Income-tax consequences of Redevelopment of Societies

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General Background

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- This presentation covers issues relating to redevelopment of buildings by co-operative housing societies. Consequences under the provisions of the Income-tax Act, 1961 are examined. The present wide spread understanding of the tax consequences, judicial precedents and some of the practices being followed, both by the assessee and the revenue, are revisited on first principles.
- It is presumed that the flats held by the members are capital assets but not capital asset qualifying for depreciation. Tax consequences of a flat held for the purpose of business, on which depreciation is claimed, will be different from what has been discussed in this presentation. They are also briefly covered in a separate section.
- While there are several types of co-operative societies, this presentation deals with the most popular form of society viz. one where the flat purchasers having purchased flats from the builder / developer, have formed the society / builder has formed the society of purchasers of flats from him.

General Background

- The presentation deals with the situation where the society along with its members enters into a development agreement with the builder / developer where under the builder / developer is to exploit the entire development potential of the plot of land belonging to the society by constructing a new building by demolishing the existing building and under takes to give to the members flats in new building so constructed by him in lieu of their existing flats (new flats being bigger than the present flats of the respective members); he agrees to sell them additional area at a concessional rate; gives them rent for alternate accommodation till such time as the new building is constructed; pays hardship compensation; gives corpus to the society and also undertakes that upon flats belonging to him being sold and new members being admitted – further corpus will be brought in.
- Society gets new building, better amenities, corpus
- Member gets bigger flat, inconvenience allowance, rent for alternate accommodation; additional area at a concessional rate

General Background

- The builder incurs the cost of construction of new building, pays corpus to the society, pays inconvenience allowance and also rent for alternate accommodation to the members and gets for himself the additional areas which can be constructed by him. The additional areas available to him are sold by him. Upon sale of flats by the builder / developer, the purchasers of the said flats are made members of the society.

What is the subject matter of the transfer?

What is the subject matter of transfer?

- The transfer under a development agreement entered into by the society and its members with the builder / developer is the balance development potential of the plot of land of which society is the legal owner.
- The balance development potential could be on account of unutilized plot FSI; right to load TDR FSI; right to use additional FSI by paying premium; right to use Fungible FSI.
- The concept of right to load TDR FSI was a creature of DC Regulations, 1991. Additional / Premium FSI and Fungible FSI are available as a result of DC Regulations, 2034 coming into force.
- There is an upper cap upto which TDR FSI and Additional / Premium FSI can be loaded on a plot of land. This upper cap depends on the width of the road.

What is the subject matter of transfer?

- Upper cap is linked with the size of the plot. Construction cannot exceed the upper cap. To illustrate, if upper cap is 2.00 then if plot area is 1000 sq. mts, construction utilizing 2,000 sq. mts of FSI will be permissible.
- Additional FSI is available upon payment of premium to BMC. Fungible FSI is available on the aggregate of Plot FSI / Base FSI plus Additional / Premium FSI plus TDR FSI.
- In order to utilize Additional / Premium FSI and also Fungible FSI, premium is required to be paid to BMC.
- A builder / developer would take up the project only if he has available to himself flats which can be sold by him after giving bigger flats to the members of the society.

Commercials

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Who gets what and for giving up what?

- **Society**
- Society transfers to the builder / developer the balance / unutilized development potential of the plot of land belonging to the Society.
- Society, in turn, gets new building constructed, corpus, further corpus, better amenities in the building such as bigger society office, etc.

- **Members**
- Member gets a bigger flat;
- Member gets rent for alternate accommodation while the existing building stands demolished and new building is being constructed;
- Member gets compensation for hardship / inconvenience suffered by him
- Member agrees to Society granting balance potential to the developer;
- Member agrees to share the common areas and facilities with greater number of persons

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What does the Society get

- **Developer**
- Developer is entitled to exploit, at his cost, balance development potential of the plot.
- Developer can sell, on his own account, additional flats which are available as a result of exploiting the development potential and giving the larger flats to the society members
- Developer agrees to –
  - incur the cost of construction of new building;
  - pay corpus to the Society;
  - give bigger flats to the members;
  - pay compensation for hardship / inconvenience to the members;
  - pay to members towards rent for alternate accommodation
- .

What is a development agreement

Observations from Bom HC in Adityaraj Builders

- Division Bench of the Bombay High Court, very recently in February / March 2023, was dealing with a bunch of Writ Petitions challenging the levy of stamp duty on PAAA entered into by the member of the society with the developer. Stamp Authorities sought to levy stamp duty on construction cost of new flat allotted to the member in lieu of his existing flat. The Court observed that the redevelopment agreements follow a pattern which the court described as under –
  - The society enters into an agreement, often called a Development Agreement (DA) or a Redevelopment Agreement with a developer. That DA has two parts. One part is the construction of new homes for existing society members or occupants. The second part is the construction of what are called free sale units which the developer can put to sale in the open market. Sometimes, but not always, individual society members also sign the DA. Equally, there are many cases where the society executes the DA with the developer, but individual members do not. Those individual members are still members of the society and the society acts on their behalf."

What is a Development Agreement?

- Development Agreements are agreements where the developer agrees to put up construction on owner's plots in consideration of his parting with a part of the plot.

- The development agreement is some sort of business agreement and it basically postulates coming together of two parties only i.e. the developer and the owner of the land. The developer does not have land to develop and the assessee (land owner) does not have sufficient finance to develop the land and therefore they come together i.e. land and finance for the development of project is necessarily a business agreement whereby the owner of land allows the developer to enter and exploit the land for the limited purposes of developing the said land. – **ITO v. Ronak Marble Industries [ITA No. 3318/Mum./2015; AY : 2009-10; Date of Order : 14.3.2017]**

Development Agreement as explained by SC

- Supreme Court has in the case of **Faqir Chand Gulati v. Uppal**, in the context of Consumer Protection Act, was examining whether the land owner can be regarded to be a "consumer" of the services provided by the builder. In that context the Apex Court held that development agreement is not a joint venture but is a contract for services. The Apex Court has explained the Development Agreement as follows –
- A development agreement is one where the land-holder provides the land. The Builder puts up a building. Thereafter, the land owner and builder share the constructed area. The builder delivers the "owner's share" to the land-holder and retains the "builder's share'. The land-holder sells / transfers undivided share/s in the land corresponding to the Builder's share of the building to the builder or his nominees. The land-holder will have no say or control in the construction or have any say as to whom and what cost the builder's share of apartments are to be dealt with or disposed of. Such an agreement is not a "joint venture" in the legal sense. It is a contract for "services".

What is a Development Agreement?

- Appropriate Authority, acting under Chapter XX-C, construed such agreements as agreements for sale. The Calcutta High Court has in the case of **Madgul Udyog v. CIT [(1990) 184 ITR 484 (Cal.)],** in a different context, pointed out that such agreements are in the nature of business agreements and not agreements of sale.
- Generally, the possession in such cases to the developer is only to fulfill his obligations under such development agreements.

When does Joint Development Agreement constitute a Joint Venture?

- An agreement between the owner of a land and a builder, for construction of apartments and sale of those apartments so as to share the profits in a particular ratio may be a joint venture, if the agreement discloses an intent that both the parties shall exercise joint control over the construction / development and be accountable to each other for their respective acts with reference to the project.

- The title of the document is not determinative of the nature and character of the document, though the name may usually give some indication of the nature of the document. The use of the words “joint venture” or “collaboration” in the agreement will not make the transaction a joint venture, if there are no provisions for shared control and losses. - **Faqir Chand Gulati v. Uppal (SC)**

Nature of a DA - Sushil Kumar Agarwal v. Meenakshi Sadhu & Ors

- Supreme Court in **Sushil Kumar Agarwal v. Meenakshi Sadhu & Ors**. **[MANU/SC/1144/2018; (2019)2SCC241]** has in the context of Specific Relief Act, 1963 held –

- The expression "development agreement" has not been defined statutorily. In a sense, it is a catch-all nomenclature which is used to describe a wide range of agreements which an owner of a property may enter into for development of immovable property. As real estate transactions have grown in complexity, the nature of these agreements has become increasingly intricate. Broadly speaking, (without intending to be exhaustive), development agreements may be of various kinds:

Nature of a DA - Sushil Kumar Agarwal v. Meenakshi Sadhu & Ors [Manu/SC/1144/2018]

- (i) An agreement may envisage that the owner of the immovable property engages someone to carry out the work of construction on the property for monetary consideration. This is a pure construction contract;
- (ii) An agreement by which the owner or a person holding other rights in an immovable property grants rights to a third party to carry on development for a monetary consideration payable by the developer to the other. In such a situation, the owner or right holder may in effect create an interest in the property in favour of the developer for a monetary consideration;
- (iii) An agreement where the owner or a person holding any other rights in an immovable property grants rights to another person to carry out development. In consideration, the developer has to hand over a part of the constructed area to the owner. The developer is entitled to deal with the balance of the constructed area. In some situations, a society or similar other association is formed and the land is conveyed or leased to the society or association;

Nature of a DA - Sushil Kumar Agarwal v. Meenakshi Sadhu & Ors [Manu/SC/1144/2018]

- (iv) A development agreement may be entered into in a situation where the immovable property is occupied by tenants or other right holders. In some cases, the property may be encroached upon. The developer may take on the entire responsibility to settle with the occupants and to thereafter carry out construction; and

- (v) An owner may negotiate with a developer to develop a plot of land which is occupied by slum dwellers and which has been declared as a slum. Alternately, there may be old and dilapidated buildings which are occupied by a number of occupants or tenants. The developer may undertake to rehabilitate the occupants or, as the case may be, the slum dwellers and thereafter share the saleable constructed area with the owner.

Nature of a DA - Sushil Kumar Agarwal v. Meenakshi Sadhu & Ors [Manu/SC/1144/2018]

- When a pure construction contact is entered into, the contractor has no interest in either the land or the construction which is carried out. ***But in various other categories of development agreements, the developer may have acquired a valuable right either in the property or in the constructed area. The terms of the agreement are crucial in determining whether any interest has been created in the land or in respect of rights in the land in favour of the developer and if so, the nature and extent of the rights***. [Para 16]

Nature of a DA - Sushil Kumar Agarwal v. Meenakshi Sadhu & Ors [Manu/SC/1144/2018]

- In a construction contract, the contractor has no interest in either the land or the construction carried out on the land. But, in other species of development agreements, the developer may have acquired a valuable right either in the property or the constructed area. There are various incidents of ownership in respect of an immovable property. Primarily, ownership imports the right of exclusive possession and the enjoyment of the thing owned. The owner in possession of the thing has the right to exclude all others from its possession and enjoyment. The right to ownership of a property carries with it the right to its enjoyment, right to its access and to other beneficial enjoyments incidental to it. (B. Gangadhar v. BG Rajalingam MANU/SC/0212/1996 : (1995) 5 SCC 239 at para 6). Ownership denotes the relationship between a person and an object forming the subject matter of the ownership. It consists of a complex of rights, all of which are rights in rem, being good against the world and not merely against specific persons.

