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LIST OF ABBREVIATIONS USED

CG	Capital Gains
LTCG	Long Term Capital Gain
STCG	Short Term Capital Gain
COA	Cost of Acquisition
CII	Cost Inflation Index
COI	Cost of Improvement
JDA	Joint Development Agreement
SDV	Stamp Duty Value
CC	Completion Certificate
TOPA	Transfer of Property Act
CCM	Completed Contract Method
PCM	Percentage Completion Method
ICDS	Income Computation and Disclosure Standard

CAPITAL GAINS ON IMMOVABLE PROPERTY

Chapter I: Basics regarding Capital Gain on Sale of Property

❖ **Over View of Capital Gains.**

- Profits or gains arising from the transfer of an immovable property, held as a capital asset, are taxed under the head "Capital Gains" **(Section 45)**

- The Incidence of tax on Capital Gains would arise in the previous year in which the capital asset under consideration is being transferred.

- **Exception to Section 45(1)**: As per section 45(1), capital gain is chargeable to tax in the year of transfer but in following four cases capital gain is not taxable in the year of transfer but it would be taxable in the year of receipt of consideration.

  - **Section 45(1A)**: Insurance Claims for damage or destruction of capital assets.
  - **Section 45(2):** Conversion of Capital Assets into Stock-in-Trade.
  - **Section 45(5):** Compensation on Compulsory Acquisition under any law.
  - **Section 45(5A):** Capital Gain in case of Joint Development Agreement (Applicable only to Individuals and HUF's)

- An immovable property, being land or building or both, held for a period of 24 months or less qualifies as a 'short term capital asset' **[Proviso to Section 2 (42A)]** and if such capital asset is held for more than 24 months it qualifies as 'long term capital asset'. For assessment years prior to AY 2018-19, such period was 36 months instead of 24 months

- Transfer of a short term capital asset gives rise to Short Term Capital Gains ("STCG") **[section 2(42B)]** and transfer of a long term capital asset gives rise to Long Term Capital Gains ("LTCG") **[Section 2(29B)]**. It is important to distinguish between STCG & LTCG as the tax rates for both are different.

- **STCG arising on account of transfer of short term capital asset is computed as under (Section 48):**

Full Value of Consideration	XXX
Less: Expenditure incurred Wholly and exclusively in connection with transfer of asset	(XX)
Net Sale Consideration	XXX

Less: Cost of Acquisition	(XX)
Less: Cost of Improvement	(XX)
Short Term Capital Gains	XXX

The STCG computed as above forms part of total income and is chargeable to tax as per the normal rate of tax as applicable to assessee.

- **LTCG arising on account of transfer of long term capital asset is computed as under (Section 48):**

Full Value of Consideration	XXX
Less: Expenditure Incurred Wholly and Exclusively in connection with transfer of Capital asset	(XX)
Net Sale Consideration	XXX
Less: Indexed Cost of Acquisition	(XX)
Less: Indexed Cost of Improvement	(XX)
Long Term Capital Gain	XXX

Indexation is a process by which the cost of acquisition is adjusted against inflationary rise in the value of asset. For this purpose, the CBDT has notified cost inflation index. The benefit of indexation is available only to long term capital assets. For Computation of indexed cost of acquisition following factors are to be considered:

- Year of acquisition/improvement;
- Year of transfer;
- Cost Inflation Index of the year of acquisition/improvement;

Indexed cost of acquisition is computed with the help of following formula:

COA X CII of the year of transfer of capital asset/ CII of the year of acquisition.

Indexed cost of improvement is computed with the help of following formula:

COI X CII of the year of transfer of capital asset/ CII of the year of improvement.

- **Rate of Taxation for LTCG:**

The LTCG Computed as above is chargeable to tax at special rate of tax @ 20% (Plus Surcharge and cess as applicable). **No deduction** under **chapter VIA** is allowed against LTCG. Further **rebate u/s 87A** is also not available against such income.

Where the actual sale consideration receivable for the transfer of a capital asset, being land or building or both, is less than the value

adopted or assessable by Stamp Valuation Authority for the purpose of stamp duty in respect of such transfer, the value adopted by such authority would be taken as the full value of consideration in computing the Capital Gains as per provisions of **section 50C** of the Act.

In other words, while computing Capital Gains: Full Value of Consideration = (Actual Sales Consideration) or (Value Adopted by Stamp Duty payment), Whichever is higher.

In this regard, some relief has been provided from A.Y. 2019-20 whereby the effect of the above deeming provision would not apply if the difference between actual sales consideration and stamp duty valuation of such property is not more than 5% of the actual sale consideration. (from A.Y. 2021-2022 the tolerance band is increased from 5% to10%)

Where the amount of actual purchase consideration payable by a buyer for purchase of immovable property is less than the Stamp Duty Value of such property, the difference between the Stamp Duty Value and purchase consideration shall be taxable in the hands of the Buyer under the head "**Income from Other Sources**" at the normal rate of tax applicable to such assessee as provided under section 56(2)(x) of the Act.

The above provision will not apply if such difference does not exceed Rs. 50,000. Further, some relief has been provided from A.Y. 2019-20. whereby the effect of the above provision would not apply if the difference between Stamp Duty Value and actual purchase consideration is not more than 5%(Increased to 10% from A.Y. 2021-22) of the actual purchase consideration.

LTCG is exempt from tax if the seller invests the amount of such capital gain in specified type of assets.
The Key Deductions in this regard have been summarized below:

Section	**54**	**54EC**	**54GB**	**54F**
Exemption available	Individual or HUF	Any Assessee	Individual or HUF	Individual or HUF
Sale of	Asset being residential house or land appurtenant thereto	Asset being land/building or both	Asset being residential house property	Any Long Term Capital Asset other than residential house property.
Investment Made	Amount of Capital	Amount of Capital Gains to be invested in	Amount of Sale considerat	Amount of sale considera

in Purchase of	Gain to be invested in a Residential house property in India (Note 2 below)	Specified bonds of NHAI/RECL/PFCL /IRFCL (These bonds will now have maturity of 5 years or more)	ion invested in purchase of Equity Shares of an eligible company in which the assessee holds 50% or more shares/voting power, and the eligible company makes investment in Plant & Machinery as prescribed	tion is to be invested in a residential house property in India.
Time Period of Purchase	If purchased within one year before or 2 years after; if constructed within 3 years after the transfer (Refer Note 1 below)	Within 6 months of transfer	Before the due date of ITR (refer note 1 below)	If purchased within 1 year before or 2 years after; if constructed within 3 years of transfer(refer Note 1 below)
Consequence if new asset sold within a particular period	If new asset sold within 3 years, while calculating capital gains for the new asset the capital gain	On sale of Bonds or otherwise conversion into money within 5 years. Long Term Capital Gain exempted earlier will be taxable in the year of such sale or conversion.	If new asset (shares or plant and machinery) sold within 5 years, then amount of long term capital gain exempted	If new asset sold within 3 years then amount of Long Term capital gain exempted earlier taxable in the year

	exemption allowed earlier will be reduced from its cost of acquisition		will be taxable in the year of such sale in the hands of respective assessee.	of such sale.

Note 1: If investment in new asset is not made before the due date of filing tax return for the year in which LTCG is taxable, such amount of investment shall be deposited in a specified bank/institution under Capital Gains Account Scheme before the applicable due date.

Note 2: For LTCG upto Rs. 2 Crore the assessee can acquire two residential house properties in prescribed time limit. However, this benefit is available once in a life time. (Proviso to Section 54(1) as Amended by Finance Act, 2019 w.e.f A.Y. 2020-2021)

Note 3: Amount of deduction as claimed under section 80C to be taxable if residential house sold within 5 years.

Where loan was taken for purchase of residential house property and deductions were claimed for the principal repayment, stamp duty and registration under section 80C of the Act and thereafter, if such house property is sold within five years from the end of the financial year in which the possession of such property was obtained, the tax benefits which were claimed earlier will have to be reversed. The tax deduction claimed for the principal repayment, stamp duty and registration under section 80C becomes taxable in the year of such sale.

- **Scenario 1: Seller and Buyer both are resident:**

1. In case the total amount of purchase consideration payable for immovable property other than agricultural land is more than INR 50 lakhs, the Buyer is required to deduct tax at the rate of 1% of the purchase consideration payable to the resident seller.

2. Such TDS is required to be deducted at the time of payment or credit to the account of the Seller whichever is earlier.

3. The Buyer is required to deduct tax at higher rates of 20% in case the seller does not provide his PAN to the buyer [(Section 206(AA)].

4. The tax so deducted has to be deposited by the Buyer with the Government authorities within 30 days from the end of the month in which TDS was deducted along with Form 26QB.

5. The Buyer is also required to furnish a TDS certificate as per Forms 16B to the Seller within 15 days from the due date for furnishing Form No 26QB after generating & downloading the same from the web portal specified by the income tax Department.

6. The Seller can then claim credit of such TDS from his income tax liability in his income tax return.

7. The Seller can claim a refund of the TDS in his income-tax return if he is incurring a loss on the sale of the property or if he is claiming exemption from long-term capital gains under any of the ways discussed earlier.

- **Scenario 2: Seller is a Non-resident and Buyer is Resident:**

1. If the immovable property is being purchased from a person who is a non-resident in India as per the provisions of the Income-tax Act, the Buyer is obligated to deduct tax 20% if the asset is a long-term capital asset and @ 30% if the asset is a short-term capital asset (plus surcharge and cess as applicable) (Section. 195)

2. Such TDS is required to be done at the time of payment or credit to the account of the Seller, whichever is earlier.

3. The tax so deducted has to be deposited by the buyer with the government authorities within 7 days from the end of the month in which TDS was deducted.

4. Seller may also apply for a certificate of low or Nil deduction of tax (Section197), if his total income is not taxable at rates mentioned in this section.

5. The Buyer will also need to have a Tax Deduction Account Number (TAN)

6. The Buyer is also required to furnish the applicable Quarterly TDS Statement in Form 27Q in the prescribed manner The due dates for filing such quarterly TDS statements have been summarized below:

Quarter Ending on	**Due date for filing TDS Statement in form 27Q**
30th June	31st July of Financial Year
30th September	31st October of Financial Year
31st December	31stJanuary of Financial Year
31st March	31st May of Financial Year.

❖ SOME IMPORTANT TAX PLANNING TIPS

- One should hold the asset for a long term perspective, as the tax rate on sale of long term capital asset is comparatively less than short term capital asset.

- One should ensure that some re-investments to be done as per Section 54,54F, 54EC, etc within the prescribed time limit so that the tax liability of an assessee gets reduced or eliminated.

- One should also ensure that transactions relating to immovable property/assets shall be done **in any mode other than cash.** Transactions in cash may lead to initiation of strict penal provision under section 271D, 271DA and 271E.

Chapter II: Basics concept of Joint Development Agreement (JDA) in Real Estate Sector.

❖ Need For JDA

Real estate is considered to be an infrastructure sector for the growth and development of economy for a country. Development of real estate involves huge amount of investment, high degree of skill, efforts and time. Investment is required in form of acquiring land, for obtaining permission from the concerned authority for the purpose of development, for developing the project as per norms of the regulatory authority, for carrying out the construction activity and for marketing the project. The real estate project may be in the nature of development of Industrial Township, Commercial Complex, Residential Township, or Group Housing Society etc. It generally takes several years in development and completion of a real estate project.

For development of real estate, model of joint development arrangement has emerged as a popular model wherein land owner and developer contribute and combine their available resources and efforts for the development of real estate project.

Under such joint development agreement, land owner contributes his land and enters into an arrangement with the developer to develop and construct a real estate project at the developer's cost. Thus, land is contributed by the land owner and the cost of development and construction is incurred by the developer.

❖ Benefits arising from Joint Development Agreement to the land owner and real estate developer;

For Land Owner	For Real Estate Developer
Land owner may not have requisite experience in developing the property. The land owner gets an advantage to get its property developed by the professional developer as per the need and specification.	The cost of land in a project forms substantial part of total cost of project. In such an arrangement the developer is not required to make investment for acquiring land at initial stage.
The land owner may get consideration in the form of either lump sum consideration or percentage of sales revenue or certain percentage of constructed area in the project, depending upon the terms and conditions agreed upon between them	The real estate developer can develop the property on the said land and can earn additional profit after deducting the consideration paid to the land owner. Real estate developer can utilize his expertise of project development with limited resources in a much efficient manner

❖ Types of Joint Development Arrangements

1. **Owner of an old house is ready to develop the property in modern style which may have been allowed by the regulatory authorities:-**
   In such a case the owner hands over the house to the developer for the development and the floors constructed are shared between them. In addition, the developer may provide in a given case certain monetary consideration and alternative residence to the owner to live during the development period. This type of arrangement is mostly seen in metro cities.

2. **Large real estate project for development of residential or commercial complexes**:-
   The developer may not be in position to invest in acquisition of land for development of such project. In such a case, land owner contributes his land whereas the development is undertaken by the developer and the consideration for land is given by the developer to the land owner linked with the development of the project as per the terms and conditions mentioned in the agreement.

