



# TAXATION OF REAL ESTATE TRANSACTION & INTRICACIES IN JDA : RECENT JUDICIAL DEVELOPMENT

Nagpur branch of WIRC of ICAI  
18 MAY 2024  
CA SUNIL GARG

# JOINT DEVELOPMENT AGREEMENT

- JDA with registered agreement / WITHOUT registered agreement
- Situation prior to 45(5A) .
- JDA by company / Firm other than individual & HUF
- JDA by company firm with land as business assets : business income
- JDA by company / firm with land as capital assets : normal provision
- sale / purchase under POA : benami act
- conversion of capital asset in stock in trade & vice versa : section 45(2) , 28 (via)

# SECTION 45 (1)

- Any **profits** or **gains** arising
- from the **transfer of a capital asset**
- effected in the **previous year shall**

*Save as otherwise provided in section 54,54B,54D,54E,54 EA,54 EB,54 F,54 G,54H*

- be chargeable to income tax under the head capital gain and shall be **deemed to be the income of the previous year in which the transfer took place.**

# SECTION 48 : MODE OF COMPUTATION

- The income chargeable under the head Capital Gain shall be computed by deducting from **full value of consideration received or accruing** as a result of the transfer of capital assets the following amount , namely :-
  - (i) expenditure incurred wholly and exclusively in connection with such transfer
  - (ii) the cost of acquisition of the asset and cost of any improvement thereto

# SECTION 50 D

Fair market value deemed to be full value of consideration in certain cases.

**50D.** Where the consideration received or accruing as a result of the transfer of a capital asset by **an assessee is not ascertainable or cannot be determined**, then, for the purpose of computing income chargeable to tax as capital gains, **the fair market value of the said asset on the date of transfer shall be deemed to be the full value of the consideration received or accruing as a result of such transfer.**

# MEANING OF CAPITAL ASSET [SEC 2(14)]

Capital Asset means

- a) **property of Any kind held by an Assessee** , whether or not connected with business or profession of the **Assessee** .
- b) Any securities held by a FII which has invested in such securities in accordance with the regulations made under the SEBI Act, 1992.

# MEANING OF PROPERTY : NOT DEFINED IN IT ACT

Section 2(c) of the Benami Transactions (Prohibition) Act, 1988 defines property as:

“Property” means property of any kind, whether movable or immovable, tangible or intangible, and includes any **right or interest in such property.**

# TRANSFER : SECTION 2(47)

Transfer”, in relation to a **capital asset, includes:**

- (i) Sale, exchange or relinquishment of the asset;
- (ii) Extinguishment of any rights in relation to a capital asset;
- (iii) Compulsory acquisition thereof under any law



# TRANSFER :2(47)

(iv) Conversion of capital asset into stock-in-trade;

(iv a) Maturity or redemption of a zero coupon bond;

(v) any transaction involving the **Allowing of the possession of any immovable properties to be taken or retained in part performance of the contract of the nature as referred in section 53 A of Transfer of property act , 1882 .**

## SECTION 2(47)

(vi) any transaction

( whether by way of becoming a member of, or acquiring shares in a cooperative society , company , or other association of person **or by way of any agreement or any arrangement or any other manner whatsoever** )

**which has the effect of transferring , or enabling the enjoyment of any immovable property .**

# YEAR OF TAXABILITY

- Date of JDA
- Date of registration of JDA
- handing of physical possession or constructive possession
- At the time of completion of project
- at the time of sale / conveyance deed
- date of receipts of consideration
- Or depends on terms of JDA

# JOURNEY SO FAR

|  |  |
|--|--|
| <b>Chaturbhuj Das Kapadia</b><br><b>260 ITR 491 ( Bombay )</b>                                       | <b>Physical possession</b>                   |
| Jasbir singh sarkaria  | Physical possession or general control       |
| Charanjit singh Atwal  | General control plus registration            |
| Balbir singh maini<br>398 ITR 531<br><b>Seshasayee Steels (P.) Ltd. vs. ACIT</b><br><b>421ITR 46</b> | General control plus registration after 2001 |

