Taxation of Real Estate Transactions: Current Issues

Dr. Girish Ahuja
M.Com., Ph.D., FCA
Chartered Accountant

The boom in the Real Estate Market had attracted the attention of every person to this market. Economic Development, Industrialization, Commercialization and Development of Infrastructure led to sharp increase in the value of property all over the country which has now stabilized. As supply of land is limited, the prices are bound to increase as demand increases. The interest in the Real Estate Market is also coupled with the vexed issues of taxation with respect to various transactions relating to this market. The most popular and contentious issues relating to real estate transactions are discussed in this article.

1. Capital gain v Business income:

Whether a particular asset is stock-in-trade or capital asset does not depend upon the nature of the article, but the manner in which it is held. The same item may be stock-in-trade in the hands of the assessee who deals in that item. But it will be capital asset in the case of an assessee who uses it for earning income or holds as an investment. For example, a dealer in real estate holds a piece of land or house property as stock-in-trade. But it will be a capital asset in the hands of a person who holds it as an investment and derives income from leasing or renting of the property.

Even stock-in-trade may become capital asset in certain circumstances and *vice versa*. If an assessee who deals in certain goods or commodities as trader, on closure of the business, retains the existing stocks as investment, the stocks will become capital asset in his hands from the time of closure, not withstanding that they were stock-in-trade earlier in his hands. Even in the course of a business, an assessee may try to transfer some of the stock-in-trade from his trading activity and decide to hold them as investment. The stocks so held would assume the character of capital asset from the date of such holding. This may usually happen in the case of dealer in shares and real estate. But in all these cases, the finding will be one of fact depending upon the intention and conduct of the assessee supported by direct and circumstantial evidence. Similarly, when a capital asset is converted into stock-in-trade, the same will no longer be capital asset. However, this situation is covered by section 45(2). As per section 45(2), the capital gain shall not arise in the year of conversion but would arise in the previous year in which such converted asset is sold or otherwise transferred. For the purpose of computation of capital gain in case of such converted asset, the fair market value of the asset on the date of its conversion shall be treated as its consideration price. Excess of the sale price over the consideration price (i.e. fair market value on the date of conversion) shall be treated as business income. Both the capital gain and business income shall be taxable in the previous year in which such converted as sold.

Investment in land or sale of land after plotting — whether business income or capital gain: Normally, the purchase of land represents investment of money in land. [*CIT* v *Jawahar Development Association* (1981) 127 ITR 431 (MP)].

A transaction of purchase and sale of land cannot be assumed, without more, to be a venture in the nature of a trade.

It is well settled that the mere fact that property was purchased with the intention of selling it at a profit is not conclusive on the question whether an isolated transaction of purchase and resale is an adventure in the nature of trade. If there are relevant facts besides the fact of purchase and resale, it is open to come to the conclusion that the transaction is one in the nature of trade. [*Gurdial Naraindas & Co*. v *CIT* (1963) 50 ITR 633 (Bom)].

In order to hold that an activity is in the nature of an adventure in the nature of trade there must be positive material to prove that the assessee intended to trade in such an activity and in the absence of evidence the sale of immovable property consisting land could give rise only capital accretion. If the land owner developed the land, expended the money, laid roads convert the land into house sites and with the view to get better price it will not be considered as an adventure in the nature of trade to give any business profit. [CIT v A. Mohammed Mohideen (1989) 176 ITR 393 (Mad)]

The activity of an assessee in dividing the land into plots and not selling it as a single unit as he purchased, goes to establish that he was carrying on business in real property and it is a business venture. [*Raja J. Rameshwar Rao* v *CIT* (1961) 42 ITR 179 (SC)].

Ordinarily, where a person acquired land with a view to selling it later after developing it and actually divided the land into plots and sold the same in parcels, the activity could only be described as a business adventure. Generally speaking, the original intention of the party in purchasing the property, the magnitude of the transaction of purchase, the nature of the property, the length of its ownership and holding, the conduct and subsequent dealings of the assessee in respect of the property, the manner of its disposal and the frequency and multiplicity of transactions afforded valuable guides in determining whether the assessee

was carrying on a trading activity and whether a particular transaction should be stamped with the character of a trading adventure. [*CIT* v *Trivedi* (*V.A.*) (1988) 172 ITR 95 (Bom)].

However, on some different facts and circumstances. It was held that profit on the sale of land after plotting it out to secure better price cannot be taxed as profit from an adventure in the nature of trade. It shall be taxed under the head 'capital gain'. [*CIT* v *Shashi Kumar Agrawal* (2003) 131 Taxman 823 (All)].

Assessee had purchased a plot of land in 1958. In view of the Urban Land (Ceiling and Regulation) Act, 1976, she applied for construction of group housing on the excess land and sold the land to a developer and builder. The Assessing Officer held that the instalments received from the builder is business income. The Tribunal held that it is not business income as there was no adventure in the nature of trade. On reference, the Delhi High Court upheld the decision of the Tribunal and held as under:

> "The plot was purchased in the year 1958 and after the operation of law, namely, the Urban Land (Ceiling and Regulation) Act, 1976, it was not possible for the assessee to retain the land. It was very clear that on the assessee's part there was only an intention to transfer the land and not the portion that may be constructed by the builder on a future date. Clause 3 of the agreement merely provided the mode of payment. On the facts and in the circumstances of the case, the Tribunal was right in holding that there was no adventure in the nature of trade and thereby deleting business income of Rs. 11,87,387 from the income of the assessee." [*CIT* v *Radha Bai* (2005) 272 ITR 264 (Del)].

Where some land, which was contributed by partners as capital and used as brick field and later given for development, upholding the finding of the Tribunal, it was held that the firm did not acquire the land, with a view to sell it at a profit. It was treated in the accounts as a fixed asset given to other for outright development without the assessee itself plotting it out, so that it had continued to be a capital asset. There was no scope, it was found, for holding it either as business or even an adventure in the nature of trade. **[*CIT* v *Mohakampur Ice & Cold Storage* (2006) 281 ITR 354 (All)]**.

What was necessary was to find out the intention of the assessee at the time of the purchase of land. Where the land was never purchased by the assessee. She acquired the same on the basis of a will on the death of her husband. She sold the same in parcels because the huge area could not be sold in one transaction. Such an activity could not amount to trade or business within the meaning of the Act. [*CIT* v *Sushila Devi Jain* (2003) 259 ITR 671 (P&H)].

Selling of own land after plotting it out in order to secure a better price is not in the nature of trade or business, more so when the land was gifted to the assessee. There is nothing on record to show that the land was purchased for the purpose of selling into plots. **[*CIT* v *Suresh Chand Goyal* (2007) 209 CTR 410 (MP)]**.

Where it was an admitted position that the land in question was held as a capital asset by the assessee and not as a business asset and it had also been noticed that the assessee had relinquished the land in lieu of forest department allowing use of their land for laying down the drainage and the question was as to whether loss arising on such transfer could be allowed as a business loss, it was held that the loss arising on account of transfer of land to the forest department in lieu of the use of forest land for laying the drainage for discharge of effluent, was capital loss and could not be allowed as a business loss. [*Shreyans Industries Ltd.* v *Jt. CIT* (2005) 277 ITR 433 (P&H)].

Where though assessee was dealer in property, assessee, after purchase of plot, constructed shops which were also let out and rent had been received for three years and only thereafter all shops had been sold, it went to prove that assessee had no intention to deal in shops for purpose of business when these were purchased, and as such income from sale of shops was capital gain and not income from business. [*Asstt. CIT v Janak Raj Chauhan* (2006) 102 TTJ 297 (Asr)].

Entries in the account books are not decisive: Whether an asset is held as sock-in-trade or as capital asset has to be considered from the facts of the case. The entries in the books of account are not decisive of the issue. Mere fact that the assessee showed it as stock-in-trade was not determinative of the nature of the asset. [*Fort Properties Pvt. Ltd*. v *CIT* (1994) 208 ITR 232 (Bom)].

2. Transfer in a development agreement

Development agreement is not an agreement for sale *simpliciter*. It is an executory agreement, whereby the developer undertakes to put up a superstructure on that part or portion of land retained by the owner in consideration of transfer of remaining part. Development agreement is not a sale *simpliciter*, because there is an element of builder's contract with the only difference that the consideration is not cash, but in kind *i.e.* constructed portion on the retained land. An agreement for sale can be enforced in a court of law by a decree ordering specific performance, with the court itself acting as the transferor, where the owner does not carry out the obligations either under the agreement for sale or the court decree. In development agreement one cannot expect construction to be undertaken by the developer, once a breach has occurred, so that there is only damages for the party, who has suffered the breach. There cannot be specific performance in the sense ordinarily understood in enforcement of agreement for sale.

