Select issues in taxation of Immovable Property Transactions – Section 50 C

Jagdish T Punjabi June 17, 2021

Section 50C

Section 50C

Section 50C - Special provision for Full Value of Consideration in certain cases.

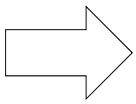
1) Where the consideration received or accruing as a result of the transfer by an assessee of a capital asset, being land or building or both, is less than the value adopted or assessed [or assessable] by any authority of a State Government (hereafter in this section referred to as the "stamp valuation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

Provided that where the date of the agreement fixing the amount of consideration and the date of registration for the transfer of the capital asset are not the same, the value adopted or assessed or assessable by the stamp valuation authority on the date of agreement may be taken for the purposes of computing full value of consideration for such transfer: [inserted by FA, 2016 w.e.f. 1.4.2017]

Section 50C

Provided further that the first proviso shall apply only in a case where the amount of consideration, or a part thereof, has been received by way of an account payee cheque or account payee bank draft or by use of electronic clearing system through a bank account [38][*or through such other electronic mode as may be prescribed] [Inserted by Finance (No. 2) Act, 2019 w.e.f. 1.4.2020*], on or before the date of the agreement for transfer:]

Provided also that where the value adopted or assessed or assessable by the stamp valuation authority does not exceed one hundred and *five* per cent of the consideration received or accruing as a result of the transfer, the consideration so received or accruing as a result of the transfer shall, for the purposes of section 48, be deemed to be the full value of the consideration [FA, 2020 has w.e.f. 1.4.2021 increased the tolerance limit to ten per cent]



Section 50C…

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

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

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

the Assessing Officer may refer the valuation of the capital asset to a Valuation Officer and where any such reference is made, the provisions of sub-sections (2), (3), (4), (5) and (6) of section 16A, clause (i) of sub-section (1) and sub-sections (6) and (7) of section 23A, sub-section (5) of section 24, section 34AA, section 35 and section 37 of the Wealth-tax Act, 1957 (27 of 1957), shall, with necessary modifications, apply in relation to such reference as they apply in relation to a reference made by the Assessing Officer under sub-section (1) of section 16A of that Act.

Section 50C…

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

[Explanation 2 - For the purposes of this section, the expression "assessable" means the price which the stamp valuation authority would have, notwithstanding anything to the contrary contained in any other law for the time being in force, adopted or assessed, if it were referred to such authority for the purposes of the payment of stamp duty.]

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

Text of Section 2(42A)

- **2.** In this Act, unless the context otherwise requires,—
  - *(42A)* [46]["short-term capital asset" means a capital asset held[47] by an assessee[47] for not more than [48][thirty-six] months immediately preceding the date of its transfer
  - **Provided** that in the case of [50][a security (other than a unit) listed in a recognized stock exchange in India] [51][or a unit of the Unit Trust of India established under the Unit Trust of India Act, 1963 (52 of 1963) or [52][a unit of an equity oriented fund]] [53][or a zero coupon bond], the provisions of this clause shall have effect as if for the words "thirty-six months", the words "twelve months" had been substituted:
  - **Provided further** that in case of a security (other than) ……..

Text of Section 2(42A)

- **Provided also** that in the case of a share of a company (not being a share listed in a recognised stock exchange in India), [56][*or an immovable property, being land or building or both*,]the provisions of this clause shall have effect as if for the words "thirty-six months", the words "twenty-four months" had been substituted.
- *[Explanation 1*].—(*i*) In determining the period for which any capital asset is held by the assessee—
  - (a) in the case of a share held in a company in liquidation, there shall be excluded the period subsequent to the date on which the company goes into liquidation ;
  - (b) ……

Text of S. 194-IA

- Section 194-IA reads as under :

'194-IA. (*1) Any person, being a transferee, responsible for paying (other than the person referred* to in section 194LA) to a resident transferor any sum by way of consideration for transfer of any immovable property (other than agricultural land), shall, at the time of credit of such sum to the account of the transferor or at the time of payment of such sum in cash or by issue of a cheque or draft or by any other mode, whichever is earlier, deduct an amount equal to one per cent. of such sum as income-tax thereon.

(*2) No deduction under sub-section (1) shall be made where the consideration for the transfer of* an immovable property is less than fifty lakh rupees.

(3) The provisions of section 203A shall not apply to a person required to deduct tax in accordance with the provisions of this section.

Explanation.— For the purposes of this section,—

(*a) "agricultural land" means agricultural land in India, not being a land situate in any area* referred to in items (*a) and (b) of sub-clause (iii) of clause (14) of section 2;*

(*b) "immovable property" means any land (other than agricultural land) or any building or part* of a building.'.

Memorandum explaining the provisions

- Section 194 IA has been introduced in the Income Tax Act, 1961 (ITA) w.e.f. 01.06.2013.
- The memorandum explaining the provisions of Finance Bill, 2013 reads as under :

"E. WIDENING OF TAX BASE AND ANTI TAX AVOIDANCE MEASURES

Tax Deduction at Source (TDS) on transfer of certain immovable properties (other than agricultural land)

There is a statutory requirement under section 139A of the Income-tax Act read with rule 114B of the Income-tax Rules, 1962 to quote Permanent Account Number (PAN) in documents pertaining to purchase or sale of immovable property for value of Rs.5 lakh or more. However, the information furnished to the department in Annual Information Returns by the Registrar or Sub- Registrar indicate that a majority of the purchasers or sellers of immovable properties, valued at Rs.30 lakh or more, during the financial year 2011-12 did not quote or quoted invalid PAN in the documents relating to transfer of the property.

Under the existing provisions of the Income-tax Act, tax is required to be deducted at source on certain specified payments made to residents by way of salary, interest, commission, brokerage, professional services, etc. On transfer of immovable property by a non-resident, tax is required to be deducted at source by the transferee. However, there is no such requirement on transfer of immovable property by a resident except in the case of compulsory acquisition of certain immovable properties. **In order to have a reporting mechanism of transactions in the real estate sector and also to collect tax at the earliest point of time**, it is proposed to insert a new section 194-IA to provide that every transferee, at the time of making payment or crediting of any sum as consideration for transfer of immovable property (other than agricultural land) to a resident transferor, shall deduct tax, at the rate of 1% of such sum.

In order to **reduce the compliance burden on the small taxpayers**, it is further proposed that no deduction of tax **under this provision** shall be made **where** the total amount of **consideration** for the transfer of an immovable property **is less than fifty lakh rupees**. This amendment will take effect from 01.06.2013. *[Clause 42]*

Notes on clauses

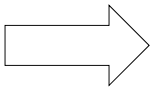
- The notes on clauses state as under :

  "Clause 42 of the Bill seeks to insert a new section 194-IA in the Income-tax Act relating to payment on transfer of certain immovable property other than agricultural land. It is proposed to insert a new section 194-IA to provide that any person, being a transferee, responsible for paying (other than the person referred to in section 194LA) to a resident transferor any sum by way of consideration for transfer of any immovable property (other than agricultural land) shall deduct an amount equal to one per cent of such sum as income-tax at the time of credit of such sum to the account of the transferor or at the time of payment of such sum in cash or by issue of cheque or draft or by any other mode, whichever is earlier.

  It is further proposed to provide that no deduction shall be made where consideration for the transfer of an immovable property is less than fifty lakh rupees.

  It is also proposed to provide an *Explanation defining the* expressions "agricultural land" and "immovable property".

  This amendment will take effect from 1st June, 2013."



Does S. 50C apply to transfer of part of a building

- The section applies only if the capital asset transferred is land or building or both. Neither the term land nor the term building is defined in the Act.
- the section does not refer to part of a building. Therefore, a question could arise as to whether the section will apply when the capital asset transferred is a part of the building.
- While it is a well settled legal principle that "**whole includes part**" as also the maxim that "**the greater contains the less**" – **Omne majus continent in se minus**. ICI India Ltd. v. DCIT [(2004) 90 ITD 258 (Kol.)]
- This well settled legal principle that "whole includes part" is also supported by the following observations of the Full bench of Punjab High Court in the case of **Bhagirath v. State of Punjab [AIR 1954 Punj. 167 (O)]** –
  - "It is clear that the whole includes the part and where an Act provides for rights in an estate it provides for rights in part of an estate."

Does S. 50C apply to transfer of part of a building

- While there can be no dispute against the above well settled legal principle, a question arises as to why do other provisions of the Act such as Sections 27, 194IA, 194LA, 261A(e), 269AB, 269I, 269UA, etc. specifically mention part of a building.
- It is debatable as to whether the section applies only to transfer of land or building or both or even to rights in land or building or both.
- While Section 50C does not make a specific reference to “rights in land or building” various other provisions make a specific reference to “rights in building, etc.
- E.g. S. 27(iiib) refers to rights in or with respect to any building or part thereof,
- Explanation 2 to S. 35 states that for the purposes of this clause “Land” includes any interest in land;
- S. 54G specifically mentions “building or land or any rights in building or land used for the….”

Does S. 50C apply to transfer of part of a building

- S. 54GA mentions “building or land or any rights in building or land used for the….”
- Chapter XX-A and also Chapter XX-C [any rights in or with respect to any land or any building…]
- Explanation to S. 269UA(d) defining the term “immovable property” states “land, building, part of a building, machinery, … “ includes any rights therein.
- It appears that legislature has consciously chosen to make the provisions applicable only to land or building or both and not to rights in land or building.

Does S. 50C apply to transfer of "rights in land & building"

Provisions of S. 50C do not apply to "rights in land & building".

- **ITO v. Yasin Moosa Godil [(2012) 18 ITR 253 (Ahd.)(Trib.)]**
- **Smt. Devindraben I. Barot *v. ITO* [(2016) 70 taxmann.com 235 (Ahmedabad - Trib.)]** - Section 50C would have no application where assessee has transferred only rights in impugned land which cannot be equated to land or building or both
- **ITO v. Tara Chand Jain [(2015) 63 taxmann.com 286 (Jaipur - Trib.)]** – 50C does not apply to a case where the ownership of the land is with the State Government. The land is acquired and the assessee is merely a Kashtkar, this clearly shows that the assessee is only having the limited rights in the land sold. The limited rights of Kashtkar on the land cannot be equated with the ownership of land or with building or with both. The Act clearly recognizes the distinction between the land or building or any right in the land or building under section50C. Thus, the Act has given the separate treatment to land, building and rights in the land. [Para 6.10]

Scope of land or building or both

However, in the following cases it was held that the provisions of S. 50C are applicable to Development Agreements.

- Chiranjeev Lal Khanna v. ITO [(2012) 66 DTR 260 (Mum.)(Trib.)]
- Mrs Arlette Rodrigues v. ITO [ITA No. 343/Mum/2010)] - When development rights are transferred, it is nothing but right to exploit said property in favour of developer, and same is covered under sub-clause (i) of section 2(47) and, therefore, provisions of Section 50C were applicable when rights to develop property was transferred.
- Smt. Myrtle D'Souza v. ITO [ITA No. 3168/Mum/2011)]
- Arif Akhtar Hussain v. ITO [(2011) 59 DTR 307 (Mum.)(Trib.)]

Scope of land or building or both

Provisions of S. 50C are not applicable to transfer of land development rights.

- Shakti Insulated Wires Pvt. Ltd. v ITO (Mum)(URO) [(ITA No. 3710/Mum/07. Assessment Year 2003-04; Mumbai E-1 Bench, Order dated 27.4.2009)]
- Voltas Ltd. v. ITO [(2016) 74 taxmann.com 99 (Mum.-Trib.)]
- ITO v. Ronak Marble Industries [ITA No. 3318/Mum./2015; AY : 2009-10; Date of Order : 14.3.2017] – application of provisions of section 50C is also bad in the present scenario as no transfer of land or building has taken place.

Scope of land or building or both

Provisions of S. 50C are not applicable to transfer of tenancy rights / leasehold rights.

