

## **General Background**

- This presentation covers issues relating to redevelopment of buildings by cooperative 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.

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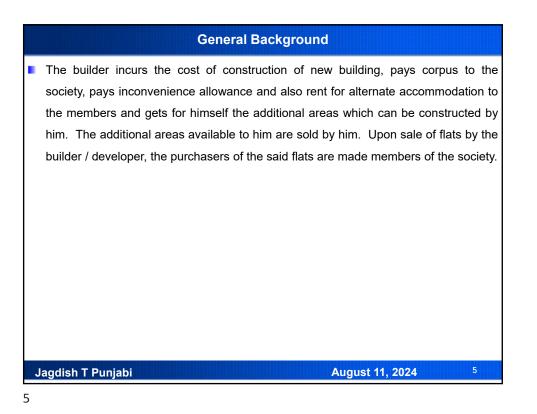
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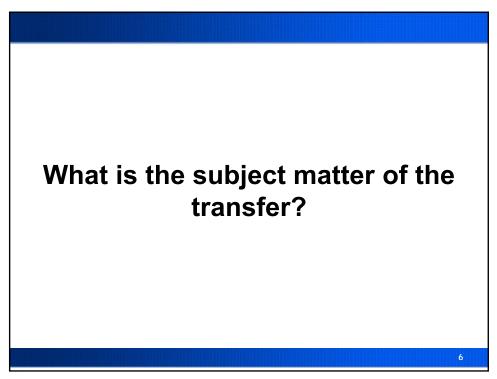
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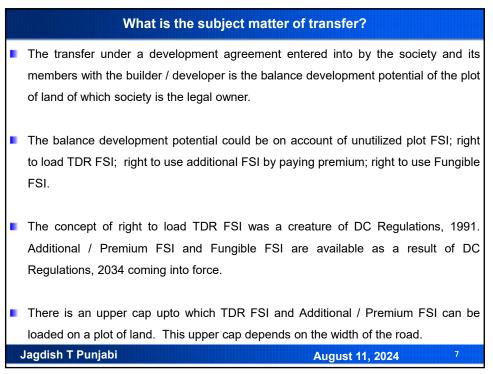
## **General Background**

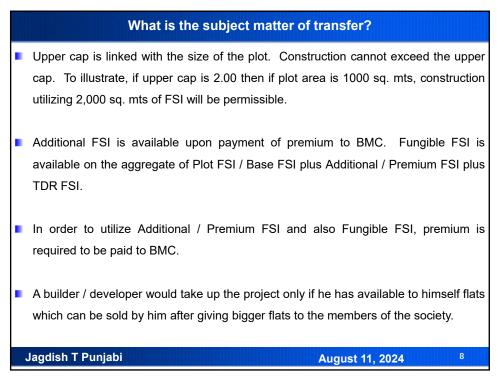
- The presentation deals with the situation where the society along with its members enters into a development agreement with the builder / developer where under the builder / developer is to exploit the entire development potential of the plot of land belonging to the society by constructing a new building 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

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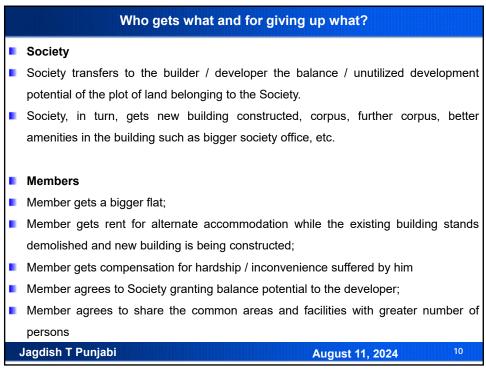


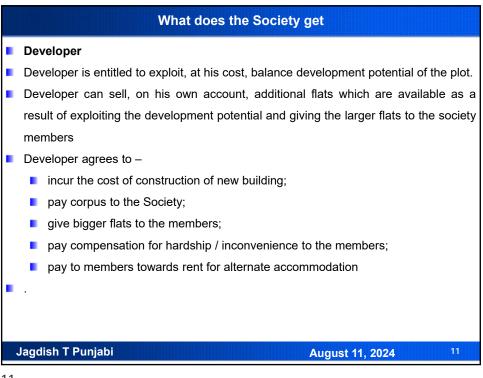


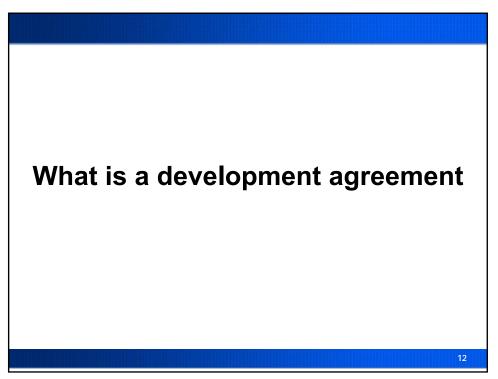












## **Observations from Bom HC in Adityaraj Builders**

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."

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## What is a Development Agreement?

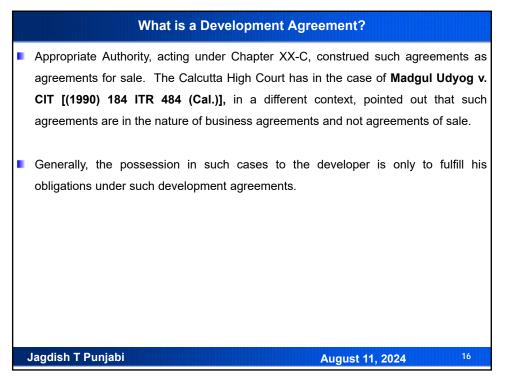
- Development Agreements are agreements where the developer agrees to put up construction on owner's plots in consideration of his parting with a part of the plot.
- The development agreement is some sort of business agreement and it basically postulates coming together of two parties only i.e. the developer 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".

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## 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)

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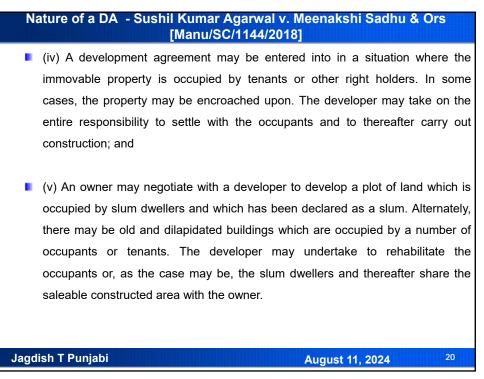
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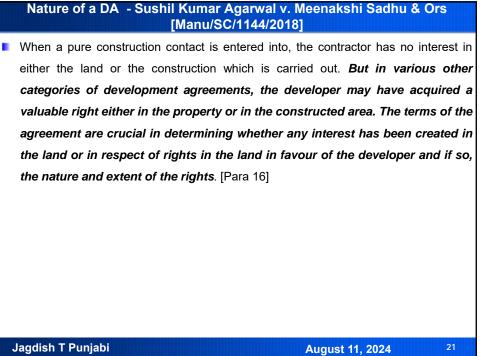
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## Nature of a DA - Sushil Kumar Agarwal v. Meenakshi Sadhu & Ors

- 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;
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## 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.