Nature of a DA - Sushil Kumar Agarwal v. Meenakshi Sadhu & Ors [Manu/SC/1144/2018]

- There are various rights or incidents of ownership all of which need not necessarily be present in every case. They may include a right to possess, use and enjoy the thing owned; and a right to consume, destroy or alienate it. (Swadesh Ranjan Sinha v. Haradeb Banerjee MANU/SC/0305/1992 : (1991) 4 SCC 572). **An essential incident of ownership of land is the right to exploit the development potential to construct and to deal with the constructed area. In some situations, under a development agreement, an owner may part with such rights to a developer. This in essence is a parting of some of the incidents of ownership of the immovable property.** There could be situations where pursuant to the grant of such rights, the developer has incurred a substantial investment, altered the state of the property and even created third party rights in the property or the construction carried out to be carried out.

Nature of a DA - Sushil Kumar Agarwal v. Meenakshi Sadhu & Ors [Manu/SC/1144/2018]

- There could be situations where it is the developer who by his efforts has rendered a property developable by taking steps in law. In development agreements of this nature, where an interest is created in the land or in the development in favour of the developer, it may be difficult to hold that the agreement is not capable of being specifically performed. For example, the developer may have evicted or settled with occupants, got land which was agricultural converted into non-agricultural use, carried out a partial development of the property and pursuant to the rights conferred under the agreement, created third party rights in favour of flat purchasers in the proposed building. In such a situation, if for no fault of the developer, the owner seeks to resile from the agreement and terminates the development agreement, it may be difficult to hold that the developer is not entitled to enforce his rights. This of course is dependent on the terms of the agreement in each case. There cannot be a uniform formula for determining whether an agreement granting development rights can be specifically enforced and it would depend on the nature of the agreement in each case and the rights created under it. [Para 17]

Nature of a DA - Sushil Kumar Agarwal v. Meenakshi Sadhu & Ors [Manu/SC/1144/2018]

- In **Chheda Housing Development Corporation v. Bibijan Shaikh Farid** MANU/MH/0070/2007 : (2007) 3 Mah LJ 402, a Division Bench of the Bombay High Court while dealing with the question of whether specific performance should be granted of a development agreement held as follows:
- In our opinion from a conspectus of these judgments, what is relevant would be the facts of each case and the agreement under consideration. Agreements considering what is discussed, amongst others, could be:
- (a) an agreement only entrusting construction work to a party for consideration.
- (b) an agreement for entrusting the work of development to a party with added rights to sell the constructed portion to flat purchasers, who would be forming a Co-operative Housing Society to which society, the owner of the land, is obliged to convey the constructed portion as also the land beneath construction on account of statutory requirements.

Nature of a DA - Sushil Kumar Agarwal v. Meenakshi Sadhu & Ors [Manu/SC/1144/2018]

- (c) A normal agreement for sale of an immovable property.

- An Agreement of the first type normally is not enforceable as compensation in money is an adequate remedy. An Agreement of the third type would normally be specifically enforceable unless the contrary is proved. A mere agreement for development, which creates no interest in the land would not be specifically enforced. [Para 18]

Provisions of DCR and Co-op Societies Act

Amendments in DCR, 1991

Development Control Regulations, 1991

34. Transfer of Development Rights

In certain circumstances, ***the development potential of a plot of land may be separated from the land itself and may be made available to the owner of the land in the form of Transferable Development Rights (TDR)***. These rights may be made available and be subject to the Regulation in Appendix VII hereto.

Appendix VII

14. The FSI of receiving plot shall be allowed to be exceeded by not more than 0.8 earned either by way of a DR in respect of reserved plots as in this Appendix or by way of land surrendered for road widening or construction of new roads according to sub-regulation No. (1) of Regulation 33 or by way of both provided that in case the receiving plot is situated in the areas listed in categories specified in clause (a) to (g) of regulation 11 of Appendix VII of these Regulations, the same shall not be allowed to be further loaded by way of TDR beyond the limit already specified in these regulations.

Who is the owner of the rights ?

- Arguments to support that Society is the owner :
  - Incorporated Body – Provisions of the Maharashtra Co-operative Societies Act
  - Conveyance in favour of Society
  - Title records in favour of Society
  - Bye laws of the Society
  - Various clauses in Flat Sale Agreement under MOFA and RERA
  - Decision of Supreme Court in Ramesh Himmatlal Shah v. Harsukh Jadhavji Joshi 1975 (062) AIR 1470 (SC)

- Arguments to support that Member is the owner :
  - Pre-incorporation history
  - Society is one of the forms
  - Economic ownership with the member
  - Objects of Society formation
  - CBDT Circular No. 9 dated 25.03.1969
  - For the purpose of section 22 - Member is deemed to be the Owner
  - Exemption u/s 54 has always been allowed to the Member

If Society is the Owner …

- Taxation of Society :
  - What is subject matter of transfer?
  - Full value of consideration
  - Does consideration accrue to a society when under the agreement it is to be paid to the member of the society ?
  - Year of transfer
  - Is the right a 'No Cost Asset'
  - Deduct FMV on 01.04.2001 duly indexed
  - Consideration received in kind
  - Amounts received by members, whether to be considered for taxation in the hands of the society?

- Taxation of Members :
  - Is it a capital receipt unaccompanied by transfer
  - Is the receipt in the nature of dividend
  - Is the receipt covered by Section 56(2)(x)

- Can the AO re-write the agreements?

If Member is the Owner …

- Taxation of Society :
  - Is it a capital receipt unaccompanied by transfer
  - If it is a 'transfer' - Year of transfer
  - Is the right a 'No Cost Asset'
  - Deduct FMV on 01.04.1981 duly indexed
  - Consideration received in kind
  - Amounts received by members
- Taxation of Members :
  - What is subject matter of transfer?
  - Full value of consideration
  - Taxability of additional area
  - Taxation of other streams of consideration viz. rent for temporary accommodation, inconvenience allowance, deposit for maintenance, shifting expenses, free construction.
  - Is there an exchange
  - Entitlement to claim exemption u/s 54 / 54F

Circular No 9 dated 25.03.1969

110. **TENANT CO-PARTNERSHIP CO-OPERATIVE HOUSING SOCIETIES - WHETHER LEGAL OWNERSHIP IN FLATS CAN BE SAID TO VEST IN INDIVIDUAL MEMBERS THEMSELVES AND NOT IN CO-OPERATIVE SOCIETY.**

1. Instructions were issued in 1955 to the effect that in the case of tenant co-partnership co-operative housing societies, the income from each building should be assessed in the hands of the individual members to whom it had been allotted, notwithstanding the fact that the technical legal ownership in the property in such cases vested in the society. However, it has now been represented to the Board that in the case of tenant co-partnership co-operative housing societies, the societies are usually only lessees of the flats and the legal ownership of the flats really vests in the individual members themselves.
2. The normal procedure in such cases is that an agreement is entered into between the builder and each purchaser of the flat in the building proposed to be constructed. The purchaser pays the entire cost of the flat in installments spread over the period of the construction. As soon as the building is completed, the builder gives the possession of flats to the various purchasers, who then join together to form a co-operative society. The builder who had originally purchased the land or taken it on lease, transfers the land and building thereon to the co-operative society. The society then allots the tenancy in the flats to the members in such a way that each member gets the tenancy rights over the flat which he has purchased.
3. The Board are advised that under the above arrangement, the legal ownership in the flats can be said to vest in the individual members themselves and not in the co-operative society. Hence, for all purposes (including attachment and recovery of tax, etc.) the individual members should be regarded as the legal owners of the property in question.

Circular : No. 9 [F. No. 8/2/69-IT(A-I)], dated 25-3-1969.

Extracts from Model Flat Sale Agreement

4. The Promoter hereby declares that the Floor Space Index available in respect of the said land is _____ sq. mts. only and that no part of the said floor space index has been utilized by the Promoter elsewhere for any purpose whatsoever. In case the said floor space index has been utilized by the Promoter elsewhere, then the Promoter shall furnish to the flat Purchaser all the detailed particulars in respect of such utilization of the said floor space index by him. In case while developing the said land the Promoter has utilized any floor space index of any other land or property by way of floating floor space index, then the particulars of such floor space index shall be disclosed by the Promoter to the Flat Purchaser. The residual F.A.R.(FSI) in the plot or the layout not consumed will be available to the promoter till the registration of the society. Whereas after the registration of the Society the residual F.A.R. (FSI) shall be available to the Society.

20. Nothing contained in this Agreement is intended to be nor shall be construed as a grant, demise or assignment in law of the said Flats or of the said Plot and Building or any part thereof. The Flat Purchaser shall have no claim save and except in respect of the Flat hereby agreed to be sold to him and all open spaces, parking spaces, lobbies, staircases, terraces, recreation spaces, etc will remain the property of the Promoter until the said land and building is transferred to the Society / Limited Company as hereinbefore mentioned.

Provisions of Maharashtra Co-operative Societies Act, 1960

- 154B-1(1) "**allottee" means** a Member of a housing society to whom a plot of land or a site, or a flat in a building or complex held by it, is allotted by the co-operative society, or **a person who has purchased a flat from the developer** or competent authority and joined as a Member of the society;

- 154B-1(17) "**housing society" means a society**, **the object of which is** to provide its members with open plots for housing, dwelling houses or flats; or if open plots, the dwelling houses or flats are already acquired, to provide its members common amenities and services and t**o demolish existing buildings and reconstruct or to construct additional tenements or premises by using potential of the land**;
  - (a) "tenant ownership housing society" means a society ….
  - (b) "**tenant co-partnership housing society**" **means a society the object of which is to allot the flats already constructed** or to be constructed **to its Members and where both land and building or buildings are held either on free-hold or lease-hold basis by the society**; and
  - (c) "other housing societies" means ….

Provisions of Maharashtra Co-operative Societies Act, 1960

Chapter IV – Incorporation, Duties and Privileges of Societies

- 36. **Societies to be bodies corporate** : The registration of a society shall render it a body corporate by the name under which it is registered, with perpetual succession and a common seal and with power to acquire, hold and dispose of property, to enter into contracts, to institute and defend suits and other legal proceedings and to do all such things as are necessary for the purpose for which it is constituted.

Extracts from Model Bye-laws of the Society

II. INTERPRETATIONS

3. Interpretations of the words and terms. Unless otherwise separately provided in these bye-laws, the following words and terms shall have the meaning assigned to them herein:

(vi) 'Flat' means a separate and self contained set of premises used or intended to be used for residence, or office, or show-room, or shop, or godown and includes a garage, or dispensary or consulting room, or clinic, or flour mill, or coaching classes, or palnaghar, beauty parlour, the premises forming part of a building and includes an apartment.

(xxii) "**Common Area and Facilities**" **means**

(a) **the land on which the building is located**;

(b) ……

Extracts from Model Bye-laws of the Society …

IV. OBJECTS

5. Objects of the society. The objects of the society shall be as under:

(a) To obtain conveyance from the owner/Promoter (Builder), in accordance with the provisions of the Ownership Flats Act and the Rules made there under, of the right, title and interest, in the land with building/buildings thereon, the details of which are as hereunder: The building/buildings known/numbered as constructed to be reconstructed on the plot/plots Nos _____ S. No / CTS No._____ of admeasuring _____sq. metres, more particularly described in the application for registration of the Society

(b) To manage, maintain and administer the property of the society

(c) To raise funds for achieving the objects of the society

(d) to undertake and provide, for on its own account or jointly with co-operative institution, social cultural or recreative activities.