- Kishori Sharad Gaitonde [(Mum SMC)(URO)]
- DCIT v. Tejinder Singh [(2012) 50 SOT 391 (Kol.)(Trib.)]
- Atul G. Puranik v. ITO [(2011) 58 DTR 208 (Mum.)(Trib.)]
- Fleurette Marine Novelle Hatam V. ITO (International Taxation) [(2015) 61 taxmann.com 362 (Mumbai - Trib.)]
- Kancast (P.) Ltd. v. ITO [(2015) 55 taxmann.com 171 (Pune - Trib.)]
- ITO v. Pradeep Steel Re-Rolling Mills (P.) Ltd. [(2013) 39 taxmann.com 123 (Mumbai - Trib.)]
- **CIT v. Greenfield Hotels & Estates (P.) Ltd. [(2017) 77 taxmann.com 308 (Bom.)]** - This decision was allowed as the Tribunal had decided the matter following decision in Atul G. Puranik [2011 (5) TMI 576 – ITAT, Mumbai] and the Revenue could not in the High Court point out any distinguishing features either in facts or in law in the present appeal from that arising in the case of Atul Puranik

Decision of Bombay High Court in CIT v. Heatex Products Pvt. Ltd. [2016 (7) TMI 1393 – Bombay High Court]

- CIT v. Heatex Products Pvt. Ltd. [2016 (7) TMI 1393 – Bombay High Court]
  - In this case the revenue contended that Section 50C would apply also to transfer of leasehold interest in land and is not limited to only to transfer of land and building or both. The Court held that the impugned order of the Tribunal allowed the respondent assessee's appeal by following its own decision in Atul G. Puranik V. ITO [2011 (5) TMI 576 - ITAT, Mumbai] as held that Section 50C of the Act would apply only to a capital asset being land or building or both and it cannot apply to transfer of lease rights in a land. No substantial question of law.

Decision of SC in UOI v. Satish P. Shah [2000 (12) TMI 5 – Supreme Court]

- Supreme Court in the case of UOI v. Satish P. Shah [2000 (12) TMI 5 – Supreme Court] has laid down salutary principle that where the Revenue has accepted the decision of the Court / Tribunal on an issue of law and not challenged it in appeal, then a subsequent decision following the earlier decision cannot be challenged.

Decision of Bombay High Court in Pr. CIT v. Kancast Pvt. Ltd. [2018 (5) TMI 713

- Bombay High Court has in the case of Pr. CIT v. Kancast Pvt. Ltd. [2018 (5) TMI 713 - Bombay High Court] admitted the following substantial question of law –

  "(i) Whether on the facts and in the circumstances of the case and in law, the Tribunal was justified in holding that the provisions of Section 50C of the Act does not come into operation where leasehold rights in land are transferred?"

Decision of Bombay High Court in Pr. CIT v. Kancast Pvt. Ltd. [2018 (5) TMI 713

- As no appeal had been filed by the Revenue for the order of the Tribunal in the case of Atul Puranik [2011 (5) TMI 576 - ITAT, Mumbai] which had held that section 50C of the Act will not apply to transfer of leasehold rights in land and buildings. However, at the time when both aforesaid decisions in Greenfield Hotels and Estates [2016 (12) TMI 353 – Bombay High Court] and Heatex Products Pvt. Ltd. [2016 (7) TMI 1393 - Bombay High Court] were not entertained by this Court, the decision of this Court in Pradeep Steel Re-Rolling Mills Pvt. Ltd. [2011 (7) TMI 1101 - ITAT MUMBAI] admitting the Appeal on this very question was not brought to our notice.

Decision of Bombay High Court in Keki Bomi Dadiseth v. CIT [2017 (3) TMI 1055 – Bombay High Court]

- The Bombay High Court has in the case of Keki Bomi Dadiseth v. CIT [2017 (3) TMI 1055 – Bombay High Court] was dealing with objection of the assessee to the action of the AO in reopening the assessment. The assessee contended that in view of the decision of the Bombay High Court in Greenfield Hotels & Estates (P) Ltd., the AO could not have reason to believe that the income chargeable to tax has escaped assessment, the Court held as under –

Decision of Bombay High Court in Keki Bomi Dadiseth v. CIT [2017 (3) TMI 1055 – Bombay High Court]

- So far as the submission on behalf of the petitioner that the Assessing Officer *could* not have any reason to believe that income chargeable to tax has escaped assessment in view of the decision of this Court in Greenfield Hotels & Estates (P) Ltd. (2016 (12) TMI 353 - BOMBAY HIGH COURT) is concerned, it is observed that the aforesaid decision of this Court did not independently rule appropriate interpretation of Section 50C of the Act. The Court refused to entertain the Revenue's appeal for the reason that the impugned Order of the Tribunal had followed its earlier decision in case of Atul G Puranik vs ITO [2011 (5) TMI 576 - ITAT, Mumbai]. The Revenue had accepted the same and in appeal from the Order of the Tribunal in Atul G. Purnaik (supra) was preferred. In the aforesaid background the Court refused to interfere with the Order of the Tribunal as there were no distinguishing features either on facts or in law as reiterated in Green Field Hotels & Estates (P) Ltd. (supra) from that existing in Atul G. Puranik (supra).
- In the present facts, the petitioner had not brought any decision of the Tribunal on the issue of law while filing its objections which the Assessing Officer could have dealt with bearing in mind facts involved.

Decision of Rajasthan High Court in Ram ji Lal Meena v. ITO [2018 (5) TMI 1792 – Rajasthan High Court]

- Further, Rajasthan High Court has in the case of **Sh. Ram Ji Lal Meena s/o Sh. Bachu Ram Meena v. ITO, JAIPUR [2018 (5) TMI 1792 - Rajasthan High Court]**
- The appellant has referred judgment of Bombay High Court in M/s. Greenfield Hotels & Estates Pvt. Ltd. [2016 (12) TMI 353 - Bombay High Court] where 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 would not be applicable in majority of the cases as not it is allowed as lease hold property. Section 50C is applicable to 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 & Estates Pvt. Ltd. (supra). No substantial question of law arises.

Decision of Bombay High Court in Jai Hind Sciaky Ltd. v. DCIT [2017 80 taxmann.com 105]

- Section 40 of the Finance Act, 1983 levied wealth-tax on net wealth of a closely closely held company on a valuation date.
- Section 40(3) of the Act defined assets inter alia as **land other than agricultural land.**
- The assessee had taken a plot of land on lease from MIDC, a part of which was open land and the balance was used for constructing a factory building.
- In its return of wealth, the assessee had in computing its net wealth, not taken into account its leasehold interest in the said plot or any part thereof.
- The AO included the open land in the net wealth of the assessee by regarding the open land to be an `asset'.

Decision of Bombay High Court in Jai Hind Sciaky Ltd. v. DCIT [2017 80 taxmann.com 105]

- The substantial question of law for consideration of the Court was –
  - Whether on the facts and in the circumstances and on a proper interpretation of Lease Deed dated 29/9/1978, the tribunal was right in law in holding that for the purposes of S. 40 of Finance Act 1983, **the expression "land" will include any interest in land also**?
- The assessee submitted to the Court that a lease hold interest in open land is not includable in net wealth under Section 40(2) of the Act as it is not an asset in terms of Section 40(3) of the Act.
- The Court held that that leasehold interest in open land will for purposes of Section 40 of the Act would be an asset as on the valuation date for A. Y. 1998-99

Decision of Mumbai Tribunal in Radharaman Constructions v. ACIT [2021(1) TMI-230-ITAT-Mum]

- In this case, the assessee sold 3 plots of land. The consideration for one of the plots sold was far lower than its stamp duty value. The assessee submitted before the AO that a major portion of this plot was reserved for forest land and therefore no development was permissible and the value of this portion was nil. Therefore, this plot was sold for a consideration lower than its stamp duty value. The assessee asked for a reference to DVO.
- The DVO valued the land at a price lower than its SDV but greater than its consideration as per instrument of transfer.
- For the first time before the CIT(A) amongst several other arguments a contention was taken up that the provisions of S. 50C do not apply to transfer of development rights and that the agreements entered into by the assessee are akin to development rights.
- The CIT(A) rejected this argument for the following reasons -

Decision of Mumbai Tribunal in Radharaman Constructions v. ACIT [2021(1) TMI-230-ITAT-Mum]

- The CIT(A) rejected this argument for the following reasons –
  - The assessee in Voltas Ltd. had transferred development rights vide Development Agreement, here the assessee had entered into a Sale Agreement and in various submissions and/or accounts the assessee has in his submissions not maintained the distinction between land and development rights;
  - In every classical Development Agreement model, the landholder continues to be the technical owner of the land when he divests his Development Rights beneficially and irrevocably to a builder. For this reason, the landowner ordinarily continues to sign nominally in the land/flats transfer documents as one of the parties. In this perspective, the contention urged by the appellant that the transaction was in the nature of transfer of Development Rights and would be beyond the scope of section is examined.

Decision of Mumbai Tribunal in Radharaman Constructions v. ACIT [2021(1) TMI-230-ITAT-Mum]

- The CIT(A) rejected this argument for the following reasons –
  - Referring to opening sentence of S. 50C, CIT(A) proceeded to examine whether there was a transfer within s. 2(47) of the Act. He noted that the Tribunal has in **ACIT, vs. Seth Industries (P) Ltd (ITA 4094/Mum/2013 dated 18.05.2013)** held that 'transfer' of land would.be on the date of executing the registered Development Agreement transferring development rights. The Tribunal, in this case, held "*As could be seen from the.-facts on record, assessee has entered into a registered development agreement with M/s. Sanghvi Premises P. Ltd. on 29.10.2005. As per the terms of the agreement, transfer of the land should be concluded on the date of execution of the deed. Thus, in terms of Section 2(47)(v) of the Act there was transfer of capital asset insofar as it relates to the land in question. The ratio laid down by the Hon'ble Jurisdictional High Court in the case of Chaturbhuj Dwarkadas Kapaida (supra) supports this view* "

Decision of Mumbai Tribunal in Radharaman Constructions v. ACIT [2021(1) TMI-230-ITAT-Mum]

- The CIT(A) rejected this argument for the following reasons –
  - He referred to the decisions of the Tribunal in the case of *ArifAkhatar Hussain vs ITO 12(2X1), Mumbai [2011] (45 SOT 257) and Mrs. Arlette Rodrigues vs /TO, Ward 15(2)(2), Mumbai [2011] reported In 10 taxmann.com 235 for the proposition that provisions of S. 50C are applicable to transfer of development rights.*
  - ***Mumbai Tribunal in ACIT-25(3)I Mumbai vs Dattani Development (1TA 5075/Mum/2010 dated 27.07.2016) considered a number of judicial precedents and held "section 50C of the Act is clearly ' applicable even to the sale pf development rights in the land**". However, in this case the Tribunal has also noted that "in-fact the assessee has not only sold development rights in the land but the assessee sold the entire land with ownership rights in the land if the development agreement are rend in conjunction with deed of confirmation / conveyance executed by the assessee which are placed in paper book filed with the Tribunal*

Decision of Mumbai Tribunal in Radharaman Constructions v. ACIT [2021(1) TMI-230-ITAT-Mum]

- The CIT(A) rejected this argument for the following reasons –
  - The Hon'ble Allahabad High Court in **CIT vs Shimbhu Mehra [(2016) 65 taxmann.com 142]**, had two dates to consider. The first was the agreement for .sale date being 04,07.2001 and other was the execution of Sale deed in April, 2003. It was held as 'under (emphasis added):

    "14. In the light of the aforesaid provision, it is apparently clear that the moment an agreement to sell is executed between the parties and part consideration is received, the transfer for the purpose of Section 50C of the Act takes places and computation under Section 48 of the Act will start accordingly, for the purpose of calculating the capital gains under Section 45 of the Act."

Decision of Mumbai Tribunal in Radharaman Constructions v. ACIT [2021(1) TMI-230-ITAT-Mum]

- The CIT(A) rejected this argument for the following reasons –

  The Vishakapatnam Bench of Tribunal in DCIT v. Dr. Chalasani Mallikarjuns Rao [(2016) 75 taxmann.com 270], observed that that it was "illogical and improper" on the part of the assessee to say that 'transfer, within the meaning of section 2(47}(v) of the Act took place, but yet there was no application of provisions of section 50C of the Act when the property has been transferred by way of registered un-possessory sale-cum-GPA. It noted that the assessee had computed long-term capital gain by adopting sale consideration-shown.in the sale deed. The averments of the appellant are congruous. The Id. ITAT held as under (emphasis supplied):

  "In this 'case, admittedly, the assessee himself has admitted long term capital gain on transfer of asset, The moment transfer took place inviting the meaning of section 2(47)(u) of the Act, the . deeming fiction provided u/s.50C of the Act are applicable, when the sale consideration shown in the sale deed is less than the market value determined by the stamp duty authority for the purpose of payment of stamp duty."