# ANALYSIS OF BALBIR SINGH MAINI DECISION

## Precondition of applicability of 2(47)(v)

In case of **Shrimant Shamrao Suryavanshi & Anr. v. Pralhad Bhairoba**

**Suryavanshi (D) by LRs. & Ors** honourable supreme court held

**“16. But there are certain conditions which are required to be fulfilled if a transferee wants to defend or protect his possession under Section 53-A of the Act.**

The necessary conditions are:

**(1) there must be a contract to transfer for consideration of any immovable property;**

## PRECONDITION OF VALID CONTRACT FOR 53 A

(2) the contract must be in writing, signed by the transferor, or by someone on his behalf;

(3) the writing must be in such words from which the terms necessary to construe the transfer can be ascertained;

(4) the transferee must in part-performance of the contract take possession of the property, or of any

part thereof

(5) the transferee must have done some act in furtherance of the contract; and

(6) the transferee must have performed or be willing to perform his part of the contract.”

# BALBIR SINGH MAINI : EFFECT OF NON REGISTRATION OF CONTRACT

➤ however after amendment in section 17 (1A) & 49 registration act in 2001 , any agreement which is not registered :

**it shall not have any effect in law, other than being received as evidence of a contract in a suit for specific performance or as evidence of any collateral transaction not required to be effected by a registered instrument.**

# BALBIR SINGH MAINI : WHETHER IT IS TRANSFER IN 2(47)(VI)

- The object of Section 2(47)(vi) appears to be to bring within the tax net a *de facto* transfer of any immovable property
- The expression “enabling the enjoyment of” takes color from the earlier expression “transferring”,
- we have to check whether ownership rights has really been transferred or it was mere a possession or licence to work only
- unless and until ownership rights are being transferred, mere enabling enjoyment of property does not tantamount to transfer



# BALBIR SINGH MAINI : REAL INCOME VS HYPOTHETICAL INCOME

- the court in para 25 explained the meaning of accrual of income citing cases of ED E D Susson & co Ltd (1955 )
- held accrual of income arises only when the right to receive that income has arisen

*Unless and until there is created in favour of the assessee a debt due by somebody it cannot be said that he has acquired a right to receive the income or that income has accrued to him.”*

# CASE STUDY :

ITO vs Rishi construction 157 taxmann.com 79

Where A entered into unregistered agreement with B for Rs X and later on A executed sale deed in favour of C for a sum of  $x+Y$  . A returned excess amount i.e Y to B . Held as the agreement between A & B is unregistered and whole capital gain belongs to A only .

# CASE STUDY : TAXING CAPITAL GAIN , RELEVANCE OF RECEIPT OF CONSIDERATION

[2020] 117 taxmann.com 424 / 183 ITD 237 Jaipur

CIT vs Iyraj Singh

- Whether accrual without receipt is a taxable event .
- assessee executed sale deed against three cheques , wherein payment of two cheques were stopped by buyer ,
- assessee contended that , even though registration has been done , but as per terms of agreement , ownership will be transferred only when full payment has been received
- though payment has accrued but not received , hence no transfer of ownership

# IMPORTANT DECISION ON TRANSFER

- **Principal Commissioner of Income Tax, Kolkata-1 v. Infinity Infotech Parks Ltd.**
  - ❖ possession given , but if transferee can be dispossessed due to terms contained in JDA , then it is not a transfer
  - ❖ **Tamilnadu Brick Industries 97 taxmann .com 1(2018 ) Chennai**
  - ❖ JDA and GPA for full control has been given for 40 % of superstructure , held transfer has been taken place
- **Emporis Properties (P.) Ltd. 151 taxmann 64 (2023) Calcutta high court**
  - terms of JDA contains termination clause , refundable security recd , only licence to develop was given : held NO TRANSFER

# SECTION 45 (5A)

*FINANCE ACT -2017*

*Notwithstanding anything contained in sub-section (1),*

- *Where the capital gain arises to an Assessee,*
- *being an individual or a HUF,*
- *from the transfer of a capital asset, being land or building or both,*
- *under a specified agreement,*
- *the capital gains shall be chargeable to income tax*
- *as income of the previous year in which the certificate of completion for the whole or part of the project is issued by the competent authority;*