(e) To do all things, necessary or expedient for the attainment of the objects of the society, specified in these bye-laws.

Extracts from Model Bye-laws of the Society ….

II. RIGHTS OF MEMBERS

(A) Getting copy of the Bye-laws

(B) Inspection of Books and Records

(C) Occupation of Flats

24. Right of occupation of the flat.

(a) The member, who is deemed to have been allotted the flat under the bye-laws No. 76(a) of the society shall have a right to occupy the flat subject to the terms and conditions set out in the letter in the prescribed form under the said bye-law.

(b) The associate/nominal member may have a right to occupy the flat with the consent of the member and permission of the society subject to the conditions set out by the society.

(D) Restrictions on Rights of Associate and Nominal Members

(E) Resignation of Membership

(F) Nomination by Members

Extracts from Model Bye-laws of the Society ….

IX. INCORPORATION, DUTIES AND POWERS OF THE SOCIETY

73. **Incorporation**. The registration of the society shall render it a body corporate by the name under which it is registered, with perpetual succession and common seal and with power to acquire, hold and dispose of the property, to enter into contracts and other legal proceedings and to do all such things as are necessary for the purpose for which it is constituted.

76(a) **Flat purchased is deemed to have been allotted**. The member, person/firm who had purchased the flat under an agreement under section 4 of the Ownership Flats Act, or acquired interest in the flat on transfer of the same by existing member with previous permission of the society, shall be deemed to have been allotted the same flat by the society subject to the terms and conditions set out in the letter of allotment in the prescribed form, including subsequent modifications made by the society to it.

(b) No member of the Society shall use the flat deemed to have been allotted to him under (a) above, for a purpose other than that mentioned in the letter of allotment, without the previous consent in writing of the committee.

Extracts from Model Bye-laws of the Society ….

XVI. CONVEYANCE OF THE PROPETY, THE REPAIRS TO AND MAINTENANCE OF THE PROPERTY

155(a) The Committee shall in consultation with the General Body, take necessary steps for Conveyance of the land/building/buildings in favor of the Society.

(b) **Finalisation of the deed of conveyance**. The Committee shall examine, in consultation with the Solicitor or the Advocate of the Society, the deed of conveyance of the land and the building/buildings thereon prepared by the builder and place the same before the meeting of the general body of the society for its approval.

(c) **Execution of the deed of conveyance**. On approval of the draft deed by the general body meeting of the Society, the Committee shall execute it.

Extracts from the decision of SC in 1975-(062)-AIR-1470-SC

- **Ramesh Himmatlal Shah v. Harsukh Jadhavji Joshi**

"The flat is owned by the Society and the allottee has a right or interest to occupy the same. There is nothing in the language of Section 31 to indicate that the right to occupation which is the right to be sold in auction is not attachable in execution of the decree. There is nothing in Section 31 to even remotely include a prohibition against attachment or sale of the aforesaid right to occupation of the flat. (paras 17, 18)"

"A flat in a tenant co-partnership housing society under the Maharashtra Co-operative Societies Act is liable to attachment and sale in execution of a decree against a member in whose favor or for whose benefit the same has been allotted by the Society. The right to occupy a flat of this type, assumes significant importance and acquires under the law a stamp of transferability in furtherance of the interest of commerce. In absence of clear and unambiguous legal provisions to the contrary, it will not be in public interest nor in the interest of commerce to impose a ban on saleability of these flats by a tortuous process of reasoning. The prohibition, if intended by the legislature, must be in express terms. (paras 18, 19)"

Head of income under which the receipts under DA are chargeable to tax

Head of Income under which chargeable

- **Maheshwar Prakash – 2 Co-op Hsg Society Ltd. v. ITO [(2009) 121 TTJ 641 (Mum.-Trib.)]**
  - "In view of this legal position it is held that the right to construct additional storeys on account of increase in FSI by virtue of Regulation No. 14 of the Appendix VII to DCR, 1991 was a capital asset held by the assessee. Therefore, assignment of such right in favour of the developers amounted to transfer of a capital asset."
- **ITO v. Shri Ram Kumar Malhotra** (ITA No. 4843/Mum/2009 AY 2006-07)(Order dated 14.05.2010) **(2010-TIOL-512-ITAT-Mum) -** The Tribunal in this case, after quoting the ratio of the decision of Bombay High Court in the case of Chheda Housing Development Corporation v. Bibijan Shaikh Farid and Ors. 2007 (3) Mh. L.J. held as under :

  "The Court held that FSI / TDR being a benefit arising from the land, consequently must be held to be immovable property. Hence, development rights is a capital asset and transfer of such rights leads to be capital gain."
- **Land Breez Co-opeartive Housing Society Ltd. v. ITO [(2013) 55 SOT 103 (Mum)**
  - Thus, such right is definitely a capital asset held by the assessee and assignment of such right in favour of the developer amounts to transfer of a capital asset."

Head of Income under which chargeable

- **New Shailaja Co-op Hsg Soc. Ltd. v. ITO [(2010) 36 SOT 19 (Mum.)]**
  - "The assessee was the owner of land and building and continued to remain so even after the transfer of the said capital asset. Thus, the cost of land and building of the existing structure could not be attributed to the additional FSI received by means of 1991 Rules. **It is true that such right is a capital asset**. ….."

Who is the owner of the development potential which is the subject matter of transfer?

Ownership of development potential – incidental questions

- Is it the society or the members who own the development potential which is available for exploitation on the plot of land belonging to the Society? While the legal owner of the plot is undoubtedly the Society, it is possible to contend when it comes to taxation that the real owner of the plot of land is the Members of the Society.
- Is capital gains to be charged to tax in the hands of the person owning the capital asset or is it to be taxed in the hands of the person who receives consideration?
- Can amounts received by members as well as cost of construction of new building be considered as full value of consideration in the hands of the society?
- In the event that a wrong person has paid tax, can the person who is correctly chargeable, in law, escape taxation on the ground that the tax has been paid by the other person.

Ownership of development potential – incidental questions

- **Arguments to support that Society is the owner of the development potential**
  - Land is conveyed to the Society. In law, the land belongs to the Society.
  - All title deeds and property card is in the name of the Society.
  - Development potential cannot be transferred without the Society being a party to the transfer
  - Society is a body corporate and a separate person from its members.
  - Society can own property in its own name.
  - Property taxes, uptil very recently, were levied on the society;
  - Bye-laws deem that the flat purchased by the member is deemed to be allotted to him by the Society.
  - Bombay High Court has in the case of Adityaraj Builders has held "***It is impossible to argue that the land and building are not the property of the society itself.***"
- .

Ownership of development potential – incidental questions

- **Arguments to support that Society is the owner of the development potential**
  - Grant of right to load TDR will accrue to the society and not to the individual members and it is the society which will be subjected to tax on capital gains – **ITO v. Bhagwandas J. Lakhiani [ITA No. 7054/Mum./2005 dated 30.3.2005]**

Ownership of development potential – incidental questions

- **Arguments to support that Member is the owner of the development potential**
  - While the legal ownership of the land may be with the Society, economic ownership thereof is with the Members;
  - Income-tax law recognizes economic ownership e.g. depreciation is allowed to a company / firm though asset is in the name of director / partner;
  - Section 27(iii) deems member to be owner of the house though it states that it is for the purposes of sections 22 to 26;
  - It is the members who have purchased the flats, paid consideration therefor and under their agreement of purchase, as a consideration the builder / developer had agreed to convey the land to the society;
  - Claim for deduction under section 54/54F has always been allowed;

Ownership of development potential – incidental questions

- **Arguments to support that Member is the owner of the development potential**
  - In certain cases, with a view to disallow a part of depreciation claimed, department has sought to bifurcate the consideration paid for purchase of premises in a society building into land component and building component – In **Hathway Investments (P.) Ltd. v. ACIT [(2013) 38 taxmann.com 389 (Mumbai - Trib.)],** the Tribunal while dealing with the question of allowability of depreciation on the part of consideration allocable to land out of total consideration paid for purchase of office premises in a society building held –
    - In the instant case, the land does not vest with the Municipal Corporation, but with the society itself. ***The assessee being a member of the society can be considered as the part owner in the land in proportion to its share holding in the super structure over it.*** [Para 47]

Ownership of development potential – incidental questions

- **Arguments to support that Member is the owner of the development potential**
  - Society is one of the forms of organization which could have been formed. Alternatively, a condimonium could have been formed. In the event a condimonium is formed, undoubtedly, the member would be said to be owner of undivided interest in land. So merely going by this alternative form of organization, cannot be disadvantageous;
  - Society is regarded as a mutual association and surplus which arises to the society from members is not charged to tax on principles of mutuality;
  - CBDT has issued a circular being Circular No. 9 [F. No. 8/2/69-IT(AI)P] dated 25.3.1969 which states that "***for all purposes (including attachment and recovery) the individual members should be regarded as the legal owners of the property in question***."

ITO v. Bhaveshwar Vilas CHS [ITA No. 7156/Mum/2019; AY : 2014-15; Order dated 23.2.2022]

- **ITO v. Bhaveshwar Vilas CHS Ltd. [ITA No. 7156/Mum/2019; AY: 2014-15; Order dated 23.2.2022]**
- In this case, revenue being aggrieved by the order of the CIT(A) preferred an appeal to the Tribunal. The AO taxed a sum of Rs. 4,17,39,950 as capital gain arising to the society on entering a development agreement with the developer whereunder the developer was to provide new and bigger flats to the members. The CIT(A) deleted the addition on the ground that the members were the real owners of the flats which were transferred to the developer in exchange of new flats with more space. Land and building belongs to the members and not to the society.
- The registered development agreement was entered into between the assessee and the developer.
- The AO held that since the agreement is entered into by the Society, tax is chargeable in the hands of the society.

ITO v. Bhaveshwar Vilas CHS [ITA No. 7156/Mum/2019; AY : 2014-15; Order dated 23.2.2022

- The CIT(A) held that the members are real owners of the flats and gave a further direction to the AO to call for details of flat owners to determine the applicability of the capital gains in their individual hands, Or he may inform the respective Assessing Officer to examine the issue of taxability of capital gain as well as of section 50C of the Act in the individual hands of the members of the society.
- The Tribunal noted that the assessee is a society formed by flat purchasers. The Tribunal held –
  - **Capital gain shall always be chargeable to tax only in the hands of the person who transferred their capital asset**. ***In the present case, this society did not transfer anything, as it did not have ownership of the flat , owners of the flat were members of the society***, the learned CIT(A) has correctly deleted the addition in the hands of the assessee- society.

