REAL ESTATE TRANSACTIONS IN INCOME TAX ACT, 1961

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INTRODUCTION –

Real estate transactions are one of the main source for generation and application of black money. The Government is regularly trying to plug loop holes in such transactions by inserting various provisions from time to time in the Income Tax Act and for this number of amendments have been introduced in the Income Tax Act in recent years. The most important amendments in this regard are sections 56(2)(vii), section 50C and section 43CA which covers more or less all types of transactions related to transfer of immovable property. The Finance Act, 2013 has also introduced section 194IA for deduction of tax at source in case of sale of immovable property.

Section 56(2)(vii) of the Income Tax Act, 1961 deals with transfer of an immovable property being received by an Assessee as Capital Assets. Section 50C of the Income Tax Act, 1961 deals with consideration amount received on transfer of immovable property held as Capital Assets. Section 43CA of the Income Tax Act, 1961 deals with consideration amount received on transfer of immovable property other than Capital Assets. Section 50C of the Income Tax Act, 1961 is applied in case of Capital Gain whether Short Term or Long Term. Section 43CA of the Income Tax Act, 1961 has been introduced in the Income Tax Act, 1961 by the Finance Act 2013 w.e.f. 1-04-2014. This section has made all the hue and cry among the real estate dealers.

Section 56(2)(vii) of the Income Tax Act, 1961 –

"(vii) where an individual or a Hindu undivided family receives, in any previous year, from any person or persons —

“(b) any immovable property,—

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

(ii) for a consideration which is less than the stamp duty value of the property by an amount exceeding fifty thousand rupees, the stamp duty value of such property as exceeds such consideration:

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

Provided further that the said proviso shall apply only in a case where the amount of consideration referred to therein, or a part thereof, has been paid by any mode other than cash on or before the date of the agreement for the transfer of such immovable property"

Salient features of Section 56(2)(vii) of the Income Tax Act, 1961 –

1) The section applies only to individuals and HUFs. Transactions related to purchase of property by company, partnership firm, LLP, Trust, AOP, AJP are out of the purview of this section.

2) The stamp duty value of immovable property should be more then Rs.50,000/- if property is transferred without any consideration.

3) The difference in stamp duty value and consideration amount received should be less then Rs.50,000/- if the immovable property is transferred without inadequate consideration.

4) In case of point no 2 above, stamp duty value shall be treated as deemed consideration for the purpose of Income Tax.

5) In case of point no 3 above, stamp value shall be treated as deemed consideration for the purpose of Income Tax, if the value of stamp duty is higher than consideration value by more than Rs.50,000/-

6) If the consideration amount has been paid by mode other than cash either partly or fully in the year of agreement prior to the year in which the registration of the property is done, the stamp value of the property of the year in which agreement to sell was executed shall be treated as deemed consideration in the year of registration for the purpose of Income Tax.

Section 43CA of the Income Tax Act, 1961–

"(1) Where the consideration received or accruing as a result of the transfer by an assessee of an asset (other than a capital asset), being land or building or both, is less than the value adopted or assessed or assessable by any authority of a State Government for the purpose of payment of stamp duty in respect of such transfer, the value so adopted or assessed or assessable shall, for the purposes of computing profits and gains from transfer of such asset, be deemed to be the full value of the consideration received or accruing as a result of such transfer.

(2) The provisions of sub-section (2) and sub-section (3) of section 50C shall, so far as may be, apply in relation to determination of the value adopted or assessed or assessable under sub-section (1).

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

(4) The provisions of sub-section (3) shall apply only in a case where the amount of consideration or a part thereof has been received by any mode other than cash on or before the date of agreement for transfer of the asset."

Salient feature of Section 43CA of the Income Tax Act, 1961 –

1) This section applies to trading assets and not to capital assets.

2) The consideration value should be less then stamp duty value.

3) If the consideration amount has been paid by cheque either partly or fully in the year of agreement prior to the year in which the registration of the property is done, the stamp value of the property of the year in which agreement to sell was executed shall be treated as deemed consideration in the year of registration for the purpose of Income Tax.

Controversial Issue –

A controversy has arisen in respect of applicability of year of this section. Whether this section applies in the year when agreement to sale was made and possession has been given or when the conveyance was registered. Let us take an example.

