CAPITAL GAIN

Presentation by

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CAPITAL GAIN

Chapter-IV

Computation of Total Income

E- Capital Gain

Section - 45 to 55A

Income Tax Act 1961

LEGISLATIVE BACKGROUND OF CAPITAL GAINS IN INDIA

- Indian Income-tax Act, 1922 'the 1922 Act', capital gain was not taxable until 1947
- It was made taxable by amendments made by Act XXII of 1947 provided that the tax shall be payable by an assessee under the head "Capital gains" in respect of any profits or gains arising from the sale, exchange or transfer of a capital asset effected after 31st March, 1946,
- **The Indian Finance Act, 1949,** virtually abolished the levy and restricted the operation of **section 12B** to 'capital gains' arising before the 1st April, 1948.
- **J.N. Duggan vs CIT, ... on 7 September, 1951 (Bombay High Court) – Challanging** validity of Act XXII of 1947 subject to Section 12B of the Indian Income-tax Act was ultra vires of the Central Legislature.
- **The Finance (No. 3) Act, 1956**, reintroduced the 'capital gains' tax. In the Income-tax Act, 1961 (the provisions of section 45 which are in *pari materia* the same as section 12B of the 1922 Act, have been retained.
- **ACIT v. Dr. B. V. Raju [2012] 135 ITD 1 (Hyd.).**

Finding : the following conditions are necessary:,

i) There must be a capital asset

ii) There should be a transfer of the capital asset other than an exempted transfer

iii) The capital asset should be something which can be acquired by paying a cost *i.e.* the cost of acquisition of the capital asset should be determinable.

iv) There must be accrual of consideration for transfer of capital asset.

Meaning

- "The word 'income' has special meaning with reference to income-tax. It *inter alia* includes gains derived on transfer of a capital asset."
- "the amount by which the sale price of a capital asset, net of any expense incurred in connection with the sale of the asset, exceeds the acquisition price of the capital asset". (As per **Direct Taxes Code** in August 2009)
- **Rule - 1A(g), Wealth-tax Rules, 1957 definitions**

  "investment company" means a company whose gross total income **consists mainly of income** which is chargeable to income-tax under the heads "Interest on securities", "Income from house property", **"Capital gains**" and "Income from other sources".

Section 45(1)

- Any profits or gains arising from the transfer of a capital asset effected in the previous year shall, save as otherwise provided in sections 54, 54B, 54D, 54E, 54EA, 54EB, 54F, 54G and 5 4H, be chargeable to income-tax under the head "Capital gains", and shall be deemed to be the income of the previous year in which the transfer took place.

Section -45(1A)

- Notwithstanding anything contained in sub-section (1), where any person receives at any time during any previous year any money or other assets under an **insurance from an insurer on account of damage to, or destruction** of, any capital asset, as a result of—

(*i*) flood, typhoon, hurricane, cyclone, earthquake or other convulsion of nature; or

(*ii*) riot or civil disturbance; or

(*iii*) accidental fire or explosion; or

(*iv*) action by an enemy or action taken in combating an enemy (whether with or without a declaration of war),

then, any profits or gains arising from receipt of such money or other assets shall be chargeable to income-tax under the head "Capital gains" and shall be deemed to be the income of such person of the previous year in which such money or other asset was received and for the purposes of section 48, value of any money or the fair market value of other assets on the date of such receipt shall be deemed to be the full value of the consideration received or accruing as a result of the transfer of such capital asset.

Explanation.—For the purposes of this sub-section, the expression "insurer" shall have the meaning assigned to it in clause (*9*) of section 2 of the Insurance Act, 1938 (4 of 1938).

- **Insurance claim received in respect of capital asset destroyed by ACT OF GOD etc.**
- This provision **will not apply** where the insurance claim is against **loss by way of theft, burglary**, etc.
- However, because of the block asset concept of claiming depreciation on plant and machinery and other depreciable assets, insurance compensation will go to reduce the block value of assets in respect of which such compensation is received. Any replacement of such depreciable asset will increase the block value subsequently. Hence, the **application of section 45(1A) may have impact on resultant short-term capital gain only where the compensation exceeds the block value of assets.** Where the compensation does not exceed the block value but all the assets comprised in the block cease to exist then there could be short-term capital loss.
- Where the insurance compensation is towards **repairing the damages to the asset** then the amount received will be applied towards reinstating the capital asset to its original condition. Any **surplus arising from such insurance compensation after repairing the damages** to the asset is not taxable as held in ***CIT* v. *Sirpur Paper Mills Ltd.* [1978] 112 ITR 776 (SC). Followed in CIT *vs. LOYAL TEXTILE MILLS LTD.*** *(2006) 284 ITR 0658 (Mad)*

Section 45(2A)

- Where any person has had at any time during previous year **any beneficial interest in any securities**, then, any profits or gains arising from transfer made by the depository or participant of such beneficial interest in respect of securities shall be chargeable to income-tax as the income of the beneficial owner of the previous year in which such transfer took place and shall not be regarded as income of the depository who is deemed to be the registered owner of securities by virtue of sub-section (1) of section 10 of the Depositories Act, 1996, and for the purposes of—

  (*i*) section 48; and

  (*ii*) proviso to clause (*42A*) of section 2,
- the cost of acquisition and the period of holding of any securities shall be determined on the basis of the first-in-first-out method.
- *Explanation*.—For the purposes of this sub-section, the expressions "beneficial owner", "depository" and "security" shall have the meanings respectively assigned to them in clauses (*a*), (*e*) and (*l*) of sub-section (1) of section 2 of the Depositories Act, 1996.

Section-45(3)

The profits or gains arising from the transfer of a capital asset **by a person to a firm or other association of persons or body of individuals** (not being a company or a co-operative society) in which **he is** or **becomes a partner or member, by way of capital contribution** or otherwise, shall be chargeable to tax as his income of the previous year in which such transfer takes place and, for the purposes of section 48, the amount recorded in the books of account of the firm, association or body as the value of the capital asset shall be deemed to be the full value of the consideration received or accruing as a result of the transfer of the capital asset.

- **PCIT v. Dr. D. Ramamurthy (2019) 410 ITR 236 (Madras) (Revenue SLP (CIVIL) DIARY NOS. 29239 OF 2018 DISMISSED DATED 14.09.2018)**
  Partnership firm was converted into a private company limited by shares - Before private limited company was constituted, assets of partnership firm were revalued . For purpose of computing capital gains under section 45(3), value of assets recorded in books of firm on date of transfer would be deemed to be full value of consideration received or accrued as a result of transfer.

- **Mafatlal Holdings Ltd. v. CIT [2004] 85 TTJ 821 (Mum. - Trib.)** When a partner contributes a capital asset into the firm the amount recorded in the books shall be taken as the sale consideration. The credit for the contribution need not necessarily be in the capital account of the contributing partner.

- **Prakash Chand Daddha v. ITO [1983] 17 TTJ 230 (Jp. - Trib.)**
  Where the goods are transferred to the capital account of the firm being the regular stock-in-trade of the assessee, the position is different. In such a case, it would be covered by the **exception provided in section 2(14)(i)** and, thus, no capital gain will arise at the time of contribution of stock in trade as capital contribution.

Section 45(4)

The profits or gains arising from the transfer of a capital asset by way of **distribution of capital assets on the dissolution of a firm** or other **association of persons** or body of individuals (not being a company or a co-operative society) or otherwise, shall be chargeable to tax as the income of the firm, association or body, of the previous year in which the said transfer takes place and, for the purposes of section 48, the fair market value of the asset on the date of such transfer shall be deemed to be the full value of the consideration received or accruing as a result of the transfer.

- The provisions of section 45(4) would apply to the financial year in which the capital assets of the firm are actually distributed on dissolution of the firm. A mere dissolution of the firm without distribution of assets is not covered by section 45(4).

- **CIT v. A.N. Naik Associates [2004] 265 ITR 346 (Bom.)**

  When a partner retires from the firm and he is given an asset owned by the firm towards settlement of his dues, provisions of section 45(4) are applicable.
- **Dy. CIT v. G.K. Enterprises [2003] 131 Taxman 181 (Mad. - Trib.) (Mag.)**
- **Asstt. CIT v. Sohrabji Khanna & Co [2003] 133 Taxman 112 (Asr. - Trib**.)

  When some of the partners retire from the firm and the other partners continue the firm, the provisions of section 45(4) do not apply.
- **ITO v. Ramesh M. Shah [2004] 2 SOT 558 (Mum. - Trib.)**

  Where assets revalued at the time of retirement of a partner, there is no capital gain implication on the firm.

Section-45(5) r/w 10(37)

"COMPENSATION ON COMPULSORY ACQUISITION INCLUDING ENHANCEMENT IN COMPENSATION IS TAXABLE ONLY ON ACTUAL RECEIPT BASIS."

Notwithstanding anything contained in sub-section (1), where the capital gain arises from the transfer of a capital asset, being a **transfer by way of compulsory acquisition under any law, or a transfer the consideration for which was determined or approved by the Central Government or the Reserve Bank of India, and the compensation or the consideration** for such transfer is enhanced or further enhanced by any court, Tribunal or other authority, the capital gain shall be dealt with in the following manner, namely :—

(*a*) the capital gain computed with reference to the **compensation awarded** in the first instance or, as the case may be, the consideration determined or approved in the first instance by the Central Government or the Reserve Bank of India shall be chargeable as income under the head "Capital gains" of the previous year in which such compensation or part thereof, or such consideration or part thereof, was first received; and

(*b*) the amount by which the compensation or consideration is enhanced or further enhanced by the court, Tribunal or other authority shall be deemed to be income chargeable under the head "Capital gains" of the previous year in which such amount is received by the assessee :

Provided that any amount of compensation received in pursuance of an interim order of a court, Tribunal or other authority shall be deemed to be income chargeable under the head "Capital gains" of the previous year in which the final order of such court, Tribunal or other authority is made;

(*c*) where in the assessment for any year, the capital gain arising from the transfer of a capital asset is computed by taking the compensation or consideration referred to in clause (*a*) or, as the case may be, enhanced compensation or consideration referred to in clause (*b*), and subsequently such compensation or consideration is reduced by any court, Tribunal or other authority, such assessed capital gain of that year shall be recomputed by taking the compensation or consideration as so reduced by such court, Tribunal or other authority to be the full value of the consideration.

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

(*i*) in relation to the amount referred to in clause (*b*), the cost of acquisition and the **cost of improvement shall be taken to be *nil*;**

(*ii*) the provisions of this sub-section shall apply also in a case where the transfer took place prior to the 1st day of April, 1988;

(*iii*) where by reason of the death of the person who made the transfer, or for any other reason, the enhanced compensation or consideration is received by any other person, the amount referred to in clause (*b*) shall be deemed to be the income, chargeable to tax under the head "Capital gains", of such other person.

COMPULSORY ACQUISITION AND ACTUAL RECEIPT

- Section 45(5) says that capital gains arising on transfer by way of compulsory acquisition of a capital asset is chargeable to tax in the first instance as income of the previous year in which such compensation or consideration or part thereof is first received. Hence, if the acquisition of the asset was notified on 10-5-2015, the possession was taken on 16-8-2014, the award is made on 20-10-2017 and the compensation is first paid on 14-5-2018, the capital gain on the acquisition will first be brought to tax in the assessment year 2019-20 (*i.e.* based on actual receipt on 14-5-2018).
- Any subsequent enhancement of the amount of compensation/consideration will also be deemed to be the income under the head 'Capital gains' of the previous year in which such amount is received by the assessee.

section 10(*37*) deals with compulsory acquisition

section 10(*37*) deals with compulsory acquisition of agricultural land. Capital gains arising from the same is exempt if the following conditions are satisfied.

(a) The land must be situated in an area referred to in item (*a*) or item (*b*) of sub-clause (*iii*) of clause (*14*) of section 2 (*i.e.* the agricultural land falls within the definition of capital asset).

(*b*) The land was used for agricultural purposes by the HUF or individual or the parents of the assessee during the period of 2 years immediately preceding the date of transfer.

(c) The transfer is by way of compulsory acquisition under any law or a transfer the consideration for which is determined or approved by the Central Government or the Reserve Bank of India.

(d) The compensation or consideration is received on or after 1-4-2004.

DETERMINATION OF FINAL PRICE OF COMPENTATION IS NOT NECESSARY

- **Department cannot be asked to wait until the compensation or price payable is finally determined.**
- **where an assessee's undertaking is acquired by the Government, even if the assessee has disputed the quantum of compensation after receiving the amount awarded, capital gains can be assessed on the basis of the actual amount received without waiting for the final determination of compensation in appellate proceedings.**

- **CIT vs United Provinces Electric Supply Co (2000) 244 ITR 764 (SC)**

  Whether in case of acquisition of property under any law balancing charge under section 41(2) is taxable as income of business of previous year in which moneys payable became due - Held, yes - Whether section 41(2) nowhere provides that balancing charge would be taxable in year in which 'moneys payable' are determined finally by arbitrators or appellate authorities or such other authorities provided under the Acquisition Act - Held, yes - Assessee's business was acquired by Government - Compensation amount was determined and assessee received same - Assessee, however, disputed quantification of value of asset and resorted to arbitration proceedings which were still pending - Whether amount of compensation received was to be taxed in previous year of its receipt and additional compensation, if any, received would be taxable in year of receipt

- ***CIT* v. *Rohtak Textile Mills Ltd.* [1982] 138 ITR 195 (Delhi)**

  Section 45 of the Income-tax Act, 1961 - Capital gains - Chargeable as - Whether capital gains accrued in the years in which government took over certain electricity undertakings even though the price was not determined within those years - Held, on facts, yes

  Balancing charge - Certain electricity undertakings owned by assessee-company were taken over by Government - ITO treated it as a sale and brought profits to tax in the respective years of take over even though sale price had not been settled in those years - Tribunal accepted assessee's contention that no profits had accrued in those previous years in the absence of determination of price and deleted additions made by ITO on that account - Whether tribunal's action correct - Held, on facts, yes

- **CIT V Hindustan Housing and Land Development Trust (1986) 161 ITR 524** :
  - Where additional compensation awarded to the assessee has been made subject matter of appeal by the Government then such amount shall be taxable as capital gain only.
  - In the year in which additional compensation is received.
  - In the year in which the dispute is finally settled. Whichever is later.

- CIT vs Chet Ram (HUF), (2018) 400 ITR 23 (SC), CIT vs GovindbhaiMamaiya (2014) 367 ITR 498 (SC) and Smt. Premlata Purshottam Paldiwal vs CIT (2017) 84 com 317 (Bom), the it **was held that interest has to be taxed in the year of receipt and not to be spread over the years on actual basis and the enhanced compensation with interest thereon received under the interim order passed by the High Court in pending appeals relating to the land acquisition has to be assessed for tax not in the year in which the said amount had been received.**

OTHER ISSUES

- **Accrual of capital gains - Compensation on acquisition of land- exemption claimed in the year of receipts of compensation and subsequent thereof.**

  (2007) 295 ITR 444 (All) CIT vs. IQBAL AHMAD L/H OF LATE JULLAN

  Exemption under s. 54 for residential house—Compensation on acquisition of Land—Even though sub-s. (5) was inserted by the Finance Act, 1987, w.e.f. 1st April, 1988, this provision is only clarificatory in nature and has to be given retrospective effect—Necessary consequence which would follow is that the amount of compensation having been received in the previous year relevant to the asst. yr. 1985-86 could not have been treated as capital gains during the asst. yr. 1976-77—It is not disputed that the assessee have invested the amount in specified assets within the period provided under s. 54E—Assessee was therefore entitled to exemption.