Auro Ville Co-op Hsg. Soc. Ltd. v. ACIT [ITA No. 570/Mum/2008]

- The Tribunal, in this case, held that the capital gains arising on transfer of TDR FSI by the Society is taxable in the hands of members and not the society. The important observations made by the Tribunal are as under –
- (a) The assessee is a co-operative housing society registered under the Maharashtra Co-operative Societies Act, 1960 as a Tenant Co-partnership Housing Society under Rule 10(1) – clause 5(b). The Flat Owner members have transferred their individual entitlements / right to load TDR FSI in favor of the developers and are entitled to receive compensation directly;
- (b) All the individual flat owners have offered for taxation their share of compensation, in their respective returns of income;

Auro Ville Co-op Hsg. Soc. Ltd. v. ACIT [ITA No. 570/Mum/2008]

- (c) According to CBDT Circular No. 9 dated 25th March, 1969, the legal ownership in the flats is vested in individual member and not in the co-operative society. The flat owners have proportionate interest in the land and building. The society is only ostensible owner and in reality and truth the flat owners own the land and building for which they have paid full consideration and the amount received from the developer by the flat owner in their individual capacity is the income of the individual flat owner. The flat owners have relinquished their interest in the property and the society has no control over such income of the individual owners.
- (d) The benefit of additional TDR FSI was derived and enjoyed by the members of the society and no income accrued to the society;
- (e) There is no merit in computing capital gains on sale of TDR FSI in the hands of the society following the decision of Mumbai Tribunal in the case of Jethalal D. Mehta v. DCIT

Sharat Chandra Roongta v. ITO [WP No. 2597 of 2018/Bom HC; Order dt 8.10.2018]

- The Bombay High Court was dealing with a writ petition filed by the Petitioner challenging the reassessment proceedings in respect of amounts received by him as a member of a society under a development agreement. The society was assessed to tax in respect of those amounts and the legal proceedings were pending. While the proceedings were pending, AO issued a reassessment notice. The Court having observed that there is an arguable question raised by the Petitioner held –
  - "Prima facie, being a member of the Co-operative Housing Society and there being a redevelopment agreement between this Housing Society and the Developer/Builder under which certain amounts are to be paid by the Developer/Builder to each of the members and that amount has been assessed earlier as an income of the Co-operative Housing Society and legal proceedings are pending, then, ***it is doubtful whether such an amount constitutes the income of the member and can be taxed independently in hands***. The reason for reopening itself, raises a legal question. Hence, Rule."

Development potential is distinct from land

- *The contentions and reasoning of the Assessing Officer to the extent that the word 'Property' not only includes tangible asset but also intangible asset and, therefore,* ***additional FSI available to the assessee in view of DCR, 1991, was a right acquired by virtue of being owner of the plot, is correct. Thus, such a right is definitely a 'Capital Asset'*** *held by the assessee and* ***assignment of such a right in favour of the developer amounts to transfer of capital asset****. It is held that transfer of TDRs amounts to transfer of a 'Capital Asset'. [Para 15]* **[Land Breez Co. Operative Hosing Society Ltd. v. ITO [2012] 28 taxmann.com 196 (Mum.)]**

- While examining whether these development rights have cost of acquisition, the Tribunal held - ***these development rights have been available to the assessee as per the DCR, 1991, and is separate and distinct from the original right in land*** *and, hence, it cannot be held that such a right was embedded in the land.* **[Land Breez Co. Operative Hosing Society Ltd. v. ITO [2012] 28 taxmann.com 196 (Mum.)]**

Development potential is distinct from land

- *Section 45 is the charging section in respect of profits or gains arising from the transfer of capital asset. The expression 'capital asset' has been defined in clause (14) of section 2, according to which it means property of any kind held by an assessee whether or not connected with the business or profession. It excludes certain assets from the scope of the above definition. The word 'property' not only includes tangible assets but also intangible assets. Therefore,* ***the right to construct the additional storeys on account of increase in FSI by virtue of regulation No. 14 to DCR, 1991 was a capital asset held by the assessee. Therefore, assignment of such right in favour of the developers amounted to transfer of capital asset.*** *The contention of the assessee that there could not be any transfer without having TDR was without force, since* ***right to construct additional floors and TDR were different and distinct rights which could be transferred for a consideration.*** *[Para 10] [****Maheshwar Prakash -2 Co-op Hsg Society Ltd. v. ITO [(2009) 118 ITD 223 (Mum.-Tirb.)****]*

In which year does the transfer take place?

Year of transfer

- While land is in the name of the society, even after transfer of the balance development potential land continues to remain in the name of the Society. Therefore, what gets transferred from the Society is the balance development potential. The question is when does this transfer happen?

- Are sub-clauses (v) and (vi) of clause 47 of section 2 applicable? Does Explanation 2 to section 2(47) apply?
  - (v) transaction involving allowing of 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 TOPA;
  - (vi) any transaction (whether by way of becoming a memebr of, or acquiring sharesin, a co-operative society ….. Etc 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."

Year of transfer

- Explanation 2 to section 2(47) reads as under –
  - 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 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 a company registered or incorporated outside India.

Year of transfer

- When does transfer of development potential happen?
  - Is it in the year of execution of Development Agreement?
  - Is it the year in which the first or the last of the members of the Society vacates his flat and hands over possession thereof to the builder / developer;
  - Is it the year in which the Society grants a Power of Attorney to the builder / developer;
  - Is it the year in which the plans are approved;
  - Is it the year in which the builder pays the premia to the local authority and there is FSI loaded and commencement certificate issued;
  - Year in which the construction is completed and Society / Members receive the new flats

Amendment in S. 53A of TOPA and also in Ss. 17 and 49 of the Indian Registration Act

- An agreement of sale which fulfilled the ingredients of section 53A was not required to be executed through a registered instrument. This position was changed by the Registration and Other Related Laws (Amendment) Act, 2001. Amendments were made simultaneously in section 53A of the Transfer of Property Act and sections 17 and 49 of the Indian Registration Act.

- By the aforesaid amendment, the words 'the contract, though required to be registered, has not been registered, or' in section 53A of the 1882 Act have been omitted. Simultaneously, sections 17 and 49 of the 1908 Act have been amended, clarifying that unless the document containing the contract to transfer for consideration any immovable property (for the purpose of section 53A of 1882 Act) is registered, it shall not have any effect in law, other than being received as evidence of a contract in a suit for specific performance or as evidence of any collateral transaction not required to be effected by a registered instrument.

Meaning of `of the nature referred to in Section 53A' – SC in CIT v. Balbir Singh Maini [(2017) 86 taxmann.com 94 (SC)]

- Supreme Court in the case of **CIT v. Balbir Singh Maini [(2017) 86 taxmann.com 94 (SC)]** was dealing with the case of an assessee who had an agreement which was not registered. For the relevant AY, 2007-08, the assessee filed return declaring certain income. The AO held that since physical and vacant possession had been handed over under the JDA, the same would tantamount to `transfer' within the meaning of Section 2(47)(ii), (v) and (vi).
- The Tribunal confirmed the order of the AO.
- The High Court held that the Tribunal and the authorities below were not right in holding the assessee to be liable to capital gains tax in respect of land for which no consideration had been received and which stood cancelled and incapable of performance due to various orders passed by the Supreme Court and the High Court in PILs. Therefore, the assessee's appeal was allowed.
- On revenue's appeal to the Supreme Court, HELD

Meaning of `of the nature referred to in Section 53A' – SC in CIT v. Balbir Singh Maini [(2017) 86 taxmann.com 94 (SC)]

- All that is meant by this expression `of the nature referred to in section 53A' is to refer to the ingredients of applicability of section 53A to the contracts mentioned therein. It is only where the contract contains all the six features mentioned in ***Shrimant Shamrao Suryavanshi* v. *Pralhad Bhairoba Suryavanshi* [2002] 3 SCC 676**, that the section applies, and this is what is meant by the expression 'of the nature referred to in section 53A'.
- As has been stated above, there is no contract in the eye of law in force under section 53A after 2001 unless the said contract is registered. This being the case, and it being clear that the said JDA was never registered, since the JDA has no efficacy in the eye of law, obviously no 'transfer' can be said to have taken place under the aforesaid document.
- Since sub-clause (*v*) of section 2(47) is not attracted on the facts of this case, there is no need to go into any other factual question. [Para 20]

Conditions for applicability of Section 53A' – SC in Shrimant Shamrao Suryavanshi v. Pralhad Bhairoba Suryavanshi [(2002) 3 SCC 676]

- There are certain conditions which are required to be fulfilled if a transferee wants to defend or protect his possession under Section 53A of the Act.
- The necessary conditions are –
  - 1) there must be a contract to transfer for consideration any immovable property;
  - 2) the contract must be in writing, signed by the transferor, or by someone on his behalf;
  - 3) the writing must be in such words from which the terms necessary to construe the transfer can be ascertained;
  - 4) the transferee must in part performance of the contract take possession of the property, or of any part thereof;
  - 5) the transferee must have done some act in furtherance of the contract; and
  - 6) the transferee must have performed or be willing to perform his part of the contract.

Seshasayee Steels (P.) Ltd. v. ACIT [(2020) 115 taxmann.com 5 (SC)]

- The Supreme Court in **Seshasayee Steels (P.) Ltd. v. CIT [(2020) 115 taxmann.com 5 (SC)]** was dealing with a case where an assessee had entered into an agreement to sell in May 1998, executed a power of attorney, in July 1998, authorising the buyer to execute sale agreements / sale deeds in respect of the property under consideration after developing the same into flats. The power of attorney also enabled the builder to present before all competent authorities such documents as were necessary to enable development on the property and sale thereof to persons. Under the agreement to sell, both the parties were entitled to specific performance. Clause 16 of the agreement stated that the landlord is giving permission to the developer to start **advertising, selling and construction on land.** Advertisements, sales catalogues and leaflets were to be approved by the land owner / seller before publication or circulation.

Seshasayee Steels (P.) Ltd. v. ACIT [(2020) 115 taxmann.com 5 (SC)]

- The builder did not carry out the obligations under the agreement and therefore, subsequently in July 2003 a deed of compromise had to be entered into. The assessee in this case contended that the transfer happened on or about the date of agreement to sell. The Tribunal agreed with the Commissioner (Appeals) and found that on or about the date of the agreement to sell, the conditions mentioned in section 2(47)(*v*) could not be stated to have been complied with, in that, the very fact that the compromise deed was entered into on 19-7-2003 would show that the obligations under the agreement to sell were not carried out in their true letter and spirit. As a result of this, section 53A of the Transfer of Property Act, 1882, could not possibly be said to be attracted.

Seshasayee Steels (P.) Ltd. v. ACIT [(2020) 115 taxmann.com 5 (SC)]

- The Supreme Court held –
  - grant of mere license to the developer does not amount to transfer even in a case where the land parcel is held as a capital asset;
  - no transfer had arisen in the year of entering into the Joint Development Agreement in terms of section 2(47)(v) of the Act, when the license was given by the assessee (land-owner) to the Developer for developing the land and constructing flats thereon and selling the same;
  - the term `possession' in section 53A of the Transfer of Property Act, 1882 is a legal concept that denotes control over the land and not the actual physical occupation of the land;
  - clause 16 of the JDA led to the position that a license was given to another upon the land for the purpose of developing the land into flats and selling the same. such a licence cannot be said to be `possession' within the meaning of section 53A, which is a legal concept, and which denotes control over the land and not the actual physical occupation of the land;
- For this reason alone, the court held that section 2(47)(v) is not attracted.

Seshasayee Steels (P.) Ltd. v. ACIT [(2020) 115 taxmann.com 5 (SC)]

- As regards applicability of section 2(47)(vi) of the Act, the SC noted that –
- This Court in ***Commissioner of Income-tax v. Balbir Singh Maini [(2017) 86 taxmann.com 94 (SC)]*** adverted to the provisions of this section 2(47)(*vi*) and held that the object of section 2(47)(*vi*) appears to be to bring within the tax net a *de facto* transfer of any immovable property.
- The expression 'enabling the enjoyment of' takes colour from the earlier expression 'transferring', so that it is clear that any transaction which enables the enjoyment of immovable property must be enjoyment as a purported owner thereof.
- The idea is to bring within the tax net, transactions, where, though title may not be transferred in law, there is, in substance, a transfer of title in fact.