A has sold a flat to B in Financial Year 2010 – 2011 for a consideration of Rs.50 lakhs. An Agreement to Sale was made between A and B. The possession of the flat was given by A to B during the financial year 2011 – 2012. The sale deed was executed in June 2013 and stamp duty was paid at a value of Rs.75 Lakh by the buyer. A has already booked the sale in its accounts in the year 2011 – 2012 and have filed its return of income and have paid tax there on. Now the question arises that after insertion of section 43CA is A liable to pay further tax on difference between consideration amount and stamp duty value as sale deed was executed in the current financial year?

Section 43CA of the Income Tax Act, 1961 applies when the immovable property is transferred. In the Income Tax Act, transfer in relation to capital assets has been defined in section 2(47) of the Income Tax Act, 1961. In case of trading assets, the Act is silent and therefore, we will have to look in to the Transfer of property Act, 1882. Section 5 of the Transfer of Property Act deals with Transfer of immovable Property. The said section is reproduced below –

" 'Transfer of Property' means an act by which a living person conveys property, in present or in future, to one or more other living persons, or to himself and one or more other living persons; and 'to transfer property' is to perform such act."

In this section living person includes a Company or Association or Body of Individuals, whether incorporated or not, but nothing herein contained shall affect any law for the time being in force relating to transfer of property to or by Companies, Associations or Bodies of Individuals.

Hence, transfer of property takes place only when it is conveyed. Section 53A of Transfer of Property Act, 1882 is not applicable in case of section 43CA of the Income Tax Act, 1961 because it relates to capital assets as per provision of section 2(47) of Income Tax Act, 1961. Delivery of possession of immovable property cannot by itself be treated as equivalent to conveyance of immovable property as held by the Hon'ble Apex Court in the case of ***Alapati Venkataramiah Vs. Commissioner of Income Tax, Hyderabad*** reported in ***57 ITR 185***. Until and unless the title of the property is passed to the purchaser, there cannot be a sale or transfer of immovable property. Reliance can also be placed in deuces ion By: ***ITAT, Bench `A', Chennai***, in the case of ***R.Gopinath (HUF) v. ACIT,*** Appeal No: ITA Nos. 29 & 30/Mds/2008, decided on July 24, 2009.

As per provision of section 5 of Transfer of Property Act 1882, and also as per the above decisions, in my view in the above mentioned example, A will have to pay more tax on the difference in value of stamp duty and consideration amount as per provision of section 43CA of the Income Tax Act, 1961 for the assessment year 2014 – 2015.

Development Agreements –

In case of development agreement for an immovable property, Long Term Capital Gain may arise as per section 2(47) of the Income Tax Act, 1961, if the land is capital assets, Section 43CA of the Income Tax Act, 1961 in case of development agreement at the time of possession does not apply.

We must also look it to Section 50D of the Income Tax Act, 1961 which has come in to operation w.e.f 01-04-2013 only in respect of taxability of development agreement.

Section 50D of the Income Tax Act, 1961 –

"Where the consideration received or accruing as a result of the transfer of a capital asset by an assessee is not ascertainable or cannot be determined, then, for the purpose of computing income chargeable to tax as capital gains, the fair market value of the said asset on the date of transfer shall be deemed to be the full value of the consideration received or accruing as a result of such transfer."

The conditions for applicability of provision are:

Consideration must be received or accruing – if consideration is not received or accrued in the previous year, then provision will not apply. For example, if a consideration or part of consideration shall be received or accrued in future, then the provision will not apply. In case a developer will provide some of constructed area, to land owner, on completion of project, then the consideration to be received in kind in future, is not consideration received or accrued, therefore, in such cases the provision of Section 50D of the Income Tax Act, 1961 will not be applicable.

There must be transfer of capital asset – if there is no transfer, then this section will not apply. Here transfer of capital asset can mean a definite and absolute transfer. A transfer of some of rights for limited purposes cannot be regarded as transfer of capital asset in the context of tax on capital gains. There should not be a situation of contingent transfer which can be revert back on some contingencies. The transfer must be full and final. Readers are requested to go through definition of 'transfer' in relation to a capital asset provided in section 2(47) of the Income-tax Act, 1961 and also to see exemption from meaning of transfer as provided in section 47 of the Act.

Consideration should not be ascertainable or cannot be determined – thus if consideration can be ascertained or determined, even in future, then this provision may not be applicable. For example, if a part of consideration will be given in kind, say some of constructed area in a project, then the situation is one in which consideration will be received and it will be ascertainable in future so in such situation Section 50D of the Income Tax Act, 1961 may not be applicable depending on facts of the case.