All the same, a development agreement was treated as an agreement for sale in *Ashok Leyland Finance Ltd.* v *Appropriate Authority* (1997) 230 ITR 398 (Mad). A similar view was taken in *Ashis Mukherji* v *Union of India* (1996) 222 ITR 168 (Pat) and *Ansal Properties and Industries Ltd.* v *Appropriate Authority* (1999) 236 ITR 793 (Del). But in *Mahabodhi Society of India* v *Union of India* (1994) 209 ITR 412 (Cal), it was held that it is not an agreement for sale, which can come within the purview of Chapter XXC. Calcutta High Court has also recognised development agreement as a business agreement. [*Madgul Udyog* v *CIT* (1990) 184 ITR 484 (Cal) approved in *CIT* v *Podar Cements Pvt. Ltd.* (1997) 226 ITR 625 (SC)]. Treatment of development agreement under Chapter XXC as an agreement for sale cannot possibly mean that in every case, the development agreement can be taken as an agreement for sale *simpliciter*, though this was the inference drawn by the authorities and sometimes conceded by the taxpayer to purchase peace.

It is in the above context, that one has to take care to avoid the inference of transfer on mere signing of the agreement. A development agreement may be silent as to the date of possession, in which case it can be assumed that there is no possession, which accompanies development agreement. It is advisable that development agreement specifically stipulates possession with owner till obligations undertaken by the developer is discharged with only right of entry for developer or his nominees to discharge the obligations undertaken in the agreements.

If the development agreement had granted an unqualified, uninterrupted and irrevocable right of possession to the developer, it will be difficult to avoid liability in the year in which development agreement was executed, though there is a possible argument that the possession is not in the capacity of a buyer, but only as a builder, the property itself is not for enjoyment by the developer but by the prospective flat owners. Such an argument can be taken and defended, notwithstanding the possible hassles with the Income-tax Department. Even if such a stand is taken, liability cannot be postponed till completion of the agreement, if there are registered sales prior to completion. Proportionate profit therefrom will have to be accounted.

If on a bare reading of a contract in its entirety, an Assessing Officer comes to the conclusion that in the guise of the agreement for sale, a development agreement is contemplated under which the developer applies for permissions from various authorities either under power of attorney or otherwise and in the name of the assessee, then the Assessing Officer is entitled to take the date of the contract as the date of the transfer in view of section 2(47)(*v*). In this very case, the date on which developer obtained a commencement certificate is not within the accounting year ending 31-3-1996. At the same time, if one reads the contract as a whole it is clear that a dichotomy is contemplated between the limited power of attorney authorizing the developer to deal with the property as an irrevocable license to enter upon the property after the developer obtains the requisite approvals of various authorities. In fact the limited power of attorney may not be given but once under the agreement a limited power of attorney is intended to be given to the developer to deal with the property then the date of contract would be the relevant date to decide the date of transfer under section 2(47)(*v*) and in which event the question of substantial performance of the contract thereafter does not arise. This point has not been considered by any of the authorities below. No judgment has been shown to exist on this point. Therefore, although there is concurrent finding of fact there is no merit in the argument of the assessee that the court should go only by the date of actual possession and not by the date on which the irrevocable license was given. If the contract read as a whole indicates passing of or transferring of complete control over the property in favour of the developer then the date of the contract would be relevant to decide the year of chargeability. [*Chaturbhuj Dwarkadas Kapadia* v *CIT* (2003) 260 ITR 491 (Bom)].

A recent decision of the Authority for Advance Ruling gives an insight into sub-clause (*v*) of section 2(47) for determination the date of transfer. The main observations are as under:

The purpose of introducing sub-clause (*v*) in conjunction with sub-clause (*vi*) to section 2(47) is to widen the net of taxation so as to include transactions that closely resemble transfers but are not treated as such under the general law. For instance, there is no valid sale under the Transfer of Property Act unless a deed of conveyance is duly executed and registered. An agreement of sale by itself does not create any right or interest in or over the immovable property.

In order to be 'transfer' within the meaning of sub-clause (*v*) to section 2(47), there must be a transaction under which the possession of immovable property is allowed to be taken or allowed to be retained. Secondly, such taking or retention of possession as is well known is a facet of the equitable doctrine of part performance of contract falling within the scope of section 53A of the Transfer of Property Act. Section 53A is not a source by which title to immovable property could be acquired but it only serves as a shield to defend one's lawful possession obtained pursuant to a contract for transfer of immovable property for consideration.

There is no doubt that the agreement to transfer the entire right, title and interest of the owners for a consideration specified in the agreement and in accordance with the terms thereof answers the description of a contract falling within the scope of section 53A of the Transfer of Property Act.

The following is the summary of conclusions:

1. Where the agreement for transfer of immovable property by itself does not provide for immediate transfer of possession, the date of entering into the agreement cannot be considered to be the date of transfer within the meaning of sub-clause (*v*) of section 2(47) of the Income-tax Act.
2. To attract sub-clause (*v*) of section 2(47), it is not necessary that the entire sale consideration upto the last instalment should be received by the owner.
3. The execution of irrevocable GPA as a part of the covenant in the transfer agreement is a transaction under which possession is allowed to be taken by the transferee. Allowing the transferee to enter into possession of land and to have general control and management of the property is an integral part of that GPA and as a result of such transaction possessor rights were conferred on the developer. It was an act done in part-performance of the contract.
4. Once it is held that the transaction of the nature of referred to in sub-clause (*v*) of section 2(47) had taken place on a particular date, the actual date of taking physical possession need not be probed into. It is enough if the transferee has by virtue of that transaction a right to enter upon and exercise the acts of possession effectively.

[*Jasbir Singh Sarkaria, In re* (2007) 164 Taxman 108 (AAR - New Delhi)]

Under the development agreement which resulted in conferring of the rights of ownership of the developer's share of the land unto the developer on the date on which it was entered into the same would constitute a 'transfer' in relation to developer's share in that capital asset, and that agreement having been entered into in the year 2000-01, the capital gains accrued in the assessment year 2001-02 and sale of flat in assessment year 2005-06 received from the developer gave rise to long term capital gains, eligible for exemption under section 54EC. [*ITO* v *Vikash Behal* (2010) 36 DTR 385 (Kol 'C')].

Where there was a mere grant of a permissible right to build on plot of land and permission was there to build a multistoried building and rights of a lessee had continued to vest with the assessee and it was clear upon reading of agreement that there was no extinguishment of the rights of the assessee as a perpetual lessee of the land, it was held that there is no transfer at this stage, hence no capital would arise as what the assessee intended to do by virtue of the collaboration agreement was to embark on a joint venture to build a multi-storied commercial building. [*CIT* v *Atam Parkash & Sons* (2008) 175 Taxman 499 (Del)].

The assessee entered into a joint development agreement with a builder in the assessment year 1995-96 and, accordingly, transferred certain portion of land to the builder for the purpose of putting up a multi-storey building. The builder handed over the flats to the assessee in January 1998. The Assessing Officer taxed the transaction as capital gain chargeable for the assessment year 1998-99. The Tribunal held that the transfer of vacant land, taxable as capital gain had taken place in the previous year, relevant to the assessment year 1995-96 and it could not be taxed in the assessment year 1998-99. Thus, the decision went in favour of the assessee. [*Vemanna Reddy* (*HUF*) v *ITO* (2009) 30 SOT 11 (Bang) (URO)].

Where the assessee converted his land into stock-in-trade and thereafter a development agreement was entered into by the assessee with the developer whereby assessee provided his land measuring 44000 sq. ft. to developer for construction of residential apartments and the assessee was to get constructed area of 25130 sq. ft. the capital gain arising from the conversion of the land and building into stock-in-trade were assessable proportionately in the previous years in which the constructed property was sold by the assessee and not in the year of development agreement. [*R. Gopinath* (*HUF*) v *ACIT* (2010) 42 DTR 127 (Chennai)(Trib)].

Assessee had sold land to the builder–developer. Only the cost of construction of proposed building allotted to the assessee in the ultimately constructed area and not the market value of such share of constructed area, has to be reckoned as consideration for the purpose of computation of capital gains. [*Dy. Director of IT* v *G. Rahguram* (2010) 46 DTR 136 (Hyd)].

Where the assessee entered into a joint development agreement with builder to develop her property under which builder agreed to construct and agreed to deliver 48% of the super built area to the assessee in the form of 4 residential flats out of the 8 flats constructed by him and the assessee claimed exemption under section 54 for all the 4 residential flats delivered to him being part of one house and the Assessing Officer allowed the exemption for only one flat, it was held that expression a "residential house" used in section 54 should be understood in a sense that the building should be of residential nature and 'a' should not be understood to indicate a singular number, assessee was entitled to claim exemption under section 54 in respect of four residential flats acquired by her. [*CIT* v *K.G. Rukminiamma* (2010) 48 DTR 377 (Kar)].

Fair Market Value to be full value of consideration in certain cases [Section 50D] [W.e.f. A.Y. 2013-14]

Capital gains are calculated on transfer of a capital asset, as sale consideration minus cost of acquisition. In some recent rulings[1], it has been held that where the consideration in respect of transfer of an asset is not determinable under the existing provisions of the Income-tax Act, then, as the machinery provision fails, the gains arising from the transfer of such assets is not taxable.

Accordingly, a new section 50D has been inserted to provide as under:

> "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."

