

ALL INDIA FEDERATION OF TAX PRACTITIONERS

TAXATION OF CAPITAL GAINS

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INDORE

NOT LIABLE TO CAPITAL GAINS IF NOT A CAPITAL ASSET

Any gain arising on sale of an asset which is not a capital asset u/s. 2(14) of the Act is out of purview of capital gains.

Eg. Profit on Sale of

- Personal used cars;
- Silver utensils of personal use;
- Rural agricultural land

are not liable to capital gain.

• Assets not being Capital asset u/s. 2(14) received as Gift even from non-relative or at less than FMV or stamp duty value - **Sec. 50C and Sec. 56(2)(x) - NOT APPLICABLE.**

CAPITAL ASSET – SECTION 2(14)

Capital Assets:

Property of any kind held by an assessee, whether or not connected with his business or profession.

Eg. Land, Building, Vehicles, Patents, Trademarks, Leasehold Rights, Jewellery, etc.

Exclusions :-

Stock in trade, consumable stores, held for the purpose of business or profession. Personal effects (Movable property) held for personal use, rural agricultural land in India.

SHORT TERM OR LONG TERM CAPITAL ASSET:-

if any listed security or units of equity oriented fund are not held for more than 12 months then it will be a short term capital asset. Shares of a company not listed or **an immovable property being land or building or both** are not held for **more than 24 months** it will be short term capital asset w.e.f **A.Y. 2018 -19**.

Any other asset that is held for more than 36 months is a long-term capital asset

CONVERSION OF CAPITAL ASSET INTO STOCK IN TRADE OR VICE-VERSA

Conversion of Capital Asset into stock-in-trade [Sec. 45(2)] :-

FMV (not the Stamp Duty value) of such property on the date of conversion shall be deemed to be the full value of consideration. Taxable in the year in which such stock in trade is sold.

Conversion of stock-in-trade into Capital Asset [Sec. 28(via)] :-

From A.Y. 2019-20 if the inventory is converted into capital asset then FMV as per rule 11UAB on the date of conversion will be chargeable under the head business income.

FORFEITURE OF ADVANCE MONEY RECEIVED

Section 56(2)(ix) :- Forfeiture of advance money received towards sale of a **capital asset** is taxable u/s. 56(2)(ix) of the Act w.e.f .A.Y. 2015-16.

Forfeiture of advance money received against sale of rural agricultural land is not taxable u/s. 56(2)(ix).

SECTION 50C

If stamp duty value is higher than **5%** (**10% w.e.f A.Y. 2021-22**) or more of the transaction value then the **stamp duty value will have to be adopted for the purpose of Sec. 50C.**

However, if the **variation gap** is not more than **5%** (**10% w.e.f A.Y. 2021-22**) between such transaction value and stamp duty value, then the **transaction value will be adopted as full value of consideration.**

APPLICABILITY OF SEC.50C TO LEASEHOLD PROPERTY

Section 50C does not apply to transfer of land & building being leasehold property.

CIT vs. Greenfield Hotel & Estates P. Ltd. (2016) 389 ITR 68 Bom.

Heatex Product P. Ltd. (ITA No. 8197/Mum/2010)

Atul G. Puranik vs. ITO (ITA No. 3051/Mum/2010)

ACIT v. Everest Ind. Ltd. (2017) 158 TR (A) 749 (Mum. Trib.)

Contrary view has been taken in Ram Ji Lal Meena vs. ITO [ITA No. 53/2018 (Raj. HC)]

Ram Ji Lal Meena vs. ITO [ITA No. 53/2018 (Raj. HC)]

*“In the judgment of **Bombay High Court** it was held that **Section 50C of the Act of 1961** would not be applicable on transfer of lease hold rights of the land. Bare perusal of **Section 50C of the Act of 1961** does not show that transfer of capital asset for consideration should be other than of lease hold property or khatedari land. The court cannot re-write the provision. If analogy taken by the **Bombay High Court** in the case (supra) is applied in general then **Section 50C of the Act of 1961** would not be applicable in majority of the cases as not it is allowed as lease hold property. **Section 50C of the Act of 1961** is applicable on **transfer of** capital assets for consideration. The **Bombay High Court** has not referred as how the land was in the balance-sheet. It is as a capital asset or not thus we are unable to apply the judgment of **Bombay High Court** in the case of **M/s. Greenfield Hotels and Estates Pvt. Ltd. (2016)389 ITR 68 (Bom).**”*

COLOUR OF MONEY

Purchase of property out of bank loan not a bar in allowing exemption u/s 54F.