❖ Section 45(5A) of Income Tax Act, 1961

Section 45 of the IT Act is the charging section of the income chargeable under the head Capital Gains. In the ordinary course, a transaction is subject to capital gain in the year of transfer of the capital asset.

In case of the JDA or Specified Agreement ('SA') where the capital asset being land, building, or both have been transferred to the developer, such transaction is taxable in the year of transfer.

It is submitted that there may be significant time gap between the year in which the transfer took place and the year in which the consideration is received. Therefore, landowner of the capital asset faced difficulties in payment of taxes.

To minimize the hardship to the assessee, the amendment was bought up to insert new section 45(5A) in the IT Act. **The Finance Act 2017 has inserted a new section 45(5A) in the IT Act w.e.f. 01.04.2018 which reads as under:**

Section 45(5A). *Notwithstanding anything contained in sub-section (1), where the capital gain arises to an assessee, being an individual or a Hindu undivided family, from the transfer of a capital asset, being land or building or both, under a specified agreement, the capital gains shall be chargeable to income-tax as income of the previous year in which the certificate of completion for the whole or part of the project is issued by the competent authority; and for the purposes of section 48, the stamp duty value, on the date of issue of the said certificate, of his share, being land or building or both in the project, as increased by the consideration received in cash, if any, shall be deemed to be the full value of the consideration received or accruing as a result of the transfer of the capital asset :*

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.]

As new sub-section (5A) in section 45 of the IT Act, overrides the provisions of Section 45(1), therefore, the taxable event i.e. the transfer of title of land by the landowner **(only in the cases of individuals and HUFs)** to the Developer under a JDA, arises on receipt of the certificate of completion for the whole or part of the project, issued by the competent authority, provided the landowner does not transfer his share in the project to any other person on or before the date of issue of said certificate of completion.

Further, new sub-section (5A) in section 45 of the Income Tax Act also provides that the stamp duty value of land or building or both, of the landowner's share in the project/developed estate, on the date of issuing of certificate of completion by the competent authority, to the land owner, as increased by any monetary consideration received by the landowner, 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, under section s 48 of the IT Act.

Before insertion of the above section by Finance Act 2017 (till A.Y. 2017-18)

Section 45(1) of the IT Act, is charging section and provides that-
"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, 54EB, 54F, 54G and 54H, be chargeable to income tax under the head 'Capital Gain' and shall be deemed to be the income of the previous year in which the transfer took place."

In view of the above, Capital Gains arise on "transfer" of a capital asset. As per Section 2(47)(v) of the IT Act, the expression "transfer" amongst other things includes:

"any transaction involving the allowing of the possession of any immovable property to be taken or retained in part performance of a

contract of the nature referred to in section 53A of the Transfer of Property Act, 1882 (4 of 1882)"

It is submitted that the tax department, relying upon the said definition of transfer, has always contended that the taxability of the capital gains in the hands of the landowner, arises as soon as the JDA is signed and entered into between the landowner and the developer. It does not matter that property is not built-up and transfer to prospective buyers. Therefore, tax department considered the taxable event as and when the JDA is signed and entered into between the landowner and the developer.

But the biggest question which arises is 'when the project is just on papers at the time of signing of JDA, with no real existence, what would be the taxable value of consideration in the hands of the landowner'.

To give the answer of the above question, the tax department contended that as per the provisions of section 50D of the IT Act, which reads 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."

In view of the above, the taxable value of consideration in the hands of the landowner would be the fair market value of the project including land on the date of execution of the JDA.

Pursuant to provisions of section 50D of the IT Act, 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' but project under JDA takes times to complete (2 to 3 years) and is subject to fluctuation risk. ***Therefore, fair market value of the project on the date of execution of JDA is not justified.***

- ❖ **Judicial Ruling in case where registration of contract is mandatory in order to attract definition of Transfer**

The Hon'ble Supreme Court in its landmark Judgment in the case of CIT v. Balbir Singh Maini" Civil Appeal No. 15619 of 2017 held that

The provisions of 'transfer' under section 2(47)(v) of the IT Act, are not applicable since JDA entered into by the taxpayer with developers is not registered. In order to qualify as a 'transfer' of a capital asset under section 2(47)(v) of the IT Act, there must be a 'contract' which can be enforced in law under Section 53A of the Transfer of Property Act, 1882 (TOPA). There is no contract which can be taken cognizance of, for the purpose specified in Section 53A of the TOPA after the amendment to the Registration Act, 1908 in 2001 unless the said contract is registered. Since JDA was never registered, the JDA has no efficacy in the eye of law, therefore, no 'transfer' can be said to have taken place.

The Supreme Court also observed that the income from the capital gain on a transaction has never materialized and it is a hypothetical income. There is no profit or gain which arises from transfer of capital asset. The taxpayer did not acquire any right to receive income, in as much as alleged right was dependent upon the necessary permissions being obtained. There was no debt owned to the taxpayers by the developers, and therefore, the taxpayer had not acquired any right to receive income under JDA. Therefore, no profit or gains 'arose' from the transfer of capital asset so as to attract Section 45 and 48 of the Act.

❖ **Highlights of Section 45(5A)**

Applicable – Only to Individuals or HUF

Year of Transfer – Year in which possession of immovable property is transfer in Joint Development Agreement

Year of Tax – Year in which Completion Certificate (CC) is issued by Competent Authority

Full Value of Consideration – Stamp Duty Value on the date of issue of CC of his share in project + Consideration received in cash (if any).

Note: Above Provisions will not apply if in case assessee transfers his share in project on or before the date of issue of completion certificate and capital gain will be taxable in the year in which transfer took place i.e possession transfer in JDA.

❖ **Taxability in the hands of Real Estate Developer:**
The Income arising to the developer under JDA, in the form of sale consideration of his share in the developed property is considered as his business income and taxed as per applicable provisions.

❖ **Taxability in the hands Land Owner:**
The income arising to land owner either as percentage of built up area in a developed property or monetary consideration is taxable under the head income from capital gains.

❖ **Important issues to be taken care while drafting JDA**

- Whether possession of land is handed over to developer in a manner to grant license to enter upon and possess land only for development purpose or developer is enjoying the possession beyond that.
- Manner and Point of time, Ownership of land is transferred to the developer by land owner for deciding capital gain tax liability to the land owner.
- Whether rights and authorities to mortgage land is granted to developer by land owner to avail credit facilities from bank?
- Manner of Sale consideration and time of payment determined between land owner and developer. Further consideration in monetary terms, or in kind or in combination of both to be specified.

Chapter III: Method of Accounting.

❖ **Types of Accounting Method to be followed by Real Estate Developer**

a. Project Completion Method/Completed Contract Method (CCM)

A method of recognizing revenues and costs from a long-term project in which profit is recorded only when the project has been completed. Even if payments are received while the project is in progress, no revenues are recorded until its completion. The completed-contract method is a conservative way of accounting for long-term undertakings and is used for certain types of construction projects.In the case of sale of immovable property, ownership of the property is transferred as per the Transfer of Property Act, 1882 when legaltitle of ownership is transferred. As per the Transfer of Property Act,1882 legal title of the property is transferred by way of registrationof sale deed or in accordance with the provision of section 53A ofthe Transfer of Property Act.

Revenue is recognized as per the above principle when ownership of property is transferred. In real estate project ownership can be transferred only when property comes into existence and physical possession of the property is handed over.

b. Percentage Completion Method (PCM)

A method of recognizing revenues and costs from a long-term project in relation to the percentage completed during the course of the project. Thus, the percentage-of- completion method allows a business profits (or losses) on a project before its completion. Under PCM, revenue is recognized as per stage of completion of the project on year to year basis during the development of the project.

❖ **IMPACT OF ICDS ON THE REVENUE RECOGNITION BY THE REAL ESTATE DEVELOPER**

Applicability of Accounting Standard-7 "Construction Contract" on the Builder/Real estate Developer

The ICAI has prescribed Accounting Standard No. 7 "Construction Contract" in which accounting of Construction contractor described.

The Method of Recognition of revenue provided under the A.S. 7 is as follow

- **Before 2002**

Pre-2002 AS-7 (Old) dealing with Construction Contracts permitted two methods for revenue recognition, namely, Percentage of Completion Method (POCM) and Completed Contract Method (CCM). So before 2002 construction contractor can follow either POCM or CCM method for the recognition of revenue under the Income tax.

- **After 2002**

Thereafter accounting standard was revised by the Institute of Chartered Accountant of India and which permits only one method i.e. Percentage of Completion Method has been implemented by the construction industry at large and is also accepted by the tax authorities. Accordingly, the use of completed contract method is no longer permitted to construction contractor

Thereafter Recently CBDT (Central Board of Direct Tax) notified 10 ICDS (Income disclosure and computation slandered) for the computation of taxable income/Losses which is applicable from the financial year 2015-16 i.e. A.Y. 2016-17 and assessee is required to mandatory follow these standard for the computation of the income.

Out of these ICDS the ICDS No. III is related to “Construction Contract” wherein the computation of taxable income of the Construction Contract is provided.

The Method of Recognition of revenue provided under the ICDS III is as follow:-

Section 145(1) – Income chargeable under the heads “Profits and Gains from Business or Profession” or “Income from other Sources” – subject to 145(2)- as per method of accounting regularly followed

Section 145(2) – the Central Government has power to notify “ICDS”

CBDT vide notification dated 31 March 2015 introduced 10 ICDS to be effective from 1 April
2015 and shall be accordingly apply for AY 2016-17 onwards.

Section 145(3)-AO has the power to make best judgement assessment u/s. 144 if he is not satisfied about the :-

- correctness or completeness of the accounts of the assessee ; or
- method of accounting is not regularly followed ;or
- Income not computed as per ICDS

Hence ICDS has to be mandatorily followed or else best judgement assessment can be done by Assessing Officer.

Under the ICDS III the method of recognition of revenue by the Contractor is same as per revised AS 7. So under this ICDS it is

mandatory requirement to follow the Percentage of Completion method for the recognition of revenue.
So as per revised AS-7 and ICDS III, after 2002 it is clear position that assessee under construction contract it is required to follow the percentage of completion method for the recognition of revenue.

But, the question arises whether the ICDS III and AS-7 are applicable to the Real Estate Developer or not.

Background of AS -7

The ICAI issued Accounting Standard (AS) 7 – 'Construction Contract' in the year 1983 which was later on revised in the year 2002. The AS 7 laid down the principles of accounting for 'construction contracts' in the financial statements of the Contractors. As per the revised AS 7 the accounting was to be done as per percentage/progressive completion method.

In response to a query rose, on applicability of revised AS 7 to a real estate developer, before the Expert Advisory Committee (EAC) formed by the ICAI, the EAC observed that the pre revised AS 7 specifically mentions about its applicability to enterprises undertaking construction activities on their own which would include real estate developer. However, the revised AS 7 is applicable only to Contractors.

The Scope of AS -7 before the revision in year 2002 is as follows

"This Statement deals with accounting for construction contract in the financial statement of enterprise undertaking such contract (hereinafter referred to as "Contractor") this statement will also apply to enterprise undertaking construction activities of the type dealt with in this statement not as contractor but on their own account as a venture of commercial nature where the enterprise has entered into agreement for sale".

As per above before 2002 the AS -7 was applicable on the both contractor and Real estate developer who develop the building and thereafter sale on their own account.

The Scope of AS-7 after the revision in year 2002 is as follows

"The Standard should be applied in accounting for construction contract in the financial statement of Contractor"

As per the revise AS -7 the scope of the standard was limited to contractor only. So after revision a real estate developer/ Builder are not covered under the AS -7, accordingly they are not required to follow the percentage of completion of method for the revenue recognition.

The Scope of ICDS III is as follows

"This Computation and Disclosure should be applied in determination of income for a construction contract for a contractor"

Applicability of ICDS III
Meaning of Construction contract as given in ICDS is as follow

2(1)(a) A "construction contract" is a contract specifically negotiated for the construction of an asset or a combination of assets that are closely interrelated or interdependent in terms of their design, technology and function or their ultimate purpose or use and includes :

(i) Contract for the rendering of services which are directly related to the construction of the asset, for example, those for the services of project managers and architects;
(ii) Contract for destruction or restoration of assets, and the restoration of the environment following the demolition of assets.

So the ICDS apply on **Construction Contractor** and to service providers such as architects, project managers, etc. who generally, render services which are directly related to the construction contract. These categories of taxpayers will now be mandatorily required to compute their taxable income on POCM basis.

However this ICDS is silent whether the same is applicable to Real Estate Developers or not. But if we see applicability of ICDS – III then it will apply only on construction contract and service provider who is providing the service related to the construction contract and the Scope of ICDS III it also similar to AS -7 and as per various decided case law it is decided that provision of AS -7 is not applicable on Real Estate Developer because of that it seems that there is no applicability of ICDS III on Real estate Developer and accordingly the mandatory requirement to follow the percentage of completion method for recognition of revenue under ICDS III will not applicable on Real estate developer.

❖ **FAQ**

Whether Real Estate Developer can follow Completed Contract Method (CCM)?