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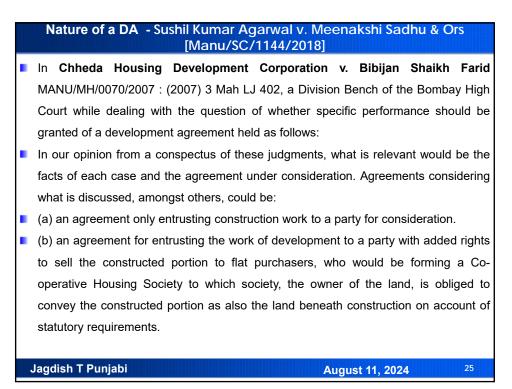
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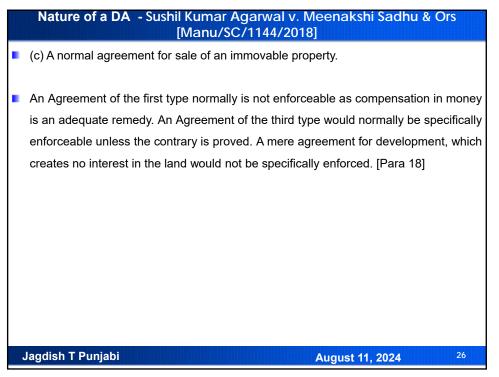
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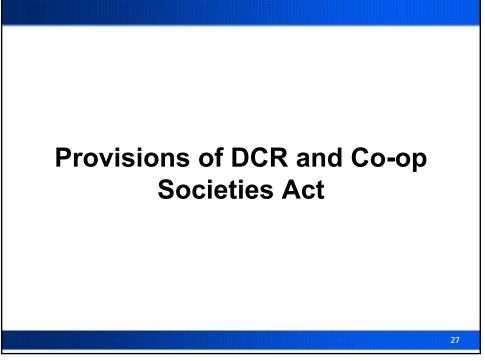
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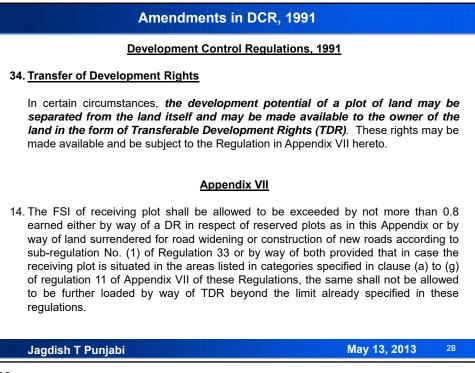
There could be situations where it is the developer who by his efforts has rendered a property developable by taking steps in law. In development agreements of this nature, where an interest is created in the land or in the development in favour of the developer, it may be difficult to hold that the 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.

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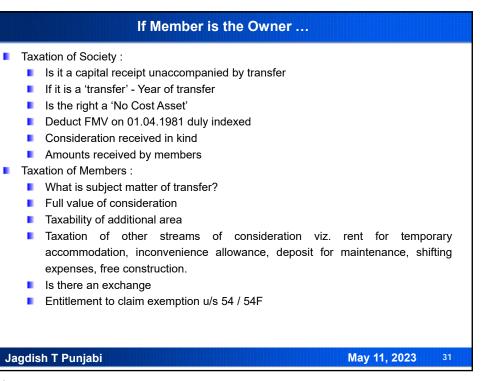






# Who is the owner of the rights ? Arguments to support that Society is the owner : Incorporated Body – Provisions of the Maharashtra Co-operative Societies Act Conveyance in favour of Society Title records in favour of Society Bye laws of the Society Various clauses in Flat Sale Agreement under MOFA 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 May 11, 2023 Jagdish T Punjabi

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?
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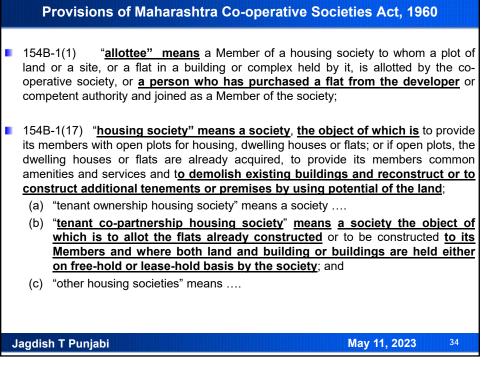
	Circular No 9 dated 25.03.1969	
11	0. TENANT CO-PARTNERSHIP CO-OPERATIVE HOUSING SOCIETIES - WHETHER LEGAL OWNERSHIP IN FLATS CAN BE SAID TO VEST IN INDIVIDUAL MEMBERS THEMSELVES AND NOT IN CO-OPERATIVE SOCIETY. Instructions were issued in 1955 to the effect that in the case of tenant co-partnership 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. 3.	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.	
Circular : No. 9 [F. No. 8/2/69-IT(A-I)], dated 25-3-1969.		
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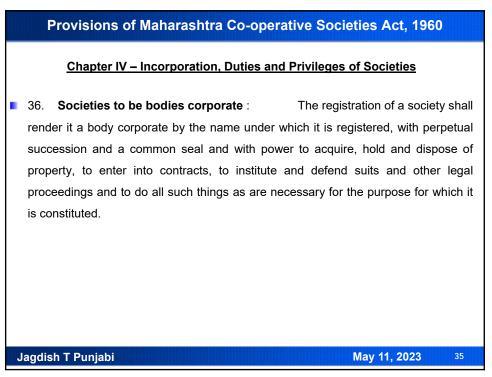
## Extracts from Model Flat Sale Agreement

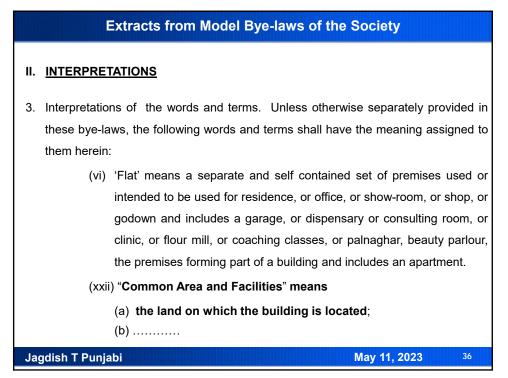
- 4. The Promoter hereby declares that the Floor Space Index available in respect of the said land is \_\_\_\_\_\_ sq. mts. only and that no part of the said floor space index has been utilized by the Promoter elsewhere for any purpose whatsoever. In case the said floor space index has been utilized 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. <u>The Flat Purchaser shall have no claim save and except in respect of the Flat hereby agreed to be sold to him</u> 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.

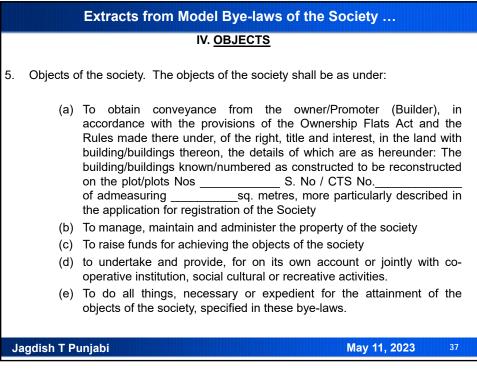
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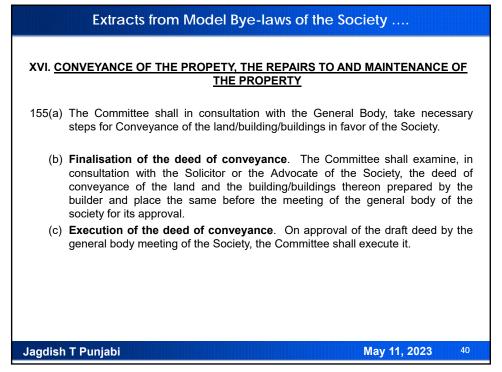


Extracts from Model Bye-laws of the Society		
II. <u>RIGHTS OF MEMBERS</u>		
<ul> <li>(A) Getting copy of the Bye-laws</li> <li>(B) Inspection of Books and Records</li> <li>(C) Occupation of Flats</li> <li>24. Right of occupation of the flat.</li> </ul>		
(a) The member, who is deemed to have been allotted 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		
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# 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.