3. Property constructed on a land purchased earlier

In case of property is constructed on a site purchased much earlier, the question arises whether the period of holding the asset *i.e.*, the property, should be reckoned from the date of completion of the construction of the property or from the date of acquisition of the land. The correct position is that the asset consists of two components: (1) Land and (2) Building. When the property is sold, the period of holding has to be reckoned separately for the land and the building. The consideration received can also be split into two parts relating to each component.

In *CIT* v *Vimal Chand Golecha* (1993) 201 ITR 442 (Raj), the land was purchased in 1962 and building was constructed thereon in the accounting years relevant to assessment years 1968-69, 1969-70 and 1970-71. The building was sold in 1970. It was held that the gains attributable to land were assessable as long-term capital gains. The gains attributed to the building were however, short-term capital gains. **Also see** *CIT* v *Lakshmi B. Menon* (2003) 264 ITR 76 (Ker); *CIT* v *C.R. Subramanian* (2000) 242 ITR 342 (Kar).

Agreeing with the above Rajasthan High Court view, it has been held that land can be considered a separate capital asset even if a building is constructed thereon. Thus, where the land is held for more than a prescribed period, the gains arising from the sale of the land can be considered as long-term capital gains even though the building thereon, being a new construction, is held for a period less than the prescribed one [*CIT* v *Dr. D.L. Ramachandra Rao* (1999) 236 ITR 51 (Mad). **Also see** *CIT* v *Citibank N.A.* (2003) 261 ITR 570 (Bom)].

In the above cases, the burden will be on the assessee to satisfy how much of the sale proceeds should be apportioned for the land and how much of the sale proceeds pertained to the structure. [*CIT* v *Estate of Omprakash Jhunjhunwala* (2002) 254 ITR 152 (Cal)].

> It may be noted that split between land and superstructure was also to be made for the purpose of depreciation as held by the Supreme Court in *CIT* v *Alps Theatre* (1967) 65 ITR 377 (SC). Hence, the decisions of the above High Courts fall in line with the views of the other precedents.

4. Right to acquire any house property is a capital asset

Where a flat is booked with a builder under a letter of allotment or an agreement for sale, this would represent only a right to acquire a flat and if such right is acquired more than 36 months back, it becomes a long-term asset. However, when the possession of the flat is taken, the period of holding would once again commence from the date of the possession of the flat as the small right to acquire a flat merged into larger right and small right upon a merger would loose its existence.

However, where a flat was allotted under scheme of DDA on 27-2-1982 and delivery of possession of said flat took place on 15.5.1986 when actual flat number was allocated to assessee and the assessee sold the said flat on 6.1.1989, it was held that since the flat was allotted under self financing scheme, the allottee gets title to property on issuance of an allotment letter and payment of instalments is only a consequential action upon which delivery of possession flows. The right of the assessee prior to 15.5.1986 was a right in property and even prior to said date assessee was holding said flat. Hence, capital gain arising on sale of said flat was a long-term capital gain and the assessee will be eligible claim exemption under section 54 on the sale of such flat. [*Vinod Kumar Jain* v *CIT* (2010) 195 Taxman 174 (P&H)].

5. Period of holding of share in the co-operative housing society

While computing the capital gain tax in case of transfer of his shares by a person who is a member of cooperative housing society, the relevant date would be date on which the member acquires the shares in the cooperative housing society and the date on which member had sold his shares therein. Thus, where the assessee acquired shares in the society on 6-9-1979 and was allotted flat on 15-11-1979. He was given

---

1 *Dana Corporation, In re* (2010) 186 Taxman 187 (AAR-New Delhi); *AMIANTIT International Holding Ltd., In re* (2010) 189 Taxman 149 (AAR-New Delhi); *Good Year Tyre & Rubber Co., In re* (2011) 199 Taxman 121 (AAR-New Delhi).

possession of flat in October 1981, and sold the shares of the society along with the flat, on 4-12-1982, the capital gains arising from the sale were long term capital gains, shares having been held for more than 36 months. [*CIT* v *Anilben Upendra Shah* (2003) 262 ITR 657 (Guj)].

Similarly, the assessee became a member in Venus Apartments (Galaxy Co-operative Housing Society). He was allotted a flat in the building of the society by resolution dated 4-11-1980, passed by the managing committee of the society. On the date of allotment, *i.e.*, 4-11-1980, the property was under construction and came to be completed on 12-9-1983. Physical possession was handed over to the assessee on 12-9-1983. On 30-4-1984, the flat was sold by the assessee for a consideration of Rs. 3,75,000. The assessee worked out long-term capital gains at Rs. 1,59,395. The Assessing Officer did not accept the stand of the assessee that the assessee had become the owner of the property as per resolution dated 4-11-1980. According to the Assessing Officer the assessee had held the property for a period of less than 36 months and as such was liable to short-term capital gains tax, it was held that the assessee in the present case was allotted a share by the co-operative housing society on 4-11-1980, and the sale of the same took place on 30-4-1984, *i.e.*, after a period of 36 months. The Tribunal was therefore justified in holding that the capital gains arising were long-term capital gains and the assessee was entitled to deduction from such gains as per law. [*CIT* v *Jindas Panchand Gandhi* (2005) 279 ITR 552 (Guj)]

6. Treatment of advance money received [Section 51]

Where any capital asset, was on any previous occasion, the subject of negotiations for its transfer, any advance or other money *received and retained by the assessee* in respect of such negotiations, shall be deducted from the cost *for which the asset was acquired* or the *written down value* or the *fair market value*, as the case may be, in computing the cost of acquisition.

It may be observed that only when the *advance or other money* has been (*a*) received, and (*b*) retained or forfeited by the *assessee*, then only it has to be deducted from the cost of the asset. If such an advance was received and retained by any previous owner, the same shall not be deducted from the cost of the asset.

If the advance money forfeited was received by the assessee before 1-4-1981 and the assessee has assumed the F.M.V. of the asset as on 1-4-1981 as the cost of acquisition, such advance money received (though before 1-4-1981) shall also be deducted as in the section it is written that it will be deducted from the *fair market value*.

A situation may arise where advance money forfeited is more than the cost of 'acquisition'. In such a case, the excess of the advance money forfeited over the cost of 'acquisition' of such asset shall be a capital receipt not taxable [*Travancore Rubber & Tea Co. Ltd.* v *CIT* (2000) 243 ITR 158 (SC)].

For purposes of section 51, no distinction is made between moneys received and retained by way of 'advance' and 'other money'. The phrase 'other money' would cover, for example, deposits made by the purchaser for guaranteeing due performance of the contracts and not forming part of the consideration. The monies received on the previous occasions and retained by the vendor/assessee cannot, therefore, be treated as a revenue receipt. [*Travancore Rubber & Tea Co. Ltd.* v *CIT* (2000) 243 ITR 158 (SC)].

The provisions of section 51 seems to be illogical after the introduction of the concept of indexed cost of acquisition as in this case the cost of acquisition will be first reduced by the amount of advance money received and thereafter it will be indexed.

Treatment in the hands of vendee: Forfeiture of earnest money by the vendor, if due to default on the part of the vendee, will not amount to relinquishment of a right in that asset. Therefore the amount forfeited will not be allowed as a capital loss under head capital gains. [*CIT* v *Sterling Investment Corporation Ltd*. (1980) 123 ITR 441 (Bom)].

On the other hand, if the vendor commits a default and the vendee receives some compensation besides the refund of the earnest money paid by him, such compensation shall be subject to capital gains as it will amount to relinquishment of a right by the vendee.

Giving up the right to obtain conveyance of immovable property amounts to transfer of a capital asset: Where the assessee had paid the earnest money and acquired right to obtain conveyance of immovable property, such earnest money paid shall be cost of acquisition of such right and if such right is given up, there is a transfer of a capital asset and the compensation received for giving up such right is the consideration price. [*CIT* v *Vijay Flexible Container* (1990) 186 ITR 693 (Bom). **See also** *K.R. Srinath* v *Asst. CIT* (2004) 268 ITR 436 (Mad) and *CIT* v *Laxmidevi Ratani* (2005) 147 Taxman 642 (MP)].

7. Deemed capital gain in real estate transactions [Section 50C]

Section 50C makes a special provision for determining the full value of consideration in cases of transfer of immovable property. 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 or assessable* by any authority of a State Government (*i.e.* 'stamp valuation authority') for the purpose of payment of stamp duty in respect of such transfer, the value so adopted or assessed or assessable shall be

deemed to be the full value of the consideration, and capital gains shall be computed on the basis of such consideration under section 48 of the Income-tax Act.

If according to the assessee, the stamp duty value of the immovable property, determined by stamp duty authority is more than its market value, he has following two remedies:

(1) He may approach the Assessing Officer to refer the valuation to the Valuation Officer.

(2) He may file an appeal or revision or reference before any authority or court.