This provision is only for the purpose of computing income chargeable to tax as capital gains. This provision is not applicable in case of business income or income falling under head 'other sources' or income from house property' etc.

In case of Joint Development Agreements where development rights for identified land are exchanged for a specified percentage of built up area in the project, there is no way of determining the value of consideration at the time the development rights are transferred. However, post the proposed amendment, the FMV of the development rights or the built up area may be determined and the gains shall be liable to capital gains tax. The basis which the FMV is required to be determined has not been specified.

Therefore, the insertion of Section 50D may have significant implications.

When the incidence of capital gain tax arises?

The point where the capital gain is deemed to accrue will purely depend on the terms of Joint

Development Agreement. Where the agreement is of such nature that possession is given in part performance of a contract, the liability of capital gain tax will arise on the handing over of such possession to the builder.

If the possession is not transferred but deferred until the construction is completed, the liability to capital gain tax will arise in the year in which the developer completes the construction.

Applicability of Capital Gain if Development Agreement breaks down –

If the developer is liable for the breaking down of joint development agreement, then either the landowner will get compensation from the developer for the breach of contract or developer have to do specific performance as per the terms of the Joint Development Agreement, in both cases landowner will acquire. And, for charging what landowner has acquired from the developer under capital gain tax, it should first come under the definition of "capital asset". Reliance can be placed in **CIT vs Vijay Flexible Containers [1990] 186 ITR 691 (Bom.) and K. R. Srinath vs ACIT, [2004] 141 Taxman 268 (Mad)**.

TDS on sale of immovable property –

The Finance Bill, 2013 has introduced a new section 194-IA providing for TDS @ 1% to be deducted by purchaser. In case valid PAN of seller is not available, tax deduction will be at higher rate of 20%. This is applicable w.e.f. June 01, 2013 for sale of immovable property (other than agricultural land) where consideration is Rs. 50 Lakhs and above. The purchaser is exempt from the obligation to obtain TAN, which is otherwise mandatory for all Deductors.

Agriculture Land and TDS –

It may be noted that the Agricultural Land has been excluded from the ambit of this new provision, however all agricultural lands are not excluded and that the agricultural land which is comprised within the jurisdiction of a municipality having population between 10,000 to 1,00,000 as well as land which is not more than 2 Kilometres or has population between 1,00,000 to 10,00,000 as well as land which is not more than 6 Kilometres or population above 10,00,000 as well as land which is not more than 8 Kilometres of the local limits of any municipality would come within the purview of making compliance as per the above section 194LA and thus in respect of this category of agricultural land the formalities of TDS are required to be complied with.

CBDT has issued Notification No. 39/2013 on 31st May 2013 amending rules to simplify procedure for complying with provisions of this new section.

"In exercise of the powers conferred by section 295 of the Income-tax Act, 1961 (43 of 1961), the Central Board of Direct Taxes hereby makes the following rules further to amend the Income-tax Rules, 1962, namely:—

1. *(1) These rules may be called the Income-tax (Fifth Amendment) Rules, 2013.*

   (2) They shall come into force on the date of their publication in the Official Gazette.

2. *In the Income-tax Rules, 1962, (hereinafter referred to as the said rules) in rule 30,–*

   (a) after sub-rule (2), the following sub-rule shall be inserted, namely:—

"(2A) Notwithstanding anything contained in sub-rule (1) or sub-rule (2), any sum deducted under section 194-IA shall be paid to the credit of the Central Government within a period of seven days from the end of the month in which the deduction is made and shall be accompanied by a challan-cum-statement in Form No.26QB.";

(b) after sub-rule (6), the following sub-rule shall be inserted, namely:—

"(6A) Where tax deducted is to be deposited accompanied by a challan-cum-statement in Form No.26QB, the amount of tax so deducted shall be deposited to the credit of the Central Government by remitting it electronically within the time specified in sub-rule (2A) into the Reserve Bank of India or the State Bank of India or any authorised bank.";

(c) after sub-rule (7), the following sub-rules shall be inserted, namely:–

"(7A) The Director General of Income-tax (Systems) shall specify the procedure, formats and standards for the purposes of remitting the amount electronically to the Reserve Bank of India or the State Bank of India or any authorised bank and shall be responsible for the day-to-day administration in relation to the remitting of the amount electronically in the manner so specified.";

3. *In rule 31 of the said rules,–*
(a) after sub-rule (3), the following sub-rule shall be inserted, namely:—

