Will the definition of 'transfer' u/s 2(47) apply?
- If major/entire consideration has passed impact thereof

# Issues in section 194IA

- Does the provision apply to transactions which have taken place prior to 01.06.2013 but payments have occurred after that period.
- Does the limit of Rs. 50 lakhs apply qua property or qua owner?

# Section 45(5A)

- Notwithstanding anything contained in sub-section(1)
- Where capital gains arises to an assessee, being individual of HUF
- From transfer of capital asset being land or building or both
- Under a specified agreement
- Capital gains shall be chargeable in the previous year
- In which certificate of completion for the whole or part of the project is issued by the competent authority.
- Stamp duty value of the share owner at the date of issue of the certificate
- As increased by the consideration received in cash
- Deemed to be full value of consideration.

# Issues in 194IC

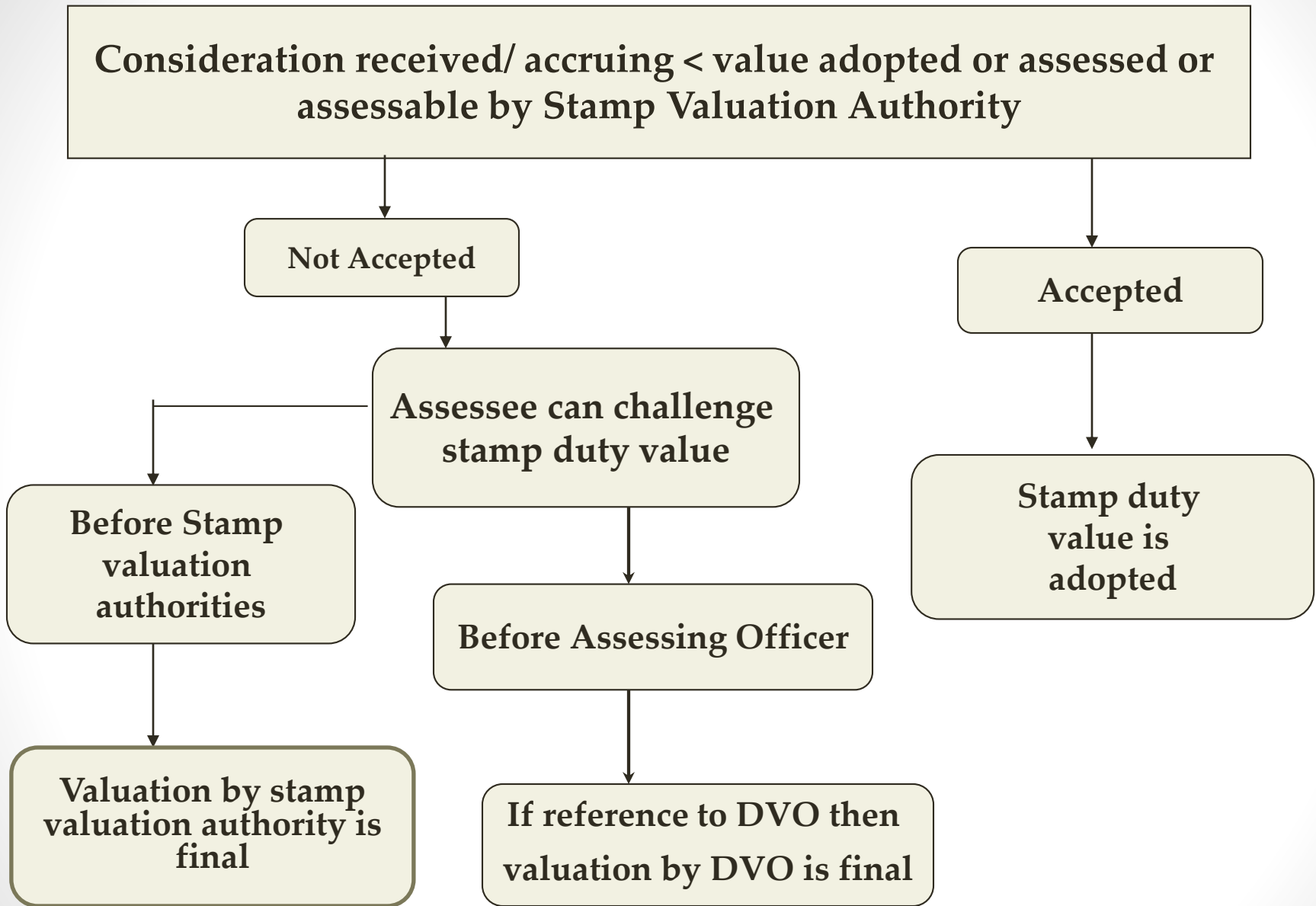
- Notwithstanding anything contained in section 194-IA
- Any person responsible for paying to a resident
- A sum by way of consideration, not being consideration in kind
- Shall at the time of payment or credit deduct tax @ 10%

# Issues in 45(5A) and 194-IC

- Will it apply to transaction which had been executed prior to coming into force of the amendment but transfer as is understood in section 2(47) has not taken place.
- If the share of the land owner is only one flat and the rest is monetary consideration, will the provision apply?
- If the project completion certificate for a part of the project is received, but the share of the landowner is in the part yet to be completed, what is the consequence
- What will be the position in regard to credit of the tax deducted at the time of the payment, where charge to capital gains has not yet arisen

# Section 50C

- Purpose of introduction
- Scope and ambit
- Nature of provision
  - Substantive
  - Machinery
  - Deeming fiction
- Relief in regard to anterior agreement if the the stamp duty value does not exceed 105% of Consideration.