Kyasa Srinivas v. JCIT (2017) 157 TR (A) 745 (Hyd. Trib.), Kapil singh agrawal v. ACIT (ITA no. 2975 of 2013 dt. 16-7-2013 Del trib.), Smt. Sumathi Gedpudi (ITA no. 1403 of Hyd. Of 2014 dt. 1-5-15).

SEC. 54: EXEMPTION ON SALE OF HOUSE PROPERTY ON PURCHASE OF ANOTHER HOUSE PROPERTY

The investment should be in the residential house i.e. **construction with basic amenities.**

Ashok Syal vs. CIT (2012) 24 taxmann.com 274 (P. & H. HC) and in the case of Dr. A. S Atwal V. CIT (2005) 146 taxmann 171 (P&H) it was held that a house with tin-shed and with no basic amenities like lat, bath and no approved map before construction is not a house therefore NO exemption u/s 54.

Investment in 2 Residential houses in India [w.e.f A.Y. 2020-21]:-

The exemption on two house properties will be allowed once in the lifetime of a taxpayer, **provided the capital gain does not exceed Rs. 2 crores.**

SECTION 54F

Construction of new residential property can precede sale of original asset.

Smt. Shantaben p. Gandhi V. CIT (1981) 129 ITR 218 (Guj.),
CIT V. H. K. Kapoor (1998) 150 CTR (All.) 128,
CIT v. J. R. Subramanya Bhat (1987) 165 ITR 571 (Kar.),
CIT v. Bharti Mishra (2014) taxmann.com 50 (Delhi),
CIT V. R. Srinivasan (2011) 198 taxmann 26 (Mad.),
Ito V. Saroj Devi Agrawal (2018) 159 TR (A) 414 (JP.Trib).

SECTION 54F

Exemption cannot be denied if construction is not complete within 3 years.

CIT v. Sambandam Udaykumar (2012) 19 taxmann.com 17 (Kar.),
Sardarmal Kothari (302) ITR 286 (Mad.)

SECTION 54 & 54F

New asset can be in the name of wife.

In the case of CIT Vs. Gurnam Singh : (2014) 327 ITR 278 (P&H),
CIT v.V. Natarajan (2006) 287 ITR 271
(Mad.), CIT V. Kamal Wahal (2013) 30 taxmann.com 34 (Delhi).

**IF NO CAPITAL GAIN REMAINS AFTER
AVAILING EXEMPTION U/S 54F THEN
SECTION 50C NOT
APPLICABLE**

Since Section 50C does not start with non-obstante clause therefore if net consideration arising out of sale of land or building has been invested in accordance with Section 54F then Section 50C will not come into play as held in the cases of Dhanveer Singh Gambhir vs. ITO [2015] 56 taxmann.com 205 (Indore ITAT), Gyanchand Batra ITAT Jaipur ITA 9/JP/2010/13-08-2010 and in the case of ITO V. Rajkumar Parashar ITAT Jaipur ITA No. 11/JP/2016/dt. 28-9-2017 A.Y. 2011-12.