Seshasayee Steels (P.) Ltd. v. ACIT [(2020) 115 taxmann.com 5 (SC)]

- As regards applicability of section 2(47)(vi) of the Act, the SC HELD :

- Given the test stated in paragraph 25 of the decision in the case of Balbir Singh Maini, it is clear that the expression 'enabling the enjoyment of' must take colour from the earlier expression 'transferring', so that it can be stated, on the facts of a case, that a *de facto* transfer of immovable property has, in fact, taken place making it clear that the *de facto* owner's rights stand extinguished.

- It is clear that as on the date of the agreement to sell, the owner's rights were completely intact both as to ownership and to possession even *de facto*, so that this Section equally, cannot be said to be attracted.

Does ratio of Balbir Singh & Seshasayee apply to society redevelopment

- In both the above decisions, the ultimate transfer of title was contemplated. In the case of a society, that is not so. Hence, it can be contended that the theory that the Developer is entering as a mere licensee on land is not a “transfer” of land, may not be appropriate here. Instead, one may have to go by the principles laid down by the decisions in the context of specific performance. If the agreement is such that the builder may be able to enforce specific performance thereof, it is quite likely that the transfer has happened.

Does ratio of Balbir Singh & Seshasayee apply to society redevelopment

- What is relevant is therefore when is the development potential transferred?
  - If it is unconditional, then it gets transferred when the POA is granted to get the plans approved and exploit the development potential;
  - If it is conditional upon plans getting sanctioned, then, the transfer gets complete on approval of the plans;
  - If it is conditional upon getting IOD / CC, it gets transferred when IOD / CC is received;
  - If it is agreed that the development potential shall be transferred in stages or on completion of milestones, it gets transferred at that time;
  - If the agreement is made terminable in case the developer fails to deliver the members' area, then, the transfer happens on delivery of the members' area;
  - If the agreement contemplates specific performance and is not terminable but only provides for damages then on termination it may be difficult to argue that transfer had not happened.

Bom HC : Bhatia Nagar Premises Co-op Society Ltd [(2017) 80 taxmann.com 33 (Bombay HC)]

- In this case, the department sought to tax the assessee on capital gains arising on transfer of additional FSI in the year of execution of the agreement. Possession of existing building was not handed over. Agreement provided that in the event that IOD and CC is not obtained within six months from the agreement, the agreement shall be terminated without any further notice. It was also to stand terminated in the event the developer obtains these certificates but does not commence the construction activity and complete it within the time frame.

- The Developer could not obtain IOD and CC within the prescribed time limit and the society passed the resolution terminating that agreement.

- The High Court did not find any perversity on the finding of fact that Section 2(47)(v) would be attracted if the agreement had gone further.

Bom HC : Bhatia Nagar Premises Co-op Society Ltd

- The Tribunal held that the assessee never lost its control over the property. It never handed over possession. Rather the agreement stood terminated. There was no transfer of land and building. The assessee had only transferred its entitlement to additional FSI to the developer for reconstruction of building. However, once that agreement itself did not survive and this benefit was to flow from the agreement, then, the Tribunal concluded that in light of factual circumstances, when there is no benefit obtained by way of transfer of additional FSI and that could have been transferred only on demolition of old building, the ingredients of section 2(47)(v) are not at all satisfied and attracted.

How does stamp duty authority compute the value of the development potential which is subject matter of transfer?

How does stamp authority value development potential

- Stamp duty is payable on higher of the following two values –

(a) Value of constructed area as per document which is the share of the developer i.e. constructed area available to the Developer for its use x land rate [it should be 65% or 70% of land rate]

(b) Consideration received by the society / shareholder i.e the aggregate of the

Sr. No	Particulars
I	Value of total constructed area like flat / other gala available to the Society / shareholder as per construction cost of new construction
Ii	Value of total constructed area of amenity space to be received by the society like club house, office, etc as per construction cost of new construction
Iii	Cash consideration received by the society apart from constructed area
Iv	6% simple interest on deposit given by the developer for the entire period of the completion of the project

How does stamp authority value development potential

Sr. No	Particulars
v	Corpus fund to be given to the Society / shareholder
vi	Rent given to the shareholder for alternate accommodation for the period mentioned in the agreement
vii	Shifting charges given to the shareholders
viii	Brokerage given to shareholders for alternate accommodation for the period mentioned in the agreement
ix	Development charges payable on total area of construction given to Society / Shareholder (as per MRTP Act, 1966)
x	Built-up area available to society / shareholder which is more than existing built-up area in old building should be valued at the rate of 30% of land area (considering Fungible Premium, TDR, Premium FSI, etc)
xi	Any other obligation which is taken over by the developer apart from the above points then value of such obligation as noted in the document

For (iv) to (x) if value is not noted in the document then to ascertain value of those points and to include in value. In case certain payments noted in (iv) to (x) is not given / not payable and such fact is written in the document then such amounts should not be included in the value.

How does stamp authority value development potential

- Basic permissible FSI table, TDR, carpet area, premium as well as Fungible carpet area, etc all development potential as certified by Architect should be considered and percentage of distribution of constructed area between land owner and the developer is to be calculated.

- Expenses relating to the TDR as well as the premium amount should be reduced from the share of the Society or Developer depending upon who is sp[ending pon it.

Does section 50C apply to a development agreement entered into by the Society and its Members with the Developer

Does section 50C apply to a DA entered into by a Society / Members

- Section 50C applies when there is a transfer of a capital asset being land or building or both.

- In a development agreement entered into by the land lord with the builder / developer, the land is ultimately to be conveyed to the society of flat purchasers. However, in case of a development agreement entered into by a co-operative society, the land is not to be conveyed to anyone. The society is the owner of the land and even subsequent to the development having taken place, the society shall continue to remain owner of the land. Therefore, in that sense there is no transfer of `land or building or both' and therefore one may contend that the provisions of section 50C do not apply.

Does section 50C apply to a DA entered into by a Society / Members

- The Tribunals have in the following cases held that the provisions of section 50C are not applicable to transfer of development rights –
  - Voltas Ltd. v. ITO **[(2016) 74 taxmann.com 99 (Mumbai)]**
  - Shakti Insulated Wires P. Ltd. v. ITO [(Mum.)(ITA No. 3710/Mum./07; Order dated 27.4.2009]
  - ITO v. Ronak Marble Industries [ITA No. 3318/Mum./2015dated 14.3.2017]
- However, in the following cases, it has been held that section 50C does apply to transfer of development rights –
  - Chiranjeev Lal Khanna [(2012) 66 DTR 260 (Mum.)]
  - Mrs. Arlette Rodrigues v. ITO [ITA No. 343/Mum./2010]
  - Smt. Mrytle D'souza v. ITO [ITA No. 3168/Mum./2011]
  - Arif Akhtar Hussain v. ITO [(2011) 59 DTR 307 (Mum.)]
- Bombay High Court has admitted the appeal of the assesssee in the case of Chiranjeev Lal Khanna, so the matter is not free from doubt.

Does section 50C apply to a DA entered into by a Society / Members

- Rajasthan High Court in **Sh. Ram Ji Lal Meena s/o Sh. Bachu Ram Meena v. ITO, JAIPUR [2018 (5) TMI 1792 - Rajasthan High Court]** has held that section 50C applies to transfer of leasehold rights in plot of land. Arif Akhtar Hussain v. ITO [(2011) 59 DTR 307 (Mum.)]

- Karnataka High Court has in the case of **V S Chandrashekhar v. ACIT [(2021) 129 taxmann.com 273 (Kar. HC)]** has held that "***from the clear, plain and unambiguous language employed in section 50C, it is evident that the same does not apply to a case of rights in land.***"

- Supreme Court has in the case of Vegetable Products held that where two views are possible, a view in favor of the assessee should be adopted. Undoubtedly, the view of Rajasthan High Court is against the assessee but view of Karnataka High Court is in favour of the assessee.

Does section 50C apply to a DA entered into by a Society / Members

- Bombay High Court in the case of **Jai Hind Sciaky Ltd. v. DCIT [(2017) 70 taxmann.com 105 (Bom.)]** was dealing with a question as to whether the expression would include "interest in land" as well. In case, it did then the leasehold interest held by the assessee would qualify as an "asset" chargeable to wealth-tax. The court held that lease hold interest in land was an asset chargeable to wealth-tax.

- Bombay High Court has admitted the appeal of the assesssee in the case of Chiranjeev Lal Khanna, so the matter is not free from doubt.

Assuming 50C applies what should it be compared with

- Assuming that the provisions of section 50C are applicable to transfer of development potential, since the consideration flows to both Society as well as to various members and also it assumes various forms e.g. corpus, hardship compensation, rent for alternate accommodation, consideration for development potential, cost of construction of new house, etc., a question arises that whether for applying section 50C which is the amount which needs to be compared?

- It appears that the aggregate of all the amounts / value of benefits which constitute consideration for transfer of development potential need to be compared with the stamp duty value. If any of these components is considered on a stand alone basis or some of the components are not taken then it will mean that the comparison is not of an apple with an apple but one is comparing two non-comparable amounts.

Is the member transferring a residential house?

Is Member transferring a house?

- Even if it is concluded that the member needs to be taxed on the consideration received by him, a question which arises is what is the asset which is being transferred by the member?
- Is it that the member has transferred his present residential house to the builder / developer in consideration for the bigger house along with other monetary consideration or is it some other asset which is transferred by the member?
- Presently, the practice and the general understanding is that the member has transferred the residential house and has received a bigger house. Claim of deduction under section 54 is also being upheld on this ground.
- However, if one looks at the real transaction and the documentation, the member is not transferring his residential house. What is being transferred to the builder / developer is the development potential to the extent it can be attributed to the member.

Is Member transferring a house?

- The documentation is always for transfer of a development potential and not for transfer of a residential house. The member continues to be the owner of the house in the interregnum while the new building is being constructed. The mortgage created by the member survives.
- Subject to satisfaction of conditions mentioned in section 54F, claim for deduction under section 54F will be admissible on transfer of development potential.
- The development potential which has been transferred is a creature of the statute. It is upon amendment of the DC Regulations that the development potential came into existence. Therefore, prior to 1.4.2023, it was possible to argue that the gain is not chargeable to tax as the cost of this development potential is not ascertainable.
- However, w.e.f. 1.4.2023, consequent to amendment of section 55, the cost of this right will be nil.
- In cases where the flat has been purchased subsequent to the amendment of DCR, 2034 then it is possible to contend that the cost of the flat has embedded in it the development potential as well.

Is Member transferring a house?

- In cases where the flat has been purchased subsequent to the amendment of DCR, 2034 then it is possible to contend that the cost of the flat has embedded in it the cost of this development potential as well. Going by the ratio of the decision of Apex Court in A R Krishnamurthy's case – land is a bundle of rights. Allocation of cost may be difficult but that does not mean that the amount is not to be charged to tax.

Taxability of inconvenience allowance / rent for alternate accommodation

Compensation for alternate accommodation – capital receipt ?