- **Accrual of capital gains - Compensation received prior to award**

  CIT vs C. P. Lonappan and Sons **[2003] 132 TAXMAN 468 (KER.)**

  Capital gains - Year in which assessable - Assessment year 1992-93 - Whether in view of provisions of clause (a) of section 45(5), compensation received by an assessee in 'first instance' for compulsory acquisition of land by Government, refers to amount received pursuant to award passed by Collector and not amount received earlier to award - Held, yes - Whether, therefore, entire compensation received by assessee including amount received prior to passing of award is to be brought to capital gains tax in assessment year relevant to year of passing of award - Held, yes

Section 45(5A)

Finance Act, 2017 has introduced a new sub-section (5A) to section 45 of the Income-tax Act, 1961 with effect from A.Y. 2018-19

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 :

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 the 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.

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 the Government for the purpose of payment of stamp duty in respect of an immovable property being land or building or both.

(6) Notwithstanding anything contained in sub-section (1), the difference between the repurchase price of the units referred to in sub-section (2) of **section 80CCB and the capital value of such units shall be deemed to be the capital gains arising** to the assessee in the previous year in which such repurchase takes place or the plan referred to in that section is terminated and shall be taxed accordingly.

Explanation.—For the purposes of this sub-section, "capital value of such units" means any amount invested by the assessee in the units referred to in sub-section (2) of section 80CCB.

Objects of Section 45(5A)

- In case Joint Development Arrangement of real estate, when land owner being an individual or HUF contributes his land for development and marketing of the real estate project on such land by the developer, the determination of the year of taxability and the amount of sale consideration remain contentious issues particularly when consideration is received by the land owner as certain share of developed land or building in the real estate project whether with or without payment of part of the consideration in cash.
- That the execution of Joint Development Agreement between the land owner and the developer triggers the capital gains tax liability in the hands of land owner since possession of land is usually handed over to the developer along with the rights of development and selling of the project on such land in **part performance of the contract**.
- Assessee being the land owner does not accept this position and also does not have the availability of liquidity to discharge the tax liability at the time of execution of joint development agreement. Land owner pleads that under the joint development agreement, possession is though handed over but it is not in the nature of transferring of ownership rights, and therefore it cannot be said that transfer of land takes place at the time of execution of joint development agreement.
- **Mrs. Aarti Sanjay Kadam vs ITO [2018] 172 ITD 362 (Mumbai)**

  Where as per terms of development agreement entered between assessee, owner of land, and developer, for construction of a housing project, assessee would not be paid any monetary consideration but would receive built-up residential area on completion of project, it could not be said that capital gain had accrued in year of agreement.

  As per terms of development agreement, assessee would not be paid any monetary consideration but would receive 35 per cent of built-up residential area on completion of housing project - Assessing Officer considering value of land as sale consideration at hands of assessee determined long term capital gain during relevant assessment year when agreement was signed - Whether since assessee would receive her share in built-up area of project on completion of project and there was no consideration received in impugned assessment year, it could not be said that capital gain had accrued in relevant assessment year when agreement was signed –
- **K. Vijaya Lakshmi, Hyderabad vs. ACIT [2018] 169 ITD 597 (Hyderabad-Trib.)**

  Where, under a development agreement, assessee permitted developer to enter premises of its plot to do all necessary things for construction of apartments, it could be said that assessee did hand over possession of its plot to developer and, thus, there was 'transfer' as per section 2(47) and same was taxable as capital gain in year in which agreement was entered into.

  That assessee was under the bona fide impression that capital gains did not arise at the time of entering into the development agreement. He also argued that in the instant case, the possession in the property under consideration had not been transferred to the developer and the possession of the impugned land was continuously enjoyed by the assessee. Therefore, no capital gain arose in the year under consideration. He further contended that in view of the amended provisions of section 45(5A) by the Finance Act, 2017, the taxation of capital gain in case of Joint development agreement arises in the year in which the land owner receives his share of property from the builder and same was applicable retrospectively. Hence, there was no capital gain arise to assessee in the year under consideration as there was nothing received from the builder.
- **Tamilnadu Brick Industries *vs.* ITO ITA NO. 744 (Chnn) OF 2017**

  Where pursuant to joint development agreement entered into by assessee with a developer, it was agreed that 60 per cent of constructed area would be retained by developer and a General Power of Attorney (GPA) was also executed in terms of which developer was conferred complete rights to deal with landed property in any manner, it would amount to transfer of property within meaning of section 2(47)(v)

CERTAIN CONTROVERSIAL ISSUES REGARDING SECTION 45(5A)

- **Whether profit on sale of developed real estate shall be in the nature of business income or capital gain.**
- **In case Stamp Duty Value of developed real estate is higher than its Fair Market Value – Whether provision of section 50C is attracted**
- Under sub-section (5A) of section 45, no such provision has been made to substitute fair market value as sale consideration if fair market value of the asset is less than the stamp duty value. A question may arise as to whether in such a case provision of sub-section (2) of section 50C can also be applied. This may be a contentious issue, provision of sub-section (2) of section 50C can be made applicable even when capital gain is chargeable to tax as per the provision of section 45(5A) .
- **In case agricultural land, not covered within the definition of *capital asset* u/s 2(14) is contributed for joint development – Whether capital gain liability shall be attracted?**
- **"**the nature of agricultural land in such a case is to be seen as on the date of transfer of land by land owner to the developer. In case land transferred by land owner to the developer was rural agricultural land in terms of section 2(14) of the Act at the time of transfer of land, it is not a capital asset. In the case of transfer of rural agricultural land, there is no transfer of capital asset by land owner. Provision of section 45(5A) is applicable when there is transfer of capital asset. Therefore, in such a case there should not arise any capital gain tax liability in the hands of the land owner.**"**
- **Non-availability of liquidity to discharge tax liability not tenable plea to defer taxability of capital gain.** at the end of land owner to defer the tax liability of capital gain. The land owner shall be liable to pay capital gain tax by taking the stamp duty value of his share in developed real estate as full value of consideration in the year in which certificate of completion of the project is issued by the competent authority.
- **In case land has been transferred or conveyance deed has been executed by land owner in favour of developer in earlier year** The mode of transfer may be in any manner even by way of execution of conveyance deed and/or transfer of title deed by the land owner in favour of the developer. Even in such situation capital gain shall be attracted in the year in which certificate of completion for the whole or part of the project is issued by the competent authority.

Meaning of Capital Asset [Sec 2(14)]

Capital Asset is defined **to include:**

a) Any kind of property held by an assessee, whether or **not connected with business or profession** of the assessee.

b) Any securities held by a FII which has invested in such securities in accordance with the **regulations made under the SEBI Act**, 1992.

However, the term 'capital asset' shall **exclude the following**

a) Stock-in-trade, consumable stores, raw materials held for the purpose of business or profession;

b) Movable property held for personal use of taxpayer or for any member of his family dependent upon him.

However, jewellery, costly stones, and ornaments made of silver, gold, platinum or any other precious metal, collections, drawings, paintings, sculptures or any work of art **shall be considered as capital asset even if used for personal purposes;**

c) Specified Gold Bonds and Special Bearer Bonds;

d) Agricultural Land in India, not being a land situated:

a. Within jurisdiction of municipality, notified area committee, town area committee, cantonment board and which has a population not less than 10,000;

b. Within range of following distance measured aerially from the local limits of any municipality or cantonment board:

i. not being more than 2 KMs, if population of such area is more than 10,000 but not exceeding 1 lakh;

ii. not being more than 6 KMs , if population of such area is more than 1 lakh but not exceeding 10 lakhs; or

iii. not being more than 8 KMs , if population of such area is more than 10 lakhs.

e) Deposit certificates issued under the Gold Monetisation Scheme, 2015

Capital Assets

POSITIVE LIST of items specifically included in the definition of 'capital asset'

i) Securities held by FIIs

ii) Jewellery (except those held as stock-in-trade)

iii) Archaeological collections (except those held as stock-in-trade)

iv) Drawings (except those held as stock-in-trade)

v) Paintings (except those held as stock-in-trade)

vi) Sculptures (except those held as stock-in-trade)

vii) Any work of art (except those held as stock-in-trade)

NEGATIVE LIST of items specifically excluded from the definition of 'capital asset' and is not regarded as 'capital asset'

i) Any stock-in-trade, consumable stores or raw materials held for the purposes of his business or profession,

ii)Personal effects other than Jewellery, Archaeological collections, drawings, paintings, sculptures and any work of art,

iii) Agricultural land in India except urban agricultural land,

iv) Deposit certificates issued under the Gold Monetisation Scheme, 2015.

THE **CHARACTER OF THE ASSET** AT THE **TIME OF TRANSFER** ALONE IS RELEVANT **AND AT NO OTHER POINT OF TIME** TO DETERMINE THE CAPITAL GAINS TAX LIABILITY.

- **M. Venkatesan v. CIT [1983] 144 ITR 886 (Mad).**

  Assessee was owner of agricultural lands—Assessee selling the same to urban co-operative building society on 4th March, 1970—As per the amended definition of capital asset under s. 2(14)(iii) which was brought in force w.e.f. 31st March,1970 the agricultural lands situated within municipal limits are brought under the ambit of capital asset—The character of the asset at the time of transfer alone matters—Assessee was liable for capital gains tax.

- **A.R. Dahiya v. Asstt. CIT [2004] 141 Taxman 449 (Punj. & Har.)**

  When the land in question was treated as agricultural land not falling within the definition of "capital asset" in the year when the land was compulsorily acquired, Revenue cannot be permitted to treat it as a capital asset in the year in which enhanced compensation has been received and hence, the additional compensation could not be assessed as capital gain under s. 45(5)(b) of the Act.

- **ITO vs. CHAMAN LAL NAGPAL [2007] 102 TTJ 890 (Amritsar Trib)**

  Agricultural land of the assessee being situated outside the municipal limits and the area was not notified in this behalf at the time of compulsory acquisition of the land, it was not a capital asset within the meaning of s. 2(14) and, therefore, **enhanced compensation** received by the assessee for the acquisition of land cannot be charged to tax under s. 45(5).

- **PYARIBAI K JAIN vs. ACIT(2019) 175 ITD 177 (Mumbai-Trib)**

  When additional compensation in form of land received by assessee is treated as non-taxable because of nature of land acquired in year of acquisition, and also said additional compensation partakes nature of agricultural income, cost of said land when it is subsequently transferred should be determined as on date of receipt of additional compensation for purpose of computation of capital gain.

Period of holding to Capital Assets

A) Long Term Capital Asset

Any capital asset held by the taxpayer for a period of more than **36 months** immediately preceding the date of its transfer will be treated as long-term capital asset. However, in respect of certain assets like shares (equity or preference) which are listed in a recognised stock exchange in India (listing of shares is not mandatory if transfer of such shares took place on or before July 10, 2014), units of equity oriented mutual funds, listed securities like debentures and Government securities, Units of UTI and Zero Coupon Bonds, the period of holding to be considered is 12 months instead of 36 months

Note: 1) With effect from AY 2017- 18, period of holding to be considered as 24 months instead of 36 months in case of **unlisted shares of a company,**

2) With effect from A.Y. 2018-19, period of holding to be considered as 24 months in instead of 36 months in case of immovable property being land or building or both.

B) **Short Term Capital Asset**

Any capital asset held by the taxpayer for a period of **not** more than 36 months immediately preceding the date of its transfer will be treated as short-term capital asset. However, in respect of certain assets like shares (equity or preference) which are listed in a recognised stock exchange in India (listing of shares is not mandatory if transfer of such shares took place on or before July 10, 2014), units of equity oriented mutual funds, listed securities like debentures and Government securities, Units of UTI and Zero Coupon Bonds, the period of holding to be considered is 12 months instead of 36 months Note: 1) With effect from Assessment Year 2017- 18, period of holding to be considered as 24 months instead of 36 months in case of unlisted shares of a company, 2) With effect from A.Y. 2018-19, period of holding to be considered as 24 months in instead of 36 months in case of immovable property being land or building or both.

- *Bharti Gupta Ramola* v. *CIT* [2012] 20 taxmann.com 762, the Delhi High Court held that the **holding period** of a capital asset (36 months/24 months/12 months) to be computed as under:

i) **Holding period of capital asset u/s 2(*42A*) (36 months/24 months/12 months) to be reckoned in calendar months by including both date of its acquisition and date of its transfer and without excluding even a fraction of a day.**

ii) The term 'month' **has not been defined** in the Act and, therefore, 'month' would have to be understood in the sense of 'calendar month' as defined in section 3(35) of the General Clauses Act, 1897.

iii) Period of 12 calendar months **would begin on the day when the assessee became the holder of the asset and end one day before in the relevant calendar month, next yea**r. Thus, if an assessee acquires an asset on 2nd January in a preceding year, the period of 12 months would be complete on 1st January, next year and not on 2nd January. This position will apply to all cases, except when an asset is transferred/purchased on 1st January. In such cases, the period of one year or 12 months would expire and would be complete on 31st December in the same year.

iv) There is nothing in section 2(*42A*) to show that the time period would not include fraction of a day.

BUSINESS INCOME vs CAPITAL GAINS

- **That income earned by assessee huf as a partner of partnership firm from sale of goodwill and trademark of firm was taxable as capital gain.**

  PCIT vs Prakashchandra S Soni, HUF , [2019] 107 taxmann.com 86 (Guj.) [*SLP dismissed by Apex Court in* DIARY NO (S). 10085 OF 2019 DATED- 26.04.2019

  Capital gains - Chargeable as (Sale of goodwill) - Assessee H.U.F. was a partner in firm - During relevant year, partnership firm sold its trademark and goodwill and **assessee's share was credited in its books of account** - During relevant year, assessee filed its return wherein income from sale of goodwill was declared as capital gain - Assessing Officer opined that said income was taxable as business income - Assessing Officer also passed a penalty order under section 271(1)(c) - Tribunal accepted assessee's plea that amount in question was taxable as capital gain - Tribunal also set aside penalty order - High Court upheld Tribunal's order.

- **SALE OF JEWELLERY**
- **CIT vs Manna Lal Normal Kumar Surana 64 ITR 116 (Raj)**

Profit on sale of jewellery, precious stone, etc.—Assessee did not carry on any business in jewellery, precious stone, etc.—Asset in question was treated as capital asset—Unless the asset is converted into stock-in-trade, there is no question of treating the profit on sale of such item as business profit—Asset in question was treated as capital asset—Tribunal was justified in holding that gain resulting from such sale was not assessable as business profit—No interference called for.