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

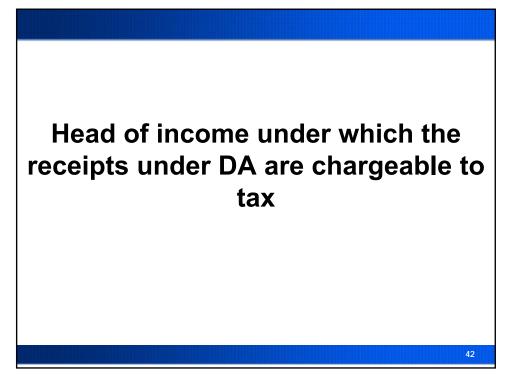
## Ramesh Himmatlal Shah v. Harsukh Jadhavji Joshi

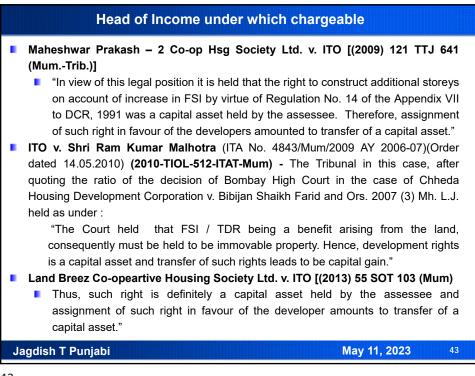
"The flat is owned by the Society and the allottee has a right or interest to occupy the same. There is nothing in the language of Section 31 to indicate that the right to occupation which is the right to be sold in auction is not attachable in execution of the decree. There is nothing in Section 31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

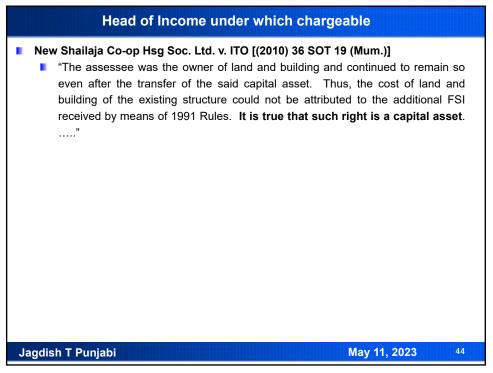
"A flat in a tenant co-partnership housing society under the Maharashtra Cooperative Societies Act is liable to attachment and sale in execution of a decree against a member in whose favor or for whose benefit the same has been allotted by the Society. The right to occupy a flat of this type, assumes 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)"

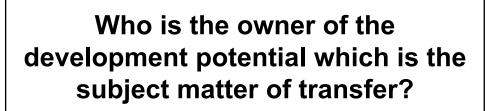
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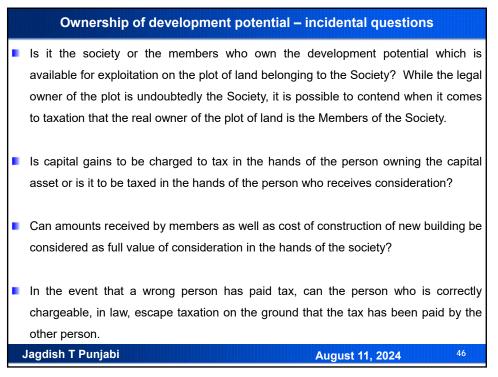
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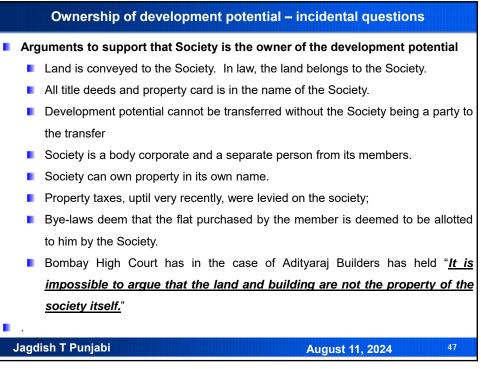


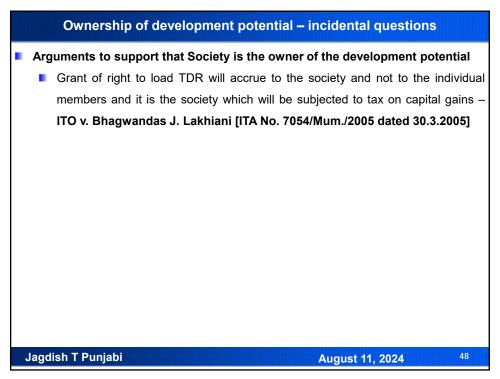


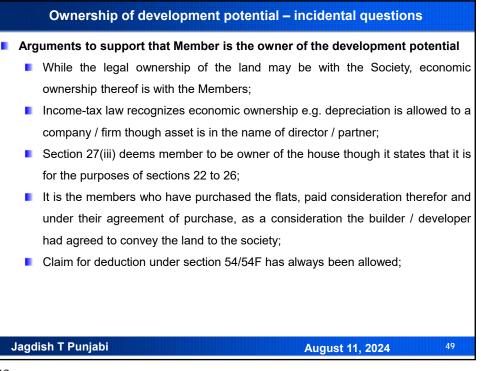


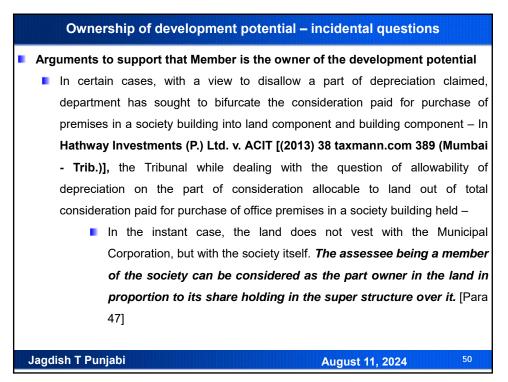


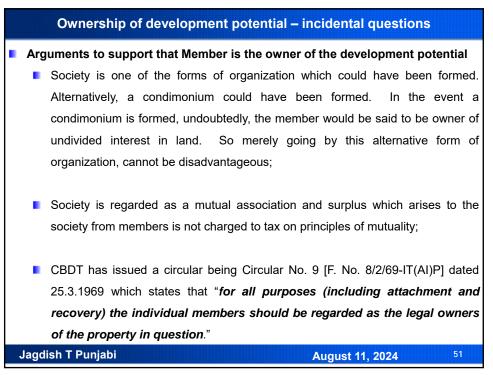






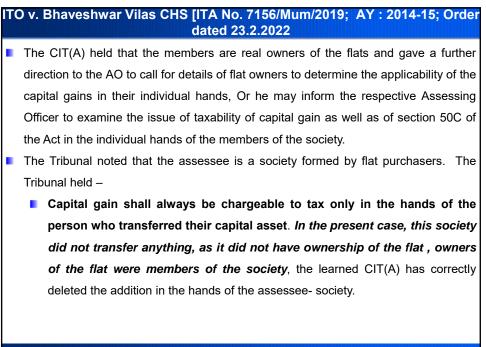






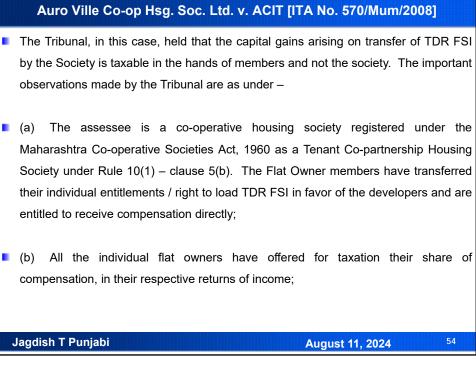
## ITO v. Bhaveshwar Vilas CHS [ITA No. 7156/Mum/2019; AY : 2014-15; Order dated 23.2.2022]

- 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.