(1) Where valuation can be referred to the Valuation Officer [*Section 50C*(*2*)]: If the following conditions are satisfied, 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:

(*i*) where the assessee claims before the Assessing Officer that the value adopted or assessed or assessable by the stamp valuation authority exceeds the fair market value of the property as on the date of transfer; and

(*ii*) the value so adopted or assessed or assessable by stamp valuation authority has not been disputed, in any appeal or revision or reference before any authority or Court,

Consequences where the value is determined by the Valuation Officer: If the fair market value determined by the Valuation Officer is less than the value adopted, assessed or assessable for stamp duty purposes, the Assessing Officer may take such fair market value to be the full value of consideration. However, as per section 50C(3), if the fair market value determined by the Valuation Officer is more than the value adopted or assessed or assessable for stamp duty purposes, the Assessing Officer shall not adopt such fair market value and will take the full value of consideration to be the value adopted or assessed or assessable for stamp duty purposes.

For the purposes of this section, the expression "assessable" means the price which the stamp valuation authority would have, notwithstanding anything to the contrary contained in any other law for the time being in force, adopted or assessed, if it were referred to such authority for the purposes of the payment of stamp duty.

(2) Where valuation is disputed: The assessee instead of approaching the Assessing Officer under section 50C(2), may file an appeal, revision or reference before any authority or court for determination of consideration.

Re-computation of capital gain in case the consideration is revised in any appeal, revision, etc. [*Section 155*(*15*)]: The act has also inserted sub-section (15) to section 155 so as to provide that if the value adopted or assessed for stamp duty purposes is subsequently revised in any appeal, revision or reference, the assessment made shall be amended to recompute the capital gains by taking the revised value as the full value of consideration and the provision of section 154 (relating to rectification of mistake) shall apply thereto. Further for this purpose, the period of 4 years shall be reckoned from the end of the previous year in which such order revising the value was passed in the appeal/revision/reference.

1. Where any such reference is made as per this section, the provisions of section 16A of the Wealth-tax Act shall, with the necessary modifications, apply in relation to such reference as they apply in relation to a reference made by the Assessing Officer under section 16A of that Act.

2. The word "assessable" has been inserted in section 50C by the Finance (No. 2) Act, 2009, w.e.f. 1-10-2009 and as such section 50C is now also applicable to transactions which are not registered and executed through agreement to sell or power of attorney.

Clauses (*a*) and clause (*b*) of sub-section (2) of section 50C are in continuation to each other and, therefore, conditions laid down in both the clauses are required to be satisfied together – AO has to refer the valuation to the DVO for determining the fair market value if the property under transfer is less than valuation made by SVA and further that he has not disputed the valuation by SVA before appellate authorities under stamp Duty Act. [*Mohd. Shoib* v *Dy. CIT* (2009) 29 DTR 306 (Lucknow 'B')].

It is mandatory on the part of the Assessing Officer to make reference to valuation officer as per provisions of section 50C where the assessee contended that valuation as done by stamp valuation authority is not acceptable to him. The decision of the Assessing Officer was not correct where he held that the reference to valuation officer is optional since the assessee had not objected to value adopted by the State Valuation Authority there was no need to refer matter to the Valuation Officer. [*Kalpataru Industries* v *ITO* ITAT No. 5540/Mum/2007 decided on 24-8-2009].

Assessment order passed by Assessing Officer accepting stamp duty value without waiting for report of DVO is liable to be set aside. [*N. Meenakshi* v *ACIT* (2009) 30 DTR 1 (Mad)].

The assessee sold its land for Rs. 16.34 lakhs at the rate of Rs. 22-.81 per sq. yd., which value was accepted by the State Authority for stamp valuation purposes. As per the Assessing Officer, the value

according to Punjab State Rules was Rs. 1500 per sq. yd. He referred the matter to the DVO for valuation, who fixed the value of the land at Rs. 72,00,000. The Assessing Officer assessed capital gain accordingly.

It was held that the value which was accepted for registration purposes cannot be replaced by the valuation fixed by the DVO. The stamp valuation authority having accepted the value as shown, there was no question of referring the same to DVO. [*Punjab Poly Jute Corporation* v *ACIT* (2009) 313 ITR (AT) 178 (Amritsar)].

8. Exemption of capital gains on compensation received on compulsory acquisition of agricultural land situated within specified urban limits [Section 10(37)]

With a view to mitigate the hardship faced by the farmers whose agricultural land situated in specified urban limits has been *compulsorily acquired*, the Finance (No. 2) Act, 2004 has inserted a new clause (37) in section 10 so as to exempt the capital gains (whether short-term or long-term) arising to an *individual or a Hindu undivided family* from transfer of agricultural land by way of *compulsory acquisition* where the compensation or the enhanced compensation or consideration, as the case may be, is received *on or after 1-4-2004*. The exemption is available only when such land has been used for agricultural purposes during the preceding two years *by such individual* or a *parent of his* or by *such* Hindu undivided family.

Where the compulsory acquisition has taken place before 1-4-2004 but the compensation is received after 31-3-2004, it shall be exempt. But if part of the original compensation in the above case has already been received before 1-4-2004, then exemption shall not be available even though balance original compensation is received after 31-3-2004.

However, enhanced compensation received on or after 1-4-2004 against agricultural land compulsory acquired before 1-4-2004 shall be exempt.

9. Profit on transfer of house property used for residence [Section 54]

Any long-term capital gain, arising to an *individual or HUF*, from the transfer of buildings or land appurtenant thereto and being a residential house property, (income from which is chargeable under the head 'Income from house property') shall be exempt to the extent such capital gain is invested in the purchase of another residential house property, within one year *before* or 2 years *after the date of transfer*, and/or in the construction of a residential house property, within three years *after the date of such transfer* provided the house property, purchased or constructed, is not transferred within a period of 3 years from the date of its acquisition.

If the new asset is transferred within a period of 3 years from the date of its acquisition, then, for the purpose of computing the capital gain on this transfer, the cost of acquisition of this house property shall be reduced by the amount of capital gain exempt under this section earlier. The capital gain arising on this transfer will always be a short-term capital gain.

In other words, capital gain arising on the transfer of a residential house is exempt u/s 54 in the following circumstances:

(*i*) the asset transferred is a residential house, the income of which is chargeable under the head "income from house property";

(*ii*) the asset transferred is a long-term capital asset and hence there is a long-term capital gain;

(*iii*) the asset has been transferred by an *individual or a Hindu Undivided Family*;

(*iv*) the assessee has, within the specified period, purchased/constructed another residential house(s).

If all these four conditions are satisfied then the assessee can claim the exemption under section 54.

Specified period: The specified period is—

(*i*) 1 year before or 2 years *after the date* on which the *transfer took place*, for purchase of a residential house; or

(*ii*) a period of 3 years *after the date* on which the transfer took place, for construction of a residential house.

Quantum of Deduction

(1) If the amount of capital gain is equal to or less than the cost of the new house, the entire capital gain shall be exempt.

(2) If the amount of capital gain is greater than the cost of the new house, then the cost of the new house shall be allowed as an exemption.

In other words, capital gains shall be exempt to the extent it is invested in the purchase and/or construction of another house.

Judicial decisions: (1) Where a property is owned by more than one person and the other co-owner or co-owners release his or their respective share or interest in the property in favour of one of the co-owners, it can be said that the property has been purchased by the releasee. Such release also fulfils the condition of section 54 as to purchase so far as releasee-assessee is concerned [*CIT* v *T.N. Aravinda Reddy* (1979) 120

ITR 46 (SC)].

(2) The assessee sold his residential property and invested the capital gain within the stipulated time in the construction of a new floor on another house owned by him by demolishing the existing floor, it was held that he was entitled to exemption under section 54. [*CIT* v *Narasimhan* (*PV*) (1990) 181 ITR 101 (Mad)].

(3) The house property concerned must be building or land appurtenant to building. The basic test was whether the land appurtenant to building could be used independent of the user of the building. If so, it cannot be said to be land appurtenant to building. Further, the basic requirement is that the capital gain should arise from the transfer of building or land, the income of which is chargeable under the head Income from house property. If the land alone is sold, the provisions of section 54 will have no application inasmuch as the income from land is not chargeable under the head Income from house property. [*CIT* v *Zaibunnisa Begum* (1985) 151 ITR 320 (AP)].

(4) In case of assessee's death during the stipulated period, benefit of exemption under section 54(1) is available to legal representative if the required conditions are satisfied by the legal representative. [*Ramanathan* (*CV*) v *CIT* (1980) 155 ITR 191 (Mad)].

(5) Where an assessee had sold the residential house and acquired only 15% interest in another house and such other house was already used for residence prior to purchase, it was held that the benefit should be available to the assessee. [*CIT* v *Chandaben Maganlal* (2000) 245 ITR 182 (Guj)]. In coming to the conclusion, the High Court followed its own earlier decision in *CIT* v *Tikyomal Jasanmal* (1971) 82 ITR 95 (Guj). In that case, what was purchased was a unit of house property, while in the present case before the High Court, it was a limited interest in the property.