"(3A) Notwithstanding anything contained in sub-rule (1) or sub-rule (2) or sub-rule (3), every person responsible for deduction of tax under section 194-IA shall furnish the certificate of deduction of tax at source in Form No.16B to the payee within fifteen days from the due date for furnishing the challan-cum-statement in Form No.26QB under rule 31A after generating and downloading the same from the web portal specified by the Director General of Income-tax (System) or the person authorised by him.";

(b) after sub-rule (6), the following sub-rule shall be inserted, namely:—

"(6A) The Director General of Income-tax (Systems) shall specify the procedure, formats and standards for the purposes of generation and download of certificates and shall be responsible for the day-to-day administration in relation to the generation and download of certificates from the web portal specified by him or the person authorised by him.";

4. *In rule 31A of the said rules, after sub-rule (4), the following sub-rule shall be inserted, namely:—*

"(4A) Notwithstanding anything contained in sub-rule (1) or sub-rule (2) or sub-rule (3) or sub rule (4), every person responsible for deduction of tax under section 194-IA shall furnish to the Director General of Income-tax (System) or the person authorised by the Director General of Income-tax (System) a challan-cum-statement in Form No.26QB electronically in accordance with the procedures, formats and standards specified under sub-rule (5) within seven days from the end of the month in which the deduction is made.";

5. *In Appendix-II of the said rules,—*

(a) after Form No.16AA, the following Form shall be inserted, namely:—

FORM 16B"

TDS on compulsory acquisition of Immovable Property –

In respect of compulsory acquisition of immovable property, TDS is also required to be made on compensation amount exceeding Rs 2,00,000/- @10% as per provision of section 194LA of the Income Tax Act, 1961. This section does not apply in case of compensation received for agriculture land.

Hardship in Let out Property –

Sections 43CA of the Income Tax Act, 1961 and section 50C of the Income Tax Act, 1961 create problems for genuine Assessees. If a person has a building which is occupied by tenants, cannot fetch market price if sold. Such property can hardly fetch 25% value of the stamp duty value. Such property owner may have to pay tax more than consideration amount being received by him. In future, no one would be able to sell the litigated or let out property. The Finance minister should look in to such problems and should make the appropriate amendment to remove genuine hardship to the immovable property owner.

Hardship in claiming exemption u/s 54 or 54F –

In case of long term capital gain on sale of residential house, if the sale consideration is invested in buying another residential house, no capital gain tax will be charged as per provision of section 54 of the Income Tax Act, 1961. But I would like to mention one case in which in spite of availing exemption u/s 54 the Assessee has to bear tax liability.

Mr. A is owner of a residential flat. The acquisition value of said house was for say Rs.25,00,000/- and it's index cost was Rs 50,00,000/-. X sales that flat at Rs.73,00,000/- and buys another flat at Rs.75,00,000/- to claim exemption u/s 54F of the Income Tax Act, 1961. The stamp duty of flat sold is Rs.85,00,000/- and stamp duty value of the house purchased is Rs.90,00,000/-. He will have to bear tax liability on Rs.13,00,000/- u/s 50C of the Income Tax Act, 1961 and Rs.15,00,000/- u/s56(2)(vii) of the Income Tax Act, 1961 plus proportionate tax on capital gain tax for not investing entire sales consideration in new house. Even if he does not claim any exemption he will pay much less tax. So even if the exemption u/s 54 or 54F of the Income Tax Act, 1961 is claimed, the Assessee may not get any benefit due to insertion of these sections such as 50C and 56(vii).

Conclusion –

Some of the state governments are revising value of stamp duty continuously and also without looking at real market value in the particular locality. The market price in a particular locality of immovable property may differ due to various factors but the stamp duty value remains the same in a particular locality. The state Government should not think about its own revenue but should also take other factors in to account regarding location of the property.

The assessee should be careful in selling or buying immovable properties. The Assessee should also look in to TDS on sale of immovable property exceeding Rs.50,00,000/-. In light of all the provisions discussed above, it reveals that all types of Assessees are covered by the above mentioned provisions related to Real Estate transactions excepting in case of Companies, Partnership Firm, LLP, Trusts etc., where if an immovable property is bought, stamp duty value has no significance and as such immovable property can be bought at a price below stamp duty value. We hope in the next Finance Bill the Finance Minister may cover the transfer of immovable property by persons other than individuals and HUFs under the purview of section 56(2)(vii) of the Income Tax Act, 1961 or section 43CA of the Income Tax Act, 1961.