# Reference to Valuation Officer

## S.50C(2)

- Where the Assessing Officer does not agree with the value as submitted by the valuation provided by the assessee, or he is seeking to adopt an increased valuation; he cannot unilaterally substitute a different value
- Reference to DVO is mandatory
- Rules reg. Value to be adopted
- Rules of Equity to be observed



# Applicability of Section 50C

- Does not apply to transfer of stock in trade
  - *Inderlok Hotels Pvt Ltd vs ITO (2009) 32 SOT 419 (Mum)*
- May not apply to transfer of leasehold rights
  - *Atul G. Puranik vs. ITO (2011) 132 ITD 499 / 11 ITR 120 (Trib.) (Mum.)*

# Issues

- Does Land & Building include
  - Transfer of Tenancy Rights
  - TDR / FSI ?
  - Grant of Development Rights (*Arif Akhtar Husain vs. ITO (2011) 59 DTR 307 (Mum.)(Trib.)*)

# Sec 50C : Issues

- Transaction giving rise to the transfer
  - Agreement of Sale & later Conveyance
- Applies only to capital asset & not to stock in trade
  - What if assessee converts asset into stock in trade and thereafter sells it
- Is 50 C a substantive provision or machinery provision ?
  - burden of proof
  - Sale to PSU / Local Body ?
- Investment required U/s. 54 / 54 E / 54 EC
  - W.r.t. consideration in the deed of sale or per SVA valuation?
- What if effected via transfer of Co. shares ?

# Section 56(2)(x)

Where any person receives in any previous year, from any person or persons on or after the 1st day of April 2017-

- Any immovable property-

How transferred	Chargeable to tax as income from other sources
Without consideration, and the stamp duty value exceeds fifty thousand rupees	The stamp duty value of such property
For a consideration which is less than the stamp duty value by Rs.50000	The stamp duty value of such property as exceeds such consideration.  Relief if stamp duty value exceeds consideration by 5% or less

# Section 49(4)-Cost of acquisition

- Where the capital gain arises from the transfer of a property, the value of which has been subject to income tax under clause (vii) or clause (viia) or clause (x) of subsection (2) of Section 56, the cost of acquisition of such property shall be deemed to be the value which has been taken into account for the purposes of the said clause (vii), (viia) or (x)

# Exemptions

## Sec 54 Issues

- Can one residential house consist of more than one residential units
- Position when property consisting of multiple residential units transferred- can the owner claim section 54 in respect of all units separately ?
- What is the meaning of “purchase”
- Will it require letter of allotment/agreement/registered document?
- Meaning of ‘constructed’
- How far date of completion sacrosanct

# Sec 54F : Issues

- Can it be claimed simultaneously with Sec 54?
- Two restrictions in proviso (ii) and (iii)
- Not to be lost sight of

# Tax Issues in regard to Co-operative Housing Societies

- Ownership of land and building of co-operative society
- That of Society  
OR
- That of Member

## Redevelopment and Tax Issues

- Redevelopment Issues:
  - Concept of FSI (Floor Space Index)
  - Concept of TDR (Transferable Development Rights)
- Tax Issues:
  - Unutilized FSI at the stage of conveyance of property of society
  - Incremental arising thereafter



# TDR

- TDR received by the society surrendering plot or part therefore
- TDR Compensation received by the society on whose property TDR is utilized

# Redevelopment Issues

- Redevelopment Issues Qua Society
  - Facilities by way of Community hall/garden etc.
  - Corpus Fund
- Redevelopment Issues Qua Member
  - Exchange of old unit for new unit
    - a) Same area
    - b) Additional area
    - c) Lesser area
- Rental during the period and redevelopment
- Monetary compensation for inconvenience etc.

# Compensation received by Members

- For surrender of FSI
- For TDR in case society surrendering plot
- In case of society permitting use of TDR

# Accounting Standards

- Accounting Standards (AS)
  - Whether AS 7 (Construction Contract) or AS 9 (Revenue Recognition) is applicable for Real Estate Transaction
  - EAC of ICAI in its opinion clarified that the revised AS-7 was not applicable for real estate developers.
  - The committee further noted that the principles laid down in para 10 and para 11 of AS 9 should be applied for recognizing revenue in case of real estate developer.

# ICDS

- The CBDT has notified 10 ICDS . However, none of the ICDS specifically covered within its ambit taxability of real estate transactions.
- The CBDT has released the Draft ICDS on Real Estate Transaction in May, 2017
- The draft ICDS is based on the Guidance note Real Estate Transactions issued by the ICAI.
- Thus the position is that today there is neither an AS or ICDS specifically applicable to real estate developers.

Thank You