(6) Where for the purpose of claiming exemption under section 54, the assessee purchased property from two different persons, by virtue of four different sale instances in the shape of four different parcels which constituted one single residential unit or house, it was held that the execution of four different sale deeds in respect of four different portions of the property does not materially affect the nature of transaction or nature of property acquired, the investment so made in the purchase of the same was eligible for deduction under section 54. **[*CIT* v *Smt. Sunita Aggarwal* (2006) 284 ITR 20 (Del)]**.

However, no court has yet decided whether the assessee would have been eligible for exemption even if the assessee acquired more than one residential unit in different places.

(7) Where an assessee who owned a house property, sold the same and purchased another property in the name of his wife, exemption under section 54 shall be allowable. **[*CIT* v *V. Natarajan* (2006) 154 Taxman 399 (Mad)]**.

(8) An assessee gifted some land to his wife. He, thereafter constructed a building on the said land. The Government acquired the land and building and paid compensation for land to the wife and for the building to the assessee (husband). It was held that capital gain on land was assessable in the hands of the husband by virtue of section 64 but he was not entitled to exemption under section 54 in respect of capital gain on the acquisition of the land of the wife as the capital gain to the wife did not arise on transfer of a residential house. [*T.N. Vasavan* v *CIT* (1992) 197 ITR 163 (Ker)].

(9) The assessee was held entitled to the benefit of section 54(1) where he had acquired substantial domain over the flat purchased under an agreement with the co-operative society coupled with the payment of almost the entire cost of construction within a period of two years. [*CIT* v *Hilla J.B. Wadia* (1995) 216 ITR 376, 383 (Bom)].

(10) A perusal of section 54 of the Income-tax Act, 1961, makes it clear that the exemption under the provision is available only where a building or land appurtenant thereto is sold. Land appurtenant to the building implies that the ownership of the building and the land appurtenant should be of the same person. If the building is owned by one person and the land is owned by another person then it will be the case of land adjoining the building and by no stretch of imagination can it be called land appurtenant to the said building. [*P.K. Lahiri* v *CIT* (2005) 275 ITR 17 (All)].

(11) Where the assessee utilised the sale consideration for other purposes and borrowed the money for the purpose of purchasing the residential house property to claim exemption under section 54, it was held that the contention that the same amount should have been utilised for the acquisition of new asset could not be accepted. [*Bombay Housing Corporation* v *Asst. CIT* (2002) 81 ITD 454 (Bom). **Also** followed in ***Mrs. Prema P. Shah, Sanjiv P. Shah* v *ITO* (2006) 282 ITR (AT) 211 (Mumbai)**].

The very fact that purchase of another house as also the construction can take place before the sale means that cost of purchase or new construction need not flow from the sale proceeds of the old property. [*CIT v H.K. Kapoor* (*Decd*) 1998 234 ITR 753 (All) and *CIT v M. Vasudevan Chettiar* (1998) 234 ITR 705 (Mad)].

However, in the case of *Milan Sharad Ruparel v ACIT* (2009) 27 SOT 61 (Mum), it was held

that the assessee is not eligible for deduction under section 54F if the assessee constructs or purchases a residential house out of borrowed funds. In this case the above case were also referred to the Learned Tribunal.

(12) Where non-resident Indian sold property in India and purchased residential property in U.K. and claimed deduction under section 54, it was held that it was not necessary that residential property showed be purchased in India itself. **[*Mrs. Prema P. Shah, Sanjiv P. Shah* v *ITO* (2006) 282 ITR (AT) 211 (Mumbai)]**. However, a contrary view has been given in respect of section 54F in the case of **Leena J. Shah v ACIT (2006) 6 SOT 721 (Ahd).** However, the Bangalore Tribunal after having considered both the above cases has held that the benefit of section 54F shall be available to be assessee even though the residential property was acquired outside India. **[ACIT v Vinay Mishra (2013) 30 Taxmann.com (Bang)(Tri)]**.

(13) Where the assessee had partly invested the capital gains on the purchase of another house and partly on the construction of additional floor to the house so purchased within the prescribed time limit, it was held that the Income-tax Officer was not justified in restricting exemption to investment on purchase only, holding that the exemption under section 54 was admissible either for purchase or for construction but not for both. [*Sarkar* (*B.B.*) v *CIT* (1981) 132 ITR 661 (Del)].

(14) Allotment of a flat by DDA under the Self-Financing Scheme shall be treated as construction of the house [Circular No. 471, dated 15-10-1986]. Similarly, allotment of a flat or a house by a cooperative society, of which the assessee is the member, is also treated as construction of the house [Circular No. 672, dated 16-12-1993]. Further, in these cases, the assessee shall be entitled to claim exemption in respect of capital gains even though the construction is not completed within the statutory time limit. [*Sashi Varma* v *CIT* (1997) 224 ITR 106 (MP)]. Delhi High Court applied the same analogy where the assessee made substantial payment within the prescribed time and thus acquired substantial domain over the property, although the builder failed to hand over the possession within the stipulated period. [*CIT* v *R.L. Sood* (2000) 245 ITR 727 (Del)].

(15) The cost of the land is an integral part of the cost of the residential house, whether purchased or constructed. [Circular No. 667, dated 18-10-1993].

(16) The construction of the new house may start before the date of transfer, but it should be completed after the date of transfer of the original house. [*CIT* v *J.R. Subramanya Bhat* (1987) 165 ITR 571 (Karn)].

(17) If the assessee has paid the full consideration and obtained the possession of the house within the specified period, he is eligible for exemption, even if, the sale deed has not been registered in his favour. [*CIT* v *Shahzada Begum* (1988) 173 ITR 397 (AP)].

(18) The very fact that purchase of another house as also the construction can take place before the sale means that cost of purchase or new construction need not flow from the sale proceeds of the old property. [*CIT* v *H.K. Kapoor* (*Decd*) 1998 234 ITR 753 (All) and *CIT* v *M. Vasudevan Chettiar* (1998) 234 ITR 705 (Mad)].

9a. To claim exemption under section 54, can an assessee acquire more than one house?

Where the assessee purchased more than one house, then he can claim relief in respect of *only one house* provided he satisfies the conditions of section 54. [*K.C. Kaushik v P.B. Rane, ITO* (1990) 185 ITR 499 (Bom)]. However, in the following three tribunal judgments, the exemption was given for more than one house/flats—

(1) Where the assessee had purchased two adjacent residential units having a different municipal number. but used as one single residential house. [*Anand Basappa* (*Dr.*) *v ITO* (2004) 91 ITD 53 (Bang-Trib)].

(2) Where the assessee had purchased four flats in the same building though on different floors and since all the flats were required because of large size of the family, which maintained a common kitchen and a common ration card. [*Vyas* (*K.G.*) *v 7th ITO* (1986) 16 ITD 195 (Bom)].

(3) Where an assessee purchased two adjoining flats converting into a single residence, exemption under section 54 shall be allowed. [*ACIT v Mrs. Leela P. Nanda* (2006) 286 ITR (AT) 113 (Mumbai)].

However, in a recent case it has been held that the expression ‘a’ residential house should be understood in a sense that building should be of residential nature and ‘a’ should not be understood to indicate a singular number. The combined reading of sections 54(1) and 54F of the Income-tax Act discloses that, a non-residential building can be sold, the capital gain of which

can be invested in a residential building to seek exemption of capital gain tax. However, the proviso to section 54F of the Income-tax Act, lays down that if the assessee has already one residential building, he is not entitled to exemption of capital gains tax, when he invests the capital gain in purchase of additional residential building. [*CIT v D. Ananda Basappa* (2009) 309 ITR 329 (Karn)].

However, Punjab and Haryana High Court, distinguishing *D. Ananda Basappa* case has held as under: Exemption under section 54 is available in respect of purchase or construction of one house only. The assessee was not entitled to exemption in respect of two independent residential house situated at different locations. [*Pawan Arya* v *CIT* (2011) 49 DTR 123 (P&H)].

In case of section 54F, the law specifically prohibits the purchase or construction of more than one residential house.

Scheme of deposit in Capital Gains Accounts Scheme, 1988[2]: Although under section 54, the assessee is given 2 years to purchase the house property or 3 years for construction of the house property, but the capital gain on the transfer of the original house property is taxable in the previous year in which the transfer took place. The return of income of that previous year is to be submitted in the relevant assessment year on or before the specified date. Hence the assessee will have to take a decision for the purchase/construction of the house property till the date of furnishing of the return other wise the capital gain would become taxable.

To avoid the above situation, the Income-tax Act has specified an alternative in the form of a deposit under the Capital Gains Accounts Scheme.

The amount of capital gain, which is not utilised by the assessee for the purchase or construction of the new house before the date of furnishing of the return of income, should be deposited by him under the Capital Gains Accounts Scheme, before the due date of furnishing the return. The proof of such a deposit shall be attached with the return. In this case, the amount already utilised by the assessee for the purchase/ construction of the new house, along with the amount so deposited, shall be deemed to the cost of the new house and shall be eligible for exemption.