BUSINESS INCOME vs CAPITAL GAINS

- **SALE OF AGRICULTURAL LAND**

i) CIT vs S.K. Kaintal (2009) 231 CTR 531 (Punjab and Haryana)

Land sold by the assessee after holding it for a period of two decades—During this period of two decades, assessee continued to use the said land for agricultural purposes—Even for the relevant assessment year assessee has declared agricultural income of Rs. 2,34,000—Further, there is no material on record to suggest that the assessee effected any kind of improvement on the land so as to sell the same at a higher price—Therefore, the earning from the sale of land is to be treated as a capital gain and not "Profits and gains of business or profession"

G. Venkataswami Naidu & Co. vs. CIT (1959) 35 ITR 594 (SC) and Raja Bahadur Kamakhya Narain Singh vs. CIT (1970) 77 ITR 253 (SC) applied.

ii) ACIT vs Bhopindersingh R. Arneja (2013) 57 SOT 225 (NAGPUR)

Assessee sold agricultural plots and surplus arising thereon taxed Capital Gains—AO held that sale of Agricultural land was adventure in nature of trade, on ground that assessee frequently purchased/sold agricultural land in past/succeeding years and intention of assessee was not to hold agricultural land, but to reap a benefit when price of land was at peak—First Appellate authority (FAA) reversed findings of AO holding that observation of AO that assessee was regularly trading in land was contrary to evidence on record and AO having accepted capital gain as shown in respect to certain lands could not have taken a different view in respect of the two other pieces of agricultural lands and treat the same as adventure in the nature of trade—Held, no evidence highlighted by AO to show that assessee was purchasing and selling plots of land—Conclusion that assessee that sale of agricultural land was AO adventure in nature of trade, adversely affecting interests of a assessee were not based on facts—Income from certain plots question has been assessed as agricultural income by the AO for AY under consideration—Factum that pieces of land were shown as agricultural land in Revenue records even after sale was not challenged by AO—

AO was entitled to draw inferences and conclusions during assessment proceedings. But, the conclusion which adversely affect the interests of a tax-payer should be based on facts and same should be confronted to the assessee for rebuttal. FAA has given a categorical finding of fact that such exercise was not undertaken by the AO.

It is a fact that sale proceeds of plots of land situated in Municipal Area *have been taxed under the head Short Term capital gains by the AO. If the said transaction was not assessed as an adventure in nature of business* how the sale of agriculture land can be assessed as business income. *It is also a fact that income from the plots in question has been assessed as agricultural income by the AO for the AY under consideration. Similarly, the* factum that pieces of land were shown as agricultural land in Revenue records even after the sale has not been challenged by the AO.

Legal maxim—Interest reipublicaeut sit finis litium—Meaning of—It is for the general welfare that a period be put to litigation. The public interest of a matter so that a litigation should end.

Business income v. Capital gains

- **Tests**

  ACIT vs Anil Kumar Jain 2013 55 SOT 77 (Hyd.)

  Volume, frequency, period of holding, quantum of turnover, regularity of the activity carried on by assesse and the **intention of the assesssee** are the factors to be considered by the authorities while deciding whether the income from sale of shares has to be treated as short term capital gains or business income.

  Sale of shares—Whether short term capital gain or business income—Assessee filed return of income admitting income consisting of share of profit from partnership firm, salary income, short term capital gains and income from other sources like interest, dividend, etc.—AO treated income of assessee arising out of sale of shares as business income, rejecting assessee's claim for taxing same as short term capital gains—CIT(A) reversed order of AO holding that income arising out of sale of shares has to be considered as income from short term capital gains.

"PROPERTY"

- The Finance Act, 2012 has inserted a new *Explanation* to section 2(*14*) with retrospective effect from 1-4-1962 to clarify that the scope of the term 'property' (and consequently the scope of the term 'capital asset') includes and shall be deemed to have always included any rights in or in relation to an Indian company, including rights of management or control or any other rights whatsoever.This amendment has been made to overcome the ruling in *Vodafone International Holdings B.V.* v. *UOI* [2012] 17 taxmann.com 202 (SC)

- In the context of taxation of capital gains, it appears that it should be something capable of being transferred. In this context, **section 6 of the Transfer of Property Act, 1882** is relevant as it provides that Property of any kind may be transferred, except as otherwise provided by this Act or by any other law for the time being in force. The said section 6 further provides as under :

  i) The chance of an heir-apparent succeeding to an estate, the chance of a relation obtaining a legacy on the death of a kinsman, or any other mere possibility of a like nature, cannot be transferred.

  ii) A mere right of re-entry for breach of a condition subsequent cannot be transferred to anyone except the owner of the property affected thereby.

  iii) An easement cannot be transferred apart from the dominant heritage.

  iv) An interest in property restricted in its enjoyment to the owner personally cannot be transferred by him.

  v) A right to future maintenance, in whatsoever manner arising, secured or determined, cannot be transferred.

  vi) A mere right to sue cannot be transferred.

  vii) A public office cannot be transferred, nor can the salary of a public officer, whether before or after it has become payable.

  ix) Stipends allowed to military, naval, air-force and civil pensioners of the Government and political pensions cannot be transferred.

  x) No transfer can be made (1) insofar as it is opposed to the nature of the interest affected thereby, or (2) for an unlawful object or consideration within the meaning of section 23 of the Indian Contract Act, 1872, or (3) to a person legally disqualified to be transferee.

  xi) Nothing in this section shall be deemed to authorise a tenant having an untransferable right of occupancy, the farmer of an estate in respect of which default has been made in paying revenue, or the lessee of an estate, under the management of a Court of Wards, to assign his interest as such tenant, farmer or lessee.

- **items of property specified in (*a*) to (*i*) above which are not transferable as per section 6 of the Transfer of Property Act,1882 are not capital assets.**

Property held as stock-in-trade is not capital asset

'Capital asset' does not include any stock-in-trade, consumable stores or raw materials held by the assessee for the purpose of business or profession.

'Capital asset' is to be distinguished from 'stock-in-trade'. The following points are noteworthy :

- ♦ Profits from the transfer of the former are taxable as business income under section 28 of the Act while profits from transfer of capital assets are taxable as capital gains.
- ♦ Stock-in-trade must have ready marketability in both theoretical (legal) and practical sense. If ready marketability is lacking either in the theoretical (legal) or in the practical sense or both, asset would be regarded as 'capital asset' and not as 'stock-in-trade'. In ***Breeze Constructions (P.) Ltd.*** **v.** ***ITO*** **[2012] 21 taxmann.com 114 (Delhi - Trib.),** it was held that plot of land acquired from DDA under perpetual lease for construction and running of hotel which is not transferable is capital asset and not 'stock-in-trade' Where the assessee-company can use the hotel plot leased to it only for construction and running of hotel, with no right to transfer the same, the hotel plot is indeed a capital asset for the assessee-company. Although the assessee-company has shown it as a stock in its balance sheet and profit and loss account, this will not alter the legal position because the substance of a transaction is important and not its entry in the books of account or its treatment by the assessee-company.

- **Definition of 'stock-in-trade'**

  Stroud's Judicial Dictionary defines 'stock-in-trade' as under: This phrase comprises all such chattels as are acquired for the purpose of being sold, or let to hire, in a person's trade; but, probably, utensils in trade are also included in the phrase (*Seymour* v. *Rapier Burb*. 28) Setting aside a mere dictum in *Elliott* v. *Elliott* (11 L.J. Ex. 3), the only modern authority on the interpretation of this phrase, standing alone, seems to be *Re Richardson* (50 L.J. Ch. 488). In that case the testator was a barge-builder, and, according to the custom of that trade, he would sometimes, on the sale of a new barge, accept an old one in part payment which he would repair and let out on hire; at the time of his death he had five of such barges: held, that these barges passed under a bequest of his "stock-in-trade as a barge-builder"……… Copyrights are not stock-in-trade for tax purposes (*Mason* v. *Innes* [1967] Ch. 1079).
- ***CIT*** **v.** ***Kan Construction and Colonizers (P.) Ltd.*** **[2012] 20 taxmann.com 381**, the Allahabad High Court defined 'stock-in-trade' as under:

  According to the *Webster's New International Dictionary*, the 'stock-in-trade' is "*a.* The goods kept for sale by a shopkeeper. *b.* The fittings and appliances of a workman." In other words, the stock-in-trade includes all such chattels as are required for the purposes of being sold or let to hire on a person's trade. According to *Stroud's judicial dictionary*……. "stock-in-trade comprises all such chattels as are required for the purposes of being sold, or let to hire on a person's trade"
- ***Addl.CIT*** **v.** ***Putco (P.) Ltd.*** **[1983] 140 ITR 740 (Bom.),** the assessee was money lender, who purchased a ship in satisfaction of his major portion of outstanding loan. The ship was considered as stock in trade of the assessee's money lending business.
- ***DLF Universal Ltd.*** **v.** ***Dy. CIT*** **[2010] 36 SOT 1 (Delhi) (SB),** it was held that when a businessman withdraws his stock-in-trade held by him for the purpose of business or profession from his business for some purpose or purposes other than the purpose of dealing with it in the course of any trading or commercial transaction, it would lose its character of being "stock-in-trade", and will acquire such character with regard to the purpose for which same has been employed. For example, where a dealer in jewellery brings in his personal jewellery to business, there is a conversion of capital asset to stock-in-trade. Similarly, a stock-in-trade is converted into a capital asset, when the dealer in jewellery withdraws jewellery from his business for his personal use or for holding the same as investment. Where a grocer draws a part of his stock for his personal consumption, there is a conversion from stock-in-trade to personal investment on withdrawal of stock-in-trade. In the case of grocer, when he withdraws part of his stock for his personal consumption, stock-in-trade so withdrawn would not retain the character of stock-in-trade at the time when a grocer consumes that item withdrawn from his business; it is not a loss to business but it is regarded as a personal expenses or drawing.

CONVERSION OF CAPITAL ASSET INTO STOCK IN TRADE IS TAXABLE

- **Dy. CIT v. Crest Hotels Ltd. 78 ITD 213 (Mum. - Trib.)**

  Conversion of capital asset into stock in trade of business is also chargeable to capital gains. However, the taxability is postponed to the year of actual sale of such converted asset in the regular course of business. Where the capital asset converted into stock in trade is sold in various years the application of section 45(2) will apply in each of the years in which it was sold. The taxability under capital gains is not to be postponed till the complete sale of such converted asset.

CONVERSION OF STOCK-IN-TRADE INTO CAPITAL ASSETS

- **DLF Universal Ltd. v. Dy. CIT [2010] 36 SOT 1 (Delhi) (SB)**. There is **no transfer on mere conversion** of stock-in-trade into capital assets and/or on revaluation thereof in the assessee's books and **no income arising on such conversion**. In other words, there could not be **any actual profit or loss on withdrawal of stock-in-trade from a trading business and its conversion into capital asset**. There is no deeming fiction to deem the conversion of stock-in-trade into capital assets as a transfer or to deem the fair market value as on the date of conversion as the cost of acquisition of the capital assets -
- **Growmore Exports Ltd. v. Asstt. CIT [2001] 78 ITD 95 (Mum. - Trib.)** it was held that where the stock-in-trade is converted into the capital asset, the holding period must be counted from the date of acquisition of stock-in-trade and not from the date of conversion into capital asset.

Whether assets acquired with borrowed funds are necessarily 'stock-in-trade' and not 'capital assets'?

- ***Narendra Gehlaut* v. *JCIT* [2012] 21 taxmann.com 82 (Delhi - Trib.).** Merely because shares are purchased with borrowed funds, it cannot be inferred that the shares are 'stock-in-trade' and not 'capital assets' and that the profit from their sale shall be taxable as business income rather than as capital gains. None of the case laws or CBDT circular has held that borrowings will not be allowed in investment transactions. Investment in capital assets also can be carried out by way of borrowed funds. Limited number of share dealings, only investment portfolio, no trading portfolio and accounting for shares as investment can **justify taxing profits on sale of shares as capital gains** and not as business **income-**
- ***OUF PTE Ltd.* v. *Comptroller of Income-tax* [March 1999 issue of Asia-Pacific Tax Bulletin],** the Singapore Income Tax Board of Review ("the Board") also examined how OUF financed the purchase of the relevant shares. Whilst noting that OUF "financed the majority of the purchases with short term loans and overdraft facilities", the Board agreed with the taxpayer's submission that the issue was whether the taxpayer had the "financial ability to hold the shares as long term investments" and not whether OUF had taken out any short term loans and overdraft facilities. In cases dealing with isolated property transactions, the presence of short term financing may be indicative of an intention to trade if it is established that the taxpayer had no means of holding on to the property over a long period of time. In this case, however, OUF had in fact held on to its share counters for a considerable amount of time and did not require any presumption derived from its method of financing to establish the fact that it had the ability to hold on to these shares on a long term basis. The Board focused on the relevant issue which was whether OUF had the ability to hold these shares as long term investments and chose not to dwell on the irrelevant question of whether the financing adopted by the taxpayer in question was of a long term or short term nature. The Board noted that OUF was under little or no financial pressure with respect to the credit facilities it had taken out because the market value of its share portfolio exceeded the amount of its short term loans and overdraft facilities by about three times. The Board stated that OUF could easily have found alternative financing or sold off a third of its portfolio if any of OUF's credit facilities had been recalled. As matters turned out, there was never a call on any of the credit facilities taken out by OUF. *The OUF case illustrates that a taxpayer's mode of financing sometimes does not reveal anything about the intent of the taxpayer in making his purchase. The ex-director of OUF had testified that the short-term loans were taken out not because OUF had an intention to sell the shares within a short period of time but because such short-term loans attracted a lower interest rate. Further, these short-term loans may easily be renewed over several consecutive loan periods. It is therefore possible for a taxpayer to finance his long-term investments through the use of short-term loans. This was, in fact, how OUF financed its long-term investments.*
- Therefore, where investor finances his acquisitions out of medium-term/long-term funds (say a personal loan repayable in 3 to 5 years or a top-up loan on property from a housing finance company having a 10-15 years tenure), it cannot be presumed that the taxpayer purchased shares to sell them within a short period of time. Further, even when shares are purchased with short-term funds, this presumption of purchase with intention to sell within a short period of time cannot be raised if short-term loans are easily renewable over several consecutive loan periods. The method of financing, by itself, is irrelevant. It is only relevant from the point of view of judging the intention and capacity of the taxpayer to hold for long-term. Where the taxpayer actually demonstrates the intention and capacity by actually holding for long periods of time, the method of financing cannot be held against him. This is particularly so when his pattern of purchasing and selling shares is consistent with that of an investor.

RIGHT TO OBTAIN CONVEYANCE OF AN IMMOVABLE PROPERTY

- **COMMISSIONER OF INCOME TAX vs. TATA SERVICES LTD. (1980) 122 ITR 594 (Bom)**

  A right to obtain conveyance of immovable property is also a 'property' contemplated by section 2(14). Therefore Word "property" in s. 2(14) includes any right which can be called property.

  Right to acquire a property under a contract is a capital asset and the profit arising from the assignment of such right is liable for capital gains tax.

- **COMMISSIONER OF INCOME TAX vs. VIJAY FLEXIBLE CONTAINERS (1990)186 ITR 693, (Bombay)**

  Right to obtain a conveyance of immovable property falls within the expression "property of any kind" used in s. 2(14)—It is not a mere right to sue—In the present case, the assessee had entered into an agreement for purchase of immovable property and had paid a certain sum as earnest money—Later on, suit for specific performance of the agreement was filed and consent decree was passed in favour of the assessee for a certain **sum—Assessee's right to have the immovable property conveyed to him was a property—His giving up the right to claim specific performance by conveyance to him of the immovable property was a relinquishment of capital asset**—There was, therefore, a transfer of capital **asset—Payment of earnest money under the agreement for sale was the cost of acquisition of capital asse**t—ITO was, therefore, justified in bringing to tax the amount received by assessee under the consent decree

SHARE IN PARTNERSHIP FIRM – Whether 'property'

- **SUNIL SIDDHARTHBHAI v. COMMISSIONER OF INCOME TAX [1985] 156 ITR 509**
- **B.T. PATIL & SONS vs. COMMISSIONER OF GIFT TAX (2001) 247 ITR 0588, (2001)**

  Partner bringing his individual assets into partnership as capital contribution—There is a transfer within the meaning of s. 45, inasmuch as, his exclusive interest in the asset gets transferred into an interest shared with other partners—However, the consideration therefor, viz., the right to get his share from time to time during subsistence of partnership firm and to get the value of share in net partnership assets on dissolution or retirement being impossible of evaluation at the time of bringing the assets into partnership, such consideration cannot come into computation under s. 48 and is, therefore, outside the scope of s. 45—Further, having regard to such nature of consideration, it cannot be said that any income or gain arises or accrues to such partner—No capital gains can, therefore, be chargeable

  Hence, partners hold shared interest in all the assets of the firm and there could be no transfer on the change in constitution of the firm.