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

- (c) According to CBDT Circular No. 9 dated 25<sup>th</sup> 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

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# 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, <u>additional FSI available to the assessee in view of DCR, 1991, was a right acquired</u> <u>by virtue of being owner of the plot, is correct. Thus, such a right is definitely a</u> <u>'Capital Asset'</u> held by the assessee and <u>assignment of such a right in favour of the</u> <u>developer amounts to transfer of capital asset</u>. 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 <u>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</u> 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.)]

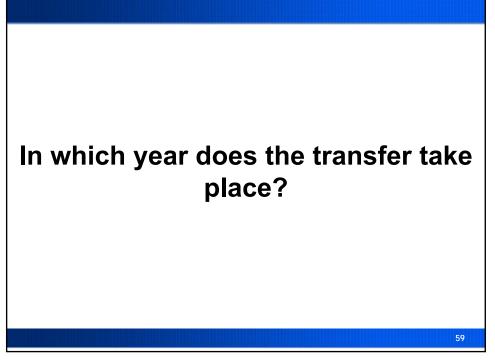
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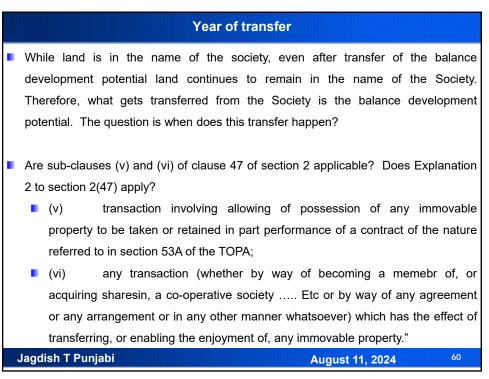
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## Development potential is distinct from land

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.)]





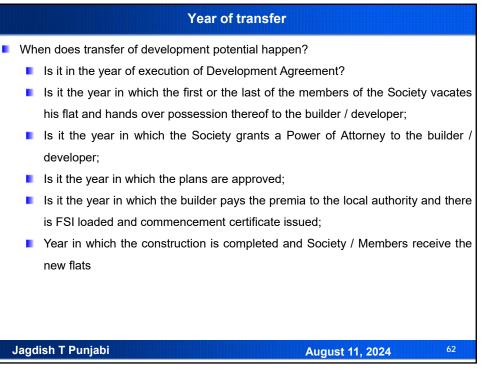
## Year of transfer

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 <u>disposing of or parting</u> <u>with</u> an asset or <u>any interest therein</u>, 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.

Jagdish T Punjabi

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## 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.

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

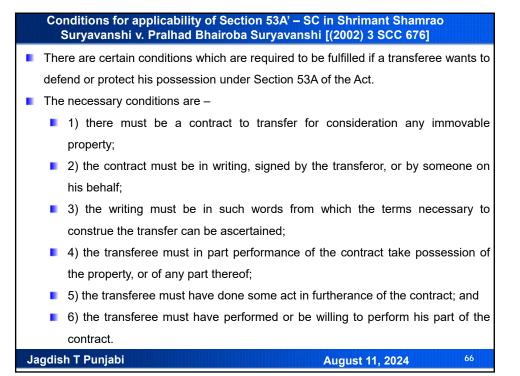
- Supreme Court in the case of CIT v. Balbir Singh Maini [(2017) 86 taxmann.com 94 (SC)] was dealing with the case of an assessee who had an agreement which was not registered. For the relevant AY, 2007-08, the assessee filed return declaring certain income. The AO held that since physical and vacant 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]

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## 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.

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# 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.

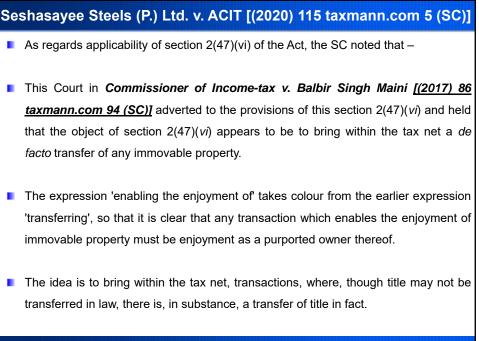
Jagdish T Punjabi

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

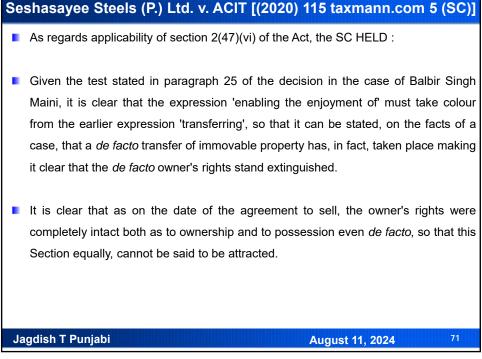
- The Supreme Court held
  - grant of mere license to the developer does not amount to transfer even in a case where the land parcel is held as a capital asset;
  - no transfer had arisen in the year of entering into the Joint Development Agreement in terms of section 2(47)(v) of the Act, when the license 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.

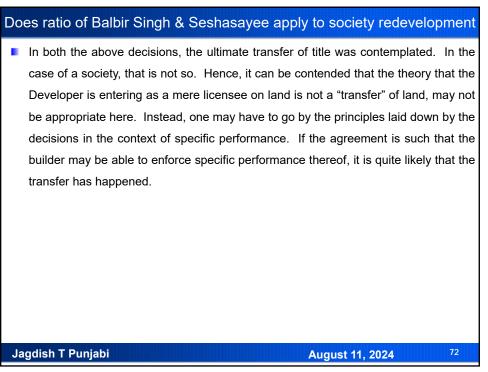
#### Jagdish T Punjabi

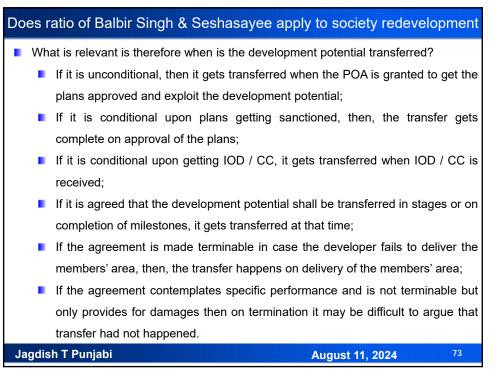
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# Bom HC : Bhatia Nagar Premises Co-op Society Ltd [(2017) 80 taxmann.com 33 (Bombay HC)]

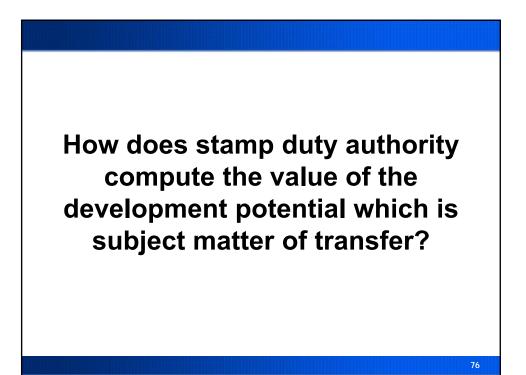
- In this case, the department sought to tax the assessee on capital gains arising on transfer of additional FSI in the year of execution of the agreement. Possession of existing building was not handed over. Agreement provided that in the event that IOD and CC is not obtained within six months from 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.