Answer: Income-tax Act does not prescribe any specific method to be adopted to compute taxable income of real estate developer. There is no specific provision under the Income-tax Act in this regard and therefore, business income of the real estate developer is to be computed and assessed in accordance with the normal provisions of computation of business income prescribed under the Act. The tax authorities cannot impose and do not have power to insist to adopt any particular method for revenue recognition and computation of taxable income by the real estate developer.

Furthermore, for the purpose of tax computation and filing of Income Tax return by the real estate developer, income can still be computed by adopting Completed Contract Method even after the issue of revised guidance note, primarily for the following reasons:

- Developer has been following CCM regularly in the past and thereforefollowing the principle of consistency and as per method of accounting regularly employed as permitted under section 145, it continuesto follow CCM.

- No specific ICDS has been issued by CBDT applicable to real estate developers. Therefore, neither the assessing officer nor the assessee is having any specific provision under the Act to be followed for tax computation purpose by the real estate developers.

❖Judicial Rulings for adoption of Method of Accounting.

Following case laws have been decided in favor of assessee wherein an option to the assessee is given to choose either of the method i.e. CCM or PCM

- ***Krish Infrastructures Ltd v. Asstt. CIT [2013] 35 taxmann.com 38/58 SOT 127 (Jaipur – Tribunal)***
- ***Awadesh Builders v. ITO [2010] 37 SOT 122 (Mum).***

Cases where adoption of CCM is approved (favorable to assessee)

- ***CIT V. Manish Buildwell Ltd (Delhi)***
- ***Prem Enterprises V. ITO (Mumbai)***
- ***Haware Constructions (P) Ltd V. ITO***
- ***ITO V.Kasturi Construction***
- ***CIT V. Unique Builders & Developers.***

Chapter IV:-Definition and Interpretation of Section 2(47) of Income Tax Act, 1961, Some Important Aspects regarding Conversion of Capital Asset into Stock in Trade and vice versa, Compulsory Acquisition of capital asset and compensation receive thereof.

❖ Section 2(47)

Clause (47) of section 2 of Income-tax Act, 1961 defines the term "transfer" as under:-

"transfer", in relation to a capital asset, includes,-

(i) the sale, exchange or relinquishment of the asset; or
(ii) the extinguishment of any rights therein; or
(iii) the compulsory acquisition thereof under any law; or
(iv) ina case where the asset is converted by the owner thereof into, oris treated by him as, stock-in-trade of a business carried on by him. such conversion or treatment; or
(iva) the maturity or redemption of a zero coupon bond; or
(v) any transaction involving the allowing of the possession of any immovable property to be taken or retained in part performance of a contract of the nature referred to in section 53A of the Transfer of Property Act, 1882 (4 of 1882); or
(vi) any transaction (whether by way of becoming a member of, or acquiring shares in, a co-operative society, company or other association of persons or by way of any agreement or any arrangement or in any other manner whatsoever) which has the effect of transferring, or enabling the enjoyment of, any immovable property.

Explanation 1-For the purposes of sub-clauses (v) and (vi). "immovable property" shall have the same meaning as in clause (d) of section 269UA.

Explanation 2.-For the removal of doubts, it is hereby clarified that transfer includes and shall be deemed to have always included disposing of or parting with an asset or any interest therein, or creating any interest in any asset in any manner whatsoever, directly or indirectly, absolutely or conditionally, voluntarily or involuntarily, by the way of an agreement (whether entered into in India or outside India) or otherwise, notwithstanding that such transfer of rights has been characterized as being effected or dependent upon or flowing from the transfer of a share or shares of the company registered or incorporated outside India."

❖ Interpretation of the above definition

As it uses the word ***'includes'***it is an inclusive definition and does not exclude the contextual or the ordinary meaning of the word ***'transfer'.***

(i) Relinquishment means 'to withdraw from' or 'to abandon' or 'to give up any thing or any right' or 'to cease to hold' or 'to surrender'. For example, co-owner of property relinquishes his right in the property, transfer of right in right share etc.

(ii) Extinguishment means cancellation or destruction of a right.

(iii) Compulsory acquisition of a capital asset under any law means capital asset such as land or interest in land is purchased or taken under statutory powers without agreement of the owner.

It is compulsorily acquired by the government authorities for the development of infrastructure facilities for public, for example land acquired by NHAI or by Railways for its further development for public. Such compulsory acquisition results in transfer of the ownership rights of the asset by the owner to the government. Therefore, the definition of transfer under section 2(47) covers such situation within its ambit and capital gains shall be liable to be charged to tax on compulsory acquisition of the asset in the year of acquisition

(iv) Conversion of capital asset into stock in trade When a person converts any capital asset owned by him into stock in-trade of a business carried on by him, it is regarded as a transfer under section 2(47)(iv). Normally, there can be no transfer if the ownership of an asset remains with the same person. However, the Income-tax Act provides an exception for the purpose of capital gains. The definition of transfer u/s 2(47) has been expanded to include conversion of capital asset into stock in trade to be covered within the ambit of transfer of capital asset.

(v) Analysis of clause (v) - Transaction involving the allowing of the possession of an immovable property in part performance of a contract of the nature referred to in section 53A of Transfer of Property Act, 1882 treated as 'transfer'

In order to attract section 53A of the Transfer of Property Act, 1882, following conditions should exist:

(a) There should be a contract for consideration, it should be in writing; it should be signed by the transferor,
(b) The contract should pertain to the transfer of immovable property, from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty,
(c) The transferee should have taken possession of the property & has done some act in furtherance of the contract.
(d) The transferee should be ready and willing to perform his partof the contract.
(e) Even without execution of sale deed, the transferee acquires the rights in the property and the transferor cannot claim any right in respect of the property other than the right expressly provided in the terms of the contract.

As per the Transfer of Property Act, 1882, ownership rights of the immovable property are validly transferred when conveyance deed is registered in favour of the transferee. The analysis of section 53A of the Transfer of Property Act, 1882 shows that an alternative method for transfer of ownership rights of the immovable property, has been prescribed even when conveyance deed is not registered The combined reading of various components of section 53A indicates that when there

is an intention to transfer the ownership rights of the property by the transferor to the transferee by entering into a contract for consideration and handing over the possession of the property and accepting part consideration there under, the transferee acquires the rights in the property, provided the transferee is willing to perform the balance part of his obligations.

Thus, unless there is contract with the intention to transfer the ownership rights of the immovable property, mere handing over the possession of the immovable property would not be enough to constitute transfer of the property

❖Conversion of capital asset into stock in trade Section 45(2)

The provision of Section 45(2) is applicable when Capital Asset is converted into business asset by the owner of asset/land and subsequently asset is used by him by undertaking business activity. Such business activity may be taken by the owner of the land himself or with a builder/developer in a Joint Development Agreement. But it is important that the ownership of the land should not be transferred to the Builder/Developer through Joint Development Agreement. It should be in the name of the owner of Capital Asset/Land.

In case of conversion of capital asset into stock in trade, the transfer would be considered in the year in which such conversion took place However, capital gain will be taxable in the year in which converted asset (Stock in trade) is sold.

Further on sale of converted asset (Stock in trade) the assessee would also be liable to tax under the heads of profits and gains from business or profession on sale of Stock in trade

Computation of taxable income under both the heads is shown below:

Under the head Capital Gain

Full Value of Consideration (Fair market Value on the date of conversion)	*XXX*
Less: Cost of Acquisition	*(XX)*
Less: Cost of Improvement	*(XX)*
Long term/Short Term Capital Gain	*XXX*

Under the head Profits and Gains from Business or Profession

Sale Price of Stock in Trade	*XXXX*
Less: Cost (Fair Market Value of asset as on the date of conversion)	*(XX)*
Profits/Gains from Business or Profession	*XXXX*

Note:

If any part of Stock in trade is sold then only part Capital gain shall arise in the year in which part Stock in trade is sold.

In case of conversion of capital asset into stock in trade and subsequent sale of stock, the period of 6 months shall be calculated from the date of sale of stock in trade for the purpose of exemption under section 54EC.

❖ Conversion of stock in trade into capital asset (Section 28(via) as Amended by Finance Act, 2018 w.e.f A.Y. 2019-20)

Section 28(via) of the Profits and Gains from Business or profession provides that FMV of Inventory as on the date on which it is converted into, or treated as, a Capital asset shall be taxable under Profits and Gains from Business or Profession on the date of conversion.

For the purpose of computing capital gain Cost of acquisition of such asset shall be the fair market value referred in section 28(via) of the income tax act.

❖ Compensation on compulsory acquisition of capital asset under any law (Section 45(5))

Normally capital gain is taxed in the year of transfer but in case of compulsory acquisition of capital asset, Capital gain will be taxable in the year in which ***compensation is received***

Compensation are of two types

(a) Initial Compensation and;
(b) Enhanced Compensation

Initial Compensation means compensation decided by the government authorities and paid to the assessee. Normally these compensation are undisputed compensation.

Where the compensation is fixed by the government authority and the same is not acceptable to the assessee, in that case an assessee has an option to go in court of law for claiming higher compensation. If the court orders the government to provide such higher compensation, such compensation is termed as **Enhanced Compensation.**

❖ FAQ

What are the consequences on taxability if the amount of compensation is received in installments?

Ans: If the Compensation received is in the nature of Initial Compensation: It will be taxable in the year in which first installment is received.

If the Compensation received is in the nature of Enhanced Compensation: It will be taxable as and when received. However, if any enhanced compensation is received due to the interim order of any court, then such compensation shall not be taxable in the year of receipt but shall be taxable in the year in which final order is passed by such court or other authority.

Further Interest received on late compensation shall be taxable under Income from other sources in the year of receipt and 50% deduction will be allowed u/s 57.

Amendments made in Income Tax due to '*Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013*' (RFCTLARR) which has been made effective from 1st January 2014 which states as hereunder:

The CBDT has clarified that compensation received in respect of any award or agreement which has been exempted from levy of income-tax vide **section 96** of the **Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 (RFCTLARR)** shall also not be taxable under the provisions of Income-tax Act, 1961 even if there is no specific provision for exemption of such compensation in the Income Tax Act, 1961.

CHAPTER V:- Provision related to section 50C, 43CA and section 56(2)(x) of the Income Tax Act, 1961.

❖SECTION 50C

(1) Where the consideration received or accruing as a result of the transfer by an assessee of a capital asset, being land or building or both is less than the value adopted or assessed or assessable by any authority of a State Government (hereafter in this section referred to as the "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, for the purposes of section 48, be deemed to be the full value of the consideration received or accruing as a result of such transfer:

Provided that where the date of the agreement fixing the amount of con sideration and the date of registration for the transfer of the capital asset are not the same, the value adopted or assessed or assessable by the stamp valuation authority on the date of agreement may be taken for the purposes of computing full value of consideration for such transfer:

Provided further that the first proviso shall apply only in a case where the amount of consideration, or a part thereof, has been received by way of an account payee cheque or account payee bank draft or by use of electronic clearing system through a bank account or through such other electronic mode as may be prescribed, on or before the date of the agreement for transfer:

Provided also that where the value adopted or assessed or assessable by the stamp valuation authority 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 section 48, be deemed to be the full value of the consideration.

(2) Without prejudice to the provisions of sub-section (1), where –

(a) the assessee claims before any Assessing Officer that the value ad opted or assessed or assessable by the stamp valuation authority under sub-section (1) exceeds the fair market value of the property as on the date of transfer;

(b) the value so adopted or assessed or assessable by the stamp valuation authority under sub-section (1) has not been disputed in any appeal or revision or no reference has been made before any other authority, court or the High Court,

the Assessing Officer may refer the valuation of the capital asset to a Valuation Officer and where any such reference is made, the provisions of sub-sections (2), (3), (4), (5) and (6) of section 16A, clause (i) of sub-section (1) and sub-sections (6) and (7) of section 23A, sub-section (5) of section 24, section 34AA, section 35 and

section 37 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 that Act.

Explanation 1.-For the purposes of this section, "Valuation Officer" shallhave the same meaning as in clause (r) of section 2 of the Wealth-tax Act, 1957 (27 of 1957).

Explanation 2.-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 timebeing in force, adopted or assessed, if it were referred to such authority for the purposes of the payment of stamp duty.

(3) Subject to the provisions contained in sub-section (2), where the value ascertained under sub-section (2) exceeds the value adopted or assessedor assessable by the stamp valuation authority referred to in sub-section (1), the value so adopted or assessed or assessable by such authority shall be taken as the full value of the consideration received or accruing as a result of the transfer.

❖ **Analysis of Section 50C:**

- This section is applicable to all assesses such as Individual, HUF, Firm, Companies or any other persons.
- This section is applicable in case of transfer of capital assets being land, building or both.
- In case the asset being land, building or both is not held as capital asset but held as stock in trade then Provisions of Section 43CA would be applicable rather than provisions of Section 50C.
- Where assessee claims that stamp duty value (SDV) is more than fair market value and such SDV has not been disputed in any appeal then the AO may refer the valuation to valuation officer.
- If the value ascertained by Valuation Officer is more than SDV of stamp valuation authority then Full value of consideration would be equal to SDV of Stamp Authority and value determined by Valuation Officer would be ignored. However, If the value ascertained by Valuation Officer is less than SDV of stamp valuation authority then Full value of consideration would be equal to value ascertained by Valuation Officer.
- Normally SDV as on the date of registration is considered but in case if the date of agreement and date of registration is not same, then assessee can take SDV as on the date of agreement if the assessee has received consideration or part thereof upto the date of agreement by account payee cheque, account payee draft or use of

any electronic clearing system through bank account or any other electric modes as prescribed.