SEC. 54EC

Exemption on sale of
house property on
investing CG in specific
bonds



**From A.Y. 19-20 allowed
only against sale of land or
building or both and such
bond for 5 years cap.**

CAPITAL GAIN ACCOUNT

- (i) as per CBDT circular No. 743 dt 6-5-96, if any amount lying in capital gain account and before utilization the assessee deceased then unutilized amount lying in the account shall not be the income of the deceased u/s 45 or cannot be the income of the legal heir.
- (ii) The capital gain account can be closed only with the permission of the assessing officer.
- (iii) Assessee himself cannot withdraw the amount from the capital gain account, i.e. the said amount can be used only for the purpose of issuing bankers cheque by the bank directly in favour of recipient of material supplier or contractor etc. for the purpose of making payment for residential house construction or for purchase of residential house.
- (iv) if the amount lying in the capital gain account is not utilized within the stipulated period of two year for purchase or within three years for construction of the residential property from the date of transfer of the original asset U/s 54 or 54F then such unutilized amount will be chargeable to long term capital gain u/s 45 as income of the previous year in which the period of three years from the date of transfer of the original asset expires.

SEC. 55(2)(a)

From A.Y. 17-18 **cost of acquisition of goodwill of a profession** shall be taken to be NIL. Earlier its cost of acquisition was not specified to be Nil therefore in the case of Dr. K. Premraj V. Chennai (vasan eye care) v. DCIT, Chennai ITAT [ITA No. 1270/Mds/2013]. AO treated the same as non compete fee but ITAT held it as goodwill of profession out of purview of tax.

If any asset which was not a capital asset earlier but came within purview of capital asset by virtue of amendment in law or by change in any law like ***rural agricultural land became urban agricultural land due to widening of municipal limits*** then cost of acquisition of the said asset will be the fair market value on the date when the said asset became capital asset. The said view becomes stronger in view of recently introduced Sec. 55(2)(ac) which permits **grandfathering** in case of shares which were earlier exempt U/s 10(38) but now became taxable due to introduction of Section 55(2)(ac) and Section 112A. w.e.f A.Y. 2019-20.

SEC. 55(2)(a)

Earlier the said view was taken in the case of agricultural land cases of S. Hoshnak Singh (2007) 212 CTR (P&H) 422, (2007) 292 ITR 390 (P&H) 390, CIT V. Gurcharan Singh (2007) 212 CTR (P&H) 420, (2007) 292 ITR 387 (P&H).

Possessory right of any property is not a tenancy right hence also out of purview of capital gain as held in the case of CIT V. Appukutty (2001) 171 CTR (Ker.) 145, (2002) 253 ITR 159 (Ker.)

SECTION 50 SALE OF DEPRECIABLE ASSET

CIT v. Assam Petroleum Ind. P. Ltd. (2003) 262 ITR 587 (Gau.) - Section 50 is for method of computing the capital gain and not about determining nature of capital gain. **Sec. 50 nowhere says that gain arising from depreciated asset shall be treated as short term capital gain.**

CIT v. ACE Builders P. Ltd. (2005) 144 taxmann 855 (Bom.) - Deeming fiction of Section 50 does not state that deeming provisions of Section are not only restricted to Section 48 & 49 but also to other sections, it means other exemptions u/s 54EC, 54F etc. cannot be denied.

M. Raghavan v. ACIT (2004) 134 taxmann 790 (Mad.) – Indexation Benefit will not be available. Exemption u/s. 54EC was also allowed on gain arising u/s 50 of the Act.

SLUMP SALE – SECTION 2(42C)

Transfer of one or more undertakings as a result of the sale for a lump sum consideration without values being assigned to the individual assets and liabilities in such sale.

Undertaking does not include individual assets or liabilities or any combination thereof not constituting a business activity

Cost of Acquisition - Net worth of the undertaking

Section 50C – Not Applicable in case of transfer of land and building under slump sale u/s. 50B.

COMPULSORY ACQUISITION OF IMMOVABLE PROPERTY

If the compulsory acquisition of any immovable property being any land or building or any agricultural land has been done in accordance with the Right to Fair Compensation and Transparency in Land acquisition and Rehabilitation and Resettlement Act, 2013 (**RFCTLARR**), then compensation received on such acquisition will not be liable to income tax as per **CBDT circular No. 36/2016 dtd. 25-10-2016**.

Further, no TDS is deductible u/s. 194LA of the Act on such compensation.