Decision of Mumbai Tribunal in Radharaman Constructions v. ACIT [2021(1) TMI-230-ITAT-Mum]

- The CIT(A) rejected this argument for the following reasons –

  The Apex Court in Sanjeev Lal v. CIT has held that "an agreement to sell gave rights to the vendor and reduced or extinguished rights of the assessee 'which was sufficient for the purpose of section 2(47) of the Act which defines the term 'transfer' in relation to a capital asset."

Decision of Mumbai Tribunal in Radharaman Constructions v. ACIT [2021(1) TMI-230-ITAT-Mum]

- The CIT(A) rejected this argument for the following reasons –

  Moreover, the insertion of Explanation 2 to section 2(47) of the Act by the Finance Act, 2012, with retrospective effect from April 01, 1962 unambiguously provides that 'transfer of an asset "includes disposing of or parting with an asset by way of an 'agreement'.

  As thus seen, there is a catena of judicial authorities holding categorically that 'transfer of land or building' will encompass in its fold transfer of Development Rights. As. a result, even if it is taken that what was transferred was such a right alone, even then the application of section 50C of the Act remains 'intact and unaltered. Needless to add, the debate as to whether a particular Development Agreement leads to the incidence of Capital Gains or not, is settled here, as the appellant itself has recognized, computed and offered .the gains arising to tax without any dispute or reservation. Hence, this arena is not required to be ventured into ab initio.

Decision of Mumbai Tribunal in Radharaman Constructions v. ACIT [2021(1) TMI-230-ITAT-Mum]

- The Tribunal held –

  CIT appeals has elaborately addressed the various legal issues raised by the assessee. However, he has not dealt with the merits of the objections of the assessee that there were inherent defects/deficiencies in the said piece of land, due to which the assessee was contesting the valuation. It is not discernible whether the merits of various objections of the assessee to the deficiency in the said piece of land were considered by the DVO in his report. We find that it is necessary in the interest of justice that the various objections on merits of the valuation be dealt with by the learned CIT appeals by a speaking order. This is also noted that the said objections were not subject matter of consideration by the assessing officer also. In this regard, the learned CIT appeals while addressing the merits of the assessee objection should also give opportunity to the DVO if he chooses to consider the various objections of the assessee and examine how the same are dealt with by the DVO. In coming to the above proposition we draw support from the decision of honourable Supreme Court in the case of Kapurchand Shrimal (1969) 72 ITR 623 (SC) that it is the duty of the appellate authority to correct the errors in the order of the authority below and if necessary, remit the matter for reconsideration with or without direction unless prohibited by law.

Decision of Mumbai Tribunal in Radharaman Constructions v. ACIT [2021(1) TMI-230-ITAT-Mum]

- The Tribunal held –

  As regards the issue whether the transfer of development right would come under the sweep of section 50 C, the learned counsel of the assessee simply stated that the decisions referred by the learned CIT appeals are not applicable. However, he has relied upon certain case laws from the tribunal. In this regard, there is no cogent submission by the learned counsel of the assessee as to how the decisions referred by learned CIT appeals including that from the honourable Supreme Court in the case of Sanjeev Lal (supra) are not applicable. The decision referred by learned counsel of the assessee from honourable Bombay High Court in this regard was with reference to transfer of leasehold rights. *In our considered opinion, when the issue is being remitted to the file of learned CIT appeals, the learned CIT appeals shall consider this aspect also afresh. He shall take into account the decisions referred by learned counsel of the assessee and learned counsel of the assessee shall also submit objections to the case laws referred by learned CIT appeals including that from the Supreme Court referred by him as above*. We also note that the issue of transfer of development right, was never raised before the assessing officer and the claim of the assessee is also without filing the revised return of income. The learned CIT appeals shall consider this aspect also and if he deems necessary, he may seek a remand from the assessing officer in this regard.

Is the tolerance limit of 10% retrospective?

- Finance Act, 2018 has w.e.f. 1.4.2019 inserted third proviso to Section 50C which provides for a tolerance limit of 5% of the consideration received or accruing as a result of the transfer.
- The limit of 5% has been increased to 10% by the Finance Act, 2020 w.e.f. 1.4.2021.
- A question arises as to whether the tolerance limit is prospective from the date of its introduction or is retrospective? If it is retrospective, it is retrospective since when?
- Amendment made in scheme of section 50C(1), by inserting third proviso thereto and by enhancing tolerance band for variations between stated sale consideration vis-à-vis stamp duty valuation from 5 per cent to 10 per cent are effective from date on which section 50C, itself was introduced, i.e 1-4-2003 **- Maria Fernandes Cheryl v. ITO, International Taxation [(2021) 123 taxmann.com 252 (Mumbai - Trib.)]**

Is the tolerance limit of 10% retrospective?

- The Tribunal noted that –
- Central Board of Direct Taxes circular No. 8 of 2018, explaining the reason for the insertion of the third proviso to section 50C(1), has observed that 'It has been pointed out that the variation between stamp duty value and actual consideration received can occur in respect of similar properties in the same area because of a variety of factors, including the shape of the plot or location'.
- Once the CBDT itself accepts that these variations could be on account of a variety of factors, essentially *bona fide* factors, and, for this reason, section 50C(1) should not come into play, it was an 'unintended consequence' of section 50C(1) that even in such *bona fide* situations, this provision, which is inherently in the nature of an anti-avoidance provision, is invoked.
- Once this situation is sought to be addressed, this situation needs to be addressed in entirety for the entire period in which such legal provisions had effect, and not for a specific time period only.

Is the tolerance limit of 10% retrospective?

- The Tribunal observed that –
- On a conceptual note, an estimation of market price is an estimation nevertheless, even if by a statutory authority like the stamp duty valuation authority, and such a valuation can never be elevated to the status of such a precise computation which admits no variations. The rigour of section 50C(1) was thus relaxed, and very thoughtfully so, to take these *bona fide* cases of small variations between the stated sale consideration *vis-à-vis* stamp duty valuation, out of the scope of adjustments contemplated in the computation of capital gains under this anti-avoidance provision. It is a case of a curative amendment to take care of unintended consequences of the scheme of section 50C.

Is the tolerance limit of 10% retrospective?

- Parliament has introduced third proviso in section 50C(1) of the Act, as per which the difference in stamp duty valuation and actual consideration should be ignored, if it is less than 5%/10%. The Kolkata Bench of Tribunal has held it to be curative in nature in the case of **Chandra Prakash Jhunjhunwala [2019 (8) TMI 1192 - ITAT KOLKATA]** has held that the proviso shall apply since the date of insertion of sec.50C of the Act. The Tribunal was of the view that even prior to introduction of the proviso the Tribunals were allowing a variation of upto 10%. It also noted that the amendment is procedural in nature.

Special provision for full value of consideration for transfer of assets other than capital assets in certain cases – Section 43CA.

Background of Section 43CA and Explanatory Memorandum

- **Section 43CA - Special provision for full value of consideration for transfer of assets other than capital assets in certain cases.**
- The Finance Act, 2013 has with effect from 1.4.2014 inserted S. 43CA in the Income-tax Act, 1961 ("the Act"). This section deems value adapted or assessed or assessable by any authority of a State Government for the purpose of payment of stamp duty (stamp duty value) of an asset (other than capital asset) being land or building or both to be the full value of consideration, received or accruing as a result of transfer thereof, by the assessee, in the event consideration received or accruing is less than the stamp duty value of the asset so transferred. The provisions of this section, as introduced, were broadly identical to the provisions of S. 50C and the two provisos to S. 56(2)(vii)(b)(ii).
- The Memorandum explaining the provisions of the Finance Act, 2013 states as under –

  "E. WIDENING OF TAX BASE AND ANTI TAX AVOIDANCE MEASURES

  Computation of income under the head "Profits and gains of business or profession" for transfer of immovable property in certain cases

  Currently, when a capital asset, being immovable property, is transferred for a consideration which is less than the value adopted, assessed or assessable by any authority of a State Government for the purpose of payment of stamp duty in respect of such transfer, then such value (stamp duty value) is taken as full value of consideration under section 50C of the Income-tax Act. These provisions do not apply to transfer of immovable property, held by the transferor as stock-in-trade.

Explanatory Memorandum ….

It is proposed to provide by inserting a new section 43CA that where the consideration for the transfer of an asset (other than capital asset), being land or building or both, is less than the stamp duty value, the value so adopted or assessed or assessable shall be deemed to be the full value of the consideration for the purposes of computing income under the head "Profits and gains of business of profession".

It is also proposed to provide that where the date of an agreement fixing the value of consideration for the transfer of the asset and the date of registration of the transfer of the asset are not same, the stamp duty value may be taken as on the date of the agreement for transfer and not as on the date of registration for such transfer. However, this exception shall apply only in those cases where amount of consideration or a part thereof for the transfer has been received by any mode other than cash on or before the date of the agreement.

These amendments will take effect from 1st April, 2014 and will, accordingly, apply in relation to the assessment year 2014-15 and subsequent assessment years. [Clause 8]"

The section is introduced as a tax avoidance measure. The Memorandum states that this provision is intended to apply to stock-in-trade since the provisions of S. 50C are applicable only to capital asset. This objective will have to be kept in mind while interpreting the provisions in case two interpretations are possible due to ambiguity in the language of the provisions.

Text of Section 43CA

- The text of the section is as under –

Special provision for full value of consideration for transfer of assets other than capital assets in certain cases.

"43CA. (1) Where the consideration received or accruing as a result of the transfer by an assessee of an asset (other than a capital asset), being land or 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.

Following proviso shall be inserted in sub-section (1) of section 43CA by the Finance Act, 2018, w.e.f. 1-4-2019 :

Provided *that where the value adopted or assessed or assessable by the authority for the purpose of payment of stamp duty does not exceed one hundred and five [**ten w.e.f. 1.4.2021 by FA, 2020**] per cent of the consideration received or accruing as a result of the transfer, the consideration so received or accruing as a result of the transfer shall, for the purposes of computing profits and gains from transfer of such asset, be deemed to be the full value of the consideration.*

Text of Section 43CA

- The text of the section is as under –

Inserted by the Finance Act, 2021 w.e.f. 1.4.2021

Provided further *that in case of transfer of an asset, being a residential unit, the provisions of this proviso shall have the effect as if for the words "one hundred and ten per cent", the words "one hundred and twenty per cent" had been substituted, if the following conditions are satisfied, namely –*

(i) the transfer of such residential unit takes place during the period beginning from 12th day of November, 2020 and ending on the 30th day of June, 2021;

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

(iii) the consideration received or accruing as a result 0of such transfer does not exceed two crore rupees.

Text of Section 43CA

- The text of the section is as under –

(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.

*[*Words "*by way of an account payee cheque or an account payee bank draft or by use of electronic clearing system through a bank account*" shall be substituted for "by any mode other than cash" by the Finance Act, 2018, w.e.f. **1-4-2019**.]

Text of Section 43CA

- The text of the section is as under –

Inserted by the Finance Act, 2021 w.e.f. 1.4.2021

Explanation. - For the purposes of this section, "residential unit" means an independent housing unit with separate facilities for living, cooking and sanitary requirement, distinctly separated from other residential units within the building which is directly accessible from an outer door or through an interior door in a shared hallway and not by walking through the living space of another household.

Analysis of Section 43CA

- **Conditions precedent**
  1. there is an assessee.
  2. there is a transfer by the assessee.
  3. the transfer is of an asset as defined in this section.
  4. there is consideration received or accruing as a result of such transfer.
  5. the value adopted or assessed or assessable by any authority of a State Government (stamp duty value) for the purpose of payment of stamp duty in respect of such transfer is greater than the consideration mentioned in 4 above.
- **Consequence –**
  1. For the purpose of computing profits and gains from transfer of such asset, stamp duty value shall be deemed to be full value of consideration received or accruing as a result of such transfer.
- **Exception:**
  1. The asset (i.e. land or building or both) is a capital asset of the assessee.
  2. Where the date of agreement of sale and the date of registration of transfer are not the same, the stamp duty value on the date of agreement shall be taken in place of stamp duty value on the date of registration provided the conditions mentioned in sub-sections (3) and (4) are satisfied (see notes later).
  3. Where the difference between the stamp duty value and consideration accrued or received as a result of transfer is within the tolerance limit stated in the proviso.
- **Definition:**

  Asset means land or building or both. However, such asset should not be capital asset.