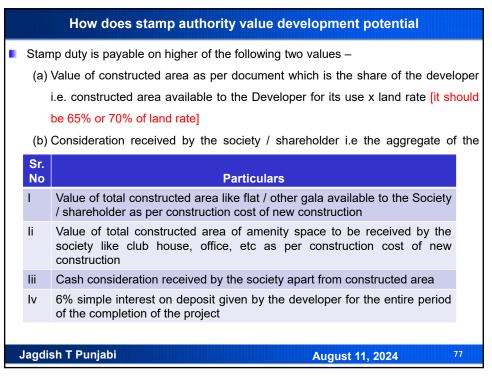
# Bom HC : Bhatia Nagar Premises Co-op Society Ltd

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.

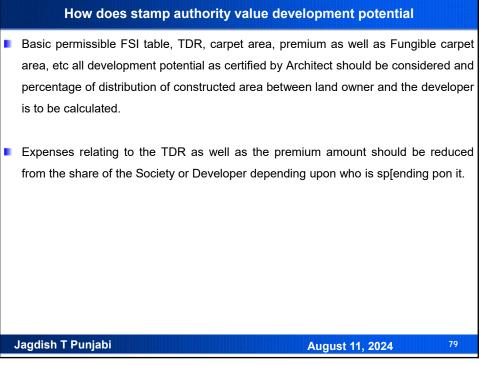
Jagdish T Punjabi

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	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.	
Jagdish T Punjabi August 11, 2024 <sup>78</sup>	





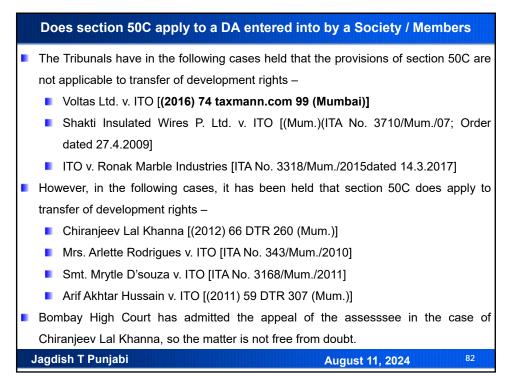
#### Does section 50C apply to a DA entered into by a Society / Members

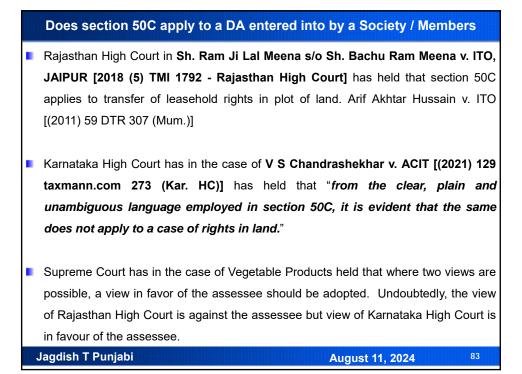
Section 50C applies when there is a transfer of a capital asset being land or building or both.

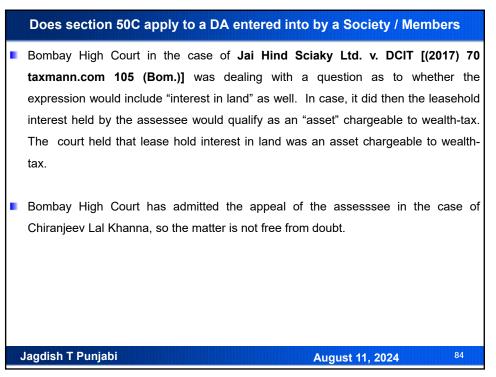
In a development agreement entered into by the land lord with the builder / developer, the land is ultimately to be conveyed to the society of flat purchasers. However, in case of a development agreement entered into by a co-operative society, the land is not to be conveyed to anyone. The society is 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.

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# Assuming 50C applies what should it be compared with

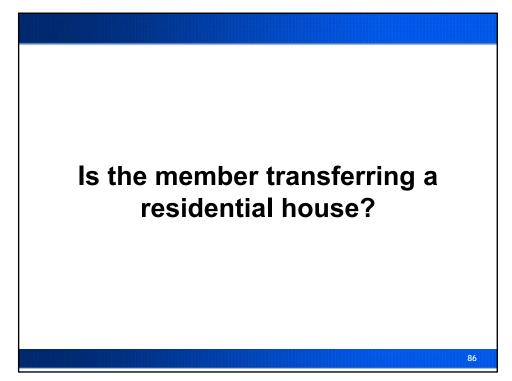
Assuming that the provisions of section 50C are applicable to transfer of development potential, since the consideration flows to both Society as well as to various members and also it assumes various forms e.g. corpus, hardship compensation, rent for alternate accommodation, consideration for development 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.

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#### 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.

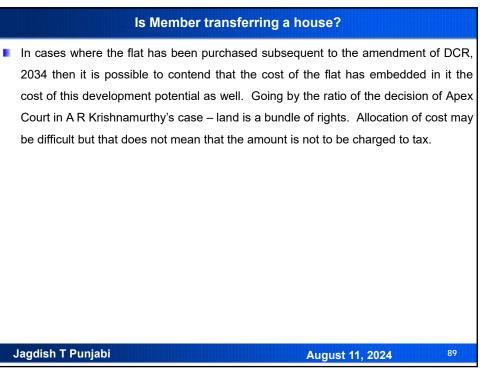
Jagdish T Punjabi

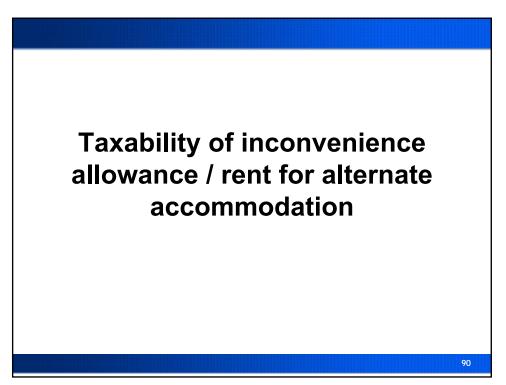
#### August 11, 2024

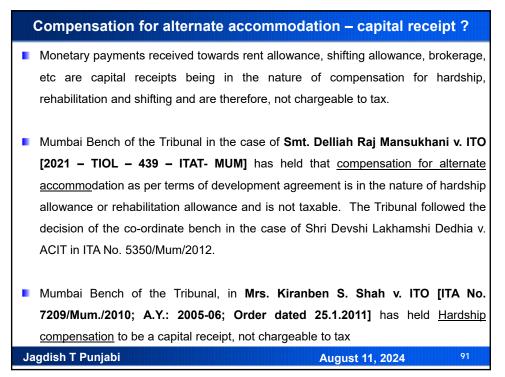
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#### Is Member transferring a house?