SHARES TRADING AND INVESTMENT

CBDT in a circular 4/2007 dt. 15-6-2007 has mentioned that an assessee can have two portfolio one as investment and second as stock in trade.

CIT v. Gopal Purohit (2011) 336 ITR 287 (Bom.),
CIT v. Avinash Jain (2013) 214 taxmann 260 (Del)

**SALE OF LISTED SECURITIES
ONLINE OR OFFLINE BOTH
LIABLE TO TAX @ 10%**

Long term capital gain tax will be 10% without indexation after allowing exemption of capital gain of first Rs. 1 Lakh subject to the condition that acquisition and sale of shares have borne STT or sale of equity oriented fund have borne STT or sale of securities is covered within conditions laid down in the CBDT notification dated 1-10-2018. If the sale of such listed securities is not covered in the conditions laid down U/s 112A then the assessee will have option to pay tax as specified U/s 112 where as per the first proviso to Sec. 112 also the rate of tax is @10% with indexation but only a disadvantage that out of such long term capital gain first Rs. 1 Lakh will not be exempted.

SECTION 50D – FMV DEEMED TO BE FULL VALUE OF CONSIDERATION

Where the consideration received or accruing is **not ascertainable**, then FMV on the date of transfer of the capital asset being transferred shall be deemed to be the full value of consideration.

JOINT DEVELOPMENT AGREEMENT(JDA)

If From A. Y. 2018-19 Section 45(5A) was inserted which states that, “Notwithstanding anything contained in subsection (1), where the capital gain arises to an assessee, being an **individual or a Hindu undivided family, from the transfer of a capital asset, being land or building or both, under a specified agreement, the capital gains shall be** chargeable to income-tax as income of the previous year in which the certificate of completion for the whole or part of the project is issued by the competent authority. ***For the purposes of section 48, the stamp duty value on the date of issue of the said certificate, of his share, being land or building or both in the project, as increased by the consideration received in cash, if any, shall be deemed to be the full value of the consideration received or accruing as a result of the transfer of the capital asset :***

Provided that the provisions of **this sub-section shall not apply where the assessee transfers his share in the project on or before the date of issue of said certificate of completion. The capital gains shall be deemed to be the income of** the previous year in which such transfer takes place and the provisions of this Act, other than the provisions of this sub-section, shall apply for the purpose of determination of full value of consideration received or accruing as a result of such transfer.

In the aforesaid section for the purpose of full value of consideration U/s 48 the word cheque or online payment have not been included in the act probably due to drafting error, but because of this unintended omission of the word “cheque”, the cheque amount should not be treated as out of purview of tax. If the assessee transfer his share before completion certificate then he will not be covered U/s 45(5A) and will be governed by all other provisions of the act.

In the case of **CIT v. Balbir Singh Maini civil appeal No. 15619 of 2017** **Hon. Supreme** Court held that if the agreement like JDA is not registered then it shall have no effect in law for the purpose of Section 53A of transfer of Property Act, where no possession had been given by the transferor to the transferee of the entire land in part performance of JDA, the possession was delivered if at all was as a licensee for the development of the property and not in the capacity of transferee. Earlier an agreement of sale which fulfill the ingredient of Sec. 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 Sec. 53A of Transfer of Property Act and Sec. 17 and 49 of Indian Registration Act. By the aforesaid amendment, the words “the contract, though required to be registered, has not been registered, or” in Sec. 53A of TP 1882 Act have been omitted. By the said amendment the agreements of immovable property has to be compulsorily registered.

In case of payment other than in kind TDS U/s 194IC will also have to be deducted by the developer.

"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."

CONCLUSION

Issues in capital gain are very wide and unending, the above discussion is brief. Every capital gain transaction has to be analyzed from every aspect, otherwise very thin ignorance may result in heavy burden of tax.

The issues discussed by me in this presentation are very limited and before taking any decision on taxation of capital gains, law prevailing at the time of transactions and various recent court rulings must be kept in mind.

THANK YOU ! 

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