Analysis of Section 43CA …

- The consideration need not always be monetary consideration. In the context of S. 56(2)(v)/(vi)/(vii), the Tribunal has in the following cases held –
  a. that the amount received by a beneficiary from a trustee on dissolution of a trust cannot be said to be without consideration - Mumbai Bench of ITAT in the case of Ashok C. Pratap v Addl. CIT (2012) 23 Taxmann.com 347 (Mum);
  b. that the amount received by the assessee, from her ex-husband, representing accumulated monthly installments of alimony constitutes consideration for relinquishing all her past and future claims. The Tribunal held that since there was sufficient consideration in getting the said amount, S. 56(2)(vi) was not applicable – Delhi Bench of ITAT in the case of ACIT v. Meenakshi Khanna (143 ITD 744).
  c. that abstaining from contesting the will was consideration for the amount received by the assessee and therefore the amount so received was not covered u/s 56(2)(v) – Mumbai Bench of ITAT in the case of Purvez A. Poonawalla v. ITO (2011-TIOL-262-ITAT-MUM).

- Since the language of S. 43CA and that of S. 56(2)(v) / (vi) / (vii) is identical reliance can be placed on the ratio of the abovementioned decisions for the proposition that section 43CA does not envisage only monetary consideration.

Analysis of Section 43CA …

- In cases where the consideration is not monetary consideration but is received in kind possibly the value of the property / thing received may have to be compared with the stamp duty value of the asset but in cases where it is not possible to do so e.g., in case where a person gives up a personal legal right (eg right to file a suit to contest the will of the parent of the assessee) and receives the asset in lieu thereof, it cannot be said that the receipt is without consideration. Also S. 43CA may not apply since it requires comparison of the consideration with the stamp duty value. Since the consideration in such case is not capable of measurement it can be argued that the charge fails on the ground that the computation machinery does not contemplate such a situation. Illustrations of consideration not being capable of measurement could be giving up of a right to contest a will, inconvenience / hardship suffered in the course of redevelopment.

- The consideration could even be a detriment to the giver or a promise not to do a certain act. The applicability of the section in such cases may be doubtful since the consideration is not capable of being received / accrued eg promise not to enter a refuge area in a building.

Analysis of Section 43CA …

- A building under construction may not be covered by this section because a building under construction is certainly not a building. The Hon'ble Punjab & Haryana High Court has in the case of CWT v. Smt. Neena Jain (189 Taxman 308)(P & H) held that an incomplete building does not fall within ambit of `assets' as defined in section 2(ea) of the wealth-tax Act as it does not fall within definition of `building' nor does it fall within purview of `urban land'.

- Supreme Court has in various decisions in the context of tax levied by Municipal Coproration held that building under construction cannot be subjected to a valuation for levy of corporation tax. These decisions lay down the proposition that a building under construction is not a building.

- There are provisions in the Act eg. Ss. 35, 35D, 54G, 54H, 269UAB which extend the meaning of the words land and building by having leasehold rights, etc into the meaning of land and which. However, for the purposes of S. 43CA it appears that rights which are attached to or incidental to or connected with land or building or both do not come within the scope of s. 43CA.

- In a case where the assessee transferred both land and building, the Andhra Pradesh High Court held that the transfer of both will have to be subjected to a valuation of both and not a split valuation as was suggested by the assessee.

Analysis of Section 43CA …

- **Cases where date of agreement fixing value of consideration for transfer of the asset and the date of registration of such transfer are not the same {S. 43CA(3) and S. 43CA(4)}** - Sub-section (3) of S. 43CA deals with cases where date of agreement fixing value of consideration for transfer of the asset and the date of registration of such transfer are not the same. The language of this sub-section is identical to the language of first proviso to S. 56(2)(vii)(b)(ii) with the only difference being that this sub-section uses the expression `value of consideration' whereas the first proviso to S. 56(2)(vii)(b)(ii) uses the expression `amount of consideration'. The provisions of sub-section (3) apply when the following conditions are cumulatively satisfied –
  1. there is an agreement;
  2. the agreement is dated;
  3. the agreement is for transfer of the asset;
  4. the agreement fixes value of consideration;
  5. the date of agreement and date of registration of such transfer are not the same;
  6. the amount of consideration or a part thereof has been received by any mode other than cash;
  7. the amount referred to in 6 above is received on or before the date of the agreement.
- If all the above mentioned conditions are cumulatively satisfied the consequence is that the stamp duty value of the asset on the date of agreement shall be deemed to be full value of consideration received or accruing as a result of such transfer.

Analysis of Section 43CA …

- The term `agreement' has not been defined in the Act. Therefore, a useful reference can be made to the definition in S. 2(e) of The Indian Contract Act, 1872 which defines the term `agreement' as:

  "Every promise and every set of promises, forming the consideration for each other, is an agreement. (Indian Contract Act (9 of 1872), S. 2(e))"
- Dictionaries have explained the meaning of the term `agreement' as under:
  1. the fact of being of one mind; concurrence in the same opinion. {**Casell Concise Dictionary (Revised Edition, P. 29)}**
  2. 1. The act of agreeing or of coming to a mutual arrangement. 2. The state of being in accord. 3. An arrangement that is accepted by all parties to a transaction. ……. 8. Law. A. ***an expression of assent by two or more parties to the same object. B. the phraseology written or oral, of an exchange of promises.*** { **Websters Unabridged Dictionary (P. 40)}**
  3. AGREEMENT ranges in meaning from mutual understanding to binding obligation.
- The following observations lucidly explain the meaning of the term `agreement'.

  "An `agreement' is an instrument between the parties who willfully agree to perform certain acts or refrain from doing something. The parties to the instrument should be agreed about the subject matter at the same time and in the same sense. The two or more parties which are agreed must communicate with each other." [Felthouse v. Bindley, (1862) 142 ER 1037]

Is the section retroactive?

- While the section is not retrospective a question will arise as to whether the section is retroactive e.g. In case the property is transferred (i.e. registration / possession of the property is received by the assessee) for a consideration which is less than its stamp duty value after the section was introduced i.e. in the year 2014-15 but the agreement for its transfer was entered into 3 years earlier i.e. in the year 2011-12 when the section was not applicable and the stamp duty value of the property was more than the consideration, will the provisions of the section apply in such a situation. In the context of S. 50C, the Tribunal has held that the provisions of S. 50C are not applicable where agreement fixing consideration was entered prior to enactment of S. 50C and the transfer takes place in a period after the provisions of S. 50C are effective provided the delay in completion of transfer is beyond the control of the assessee and the circumstances are documented. (M. Siva Parvathi & Ors. V. ITO (2011)(7 ITR 468)(Vish); Administrator of Estate of Late Mr. F. E. Dinsha v. ITO (2013-TIOL-831-ITAT-MUM).

Are the provisions applicable to transfers happening post AY 2013-14 but agreements whereof were entered into in AY 2013-14 or earlier years

- The provisions of Section 43CA are effective Assessment Year 2014-15.
- The Bombay High Court has held that the provisions of Section 43CA are prospective and apply w.e.f. AY 2014-15.
- Therefore, a question which arises is whether the provisions are applicable to
  - transfers on or after 1.4.2013; or
  - agreements entered into on or after 1.4.2013
- The Jaipur Bench of the Tribunal, in the case of **Indexone Tradecone Pvt. Ltd. v. DCIT [ITA No. 470/JP/2018; Assessment Year : 2014-15]** was dealing with the case of an assessee for AY 2014-15 where the assessee had in earlier years entered into agreements and had received amounts thereunder. Small amounts were received in cash at the time of entering into agreement. In fact, possession was also handed over and profits offered for taxation in earlier years. It was in Financial Year 2013-14 that the agreement was registered.

Are the provisions applicable to transfers happening post AY 2013-14 but agreements whereof were entered into in AY 2013-14 or earlier years

- The Tribunal held as under –
  - 12. The provisions of section 43CA have been inserted by the Finance Act, 2013 w.e.f 01.04.2014 relevant to assessment year 2014-15 and if we look at the provisions of sub-section (3) and sub-section (4), it emphasizes a scenario where the date of agreement fixing value of consideration for transfer of the assets and date of registration are not the same and provides that the value as on the date of agreement would be considered provided the amount of consideration or part thereof has been received by any mode other than cash on or before the date of agreement for transfer of the assets.

Are the provisions applicable to transfers happening post AY 2013-14 but agreements whereof were entered into in AY 2013-14 or earlier years

- 13. In the present case, where the date of agreement to sell in respect of the two flats is 9.4.2007, which is much prior to the financial year relevant to assessment year 2014-15 when the provisions of section 43CA have become effective, there is no way the assessee would have foreseen these provisions at the time of entering into the agreement to sell that it has to receive the consideration only by any mode other than cash. At the relevant point in time when it had entered into agreement to sell, there was no such requirement of receiving the whole of the consideration in mode other than cash. Therefore, in order to make the provisions of sub-section (4) workable, in our view, the provisions of sub-section (4) would be applicable in respect of agreement to sell for transfer of an asset which has been executed on or after 1st April, 2013 and thus, not applicable in the instant case. The matter is accordingly remanded back to the file of the ld CIT(A) to determine the valuation of the two properties in terms of sub-section (3) as on the date of agreement to sell which is 9.4.2007 and where it is so determined that such valuation is higher than what has been declared by the assessee, the same can be brought to tax in the year under consideration.

Is the ratio of decisions of S. 50C applicable to S. 43CA

- The provisions of Section 43CA are pari materia the provisions of Section 50C except that section 50C applies to transfer of capital asset being land or buildings or both whereas section 43CA applies to transfer of an asset (other than capital asset) being land or building or both.

- The provisions of Section 43CA are effective from AY 2014-15 whereas the provisions of Section 50C are in force since Assessment Year 2003-04.

- A question arises as to whether the ratio of the decisions rendered in the context of Section 50C would also apply to similar issues arising in the context of Section 43CA. Pune Bench of the Tribunal in the case of Buttepatil Properties v. ITO SMC Bench Pune [ITA No. 682/PUN/2018; Assessment Year : 2014-15] has held as under -

Is the ratio of decisions of S. 50C applicable to S. 43CA

- "7. We have perused the case records and considered the relevant provisions of the Act i.e. Section 50C and Section 43CA. Section 50C deals with special provision for full value of consideration in certain cases with regard to capital asset. Section 43CA is also special provision for full value of consideration for transfer of assets other than capital assets in certain cases. In this context, the application of the case laws with regard to Section 50C is applicable to Section 43CA as well."

- The Pune Bench was dealing with a case where the difference between the stamp duty value and the consideration, as per deed of transfer, was less than 10%. The Tribunal held that –

Is the ratio of decisions of S. 50C applicable to S. 43CA

- "8. With these observations, we refer to the decision of the Co-ordinate Bench of the Tribunal, Pune in the case of Rahul Construction Vs. Deputy Commissioner of Income Tax (supra.). In that case, assessee received an amount of Rs.19,00,000/- as sale consideration on account of sale of basement of a building. Stamp Valuation authorities have adopted the value at Rs.28,73,000/- for the purpose of stamp duty on being objected by the assessee for substitution of the same figure under section 50C(2). The Assessing Officer referred the matter to the DVO who determined the fair market value of the property on the date of sale at Rs.20,55,000/-. The Pune Bench of the Tribunal observed that this itself shows that there is a wide variation between the two values and that they are based on some estimate. Difference between the sale consideration shown by the assessee and the fair market value determined by the DVO is only Rs.1,55,000/- which is less than 10%. In view of the fact that valuation is always a matter of estimation where some difference is bound to occur. The Assessing Officer was not justified in substituting the value determined by the DVO for the sale consideration disclosed by the assessee. Therefore, Assessing Officer was directed to take Rs.19,00,000/- only as the sale consideration of the property.

Is the ratio of decisions of S. 50C applicable to S. 43CA

- This case of Rahul Construction Vs. DCIT (supra.) was also followed by the Pune Bench of the Tribunal in ITA No.2704/PUN/2016, therein also, the benefit of 10% difference of sale value was allowed in favour of the assessee.

- Thus, following the aforesaid decisions, we are of the considered view that difference between the sale consideration of the property shown by the assessee and the fair market value determined by the DVO under section 50C(2) being less than 10%, the Assessing Officer is not justified in substituting the value determined by the DVO for the sale consideration disclosed by the assessee.