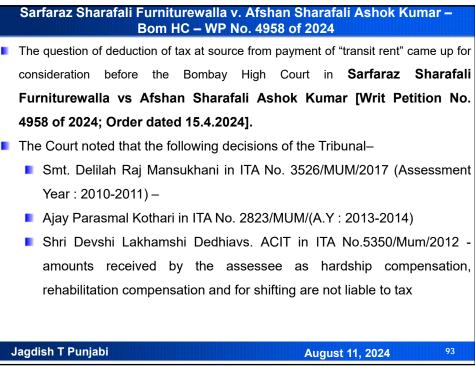
- The documentation is always for transfer of a development potential and not for transfer of a residential house. The member continues to be the owner of the house in the interregnum while the new building is being constructed. The mortgage created by the member survives.
- Subject to satisfaction of 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 Jagdish T.Runjabiopment potential as well.
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# 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."

**Jagdish T Punjabi** 

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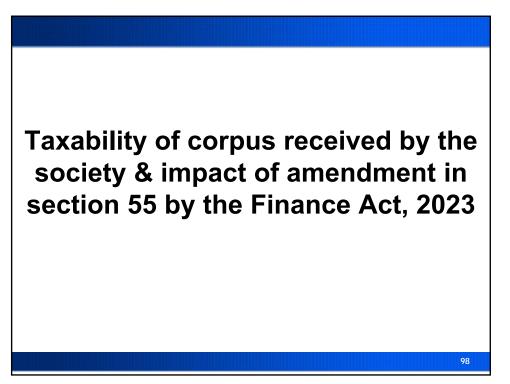
# Taxability of rent free accommodation provided under DA In the context of land owner receiving rent free accommodation from the developer pursuant to the terms of the Joint Development Agreement, the judicial precedents are as follows -In the case of P Madhusudhan v. PCIT [ITA No. 1986 of 2008; AY: 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." 96

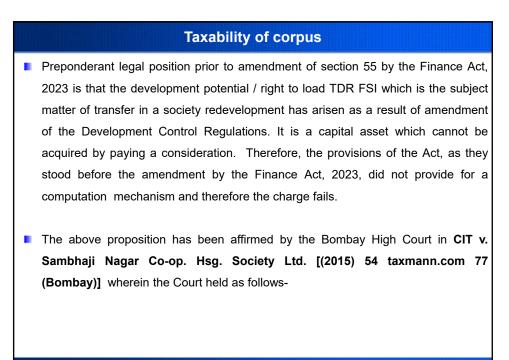
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#### Taxability of rent free accommodation provided under DA

- 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.)]
  Jagdish T Punjabi

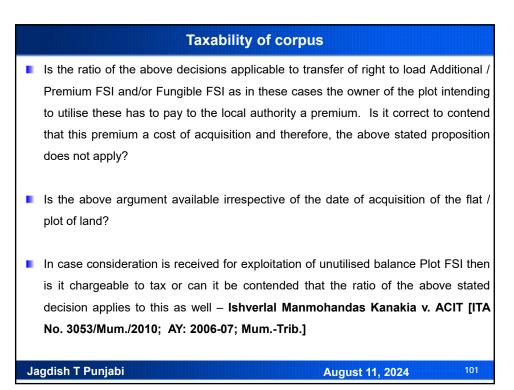


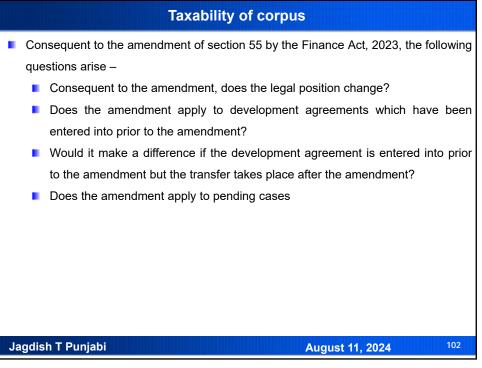


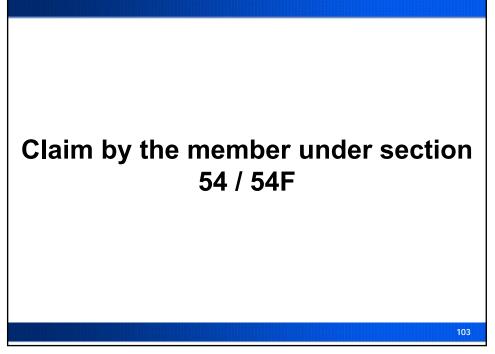
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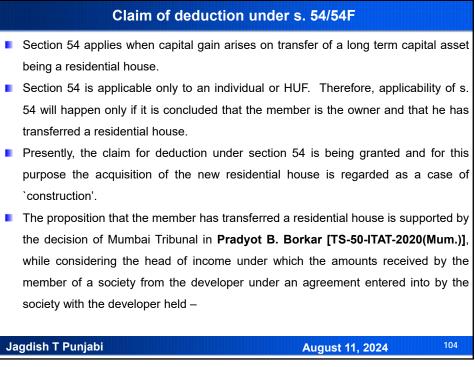
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Taxability of corpus	
In the instant case, <u>additional FSI/TDR is generated by change in the DC</u> . A specific insertion would therefore be necessary so as to ascertain its cost for computing the capital gains. Therefore, the Tribunal was in no 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 no 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 lance 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 assession 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 ou 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]	
Jagdish T Punjabi August 11, 2024 100	









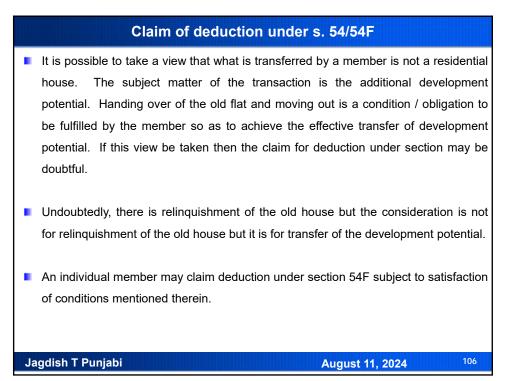
### Claim of deduction under s. 54/54F

- 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';

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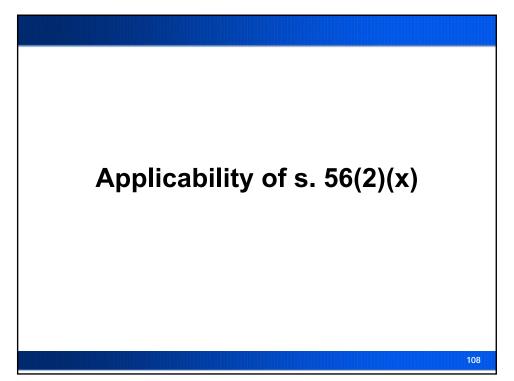
# Claim of deduction under s. 54/54F

- 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.