- Monetary payments received towards rent allowance, shifting allowance, brokerage, etc are capital receipts being in the nature of compensation for hardship, rehabilitation and shifting and are therefore, not chargeable to tax.

- Mumbai Bench of the Tribunal in the case of **Smt. Delliah Raj Mansukhani v. ITO [2021 – TIOL – 439 – ITAT- MUM]** has held that compensation for alternate accommodation as per terms of development agreement is in the nature of hardship allowance or rehabilitation allowance and is not taxable. The Tribunal followed the decision of the co-ordinate bench in the case of Shri Devshi Lakhamshi Dedhia v. ACIT in ITA No. 5350/Mum/2012.

- Mumbai Bench of the Tribunal, in **Mrs. Kiranben S. Shah v. ITO [ITA No. 7209/Mum./2010; A.Y.: 2005-06; Order dated 25.1.2011]** has held Hardship compensation to be a capital receipt, not chargeable to tax

Compensation for alternate accommodation – capital receipt ?

- Also, in the following cases, compensation for alternate accommodation is held to be not taxable –
  - Kushal K. Bangia v. ITO [2012 – TIOL – 100 – ITAT – Mum]
  - Sunil Manaktala v. ACIT [ITA No. 72/Mum/2012; A.Y. : 2008-09; Order dated 23.7.2015];
  - Rita Sunil Manaktala [ITA No. 5271/Mum/2012; A.Y.: 2008-09; Order dated 9.10.2013].

Sarfaraz Sharafali Furniturewalla v. Afshan Sharafali Ashok Kumar – Bom HC – WP No. 4958 of 2024

- The question of deduction of tax at source from payment of "transit rent" came up for consideration before the Bombay High Court in **Sarfaraz Sharafali Furniturewalla vs Afshan Sharafali Ashok Kumar [Writ Petition No. 4958 of 2024; Order dated 15.4.2024].**
- The Court noted that the following decisions of the Tribunal–
  - Smt. Delilah Raj Mansukhani in ITA No. 3526/MUM/2017 (Assessment Year : 2010-2011) –
  - Ajay Parasmal Kothari in ITA No. 2823/MUM/(A.Y : 2013-2014)
  - Shri Devshi Lakhamshi Dedhiavs. ACIT in ITA No.5350/Mum/2012 - amounts received by the assessee as hardship compensation, rehabilitation compensation and for shifting are not liable to tax

Sarfaraz Sharafali Furniturewalla v. Afshan Sharafali Ashok Kumar – Bom HC – WP No. 4958 of 2024

- In Smt. Delilah Raj Mansukhani the Tribunal held "compensation received by the assessee towards displacement in terms of Development Agreement is not a revenue receipt and constitute capital receipt as the property has gone into re-development. In such scenario , the compensation is normally paid by the builder on account of hardship faced by owner of the flat due to displacement of the occupants of the flat. The said payment is in the nature of hardship allowance / rehabilitation allowance and is not liable to tax.
- Delilah Raj Mansukhani relies upon Devshi Lakhamshi Dedhia (supra) and Ajay Kothari (supra) follows judgment of Delilah Mansukhani (supra).
- High Court held that the view taken by the Tribunal is correct view.'

Sarfaraz Sharafali Furniturewalla v. Afshan Sharafali Ashok Kumar – Bom HC – WP No. 4958 of 2024

- The Court held –
  - "The ordinary meaning of Rent would be an amount which the Tenant / Licensee pays to the Landlord / Licensor. In the present proceedings the term used is "Transit Rent", which is commonly referred as Hardship Allowance / Rehabilitation Allowance / Displacement Allowance, which is paid by the Developer / Landlord to the tenant who suffers hardship due to dispossession. Hence, in my opinion 'Transit Rent' is not to be considered as revenue receipt and is not liable to be tax, as a result there will be no question of deduction of T.D.S. from the amount payable by the Developer to the tenant."

Taxability of rent free accommodation provided under DA

- In the context of land owner receiving rent free accommodation from the developer pursuant to the terms of the Joint Development Agreement, the judicial precedents are as follows -
- In the case of **P Madhusudhan v. PCIT [ITA No. 1986 of 2008; AY: 2001-02; Order dated 11.6.2019](Madras HC)**; Madras High Court was dealing with the correctness of the decision of the Tribunal in holding that entire damages, deposit and rent free accommodation should be charged to tax as capital gain. The Court held that – "*The development agreement makes it abundantly clear and the first of the covenants states that the developer shall provide free of rent for the owners alternate residential accommodation. Admittedly, rents were paid by the developer, rental deposit was paid by the developer and the agreement does not provide for any adjustment of these payments as against the consideration payable under the development agreement. Therefore, the Tribunal committed an error in including the same to be assessed as capital gains. Accordingly, this finding is set aside and the substantial question of law is answered in favour of the assessee*."

Taxability of rent free accommodation provided under DA

- However, Bangalore Bench of the Tribunal has in the case of **E G Amal Kumar v. ACIT [ITA No. 6(Bang.)/2010; AY : 2001-02; Order dated 14.10.2011]** has upheld the action of the AO in considering the value of rent free accommodation provided under the terms of development agreement as part of full value of consideration.
- Monetary payments towards shifting allowance, rent allowance and brokerage are in the nature of capital receipts and can be brought to tax only under the head `Capital Gains'.
- **Contra view**
- There are some decisions where an assessee offered rent allowance as income under the head `income from other sources' and claimed deduction for rent paid. Tribunal has upheld the claim of the assessee. It is respectfully submitted that the allowability of rent paid as deduction from rent allowance requires reconsideration and one should not plan on the basis of the ratio of this decision – **Jatinder Kumar Madan v. ITO [(2012) 21 taxmann.com 316 (Mum.)]**

Taxability of corpus received by the society & impact of amendment in section 55 by the Finance Act, 2023

Taxability of corpus

- Preponderant legal position prior to amendment of section 55 by the Finance Act, 2023 is that the development potential / right to load TDR FSI which is the subject matter of transfer in a society redevelopment has arisen as a result of amendment of the Development Control Regulations. It is a capital asset which cannot be acquired by paying a consideration. Therefore, the provisions of the Act, as they stood before the amendment by the Finance Act, 2023, did not provide for a computation mechanism and therefore the charge fails.

- The above proposition has been affirmed by the Bombay High Court in **CIT v. Sambhaji Nagar Co-op. Hsg. Society Ltd. [(2015) 54 taxmann.com 77 (Bombay)]** wherein the Court held as follows-

Taxability of corpus

- In the instant case, ***additional FSI/TDR is generated by change in the DC***. A specific insertion would therefore be necessary so as to ascertain its cost for computing the capital gains. Therefore, the Tribunal was in no error in concluding that the TDR which was generated by the plot/property/land and came to be transferred under a document in favour of the purchaser would not result in the gains being assessed to capital gains. The factual backdrop is noted by the Tribunal and thereafter the rival contentions. The Tribunal concluded and relying upon its order passed in two other cases that ***what the assessee sold was TDR received as additional FSI as per the DC. It was not a case of sale of development rights already embedded in the land acquired and owned by the assessee***. The Tribunal concluded that the assessee had not incurred any cost of acquisition in respect of the right which emanated from 1991 Rules, making the assessee eligible to additional FSI. ***The land and building earlier in the possession of the assessee continued to remain with it. Even after the transfer of the right or the additional FSI, the position did not undergo any change***. ***The revenue could not point out any particular asset as specified in sub-section (2) of section 55***. The conclusion of the Tribunal in imminently possible and in the given facts. That is also possible in the light of the legal position as noted by language of section 55(2) and the judgment of the Supreme Court in *CIT* v. *B.C. Srinivasa Shetty* [1981] 128 ITR 294/5 Taxman 1, which is in the field. [Para 11]

Taxability of corpus

- Is the ratio of the above decisions applicable to transfer of right to load Additional / Premium FSI and/or Fungible FSI as in these cases the owner of the plot intending to utilise these has to pay to the local authority a premium. Is it correct to contend that this premium a cost of acquisition and therefore, the above stated proposition does not apply?

- Is the above argument available irrespective of the date of acquisition of the flat / plot of land?

- In case consideration is received for exploitation of unutilised balance Plot FSI then is it chargeable to tax or can it be contended that the ratio of the above stated decision applies to this as well – **Ishverlal Manmohandas Kanakia v. ACIT [ITA No. 3053/Mum./2010; AY: 2006-07; Mum.-Trib.]**

Taxability of corpus

- Consequent to the amendment of section 55 by the Finance Act, 2023, the following questions arise –
  - Consequent to the amendment, does the legal position change?
  - Does the amendment apply to development agreements which have been entered into prior to the amendment?
  - Would it make a difference if the development agreement is entered into prior to the amendment but the transfer takes place after the amendment?
  - Does the amendment apply to pending cases

Claim by the member under section 54 / 54F

Claim of deduction under s. 54/54F

- Section 54 applies when capital gain arises on transfer of a long term capital asset being a residential house.
- Section 54 is applicable only to an individual or HUF. Therefore, applicability of s. 54 will happen only if it is concluded that the member is the owner and that he has transferred a residential house.
- Presently, the claim for deduction under section 54 is being granted and for this purpose the acquisition of the new residential house is regarded as a case of `construction'.
- The proposition that the member has transferred a residential house is supported by the decision of Mumbai Tribunal in **Pradyot B. Borkar [TS-50-ITAT-2020(Mum.)]**, while considering the head of income under which the amounts received by the member of a society from the developer under an agreement entered into by the society with the developer held –

Claim of deduction under s. 54/54F

- The proposition that the member has transferred a residential house is supported by the decision of Mumbai Tribunal in **Pradyot B. Borkar [TS-50-ITAT-2020(Mum.)]**, while considering the head of income under which the amounts received by the member of a society from the developer under an agreement entered into by the society with the developer held –
  - "the amount of Rs. 53,50,500 was received by the assessee only because of handing over the old flat for the purpose of re-development. Therefore the amount of Rs. 53,50,500, received by the assessee, is integrally connected with transfer of his old flat to the developer for redevelopment in lieu of which he received the amount of Rs. 53,50,000 and a residential fat. Therefore, the amount of Rs. 53,50,000 has to be treated as income under `capital gains';

Claim of deduction under s. 54/54F

- It is possible to take a view that what is transferred by a member is not a residential house. The subject matter of the transaction is the additional development potential. Handing over of the old flat and moving out is a condition / obligation to be fulfilled by the member so as to achieve the effective transfer of development potential. If this view be taken then the claim for deduction under section may be doubtful.
- Undoubtedly, there is relinquishment of the old house but the consideration is not for relinquishment of the old house but it is for transfer of the development potential.
- An individual member may claim deduction under section 54F subject to satisfaction of conditions mentioned therein.

Claim of deduction under s. 54/54F

- Further, assuming that the member is eligible to claim deduction under section 54/54F, the amendment to these provisions by the FA, 2023 need to be kept in mind. Vide FA, 2023 it is now provided that the cost of new house if it exceeds Rs 10 crore then the same shall, for the purposes of s. 54 and s. 54F be deemed to be Rs. 10 crore.