- 9. In view of the matter, we set aside the order of the Ld. CIT(Appeal) and allow the appeal of the assessee."

Does S. 43CA apply to a case of property under construction

- Section 43CA applies to transfer of an asset (other than capital asset) being land or building or both.

- In the case of Shree Laxmi Estate Pvt. Ltd. v. ITO, the Mumbai Bench of the Tribunal was dealing with the case of an assessee who had during the previous year relevant to AY 2014-15 registered 14 agreements respect of properties under construction out of which allotment letters for 7 were issued and monies received prior to 31.3.2013. The assessee was following project completion method and had offered profits for taxation based on sale consideration in the A.Y. 2015-16 when the project was completed. The assessee pleaded that the difference, if it needs to be taxed, may be taxed in AY 2015-16, being the year in which the project was completed. The AO added the difference to the income of AY 2014-15 as the transactions were entered during the year under consideration. CIT(A) confirmed the action of the AO.

Does S. 43CA apply to a case of property under construction

- The Tribunal noted that only the agreement was registered during the year under consideration. The agreement mentioned that the property was under construction. The Tribunal held that the agreement which was registered was `property under construction' and not property per se. The Tribunal raised a question whether provisions of S. 43CA would apply to such a case? It noted that S. 43CA applies when there is transfer of land or building or both. It observed that in the instant case neither has happened. In respect of allotments made prior to 31.3.2013 the Tribunal noticed that the allottees had agreed that till such time as agreement is executed no right is created in favor of flat buyer and allotment is just a confirmation of booking subject to execution of agreement to be drafted at a later point of time. The allotment letter specified that the relevant office has been allotted to the flat buyer with rights reserved to the assessee to amend the building plans as it may deem fit.

Does S. 43CA apply to a case of property under construction

- The Tribunal held that since the assessee had not completed the construction of the office during the relevant year. It could also be inferred that pursuant to registration of agreement with the stamp duty valuation authorities, a right is created in favour of the flat buyer. Hence what the assessee had transferred pursuant to registration of the agreement was only the rights in the flat/office (which is under construction) and not the property per se. Hence it could be safely concluded that there was no transfer of any land or building or both by the assessee in favour of the flat buyers pursuant to registration of the agreement in the year under appeal. The Tribunal held that the provisions of section 43CA of the Act cannot be made applicable to the same. For this proposition the Tribunal relied upon the following decisions
  - *ITO vs Yasin Moosa Godil in ITA No. 2519/Ahd/2009 dated13.4.2012*
  - *Mrs Rekha Agarwal vs ITO reported in (2017) 79 taxmann.com 290(Jaipur Trib.) dated 17.2.2017*

Section 56(2)(x)(b) – Receipt of immovable property without consideration or for inadequate consideration

General background

- Gift Tax Act, 1957 – applicable to gifts made on or after 01.04.1957.
- Finance (No. 2) Act, 1998 abolished the Gift Tax Act, 1957 and proposed to tax value of any movable or immovable property received on or after 01.10.1998 by any person without consideration in money or money's worth as income. This provision did not see the light of the day.
- S. 56(2)(v) introduced by Finance (No. 2) Act, 2004 – applicable to gifts made on or after 01.09.2004.
- S. 56(2)(vi), introduced by Taxation Laws (Amendment) Act, 2006, replaced S. 56(2)(v) – applicable to gifts made on or after 01.04.2006.
- S. 56(2)(vii), introduced by Finance (No. 2) Act, 2009, replaced S. 56(2)(vi) – applicable to gifts made on or after 01.10.2009. Property in kind covered.
- S. 56(2)(viia) introduced by Finance Act, 2010 – applicable to firms or closely held companies receiving shares of closely held companies, on or after 01.06.2010, without consideration or for inadequate consideration.
- Rules 11U and 11UA notified on 07.04.2010 w.e.f. 01.10.2009 for determination of fair market value of the property other than immovable property – Valuation Rules for Ss. 56(2)(vii) and 56(2)(viia).
- S. 56(2)(viib) introduced by Finance Act, 2012, w.e.f. 01.04.2013 – applicable to closely held companies receiving consideration for issue of shares in excess of FMV of the shares.

Background for 56(2)(x)

- The Finance Act, 2009 inserted section 56(2)(vii) w.e.f. 01.10.2009. Simultaneously with introduction of this section, s. 56(2)(vi) was deleted.
- S. 56(2)(vi) did not cover receipts in kind whereas S. 56(2)(vii) covers receipts in kind as well.
- S. 56(2)(vii) covered receipt of property mentioned therein. A receipt was covered if it was without consideration or for a consideration which less than its stamp duty value / fair market value
- Receipt of immovable property without consideration is chargeable to tax if such receipt is on or after 01.10.2009 and other conditions are satisfied.
- Receipt of immovable property for a consideration which is less than its stamp duty value is chargeable to tax w.e.f. Asst Year 2014-2015. Earlier, such receipt was chargeable to tax w.e.f. 01.10.2009. However, Finance Act, 2010 deleted this part with retrospective effect from 01.10.2009. The Memorandum explaining the provisions of the Finance Bill, 2010 explained the reason for deletion as under :
  - "C. In several cases of immovable property transactions, there is a time gap between the booking of a property and the receipt of such property on registration, which results in a taxable differential. It is, therefore, proposed to amend clause (vii) of section 56(2) so as to provide that it would apply only if the immovable property is received without any consideration and to remove the stipulation regarding transactions involving cases of inadequate consideration in respect of immovable property."

Background for 56(2)(x)(b)…

- The difficulty envisaged by the Finance Bill, 2010 was sought to be resolved by inserting a proviso to 56(2)(vii)(b)(ii).
- Except for the proviso to S. 56(2)(vii)(b)(ii) the provisions are the same as they were introduced by the Finance Act, 2009 and amended by the Finance Act, 2010.
- In the event that there is an issue of interpretation of the provisos in view of the language not being clear or being capable of two interpretations the provisos will have to be interpreted in a manner that they resolve the difficulties which were envisaged by the Finance Act, 2010.
- Since the provisions of S. 56(2)(vii) were applicable only to individuals and HUFs, with a view to widen the net, the FA, 2017 made provisions of S. 56(2)(vii) inapplicable to receipts from 1.4.2017 and a new clause viz. clause (x) was introduced which applied to receipts on or after 1.4.2017 by all persons.
- In case of receipt of immovable property for inadequate consideration -
  - FA, 2018 has w.e.f. 1.4.2019 introduced a tolerance limit of 5%;
  - FA, 2020 has w.e.f. 1.4.2021 increased the tolerance limit to 10%
  - FA, 2021 has w.e.f. 1.4.2021 inserted 4th proviso to s. 56(2)(x)(b) to incorporate increased tolerance limit of 43CA qua the recipient of IP

Text of Section 56(2)(x)

"56(2) In particular, and without prejudice to the generality of the provisions of sub-section (1), the following incomes, shall be chargeable to income-tax under the head "Income from other sources", namely :—

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

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

(b) any immovable property, -

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

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

(i) the amount of fifty thousand rupees; and

(ii) the amount equal to five per cent [w.e.f. 1.4.2019] of the consideration: [w.e.f. 1.4.2021 it is ten per cent]

Text of Section 56(2)(x)

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

Provided also that where the stamp duty value of immovable property is disputed by the assessee on grounds mentioned in sub-section (2) of section 50C, the Assessing Officer may refer the valuation of such property to a Valuation Officer, and the provisions of section 50C and sub-section (15) of section 155 shall, as far as may be, apply in relation to the stamp duty value of such property for the purpose of this sub-clause as they apply for valuation of capital asset under those sections ;

Text of Section 56(2)(x)

Provided also that in case of property being referred to in the second proviso to sub-section (1) of section 43CA, the provisions of sub-item (ii) of item (B) shall have effect as if for the words “ten per cent”, the words “twenty per cent” had been substituted. **[This proviso has been inserted by Finance Act, 2021 w.e.f. 1.4.2021]**

Text of Section 56(2)(x) …

(*c*) any property, other than immovable property,—

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

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

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

(*I*) from any relative; or

(*II*) on the occasion of the marriage of the individual; or

(*III*) under a will or by way of inheritance; or

(*IV*) in contemplation of death of the payer or donor, as the case may be; or

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

Text of Section 56(2)(x) …

(VI) from any fund or foundation or university or other educational institution or hospital or other medical institution or any trust or institution referred to in clause (23C) of section 10; or

(VI) from or by any trust or institution registered under section 12A or section 12AA; or

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

(VIII)By way of transaction not regarded as transfer under clause (i) or clause (iv) or clause (v) or clause (vi) or clause (via) or clause (viaa) or clause (vib) or clause (vic) or clause (vica) or clause (vicb) or clause (vicd) or clause (vii) of section 47; or

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

(X)from such class of persons and subject to such conditions as may be prescribed [w.e.f. 1.4.2020].

Definitions for the purpose of 56(2)(x)…

Explanation.—For the purposes of this clause the expressions “assessable”, “fair market value”, “jewellery”, “property”, “relative” and “stamp duty value” shall have the same meanings as respectively assigned to them in the Explanation to clause (vii).

Explanation (d) to clause (vii) defines “property” as -

(*d*) "**property**" means the **following capital asset** of the assessee, namely:—

- (*i*) **immovable property being land or building or both**;
- (*ii*) shares and securities;
- (*iii*) jewellery;
- (*iv*) archaeological collections;
- (*v*) drawings;
- (*vi*) paintings;
- (*vii*) sculptures;
- (*viii*) any work of art; or
- (*ix*) bullion;

Definitions for the purpose of 56(2)(x)…

*(*e) *"relative" means,—*

*(*i) *in case of an individual—*

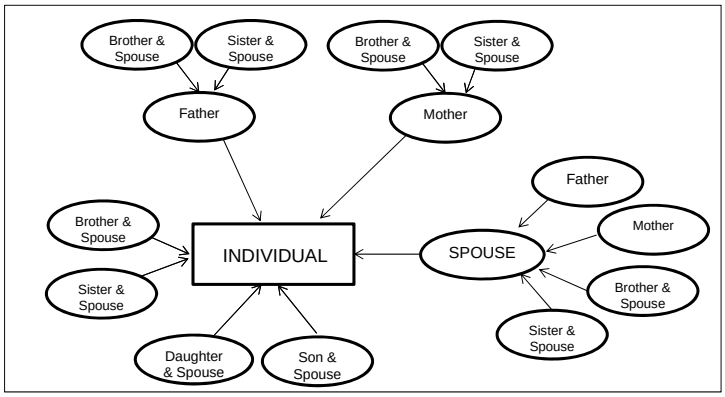
- *(*A) *spouse of the individual;*
- *(*B) *brother or sister of the individual;*
- *(*C) *brother or sister of the spouse of the individual;*
- *(*D) *brother or sister of either of the parents of the individual;*
- *(*E) *any lineal ascendant or descendant of the individual;*
- *(*F) *any lineal ascendant or descendant of the spouse of the individual;*
- *(*G) *spouse of the person referred to in items (*B*) to (*F*); and*

*(*ii*) in case of a Hindu undivided family, any member thereof;*

(*f*) "stamp duty value" means the value adopted or assessed or assessable by any authority of the Central Government or a State Government for the purpose of payment of stamp duty in respect of an immovable property;"

'Relative'

- **The relatives of an assessee who is an individual are very nicely explained by the following diagram from BCAS Referencer**.



Source : BCAS Referencer

Is immovable property situated outside India also covered by this clause?

- A question which arises for consideration is whether receipt of immovable property situate outside India, without consideration or for inadequate consideration is covered by this clause.

- In the event of receipt of immovable property without consideration, stamp duty value whereof exceeds Rs. 50,000 the stamp duty value of such property is charged to tax under clause (x) of sub-section (2) of section 56. Similarly, in case of receipt of immovable property for inadequate consideration if the difference between the stamp duty value of the property received and the consideration is either more than Rs. 50,000 or 5% / 10% of the consideration, the entire difference between the stamp duty value of the property and the consideration is charged to tax under clause (x) of sub-section (2) of section 56. Thus, the basis of levy / computation is the stamp duty value. The word `stamp duty value' has been defined in Explanation (f) as under –

> "(f) "stamp duty value" means the value adopted or assessed or assessable by any authority of the Central Government or a State Government for the purpose of payment of stamp duty in respect of an immovable property."