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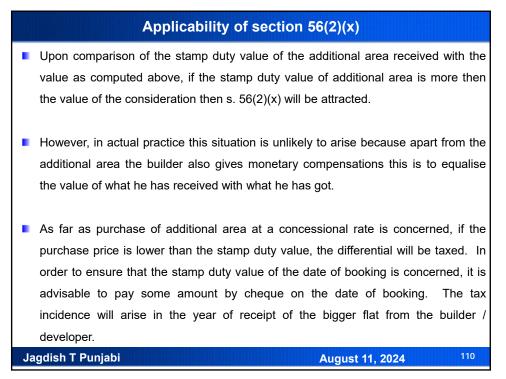
# Applicability of section 56(2)(x)

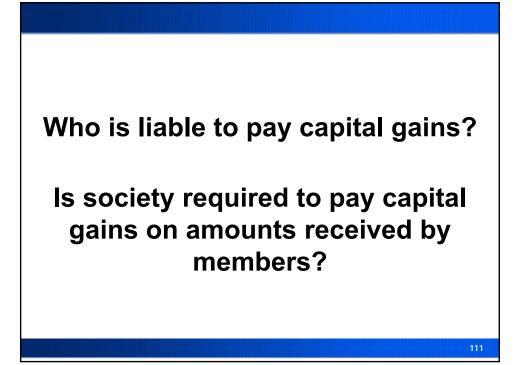
- In the case of a society redevelopment, a member receives a house which is bigger than the earlier house. The entitlement to a larger area arises pursuant to the Development Agreement (and Permanent Alternate Agreement) entered into by the Member with the Builder / Developer.
- What is being received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

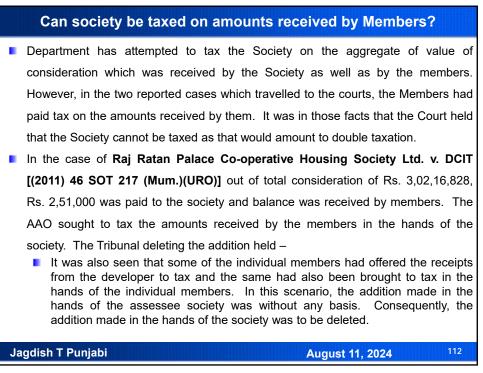
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# Can society be taxed on amounts received by Members?

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?"

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# Can society be taxed on amounts received by Members? The Court decided the issue as under 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 amounts 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.)]

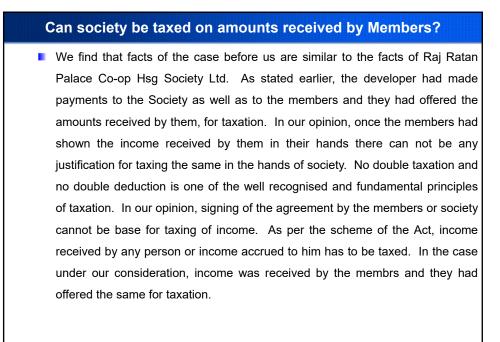
#### Can society be taxed on amounts received by Members?

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 -

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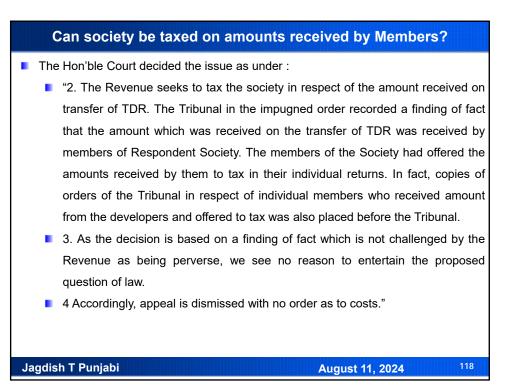
# Can society be taxed on amounts received by Members?

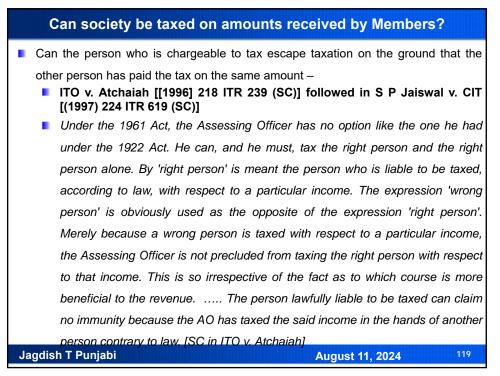
Before the Hon'ble Bombay High Court following question was raised by the department-

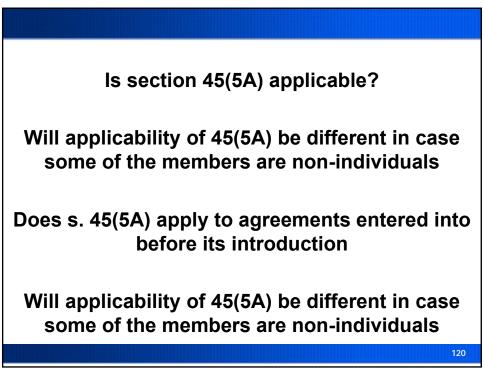
"Whether on the facts and in the circumstances of the case and in law, the Tribunal is right in holding that amount received cannot be taxed in the hands of assessee society because society continues to be owner of the land as no change in ownership of land has taken place without appreciation the fact 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?"

Jagdish T Punjabi

August 11, 2024







#### 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.

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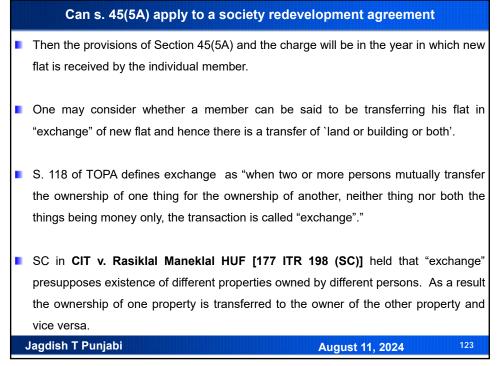
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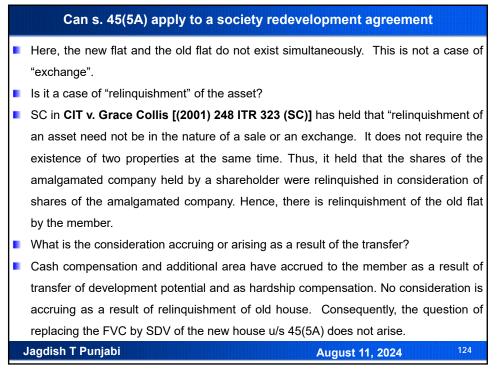
# Can s. 45(5A) apply to a society redevelopment agreement

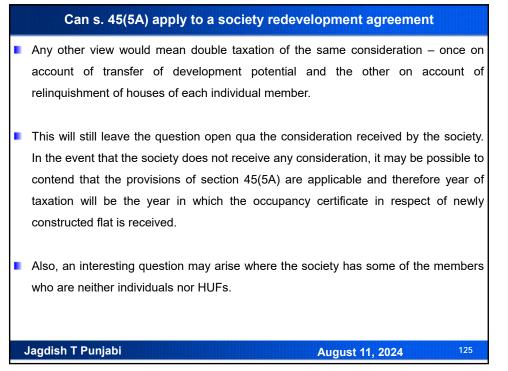
- While it is true that an individual who is a member of a society may be regarded as an owner of land or building and the ingredients of specified agreement are satisfied. The real question is whether the ingredient of s. 45(5A) viz. transfer of a capital asset being land or building or both is satisfied. 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.