- This section is applicable where sales consideration is less than the SDV assessed or assessable by stamp valuation authority. However, a tolerance band of 10% is given to assessee from A.Y. 2021-22 which means if the SDV does not exceed 110% of sales consideration then provision of this section is not applicable (This tolerance band was earlier introduced in Budget 2018 and was set at 5% but from A.Y. 2021-22 this has been increased to 10%)

❖ Judicial Ruling

Where limit of tolerance band is set and allowed upto 15% of variance between SDV and Sales Consideration.

(i) C B Gautam V. Union of India [199 ITR 530 SC]

(ii) Welfare Properties Pvt Ltd V. DCIT 13(3)(1), [ITA 4394/MUM/2018 – 29.11.2019]

Whether this tolerance limit may be made applicable retrospectively?

It has been held in the case of ***Chandra Prakash Jhunjhunwala V. Dy. CIT [2020] 181 ITD 185/188 DTR (Kol. 'B')*** that third proviso to Section 50C has been inserted to remove an undue hardship to the assessee or to remove apparent incongruity and same being curative in nature is applicable with retrospective effect from 1st April, 2003 i.e. the date effective from which Section 50C was introduced.

❖ *In case of immovable properties if SDV as on 01.04.2001 is available then Fair Market Value as on 01.04.2001 should not be more then SDV as on 01.04.2001 (Added by Finance Act 2020, w.e.f. AY 2021-22)*

Example: 1

Mr A acquired a House property on 12.02.1992 for Rs. 2,00,000. FMV as on 01.04.2001is Rs. 4,50,000 & SDV as on 01.04.2001 is Rs. 3,60,000.:- **In this case COA of property is Rs.3,60,000.**

Example:2

MrA acquired a House property on 12.02.1992 for 2,00,000. FMV as on 01.04.2001 is Rs 4,50,000 & SDV as on 01.04.2001 is Rs. 7,60,000.:- **In this case COA of property is Rs 4,50,000. (In this case if an assessee has not obtained Valuation Report from Registered valuer determining Fair Market Value as on 01.04.2001 then SDV can be taken as on 01.04.2001. i.e Rs. 7,60,000)**

Example:3

MrA acquired a House property on 12.02.1992 for Rs. 2,00,000. FMV as on 01.04.2001is Rs.1,50,000& SDV as on 01.04.2001 is 1,20,000.:- **In this case COA of property is Rs. 2,00,000,**

Example:4

Mr A acquired a House property on 12.02.1992 for Rs. 2,00,000. FMV as on 01.04.2001 is Rs. 4,50,000& SDV as on 01.04.2001 Not available,:- **In this case COA of property is Rs 4,50,000**

❖ Section 43CA:

(1) Where the consideration received or accruing as a result of the transfer by an assessee of an asset (other than a capital asset), being land or assessed or building or both, is less than the value adopted or assessed or assessable 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 assessable shall, for the purposes of computing profits and gains from transfer of such asset, be deemed to be the full value of the consideration received or accruing as a result of such transfer:

***Provided** that where 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 com puting profits and gains from transfer of such asset, be deemed to be the full value of the consideration.*

As per Finance Act 2021 this safe harbour limit of 10% for home buyer andreal estate developers selling such residential units has been increased to20% for certain transfer of residential property complying with the following requirements:

(i) the transfer of such residential unit takes place during the periodbeginning from the 12th day of November, 2020 and ending on the30th day of June, 2021;

(ii) such transfer is by way of first time allotment of the residential unit to any person; and

(iii) the consideration received or accruing as a result of such transferdoes not exceed two crore rupees.

(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 sub-section (1).

(3) Where the date of agreement fixing the value of consideration for transfer of the asset and the date of registration of such transfer of asset are not the same, the value referred to in sub-section (1) may be taken as the value assessable by any authority of a State Government for the purpose of payment of stamp duty in respect of such transfer on the date of the agreement.

(4) The provisions of sub-section (3) shall apply only in a case where the amount of consideration or a part thereof has been received by way of an account payee cheque or an account payee bank draft or by use of electronic clearing system through a bank account or through such other electronic mode as may be prescribed on or before the date of agreement for transfer of the asset.

❖ **Analysis of Section 43CA:**

- This section is applicable from assessment year 2014-15

- This section is applicable to any person transferring land or building or both held as stock in trade.

- In case transfer of property takes place without registration of sale deed but by execution of sale agreement and power of attorney or by way of transfer with the regulatory authority in any other manner, Provision of section 43CA is applicable.

- Normally SDV as on the date of registration is considered but in case if the date of agreement and date of registration is not same, then assessee can take SDV as on the date of agreement if the assessee has received consideration or part thereof upto the date of agreement by account payee cheque, account payee draft or use of any electronic clearing system through bank account or any other electric modes as prescribed.

- Assessee has the option to claim before the Assessing Officer that the value adopted or assessed or assessable by the Stamp Valuation Officer exceeds the Fair Market Value (FMV) as on date of the transfer and ask him to refer the valuation of the property to the Valuation Officer like as per the provisions of section 50C.

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

Common point w.r.t Section 50C and 43CA in case of reference to valuation Officer:

Assessing Officer (AO) may refer the case to Valuation officer in the following circumstances:

(i) Fair Market Value (FMV) claimed by the assessee as per the registered valuer and AO is of the opinion that value so claimed is at variance with its FMV.

(ii) In other case :

(a) If AO is of the Opinion that FMV as claimed by the assessee is more than the lower of below.
- 15% of value claimed by assessee; or
- Rs. 25000/-

(b) Having regard to nature of asset and other relevant circumstances, it is necessary to do so.

❖ SECTION 56(2)(X):

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

(a) any sum of money, without consideration, the aggregate value of which exceeds fifty thousand rupees, the whole of the aggregate value of such sum;

(b) any immovable property,-

(A) without consideration, the stamp duty value of which exceeds fifty thousand rupees, the stamp duty value of such property;

(B) for a consideration, the stamp duty value of such property as exceeds such consideration, if the amount of such excess is more than the higher of the following amounts, namely-

(i) the amount of fifty thousand rupees; and

(ii) the amount equal to "[ten] per cent of the consideration:]

***Provided** that where the date of agreement fixing the amount of consideration for the transfer of immovable property and the date of registration are not the same, the stamp duty value on the date of agreement may be taken for the purposes of this sub clause*

***Provided further** that the provisions of the first proviso shall apply only in a case where the amount of consideration referred to therein, or a part thereof, has been paid by way of an account payee cheque or an account payee bank draft or by use of electronic clearing system through a bank account "[or through such other electronic mode as may be prescribed], on or before the date of agreement for transfer of such immovable property:*

***Provided also** that where the stamp duty value of immovable property is disputed by the assessee on grounds mentioned in sub-section (2) of section 50C, the Assessing Officer may refer the valuation of such property to a Valuation Officer, and the provisions of section 50C and sub-section (15) of section 155*

shall, as far as may be, apply in relation to the stamp duty value of such property for the purpose of this sub-clause as they apply for valuation of capital asset under those sections:

*(**Provided also** that in case of property being referred to in the second proviso to sub-section (1) of section 43CA, the provisions of sub-item (i) of item (B) shall have effect as if for the words ten per cent, the words "twenty per cent had been substituted;]*

(C) any property, other than immovable property-

(A) without consideration, the aggregate fair market value of which exceeds fifty thousand rupees, the whole of the aggregate fair market value of such property;

(B) for a consideration which is less than the aggregate fair market value of the property by an amount exceeding fifty thousand rupees, the aggregate fair market value of such property as exceeds such consideration:

***Provided** that this clause shall not apply to any sum of money or any property received-*

(i) from any relative; or

(ii) on the occasion of the marriage of the individual; (under a will or by way of inheritance, or

(iii) Under a will or by way of inheritance; or

(iv) in contemplation of death of the payer or donor, as the case may be: or

(v) from any local authority as defined in the Explanation to clause (20) of section 10; or

(vi) 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 clause (23C) of section 10; or

(vii) from or by any trust or institution registered under "[section 12A or section 12AA or section 12AB]; or

(viii) by any fund or trust or institution or any university or other educational institution or any hospital or other medical institution referred to in sub-clause (iv) or sub-clause (v) or sub-clause (vi) or sub-clause (via) of clause (23C) of section 10; or

(ix) by way of transaction not regarded as transfer under clause (1) or "[clause (iv) or clause (v) or] clause (vi) or clause

(via) or clause (viaa) or clause (vib) or clause (vic) or clause (vica) or clause (vich) or clause (vid) or clause (vii) [or clause (viiac) or clause (viiad) or clause (viiae) or clause (viiaf)] of section 47; or

(x) from an individual by a trust created or established solely for the benefit of relative of the individual;

(xi) from such class of persons and subject to such conditions, as may be prescribed.]

Explanation For the purposes of this clause, the expressions "assessable", "fair market value", "jewellery", "property", "relative" and " Stamp Duty Value" shall have the same meaning as respectively assigned to them in the explanation to clause (vii).

❖ **Analysis of Section 56(2)(X):**

- This section was introduced by the Finance Act, 2017 and it was made applicable from A.Y. 2018-19 to all persons.

- Prior to this section the provision related to immovable property was covered in Section 56(2)(vii)(b) which was only applicable to Individuals and HUF.

- The provision of Section 56(2)(vii)(b) was introduced from 1st October 2009 and was made applicable in receipt of immovable property only to individuals and HUF and not to any other person such as firm, company, etc. The said provisions were effective from 1st October 2009 till 31st March 2017,thereafter the provisions of section 56(2)(x) was made applicable with respect to all the assessee.

- Section 56(2)(x) is applicable only if the property is in the nature of capital asset of the recipient. If it is in the nature of Stock in trade provision of this section is not applicable.

- This section is applicable to immovable properties and movable properties such as Shares & Securities, Jewellery, Drawing, Painting, Sculptures, Archaeological collections, any other work of art and Bullion.

- Money or property not taxable if it is received from Relative, on occasion of Marriage, Under will or by way of inheritance, in contemplation of death, from any Trust registered u/s 12AA, from any hospital or medical institution, from any university or educational institution, from any local authority defined u/s 10(20), From an individual by a trust created solely for the benefit of the relative of the individual, by any fund, trust, institution, referred in section 10(23C), by way of certain transaction not regarded as transfer under section 47.

- With respect stamp duty value to be considered on the date of sale agreement and stamp duty value as adopted, assessed or assessable, the provisions of section 50C are applicable to this section also.

- If any person receiving any asset for inadequate consideration and he already assessed under this section on the basis of SDV or FMV then Cost of Acquisition of such asset shall be the FMV or SDV which was considered under Income from Other Sources u/s 56(2)(x)

- Normally SDV as on the date of registration is considered but in case if the date of agreement and date of registration is not same, then assessee can take SDV as on the date of agreement if the assessee has received consideration or part thereof upto the date of agreement by account payee cheque, account payee draft or use of any electronic clearing system through bank account or any other electric modes as prescribed.

Clause (XI) of proviso to Section 56(2)(x) of the IT Act read with Rule 11UAC of the IT Rules, provides for prescribed class of persons to whom the provisions of Section 56(2)(x) of the IT Act would not apply.

The Central Board of Direct Taxes (CBDT) vide notification1 dated 29 June 2020 has replaced the said Rule 11UAC of the IT Rules. As per the revised Rule 11UAC, effective from fiscal year 2019-20, the provisions of Section 56(2)(x) of the IT Act would not apply to:

Any immovable property, being land or building or both, received by a resident of an unauthorized colony in the National Capital Territory of Delhi, where the Central Government has regularized the transactions of such immovable property based on the prescribed documents in favour of such resident

CHAPTER VI:-Exemption of Capital Gains u/s. 54, 54B, 54EC & 54F of Income Tax Act, 1961.

❖ Profit on transfer of house property used for residence [Section54]:

Benefit of section 54 is confined to sale of a residential house after 24 months and reinvestment in a residential house. Reinvestment benefits are available both for purchase and construction of the house. Purchase has to be either one year before or two years later. Construction has to be completed within three years of the sale of the asset in respect of which benefit of reinvestment is claimed. There have been many decisions on purchase/construction of the house.