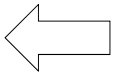
Is immovable property situated outside India also covered by this clause?...

- Thus, stamp duty value is –

  (i) the value adopted or assessed or assessable by **any authority of Central Government or a State Government;** and

  (ii) such value is for the purpose of payment of stamp duty in respect of an immovable property.

- In case of an immovable property situate outside India, there will not be any such value and therefore the charge will fail. Therefore, one can conclude that, the provisions of clause (vii) / (x) are not applicable to immovable property situate outside India.



'Immovable Property'

- S. 56(2)(x) interalia applies to an assessee receiving 'immovable property' without consideration or for a consideration which is less than its stamp duty value and the difference is greater than either Rs. 50,000 or 5% / 10% / 20% of consideration.

- Explanation to S. 56(2)(x) interalia provides that for the purpose of s. 56(2)(x), 'property' shall have the same meaning as is assigned to it in the Explanation to clause (vii).

- Explanation to clause (vii) defines various words for the purpose of this clause. Explanation (d) defines "property". The word `property' is exhaustively defined as follows –

  "(d) "property" means the following capital asset of the assessee, namely:-

  (i) immovable property being land or building or both;

  (ii) .....

  (iii) ....."

Meaning of `immovable property'

- A question which arises is whether the word `immovable property' used in sub-clause (b) can be understood to cover only land or building or both. The answer appears to be in affirmative. The correctness of this proposition can be tested by assuming that this proposition is not correct. If, even rights in immovable property are sought to be covered by sub-clause (b) then the first proviso to s. 56(2)(x) which excludes the application of clause (x) to any sum of money or property received from persons mentioned therein which interalia covers receipts from relatives will operate to exclude only immovable property being land or building or both. Therefore, rights in immovable property received from a relative will be covered whereas the receipt of immovable property being land or building or both from a relative will not be covered. This is absurd. Therefore, it appears that the word `immovable property' in sub-clause (b) will mean only land or building or both.

Meaning of `immovable property'…

- This view is also supported by the Explanatory Memorandum to Finance (No. 2) Bill, 2009 vide which clause (vii) was introduced in the Act. The Explanatory Memorandum after explaining that the provisions of clause (vi) do not cover anything which is received in kind having `money's worth' states that it is, therefore, proposed to amend section 56 of the Income-tax Act to provide that the value of any property received without consideration or for inadequate consideration will also be included in the computation of total income of the recipient. ***Such properties will include immovable property being land or building or both***, shares, and securities, jewellery, archaeological collections, drawings, paintings, sculptures or any work of art. Thus, the Explanatory Memorandum clearly states that what is proposed to be covered is land or building or both and not rights therein. (emphasis supplied)
- A useful reference, to support the above proposition, can also be made to CBDT Circular No. 05/2010 dated 3rd June, 2010 explaining the provisions of Finance (No. 2) Act, 2009 in para 24.2 states as follows-
  - "24.2 …… ***Such properties will include immovable property being land or building or both***, shares and securities, jewellery, archaeological collections, drawings, paintings, sculptures or any work of art." (emphasis supplied)

Are rights in immovable property also covered?

- Question may arise whether rights in land or building, such as tenancy, lease, license in or with respect to land or building or both, are covered by this section. Since the definition of property does not refer to rights or transactions which may enable use or enjoyment of property, it appears that having regard to the description, context and objective, acquisition of such rights cannot be equated with immovable property because the Act specifically refers to such rights or transactions where the same are sought to be covered.
  - Chapter XXC as was applicable, before 01.07.2002, to transfer of immovable property specifically included rights in or with respect to any land or any building apart from land or building [S. 269UA(d)(ii)].
  - Section 27(iii) to (iiib) refer to certain types of transactions w.r.t. land or building.
  - Sections 35, 54G, 54GA, specifically refer to rights in land or building.

Are rights in immovable property also covered?

- Provisions of section 50C also apply to transfer of a capital asset being land or building or both.

- In the context of provisions of section 50C, in the following cases, it has been held that rights in immovable property are not covered –
  - *DCIT v Tejinder Singh (2012) (50 SOT 391) (Kol)* - Transfer of leasehold rights in a building do not attract provisions of S. 50C.
  - *Atul G. Puranik v. ITO (132 ITD 499)(Mum)* - Leasehold rights in plot of land is not `land or building or both'.
  - *Kishori Sharad Gaitonde v. ITO ((ITA No. 1561/M/09)*, BCAJ Pg. 28, Vol 41 B Part 5, February 2010).
  - *Fleurette Marine Novell Hatam v. ITO* (2015) 61 taxmann.com 362 (Mum Trib).
  - *Kancast (P.) Ltd. v. ITO (2015)* 55 taxmann.com 171 (Pune Trib).
  - *ITO v. Pradeep Steel Re-Rolling Mills (P) Ltd.,* (2013) 39 taxmann.com 123 (Mum Trib)
  - Voltas Ltd. v. ITO [(2016) 74 taxmann.com 99 (Mum.-Trib.)]

Are rights in immovable property also covered?

- However, in the following cases, it has been held that the provisions of section 50C are applicable to transfer of development rights.
  - *Chiranjeev Lal Khanna v. ITO* [132 ITD 474 (Mum)] – S. 50C applies to Transfer of Development Rights
  - *Mrs. Arlette Rodrigues v. ITO* [ITA No. 343/Mum/2010 (Assessment Year 2006-07) order dated 18.02.2011] – S. 50C applies to Transfer of Development Rights.
  - *Smt. Myrtle D'Souza v. ITO* [ITA No. 3168/Mum/2011 (Assessment Year 2006-07) order dated 20.06.2012] – follows Mrs. Arlette Rodrigues and holds that S. 50C applies to Transfer of Development Rights.

Are rights in immovable property also covered?

- Also, the decisions rendered in favor of the assessee under s. 50C need to be read alongside the following decisions –
  - Pr. CIT v. Kancast Pvt. Ltd. [2018 (5) TMI 713 - Bombay High Court]
  - Keki Bomi Dadiseth v. CIT [2017 (3) TMI 1055 – Bombay High Court]
  - Sh. Ram Ji Lal Meena s/o Sh. Bachu Ram Meena v. ITO, JAIPUR [2018 (5) TMI 1792 - Rajasthan High Court]
  - Jai Hind Sciaky Ltd. v. DCIT [(2017) 80 taxmann.com 105 (Bombay High Court)]
- In the context of section 56(2)(x) since the asset received has to be a capital asset and development rights, generally received by builders, constitute stock-in-trade, the same may not be relevant for this clause.
- Wherever, the Legislature intended to cover rights in land and building it has done so specifically e.g. provisions of Chapter XX-C of the Act, 27, 35, 54G, 54GA.

Scope of land or building or both

- **ITO v. Yasin Moosa Godil [(2012) 18 ITR 253 (Ahd.-Trib.] -** S. 50C does not apply to "rights in land & building". Consequently, the provisions do not apply to transfer of booking rights by the assessee.
- **Smt. Devindraben I. Barot *v. ITO* [(2016) 70 taxmann.com 235 (Ahmedabad - Trib.)]** - Section 50C would have no application where assessee has transferred only rights in impugned land which cannot be equated to land or building or both
- **ITO v. Tara Chand Jain [(2015) 63 taxmann.com 286 (Jaipur - Trib.)]** – 50C does not apply to a case where the ownership of the land is with the State Government. The land is acquired and the assessee is merely a Kashtkar, this clearly shows that the assessee is only having the limited rights in the land sold. The limited rights of Kashtkar on the land cannot be equated with the ownership of land or with building or with both. **The Act clearly recognizes the distinction between the land or building or any right in the land or building under section 50C. Thus, the Act has given the separate treatment to land, building and rights in the land.** [Para 6.10]

Scope of land or building or both

In the following cases it was held that the provisions of S. 50C are applicable to Development Agreements

- Chiranjeev Lal Khanna v. ITO [(2012) 66 DTR 260 (Mum.)(Trib.)]
- Mrs Arlette Rodrigues v. ITO [ITA No. 343/Mum/2010)]
- Smt. Myrtle D'Souza v. ITO [ITA No. 3168/Mum/2011)]
- Arif Akhtar Hussain v. ITO [(2011) 59 DTR 307 (Mum.)(Trib.)]

S. 50C is not applicable to transfer of land development rights

- Shakti Insulated Wires Pvt. Ltd. v ITO (Mum)(URO) [(ITA No. 3710/Mum/07; Assessment Year 2003-04; Mumbai E-1 Bench, Order dated 27.4.2009)]
- Voltas Ltd. v. ITO [(2016) 74 taxmann.com 99 (Mum.-Trib.)]

Scope of land or building or both

S. 50C is not applicable to transfer of tenancy rights / leasehold rights

- Kishori Sharad Gaitonde [(Mum SMC)(URO)]
- DCIT v. Tejinder Singh [(2012) 50 SOT 391 (Kol.)(Trib.)]
- Atul G. Puranik v. ITO [(2011) 58 DTR 208 (Mum.)(Trib.)]
- Fleurette Marine Novelle Hatam v. ITO (International Taxation) [(2015) 61 taxmann.com 362 (Mumbai - Trib.)]
- Kancast (P.) Ltd. v. ITO [(2015) 55 taxmann.com 171 (Pune - Trib.)]
- ITO v. Pradeep Steel Re-Rolling Mills (P.) Ltd. [(2013) 39 taxmann.com 123 (Mumbai - Trib.)]
- **CIT v. Greenfield Hotels & Estates (P.) Ltd. [(2017) 77 taxmann.com 308 (Bom.)]** - This decision was allowed as the Tribunal had decided the matter following decision in Atul G. Puranik [2011 (5) TMI 576 – ITAT, Mumbai] and the Revenue could not in the High Court point out any distinguishing features either in facts or in law in the present appeal from that arising in the case of Atul Puranik

Should the immovable property to be covered by this clause be a capital asset of the assessee or should it be capital asset u/s 2(14) of the Act

- Sub-clause (b) refers to receipt of immovable property without any mention about it being a capital asset. The reference to capital asset is only in the definition of property in Explanation (d). An argument is made that the word `immovable property' in sub-clause (b) is not qualified by the word capital asset therefore, even receipt of immovable property as stock-in-trade will also be covered. It is submitted that such a contention is fallacious for the following two reasons –
  - If we assume that even stock-in-trade is covered by the provisions then receipt of immovable property constituting stock-in-trade from a relative will also be covered whereas receipt of immovable property constituting capital asset will not be covered by sub-clause (b). This certainly is not the intention.
  - If receipt of an immovable property which constitutes stock-in-trade is also covered then there is no back up provision similar to section 49(4) allowing deduction of the amount charged to tax under this clause;

  It can also be argued that section 14 requires income to be classified under each of the 5 heads mentioned therein. The head `Income from Other Sources' is the last head there. Income can be taxed under the residuary head only if it does not properly fall under any of the earlier heads of income. Receipt of stock-in-trade would fall under the head `Profits & Gains of Business or Profession' and not Income from Other Sources – T. P. Sidhwa (Bom) 133 ITR

Should the immovable property to be covered by this clause be a capital asset of the assessee or should it be capital asset u/s 2(14) of the Act…

- The phrase `capital asset' in the definition of `property' in Explanation (d) to s. 56(2)(vii) was inserted by the Finance Act, 2010 w.e.f. 1.4.2010. The intent as stated in the Explanatory Memorandum reads as under –
  - **B.** The provisions of section 56(2)(vii) were introduced as a counter evasion mechanism to prevent laundering of unaccounted income under the garb of gifts, particularly after abolition of the Gift Tax Act. The provisions were intended to extend the tax net to such transactions in kind. The intent is not to tax the transactions entered into in the normal course of business or trade, the profits of which are taxable under specific head of income. It is, therefore, proposed to amend the definition of property **so as to provide that section 56(2)(vii) will have application to the 'property' which is in the nature of a capital asset of the recipient and therefore would not apply to stock-in-trade, raw material and consumable stores of any business of such recipient**.
- Thus, it appears that the immovable property constituting capital asset of the recipient only will be covered and not immovable property constituting stock-in-trade.