- Amendment to Sections 54 and 54F by the FA, 2023 is prospective and will apply to transfers which take place on or after 1.4.2023. It will not apply to transfers which have happened upto 31.3.2023. The date of receiving the new house is not relevant to decide whether the amended provisions are applicable or not. The date of entering into DA will not be relevant if the transfer takes place after the amendment.

Applicability of s. 56(2)(x)

Applicability of section 56(2)(x)

- In the case of a society redevelopment, a member receives a house which is bigger than the earlier house. The entitlement to a larger area arises pursuant to the Development Agreement (and Permanent Alternate Agreement) entered into by the Member with the Builder / Developer.

- What is being received by the member is a larger flat. This is undoubtedly `immovable property being land or building or both'. The question is whether the receipt is of the entire new flat or only of the incremental area. The house to the extent of earlier area is merely a replacement of what the member already had.

- The consideration for receiving this is the fair market value (stamp duty value) of the development potential transferred. The development potential to be transferred will may be valued at land rate x 70%.

Applicability of section 56(2)(x)

- Upon comparison of the stamp duty value of the additional area received with the value as computed above, if the stamp duty value of additional area is more then the value of the consideration then s. 56(2)(x) will be attracted.

- However, in actual practice this situation is unlikely to arise because apart from the additional area the builder also gives monetary compensations this is to equalise the value of what he has received with what he has got.

- As far as purchase of additional area at a concessional rate is concerned, if the purchase price is lower than the stamp duty value, the differential will be taxed. In order to ensure that the stamp duty value of the date of booking is concerned, it is advisable to pay some amount by cheque on the date of booking. The tax incidence will arise in the year of receipt of the bigger flat from the builder / developer.

Who is liable to pay capital gains?

Is society required to pay capital gains on amounts received by members?

Can society be taxed on amounts received by Members?

- Department has attempted to tax the Society on the aggregate of value of consideration which was received by the Society as well as by the members. However, in the two reported cases which travelled to the courts, the Members had paid tax on the amounts received by them. It was in those facts that the Court held that the Society cannot be taxed as that would amount to double taxation.
- In the case of **Raj Ratan Palace Co-operative Housing Society Ltd. v. DCIT [(2011) 46 SOT 217 (Mum.)(URO)]** out of total consideration of Rs. 3,02,16,828, Rs. 2,51,000 was paid to the society and balance was received by members. The AAO sought to tax the amounts received by the members in the hands of the society. The Tribunal deleting the addition held –
  - It was also seen that some of the individual members had offered the receipts from the developer to tax and the same had also been brought to tax in the hands of the individual members. In this scenario, the addition made in the hands of the assessee society was without any basis. Consequently, the addition made in the hands of the society was to be deleted.

Can society be taxed on amounts received by Members?

- An appeal against the above order of ITAT, the Bombay High Court in **CIT v. Raj Ratan Palace Co-operative Housing Society Ltd. [ITA No. 2292 of 2011 dated 27.2.2013]** while confirming order of ITAT dealt with the following question raised by the department –
  - Whether on facts and in the circumstances of the case and in law, the Tribunal is right in holding that amount received cannot be taxed in the hands of the assessee society because society continues to be the owner of the land as no change in ownership of land has taken place without appreciation of the fact that the assessee has received compensation of Rs. 3,02,16,828 for granting the developer the right to develop the property which is clearly taxable as per provisions of section 2(24) read with secton 2(47) and 2(14) of the Income-tax Act?"

Can society be taxed on amounts received by Members?

- The Court decided the issue as under -
  - 2. The Revenue seeks to tax the society in respect of the amount received on transfer of TDR. The Tribunal in the impugned order recorded a finding of fact that the amount wwhich was received on the transfer of TDR was received by the members of the Respondent society. The members of the society had offered the amoutns received by them to taxin their individual retursn. In fact, copies of orders of the Tribunal in respect of individual members who received amount from the developers and offered to tax was also placed before the Tribunal.
- SLP against the decision of the High Court has been dismissed [**CIT v. Raj Ratan Palace Co-operative Housing Society Ltd. [(2014) 362 ITR 1 (SC)(St.)]**

Can society be taxed on amounts received by Members?

- In **MIG Co-operative Housing Society Ltd. v. ITO [ITA No. 896 & 1099/M/16 dated 17.2.2017 (Mum.-Trib.)]** development agreement was entered into between the Society and the Developer whereby the Corpus Fund was paid to the Society and the members were entitled to new flat in the redeveloped project as well as the cash compensation. The society had offered to tax the amounts received by it and the members offered to tax the consideration received by them. The AO sought to tax value of new flat as well as cash compensation in the hands of the society on the ground that society was the owner of land and building. The Tribunal deleting the additions made in the hands of the Society held as under -

Can society be taxed on amounts received by Members?

- We find that facts of the case before us are similar to the facts of Raj Ratan Palace Co-op Hsg Society Ltd. As stated earlier, the developer had made payments to the Society as well as to the members and they had offered the amounts received by them, for taxation. In our opinion, once the members had shown the income received by them in their hands there can not be any justification for taxing the same in the hands of society. No double taxation and no double deduction is one of the well recognised and fundamental principles of taxation. In our opinion, signing of the agreement by the members or society cannot be base for taxing of income. As per the scheme of the Act, income received by any person or income accrued to him has to be taxed. In the case under our consideration, income was received by the membrs and they had offered the same for taxation.

Can society be taxed on amounts received by Members?

- Before the Hon'ble Bombay High Court following question was raised by the department-
  - "Whether on the facts and in the circumstances of the case and in law, the Tribunal is right in holding that amount received cannot be taxed in the hands of assessee society because society continues to be owner of the land as no change in ownership of land has taken place without appreciation the fact that the assessee has received compensation of Rs.3,02,16,828/-for granting the developer the right to develop the property which is clearly taxable as per provisions of Section 2(24) read with Section 2(47) and 2(14) of the Income Tax Act?"

Can society be taxed on amounts received by Members?

- The Hon'ble Court decided the issue as under :
  - "2. The Revenue seeks to tax the society in respect of the amount received on transfer of TDR. The Tribunal in the impugned order recorded a finding of fact that the amount which was received on the transfer of TDR was received by members of Respondent Society. The members of the Society had offered the amounts received by them to tax in their individual returns. In fact, copies of orders of the Tribunal in respect of individual members who received amount from the developers and offered to tax was also placed before the Tribunal.
  - 3. As the decision is based on a finding of fact which is not challenged by the Revenue as being perverse, we see no reason to entertain the proposed question of law.
  - 4 Accordingly, appeal is dismissed with no order as to costs."

Can society be taxed on amounts received by Members?

- Can the person who is chargeable to tax escape taxation on the ground that the other person has paid the tax on the same amount –
  - **ITO v. Atchaiah [[1996] 218 ITR 239 (SC)] followed in S P Jaiswal v. CIT [(1997) 224 ITR 619 (SC)]**
  - *Under the 1961 Act, the Assessing Officer has no option like the one he had under the 1922 Act. He can, and he must, tax the right person and the right person alone. By 'right person' is meant the person who is liable to be taxed, according to law, with respect to a particular income. The expression 'wrong person' is obviously used as the opposite of the expression 'right person'. Merely because a wrong person is taxed with respect to a particular income, the Assessing Officer is not precluded from taxing the right person with respect to that income. This is so irrespective of the fact as to which course is more beneficial to the revenue. ….. The person lawfully liable to be taxed can claim no immunity because the AO has taxed the said income in the hands of another person contrary to law. [SC in ITO v. Atchaiah]*

Is section 45(5A) applicable?

Will applicability of 45(5A) be different in case some of the members are non-individuals

Does s. 45(5A) apply to agreements entered into before its introduction

Will applicability of 45(5A) be different in case some of the members are non-individuals

Can s. 45(5A) apply to a society redevelopment agreement

- Section 45(5A) applies to an assessee being individual or HUF who transfers a capital asset being land or building or both under a specified agreement. Specified agreement is defined to mean an 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 consideration in cash.

- Society is the legal owner of the land. Development potential which is the subject mater of transfer under a development agreement entered into by the society is, in law, an entitlement of the society. Society is not an individual or HUF but a BOI. Therefore, the provisions of section 45(5A) ought not to apply.

Can s. 45(5A) apply to a society redevelopment agreement

- While it is true that an individual who is a member of a society may be regarded as an owner of land or building and the ingredients of specified agreement are satisfied. The real question is whether the ingredient of s. 45(5A) viz. transfer of a capital asset being land or building or both is satisfied. In the context of section 50C there are plethora of decisions to suggest that the expression `land or building or both' does not include rights in land or building or both. The subject matter of transfer in a society redevelopment is development potential available on the plot which is unutilised.

- While one may argue that the rights in land are also land by relying on decisions of the Tribunal in the context of section 50C in the case of Chiranjeev Lal Khanna, Arlette Rodrigues, Mrytle D'souza, Arif Akhtar Hussain, Rajasthan High Court in the case of Sh. Ram Ji Lal Meena and also Bombay High Court in the case of Jai Hind Sciaky Ltd.

Can s. 45(5A) apply to a society redevelopment agreement

- Then the provisions of Section 45(5A) and the charge will be in the year in which new flat is received by the individual member.
- One may consider whether a member can be said to be transferring his flat in "exchange" of new flat and hence there is a transfer of `land or building or both'.
- S. 118 of TOPA defines exchange as "when two or more persons mutually transfer the ownership of one thing for the ownership of another, neither thing nor both the things being money only, the transaction is called "exchange"."
- SC in **CIT v. Rasiklal Maneklal HUF [177 ITR 198 (SC)]** held that "exchange" presupposes existence of different properties owned by different persons. As a result the ownership of one property is transferred to the owner of the other property and vice versa.

Can s. 45(5A) apply to a society redevelopment agreement

- Here, the new flat and the old flat do not exist simultaneously. This is not a case of "exchange".
- Is it a case of "relinquishment" of the asset?
- SC in **CIT v. Grace Collis [(2001) 248 ITR 323 (SC)]** has held that "relinquishment of an asset need not be in the nature of a sale or an exchange. It does not require the existence of two properties at the same time. Thus, it held that the shares of the amalgamated company held by a shareholder were relinquished in consideration of shares of the amalgamated company. Hence, there is relinquishment of the old flat by the member.
- What is the consideration accruing or arising as a result of the transfer?
- Cash compensation and additional area have accrued to the member as a result of transfer of development potential and as hardship compensation. No consideration is accruing as a result of relinquishment of old house. Consequently, the question of replacing the FVC by SDV of the new house u/s 45(5A) does not arise.

Can s. 45(5A) apply to a society redevelopment agreement

- Any other view would mean double taxation of the same consideration – once on account of transfer of development potential and the other on account of relinquishment of houses of each individual member.
- This will still leave the question open qua the consideration received by the society. In the event that the society does not receive any consideration, it may be possible to contend that the provisions of section 45(5A) are applicable and therefore year of taxation will be the year in which the occupancy certificate in respect of newly constructed flat is received.
- Also, an interesting question may arise where the society has some of the members who are neither individuals nor HUFs.

Is TDS to be made from payments made by Builder / Developer to the Society and/or members?