❖ Judicial Rulings

i. House includes part of the house: House property does not mean a complete independent house. It includes independent residential units also, like flats in a multi-storeyed complex. The emphasis is not on the type of the property, but, on the head under which the rental income is assessed. **[CIT (Addl.) v Vidya Prakash Talwar (1981) 132 ITR 661 (Del)].**

ii. Release deed may also be treated as purchase: 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)]**

iii. Addition of floor to the existing house eligible for exemption under section 54: 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)].**

iv. No exemption under section 54 if land only is sold: 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)]**.

v. Successor is entitled to benefit of exemption in case of death of the assessee: 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)].**

vi. Purchase of limited interest in the house eligible for exemption under section 54: 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 ChandabenMaganlal (2000) 245 ITR 182 (Guj)].** In coming to the conclusion, the High Court followed its own earlier decision in **CIT v TikyomalJasanmal (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.

vii. Construction in another property not eligible for exemption: 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)].**

viii. House of the firm used by partners: Where a firms property is used for residence of partners and thereafter distributed to the partners upon dissolution of the firm and the partner sells the same, exemption can be claimed by the partner under section 54. For this purpose, period for which this property was held by the firm shall also be taken into account for determining the question whether the house property in exemption was a long-term capital asset or not. **[CIT v M.K. Chandrakanth (2002) 258 ITR 14 (Mad)].**

ix. There can be both purchase and construction: 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)].**

x. Construction can start before the sale of asset: 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. SubramanyaBhat (1987) 165 ITR 571 (Karn)]**. 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. VasudevanChettiar (1998) 234 ITR 705 (Mad)].**

xi. 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

xii. [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. **[SashiVarma v CIT (1997) 224 ITR 106 (MP)].** Delhi High Court has 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.C. Sood (2000) 108 Taxman 227 (Del)]**.

xiii. As per a circular of CBDT, 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].

xiv. 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)]**.

xv. 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)]**.

xvi. 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)].**

But, After the Amendment vide Finance (No.2) Act, 2014, exemption is no longer allowed on Investment in residential house outside India.

If Long Term capital gain is upto Rs. 2 Crore the assessee can acquire two residential house properties in prescribed time limit. However, the benefit of acquisition of two house property is available once in a life time. (As Amended by Finance Act 2019 w.e.f A.Y. 2020-2021)

- **Whether Investment made in new house property prior to the date of transfer of old house property is eligible as deduction under section 54 or 54F?**

Hon'ble Delhi High Court in the case of Commissioner of Income Tax vs Bharti Mishra (supra) has observed that sub-section 4 of section 54F prescribes appropriation of sale consideration of original asset towards provision of new asset made within one year before the date of transfer of original asset, two years from the date of transfer or construction of new in-house property, within three years from the date of transfer of original receipt but the Act does not prescribe any condition as to the date

of commencement of construction of house property which may be commenced even before the date of transfer of original receipt. Similarly, **the Hon'ble Karnataka High Court in the case of Commissioner of Income Tax vs J.R. Subramanya Bhat reported in 165 ITR 571 (Kar.)** had expressed similar view and had held that investment made towards construction of house property prior to the date of transfer should also be eligible as deduction for the purpose of section 54 of the Act.

Accordingly, respectfully following the ratio laid down by the Hon'ble Delhi High Court and the Hon'ble Karnataka High Court as aforementioned, we are of the view that provisions of section 54F do not prescribe any condition as to the date of commencement of construction of new house property, meaning thereby that the construction of house property may be commenced even before the date of transfer of original asset. However, it should be completed within three years after the date of transfer of original asset.

In case of Tarun Jalali V. DDIT (ITAT Delhi) it was held that

On the facts of this case, we find that the construction of house property had been completed within three years from the date of transfer and accordingly, we are of the view that the assessee is eligible for exemption u/s 54F in respect of the two disputed amounts viz. Rs. 12 lakh paid on 20.06.2008 and Rs. 14,91,697 paid on 22.08.2008 which were expended prior to the date of transfer of original asset.

Assessee is eligible to claim deduction under section 54 in respect of purchase of more than 1 house property wherein the said purchases of more than 1 house was on account of more number of family members

Yes as held in **K.G Vyas V. Seventh Income tax Officer by Mumbai Tribunal***the mere fact that the assessee had purchased them jointly either in the name of his wife or in the names of his sons would not materially affect or alter the factual position that he is the owner of all the four flats and that he is also living in them along with the members of his family. The fact that on a future date the assessee may divide these properties among the members of his family is of no relevance or consequence for the purpose of allowing relief to the assessee under Section 54, since the assessee has fulfilled the conditions laid down under Section 54, namely, that he had purchased a house for his own residence by investing the sale proceeds of his former residential house in the purchase of these four flats. It can hardly be denied that considering the strength of the assessee's family with ten members, the accommodation acquired by the assessee in the form of four flats in the same building is commensurate to his requirements. We are, therefore, inclined to accept the contentions of the learned counsel for the appellant and hold that the assessee is entitled to full relief under Section 54*

❖ 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.

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)]**

❖ Capital gain on transfer of long-term capital assets not to be charged on investment in certain bonds [Section 54EC]:

Any long-term capital gain, arising to any assessee, from the transfer of any capital asset on or after 1-4-2000 shall be exempt to the extent such capital gain is invested within a period of 6 months after the date of such transfer in the long-term specified asset provided such specified asset is not transferred or converted into money within a period of 5 years from the date of its acquisition.

Exemption under section 54EC not available in respect of deemed capital gains on amount received on liquidation of a company: Section 54E (now section 54EC) permits reinvestment benefit, if the sale proceeds/capital gains on sale of long-term capital assets are invested in the manner required by the section. Where a shareholder is made liable for deemed capital gains on amount received on liquidation of a company, is he eligible for reinvestment benefit under section 54E (now 54EC)? It was held that section 54E (now 54EC) would have application only where there is an actual transfer and not in a case, where there is only a deemed transfer. **[CIT v Ruby Trading Co. Pvt. Ltd. (2003) 259 ITR 54 (Raj)]**.

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) 131 Taxman 699 (Gau). See also CIT v ACE Builders Pvt. Ltd. (2005) 144 Taxman 855 (Bom)].**

On the same analogy benefit under section 54EC or 54F shall be available in the case of depreciable asset if these are held for more than 36 months. (Now the period of holding is reduced from 36 to 24 months for determining Long Term Capital Asset)

AMENDMENTS IN THE FINANCE (NO.2) ACT, 2014:

Earlier due to Various Decision of Courts ceiling limit of Rs. 50Lakh was taken as per financial year. Because the words used in proviso to Section 54EC is “any financial year” and not “relevant financial year”.

This means that the assessee cannot invest more than Rs. 50 lacs during one financial year under 54EC bonds but he can do so in two different financial years provided that the financial year falls within the six months time limit after the sale of asset.**Reliance is placed on:**

AspiGinwala v. Asstt. CIT [2012] 20 taxmann.com 75 (Ahd. - Trib.)

But, After the Amendment vide Finance (No.2) Act, 2014 The investment in capital gains bonds for section 54EC exemption is now being restricted to Rs.50 lakh both in the year of transfer of the capital asset and in the subsequent year, so that one can’t claim exemption of Rs.100 lakh for investments made in both the years.

The above amendment has taken effect from 01.04.2014

- **If assessee takes any loan or advance on the security of Bonds/Units as specified in section 54EC then he shall be deemed to have converted the said bonds into money on the date on which such loan or advance is taken and capital gain exempted earlier shall be taxable to the assessee in the year of such conversion**

- **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 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.

Section 54 and 54F are comparable in many respects. Hence, the law and precedents relating to section 54 as to whether the house property on which investment is made is residential or not, the law relating to time limits, the precedent that construction could start earlier though completed within three years are all equally

applicable for section 54F. Hence, for judicial decisions for section 54F, refer to the judicial decisions given under section 54.

Circular : No. 743, dated 6-5-1996.

Taxability of unutilised deposit under the Capital Gains Accounts Scheme, 1988 in the hands of the legal heirs of the assessee

1. Under sections 54, 54B, 54D, 54F and 54G of the Income-tax Act, 1961, capital gain is not chargeable to tax if the amount of capital gain or net consideration has been utilised for specified purposes by the assessee within the stipulated period laid down in the relevant section. These provisions also provide for the deposit in specified Banks, etc., of the amount of capital gain which is not utilised by the assessee for the acquisition of new assets before the date of furnishing the return of income under section 139(1). The amount of capital gain already utilised for the acquisition/construction of new asset together with amount deposited is deemed to be the cost of new asset and, consequent¬ly, this amount is not chargeable to capital gain in the year of transfer of asset. The provisions of sections 54, 54B, 54D, 54F and 54G further provide that if the amount deposited is not utilised wholly or partly for the prescribed purposes, within the period specified, the amount not so utilised shall be charged under section 45 as the income of the financial year in which the period of two/three years (as prescribed in the relevant section) from the date of transfer of the original asset expires.

2. A question has been raised regarding the taxability of the unutilised deposit amount in the case of an individual who dies before the expiry of the stipulated period.

3. The matter has been considered by the Board and it is clarified that in such cases the said amount 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.

CHAPTER VII:- Redevelopment issues in case of Builders, Members, Land Owner, Society, etc

❖REDEVELOPMENT FROM VIEW POINT OF FLAT OWNER

DEVELOPMENT RIGHTS – WHO ARE ENTITLE – SOCIETIES OR MEMBERS?

In respect of Tenants co-partnership co-operative societies, which are of the nature of “Flat Owners Societies” in which the flats are acquired by the society from the builder on ownership basis and thereafter Society is formed, and land is conveyed to the society and individual members acquire ownership rights over the building and underneath the development rights.

This concept has been recognized under Bombay stamp Act as on the conveyance in favour of the housing societies, stamp duty paid by the purchasers of flats on ownership agreements is deducted from the stamp duty payable on the market value of the property transferred in favour of the society as per proviso to article 25 of schedule 1 of Bombay Stamp Act.

Circular No. F.N. 4 / 28 / 68 – WT DT. 10.0.1969 AND 27.01.1969 explaining the provisions of section 5(1)(iv), the Board clarify that flats vest with individual members of society.

❖Additional Area expected at Redevelopment

Liability of Income/Capital Gain Tax, if any, on:-

A. Additional area in the hands of individual members.

Ans. As per Section 54 of the Income Tax Act, 1961, if any residential property which was held for a period of more than 24 months is sold or given for redevelopment and the new flat is purchased or acquired within a period of 1 year before or 2 years after the sale or constructed within 3 years after the sale then capital gain arising on the transfer of the old flat will be exempt to tax u/s. 54 of the Income Tax Act, 1961 to the extent of the cost of such new flat.

In the case of redevelopment, the new flat to be acquired is treated as constructed for the purpose of the Section 54. Thus, if the new flat is acquired by the owner within a period of 3 years from the surrender of the original flat then the capital gain arising from the sale of the original flat can be claimed to be exempted u/s. 54 of the Income Tax Act.

If the new flat is not acquired by the owner within a period of 3years then the Assessing Officer at his discretion can disallow the same at any time during the assessment.

However, 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 has 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.C. Sood (2000) 108 Taxman 227 (Del)]**.

Hence, relying upon the above judgments, even if in the case of development, the new flat is acquired by the owner after a period of 3 years from the surrender of the old flat, an assessee can claim exemption u/s. 54.

If the new flat acquired to claim exemption u/s. 54 is sold within a period of three years from the date of purchase then the capital gain exemption claimed earlier would become taxable in the year the new flat is transferred.

Thus, in your case, the Receipt of extra carpet area over and above the existing area could be claimed as exemption u/s. 54 of the Income Tax Act, 1961.

Further, we would like to state that under the definition of "Transfer" according to Sec 2(47) Income Tax Act, 1961, transfer, in relation to a capital asset, includes sale, exchange, or relinquishment of the asset or the extinguishment of any rights therein or the compulsory acquisition thereof under any law.

An exchange involves the transfer of property by one person to another and reciprocally the transfer of property by that other to the first person. There must be a mutual transfer of ownership of one thing for the ownership of another. Hence, the acquisition of new flat would be considered as exchange and would be considered as transfer for the purpose of capital gain.

Argument could not be made that no cost is incurred by any member for the acquisition of the new flat and hence capital gain cannot be computed and the case does not fall within the ambit of Section 55(2). The member is forgoing his rights in the old flat. And hence, it would be considered as the cost of acquisition of the new flat.

However, if the residential flat is held for a period of less than 24 months than the receipt of extra area by the individual members would be taxable in the hands of the individual members.

B. Cash compensation received upon surrender of entitled additional area, in part or in full, by an individual member.

Ans. If the Individual member is surrendering a part of the existing area then the Individual member would be liable to pay Capital Gain Tax. The sale consideration would be calculated as per Section 50C of the Income Tax Act, which is as follows:

"Where the consideration received or accruing as a result of the transfer by an assessee of a capital asset, being land or building or both, is less than the value adopted or assessed or assessable 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 or assessable shall, for

the purposes of section 48, be deemed to be the full value of the consideration received or accruing as a result of such transfer.