- **COMMISSIONER OF INCOME TAX vs. CARLTON HOTEL PVT. LTD.**(2017) 399 ITR 0611 (All),

  Evaluation of partner's interest took place only when there is dissolution of firm or upon his retirement from it and merely interest, existed already before distribution of asset on dissolution amount to transfer and capital gains can be charged in this regard.

DISTRIBUTION OF ASSETS ON PARTITION OF HUF

- Where an **asset becomes the property of the assessee** on the distribution of assets on the **partition of a HUF** its cost of acquisition shall be deemed to be the cost for which the HUF [assuming the HUF to be the last previous owner to have acquired it by a mode other than that referred to in section 49(1)] acquired it, as increased by any cost of improvement of the asset incurred by the HUF or by the assessee [Section 49(1)(*i*)].
- ***C. Ramiah Reddy* v. *Dy. CIT* - I.T.A. No.122/Bang/2011**(decided on 25-5-2012), the Tribunal dealt with a case where the real estate business of assessee's HUF was allotted to him in partition. Question arose regarding the computation of profits from sale of lands that formed stock-in-trade of the business which was received by the assessee on partition along with the business and assessee continued to carry on real estate business of erstwhile HUF after the partition. The Tribunal held as under:

1) Lands-the stock-in-trade of real estate business of HUF remain stock-in-trade even after change of ownership of the business due to partition of HUF.
2) Where assessee receives real estate business of his HUF on its partition which, cost of lands which were stock-in-trade of HUF business to assessee is FMV on date of distribution and not cost to previous owner u/s 49(1). Cost of acquisition of properties to the assessee is FMV of lands and not their cost to previous owner.
3) Section 49(1) applies to capital asset and not to stock-in-trade. The capital asset/s received by assessee in the instant case is the real estate business of HUF itself which he received on partition. These properties which were hitherto being held as stock-in-trade, were allotted to the assessee on partition. The assessee continued to carry on the said real estate business after the partition.
4) The properties were stock-in-trade of real estate business when HUF owned it and remained stock-in-trade when assessee became its owner on partition. In these circumstances, there was no conversion of capital assets to stock-in-trade either by the assessee or the joint family. Therefore, the provision of section 45(2) of the Act are not applicable in the instant case.
5) ITAT held that since the provisions of section 49(1) of the Act, does not apply to other assets, viz. stock-in-trade etc., the ratio of the judgment of the Hon'ble Apex Court would be applicable and it is the cost at which the assessee acquired the property in the partition (FMV valuation for partition) that has to be taken.

Meaning of Transfer [Section 2(47)]

“Transfer”, in relation to a capital asset, **includes:**

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

(ii) Extinguishment of any rights in relation to a capital asset;

(iii) Compulsory acquisition of an asset;

(iv) Conversion of capital asset into stock-in-trade;

(v) Maturity or redemption of a zero coupon bond;

(vi) Allowing possession of immovable properties to the buyer in part performance of the contract;

(vii) Any transaction which has the effect of transferring an (or enabling the enjoyment of) immovable property; or

(viii) Disposing of or parting with an asset or any interest therein or creating any interest in any asset in any manner whatsoever.

Property is thrown into HUF hotchpotch

- ***Deena Nath Nanda & Sons* v. *CIT* [1984] 149 ITR 96 (Delhi),**

  Cost of acquisition of property thrown into hotchpot of HUF was neither nil nor its value on the date on which it was thrown into its common hotchpot but its cost in the hands of the individual throwing it in the common hotchpot.

- ***Addl. CIT* v. *Madan Lal Jain & Sons* [1983] 140 ITR 200** (Delhi) and
- ***CIT* v. *N.S. Krishna Rao* [1983] 144 ITR 347 (Mad.)**

  The Courts have *held* that where a coparcener of a HUF had purchased a property and later thrown it in the hotchpotch of the HUF which sold it, the amount paid by the coparcener would be the cost of acquisition of the asset in the hands of the HUF.

- ***CIT* v. *Ashok Kumar Jalan* [1993] 204 ITR 16 (Pat.)].**

  Section 49(1)(*iv*) will have its application only in such cases where a coparcener has thrown his separate property into the common stock of the family after December 31, 1969

- ***CIT* v. *Harbhagwan* [1998] 100 Taxman 306 (Punj. & Har.)**

  Section 49 provides that the cost of acquisition of the capital asset shall be deemed to be the cost at which the previous owner acquired it. The legal fiction created by section 49 would apply only to the situations specified therein. If the situation did not exist in terms of section 49 or section 55, the actual cost of acquisition of the assessee alone shall be adopted. .

'Succession', 'Inheritance', 'Devolution'

- Not defined in the Income-tax Act

A) **Succession** : the right, act or process by which one person succeeds to the office, rank, estate, or the like, of another

B) **Inheritance** : something that is or may be inherited; any property passing at the owner's death to the heir or those entitled to succeed

C) **Devolution** : the passing of property upon death, as to a heir.

- ***Deepak Anubhai Shah* v. *CIT* [1993] 201 ITR 577 (Guj.)**

  Where the assessee has acquired property by inheritance or will or by partition, the original or actual cost of acquisition of property would be the real value thereof to the assessee, namely, the market value on the date of its acquisition.

- *CIT* v. *Jaideo Oil Mills* [1991] 194 ITR 495 (Bom.) the assessee-company took over the entire business including the stock-in-trade, goodwill and benefit of pending contracts of a firm. The Court held that the mere fact that the **debts and liabilities of the partnership were not taken over by the assessee was not sufficient to disentitle the assessee from claiming the status of a successor to the partnership**, and the Tribunal was justified in holding that the benefit of section 49(1)(*iii*)(*a*), read with section 50(2) could be given to the assessee and no question of law arose from the Tribunal's order.

- **Followed CIT vs. K. H. Chambers (1965) 55 ITR 674 (SC) ,** the assessee-company is a successor to the partnership. The mere fact that the debts and liabilities of the partnership were not taken over by the assessee-company is not sufficient to disentitle the assessee-company from claiming the status of successor to the partnership when the entire business including its stock-in-trade, goodwill and the benefit of pending contracts was taken over by the assessee-company for the purpose of computing the capital gains.

Distribution on dissolution of a firm/AOP/BOI

- Section 49(1)(*iii*)(*b*) read with section 45(4) provides that the **profits arising from the transfer of a capital asset by way of distribution of capital assets on the dissolution of a firm or other AOP/BOI or** otherwise is chargeable to tax as the income of the firm/AOP/BOI of the previous year in which the transfer takes place. For computing the capital gains the **fair market value** of the asset on the date of transfer will be deemed to be the full value of the consideration received or accruing as a result of the transfer.
- **In *CIT* v. *Alagappa Cotton Mills* [1984] 149 ITR 640 (Mad.)** it was held that where upon a change in constitution of the firm the assets were taken over by the reconstituted firm at **enhanced value**, the **depreciation is allowable only on the basis of the written down value of the assets** arrived at in the earlier years and the assessee firm cannot claim depreciation on the enhanced price at which it took over the assets.
- In the case of depreciable assets allocated to the partner by the firm whether on dissolution or otherwise, the written down value as per the records of the firm has to be adopted. However, where an asset not being a depreciable asset is allocated to the partner and the firm has paid tax on application of section 45(4) then the partner receiving the asset could adopt the fair market value on the date of distribution as his cost of acquisition. This cost of acquisition would be applied for computing capital gains on its transfer.
- Since the 'cost to previous owner' contained in section 49 does not apply in the case of assets obtained on dissolution of firm, the partner or any outsider on receiving the asset from the dissolved firm has to adopt the fair market value of the asset on the date of distribution as cost of acquisition.

Transactions which are not regarded as transfer [Section 46 TO 47]

- 47(i)- Distribution of capital asset on total or partial partition of HUF
- 47(iii)- Transfer of capital asset under a gift or will or an irrevocable trust

Computation of capital Gain (Section-48-Mode of computation)

Full value of consideration

Less: Indexed Cost of acquisition

Less: Indexed Cost of Improvement

Less: Expenditure incurred wholly and exclusively in connection with such transfer

: **Indexed Cost of Acquisition and Improvement [Second Proviso to Section 48]**

a) In case of transfer of long-term capital assets, indexed cost of acquisition and indexed cost of improvement shall be deducted from the full value of consideration;

b) Indexed cost of acquisition and Indexed cost of improvement shall be computed with reference to Cost Inflation Index ('CII') in the following manner:

Indexed Cost of Acquisition :-

[(Cost of Acquisition) × (CII for the year of transfer)]

(CII for the year of acquisition or for the Financial Year 2001-02, whichever is later)

Indexed Cost of Improvement :-

[(Cost of Improvement) × (CII for the year of transfer)]

CII for the year of Improvement

Note : The base year for computation of capital gains has been shifted from 1981 to 2001 with effect from **assessment year 2018-19**. Thus, if any capital asset (acquired before April 1, 2001) is transfered then assessee has an option to take its cost of acquisition either as fair market value as on April 1, 2001 or its actual cost.

DEPRECIABLE ASSET
(Section-50 Special provision for computation of capital gain in case of depreciable assets)

WDV of block of asset at the beginning of previous year

Add: Actual cost of assets falling within that block acquired during the year

Less: Full value of consideration of assets transferred during the year

Less: Expenditure incurred wholly and exclusively in connection with such transfer

Note- Short-term capital gain or loss from sale of depreciable asset will arise only in the following two situations:

- a) When on last day of the previous year, WDV of the block of asset is *nil*; or
- b) When on last day of the previous year, block ceases to exist

Special provision for full value of consideration - Section 50C

- Section 50C was inserted in the Act by the Finance Act, 2002 w.e.f. 1-4-2003.
- To combat tax evasion through under-reporting of sale consideration in sale deeds.
- In cases of transfer of capital asset being land or buildings or both, the said section deems stamp duty value as the full value of consideration where the consideration shown in sale deed is less than the stamp duty value.
- CBDT's ***Circular No.8/2002*** explains section 50C as under :

  "Computation of capital gains in real estate transactions.

  37.2 It provides that where the consideration **declared** to be received or accruing as a result of the transfer of land or building or both, is less than the value adopted or assessed by any authority of a State Government for the purpose of payment of stamp duty in respect of such transfer, the value so adopted or assessed shall be deemed to be the full value of the consideration, and capital gains shall be computed accordingly under section 48 of the Income-tax Act.
- **Amendments by Finance Act 2020**

  Earlier, 5% variation in the value of consideration received or accruing as a result of transfer of capital asset, being land or building or both, was allowed. Now**, this variation rate is increased to 10%.** It means, if the value adopted or assessed or assessable by the authority for the purpose of payment of stamp duty does not exceed one hundred and ten per cent of the consideration received or accruing as a result of the transfer, the consideration so received or accruing as a result of the transfer shall, for the purposes of computing profits and gains from transfer of such asset, be deemed to be the full value of the consideration.

  The above amendments are effective from **AY 2021-2022.**

Ingredients of section 50C

The following ingredients of section 50C may be noted :

(*i*) There is a transfer of a capital asset being land or building or both

(*ii*) The stamp duty value exceeds 105%(110%) of the consideration received or accruing as a result of the transfer.

Note : Stamp duty value is the value adopted or assessed or assessable for the purpose of payment of stamp duty in respect of such transfer by any authority of the State Government ['the stamp valuation authority'].

(*iii*) If conditions (*i*) and (*ii*) are satisfied, the stamp duty value shall, for the purposes of section 48, be deemed to be the full value of consideration except where assessee claims before AO that stamp duty value exceeds FMV.

(*iv*) If condition (*ii*) is not satisfied *i.e.* stamp duty value does not exceed 105%, of the consideration received or accruing, the consideration received or accruing shall be the value of consideration.

(*v*) In deals involving immovable properties, there is a time-gap of 3 to 6 months between the date of agreement to sell fixing the conside-ration and date of actual transfer (*i.e.* date of execution and registry of sale deed, payment of balance consideration and possession). In the meantime, stamp-duty value can be revised upwards by State Government. So, by virtue of (*i*) to (*iii*) above, seller of the property would be saddled with higher tax liability on capital gains. To avoid hardship in genuine cases, the first proviso to section 50C(1) provides that stamp duty value on the agreement to sell shall be taken as full value of consideration. The first proviso shall apply only where consideration or part thereof has been received by way of an account payee cheque or account payee DD or by use of Electronic Clearing System (ECS) through a bank account on or before the date of ATS with effect from assessment year 2020-21, prescribed electronic modes are also permissible modes of receiving payment apart from account payee cheque, account payee bank draft and ECS. Here, a word of caution needs to be sounded. The cash component of the entire deal should be less than Rs. 20,000 and balance should be received by seller by way of account payee cheque or account payee DD or by (ECS or prescribed electronic modes of payment). If seller accepts Rs. 20,000 or more in cash, it would violate section 269SS and attract penalty under section 271D.

(*v*) Sub-section (2) of section 50C provides that where the assessee claims that the stamp duty value exceeds the fair market value of the property as on the date of transfer, and he has not disputed the stamp duty value in any appeal or revision or reference before any authority or Court, the Assessing Officer may refer the valuation of the relevant asset to a Valuation Officer in accordance with section 55A of the Income-tax Act. If the fair market value determined by the Valuation Officer is less than the stamp duty value, such fair market value shall be the full value of consideration. An option is given to the seller u/s 50C(2) of the Act either to appeal against the value adopted for registration by the stamp valuation authority or to refer the matter to the valuation officer. Thus, section 50C(2) of the Act, provides two remedies at the opt ion of the assessee, in that, he can either file appeal against stamp value or seek reference to Valuation Cell. Adoption of the value by the Valuation Cell is again subject to regular appeals available against the order of the AO. However, whether assessee had not availed the opportunity, the AO is bound to follow the clear mode of law as contained u/s 50C(2) of the Act - *ITO* v. *Inderjit Kaur* [2012] 19 taxmann.com 66 (Chd. - Trib.)

(*vi*) Sub-section (3) of section 50C provides that if the fair market value determined by the Valuation Officer is more than the stamp duty value, the Assessing Officer shall not adopt such fair market value and shall take the full value of consideration to be the value adopted or assessed for stamp duty purposes. For example, if the sale consideration of a capital asset is Rs. 100 and the value as per stamp valuation is Rs. 150. If the assessee objects to the stamp value of Rs. 150 and eventually reference is made to the DVO under section 50C(2), who estimates the value at Rs. 160, the value under sub-section (1), namely, Rs. 150 shall be considered as the full value of consideration received or accruing as a result of transfer of capital asset and the computation of capital gain under section 48 shall be made accordingly. In this situation, the higher value determined by DVO at Rs. 160 shall be disregarded by virtue of the provisions of sub-section (3).