For claiming exemption under section 54F, the assessee can purchase or construct a residential house property before filing the return under section 139. There is no mention of any sub-section of section 139 in section 54F. Hence, if the house property is purchased or constructed after the due date of filing the return of income mentioned under section 139(1), the benefit of section 54F will be available to the assessee if the return is filed by him under section 139(4) after the purchase or construction of the house even though the capital gain was not deposited under the Capital Gain Scheme. [*Nipun Mehrotra* v *ACIT* (2008) 110 ITD 520 (Bang)].

From the reading of section 54(2) it is clear that for the purpose of purchase or construction of new asset, the time period mentioned is before the due date of furnishing the return of income under section 139. Thus, since only section 139 has been mentioned therein, the date of furnishing return of income can be date under section 139(4) & the capital gain utilized for specified purpose before that date shall be entitled to exemption. [*CIT* v *Rajesh Kumar Jalan* (2006) 286 ITR 274 (Gau)].

The assessee utilized the entire capital gains by purchasing a house property before the extended due date under section 139(4) although he did not deposit the money in capital gain scheme before the due date of return under section 139(1). It was held that exemption under section 54 shall be allowed even though he did not file the return under section 139(4) & his assessment was reopened under section 147. [*Fathima Bai* v *ITO* (2009) 32 DTR (Kar) 243].

Consequences where the new house purchased and/or constructed is transferred within a period of 3 years of its purchase or construction: In this case, for the purpose of computing capital gain on such transfer, cost of acquisition of the new house property shall be reduced by the amount of capital gain exempt under this Section *i.e.* Section 54 earlier, and such capital gain will always be a short-term capital gain.

Consequences where the amount deposited in the Capital Gains Accounts Scheme is not utilised for the purchase or the construction of a residential house within the specified period: In this case, the amount not so utilised shall be charged as capital gains of the previous year in which the period of 3 years from the date of transfer of the original asset expires and it will be long-term capital gain of that previous year. In that case, the assessee shall be eligible to withdraw the amount from the scheme.

1. The unutilised deposit amount in the Capital Gains Accounts Scheme, 1988, in the case of an individual, who dies before the expiry of the two/three years stipulated period under section 54, 54B, 54D, 54F and 54G, cannot be taxed in the hands of the deceased. This amount is not taxable in the hands of legal heirs also as the

2 Notified as per Notification No. GSR 724(E), dated 22-6-1988.

unutilised portion of the deposit does not partake the character of income in their hands but is only a part of the estate devolving upon them. [*Circular No. 743, dated 6-5-1996*].

2. In the case of transfer by way of compulsory acquisition by the government, the period of one year before or two years or three years for acquiring the new asset shall commence from the date of receipt of the compensation and not from the date of acquisition. Similarly, deposit under the Capital Gains Accounts Scheme may be made in the previous year in which the compensation is received or till the due date of filing of the return of income of the previous year in which the compensation is received.

10. Capital Gain on transfer of land used for agricultural purposes [Section 54B]

Any capital gain (short-term or long-term), arising to an assessee (only individuals), from the transfer of any agricultural land which has been used by the assessee or his parents for at least a period of 2 years immediately preceding the date of transfer, for agricultural purposes, shall be exempt to the extent such capital gain is invested in the purchase of another agricultural land within a period of 2 years after the date of transfer to be used for agricultural purpose, provided the new agricultural land purchased, is not transferred within a period of 3 years from the date of its acquisition.

However, if the new agricultural land is transferred within a period of 3 years from the date of its acquisition, for the purpose of computation of capital gain on this transfer, the cost of acquisition of the new agricultural land shall be reduced by the amount of capital gain exempt u/s 54B earlier and it will always be a short-term capital gain.

In other words, the exemption u/s 54B is available in respect of capital gains arising from transfer of agricultural land, if following conditions are satisfied:

(*i*) the agricultural land had been transferred by an *individual* (not by HUF or other tax payer);

(*ii*) the agricultural land has been used by the individual or his parents for agricultural purposes during the 2 years immediately preceding the date of transfer;

(*iii*) the assessee had purchased another agricultural land (rural or urban) within a period of 2 years after the date of transfer of the original agricultural land to be used for agricultural purpose.

1. Transfer of agricultural land can be after or before 3 years of acquisition, but it must be used by the assessee or his parents for a period of atleast 2 years immediately preceding the date of transfer, for agricultural purposes.
2. Although the word used in the section is assessee but condition (*ii*) prescribes parents which indicates that this exemption is available only to individual assessees as only individuals can have parents.

Quantum of deduction

1. If the amount of capital gain is equal to or less than the cost of the new agricultural land, the entire capital gain shall be exempt.
2. If the amount of capital gain is greater than the cost of the new agricultural land, the cost of the new agricultural land shall be allowed as an exemption.

In other words, capital gain will be exempt to the extent it is invested for acquiring the new agricultural land.

Scheme of deposit in Capital Gains Accounts Scheme, 1988 [Notified *vide* GSR No. 724(E), dated 22-6-1988]: The scheme of deposit is applicable, in this case also. In other words, the assessee should either purchase the agricultural land and/or deposit the amount under the Capital Gains Accounts Scheme on or before the due date of furnishing the return of income. The amount so spent/deposited, by the due date of furnishing the return, shall be treated as if it was used for the said purpose.

The proof of such a deposit shall be attached with the return. In this case, the amount already utilised by the assessee for the purchase of the agricultural land, along with the amount so deposited, shall be deemed to the cost of the agricultural land and shall be eligible for exemption.

Consequences where the new agricultural land is transferred within a period of three years of its purchase: In this case, the capital gain which was exempt earlier u/s 54B shall be reduced from the cost of the new agricultural land for the purpose of computation of capital gain in respect of the new agricultural land and it will be a short-term capital gain.

As already discussed, the assessee is allowed to acquire rural/urban agricultural land. It is true that if urban agricultural land is sold within 3 years from the date of its acquisition, the above rule for withdrawal of exemption shall apply. On the other hand, if the agricultural land acquired by the assessee is rural agricultural land, there will be no capital gain even if it is sold within a period of three years because rural agricultural land is not a 'capital asset'.

Consequences where the amount deposited in the Capital Gains Accounts Scheme is not utilised for the purchase of the agricultural land within the specified period: In this case, the amount not so utilised shall be charged as capital gains (short-term/long-term depending upon the original transfer) of the previous year in which the period of 2 years from the date of transfer of the original asset expires. In this case, the assessee shall be eligible to withdraw the amount from the scheme.

1. The unutilised deposit amount in the Capital Gains Accounts Scheme, 1988 in the case of an individual who dies before the expiry of the 2 or 3 years stipulated period under section 54, 54B, 54D, 54F and 54G cannot be taxed in the hands of the deceased. This amount is not taxable in the hands of legal heirs also as the unutilised portion of the deposit does not partake the character of income in their hands but is only a part of the estate devolving

upon them. [*Circular No. 743, dated 6-5-1996*].

2. In the case of transfer by way of compulsory acquisition by the government, the period of two years for acquiring the new asset shall commence from the date of receipt of the compensation and not from the date of acquisition. Similarly, deposit under the Capital Gains Accounts Scheme may be made in the previous year in which the compensation is received or till the due date of filing of the return of income of the previous year in which the compensation is received.

Judicial decisions: (1) Section 54B is applicable only to individuals and not to any other assessee this is because the section uses the expression used by "his or a parent of his" which clearly indicate that the "assessee" refers to an individual. [*CIT* v *Devarajalu* (*G.K.*) (1991) 191 ITR 211 (Mad)].

(2) Where the assessee obtained a land on partition of a HUF of which he was a coparcener and which land was used by the HUF earlier, the condition of user for two years prior to the date of transfer is satisfied if the assessee and HUF taken together, have used the land for atleast 2 years immediately before the date of transfer. [*CIT* v *Narayanaswamy* (1985) 156 ITR 194 (Mad)].

(3) Where there was evidence that land sold by the assessee was used for agricultural purposes and the assessee purchased within two years agricultural land for using the agricultural purposes, the assessee was entitled for exemption even though the land sold by assessee was situated in a commercial area and was acquired by the purchaser for non-agricultural purposes. [*CIT* v *Savita Rani* (2004) 270 ITR 40 (P&H)].

11. Benefit under section 54EC, etc. available even on transfer of depreciable assets

Although as per section 50 the profit arising from the transfer of depreciable asset shall be a gain arising from the transfer of short term capital asset, hence short-term capital gain but section 50 nowhere says that depreciable asset shall be treated as short-term capital asset. Section 54E [or say 54EC or 54F, etc.] is in independent provision which is not controlled by section 50. If the conditions necessary under section 54E are complied with by the assessee, he will be entitled to the benefit envisaged in section 54E, even on transfer of depreciable assets held for more than 36 months. [*CIT* v *Assam Petroleum Industries* (*P.*) *Ltd.* (2003) 262 ITR 587 (Gau). **See also** *CIT* v *ACE Builders Pvt. Ltd.* (2006) 281 ITR 210 (Bom)].

On the same analogy benefit under section 54EC or 54F shall be available in the case of depreciate asset if these are held for more than 36 months.