Provided that where the date of the agreement fixing the amount of consideration and the date of registration for the transfer of the capital asset are not the same, the value adopted or assessed or assessable by the stamp valuation authority on the date of agreement may be taken for the purposes of computing full value of consideration for such transfer: (Inserted w.e.f. 1st April, 2017)

Provided further that the first proviso shall apply only in a case where the amount of consideration, or a part thereof, has been received by way of an account payee cheque or account payee bank draft or by use of electronic clearing system through a bank account, on or before the date of the agreement for transfer (Inserted w.e.f.1st April, 2017)

Provided also that where the value adopted or assessed or assessable by the stamp valuation authority does not exceed one hundred and five 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 section 48, be deemed to be the full value of the consideration."

However, if the Individual member is surrendering a part of the additional area then the Individual member would be liable to pay capital gain tax on the same. Because the consideration received in monetary terms as against exchange of old flat and not invested in residential flat as per section 54.

C. **Society receiving amenities and facilities for the common use of its members and their families**.

Ans. If the Society is receiving for amenities and facilities for the common use of its members and their families then the same is not taxable in the hands of the Society or the Individual members as there is no cost of acquisition of the same.

In deciding the case of **JETHALAL D.MEHTA V. DY. CIT [(2005) 2 SOT 422 (MUM.),** Hon. Income Tax Appellate Tribunal mainly relied upon Supreme Court decision in the case of **CIT V. B.C.SRINVASA SHETTY 128 ITR 294** in which it was decided that if there is no cost no capital gain can be worked out hence amount received is to be treated as exempt receipt.

❖ Corpus Money expected at Redevelopment

Liability of Income/Capital Gain Tax, if any, on:-

A **Corpus Money received by the Society from the Developer in lieu of surrender of part entitlement of FSI/Development Rights, such funds being invested by the Society to earn interest income to meet/subsidize the maintenance costs of its Redeveloped premises and property.**

Ans. If at the time of Redevelopment, the Society was not in possession of unutilized FSI/Development Rights, then the Society would not be liable to pay any Capital Gain Tax on the receipt of the Corpus Money on surrender of a part of FSI/Development Rights.

Further, if the Society has unutilized FSI/Development Rights in its possession at the time of Redevelopment, then the receipt of the Corpus Money on surrender of the part of FSI/Development Rights would be taxable in the hands of the Society.

Also,in the case of **(1) New Shailaja CHS v. ITO (ITA NO. 512/M/2007. BENCH B dated 2nd Dec, 2008 (mum.)and (2) ITO v. LOTIA COURT CO- OP. HSG. SOC. LTD. (2008) 12 DTR (MUMBAI)(TRIB) 396 it was held that where the assessee, a Co-op. Hsg. Soc. Ltd.** Became entitled, by the virtue of Development Control Regulations, to Transferable development Rights (TDR) and the same was sold by it for a price to a builder , the question arose whether the transaction of sale receipt could be taxed. It was held that though the TDR was a Capital Asset, there being no 'cost of acquisition' for the same, the consideration could not be taxed. The same is held in the cases of **NEW SHAILAJA CHS LIMITED (ITA NO. 512/MUM./2007), OM SHANTI CO-OP. HSG. SOC. LTD. (ITA NO.2550/MUM./2008) & LOTIA COURT CO-OP. HSG. SOC. LTD. (ITA NO. 5096/MUM./2008).**

Further, in the case of **MAHESHWAR PRAKASH 2 CHS LTD. 24 SOT 366 (MUM.),** it was held that the assessee-society acquired the right to construct the additional floors by virtue of DCR, 1991 which could not be available to the assessee on expenditure of money. Prior to DCR, 1991, no society had any right to construct the additional floors, so it was not a tradable commodity. Suddenly by virtue of DCR, 1991, the right was conferred by the Government on the assessee. Such right exclusively belonged to the building owned by the society. It could not be transferred to any other building.

Similarly, similar right belonging to other societies could not be purchased by the assessee for the purpose of constructing additional floors in its own building. Therefore, such right had no inherent quality of being available on expenditure of money and, therefore, cost of such asset could not be envisaged. Hence, the said view was fully justified in terms of the decision of the Apex Court in the case of **B.C. Shrinivasa Shetty.**

Therefore, the right acquired by the assessee did not fall within the ambit of section 45 itself. The amended provisions of section 55(2) were also not applicable, since such right was not covered by any of the assets specified in section 55(2)(a).

Therefore, the money` received by the assessee from the developer was not chargeable to tax under section 45. Therefore, the impugned orders passed by the lower authorities were to be set aside.

B **Corpus Money received by the Society from the Developer (as described in A above) and subsequently distributed to its members. Whether such incomes enlisted above at A, & B, if taxable, shall be treated as Capital Gains or deemed to be income earned in the year of receipt.**

Ans. As per Maharashtra Co-op. Societies Act, 1960, a Co-operative Society cannot distribute the corpus funds to its Individual member, it can only declare dividends.

However, the declaring of Dividends has lots of restrictions and formalities.

C. **Liability of Income Tax, if any, on interest income arising from investment of such Corpus Money by the Society in the Co-operative/other Banks.**

Ans. If the Society receives interest income form a Co-operative bank then the same is exempt from tax. And, if the interest income is received from other banks than the same is taxable and the Society has to pay tax on the same.

However, as per Hon'ble Tribunal Judgment in the case of **ITO v. Sagar Sanjog C.H.S. Ltd., ITA Nos. 1972 to 1974 and 2231 to 2233/ Mum./ 2005(BCAJ)** it was held that the interest income earned out of the fund money invested went to reduce the maintenance. According to the tribunal, the interest would have been taxable, had there been surplus left after it being adjusted against the maintenance expenses. The tribunal also noted that there was nothing on record to suggest that the interest income would be given to members on dissolution of the Society.

Thus, even the interest income received from other than Co-operative Bank and spent on Society's work then the concept of Mutuality will apply and is not liable to tax but this view is not free from litigation.

- **Rent for Temporary Alternative Accommodation including Deposits, if any:**

Rental allowance may be received by individual members in the event of need for Relocation during Redevelopment. Such amounts may be utilized in part or in full towards rent paid for alternative premises or may remain entirely unspent if the member already has his/her own alternative accommodation. Such allowance may be received for about three years, either together in one tranche in advance or in installments on a staggered basis.

Liability of Income Tax, if any, on such Rental Allowance, including Deposits, if any, received by the individual members.

A. **Whether such income, if taxable, shall be treated as income earned in the year of receipt (if received on a staggered basis) or entirely as income in one year (if received fully in advance)**

Ans. In order to get the old building redeveloped, the existing structure of the old building is required to be demolished and hence, it is necessary to vacant the same. To facilitate redevelopment and to compensate the flat owners for the hardship to be faced by them in this regard, the Developer might offer them Rent compensation which they would be paying for the temporary accommodation during the period of redevelopment.

The Rent Compensation so provided by the developer to the owner should be expended by the owners for the purpose of their temporary accommodation and other expenditure related thereto.

If the actual rent paid by the flat owners is less than the Rent compensation received by them from the redeveloper then the excess of such amount received will be taxable under the head Income from Other Sources, otherwise, the Rent compensation received by the flat owners from the redeveloper is not taxable.

The Rent Compensation given to the Individual Members shall be taxable in the year of receipt if the Rent Compensation is received on staggered basis and the whole is not spend by the Individual Members on their alternative accommodation.

However, if the Rent Compensation is given to the Individual Members in one tranche in advance, then the Rent Compensation received by the Individual Members would be taxable on proportionate basis if the same is not spend on the Alternative Accommodation.

❖ Hardship Allowance/ Compensation for Inconvenience.

Members opting not to be temporarily relocated during the Redevelopment may receive "Hardship Allowance" from the Developer.

Members agreeing to be temporarily relocated during Redevelopment may receive "Compensation for Inconvenience" from the Developer.

A. **Liability of Income Tax, if any, on such Allowance/ Compensation and if taxable, mode of computation i.e. whether as income in the year of receipt or whether on a staggered basis as received**.

Ans. Along with extra area and Rent compensation, the redevelopers also offer lumpsum amount to the flat owners in addition to extra area and compensation.

In the case of **CIT V. B.C.SRINVASA SHETTY 128 ITR 294** in which it was decided that if there is no cost no capital gain can be worked out hence amount received is to be treated as exempt receipt.

Hence, the Hardship Allowance and the Compensation for Inconvenience is not taxable in the Hands of the Individual Members as Hardship Allowance and Compensation for Inconvenience can't be worked out in monetary terms and have no cost. Since there is no cost of acquisition, as per Income Tax Act, 1961, the receipt would be treated as a Capital Receipt and thus, is exempt from tax.

❖ Taxability on reimbursement of expenses from developer.

A. **Liability of Income Tax, if any, on the Society/ individual members for Reimbursement from Developer of Expenses such as Stamp Duty, Fees of Consultants (Architect, Lawyers, Chartered Accountants, etc.) cost of updating members and holding General Body meetings, Administrative Expenses towards the Redevelopment Process, etc. incurred/ to be incurred.**

Ans. Anything amount which is reimbursed by the Developer is not taxable either in the hands of the Society or the Individual Members, provided that the entire amount of reimbursement is been spent on the expenses it is reimbursed for.

Thus, if excess amount is reimbursed by the Developer than the amount which is actually spent for the purpose than the excess amount would be taxable on the receipt of the same.

However, in the case of a Society, if excess amount is reimbursed to a Society by the Developer than actually spent by the Society, and the excess amount so received is been used by the Society for payment of expenses which are for the welfare of the Society or the Individual Members than the excess amount received by the Society would not be taxed and hence, would be exempt. Otherwise the excess amount received by the Society would be taxable.

❖ Liquidation & Disbursement of Existing Sinking Fund.

A. **Liability of Income/Capital Gain Tax, if any, on the Society/ individual members upon liquidation and disbursement to existing members (with permission from Registrar/any other authority) of existing, unutilized Sinking Fund (generated by annual contributions from members and bank interest earned thereon.) prior to induction of new members arising from saleable portion of Redeveloped premises.**

Ans. In our view, the Sinking Fund is to be used on the property itself either for the purpose of development or Heavy Repair.

However, if the Registrar gives permission then the Sinking Fund could be distributed amongst the Individual Members which again has a number of restrictions.

This distribution of Sinking Fund after the permission of the Registrar would be taxable in the hands of the Individual Members to the extent of the interest on such a fund. The distribution of the principal amount would not be taxable in the hands of the Society or the Individual Members.

❖ TDS on receipt.

A. **Whether tax shall be deducted at Source (TDS) from Corpus Money, Allowances, Compensations, Reimbursement of Fees of Consultants and other Expenses, Rent for Temporary Alternative Accommodation and Deposits or any other form of receipt in the hands of the Society/ its individual members.**

Ans. As per the Income Tax Act, 1961, no TDS is to be deducted on the amount reimbursed by the Developer to the Society or the Individual Members or on other items such as Corpus Money, Allowances, Compensations, Reimbursement of Fees of Consultants and other Expenses, Rent for Temporary Alternative Accommodation and Deposits or any other form of receipt.

However, when the Society makes payments such as Professional Fees, Contractor, etc, the Society is to Deduct Tax at Source at the

rate given herebelow and pay the same to the Income Tax Department and file the Quarterly Returns:

Contractor	1% in the case of individual/HUF
	2% in the case of others u/s 194C
Rent	10% u/s 194I
Professional Fees	10% u/s 194J
Commission & Brokerage	5% u/s 194H

❖ Tax Planning (Saving) Instrument.

A. **Recommendation of umbrella of designated schemes, funds, securities, etc. under which the Society/ its individual members may invest taxable proceeds, if any, to minimize the impact of Income/ Capital Gain Tax.**

Ans. In our view, whether there would be any capital gain tax liability arising on account of such transactions of Redevelopment, is not free from litigation, in view of the fact that various litigations are going on in various courts in our country and the issue would finally be settled when the Supreme Court decides the matter.

It is also to be noted that even the Supreme Court changes its view from time to time depending on the frequent amendments in the Income Tax Laws.

Further we would like to state that Income Tax Department have filed appeal before Hon. High Court and, if the court allows them against the assessee then the same would be taxable for the Society otherwise till now it is tax free. Even assuming that Hon High Court decide the case against the assessee then assessee will be liable to pay tax with interest but no penalty can be charged in view of decision of Supreme Court decided in the case of **Reliance Petro products Pvt. Ltd. Vs. CIT (2010) 322 ITR 158 (SC)** on the principle that if assessee give all particulars of income in return and claim certain wrong deduction due to ignorance of highly technical law then that will not attract penalty u/s 271(1)(c)/270A of the Income Tax Act, 1961.

Further we would like to say that based on the above, till now the Corpus received by the Society and the individual members is tax free but in case the High Court decides the case against the Society then to be on the safer side and to avoid litigation with the Income Tax Department, we suggest that recipient can invest the same in Specified Bonds to claim exemption u/s. 54EC of the Income Tax Act. One can earn interest by investment in the Bonds for 5 yrs which would be an added benefit. The interest so earned would be taxable.

❖ Tax Liability on Restructuring of Society.

A. Whether the composition of the Society may need to be restructured in any manner so as to facilitate minimization of the tax liability. OR

B. Whether admission of new members (from saleable portion.) in the existing Society or their Accommodation as an independent new Society would have any bearing on the tax liability of the Society/its individual members.