‘SECTION 50C’ NOT APPLICABLE TO SALE OF PLOTS BY BUILDER

- **In *CIT* v. *Kan Construction and Colonizers (P.) Ltd.* [2012] 20 taxmann.com 381 (All.),** the Allahabad High Court held that section 50C not applicable to sale of plots by a builder since plots are his stock-in-trade and not capital assets.
- To overcome the judicial decision in *Kan Construction (supra)*, the Finance Act, 2013 has inserted new section 43CA with effect from assessment year 2014-15. Section 43CA provides that where the consi-deration for the transfer of an asset (other than capital asset), being land or building or both, **is less than the stamp duty value, the stamp duty value so adopted or assessed or assessable shall be deemed to be the full value of the consideration for the purposes of computing income under the head "Profits and gains of business or profession".**
- Section 43CA further provides that where the date of an agreement fixing the value of consideration for the transfer of the asset and the date of registration of the transfer of the asset are not same, the stamp duty value may be taken as on the date of the agreement for transfer and not as on the date of registration for such transfer. However, this exception shall apply only in those cases where amount of consideration or a part thereof for the transfer has been received by account payee cheque or account payee bank draft or by use of Electronic Clearing System (ECS) through bank account on or before the date of the agreement.
- With effect from assessment year 2020-21, payment may also be received by prescribed electronic mode for above purpose.

Circle rate on the date of registered agreement to sell is to be considered not the circle rate on the date of sale deed.
For the purpose of section 50C of the Act

i) 169 ITD 639 (All) Hari Mohan Das Tandon (HUF) v. PCIT

ii) 236 Taxman 561 (All) CIT v. Shimbu Mehra

iii) ITA No. 268/2015 dated 28.10.2015 (All) Pr. CIIT v. M/s Pandit Ranglal Trust

iv) ITA No. 12/Vizag/2009 dated 22.6.2010 M/s Lahiri Promoters v. ACIT

v) 168 TTJ 480 (Del)ITO v. Modipon Ltd.

vi) ITA No. 1521/D/2012 dated 27.11.2015 ACIT v. M/s Uttrakahand Construction Co. (P) Ltd.

vii) ITA No. 3354/Ahd/2014 dated 30.11.2017 Smt. Kundanben Ambhai Shah v. ITO v

viii) 79 taxmann.com 104(Vizag) Smt. Chalasani Naga Ratna Kumari v. ITO 7 ix) 161 ITD 627 (Ahd) Dharamhibhai Sonani v. ACIT

ix) 7 ITR (Trib) 146 (Ahd) Kaushik Sureshbhai Reshamwala v. ITO

x) ITA No. 5578/D/2014M/s Jai Laxmi Developers (P) Ltd. v. DCIT

xi) ITA No. 3353/Ahd/2014 dated 29.11.2017Amitkumar Ambalal (HUF) v. ACIT

Expression “full value of the consideration received or accruing” has to be read in totality and not in a piecemeal manner by taking it as “full value of consideration” or as “full value of consideration received”.

- **CIT v. Smt. Nilofer I. Singh 309 ITR 233 (Delhi)** wherein after considering the judgment of Apex Court in the case of CIT v. George Henderson and co. Ltd. reported in 66 ITR 622 and, CIT v. Gillanders Arbuthnot and co. reported in 87 ITR 407 has held as under:

  Expression "full value of consideration" used in s. 48 does not have any reference to the market value but only to the consideration referred to in the sale deeds as the sale price of the assets which have been transferred.

- **CIT vs. TEXSPIN ENGG. & MFG. WORKS 263 ITR 0345, (Bom)**

  Capital gains—Applicability of s. 45(4) and chargeability—Conversion of partnership firm into joint stock company under Part IX of the Companies Act—First requirement of s. 45(4) that there should be a distribution of capital assets of the firm not satisfied—Properties of the erstwhile firm vested in the limited company and there is difference between distribution on dissolution and vesting—Therefore, s. 45(4) is not attracted—Although all the properties of the firm vested in the limited company on the firm being treated as a company under Part IX of the Companies Act such vesting is not consequent or incidental to a transfer—It is a statutory vesting of properties in the company as the firm is treated as a limited company—Thus, there is no transfer of a capital asset as contemplated by s. 45(1)—Even if it is assumed that such vesting amounts to transfer, computation of capital gains as envisaged by s. 48 is not possible because full value of consideration cannot be construed to mean market value of the assets transferred, as in the case of s. 45(4)—Hence, s. 45(1) is also not attracted.

‘’FULL VALUE OF CONSIDERATION RECEIVED” OR ACCRUING” MEANS ACTUAL CONSIDERATION BARGAINED FOR AND NOTHING ELSE:

- 250 ITR 531(Del) CIT vs. Ms. Sushila Mittal & Others
- 256 ITR 165 (Del) CIT vs. Karni Singh
- 256 ITR 179 (Del) CIT vs. Smt Sushila Devi
- 309 ITR 240 (Del) Dev Kumar Jain vs.ITO
- 176 CTR 520 (Cal) CIT vs. S.S Sankaralingam
- 193 ITR 770 (All) Dinesh Kumar Mittal vs.ITO
- 87 ITD 88 (Cal) JCIT vs. The Gramophone Co. of India Ltd.
- 89 ITD 586 (Del) Sanjay Chawla vs. ITO
- 128 Taxman (Mag.) 88 Sankta Prasad Gupta vs. ITO
- 106 Taxman 65 (Del.) (Mag.) ACIT vs. Associated Techno Plastics (P) Limited
- 106 Taxman 127 (Del) Bigjos Stores (P) Limited vs. ACIT
- 39 ITD 292 (All) Nidhipati Singhania vs. ACIT
- 102 TTJ 964 (Del) Ashok Soni vs. ITO
- ITA No 3677/Del/2011 Eldeco Infrastructure & Properties Ltd. V. CIT
- 356 ITR 159 (Del) CIT vs Discovery Estates (P) Ltd

Adopting the deemed consideration u/s 50C of the Act has erred in not following the statutory mechanism u/s 50C(2) and 50C(3) of the Act

- **INCOME TAX OFFICER VS. ADITYA NARAIN VERMA (HUF)**(2017) 187 TTJ 0476 (DEL*)*

  Purpose of legislature behind provisions laid down under sub-s. (2) of s. 50C is that a Valuation Officer is an expert of subject for such valuation and is certainly in a better position than AO to determine valuation.

  land being the subject-matter of sale was subject to several distressing circumstances as a result of which the market value of said land can certainly not be compared with that of any normal land. The said land as submitted before the authorities below was inter alia, subject to the following distressing circumstances :

  "(i) The impugned land is situated in river side and is covered on three sides by the river;

  (ii) The land is fully covered by overflow of dirty rainy water which has led to creation of high land mounds;

  (iii) The aforesaid facts have been ***confirmed by way of an affidavit from Lekhpal*** *on behalf of the State Government before the Allahabad High Court in the suit of ceiling pertaining to the said land;*

  (iv) The position of land is non-symmetrical;

  (v) Further, the land is an Alluvial land i.e. infertile land on a river bed;

  (vi) Land has been ***subject to continuous litigation*** *under the UP Imposition of Ceilings on Land Holdings Act, 1960;*

  (vii) In view of the above circumstances the land was sold to the purchaser with the condition that if in future the purchaser has to vacate the land due to any order of the Court or any other legal proceedings even then the assessee will not be required to refund the sales price received. This has led to a further reduction in the sale price. Land impugned land is situated in river side and is covered on three sides by the river;

  Apart from the above the assessee has submitted certificates from various independent purchasers as noted in pp. 18-21 of CIT(A) order in the case of co-owner of property who had sold his share of land. The said certificates clearly provide that a lesser sale consideration has been paid in view of the foregoing reasons;

- **AAVISHKAR FILM PVT. LTD. vs. INCOME TAX OFFICER(2019) 178 ITD 0613 (MumbaiTrib)**

  Where the assessee objects to the adoption of stamp duty valuation as deemed sale consideration during the assessment proceedings, the AO is duty bound to make a reference to the DVO to determine the value of the property as per s. 50C(2).

IN ABSENCE OF REFERENCE TO VALUATION OFFICER U/S 50C(2) OF THE ACT, THE ENHANCEMENT OF SALE CONSIDERATION IS UNTENABLE

- Meghraj Baid vs ITO reported in 114 TTJ 841 (Jodh).
- Arlette Rodrigues v ACIT in ITA No. 343/M/2010,
- B. N. Properties Holdings (P) Ltd v ACIT in ITA No. 287/Mds/2010 and,
- N. Meenakshi v ACIT reported in 326 ITR 99 (Mad)
- ITO v Manju Rani Jain (Del) reported in 24 SOT 24

THE VALUATION OF ANY ASSET U/S 50C SHOULD BE MADE AFTER REFERRING THE MATTER TO THE VALUATION OFFICER U/S 50C(2) OF THE ACT.

i) 49 taxmann.com 513 (Madras) Appadurai Vijayaraghavan vs. JCIT
ii) 369 ITR 483 (Mad) S. Muthuraja vs. CIT
iii) 45 taxmann.com 16 (Delhi-Trib.) Sarwan Kumar vs. ITO
iv) 24 SOT 24 (Del-Trib.) ITO Vs. Smt. Manju Rani Jain
v) 11 ITR (Trib) 579 (Del) Mrs. Trishla Jain vs. ITO
vi) 40 taxmann.com 323 (Jodhpur- Trib.) ITO vs. Shiv Kumar Rangwani
vii) 46 taxmann.com 260 (Pune-Trib.) Randheer V. Nahar vs. ITO
viii) 47taxmann.com 88 (Agra-Trib.) Raj Kumari Aggarwal vs. DCIT
ix) 48 taxmann.com 181 (Rajkot-Trib.) Mansukhlal Ghelabhai Doshi vs. DCIT
x) 23 SOT (Jodh) Meghraj Baid vs. ITO
xi) 34 SOT 57 (Mum) Ajmal Fragrances & Fashions (P) Ltd. vs. Asstt. CIT

Report of Valuation Officer determining FMV is binding on AO

• *Smt. Bharti Jayesh Sangani* v. *ITO* [2011] 128 ITD 345 (Mum.), the Tribunal held that the Assessing Officer cannot disregard the value determined by the DVO and proceed to compute long-term capital gain in accordance with the value determined by stamp valuation authority except in the situation envisaged by section 50C(3). The Tribunal held as under :

Sub-section (2) of section 50C provides that : ". . . where any such reference is made, the provisions of sub-sections (2), (3), (4), (5) and (6) of section 16A, . . .of the Wealth-tax Act, 1957 (27 of 1957), shall, with necessary modifications, apply in relation to such reference as they apply in relation to a reference made by the Assessing Officer under sub-section (1) of section 16A of the Act". The ambit of expression 'with necessary modifications' implies striking out the inapplicable fractions of the provision which align strictly with the specifics of the Wealth-tax Act. It does not and cannot oust the application of the soul of section 16A, which is the process of determination of the value of capital asset by the DVO and then making such report as binding on the Assessing Officer.

•Sub-section (6) of section 16A provides in unequivocal terms that the Assessing Officer shall complete the assessment in conformity with the estimate of DVO. The term "shall" used in sub-section (6) requiring the Assessing Officer to complete the assessment, when seen in juxtaposition to the expression "in conformity with" the estimate of Valuation Officer, makes it abundantly clear that the assessment has to be done in conformity with and not in disregard to the estimate made by the Valuation Officer.

•The usage of the term "shall" in sub-section (6) evidences that the Assessing Officer has no option but to go by the estimate of Valuation Officer.

•The provisions of section 50C(3) cannot be interpreted to give authority to AO to reject the Valuation Officer's report. This sub-section applies to a situation wherein the value determined by the DVO under sub-section (2) is more than the value adopted, assessed or assessable by the stamp valuation authority under sub-section (1). In such a situation, sub-section (3) of section 50C comes to the rescue of the assessee by providing that the value so adopted or assessed or assessable by the stamp valuation authority under sub-section (1) shall be taken as the full value of consideration.

•Ordinarily where a reference is made to DVO under sub-section (2), the value so determined by the DVO is binding on the Assessing Officer. If such value is higher than the value adopted, assessed or assessable by the stamp valuation authority, then the higher value shall be ignored. In such a situation, the provisions of sub-section (3) shall override the mandate of sub-section (2). The Legislature in its wisdom has contemplated only one situation in sub-section (3) in which the provisions of sub-section (2) of section 50C have been dispensed with. It is only where the value under sub-section (2) is higher than the value under sub-section (1) that the provisions of sub-section (3) shall come into play. Only in such a situation the command of sub-section (3) is activated to take no notice of the value as determined by the DVO. But for that, the directive of sub-section (2) is applicable in all other cases. In a converse situation, *viz.,* where the value under sub-section (2) is lower than the value under sub-section (1), the provisions of sub-section (3) of section 50C have not been made applicable to.

•The natural corollary which, therefore, follows is that if the value determined by the DVO under sub-section (2) is lower than that of the value adopted, assessed or assessable by the stamp valuation authority under sub-section (1), the value so estimated under sub-section (2) shall be binding on the Assessing Officer and the assessment shall be made accordingly

INDEXED COST OF ACQUISITION AND INDEXED COST OF IMPROVEMENT

- Indexation benefit means that for computation of capital gains resulting from the transfer of long-term capital assets, the cost of acquisition and cost of improvement will be adjusted on the basis of cost inflation index to avoid taxation of the inflationary gains and to ensure that only capital appreciation is taxed.
- Indexation benefit aims to give a relief for inflation, counter act bunching of profits (profits earned over several years of holding the asset taxed in one year the year of transfer) and to exclude from the tax net capital gains which were relatively small.
- **Indexation benefit linked to period of holding of asset and not to its owner**
- ***CBDT Circular No. 636, dated 31-8-1992*** held that the indexation is to be allowed in respect of the period of holding of the asset and not in relation to the assessee who transferred the asset. Accordingly, the cost of acquisition and period of holding of the previous owner have to be reckoned for the purpose of computing the indexed cost of acquisition.
- ***Smt. Mina Deogun* v. *ITO*** [2008] 19 SOT 183 (Kol. - Trib.) the assessee who inherited the property, wanted indexation benefit for the period in which the property was held by the previous owner. Accordingly, the cost of acquisition and period of holding of the previous owner have to be reckoned for the purpose of computing the indexed cost of acquisition.
- *Kamal Mishra* v. *ITO* [2008] 19 SOT 251 (Delhi - Trib.)
- *Mrs. Pushpa Sofat* v. *ITO* [2002] 81 ITD 1 (Chd. - Trib.)
- *Dy. CIT* v. *Smt. Meera Khera* [2004] 2 SOT 902 (Mum. - Trib.)