TDS under section 194IC

- **Payment under specified agreement.**
- **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.]
- **Explanation (ii) to section 45(5A) –**
- "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;

TDS under section 194IC

- **Conditions precedent which need to be satisfied for s. 194IC to apply**
  - there should be a person responsible for paying (Developer is)
  - the payment is to a resident
  - payment is of a sum of money
  - payment of such sum is by way of consideration
  - under an agreement referred to in s. 45(5A)
- Upon satisfaction of above mentioned conditions, 10% of such sum is to be deducted at the time of credit or payment whichever is earlier

TDS under section 194IC

- **Is the Development Agreement entered into by Society and/or its Members with the Builder / Developer a Specified Agreement . To qualify as a specified agreement it has to be -**
  - An agreement which is registered; [DA entered by Soc / members is registered]
  - Person owning land or building or both [Society / Members own land]
  - Allows another person [developer is allowed to develop REP on such land]
  - To develop a real estate project on such land or building or both
  - In consideration of –
    - a share being land or building ore both in such project; [society/members get flats in the building constructed which is the project being developed]
    - with or without payment of part consideration in cash

TDS under section 194IC

- Section 194IC is non-obstante provisions of section 194IA.
- Can it be contended that the requirement of TDS u/s 194IC is only in situations where the land owner is an individual or HUF as section 45(5A) applies only to an individual or a HUF.
- The reference to an agreement referred to in section 45(5A) is a case of incorporation by reference. Therefore, other requirements of section 45(5A) are not relevant.
- Payment of “corpus” or “hardship compensation” or “rent for alternate accommodation” are all payments which constitute consideration under an agreement referred to in section 45(5A). Whether it is consideration for land or building is not relevant for TDS purposes. What is required is that it has to be payment of consideration under the `specified agreement’.
- Tax needs to be deducted u/s 194IC on the entire monetary component of the consideration. Since it is non-obstante 194IA, section 194IA shall not apply

Incorporation by Reference

Incorporation by reference

- Reference in this regard is invited to the decision of **Hon'ble Supreme Court** in the matter of **Onkarlal Nandlal v. State of Rajasthan & Anr. (1985) (1986 AIR 2146) (SC),** where it has been held that, if a subsequent Act brings into itself by reference some of the clauses of a former Act, the legal effect of that, as has often been held, is to write those sections into the new Act just as if they had been actually written in it with the pen, or printed in it, and, the moment you have those clauses in the later Act, you have no occasion to refer to the former Act at all. Also, there is no occasion or need to refer other provisions of the former act from which this incorporation is made or to its purpose or context. In that case, a subsequent act, (viz Explanation II to Section 2(o) of the Rajasthan Sales Tax Act, 1954) referred to a former act (viz. section 4(2) of the Central Sales Tax Act, 1956) and a question arose as to whether in interpretation of Explanation II to Section 2(o) of the 1954 Act, is there a need to refer also to section 4(1) of the 1956 Act. On that question the SC held that:

Incorporation by reference

- *"We must therefore proceed to interpret Explanation II to sub-section (o) of Section 2 as if sub-section (2) of section 4 were written out verbatim in the Explanation and once sub-section (2) of Section 4 is written out in the Explanation, there is no occasion or need to refer to the Central Act from which this incorporation is made or to its purpose or context. We need not therefore allow ourselves to be oppressed by the opening words "Subject to the provisions contained in Section 3" in sub-section (1) of Section 4 or by the context in which Section 4 occurs in the Central Act.*
- *We must accordingly read Explanation II to sub-section (o) of Section 2 of the State Act as if sub-section (2) of section 4 of the Central Act were written into it and then proceed to apply the Explanation to the facts of the present case in order to determine whether the resales effected by the assessee were sales inside the State within the meaning of the Explanation. Now it was not disputed on behalf of the Department that at the time when the contracts of resale were made by the assessee, the goods were specific ascertained goods lying at Bhawani Mandi inside the State and if that be so, the resales effected by the assessee must be deemed to have taken place inside the State on the principles laid down in sub-section (2) of Section 4 of the Central Act as incorporated in Explanation II to sub-section (o) of Section 2 of the State Act. It did not make any difference to this position that the resales were sales in the course of inter-State commerce…"*

Incorporation by reference

- Applying the above decision, to the present facts, it can be said that the agreement referred to in section 45(5A) is the "specified agreement". There is no need to see other conditions/provisions of section 45(5A). Thus, it is not relevant to look at the other requirement of section 45(5A). In that view of the matter section 194IC apply irrespective of whether the owner of the land or building is Individual/ HUF or some other entity/person.

Incorporation by reference

- Applying the above decision, to the present facts, it can be said that the agreement referred to in section 45(5A) is the “specified agreement”. There is no need to see other conditions/provisions of section 45(5A). Thus, it is not relevant to look at the other requirement of section 45(5A). In that view of the matter section 194IC apply irrespective of whether the owner of the land or building is Individual/ HUF or some other entity/person.

Judiciary on deductibility of TDS

Sarfaraz Sharafali Furniturewalla v. Afshan Sharafali Ashok Kumar – Bom HC – WP No. 4958 of 2024

- The Court held –
  - "The ordinary meaning of Rent would be an amount which the Tenant / Licensee pays to the Landlord / Licensor. In the present proceedings the term used is "Transit Rent", which is commonly referred as Hardship Allowance / Rehabilitation Allowance / Displacement Allowance, which is paid by the Developer / Landlord to the tenant who suffers hardship due to dispossession. Hence, in my opinion 'Transit Rent' is not to be considered as revenue receipt and is not liable to be tax, as a result there will be no question of deduction of T.D.S. from the amount payable by the Developer to the tenant."

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- Mumbai Bench of the Tribunal in **ITO, TDS v. Nathani Parekh Constructions Pvt. Ltd. [ITA Nos. 4088/Mum./2023; AY 2013-14; Order dated 21.5.2024]** was dealing with the case of an assessee in whose case survey was conducted and it was noted that the assessee has debited "Alternate Accommodation Rent" in books of accounts and had not deducted tax thereon.
- The AO treated the assessee in default for not having deducted TDS from payment made towards "alternate accommodation rent".
- The CIT(A) granted relief to the assessee by relying on the following decisions –
  - Jitendra Kumar Madan [(32 CCH 59, Mumbai)]
  - Sahana Dwellers Pvt. Ltd. [(2016) 67 taxmann.com 202 (Mum. Trib.)]
  - Shanish Construction Pvt. Ltd. [ITA Nos. 6087 and 6088/Mum/2024 dated 11.01.2017]

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- At the instance of the Revenue, the question before the Tribunal was "Whether the payment made by the assessee to the tenants of M/s Dalal Estate Co-operative Housing Society Ltd. towards alternate accommodation charges/hardship allowance/rent are liable for tax deduction under section 194I of the Act."

- Before the Tribunal it was contended on behalf of the assessee that the Hon'ble Bombay High Court in the case of Sarfaraz S. Furniturewalla Vs. Afshan Sharfali Ashok Kumar & Ors in Writ Petition No. 4958 of 2024, has held that the "transit rent" i.e. the rent paid by the developer to the tenant who suffers due to dispossession is not a revenue receipt and is not liable to be taxed as a result there will not be any question of deduction of TDS from the amount payable by the developer to the tenant.

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- The Tribunal observed that from the terms of the said agreement it is clear that the impugned payment made is in the nature of compensation towards hardship the tenants would have to undergo in order to handover the vacant possession of the property for demolition and towards the alternate accommodation charges which the tenant has to bear during the time of re-development.

- The Tribunal applying the ratio of the decision of the Hon'ble High Court held that the payment made by the assessee towards "Alternate accommodation charges / rent" is not liable for tax deduction under section 194I and therefore there is no infirmity in the order of the CIT(A).
- **Bench : Pavan Kumar Gadale Padmavathy S.**

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- In the course of survey action on the assessee, real estate developer, AO noticed amounts debited under the head “Alternate Accommodation / Rent”. On these amounts no tax was deducted at source. Assessee submitted that it had entered into a development agreement dtd 30.4.2017 with Dalal Estate Co-operative Housing Society LTd which was encumbered with more than 300 tenants and that for purposes of vacating the premises, assessee had agreed to pay compensation for hardship according to nature of tenancy occupied by each tenant. Assessee also submitted that the tenants could not be provided with alternate accommodation and therefore they have been the amount as compensation for hardship of the tenants. The amounts paid do not fall within the definition of “Rent” and therefore, tax was not deductible at source.

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- The AO held that even if payment is not liable for deduction under section 194I, section 194IC which was inserted w.e.f. 1.4.2017 is clearly applicable and that tax ought to have been deducted under section 194IC. The AO passed an order under section 201 / 201(1A) treating the assessee to be an assessee in default.
- The CIT(A) upheld the order passed by the AO.
- The Tribunal noted that the common issue is “whether the payment made by the assessee to the tenants of Dalal Estate Co-operative Housing Society Ltd. towards alternate accommodation charges / hardship allowance / rent are liable for deduction of tax at source under section 194IC of the Act”

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- The arguments on behalf of the assessee were –
  - Section 45(5A) talks of consideration paid towards transfer of a capital asset and that the alternate accommodation charges are not paid towards transfer of a capital asset;
  - Impugned payments are not consideration received within the meaning of section 45 and that the same is a capital receipt not chargeable to tax as has been held by the Jurisdictional High Court.
  - Tenant who is a recipient of the amount is not the owner of the land and is party of redevelopment agreement in the capacity as a tenant / member.
- On behalf of the department it was contended that for the purposes of s. 194IC, s. 45(5A) should be applied to the limited extent of "any payments done under specified agreement"

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- The Tribunal noted that the payment is in the nature of compensation towards hardship that the tenatns would have to undergo in order to handover the vacant possession of the property for demolition and towards the alternate accommodation charges which the tenant has to bear during the time of redevelopment. The Tribunal also noted that the argument of the Revenue appears to be that as per section 194IC any sum paid by any person under the specified agreement referred to in section 194IC shall be subjected to TDS and since compensation has been paid as per specified agreement, the TDS provisions under section 194IC are applicable.
- The Tribunal observed that the question is whether alternate accommodation / hardship allowance paid by the assessee is a sum by way of consideration under the specified agreement as claimed.

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- The Tribunal held –
- The term "consideration" is not specifically defined for the purposes of s. 194IC and its meaning has to be inferred from the definition of the term "specified agreement". As per the definition, it is the agreement entered into between the owner and the developer allowing the developer to develop the real estate project "***in consideration of share in the land or building or both in such project***", with or without payment of part of the consideration in cash. Therefore, any sum paid under the specified agreement to be treated as "consideration" should have been paid as part of a share in the land or building or both including cash payments. In the given case, payment towards alternate accommodation / hardship allowance is in the nature of a compensation paid by the developer towards hardship suffered ..

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- by the owner / tenant due to dispossession and not as part of a share in land or building or both. The terms of the agreement make it clear that the payment is made towards compensation for handing over the vacant possession of the property and towards rent if any payable by the tenants in the alternate accommodation until the completion of the re-development.
- Therefore, the Tribunal held that "Alternate accommodation charges / rent" cannot be treated as a consideration paid as part of a share in land or building or both under the specified agreement and would not fall within the provisions of section 194IC.
- The Tribunal held that assessee cannot be treated as an assessee-in-default for non-deduction and non-payment of TDS under section 194IC of the Act.
- **Bench: Pavan Kumar Gadale and Padmavathy S.**

Jagdish T Punjabi

B.Com., B.G.L., FCA.