12. Capital Gain on transfer of asset, other than a residential house [Section 54F]

Any long-term capital gain, arising to an individual or HUF, from the transfer of any capital asset, *other than residential house property*, shall be exempt in full, if the entire net sales consideration is invested in purchase of one residential house within one year *before* or two years *after* the date of transfer of such an asset or in the construction of one residential house within three years after the date of such transfer. Where part of the net sales consideration is invested, it will be exempt proportionately.

The proportionate exemption shall be that amount of capital gains which bears the same proportion which the amount invested in the new house bears to the net consideration price of the asset transferred *i.e.*,

$$\text{Capital Gain} \times \frac{\text{Amount Invested}}{\text{Net Sale Consideration}}$$

The above exemption shall be available only when the assessee does not own *more than one residential* house property *on the date of transfer* of such asset exclusive of the one which he has bought for claiming exemption under section 54F.

In other words, where an individual or HUF transfers any long-term capital asset, not being a residential house, and invests the net sale proceeds to acquire a residential house, the exemption u/s 54F is available provided following conditions are satisfied:

(*i*) the asset is transferred by an individual or HUF;

(*ii*) the asset transferred is a long-term capital asset;

(*iii*) the asset transferred is any capital asset other than a residential house;

(*iv*) the assessee has within the specified period purchased or constructed a residential house;

(*v*) the assessee does not own more than one residential house on the date of transfer of the original asset, exclusive of the one purchased for claiming exemption under this section *i.e.*, section 54F.

Specified period

(*i*) 1 year *before*, or 2 years *after* the date on which the transfer took place, for purchase of a house;

(*ii*) a period of 3 years after the date on which the transfer took place, for construction of a house.

Assessee should not acquire or construct any other house within certain time: It has been further provided that the assessee should not purchase, within a period of 1 year after the date of transfer of original asset or construct within a period of 3 years after the date of transfer of original asset, any other residential house other than the new asset.

Quantum of deduction

1. If the net sale consideration of the original asset is equal to or less than the cost of the new house, the entire capital gain shall be exempt.
2. If the net sale consideration of the original asset is greater than the cost of the new house then the exemption shall be allowed in the same proportion in which the cost of the new house bears to the net sale considerations *i.e.* it shall be allowed proportionately as under:

$$\text{Long-term capital gain} \times \frac{\text{Amount invested in the new house}}{\text{Net sale consideration}}$$

Reinvestment for the purpose of claiming exemption under section 54F should be in the assessee's own name. Where it was in the name of the assessee's son/wife, the requirement of section 54F was held not satisfied. [*ITO* v *Parkash Timaji Dhanjods* (2002) 258 ITR (AT) 114 (Nag)]. However the Madras High Court in the case of ***CIT* v *V. Natarajan* (2006) 154 Taxman 399 (Mad)** held that where an assessee who owned a house property, sold the same and purchased another property in the name of his wife, exemption under section 54 shall be allowable.

Scheme of Deposit in Capital Gains Accounts Scheme, 1988 [Notified *vide* GSR No. 724(E), dated 22-6-1988]: The amount of net consideration, which is not utilised by the assessee for the purchase or construction of the new house before the date of furnishing of the return of income, shall be deposited, before the due date of the furnishing of the return of income, in a Capital Gains Accounts Scheme. The proof of such a deposit shall be attached with the return. In this case, the amount already utilised by the assessee for the purchase/construction of the new house, along with the amount, so deposited, shall be deemed to be the cost of the new house and shall be eligible for exemption.

For exemption u/s 54F only one house is allowed to be purchased/constructed. Where the assessee has purchased the house before the due date of return, he can still deposit the amount under capital gain scheme which can be for addition made to that house only.

Consequences where the new house is transferred within a period of 3 years of its purchase or construction: In this case, there will be following two capital gains:

(*a*) Capital gain/loss on transfer of new house which will always be short-term capital gain/loss;

(*b*) Capital gain exempt earlier under this Section *i.e.* 54F shall be treated as long-term capital gain of the previous year in which the new asset is transferred.

Consequences where the assessee purchases, within a period of 2 years of the transfer of the original asset, or constructs, within a period of 3 years of transfer of such an asset, a residential house other than the new house bought/constructed, whose income is chargeable under the head Income from House Property: In this case, the capital gain exempt u/s 54F earlier shall be treated as long-term capital gain of the previous year in which the second house is bought/constructed.

Consequences where the amount deposited in the Capital Gains Accounts Scheme is not utilised, wholly or partially, for the purchase or the construction of a residential house within the specified period: The exemption u/s 54F allowed earlier, proportionate to the amount not so utilised shall be charged as long-term capital gains of the previous year in which the period of 3 years from the date of transfer of the original asset expires (and not 3 years from the date of deposit in the account). In this case, the assessee shall be eligible to withdraw the amount from the scheme.

The amount which will be taxed as long-term capital gain can be calculated as per the following simplified procedure:

Step 1 Calculate exemption already claimed u/s 54F in the year of transfer as under:

$$\text{Long-term capital gain} \times \frac{\text{Amt. invested and/or likely to be invested}}{\text{Net consideration price}}$$

Step 2 Calculate the exemption which would actually be allowed based upon the actual amount spent within the specified period.

$$\text{Long-term capital gain} \times \frac{\text{Amt. actually invested}}{\text{Net consideration price}}$$

Step 3 Calculate the difference between the amount calculated in step 1 and step 2. This will be taxable as long-term capital gain of the previous year in which the period of three years expires.

1. The unutilised deposit amount in the Capital Gains Accounts Scheme, 1988 in the case of an individual who dies before the expiry of the two/three years stipulated period under section 54, 54B, 54D, 54F and 54G cannot be taxed in the hands of the deceased. This amount is not taxable in the hands of legal heirs also as the unutilised portion of the deposit does not partake the character of income in their hands but is only a part of the estate devolving upon them. [*Circular No. 743, dated 6-5-1996*].
2. In the case of transfer by way of compulsory acquisition by the government, the period of 1 year before or 2 years or 3 years for acquiring the new asset shall commence from the date of receipt of the compensation and not from the date of acquisition. Similarly, deposit under the Capital Gains Accounts Scheme may be made in the previous year in which the compensation is received or till the due date of filing of the return of income of the

previous year in which the compensation is received.

13 Recent Issues in Real Estate Transactions

(A) Section 50C made applicable to land and building forming part of stock-in-trade

Currently, when a capital asset, being immovable property, is transferred for a consideration which is less than the value adopted, assessed or assessable by any authority of a State Government for the purpose of payment of stamp duty in respect of such transfer, then such value (stamp duty value) is taken as full value of consideration under section 50C of the Income-tax Act. However, these provisions do not apply to transfer of immovable property, held by the transferor as stock-in-trade. The Finance Act, 2013 has also covered land and building forming part of the stock-in-trade under the provisions of section 50C by inserting section 43CA in the Income Tax Act.

1. ***Stamp duty value to be deemed consideration in certain cases [Section 43CA(1)]***: Where the consideration for the transfer of an asset (other than capital asset), being land or building or both, is less than the stamp duty value, the 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 of profession".

2. ***Provisions of section 50C(2) and (3) made applicable to section 43CA [Section 43CA(2)]***: The provisions of sub-section (2) and sub-section (3) of section 50C shall, so far as may be, apply in relation to determination of the value adopted or assessed or assessable under section 43CA(1).

   Provisions of section 50C(2) and (3) which have been made application to section 43CA

   (a) Where valuation can be referred to the Valuation Officer [*Section 50C*(*2*)]: If the following conditions are satisfied, 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:

   (*i*) where the assessee claims before the Assessing Officer that the value adopted or assessed or assessable by the stamp valuation authority exceeds the fair market value of the property as on the date of transfer; and

   (*ii*) the value so adopted or assessed or assessable by stamp valuation authority has not been disputed, in any appeal or revision or reference before any authority or Court,

   (b) Consequences where the value is determined by the Valuation Officer [Section 50C(3)]: If the fair market value determined by the Valuation Officer is less than the value adopted (assessed or assessable) for stamp duty purposes, the Assessing Officer may take such fair market value to be the full value of consideration. However, as per section 50C(3), if the fair market value determined by the Valuation Officer is more than the value adopted or *assessed or assessable* for stamp duty purposes, the Assessing Officer shall not adopt such fair market value and will take the full value of consideration to be the value adopted or *assessed or assessable* for stamp duty purposes.

3. ***Stamp duty value on the date of agreement to be deemed consideration [Section 43CA(3)]***: The Finance Act, 2013 has also provided 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 any mode other than cash on or before the date of the agreement. [Section 43CA(4)]

   Consequent to the introduction of the above provisions, the purchase of immovable property for inadequate consideration shall also be treated as deemed gift in the hands of the transferee to the extent of the inadequate consideration provided such inadequate consideration exceeds `15,000.

(B) Gift of money and gift of property to be taxed in the hands of the recipient

(i) Gift of money and property

According to section 56(2)(vii), the following three kinds of gifts received by an individual or HUF from an unrelated person or persons shall be taxable under section 56(2)(vii).

(1) Gift of money.