Cost of Acquisition

- Cost of acquisition of an asset is the amount for which it was originally acquired by the assessee. It includes expenses of capital nature incurred in connection with such purchase or for completing the title of the property.
- Sections 49, 50A, 50B, 54, 54B, 54D, 54G, 54GA and 55 define this expression 'cost of acquisition' in relation to specified/special cases.
- CBDT has clarified the expression 'cost of acquisition' in ***Instruction No. 90, dated 1-8-1969*** **as under:**

  'Cost of acquisition of capital asset', meaning of section 48 of the Income-tax Act, 1961, prescribes the mode of computation of the income chargeable under the head 'Capital gain'. It, *inter alia,* allows a deduction for the cost of the acquisition of the capital asset concerned. A question has arisen as to how the "cost of acquisition of the capital asset" should be determined for the purpose of the levy of the capital gains tax under section 45 in a case where agricultural land is converted into non-agricultural land and then sold for non-agricultural use.
- The expression "cost of acquisition" could not have one meaning for the **purposes of depreciation** and another for working out capital gains. For both purposes, the cost of acquisition had to be worked out on the **same principles**. - ***CIT* v. *Ashwin M. Patel* [1983] 144 ITR 566 (Guj.)**
- The cost of acquisition of an asset, be it a capital asset or any other asset must be understood in its commonsense, that is, it must represent the expenditure incurred in acquiring the asset. [***CIT* v. *Octavious Steel & Co. Ltd.* [1995] 82 Taxman 79 (Cal.)**]
- Cost of acquisition in respect of flat purchased from builder is not merely the consideration (base price of the flat) referred to in the sale deed. It will also cover various charges paid by assessee to the builder such as fire fighting charges, generator charges, processing fee and other miscellaneous charges, stamp duty as per the agreement without payment of which assessee could not have obtained the conveyance deed in his name.- ***Praveen Gupta* v. *ACIT* - ITA No. 2558/Delhi/2010; Asst. yr. : 2007-08**
- **Agricultural land becoming capital asset by notification - How COA to be computed**
- Section 48 does not envisage that the capital asset transferred must also fall within the definition of capital asset on the date of acquisition. It is evident that the incidence of tax on the capital gains contemplated under section 45 is to be computed in the manner provided for in section 48 of the Act or upon the option being exercised by the assessee in accordance with section 55 of the Act. The meaning assigned to phrase 'cost of acquisition' under section 55(2) of the Act is exhaustive and the language used is per-emptory. It does not give any latitude to introduce any other facets of the meaning of the expression 'cost of acquisition'. Once it is found that section 45, which is the charging section, is attracted, the profit or gains ought to be computed as in the manner prescribed by the Act and in no other fashion [*CIT* v. *Vishwanath* [1993] 201 ITR 920 (All.)]

Cost to the Previous Owner Section- 49(1)

Cost to the previous owner shall be deemed to be the cost of acquisition in the hands of the taxpayer in cases where a capital asset becomes the property of the assessee under any of the modes given below:

a) On any distribution of assets on the total or partial partition of a HUF

b) Under a Gift or Will;

c) By Succession, Inheritance or Devolution;

d) On any distribution of assets on dissolution of a firm, BOI or AOP (where such dissolution had taken place at any time before the 01-04-1987);

e) On any distribution of assets on liquidation of a company;

f) Under a transfer to a revocable or an irrevocable trust;

g) On any transfer by a holding company to its wholly owned Indian subsidiary company;

h) On any transfer by a wholly owned subsidiary company to its Indian holding company;

i) On any transfer by the amalgamating company to the Indian amalgamated company;

j) In a scheme of amalgamation, any transfer of shares held in a Indian company by a amalgamating foreign company to the amalgamated Foreign company;

k) Consequent to transfer of share(in a scheme of amalgamation as referred to in Section 47(viab) of a foreign company which derives, directly or indirectly, its value substantially from the share or shares of an Indian company held by amalgamating foreign company to the amalgamated foreign company.

l) Consequent to transfer of capital asset by the demerged company to the resulting Indian company. (in case of demerger)

m) Consequent to transfer of share (in case of demerger as referred to in Section 47(vic) of a foreign company which derives, directly or indirectly, its value substantially from the share or shares of an Indian company held by a demerged foreign company to resulting foreign company.

n) Any transfer, in a scheme of amalgamation of a banking company with a banking institution;

o) On any transfer in a scheme of business reorganization of a cooperative bank;

p) On any transfer in a scheme of conversion of private company or unlisted company into LLP;

q) On any transfer in case of conversion of Firm or Sole proprietary concern into Company;

r) By HUF where one of its members has converted his self-acquired property into joint family property.

Note: Where previous owner has also acquired the property in the aforesaid manner the ‘previous owner’ of the property shall be construed as the last previous owner who acquired the property by means other than those stated above.

Cost of Improvement [Sec. 55(1)(b)]

- **Section 55** has been amended by the Finance Act, 2017 to provide that the cost of acquisition of an asset acquired before 1-4-2001 shall be allowed to be taken as **fair market value as on 1st April, 2001** and the cost of improvement shall include only those capital expenses which are incurred after 1-4-2001. Consequential amendment has been made in section 48 so as to align the provisions relating to cost inflation index to the proposed base year. These amendments are applicable with effect from assessment year 2018-19.
- Cost of improvement, in relation to the capital assets shall include all capital expenditure incurred in making addition or alteration to the capital assets by the assessee or the previous owner.
- Cost of improvement does not include any expenditure incurred prior to 01-04-2001.
- **Goodwill - Whether 'property'**

  While calculating to goodwill of a business, right to manufacture, produce any article or thing or right to carry on business **or profession will NIL**
- *Haji Abdul Kader Sahib* v. *CIT* [1961] 42 ITR 296 (Ker.)].

  Goodwill of a business, though intangible, is a capital asset
- In case of self generated asset, being goodwill of a business or profession, the cost of acquisition shall be taken to be NIL in terms of section 55(2)(*a*)(*ii*).
- ***ITO* v. *Gurdip Singh* [2008] 19 SOT 525 (Delhi - Trib.)** the assessee sold a property and claimed Rs. 1.70 lakhs towards construction/renovation of the property sold. The assessee did not furnish enough evidences to substantiate the expenditure incurred. Since the assessee had only one - fourth share in the property but claimed the entire expenditure which showed that the assessee's approach is to claim bogus expenses and consequently reduce tax liability. Accordingly, the total disallowance made by the Assessing Officer was upheld by the Tribunal.
- ***SHANTI BHUSHAN vs. COMMISSIONER OF INCOME TAX*** *(2011) 336 ITR 0026 (Del)*

  Expenditure incurred by the assessee advocate on the coronary by-pass surgery cannot be allowed either under s. 31 or under s. 37(1). ***Before expenses on repair of plant are admitted as a deduction, the plant would necessarily have to be reflected as an asset in the books of accounts***

HOUSE OF WHICH ASSESSEE IN POSSESSION AFTER PAYING FULL CONSIDERATION BUT ASSESSEE NOT REGISTERED OWNER

- In ***ITO* v. *Amrit Narain* [1987] 28 TTJ (Delhi - Trib.) 622**the assessee sold a house and later acquired another residential house for a total consi-deration of Rs. 12.21 lakhs. The Assessing Officer refused to give exemption under section 54 for the reinvestment on the reasoning that the house transferred was not in the name of the assessee and the profit arising from the sale could not be taxed under the head 'Capital gains' but to be taxed under the head 'other sources'.
- The Tribunal held that for taxing a capital gain under section 45 the reference is not to the ownership of the asset but with regard to the transfer of a capital asset. All that required to be seen is whether the subject matter of transfer is a capital asset or not. The assessee had paid the full amount and was in rightful possession of the property sold and on transfer the gain arising is a capital gain and hence could not be assessed under the head 'other sources'.

Cost of acquisition of immovable property taxed as gift

- The immovable property received without consideration and subjected to income-tax under section **56(2)(*vii*)/(*x*)** in the hands of the recipient may be sold (or otherwise transferred for consideration). According to section 49(4), for computing capital gains arising on such sale/transfer, the **cost of acquisition of such property shall be deemed to be the value (stamp duty value)** which has been taken into account for the purposes of section 56(2)(*vii*)/(*x*).

- ***ITO* v. *Shri Trilok Chand Sain* – [2019] 101 taxmannn.com 391 (Jaipur - Trib)**

  The question of receipt of agricultural land which is not 'capital asset' as per Section 2(14) is subject to provisions of Section 56(2)(vii) is raised

  On reading of provisions of 56(2)(vii)(b), we find that it refers to any immoveable property and the same is not circumscribed or limited to any particular nature of immoveable property.

  It refers to any immoveable property which by its grammatical meaning would mean all and any property which is immoveable in nature, i.e., attached to or forming part of earth surface.

  Whether such agriculture land falls in the definition of capital asset u/s 2(14) or whether such agriculture land is stock-in-trade of the assessee, in our considered view, are issues which cannot be read in the definition of "any immoveable property" used in context of Section 56(2)(vii)(b) and are thus not relevant.

Acquisition - Purchase or construction

- Central Board of Direct Taxes has issued **Circular No. 471, dated 15-10-1986**, has clarified that for the purpose of capital gains tax, the cost of the new asset is the tentative cost of construction and the fact that the amount was allowed to be paid in instalments does not affect the legal position and that cases of allotment of flats under the self-financing scheme of the Delhi Development Authority shall be treated as cases of construction for the purpose of capital gains.
- **In P.K. Datta v. ITO [2006] 100 TTJ 133 (Pune - Trib.)**

  Assessee had entered into an agreement with builder for construction of a row-house to be built by builder - Assessee also sold his old house on 26-6-1990 but construction of new house was completed on 21-9-1991 and possession was given in 15-2-1993 - ITO disallowed exemption under section 54 claimed by assessee - Whether since within stipulated period of two years substantial sum had been paid to builder for new house, it could be said that domain and control over property had passed to assessee within a period of two years from date of sale of old property and, therefore, assessee was entitled to exemption under section 54
- **Smt. Shashi Varma v. CIT [1997] 224 ITR 106 (MP)].**

  The Tribunal had taken a very pedantic approach while construing the provisions of section 54. In the instant case, in fact, the capital gain was Rs. 31,980; whereas the first instalment towards the flat from the Delhi Development Authority was Rs. 71,256, i.e., much more than the capital gains.. It was not proper for the Tribunal to have ignored the circular because it has a persuasive value and it was in the nature of granting relief. Therefore, the Tribunal should have considered the circular sympathetically and granted the relief. More so, section 54 only says that within two years, the assessee should have constructed the house but that does not mean that the construction of house should necessarily be complete within two years. What it means is that the construction of house should be completed as far as possible within two years. In the modern days, it is not easy to construct a house within the time-limit of two years and under the Government schemes, construction takes years and years. Therefore, confining to two years' period for construction and handing over possession thereof is impossible and unworkable under section 54. If substantial investment is made in the construction of house, then it should be deemed that sufficient steps have been taken and this satisfies the requirements of section 54. Therefore, the view taken by the Tribunal was not correct.
- **Where sale deed of purchased house not executed within prescribed time** - Where assessee having executed an agreement to sell in respect of a house property, purchased a new residential property within one year from date of agreement to sell and subsequently sale deed could not be executed within prescribed time due to an order passed by competent court, a valid transfer did take place within meaning of section 2(*47*), and relief under section 54 was to be granted to assessee in respect of new residential property. -
- ***Sanjeev Lal* v. *CIT* [2014] 46 taxmann.com 300/225 Taxman 239 (SC).**

  Where assessee having executed an agreement to sell in respect of a house property, purchased a new residential property within one year from date of agreement to sell are subsequently sale deed could not be executed within prescribed time due to an order passed by competent court, a valid transfer did take place within meaning of section 2(47) by even executing agreement to sell was to be granted to assessee.

PURCHASE OF NEW PROPERTY IN NAME OF SPOUSE

- Where it is not disputed that the assessee has invested the amount realised by the sale of a property in the purchase of a flat, the benefit granted by section 54 cannot be denied on a technical ground that the document is not in the name of the assessee but in his wife's name.
- ITO v. S. Vardarajan [1989] 33 TTJ (Mad. - Trib.) 466.
- CIT v. V. Natarajan [2006] 287 ITR 271 (Mad.)
- CIT v. Gurnam Singh [2008] 170 Taxman 160 (Punj. & Har.)

MESNE PROFITS and CAPITAL GAIN

- **Section 2(12)** of the **Code of Civil Procedure** says that 'mesne profits means those profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received therefrom, together with interest on such profits but shall not include profits due to improvements made by the person in wrongful possession'.
- **CIT V. SMT. LILA GHOSH [1993] 71 TAXMAN 72 (CAL.)** the assessee inherited a property which was under lease. However, the lessee did not give possession of the property to the assessee. The Court decreed the suit for eviction and mesne profit in assessee's favour. While the execution of the said decree and the **determination of the quantum of mesne profit were pending**, the Government of West Bengal acquired the demised property. A **settlement was arrived at between the assessee and the Government on the basis of which, the High Court passed an order, by which the Government was to pay a certain sum to the assessee towards compensation for the acquisition of the property.** The Government had also to pay another sum of Rs. 2 lakhs to the assessee in consideration of the assignment of the decree for mesne profit. The assessee contended that the impugned sum of Rs. 2 lakhs was a capital receipt as it was in the nature of damages for wrongful retention of the assessee's property. The High Court held that **no part of the sum of Rs. 2 lakhs could be charged to capital gains, since there was no cost of acquisition involved** in this case.
- Similar decisions could be found in *CIT* v. *Rani Prayag Kamari Debi* [1940] 8 ITR 25 (Pat.); *CIT* v. *J.D. Italia* [1983] 141 ITR 948/12 Taxman 60 (AP); *CIT* v. *Periyar & Pareekanni Rubbers Ltd.* [1973] 87 ITR 666 (Ker.); *CIT* v. *Mrs. Annamma Alexander* [1991] 191 ITR 551/58 Taxman 47 (Ker.).

Reference to valuation officer [Section 55A]

With a view to **ascertaining the fair market value** of a capital asset, the concerned Assessing Officer may refer the valuation of the capital asset to a Valuation Officer appointed by the Income-tax Department in the following cases:

1) Where the value of the asset as **claimed by the assessee** is in accordance with the estimate made by a **registered valuer** (who works in a private capacity under a licence issued by the Board and his valuation is not binding on the Assessing Officer), but the Assessing Officer is of **opinion** that the **value so claimed is at variance** with the **fair market value** of the asset;
2) Where the Assessing Officer is of **opinion** that the fair market value of the asset **exceeds the value** of the asset by more than **Rs. 25,000** or **15 per cent** of the value **claimed by the assessee**, whichever is less; or
3) Where the Assessing Officer is of **opinion** that, having regard to **nature of an asset** and relevant circumstances, it is necessary to make a reference to the Valuation Officer

Report of Valuation Officer determining FMV is binding on AO

- *Smt. Bharti Jayesh Sangani* v. *ITO* [2011] 128 ITD 345 (Mum.), the Tribunal held that the Assessing Officer cannot disregard the value determined by the DVO and proceed to compute long-term capital gain in accordance with the value determined by stamp valuation authority except in the situation envisaged by section 50C(3). The Tribunal held as under :

Sub-section (2) of section 50C provides that : ". . . where any such reference is made, the provisions of sub-sections (2), (3), (4), (5) and (6) of section 16A, . . .of the Wealth-tax Act, 1957 (27 of 1957), shall, with necessary modifications, apply in relation to such reference as they apply in relation to a reference made by the Assessing Officer under sub-section (1) of section 16A of the Act". The ambit of expression 'with necessary modifications' implies striking out the inapplicable fractions of the provision which align strictly with the specifics of the Wealth-tax Act. It does not and cannot oust the application of the soul of section 16A, which is the process of determination of the value of capital asset by the DVO and then making such report as binding on the Assessing Officer.