S. 56(2)(vii) does not apply to IP held as stock-in-trade Ashok Agarwal HUF v. DCIT(Jaipur Trib)

- Jaipur Bench of the Tribunal in **Ashok Agarwal HUF v. DCIT(Jaipur Trib)[ITA No.:71/Jp./2020; AY: 2015-16; Order dated 30.7.2020]** has examined the applicability of provisions of s. 56(2)(vii)(b) to immovable property received by an assessee who held such immovable property as stock-in-trade.
- The Tribunal held that the provisions of s. 56(2)(vii) do not apply to receipt of an immovable property (by way of purchase in that case) held as stock-in-trade. The Tribunal, while so holding, considered –
  - `property' is defined in Explanation (d) under clause (vii) to mean the capital asset of the assessee;
  - CBDT Circular No. 1 of 2011 dated 6.4.2011;
  - decision of the Tribunal in the case of Premchand Jain v. ACIT ITA No. 98/JP/2019 order dated 08.06.2020
- On behalf of the assessee, reliance was also placed on –
  - Shri Satendra Koushik vs. ITO [(2019) 106 taxmann.com 244 (Jaipur-Trib.)]
  - Mubarak Gafur Korabu v. ITO [117 taxmann.com 828 (Pune-Trib.)]
  - Akluj Tal Malshiras vs. ITO In ITA No. 752/PUN/2018 order dated 05/04/2019.

Is rural agricultural land covered by this section?

- This question arises in view of the fact that it is only immovable property which is a capital asset which is covered by this clause. Agricultural land is not a capital asset, as defined u/s 2(14) of the Act. Therefore, it may be possible to take a view that receipt of rural agricultural land without consideration or for a consideration which is less than its stamp duty value and the difference does not exceed the two amounts mentioned in s. 56(2)(x)(b)(B) may not attract charge u/s 56(2)(x). This would be a literal interpretation. Such an interpretation may not be upheld for the following reasons –
- The word ` capital asset' has been used to exclude transactions which are entered into in the normal course of business or trade, the profits of which are taxable under specific head of income. This is very evident from the Explanatory Memorandum to the Finance Bill, 2010, extracts whereof are reproduced below-

  "The provisions of section 56(2)(vii) were introduced as a counter evasion mechanism to prevent laundering of unaccounted income under the garb of gifts, particularly after abolition of the Gift Tax Act. The provisions were intended to extend the tax net to such transactions in kind. ***The intent is not to tax the transactions entered into in the normal course of business or trade, the profits of which are taxable under specific head of income. It is, therefore, proposed to amend the definition of property so as to provide that section 56(2)(vii) will have application to the 'property' which is in the nature of a capital asset of the recipient and therefore would not apply to stock-in-trade, raw material and consumable stores of any business of such recipient***."
  (Emphasis supplied)

Is rural agricultural land covered by this section?...

- This is an anti-abuse provision. Anti-abuse provisions are to be interpreted in a manner so as to advance the object for which they are enacted.
- Section 2 clearly states that the definitions given are subject to the context requiring otherwise. Considering the fact that the provisions are anti-abuse provisions one may come to a conclusion that the context requires that the term `capital asset' should not be understood as defined in S. 2(14).
- For these reasons one may come to a conclusion that receipt of rural agricultural land without consideration or for a consideration which is less than its stamp duty value would be covered by the provisions.
- The other view of the matter could be that the receipt of rural agricultural land will not be covered by sub-clause (b) because the sale of agricultural land does not attract tax and therefore, there would be no reason why the vendor of the agricultural land would understate the consideration for sale thereof.
- Neither is there any reason to go to the Explanatory Memorandum since the language of the provision is clear nor does the context require that the term `capital asset' be understood in a manner otherwise than as is defined u/s 2(14).

S. 56(2)(vii) does not apply to agricultural land which is not capital asset u/s 2(14) Shri Prem Chand Jain vs. ACIT [117 taxmann.com 370 (Jaipur-Trib.)]

- Jaipur Bench of the Tribunal has in the case of Shri Prem Chand Jain v. ACIT [117 taxmann.com 370 (Jaipur-Trib.)] held that the provisions of s. 56(2)(vii) do not apply to receipt of agricultural land which is not a capital asset as defined u/s 2(14). Similar is the view taken in several other decisions.
- The contention of the revenue, in such cases, is that s. 56(2)(vii)(b) refers to `any immovable property' and agricultural land being immovable property, the provisions of s. 56(2)(vii)(b) are applicable to receipt of agricultural land.
- The Tribunal observed that s. 56(2)(vii)(b) refers to any immoveable property. Further, s. 56(2)(vii)(c) refers to any property, other than an immovable property. The meaning of the term "property" has been provided in Explanation (d) to section 56(2)(vii) where the term "property" has been defined to mean capital asset of the assessee namely immoveable property being land or building or both.
- The Tribunal held that the term "property" has been defined to mean a capital asset as so specified and where an immoveable property as so specified being land, building or both is not held as an capital asset, it will not be subject to the provisions of section 56(2)(vii)(b) of the Act.

S. 56(2)(vii)(b) applies to any immovable property whether it is stock-in-trade or it is agricultural land which is not a capital asset u/s 2(14)

- While Jaipur Bench of the Tribunal has in the case of Shri Prem Chand Jain v. ACIT [117 taxmann.com 370 (Jaipur-Trib.)] held that the provisions of s. 56(2)(vii) do not apply to receipt of agricultural land which is not a capital asset as defined u/s 2(14). The Jaipur bench of the tribunal in **ITO v. Trilok Chand Sain [(2019) 101 taxmann.com 391 (Jaipur-Trib.)]** was dealing with a case of an assessee who was a dealer in agricultural land and who purchased agricultural land as his stock-in-trade. The AO taxed the difference between the SDV and the consideration for purchase. CIT(A) deleted the addition on the ground that the agricultural land so purchased were not `capital asset' u/s 2(14) and also they were stock-in-trade of the assessee.
- The Tribunal was dealing with assessment for AY 2014-15. The assessee contended that the agricultural land purchased by it is not a capital asset u/s 2(14) and also that it is purchased in the course of his business. The revenue contended that clause (b) refers to any immovable property and therefore agricultural land purchased by assessee is covered.

ITO v. Trilok Chand Sain [(2019) 101 taxmann.com 391 (Jaipur-Trib.)]

- The Tribunal held that –
  - On reading of provisions of section 56(2)(*vii*)(*b*), it is found that it refers to any immovable property and the same is not circumscribed or limited to any particular nature of immovable property. It refers to any immovable property which by its grammatical meaning would mean all and any property which is immovable in nature, i.e, attached to or forming part of earth surface. In the instant case, the assessee has purchased three plots of agricultural land and such agricultural land is clearly an immovable property. Whether such agriculture land falls in the definition of capital asset under section 2(14) or whether such agriculture land is stock-in-trade of the assessee, are issues which cannot be read in the definition of 'any immovable property' used in context of section 56(2)(*vii*)(*b*) and are thus not relevant. In the result, the order of the Commissioner(Appeals) is set aside to this extent and the order of the Assessing officer is upheld. In the result, said ground of the revenue's appeal is allowed. [Para 6](emphasis supplied)
- .

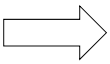
Applicability to Capital Asset / Rural Agricultural Land

- The Tribunal in ITO v. Trilokchand Sain **[(2019) 101 taxmann.com 391 (Jaipur-Trib.** has not made a reference to Explanation (d) defining `property'. It is for this reason that Pune Bench in Mubarak Gafur Korabu (ante) having noted this has held that the provisions of s. 56(2)(vii)(b) do not apply to receipt of land held as stock-in-trade. The Pune Bench observed that the Jaipur Bench of the Tribunal has not considered clause (c).

- In the following decisions it has been held that the provisions of S. 56(2)(vii)(b) do not apply to receipt of rural agricultural land as the same is not a capital asset –
  - Yogesh Maheshwari v. DCIT – 2021(1) – TMI – 832 – ITAT - Jaipur
  - Premchand Jain v. ACIT 2020(7) – TMI – 188 – ITAT - Jaipur
  - Ram Prasad Meena v. ITO – 2020(9) – TMI – 568 – ITAT - Jaipur
  - Sachin Arun Dhotre v. ITO – 2021 (5) – TMI – 60 – ITAT - Mumbai
  - Mubarak Gafur Korabu v. ITO – 2019(4) – TMI – 1877 – ITAT - Pune

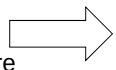
Does the clause apply to stock-in-trade

- In the following decisions it has been held that the provisions of S. 56(2)(vii)(b) do not apply to receipt of stock-in-trade –
  - When the properties in question are undisputedly shown in the books of account of the assessee as stock-in-trade and part of closing stock, then the same would not fall in the ambit of the property as defined in explanation to s. 56(2)(vii) - **CIT v. Ashok Agarwal HUF – 2020(8) – TMI – 94 – ITAT- Jaipur**
  - Agricultural land purchased by assessee is not governed by the provisions of Section 56(2)(vii)(b) being not capital asset and also because of the fact that the assessee was holding it as stock-in-trade. It is outside the purview of the said section and no addition has to be made in the hands of the assessee - **Mubarak Gafur Korabu v. ITO – 2019(4) – TMI – 1877– 286 – ITAT -Pune**



Does tolerance limit apply retrospectively

- In the following decisions it has been held that the tolerance limit will be applicable –
  - In the case of Rahul Construction v. DCIT [(2012(1)-TMI-229-ITAT-Pune] the Tribunal has adjudicated and decided the similar issue in favor of the assessee, where it was held that the margin between the value as given by the assessee the Departmental Valuer was less than 10 per cent and the difference is liable to be ignored and the addition made by lower authorities on this count cannot be sustained. …. The difference between the sale consideration shown by assessee and fair market value estimated by DVO was less than 10% and hence the same is liable to be ignored - **Geetika Sachdev v. ITO – 2019 (12) – TMI – 451 – ITAT - Delhi**
  - Valuation is always a matter of estimation and the difference of less than 5% is only a difference which should be construed as a difference in estimation and the value adopted by the assessee should be accepted in such circumstances - **Rama Jogi Reddy Sanepalli v. ITO – 2019(2) – TMI – 1875 – ITAT - Bangalore**
  - Sandeep Patil v. ITO – 2020 (10) – TMI – 923 – ITAT - Bangalore



Does tolerance limit apply retrospectively

- In the following decisions it has been held that the tolerance limit will be applicable –
  - Parliament has introduced third proviso in section 50C(1) of the Act, as per which the difference in stamp duty valuation and actual consideration should be ignored, if it is less than 5%/10%. Even though the said provision has come into effect from 1.4.2019/1.4.2021, we notice that the Kolkata Bench of Tribunal has held it to be curative in nature in the case of Chandra Prakash Jhunjhunwala [2019 (8) TMI 1192 - ITAT KOLKATA] and accordingly held that the proviso shall apply since the date of insertion of sec.50C of the Act. Accordingly, the above said reasoning given by the Kolkata bench of ITAT also supports the contentions of the assessee.
  - We notice that the addition sustained by Ld CIT(A) works out to less than 10% of the actual consideration paid by the assessee. Accordingly, we modify the order passed by Ld. CIT(A) and direct the A.O. to ignore the difference between fair market value determined by CIT(A) and the actual consideration as the same is less than 10% of the actual consideration. **Sandeep Patil v. ITO – 2020 (10) – TMI – 923 – ITAT - Bangalore**

Does the provision apply to agreements entered into after the date of its introduction

- The provisions will be applicable only if the agreement is entered into after coming into force of the provisions of s. 56(2)(vii)(b)(ii) –
  - In a case where the transferor and transferee had put their signatures on sale deed on 30.3.2013 which was registered on 1.4.2013, the Rajkot Bench of the Tribunal in **Babulal Shambhubhai (Rajkot Trib)** held that the provisions of s. 56(2)(vii)(b) would not apply as the same have been introduced w.e.f. 1.4.2014.
  - In a case full consideration was paid in FY 2011-12, mere registration at a later date would not cover a transaction already executed in the earlier years and substantial obligations have been discharged and a substantive right has accrued to the assessee therefrom. The Tribunal held that the pre-amended provisions would apply and the Revenue was debarred to cover transactions where inadequacy in purchase consideration is alleged - **Bajranglal Naredi v. ITO – 2020(1) – TMI – 1359 – ITAT – Ranchi**
  - The AO is not permitted to invoke the provisions of section 56(2)(vii)(b)(ii) in the absence of sub clause (ii) in the Act as on the date of agreement - **ACIT v. Anala Anjibabu – 2020 (8) – TMI – 597 – ITAT – Vishakapatnam**

Provision to apply to transactions after introduction of the provision

- CBDT Circular No. 5/2010 also mentions that the provisions are applicable to transactions entered into after introduction of s. 56(2)(vii).