Ans. No, the composition of the Society need not be restructured in any manner so as to facilitate minimization of the tax liability.

The admission of the new members to the existing Society or their accommodation to the new Society would not make much difference to the tax liability of the Society or its Individual Members.

However, it would be advisable to admit the new members to the existing Society because due to increase in the number of the Members of the Society, the fixed charges or expenses of the Society like maintenance, etc would be distributed amongst the Members.

❖ REDEVELOPMENT FROM THE VIEW POINT OF LAND OWNER

When a Joint Development Agreement is entered between Land Owner and Developer to develop a land The Land Owner shall provide land to Developer for development of project and In Consideration of this, the Developer can provide specified developed area to Land Owner or he can give money as well as developed area to the land owner as per terms agreed between them.

Point of Taxation in the hands of Land Owner and Valuation

Earlier, i.e. before assessment year 2018-19 there was dispute between assesse (land owner) and income tax department for taxation of joint development agreement wherein income tax department levied taxes in hands of land owner at the time of execution of agreement with developer however, land owner prefer to pay tax after receipt of his share of developed area. This was causing lot of hardship to land owner because there was no cash flow at the time of JDA. To remove the considerable hardship faced by land owner and to end the existing dispute an amendment was brought in Finance Act, 2017 for taxation of JDA which are discussed as under :-

The finance act 2017 has inserted a sub section 5A to section 45 which is effective from01.04.2018 i.e. AY 2018-19 (definition of the said section is already discussed in **Chapter IV**)

As per the provision of Section 45(5A) the capital gain tax will accrue in hands of the landowner (being Individual/ HUF) when they gets their share of developed land with completion certificate from competent authority. Sale consideration in hands of Land Owner will be the Valuation of his Developed Portion workout by Stamp Authority for working of stamp duty as on date of issuing completion certificate. This amount will further increased by the amount of monetary consideration received or receivable under JDA.

For Example:-

Mr. A (Individual) was owner of 10 acre land which was purchased by him in year 2005. During financial year 2017-18 he entered into JDA with developer wherein it is agreed that developer shall give ten lakh rupees and 1000 sq. fit developed area in consideration of land. On 07.07.2019 project completion certificate has issued and on that date stamp duty value of 1000 sq. fit is Rs. 30,00,000/- Now tax-ability in hands of Mr. A will be as follows:-

The gain will be taxed in AY 2020-21 and for this purpose sale consideration of land will be Rs. 40,00,000/- (Rs.30 Lakh Stamp Value of Developed Area and Rs.10,00,000/- monetary consideration received under JDA). Mr. A will be allowed benefit of cost of land against sale consideration and balance gain will be taxable in his hands as capital gain in AY 2020-21. If the land was long term capital asset. Then the benefit of Indexation will also be allowable to Land Owner and he can avail exemption u/s 54, 54EC, 54F etc.

Thus Land Owners will require to pay tax in respect of their share of developed area along with monetary consideration as agreed in JDA only after obtaining completion certificate from the competent authority.

However, if the land owner is other than individual or HUF, then taxation will govern by old proviso of law. Generally it depends upon the drafting & conditions of agreement. But, generally gain will be taxable in the year when the Possession of property transferred to developer for development.

Nature of Gain

Nature of gain depends upon the classification of assets by the land owner. If the and is classified as Capital Asset (Investment) in books of account. Then the gain will be capital. However, if the Land is classified as Stock in trade, then the gain will be Business Income and will be taxable in the year when Risk & Reward of Land transferred to Developer which may the year when the JDA was executed.

Thus, the tax treatment will depends upon the treatment of land in books of Land Owner.

❖ TDS liability

Section 194IC deals with TDS in respect to an agreement governed by sub-section (5A) of section 45.

Sec 194IC is reproduced for our ready reference

194-IC. Notwithstanding anything contained in section 194-IA, any person responsible for paying to a resident any sum by way of consideration, not being consideration in kind, under the agreement referred to in sub-section (5A) of section 45, shall at the time of credit of such sum to the account of the payee or at the time of payment thereof in cash or by issue of a cheque or draft or by any other mode, whichever is earlier, deduct an amount equal to ten per cent of such sum as income-tax thereon.

Thus, as per the above provision the developer is required to deduct 10% TDS on Monetary consideration payable to Land Owners while making payment or crediting consideration in Land Owners account maintain in his books of account whichever is earlier.

❖ REDEVELOPMENT FROM THE VIEW POINT OF DEVELOPER

Charge-ability of income depends upon Revenue Recognition. As the developer is dealing in real estate business. Hence, the Income will be business Income and Guidance Note on "Recognition of Revenue by Real Estate Developer" is relevant for revenue recognition.

Guidance Note on "Recognition of Revenue by Real Estate Developers" is a re-commendatory in nature. A member should ordinarily follow recommendations in a guidance note relating to an auditing matter except where he is satisfied that in the circumstances of the case, it may not be necessary to do so.

As Per Section 145 of the IT Act, this refers to the method of accounting regularly employed by an assessee as well as to the notification by the Central Government of the Accounting Standards to be followed by any class of assessee or in respect of any class of income. Pursuant to the powers Under Section 145(2) notification dt. 25th Jan., 1996 was formulated. The notification does not prescribe a method of accounting for any particular class of assessees or classes of income as is evident from the reading of the said notification.

Thus, it is liberty of the assessee that which method he wants to follow for revenue recognition.**(The method of accounting for real estate developer is discussed in Chapter III)**

Direct Taxes Committee of ICAI made detailed representation to Central Board of Direct Taxes during the Direct Tax Workshop with CBDT which was followed by written representation to Chairman, CBDT on 31.03.2016 and Hon'ble Finance Minister, on 7.04.2016. On invitation by CBDT subsequently, the ICAI representatives met Joint Secretary (TPL-I) and Director (TPL-III) at North Block, New Delhi on 18th April, 2016 and 27th April, 2016 and made detailed presentation on difficulties that would be faced by stakeholders on implementation of ICDS. The representations made by ICAI were considered positively by the Expert Committee on ICDS in meeting held on 12.05.2016 and ICAI was asked to prepare detailed FAQs and amendments to ICDS which were

submitted on 20.05.2016. The FAQ No. 15 deal with this situation which is as under:-

Question 15: Since there is no specific scope exclusion for Real estate development activity and BOT projects from ICDS IV on Revenue Recognition, please clarify whether ICDS III and IV should be applied by real estate developers and BOT operators. Also, there is no specific exclusion for lease income in ICDS IV. Please clarify whether ICDS IV is applicable for lease income.

Answer: The Accounting Standards Committee has recommended that separate ICDS should be notified for real estate development activity, BOT projects and Leases. A draft ICDS on Leases was also published for public comments but not finally notified. Hence, pending notification of specific ICDS to deal with these revenue items, they shall continue to be governed by existing tax laws. It is clarified that ICDS III and ICDS IV do not apply to these business activities.

Thus, As per ICAI it is clarified that revenue recognition of real estate developer will be governed by old law. As per old law and judicial finding the developer can follow any method with consistency.

However, Recently Central Board of Direct taxes released draft ICDS on Real Estate Transaction on May 11, 2017 wherein real estate developer are require to compulsory follow the percentage of completion method for taxation with cooling period for old projects. Till date that ICDS is not notified. Therefore, we cannot comment on same. Today's Law position can be change as per the final ICDS comes in effect in Future.

Thus the developer's Income will be taxable as Business Income. .

The point of taxation will depends upon the method adopted by the developer. IF adopt Project Completion Method then income will be tax in the year when project gets completed.And if adopt percentage completion method, then income will be taxed in phase manner as per the works completed in respective year.

CHAPTER VIII: Some additional concepts with respect to Builders and Developers

❖ FAQ'S

Q. In case of deduction u/s 80IB(10) can it be claimed even after the period of tax holiday as provided in said section in case of unsold stock held by the developer?

When construction is completed before 31.03.2008, but the sale of some flats take place in subsequent years, deduction u/s 80 – IB (10) can be claimed. Generally, in incentive provisions granting tax holidays, there is always a specification as to the number of years the tax holiday can be enjoyed. But, in Section 80 – IB (10), there is no specification as to the number of years the tax holiday is available.

Q. Disclosure in the course of Search – whether income must be taxed on completion of the project?

The conduct of search and seizure operation in a particular year does not lead to an inference that the undisclosed income detected as a consequence thereof has to be taxed in the assessment year relevant to the previous year in which search was conducted. In other words, accounting of profits has yet to be made on the basis of method of accounting followed by the assessee.

It is held that Undisclosed income in the form of 'on money' stood established by seizure of document r/w statement recorded under s. 132(4); however in computing undisclosed income, expenditure incurred has to be allowed; income discovered has to be taxed in assessment years as per method of accounting followed by assessee.

Dhanvarsha Builders & Developers (P) Ltd. vs. DCIT [(2006) 102 ITD 375 (Pune)]

❖ CONCEPT OF DEEMED RENT UNDER SECTION 23(5)

Where the property consisting of any building or land appurtenant there is held as stock-in-trade and the property or any part of the property is not let during the whole or any part of the previous year, the annual value of such property or part of the property, for the period up to two years from the end of the financial year in which the certificate of completion of construction of the property is obtained from the competent authority, shall be taken to be nil

❖ Analysis of Section 23(5)

- This Section is introduced by the Finance Act 2017 w.e.f A.Y. 2018-19.
- This section is applicable to real estate developer.
- It provides notional rent on the unsold inventory lying with the developer as stock in trade and two years from the end of financial year in which completion certificate from the competent authority is obtained is lapsed.

Chapter IX:- Some additional concepts with respect to Capital Gains.

CAPITAL ASSET

Definition of Capital asset is given under section 2(14) which is very vide in nature and covered the right in capital asset also. Only those item are not covered under capital asset which are specifically excluded from capital asset.

Some Amendment with respect to Definition of capital asset.

By the provision of "Sec. 2(14) Capital Asset", Rural agriculture land was exempt from capital gain. For being rural agriculture land, land must be satisfied certain condition laid down in section 2(14).The Finance Minister amended this conditions through Finance Bill 2013-14. For, Simplicity we discuss effect of this amended in two part.

A. Criteria for being rural agriculture prior to 01/04/2013

B. Criteria for being rural agriculture after to 01/04/2013

Criteria for being rural agriculture prior 1-04-2013:

Prior to 01/04/2013 this section are applicable:

2(14)(iii) [Agricultural land in India, not being land situate-

(a) in any area which is comprised within the jurisdiction of a municipality (whether known as a municipality, municipal corporation, notified area committee, town area committee, town committee, or by any other name) or a cantonment board and which has a population of not less than ten thousand according to the last preceding census of which the relevant figures have been published before the first day of the previous year; or

(b) in any area within such distance, not being more than eight kilometers, from the local limits of any municipality or cantonment board referred to in item (a), as the Central Government may, having regard to the extent of, and scope for, urbanization of that area and other relevant considerations, specify in this behalf by notification in the Official Gazette;]

Thus, if these conditions are satisfied than land will agriculture land.

Land is situated in any within the jurisdiction of a municipality or a cantonment board having population of less than 10000.

Land is situated outside the notified distance from jurisdiction of municipality. Govt. can notified maximum distance of 8Km.

If this condition was satisfied than land is rural agriculture land. And not liable for capital gain tax.

How to measure distance was not given in the definition. Therefore it was taken by road. And same view was followed in following judicial pronouncement.

(1) CIT V.LAL SINGH [2010] 195 TAXMAN 420 (PUNJ. & HAR.)

(2) CIT V. SANTINDER PAL SINGH [2010] 188 TAXMAN 54 (PUNJ. & HAR.)

(3) LAUKIK DEVELOPERS V. DY .CIT [2007] 105 ITD 657 (MUMBAI)

Criteria for being rural agriculture After 1-04-2013:

After 01/04/2013 this section are applies as follow:

As Per Section 2(14)" capital asset" means property of any kind held by an assessee, whether or not connected with his business or profession, but does not include-

(iii) Agricultural land in India, not being a land situated

(A) In any area which is comprised within the jurisdiction of a municipality (whether known as municipality, municipal corporation, notified area committee, town area committee, town committee, or by any other name) or a cantonment board and which has a population of not less than ten thousand [according to the last preceding census of which the relevant figures have been published before the first day of the previous year]; or

b) In any area within the distance, measured aerially,-

(I) Not being more than two kilometers, from the local limits of any municipality or cantonment board referred to in item (a) and which has a population of more than ten thousand but not exceeding one lakh; or

(II) Not being more than six kilometers, from the local limits of any municipality or cantonment board referred to in item (a) and which has a population of more than one lakh but not exceeding ten lakh; or

(III) Not being more than eight kilometers, from the local limits of any municipality or cantonment board referred to in item (a) and which has a population of more than ten lakh.

Explanation.—For the purposes of this sub-clause, "population" means the population according to the last preceding census of which the relevant figures have been published before the first day of the previous year;

Thus, if this condition is satisfied then agriculture land will be rural agriculture and accordingly not liable for capital gain tax.

Land is situated in any within the jurisdiction of a municipality or a cantonment board having population of less than 10000.