(2) Gift of immovable property received without consideration.

(3) Gift of any property, other than immovable property whether received without consideration or acquired for inadequate consideration.

(1) *Gift of money [Section 56(2)(vii)(a)]*: Where any sum of money is received by an individual or HUF from any person or persons without consideration, the aggregate value of which exceeds `50,000, the whole of the aggregate value of such sum shall be taxable in the hands of the recipient.

(2) *Gift of immovable property [Section 56(2)(vii)(b)]*

(*a*) *Received without consideration [Section 56(2)(vii)(b)(i)]*

Where any immovable property is received by an individual or HUF from any person without consideration the stamp duty value of which exceeds `50,000, the stamp duty value of such property shall be taxable in the hands of the recipient.

(*b*) *Received for inadequate consideration [Section 56(2)(vii) (b)(ii)] [Inserted by the Finance Act, 2013, w.e.f. A.Y 2014-15*]

Where any immovable property is received for a consideration which is less than the stamp duty value of the property by an amount exceeding `50,000, the stamp duty value of such property as exceeds such consideration, shall be chargeable to tax in the hands of the individual or HUF as income from other sources..

Stamp duty value to be taken on the date of agreement [Proviso to section 56(2)(vii)(b)]:

In normal circumstances, stamp duty value has to be determined on the date of registration of the immovable property.

However, where the date of the agreement fixing the amount of consideration for the transfer of the immovable property and the date of registration are not the same, the stamp duty value may be taken as on the date of the agreement, instead of that on the date of registration.

This exception shall, however, apply only in a case where the amount of consideration, or a part thereof, has been paid by any mode other than cash on or before the date of the agreement fixing the amount of consideration for the transfer of such immovable property.

(3) *Gift of property other than immovable property received without consideration or for inadequate consideration* [*Section* 56(2)(vii)(*c*)]:

(*a*) *Without consideration*: Where any property other than immovable property is received by an individual or HUF, the aggregate fair market value of which exceeds `50,000, the whole of the *aggregate* fair market value of such property shall be taxable.

(*b*) *Received for the inadequate consideration* [*Section 56(26)(vii) (c)(i)*]: Where such property other than immovable property is received for a consideration which is less than the aggregate fair market value of the property by amount exceeding `50,000 the aggregate fair market value of such property as exceeds such consideration shall be taxable.

"Property" means the following capital asset of the assessee, namely:−

(*i*) immovable property being land or building or both;

(*ii*) *shares and securities;*

(*iii*) jewellery;

(*iv*) archaeological collections;

(*v*) drawings;

(*vi*) paintings;

(*vii*) scuptures;

(*viii*) any work of art; *or*

(*ix*) bullion;

(ii) Circumstances where gift of money/property shall not be taxable even if it exceeds `50,000?

In the following cases, gift of money and/or property shall not be taxable in the hands of the recipient even if the aggregate amount of gift received during the previous year exceeds `50,000.

Where the sum of money *or any property* is received—

(*a*) from any relative; or

(*b*) on the occasion of the marriage of the individual; or

(*c*) under a will or by way of inheritance; or

(*d*) in contemplation of death of the payer; or

(*e*) from any local authority as defined in the *Explanation* to section 10(20); or

(*f*) from any fund or foundation or university or other educational institution or hospital or other medical institution or any trust or institution referred to in section 10(23C); or

(*g*) from any trust or institution registered under section 12AA.

Meaning of relative

(*i*) "Relative" means, in case of an Individual—

(*a*) spouse of the individual,

(*b*) brother or sister of the individual,

(*c*) brother or sister of the spouse of the individual,

(*d*) brother or sister of *either of the parents* of the individual,

(*e*) any lineal ascendant or descendant of the individual,

(*f*) any lineal ascendant or descendant of the spouse of the individual, and

(*g*) spouse of a person referred to in items (*ii*) to (*vi*) mentioned above.

(*ii*) In case of a Hindu undivided family, any member thereof.

1. There is lot of confusion whether the relative as defined refers to donor or to the donee. Since individual/HUF that is referred in the definition is the assessee who receives the gift, the relative should refer to the kinship of donor with assessee or in other words, the relationship is that of donor to the donee.
2. It may be noted that nephew or niece are not the lineal descendants. Thus if they make any gift to their uncle or aunt, such gift shall be taxable in the hands of uncle or aunt. On the other hand, uncle and aunt can make gift to their nephews or nieces.
3. Gift on the occasion of marriage of the individual or by way of inheritance have no application to the HUF. As such, the exception in case of HUF is restricted to gifts by will or in contemplation of death or gift from members of HUF.
4. It may, however, be noted that as per section 64(2), if a member of the HUF converts, etc. his separate property into the property belonging to the family *otherwise than for adequate consideration*, the income derived from the converted property shall be deemed to arise to the individual and not the family.
5. Foreign/NRE gifts are also covered under this section.
6. Although gifts from close relatives are not taxable, but the recipient of the gift shall have to produce the evidence to prove the genuineness of the gift.

Section 56(2)(*v*) [now (*vii*)], read with Explanation speaks of relationship between the donor and donee and not deemed assessee, maternal uncle of the assessee who made gifts of `5 lakh to two minor sons of the assessee is not a "relative" of the donees with in the meaning of Explanation to section 56(2)(*v*) and therefore, the impugned sum is chargeable to tax in the hands of the assessee under the provisions of section 56 read with section 64 [*ACIT v Lucky Pamnani* (2011) 49 DTR 501 (Trib)(Mum)].

(C) Tax to be deduct at source on transfer of immovable property

Section 194-IA has been inserted by the Finance Act, 2013 w.e.f. 1-6-2013 which provides for deduction of tax at source in case of certain immovable property provided the total amount of consideration for the transfer of immovable property is `50,00,000 or more.

(1) Who is liable to deduct tax at source under section 194-IA?

Any person, being a transferee, responsible for paying (other than the person referred to in section 194LA, relating to compensation in case of compulsory acquisition of property) to a resident transferor any sum by way of consideration for transfer of any immovable property (other than agricultural land) shall be liable to deduct tax.

(2) Meaning of immovable property

"Immovable property" means any land (other than agricultural land) or any building or part of a building.

(3) When is the tax to be deducted under section 194-IA?

Tax is to be deducted:

(*a*) at the time of credit of such sum to the account of the transferor, or

(*b*) at the time of payment of such sum in cash or by issue of a cheque or draft or by any other mode,

whichever is earlier.

(4) Rate of TDS

The rates of TDS in case of transfer of immovable property shall be 1%.

Notes:

1. No surcharge, education cess or SHEC shall be added to the above rates. Hence, tax will be deducted at source at the basic rate.
2. The rate of TDS will be 20% in all cases, if PAN is not quoted.

(5) Tax not to be deducted in certain cases

In the following cases tax is not to be deducted at source under section 194-IA:

1. The immovable property transferred is a rural agricultural land.
2. The immovable property has been compulsory acquired under any law.
3. The total amount of consideration for the transfer of immovable property is less than `50,00,000.

(6) Procedure of deposit of tax deducted at source

Notification No. 39/2013, dated 31.5.2013 has prescribed the procedure for deposit of tax deducted at source, which is as under:

(i) Any sum deducted under section 194-IA shall be paid to the credit of the Central Government within a period of seven days from the end of the month in which the deduction is made and shall be accompanied by a challan-cum-statement in Form No. 26QB.

(ii) The tax shall be deposited by remitting it electronically within 7 days from the end of month in which deduction is made into the Reserve Bank of India or the State Bank of India or any authorised bank.

(iii) The Director General of Income-tax (Systems) shall specify the procedure, formats and standards for the purposes of remitting the amount electronically to the Reserve Bank of India or the State Bank of India or any authorised bank and shall be responsible for the day-to-day administration in relation to the remitting of the amount electronically in the manner so specified.

(iv) Online payment of TDS is mandatory. Online payment of challan is available on TIN NSDL website.

(v) Both transferee and transferor must have Permanent Account Number (PAN). Transferee is not required to hold/obtain TAN for payment of TDS.

(7) Form, time limit and procedure for issue of TDS certificate of deduction of tax under section 194-IA

As per Notification No. 39/2013, dated 31.5.2013, every person responsible for deduction of tax under section 194-IA shall furnish the certificate of deduction of tax at source in Form No.16B to the payee within fifteen days from the due date for *furnishing the challan-cum-statement in Form No. 26QB* under rule 31A after generating and downloading the same from the web portal specified by the Director General of Income-tax (System) or the person authorised by him.

The Director General of Income-tax (Systems) shall specify the procedure, formats and standards for the purposes of generation and download of certificates and shall be responsible for the day-to-day administration in relation to the generation and download of certificates from the web portal specified by him or the person authorised by him.

(8) Quarterly statement

Every person responsible for deduction of tax under section 194-IA shall furnish to the Director General of Income-tax (System) or the person authorised by the Director General of Income-tax (System) a challan-cum-statement in Form No. 26QB electronically in accordance with the procedures, formats and standards specified by Director General of System within seven days from the end of the month in which the deduction is made