# CONSIDERATION FOR : 45(5A)

- *And for the purposes of section 48,*
- *the **stamp duty value**, on the **date of issue of the said** certificate, **of his share, being land or building or both in the project, as increased by the consideration received in cash, if any,** shall be deemed to be the full value of the **consideration received or accruing** as a result of the transfer of the capital asset :*

# SECTION 45 (5A) : PROVISIO

IF SHARE IS TRANSFERRED BEFORE GETTING COMPLETION

## If Assessee transfers his share in the project

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

# EXPLANATION TO 45(5A)

- competent authority : means authority empowered to approve building plans by or under any law for the time being in force
- specified agreement : means a registered agreement in which a person owning land building or both agrees to allow other person to develop a real estate project on such land building or both in consideration of share being land building or both in such project whether with or without payment of part of the consideration in cash
- stamp duty value means the value adopted assessed or assessable by any authority of government for the purpose of payment of stamp duty in respect of immovable property being land building or both .



# ISSUES IN JDA

➤ **Whether amendment by FA 2017 in section 45(5A) , can be applied retrospectively**

➤ **May be yes , being a curative provisions it can be applied for joint development agreement prior to April 2017. but in following decision it was held NO .**

- Adinarayana Reddy Kummata v. ACIT [2018] 91 taxmann.com 360 (Hyd. ITAT) -K. Vijaya Lakshmi v. ACIT [2018] 91 taxmann.com 253 (Hyd. ITAT)

➤ **How to compute tax , if the land is held by assessee business assets.**

➤ **the income will arise under the head PGBP and percentage of completion method will be applicable .**

## CONVERSION BEFORE JDA : 45(2)

- **If the capital assets is converted into business assets before entering into JDA .**
- in case of conversion from capital assets to business asset section 45(2) will be applicable . And 45(5A) will not be applicable . Hence income from PGBP will be applicable
- **deduction u/s 54 / 54 F can be claimed as per circular 791 dt 2.6 2000**

# CONVERSION BEFORE JDA : 28(VIA)

- **inventory converted to capital assets**
- **taxable event under PGBP will arise immediately u/s 28**
- **section 45(5A) will be available**

# ISSUES IN JDA

- What if the consideration is in revenue sharing model .
- if the consideration is not fixed in monetary terms , and is on the basis of revenue sharing basis , then 45(5A) is applicable . However if the consideration is fixed in monetary value then 45(5A) is not applicable .

# JDA FOR DEVELOPED PLOT ONLY

- **whether specified agreement covers JDA where only plots are developed and no building**
- Yes , it may be development of land , with infrastructure . But completion from competent authority is must .
- **whether sale of land in divided plots , can be covered .**
- No , if there is mere division . It may be treated as business venture .

# JDA OF RURAL AGRICULTURAL LAND :

- In case land transferred by the landowner is **agricultural land, what** would be the tax liability/implications thereof?
- if it is rural agricultural land it is not a capital asset . But after the change of land use is taken than it become a non agricultural land and hence taxable .
- If it is stock in trade than income will be taxable even in case of agricultural land .

# BENAMI TRANSACTION : DEFINITION

"*benami* transaction" means,—

(A) a transaction or an arrangement—

(a) where a property is transferred to, or is held by, a person, and the consideration for such property has been provided, or paid by, another person; and

(b) the property is held for the immediate or future benefit, direct or indirect, of the person who has provided the consideration

# BENAMI TRANSACTION : DEFINITION

(B) a transaction or an arrangement in respect of a property carried out or made in a fictitious name; or

(C) a transaction or an arrangement in respect of a property where the owner of the property is not aware of, or, denies knowledge of, such ownership;

(D) a transaction or an arrangement in respect of a property where the person providing the consideration is not traceable or is fictitious



## **EFFECT OF UNREGISTERED AGREEMENT : UNDER BENAMI ACT / INCOME TAX ACT**

Explanation to section 2(9) of benami transaction act :

For the removal of doubts, it is hereby declared that benami transaction shall not include any transaction involving the allowing of possession of any property to be taken or retained in part performance of a contract referred to in section 53A of the Transfer of Property Act, 1882, if, under any law for the time being in force,— (i)

consideration for such property has been provided by the person to whom possession of property has been allowed but the person who has granted possession thereof continues to hold ownership of such property; (ii)

stamp duty on such transaction or arrangement has been paid;

and (iii) the contract has been registered.