However, contra view taken in -

- The orders of the authorities below are set aside and the matter is remanded to the record of the A.O. to apply the stamp duty valuation as on 10/10/2010 when the assessee booked the flat and made the part payment of consideration and consequently, if any difference being the stamp duty valuation is higher than the purchase consideration paid by the assessee, the same would be added to the income of the assessee under the provisions of Section 56(2)(vii)(b) - **Radhakishan Kungwani v. ITO – 2020(8) – TMI – 511 – ITAT – Jaipur**

- In the case above mentioned case, the assessee did not take up the contention that the provisions are not applicable as the agreement was entered into before the provisions came into force.

Meaning of receives

- In the following decisions it has been held that the receipt would be `defacto' receipt-
  - The de facto ownership, recognized in Podar Cement Pvt. Ltd. is for the purpose of section 22 of the Act. The reason/s therefor is not far to seek, i.e., the object of the Act, being to tax the person who is in the effective control of the asset (property), and who has a better title thereto than anyone else, receiving income therefrom in his own right.
  - No doubt, the word employed in section 56(2)(vii) is 'receives'. The same, again, could only mean receipt in his own right, assuming effective control over and right on the usufruct of the property, implying a de facto ownership. It is only a de facto transfer, which stands recognized u/s. 2(47)(vi) of the Act, that would result in a de facto ownership, fulfilling the requirement of a 'receipt' u/s. 56(2)(vii) inasmuch as it enables one to exercise, for all practical purposes, rights in and over the property 'received'. While the sale, resulting in a de jure ownership, is complete only on 24/4/2013, the de facto transfer, leading to a de facto ownership, gets completed earlier on 30/3/2013 on the execution of the instrument of sale, with each party having fulfilled his part of the contract to transfer. **ITO v. Rakhi Agrawal – 2020(10) – TMI – 1115 – ITAT - Jabalpur**

Receives would mean de facto receipt

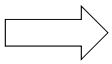
- In the following decisions it has been held that the receipt would be `defacto' receipt-
  - In the instant case, the assessee has entered into a registered sale deed on 1.11.2013 which effectively means he has lawfully received the immoveable property in terms of title and possession though for an inadequate consideration on 01.11.2013 which falls during the financial year 2013-14 relevant to assessment year 2014-15. The provisions of section 56(vii)(b)(ii) are thus clearly applicable in the instant case - **Ram Ratan Jangir v. ITO – 2018(10) – TMI – 1162 – ITAT - Jaipur**
- Receipt by POA holder is not a receipt envisaged by this clause **– Sh Gurudev Singh v. ITO – 2019(4) – TMI – 1365 – ITAT - Amritsar**
  - Power of Attorney does not give ownership rights to the assessee and that the document referred to and relied upon to infer transfer of the plot was nothing but the Power of Attorney executed by the lady owner in assessee's favour.
  - Thus a general POA was given to the assessee by Smt. Harsharan Kaur to maintain the property, it cannot be said that the assessee received the property and was liable to pay the tax on the stamp duty value of the said property.

Meaning of agreement

Poonam Ramesh Sahajwani v. ITO – 2020(11) – TMI – 817 – ITAT - Mumbai

- It is pertinent to mention here that the term 'agreement' used in proviso to sub-clause (b) does not necessarily mean a document with the title agreement. This would also include a first document by whatever name called, that reflects the intention of the parties mutually agreeing to fix amount of consideration.

- The provision of Section 56(2)(vii)(b) of the Act does not envisage transfer of ownership for determination of stamp duty value. The determination of stamp duty value hinges on the date of agreement fixing the amount of consideration for transfer of immovable property.



Cases where Tribunal held that second inning cannot be allowed

- Tribunal in **Mohd. Ilyas Ansari v. ITO 2020 (12) TMI 105 - ITAT MUMBAI** was dealing with a case where the AO mechanically applied the provisions of S. 56(2)(vii) and did not consider either the report of the Registered Valuer filed by the assessee or the objections raised. Neither the AO nor the CIT(A) referred the valuation to DVO. The Tribunal held that that the revenue cannot be allowed a second inning by sending the matter back to the Assessing Officer to prove before the Assessing Officer that the sale consideration was the fair market value of the property purchased by the assessee when the assessee was all along disputing valuation of the property and the revenue miserably failed to find out the correct value of the property both at assessment stage as well as at first appellate stage.

Cases where Tribunal held that second inning cannot be allowed

- In the case of **Hari Om Garg v. ITO, the Agra Bench of the Tribunal in ITA.No. 342/Agra/2017** dated 31.05.2019 has taken a view that the Department cannot be allowed a second inning by sending the matter back to the Assessing Officer enabling the revenue to fill the lacunae and shortcomings and furtherputting the assessee to face a re-trail for no fault of him and to prove before the Assessing Officer that the sale consideration was the fair market value of the property purchased by him.

- Similarly, in the case of **Sh. Dev Brat Sharma v. ITO**, the Amritsar Bench of the Tribunal camping at Jalandhar in **ITA.No. 493/Asr/2018 dated 17.01.2019** also considered identical situation and deleted the addition made by the Assessing Officer

Is the section retrospective / retroactive?

- Sub-clause (b)(B) is certainly not retrospective. It applies in respect of properties received by a person on or after 1.4.2017. Therefore, the mandate of the section will not apply to a case where property has been purchased before 1.10.2017**.** However, in case an assessee is an individual or a HUF then the provisions of s. 56(2)(vii)(b) may apply in respect of receipts on or after 1.10.2009. – **ACIT v. Rakesh Narang [2015] 64 taxmann.com 332 (Delhi - Trib.)**
- A question does arise as to whether this provision is retroactive? The charge under this clause is on receipt basis. If an immovable property is received after the introduction of the clause, though the agreement for transfer of immovable property was entered when the clause was not on the statute, prima facie, it appears that the sub-clause (b)(B) will apply. To illustrate, in case the property is received (i.e. registration / possession of the property is received by the assessee) for a consideration which is less than its stamp duty value after the sub-clause was amended say in the financial year 2015-16 but the agreement for its transfer was entered into 4 years earlier i.e. in the financial year 2011-12 when the section was not on the statute. However, the stamp duty value of the property, on the date of agreement, was more than the consideration. A question arises whether the provisions of sub-clause (b)(ii) apply in such a situation.

Is the section retroactive?...

- In other words, is sub-clause (b)(ii) retroactive? One may contend that while the charge is on receipt of immovable property, the Legislature has provided a mechanism whereby stamp duty value on the date of agreement is considered instead of the stamp duty value on the date of receipt of the property.
- However, a strong argument against retroactivity would be that the provisions were enacted to be effective from 1.10.2009 but later the Finance Act, 2010 deleted the same with retrospective effect from 1.10.2009 thereby giving an impression that the difference between stamp duty value and consideration is not intended to be charged. Now, the very same transaction cannot be sought to be covered under this clause.
- A better view appears to be that the section is prospective and would apply to transactions entered into after the clause has come into force.

Is flat under construction covered?

- Sub-clause (b) applies to receipt of an immovable property being land or building or both. The charge is on receipt of the immovable property. While a flat under construction is not land or building or both, in the year in which the flat is received by the assessee from the builder, the provision will be applicable. However, the amount to be charged will be computed with reference to its stamp duty value on the date of the agreement.

- It may be argued that the provision does not apply to a flat under construction on the ground that it is not land or building or both or that flat is only part of a building and part of the building is not covered. Wherever Legislature has sought to cover part of a building, specific provisions have been made in this regard for e.g. Section 194IA of the Act. Considering the judicial trend, such a view is not likely to be upheld by the Tribunals or the Courts.

Is flat under construction covered?

- n the event that the right is assigned before getting possession of the flat, the charge will not fructify because the provision does not apply to rights in land or building. In the context of section 50C, the Ahmedabad Bench of ITAT has in the case of ***ITO v. Yasin Moosa Godil (2012) 20 taxmann.com 424 (Ahd.)*** held that the provisions of section 50C do not apply to transfer of booking rights. Applying the same ratio, it can be contended that the provisions of section 56(2)(vii) also will not apply in such a case.

- Qua the assignee, the provision of this clause will apply with reference to stamp duty value on the date on which he takes the assignment. Stamp duty value on the date of assignment will have to be compared with the aggregate of amount paid to the assignor and amount payable to the builder. The charge of tax will be in the year of receipt of possession of the flat.

Conflict between 49(1) and 49(4)

- The assessee has received immovable property as gift i.e. in one of the modes mentioned in S. 49(1). S. 49(1) provides that where the capital asset became property of the assessee in any of the modes stated therein the cost of acquisition of the asset shall be deemed to be the cost for which the previous owner of the property acquired it, as increased by the cost of any improvement of the assets incurred or borne by the previous owner or the assessee, as the case may be.
- However S. 49(4) provides that capital gain arising from transfer of a property, the value whereof has been subject to income-tax under S. 56(2)(vii)/(x), the cost of acquisition shall be deemed to be the value which has been taken into account for the purposes of the said clause (vii)/(x).
- Since there are two provisions dealing with the same situation one needs to consider whether the assessee has an option to disregard the provisions of S. 49(4) and exercise the option to apply S. 49(1) or will it be contended that 49(4) is a specific provision whereas S. 49(1) is a general provision therefore, the specific will prevail over general. It appears that the specific provision will prevail over the general one. Section 49(1) is a general provision dealing with all assets acquired in modes mentioned therein but S. 49(4) is a specific provision dealing with a particular class of assets whose value has been charged to tax under clause (vii) / (x) of sub-section (2) of section 56.

Conflict between 49(1) and 49(4)...

- The next question which arises is the year from which indexation will be available in case an assessee receives property without consideration. Receipt of property without consideration is nothing but a gift. Gift is one of the modes prescribed in section 49. In case of a capital asset which is received in one of the modes prescribed in section 49, the holding period of the previous owner is tagged on with the period for which the assessee has held the asset. Also, the cost of previous owner is taken to be the cost of acquisition of the asset by the assessee. However, when it comes to indexation, the language of Explanation (iii) to section 48 clearly provides that the indexation has to be with reference to the previous year from which the assessee held the asset. In spite of this language the Bombay High Court in the case of ***CIT v. Manjula J. Shah (2011) 16 taxmann.com 42 (Bom.)*** has on a harmonious interpretation held that the indexation will be with reference to the previous year from which the previous owner held the asset. In a case where the property is received from a non-relative the stamp duty value is charged to tax under clause (vii) / (x) of sub-section (2) of section 56 of the Act. This value is considered to be the cost of acquisition. Therefore, it is the stamp duty value on the date of receipt of the property by the assessee which is considered to be its cost of acquisition. Therefore, it appears that the Court may not hold that the indexation should be with reference to the year of acquisition by the previous owner. The indexation benefit is granted so that the inflation is taken care of. By adopting the stamp duty value as the cost of acquisition, there is no need to give any indexation in respect of an earlier period.

Are the provisions applicable to a case where the consideration is approved by the Charity Commissioner?

- On reading the provisions of the clause it appears that the clause will apply even to a case where the consideration for receipt of immovable property is approved by Charity Commissioner. It needs to be kept in mind that this is an anti-abuse provision and therefore such interpretation will have to be accorded as advances the object for which the provision was introduced. In a case where the consideration for receipt of immovable property was approved by the Charity Commissioner it can be argued that there cannot be any scope for the consideration being understated. In the context of provisions of Chapter XX-C, the Gujarat High Court in the case of ***Om Shri Jigar Association v. Union of India (1994) 209 ITR 608 (Guj)*** was dealing with a case where an agreement to sell was entered into by a public charitable trust after obtaining requisite sanction of the Charity Commissioner which was granted after issuing a public notice and inviting offers for purchase of the property concerned. The Court held that it is not possible to exercise the power to purchase such property under section 269UD because, in such a case, it would be difficult to draw a presumption that there was an attempt to evade tax even though the apparent consideration seems to be understated by more than 15 per cent, unless the Appropriate Authority comes to the conclusion that there was fraud at the time of public auction or that the amount offered by the petitioner (intending purchaser) was not genuine for some reasons. The Court quashed the order of pre-emptive purchase passed by the Appropriate Authority.

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