- Sub-section (6) of section 16A provides in unequivocal terms that the Assessing Officer shall complete the assessment in conformity with the estimate of DVO. The term "shall" used in sub-section (6) requiring the Assessing Officer to complete the assessment, when seen in juxtaposition to the expression "in conformity with" the estimate of Valuation Officer, makes it abundantly clear that the assessment has to be done in conformity with and not in disregard to the estimate made by the Valuation Officer.
- The usage of the term "shall" in sub-section (6) evidences that the Assessing Officer has no option but to go by the estimate of Valuation Officer.
- The provisions of section 50C(3) cannot be interpreted to give authority to AO to reject the Valuation Officer's report. This sub-section applies to a situation wherein the value determined by the DVO under sub-section (2) is more than the value adopted, assessed or assessable by the stamp valuation authority under sub-section (1). In such a situation, sub-section (3) of section 50C comes to the rescue of the assessee by providing that the value so adopted or assessed or assessable by the stamp valuation authority under sub-section (1) shall be taken as the full value of consideration.
- Ordinarily where a reference is made to DVO under sub-section (2), the value so determined by the DVO is binding on the Assessing Officer. If such value is higher than the value adopted, assessed or assessable by the stamp valuation authority, then the higher value shall be ignored. In such a situation, the provisions of sub-section (3) shall override the mandate of sub-section (2). The Legislature in its wisdom has contemplated only one situation in sub-section (3) in which the provisions of sub-section (2) of section 50C have been dispensed with. It is only where the value under sub-section (2) is higher than the value under sub-section (1) that the provisions of sub-section (3) shall come into play. Only in such a situation the command of sub-section (3) is activated to take no notice of the value as determined by the DVO. But for that, the directive of sub-section (2) is applicable in all other cases. In a converse situation, *viz.,* where the value under sub-section (2) is lower than the value under sub-section (1), the provisions of sub-section (3) of section 50C have not been made applicable to.
- The natural corollary which, therefore, follows is that if the value determined by the DVO under sub-section (2) is lower than that of the value adopted, assessed or assessable by the stamp valuation authority under sub-section (1), the value so estimated under sub-section (2) shall be binding on the Assessing Officer and the assessment shall be made accordingly

Bharti Jayesh Sangani v. *ITO* [2011] 128 ITD 345 (Mum.),

Hon’ble Mumbai Tribunal followed

- *M.C. Khunnah* v. *Union of India* [1979] 118 ITR 414 (Allahabad) and also CBDT's *Circular No. 96, dated 25-11-1972*. Para 32 of CBDT's *Circular No. 96, dated 25-11-1972* clarifies the provisions of section 16A of WT Act, 1957 as under :

  "32. The Valuation Officers will be associated with the valuation of assets at the stage of assessment of wealth-tax. For this purpose, the Wealth-tax Officer may refer the matter of valuation of any asset to the Valuation Officer. The latter will thereupon proceed to deal with the matter and for this purpose, he will give an opportunity to the assessee to present his case regarding valuation of the asset. The valuation will thereafter be finalised by the Valuation Officer after considering the assessee's objections and other evidence. The valuation as made by the Valuation Officer **will be binding on the Wealth-tax Officer** who will make the assessment in conformity with the said valuation . . . ."

Where the consideration is not ascertainable or cannot be determined - Section 50D

- Section 50D does **not apply** to cases where **there is no consideration**. Section 50D **applies to cases where the consideration is there but is not ascertainable** or cannot be determined.
- Section 50D provides that where the consideration received or accruing as a result of the transfer of a capital asset by an assessee is not ascertainable or cannot be determined, then, for the purpose of computing income chargeable to tax as capital gains, the **fair market value of the said asset on the date of transfer shall be deemed to be the full value of the consideration** received or accruing as a result of such transfer.
- Capital gains are calculated on transfer of a capital asset, as sale consideration minus cost of acquisition. In some judicial decisions, it was held that where the consideration in respect of transfer of an asset is not determinable or ascertainable, then, as the machinery provision fails, the gains arising from the transfer of such assets is not taxable and also that fair market value cannot be taken as deemed full value of consideration unless there is a specific provision in this respect. This particularly happens when shares in Indian companies are transferred 'without consideration' by companies as part of restructuring exercise. [*See Daana Corporation,* In re [2010] 186 Taxman 187 (AAR - New Delhi), *Goodyear Tire and Rubber Company,* In Re [2011] 199 Taxman 121 (AAR - New Delhi), *Amiantit International Holding Ltd.,* In re [2010] 189 Taxman 149 (AAR - New Delhi)]. Obviously, these transfers are not "gifts" but consideration for them is general improvement in business/synergies etc. which is not "ascertainable" or "quantifiable". In *Amiantit International Holding Ltd.,* In re [2010] 189 Taxman 149 (AAR - New Delhi), the AAR observed :
- ". . . . . The possibility of applicant-transferor improving its overall business by virtue of re-organization and the mere possibility or chance of the applicant making better returns in the near or distant future as a consequence of reorganization can hardly be regarded as a consideration accruing or arising to the transferor when he has no right to receive a definite or an ascertainable amount or benefit from the transferee. A capital gain cannot arise on the basis of uncertain and indefinite future contingencies or hypothetical and imaginary estimations. There is really no effective answer from the revenue's side to the question as to what is the valuable consideration that has accrued or arisen to the transferor and how it can be converted into money's worth for the purpose of computing the alleged capital gain. The only endeavour of revenue's counsel was to take a plea that the 'benefits and advantages' mentioned by the applicant in para H of page 7 of the application represent the valuable consideration for transfer. ……. Thus, the full value of consideration for the transfer of shares is sought to be deduced from the overall objectives of reorganization and the resultant changes in investment. It is not explained how they can be evaluated in terms of money. …"
- In order to overcome the above judicial decisions, section 50D was inserted in the Act w.e.f. A.Y. 2013-14 to provide that fair market value of asset shall be deemed to be the full value of consideration if actual consideration is not attributable or determinable This amendment takes a cue from the following observations of ITAT in *Dy. CIT* v. *Summit Securities Ltd.* [2012] 19 taxmann.com 102 (Mum. - Trib.) (SB):
- ".......the full value of consideration for the purposes of section 48 has to be considered as only the amount actually received or accruing as a result of the transfer of capital asset except where it has been substituted with fair market value or by any other mode. It is only in such specific cases that the actual amount received or accruing shall be replaced with the fair market value or such other mode as specified. In the absence of any specific provision, the general meaning of the amount actually received or accruing is to be considered as the full value of consideration received or accruing as a result of transfer of capital asset......."

Rates of tax in case of 'Long Term' Capital Gains

Long Term Capital Gains

a) Long-term capital gains are subject to tax at 20%;

b) Long-term capital gains arising from transfer of listed securities, units or a zero coupon [other than as referred to in point d) below] bonds shall be taxable at lower of following:

   i. 20% after taking benefit of indexation; or

   ii. 10% without taking benefit of indexation.

c) Long-term capital gains arising to a non-residents or foreign company from transfer of unlisted securities shall be taxed at without giving benefit for indexation;

d) Long-term capital gains arising from transfer of listed equity share, or a unit of an equity oriented fund or a unit of a business trust as referred to in Section 112A shall be chargeable to tax at the rate of 10% in excess of Rs. 1 Lakh.

Rates of tax in case of ‘Short Term’ Capital Gains

a) Short-term capital gains shall be included in the gross total income of the taxpayer and will be taxed at the **normal rates;**

b) Short-term capital gains arising from transfer of Equity Shares, Units of an Equity Oriented Funds or a unit of a business trust which is chargeable to securities transaction tax shall be taxed **at 15% under Section 111A**;

Note:-Now benefit of reduced rate of tax (i.e., 15%) shall be available w.e.f. 1-4-2016 even in respect of income arising from transfer of units of a business trust which were acquired by assessee in lieu of shares of special purpose vehicle as referred to in section 47(xvii).

Deduction/ Exemption under Capital Gain

The idea behind allowing deductions is that the amount of capital gains is invested in a new capital asset within a prescribed time period. The deduction is available in respect of such investment made into a new capital asset subject to certain conditions.

Chapter-III 'INCOME WHICH DO NOT FORM PART OF TOTAL INCOME'

- Section 10 provides list of incomes which are exempt from tax Amongst these the major exemptions relating to capital gains :
- **Section 10(33) :** Long-term or short-term capital gain arising on **transfer of units of Unit Scheme, 1964 (US 64**) (transferred on or after 1-4-2002).
- **Section 10(37) :** An individual or Hindu Undivided Family (HUF) can claim exemption in respect of capital gain arising on **transfer of agricultural land situated in an urban area by way of compulsory acquisition**. This exemption is available if the land was used by the taxpayer (or by his parents in the case of an individual) for **agricultural purpose for a period of 2 years immediately preceding** the date of its transfer.
- **Section 10(37A) :** An individual or Hindu Undivided Family (HUF) can claim exemption in respect of capital gain arising on transfer of **land or building or both under Land Pooling Scheme under the Andhra Pradesh Capital City Land Pooling Scheme** (Formulation and Implementation) Rules, 2015. This exemption is available if individual or HUF was owner of such land as on 02-06-2014. [Inserted by the Finance Act 2017 w.e.f. **01-04-2015].**
- **Section 10(38) :** Long-term capital gain arising on **transfer of equity shares or units of equity oriented mutual fund** (*) or a unit of a business trust other than a unit allotted by the trust in exchange of shares of a special purpose vehicle as referred to in section 47(xvii), will be exempt from tax, if the following conditions are satisfied:

  The asset transferred should be equity shares of a company or units of an equity oriented mutual fund or a unit of a business trust other than a unit allotted by the trust in exchange of shares of a special purpose vehicle as referred to in section 47.

  The transaction should be liable to securities transaction tax (STT) at the time of transfer.

  Such asset should be a long-term capital asset.

  Transfer should take place on or after October 1, 2004.

  Note: Any long-term capital gain arising from a transaction undertaken in recognized stock exchange located in an International Financial Service Center shall be exempt from tax. Such exemption is available if such transaction is undertaken in foreign current and even if no STT is paid on such transaction.

  Long term capital gain exemption on transfer of equity share acquired or on after 01-10-2004 shall be available only if the acquisition of share is chargeable to STT. However, the exemption shall continue in genuine cases where the STT could not have been paid like acquisition of share in IPO, FPO, bonus or right issue by a listed company, acquisition by non-resident in accordance with FDI policy, etc. [Inserted by Finance Act 2017]

  (*) Equity oriented mutual fund means a mutual fund specified under section 10(23D) and 65% of its investible funds, out of total proceeds of such fund are invested in equity shares of domestic companies
- **[2019] 268 Taxman 320 (SC) Suman Poddar *v.* Income Tax Officer**_Where High Court upheld Tribunal's order holding that assessee's claim for exemption under section 10(38) could not be allowed because share transactions were bogus as company 'C' whose shares were allegedly purchased was a penny stock, SLP filed against said order was to be dismissed

TAX-FREE CAPITAL GAINS

In the following cases, income from Capital gains is specifically exempted :

(*i*) Income from transfer of a unit of the Unit Scheme, 1964 referred to in Schedule I to the Unit Trust of India (Transfer of Undertaking and Repeal) Act, 2002 and where the **transfer of such asset takes place on or after 1-4-2002.**

(*ii*) **Capital gains of a political party subject to provisions of section 13A** of the IT Act, 1961.

(*iii*) In the case of an **individual or HUF**, capital gains arising from the transfer of **agricultural land**, where such land is situated in any area falling **within the** jurisdiction of a **municipality** or a **cantonment board** having **population of at least 10,000** or in any area within such distance, not being more than 8 kms., from the local limits of any municipality or cantonment board. Such **land should have been used for agricultural purposes during the period of two years immediately preceding the date of transfer**. Further, such transfer should be by way of compulsory acquisition under any law and the said capital gains should have arisen from the compensation received on or after 1st April, 2004.

(*iv*) Clause **(*43*) of section 10** exempts from tax "any amount received by an individual as a loan, either in lump sum or in instalment, in a transaction of **reverse mortgage**". Inserted by Finance Act 2008

(*v*) Gains from the **transfer of an excluded capital asset** i.e. asset excluded from the definition of capital asset in **section 2(*14*).**

(*vi*) Capital asset transferred by a mode of **transfer which is exempted** under **section 47.**

(*vii*) Capital gain exempted from tax by **reason of sections 54 to 54H**.

(*viii*) Long-term capital gains up to a threshold limit of Rs. 1,00,000 arising from transfer of a long-term capital asset, being :

(*a*) listed equity shares where the purchase or transfer is chargeable to securities transaction tax

(*b*) unit of equity oriented fund or a unit of business trust (where STT applicable to transfer of such unit)

[Section 112A applicable w.e.f. assessment year 2019-20 to such shares or units transferred on or after 1-4-2018]

Long-term capital gains in excess of Rs. 1,00,000 is liable to be taxed at the rate of 10% [*See* **Para 23**]

(*ix*) Any income accrued or arisen to, or received by a specified fund as a result of transfer of capital asset referred to in clause (*viiab*) of section 47, on a recognised stock exchange located in any International Financial Services Centre and where the consideration for such transaction is paid or payable in convertible foreign exchange, to the extent such income accrued or arisen to, or is received in respect of units held by a non-resident. [Section 10(4D) (applicable w.e.f. assessment year 2020-21)]

(*x*) Section 115QA of the Act provides for the levy of additional Income-tax at the rate of 20% of the distributed income on account of buy-back of unlisted shares by the company. As additional income-tax has been levied at the level of company, to avoid double taxation of same income again at the shareholders' hands, the consequential income arising in the hands of shareholders has been exempted from tax under clause (*34A*) of section 10 of the Act. The Finance (No.2) Act, 2019 has extended section 115QA to buyback of shares by listed companies with effect from 05.07.2019. Consequently, with effect from 05.07.2019, the exemption under section 10(34A) has also been extended to shareholders of the listed company on account of buy-back of shares on which additional income-tax has been paid by the company.

AGRICULTURAL LAND- Tests for determining

- ***Kalpetta Estates Ltd.* v. *CIT* [1992] 61 Taxman 54 (Ker.)** The burden to prove that a land is agricultural land is on the assessee. Once the assessee proves that the land is agricultural land, the burden of proving that it is not agricultural land is on the revenue.

- **CIT v. Gemini Pictures Circuit (P.) Ltd. [1996] 220 ITR 43 (SC)**
  Assessee purchased 5 acres of land with a hotel building situated in heart of Madras city in 1950 - Two more buildings were built by assessee which were used for business purposes - Until rest of land was sold in 1966-67 to various companies for commercial use assessee had been raising bananas and vegetables in land - **Land stood recorded in Municipal record as urban land** - Land in question was surrounded on all **sides by industries and commercial buildings** - Whether land in question was agricultural in nature – Held

- **Shankar Lal v. CIT [1974] 94 ITR 433 (Delhi)**
  In order to come within the category of 'agricultural land' the land must not only be capable of being **used for agricultural purposes** but should have been actually used as such at some point of time. **A temporary non-user for agricultural purposes will not affect the character of the land** but a permanent abandonment of the use for agricultural purposes will affect the character of the land. The actual conversion of the land into non-agricultural purposes will also affect the character of the land. Whether a conversion had taken place will depend on the facts of each case.

- **Lilavati M. Amin v. CIT [1993] 201 ITR 293 (Bom.),** it was held that the test, in order to decide whether the land is agricultural or not, depends upon the actual condition of the land at the date of valuation and its intended user, as laid down by the Supreme Court in *CWT* v. *Officer-in-charge (Court of Wards)* [1976] 105 ITR 133. Where land was undoubtedly shown in record of rights as agricultural land and at the time of sale, it was assessed to land revenue on that basis and as against this revenue record, there was absence of material indicating any agricultural use of this land, it could not be treated as agricultural land.