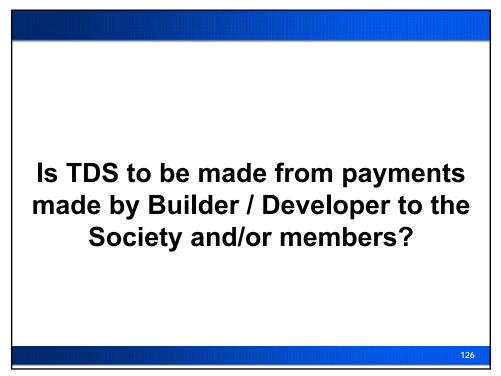
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# TDS under section 194IC

- Payment under specified agreement.
- 194-IC. Notwithstanding anything contained in <u>section 194-IA</u>, 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 <u>section 45</u>, 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 incometax 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;

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 payment of such sum is by way of consideration

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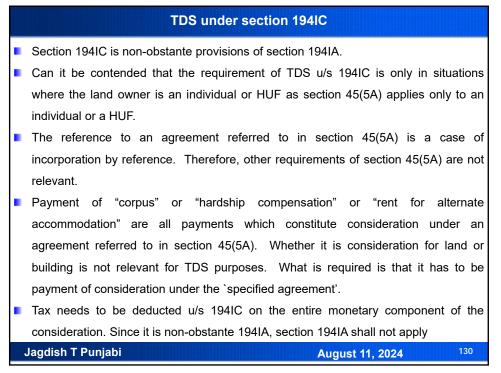
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 Upon satisfaction of above mentioned conditions, 10% of such sum is to be deducted at the time of credit or payment whichever is earlier

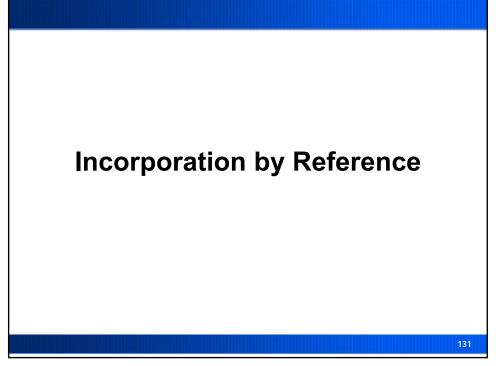
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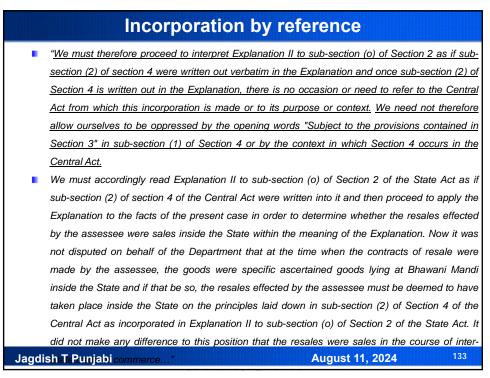


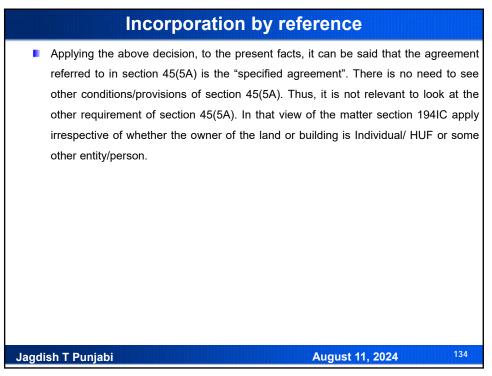


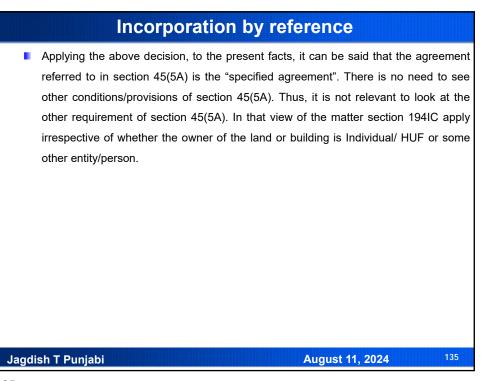


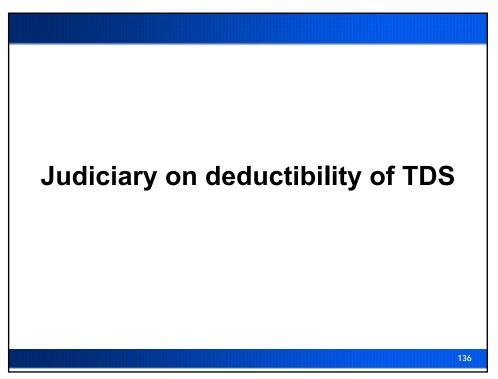
# Incorporation by reference

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:









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

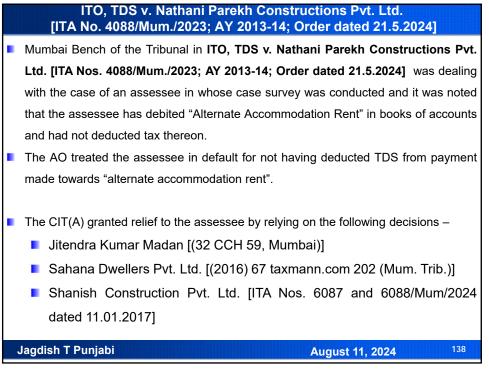
The Court held –

"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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### ITO, TDS v. Nathani Parekh Constructions Pvt. Ltd. [ITA No. 4088/Mum./2023; AY 2013-14; Order dated 21.5.2024]

- 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 1941 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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### ITO, TDS v. Nathani Parekh Constructions Pvt. Ltd. [ITA No. 4088/Mum./2023; AY 2013-14; Order dated 21.5.2024]

- 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 redevelopment.
- 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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#### Nathani Parekh Constructions Pvt. Ltd. . ITO, TDS [ITA Nos. 4174 & 4171/Mum./2023; AY 2018-19 & 19-20; Order dtd. 11.7.2024]

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.

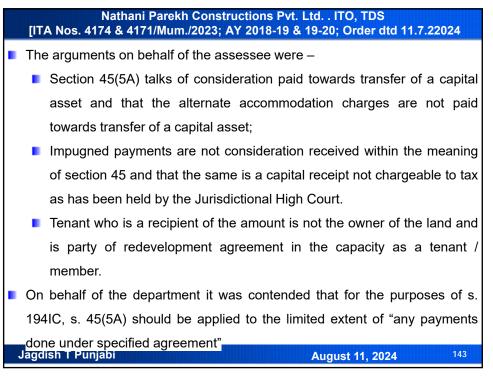
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#### Nathani Parekh Constructions Pvt. Ltd. . ITO, TDS [ITA Nos. 4174 & 4171/Mum./2023; AY 2018-19 & 19-20; Order dtd 11.7.2024]

- 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"



#### Nathani Parekh Constructions Pvt. Ltd. . ITO, TDS [ITA Nos. 4174 & 4171/Mum./2023; AY 2018-19 & 19-20; Order dtd 11.7.22024

- The Tribunal noted that the payment is in the nature of compensation towards hardship that the tenaths 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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#### Nathani Parekh Constructions Pvt. Ltd. . ITO, TDS [ITA Nos. 4174 & 4171/Mum./2023; AY 2018-19 & 19-20; Order dtd 11.7.22024

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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#### Nathani Parekh Constructions Pvt. Ltd. . ITO, TDS [ITA Nos. 4174 & 4171/Mum./2023; AY 2018-19 & 19-20; Order dtd 11.7.2024

- 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