Distance of land from municipality and population limit.

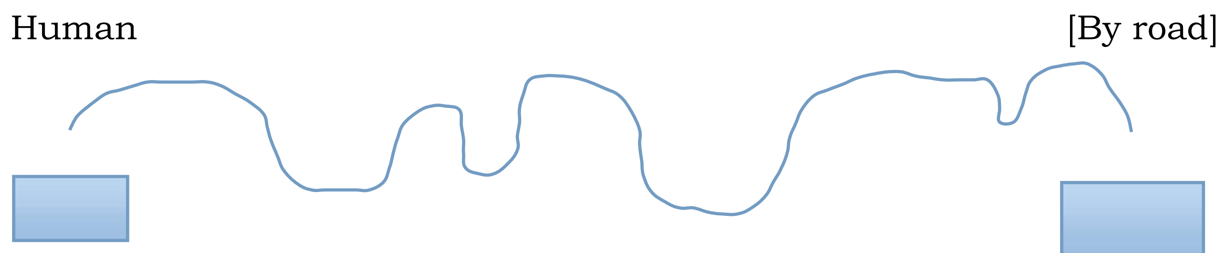
Distance	***Population***
Within 2 kilometers	*10,000-1,00,000*
2 kilometers – 6 kilometers	*1,00,000-10,00,000*
6 kilometers – 8 kilometers	*More than 10,00,000*

The distance from the Municipal Corporation measurement:

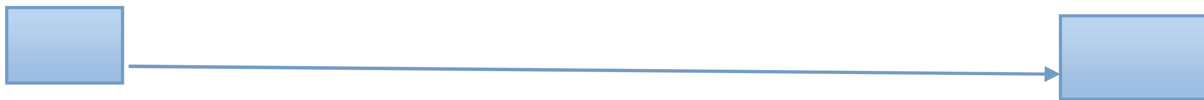
Such distance is to be measured on **straight line aerially** as crow flies. The shortest aerial distance has to be considered. Such shortest aerial distance is defined as “A straight line distance between two places.” A human would travel further to get from one point to another due to obstacles or lack of roads or trails, but a crow can go in a straight line between them. Humans have to follow roads which have their twists and turns. But, a crow does not have to face the barriers that humans face. Hence, we measure the straight line distance between two places.

“The distance as the crow flies is a way to describe the distance between two locations without considering all the variable factors. As an example, traveling from California to maine involves a rather indirect route around, over and through mountain ranges and so forth. The driving distance might be about 3,500 miles, but the distance as the crow flies is about 2,800 miles.

Human [By road]



Crow’s flight straight line distance (aerial measurement)



This amendment apply in relation to assessment year 2014-15 and subsequent assessment years.

Effect of the amendment

a) Distance from jurisdiction or municipality or cantonment board within which agricultural land is to be considered as urban land has been changed from uniformly 8 kms to within 8 kms depending on population of municipality or cantonment board.

b) Distance to be measured straight line aerially as crow flies and not by road method which was used by courts in various decision. This amendment overcomes above court decisions which say that distance should be measured by road.

c) More land will be covered under the urban land because aerially distance covered more area.

d) Earlier only notified area were covered under the distance criteria but from now any area will be covered under the distance criteria.

❖ Points to be kept in mind while deciding issue related to Agriculture land:-

- There should be agriculture Land.
- The land to be situated in India.
- Land Situated in Overseas is not consider for agriculture land Even that land is agriculture land in India.
- There is not word used in section Urban agriculture land and Rural Agriculture land
- Where agricultural land was converted into residential plots and not used for agricultural purpose it will be taxable.
- Distance from specified area will be calculated aerially.
- A Certificate from Patwari or Talati or specified officer should be obtained by person claiming benefit of agriculture Land.
- There should be documents for Income and Expenditure connected with Agriculture activity.

❖ Judicial Rulings related to Section 2(14)(iii) – Agricultural Land in India

Citation

(i) [2012] 23 taxmann.com 341 (Kar.):

Even in absence of any notification issued by Central Government under section2(14)(iii)(d) for including an area up to 8 kms. from municipal limit to render land as a capital asset, same would be treated as agricultural land

(ii) [2016] 73 taxmann.com 312 (Madras)

Where assessee earned profit on sale of land, in view of fact that land was classified as agricultural land in revenue records, it was given on lease for agricultural purpose and it had not been converted into non-agricultural land prior to sale, profit earned from sale of it could not be brought to tax

(iii) [2017] 80 taxmann.com 41 (Bombay)

Where assessee sold a piece of land in view of fact that assessee had planted various fruit bearing trees on land and produce was being used for personal consumption and, moreover, assessee had not filed an application for conversion of land for non-agricultural propose, it was not a 'capital asset' under section 2(14) and, thus, gain arising from sale of it was exempt from tax.

❖ Compulsory Acquisition of Agriculture Land -Section 10(37)– It is provision to save assessee due to hardship of provision of section 2(14)(iii)

in the case of an assessee, being an individual or a Hindu undivided family, any income chargeable under the head "Capital gains" arising from the transfer of agricultural land, where—

(i) such land is situate in any area referred to in item (a) or item (b) of sub-clause (iii) of clause (14) of section 2;

(ii) such land, during the period of two years immediately preceding the date of transfer, was being used for agricultural purposes by such Hindu undivided family or individual or a parent of his;

(iii) such 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;

(iv) such income has arisen from the compensation or consideration for such transfer received by such assessee on or after the 1st day of April, 2004.

Explanation.—For the purposes of this clause, the expression "compensation or consideration" includes the compensation or consideration enhanced or further enhanced by any court, Tribunal or other authority;

❖ Judicial Rulings related to Section 10(37)

Citation

(i) [2020] 113 taxmann.com 572 (Bangalore - Trib.)
Interest received on enhanced compensation under section 28 of Land Acquisition Act, 1894 is eligible for exemption under section 10(37)

(ii) [2015] 62 taxmann.com 345 (Karnataka)
Where assessee was not carrying on any agricultural activity in land in question in preceding two years prior to its compulsory acquisition, appellant would not be entitled to benefit of section 10(37)

(iii) [2017] 86 taxmann.com 121 (Delhi)
Where State Government had acquired assessee's agricultural land located in municipal limits, in terms of section 10(37)(i), income arising from transfer of land would not form part of total income

(iv) [2017] 80 taxmann.com 84 (SC)
Where assessee's agricultural land was compulsorily acquired by following entire procedure prescribed under Land Acquisition Act, merely because compensation amount was agreed upon after negotiation between parties would not change character of acquisition from that of compulsory acquisition to voluntary sale so as to deny exemption under section 10(37) to assesse

(v) [2014] 41 taxmann.com 430 (Gujarat)
Merely because assessee was staying away from agricultural land or was pursuing some other business would not be sufficient to hold that land was not used for agricultural purposes, thus, exemption claimed by assessee under section 10(37) on enhanced compensation received on compulsory acquisition of agricultural land could not be denied.

(vi) [2014] 47 taxmann.com 406 (Gujarat)
Assessee could be allowed exemption under section 10(37), even if agricultural land was not cultivated by assessee himself but through hired labourer or other family member.

❖ TRANSFER IS A PRE-REQUISITE FOR TAXING CAPITAL GAIN BECAUSE CAPITAL GAIN IS CHARGEABLE IN THE YEAR WHEN ASSET IS TRANSFER:

Capital gain arises only when there is a transfer of capital asset. If the capital asset is not transferred or if there is any transaction which is not regarded as transfer, there will not be any capital gain. However w.e.f. AY 2000-2001 section 45(1A) has been inserted to provide that in case of profits or gains from insurance claim due to damage or destruction of property, there will be capital gain on such deemed transfer although no asset has been actually transferred in such case.

❖ Judicial pronouncements — whether a transaction constitutes transfer or not?

Where an assessee gives up the right to claim specific performance for purchase of immovable property it is relinquishment of a capital asset and thus transfer:

The assessee had entered into an agreement to purchase certain property. Both parties reserved the right to specific performance of the agreement. Nearly four years thereafter, again another agreement was entered into in the nature of deed of cancellation, by which the assessee agreed for termination of the earlier agreement and allowed the owner of the land to sell the said property to any person and at any price of his choice. As a consideration for this, the assessee was paid a sum of Rs. 6,00,000 apart from being refunded the advance of Rs. 40,000. The question that arose for consideration was as to whether the amount of Rs. 6,00,000 received by the assessee from the vendor could be treated as capital gains in the hands of the assessee.

K.R. Srinath v Asstt. CIT (2004) 268 ITR 436 (Mad)

There is no transfer in family settlement:

Where a family settlement/ arrangement is arrived at in order to avoid continuous friction and to maintain peace among the family members, the family arrangement is governed by the principles which are not applicable to dealing between strangers. So, such bona fide realignment of interest, by way of effecting family arrangements among the family members would not amount to transfer. ***CIT v A.L. Ramanathan (2000) 245 ITR 494 (Mad)*** *In this case the court followed the decision of the Supreme Court in general law laid down in the case of* ***Kale v Deputy Director of Consolidation (1976) AIR 1976 SC 807****.*

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)***

In case of litigation pending, no capital gain tax unless the case is decided:

The AO hold that the income accrues on the date when an enforceable debt is created in favour of the Assessee. However, the Court held to consider the issue as to whether the income would accrue even when the very existence of the income is under doubt and a subject matter of litigation. Further, the subject matter of litigation cannot be a subject matter of tax avoidance.

ITO v. M/s. S. P. BUILDERS, CIT(A) XII/ 12(3)(4)/ IT – 184/07-08.

❖ PIECEMEAL TRANSFER

In **AJAI KUMAR SHAH JAGATI V ITO (1995) 55 ITD 348 (DEL.) AND M/S G. G. DANDEKAR MACHINES WORKS LTD V. JCT, ITA NO. 181/MUM/2001, BENCH – F, DATED 28TH FEBRUARY,2007,** possession of only a part of property was transferred against proportionate consideration received during the relevant assessment year. It was held that capital gains arising only on the said proportion amount of consideration could be charged in the relevant year and not on the entire consideration stipulated in the sale agreement.

❖ CAPITAL ASSETS CAN EITHER BE SHORT-TERM CAPITAL ASSET OR LONG-TERM CAPITAL ASSET

Short-term capital asset: A capital asset held by an assessee for not more than 36 months immediately preceding the date of its transfer is known as a short term capital asset. The criteria of 36 months have been reduced to 24 months in the case of immovable property being land, building, and house property, from FY 2017-18. For instance, if you sell house property after holding it for a period of 24 months, any income arising will be treated as long-term capital gain provided that property is sold after 31st March 2017.

Long-term capital asset: It means a capital asset which is not a short-term capital asset. In other words, if the asset is held by the assessee for more than 24 months or 12 months, as the case may be, such an asset will be treated as a long-term capital asset. The reduced period of aforementioned 24 months is not applicable to movable property such as jewellery, debt-oriented mutual funds etc. They will be classified as a long-term capital asset if held for more than 36 months as earlier. Some assets are considered short-term capital assets when these are held for 12 months or less. This rule is applicable if the date of transfer is after 10th July 2014 (irrespective of what the date of purchase is).

Key Changes

Time limit of qualifying as a long term capital asset in case of unlisted share and units of mutual funds (other than equity oriented funds) is now reduced from 36 months to 24 months.

Thus, period of holding of a capital asset is relevant for determining whether capital asset is short-term or long-term.

Inclusion of certain period for computing the period of holding of an asset:

Case	*Inclusion of period*
(*ii*) Property acquired in any mode given under section 49(1) (*e.g.* by way of gift will, etc.)	Include the holding period of previous owner also.

❖ Judicial decisions for determining period of holding

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. Similar decision was held in the cases of **CIT v Lakshmi B. Menon (2003) 264 ITR 76 (Ker) and 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)

CIT v Citibank N.A. (2004) 260 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)

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 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)

Right to acquire any house property: 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 lose its existence.

❖ COST OF ACQUISITION

Cost of acquisition of an asset is the value for which it was acquired by the assessee. Expenses of capital nature for completing or acquiring the title of the property are includable in the cost of acquisition.

❖ Judicial decision on cost of acquisition:

Cost of acquisition of an asset acquired from the previous owner in any mode given u/s 49(1): In this case, the cost of acquisition is taken as the cost to the previous owner and it is this cost which will have to be indexed. For the purpose of indexation the year in which the asset was first held by the assessee (not the previous owner) is to be considered. The indexation will be done as under:

COA to the previous owner X CII of the year of transferCII of the year in which the asset is first held by the assessee

However, in the case of **Mrs. Pushpa Sofat (2002) 81 ITD 1 (Chd)(SMC)**, the indexation of cost was allowed from the date of acquisition of the asset by the previous owner and not the date when the asset was acquired by the assessee from the previous owner under any mode given under section 49(1).

Now, the **Hon'ble Bombay High Court also take a same view in case of CIT V/S Manjula J. Shah [2012]204TAXMAN691(Bom HC)** that under any mode given under section 49(1) indexation will be allowed from the date when previous owner acquired property.