Deductionunder Capital Gain-54(1)

Capital gains arising from transfer of Residential House property
Eligible taxpayers: Individual and HUF
Capital gains eligible for exemption for Long-term
Assets to be acquired for exemption One residential house property or Two residential house properties

Note: To boost the **real estate sector** and solve its problem of inventory of unsold flats, the Finance Minister in Para 93 of the Budget Speech (2019 Interim Budget) announced that. "The benefit of rollover of capital gains under section 54 of the Income-tax Act will be increased from investment in one residential house to two residential houses for a taxpayer having capital gains up to Rs. 2 crore. This benefit can be availed once in a life time"

The **Notes on clauses to the Finance Bill** clarify that the amendments to section 54 of the Income-tax Act are for to providing relief to the taxpayer:—

i) having long-term capital gains up to two crore rupees,

ii) arising from transfer of a residential house,

iii) by affording him a one time opportunity, at his option, to utilise the said amount for the purchase or construction of two residential houses in India instead of one residential house as currently provided.

If during any assessment year, the assessee has exercised this option, he shall not be subsequently entitled to exercise the option for the same or any other assessment year.

The two new provisos were inserted in section 54(1) of the Act by section 6 of the Finance Act, 2019 to provide relief as above come into force with effect from assessment year 2020-21.

If transfer of residential house wherever situated is made on or after 01.04.2019, long-term capital gains therefrom if not exceeding 2 crores may be invested in 2 residential houses in India and deduction in respect of those investments shall be allowed from long-term capital gains. This is once in life-time opportunity

Time limit for acquiring the new assets - Purchase: within 1 year before or 2 years after date of transfer, Construction: within 3 years after date of transfer

Exemption Amount: Investment in new assets or capital gain, whichever is lower

Withdrawal of exemption: If new asset is transferred within 3 years of its acquisition

Deposit in Capital gains deposit scheme before due date under Sec. 139(1)- yes

Deduction under Capital Gain-Section-54B

- Capital gains arising from transfer of **Agriculture land** **used by taxpayer or by his parents or HUF for agriculture purposes in last 2 years before its transfer**
- Eligible taxpayers: **Individual and HUF**
- Capital gains eligible for exemption for **Short-term** **or Long-term**
- Assets to be acquired for exemption **Agricultural land (may be in urban area or rural area)**
- Time limit for acquiring the new assets - **Within 2 years after date of transfer**
- Exemption Amount: **Investment in agricultural land or capital gain, whichever is lower**
- Withdrawal of exemption: **If new asset is transferred within 3 years of its acquisition**
- Deposit in Capital gains deposit scheme before due date under Section. 139(1)**- yes**

- **Note: Assessee availing section 54B relief required to file ITR w.e.f. AY 2020-21 even if his total income after relief is below threshold exemption limit**
- The Finance (No. 2) Act, 2019 has amended section 139 of the Act. The amended section 139 provides that a person claiming benefit of exemption from capital gains tax under sections 54, 54B, 54D, 54EC, 54F, 54G, 54GA and 54GB of the Act will be required to file return of income with effect from assessment year 2020-21 even if his total income (before Chapter VIA deductions but after claiming such exemption benefits) is not more than the threshold exemption limit.

Deduction under Capital Gain-Section- 54D

- Capital gains arising from transfer of **Compulsory acquisition of land or building forming part of industrial undertaking (which was used for industrial purposes for at least 2 years before its acquisition).**
- Eligible taxpayers: **Any person**
- Capital gains eligible for exemption for **Short-term or Long-term**
- Assets to be acquired for exemption **Land or building for shifting or reestablishing said industrial undertaking**
- Time limit for acquiring the new assets - **Within 3 years from date of receipt of compensation**
- Exemption Amount: **Investment in new assets or capital gain, whichever is lower**
- Withdrawal of exemption: **If new asset is transferred within 3 years of its acquisition**
- Deposit in Capital gains deposit scheme before due date under Section. 139(1)**- yes**

Deduction under Capital Gain-Section- 54EC

- Capital gains arising from transfer of **Any long-term capital asset being Land or Building or Both**
- Eligible taxpayers: **Any person**
- Capital gains eligible for exemption for **Long-term**
- Assets to be acquired for exemption **Bond of NHAI or REC, which** redeemable after 5 years issued on or after 1-4-2018 **.**
- Time limit for acquiring the new assets - **Within 6 months from date of transfer**
- Exemption Amount: **Investment in new assets or capital gains, whichever is lower, however, subject to Rs. 50 lakhs.**
- Withdrawal of exemption: **If new asset is transferred or it is converted into money or a loan is taken on its security**
- **within 5 years of its acquisition**
- Deposit in Capital gains deposit scheme before due date under Section. 139(1)**- NO**

Deduction under Capital Gain-Section- 54EE

- Capital gains arising from transfer of **Any long-term capital asset**
- Eligible taxpayers: **Any Person**
- Capital gains eligible for exemption for **Long-term**
- Assets to be acquired for exemption **Units of such fund as may be notified by Central Government to finance start-ups**
- Time limit for acquiring the new assets - **Within 6 months after the date of transfer of original asset**
- Exemption Amount: **Investment in new assets or capital gains, whichever is lower, however, subject to Rs. 50 lakhs.**
- Withdrawal of exemption: **If new asset is transferred within a period of 3 years from the date of its acquisition.**
  Note:
  Where assessee takes loans or advance on security of such specified asset, he shall be deemed to have transferred such asset on the date on which such loan or advance is taken.
- Deposit in Capital gains deposit scheme before due date under Section. 139(1)**-NO**

Deduction under Capital Gain-Section- 54F

- Capital gains arising from transfer of **Any long term asset** (**other than a residential house property**) **provided on date of transfer taxpayer does not own more than one residential house property (except the new house)**
- Eligible taxpayers: **Individual and HUF**
- Capital gains eligible for exemption for **Long-term**
- Assets to be acquired for exemption **One residential house property**
- Time limit for acquiring the new assets – **Purchase within 1 year before or within 2 years after date of transfer**
- **Construction: within 3 years after date of transfer**
- Exemption Amount: **Investment in new assets X capital gain/net consideration**
- Withdrawal of exemption:

  a) If new asset is transferred within 3 years of acquisition,

  b) if another residential house is purchased within 2 years of transfer of original asset;

  c) if another house is constructed within 3 years of transfer of original asset
- Deposit in Capital gains deposit scheme before due date under Section. 139(1**)-YES**
- **Assessee availing section 54F relief required to file ITR w.e.f. AY 2020-21 even if his total income after relief is below threshold exemption limit**
- It may happen that as a result of claiming exemption benefit under section 54F of the Act, the total income of the assessee before claiming Chapter VIA deductions may not exceed the maximum amount not chargeable to tax *i.e.* the threshold exemption limit. In such a case, at present, no income-tax return needs to be filed by the assessee. This benign rule is applicable upto assessment year 2019-20.
- The Finance (No. 2) Act, 2019 has amended section 139 of the Act. The amended section 139 provides that a person claiming benefit of exemption from capital gains tax under sections 54, 54B, 54D, 54EC, 54F, 54G, 54GA and 54GB of the Act will be required to file return of income with effect from assessment year 2020-21 even if his total income (before Chapter VIA deductions but after claiming such exemption benefits) is not more than the threshold exemption limit.
- These amendments will take effect from 1st April, 2020 and will, accordingly apply in relation to assessment year 2020-21 and subsequent assessment years"

Deduction under Capital Gain-Section- 54G

- Capital gains arising from transfer of **Land, building, plant or machinery, in order to shift industrial undertaking from urban area to rural area.**
- Eligible taxpayers: **Any person**
- Capital gains eligible for exemption for **Short-term or Long-term**
- Assets to be acquired for exemption **Land, building, plant or machinery, in order to shift industrial undertaking to rural area.**
- Time limit for acquiring the new assets - **within 1 year before or 3 years after date of transfer**
- Exemption Amount: **Investment in new assets or capital gain, whichever is lower**
- Withdrawal of exemption: If new asset is transferred **within 3 years of acquisition**
- Deposit in Capital gains deposit scheme before due date under Section. 139(1)**- yes**

Deduction under Capital Gain-Section- 54GA

- Capital gains arising from transfer of **Land, building, plant or machinery, in order to shift industrial undertaking from urban area to SEZ.**
- Eligible taxpayers: **Any person**
- Capital gains eligible for exemption for **Short-term or Long-term**
- Assets to be acquired for exemption **Land, building, plant or machinery, in order to shift industrial undertaking to SEZ.**
- Time limit for acquiring the new assets - **Within 1 year before or within 3 years after date of transfer**
- Exemption Amount**: Investment in new assets or capital gain, whichever is lower**
- Withdrawal of exemption: **If new asset is transferred within 3 years of acquisition**
- Deposit in Capital gains deposit scheme before due date under Section. 139(1**)- yes**

Deduction under Capital Gain-Section- 54GB

- Capital gains arising from transfer of **Residential property** **(house or a plot of land)**The transfer should take place during 1st April, 2012 and 31st March 2017. However, in case of investment in "eligible start-up", the residential property can be transferred upto 31st march 2021
  Note: Provisions of this section shall not apply to any transfer of residential property made after March 31, 2017. However, in case of an investment in eligible start-up, the residential property can be transferred up to 31.03.2019.
  Note: w.e.f. Assessment Year 2020-21, the sunset date for transfer of original capital asset (residential property) for investment in eligible start-ups is extended from March 31, 2019 to March 31, 2021 and the condition of minimum holding of 50% of share capital or voting rights in the start-up is relaxed to 25%.
- Eligible taxpayers: **Individual and HUF**
- Capital gains eligible for exemption for **Long-term**
- Assets to be acquired for exemption **Subscription in equity shares of an eligible company.**
  Note:
  1. W.e.f. April 1, 2017, eligible start-up is also included in definition of eligible company.
  2. The eligible company should utilize the amount of subscription for purchase of new assets (i.e., plant and machinery except vehicle, office appliances, computer or computer software etc.). However, In the case of eligible startup, the new asset shall include computers or computer software.
- Time limit for acquiring the new assets - **Investment by the assessee –Before due date for furnishing of return under Sec. 139(1). Investment by the company – within 1 year from date of subscription.**
- Exemption Amount: **Investment in new assets X capital gain/net consideration**
- Withdrawal of exemption: **If equity shares in company or new asset acquired by company is sold or transferred within a period of 5 years from date of acquisition.**
  Note: w.e.f. Assessment Year 2020-21, the restriction on the transfer of new asset is reduced to 3 years in case of computer or computer software.
- Deposit in Capital gains deposit scheme before due date under Section. 139(1)**- yes**

- "**eligible start-up" and "eligible business**" shall have the meanings respectively assigned to them in *Explanation* sub-section (4) of section 80-IAC;

SECTION 80-IAC, READ WITH SECTIONS 54EE, 54GB AND 79, OF THE INCOME-TAX ACT, 1961 - DEDUCTIONS - SPECIFIED BUSINESS - TAX EXEMPTION TO STARTUPS

PRESS RELEASE, DATED 12-4-2017

- Various tax exemptions have been given to Startups in the recent past—
- Following direct tax incentives were provided in Income-tax Act, 1961 ('the Act') to promote Start-ups through Finance Act, 2016:
- Introduction of new section 54EE in Income-tax Act, 1961 to exempt investment of long term capital gains by an investor in a fund notified by Central Government.
- Amendment of section 54GB to provide exemption of capital gains arising out of sale of residential property, on investing the same in shares of Start-up company
- Introduction of new section 80-IAC to provide 100% deduction for three consecutive years out of five years, to profits of start-ups which are approved by Inter-Ministerial Board of Certification notified by DIPP. To prevent incidence of "Angel Tax" on angel investors investing in approved start-ups, CBDT vide Notification No.45/2016 dated June 14,2016 notified that Angel investors funding to approved start-ups shall be exempt from incidence of tax under section 56(2)(*viib*). Further, *vide* Finance Act,2017, following benefits have been provided to start-ups:
- Amendment of section 79 of the Act to provide that in the case of a company being an eligible start-up, loss shall be carried forward and set off against the income of the previous year, even if a change in shareholding has taken place in a previous year subject to all the shareholders of such company on the last day of the year or years in which the loss was incurred, continuing to hold shares on the last day of such previous year. The restriction of fifty one per cent of shareholding of company to remain unchanged in order to carry forward and set-off the loss of earlier years has therefore been relaxed in the case of start-ups
- Amendment to provide that deduction under section 80-IAC can be claimed by an eligible start-up for any three consecutive assessment years out of seven years beginning from the year in which such eligible start-up is incorporated against three years out of five years provided by Finance Act, 2016.The above exemptions would encourage seed-capital investment in Startups, facilitate their growth and meet the working capital requirements during the initial years of operation. Further, they would also promote investments into Start ups by mobilizing the capital gains arising from sale of capital assets.
- This information was given by the Commerce and Industry Minister Smt. NirmalaSitharaman in a written reply in Rajya Sabha today.

Utilization of amount of capital gain [without depositing into capital gain scheme up to time limit specified u/s. 139(1) for the purchase or construction of the new asset is before date for filing the return under section 139(1) or the due date for filing the return of income under section 139(4)

- It cannot be interpreted that section 139 should be read as section 139(1). Assessee, though not deposited the unutilized funds in specified capital gain account scheme before the due date under section 139(1), having utilised the entire capital gains by purchasing a house property before the extended due date under s. 139(4), he/she is eligible for exemption under section 54.

  i) Nipun Mehrotra v. ACIT [2008] 110 ITD 520 (Bang.),
- ii) Fathima Bai v. ITO [2009] 32 DTR (Kar.) 243

  iii) R. Kulkarni (HUF) v. ACIT [2011] 135 TTJ (Bang.) 630

  iv) CIT v. Jagriti Aggarwal [2011] 15 taxmann.com 146 (Punj. & Har.),

  v) RKP Elayarajan v. DCIT [2012] 23 taxmann.com 206 (Chennai - Trib.),

  vii) Anil Kumar Aurora v. ITO [2013] 37 CCH 221 (Mum.)]]

  viii) CIT v. Jagtar Singh Chawla [2013] 33 taxmann.com 38 (Punj. & Har.)

Capital Gain Account Scheme 1988

The account under the CGA Scheme can be opened in any 'Deposit Office'. By 'Deposit Office' is meant any of the following :

- any branch/branch office of the State Bank of India (SBI),
- any branch/branch office of a subsidiary bank of the SBI,
- any branch/branch office of a nationalised bank authorised by the Central Government by notification in the Official Gazette.

Who can deposit : Any person who is eligible for exemption under section 54, 54B, 54D, 54F or 54G can open an account under the CGA Scheme and make a deposit thereunder.

Types of deposits : There are two types of deposits namely,

1)**'Deposit Account A'** which is in the form of a **'savings deposit'** and under which **withdrawals can be made from time to time** by the depositor, and

2)**'Deposit Account B'** which is in the form of a **'term deposit'** which can, at the option of the depositor, be cumulative or non-cumulative, and under which in the normal course **withdrawals can only be made on expiry of the term** of deposit.

- **<u>Time of deposits to avail benifit:</u>** The deposits in the account may be made either in one lump-sum or in instalments at any time on or before the due date for furnishing the return of income under section 139(1).

Thankyou

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