# TAXABILITY OF TDR/ FSI ( AFTER 1.4.23)

Section 55 (1)(b): cost of any improvement

In relation to a capital assets being goodwill [*or any other intangible asset*] of a business or a right to manufacture, produce, or process any article or thing or any right to carry on the business or profession ( or any other right ) shall be taken as NIL

Section 55 (2)(a) : cost of acquisition

(a) in relation to a capital asset being goodwill of business or profession or a trade mark or brand name associated with a business or profession (or any other intangible asset ) or a right to manufacture , produce or process any article or thing or right to carry on any business or profession or tenancy rights or stage carriage permit or lorry hours ( or any other right)

(i) & (ii)

(iii) shall be NIL



**150 taxmann.com 111 (SC)**

**Glowshine Builders & Developers (P.) Ltd.\***

# SECTION 50 C : PLAIN READING

- Where the consideration received or accruing by as a result of
- Transfer of **capital asset** being land building or both is
- Less than value **adopted , assessed or assessable** by state authority
- For the purpose of stamp duty (circle rate)
- The value so adopted , assessed or assessable shall be deemed to be full value of consideration for section 48.

## SECTION 50 C : IF THE DATE OF AGREEMENT VS DATE OF TRANSFER

- Circle rate difference between date of agreement & date of registration
- Benefit of date of agreement can be taken , provided part payment by banking channel
- However if the difference is less than 110 % of sale consideration with circle rate , than to be ignored

## 50 C(2) : IF THE FMV IS LESS THAN STAMP DUTY VALUE

- Assessee claims before the AO
- stamp duty value is higher than FMV
- and such value has not been disputed in an appeal
- then AO may refer the case to DVO
- if the valuation by DVO is higher than stamp duty value , then stamp duty value will be taken as full value of consideration .
- if the value is lower than stamp duty value , it will be adopted .

# ISSUES IN 50 C-PROPERTY UNDER GIFT / TRANSFER TO RELATIVE FOR INADEQUATE CONSIDERATION

- 50 C provisions will not be applicable on Property transferred in gift ,will , irrevocable trust or partition of HUF , as this not a transfer u/s 47
- Transfer by **relative for inadequate consideration** , will affect 50 C, but  
will not be taxable u/s 56 (2) (x)
- **There is no concept of adequate or inadequate in section 50 C**

## 50 C : AGREEMENT TO SALE REGISTERED BUT NO PAYMENT THROUGH BANKING CHANNEL

- It is not mandatory that sale agreement must be registered .
- Part payment , through banking channel is the essence
- If agreement is registered , but no payment through banking channel , than relief should be granted , but no concrete view .
- If **circle rate reduced after agreement** , assessee can take the benefit of reduced rate.



# SECTION 50C- WHETHER TRANSFER OF RIGHT IN IMMOVABLE PROPERTY COVERED UNDER 50 C

Transfer of Lease Hold Right/Tenancy Right

Transfer of flat without possession is not immovable property , but a right only . hence 50 C is not applicable .

# ISSUES IN 50 C — SALE BY POA , WHETHER COVERED

- Property sold on POA also covered under section 50 C
- But apex court in case of Suraj Lamp Pvt Ltd vs state of Haryana held that transfer through POA is not valid transfer under transfer of property act .
- In benami act , if possession is offered on agreement of sale /POA
- Than it should be registered and stamp duty has been paid .
- Otherwise it will attract prohibition of benami transaction act 2016



# *THANK YOU*

Please feel free to contact us

CA SUNIL GARG, 9811015509

Sunil Suresh & associates

Chartered accountants

SSA LEGAL LLP

DELHI \*GURUGRAM \*FARIDABAD

**[www.ssalegalindia.com](http://www.ssalegalindia.com)**