

# **THANKS VIPINBHAI**

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**I place on record heartiest thanks to CA Vipinbhai Gujarathi for allowing me to use his presentation for preparing this presentation – Sharad A. Shah**

# Scope of the presentation

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- Tax issue for Builders & Promoters - Affordable Housing Scheme S. 80IBA
- Tax issue for the Land Owner in Development and Joint Development Agreements

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# **Affordable Housing Scheme - S. 80IBA**

## **S. 80IBA Deduction**

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- ❑ 100% of the profits derived from the business of developing and building housing project included in gross total income of the assessee shall be allowed as a deduction.
- ❑ The housing project has to fulfil conditions given hereafter for being eligible for the deduction under section 80IBA.

# CONDITIONS FOR ELIGIBILITY OF DEDUCTION U/S 80IBA

- ❑ The project has to be approved by the “**Competent Authority**” on or after 1<sup>st</sup> June 2016 but on or before 31<sup>st</sup> March 2019
- ❑ The project has to be completed within a period of 5 years from the date of approval and as such completion certificate is required to be obtained in writing from the competent authority.
- ❑ Project approved before 31-03-2017 should also be eligible for completion within 5 years
  - **Texport Overseas Pvt. Ltd. 1722/Bang/2017**
  - **Sarens Heavy Lift (I) Pvt. Ltd 1027/Del/2015**

Both this decisions analysis the effect of Repeal Vs. Amendment in the context of the General Clauses Act. 1897, which saves the effect of Repeal of Act but will not affect amendments

# **APPLICABILITY OF S. 80IBA FOR PROJECTS APPROVED DURING 01/06/2016 TO 31/03/2017**

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- The amended section has deleted the limit of Metro project of 25Km from the limits of Metro Cities and the Metro projects are limited to the plot situated within the city. Therefore, the projects which are not situated within Metro Cities will have benefits of Non-Metro projects –built up area of residential unit and utilisation of FAR.

## CONDITIONS FOR U/S 80IBA

Contd...

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- The “**Carpet Area**” of the shops and other commercial establishments in the housing project shall not exceeds 3% of the aggregate carpet area.
  - The area of the plot of land on which the project is constructed shall not be less than 1000 Sq. Meters if the project is located within the cities of Chennai, Delhi, Kolkata, or Mumbai (“**Metro Project**”)

## CONDITIONS FOR U/S 80IBA

Contd...

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- ❑ The minimum area of the plot shall not be less than 2000 sq. Mtrs if the project is located in any other place. ("**Non-Metro Project**")
  - ❑ The project is the only housing project on the plot of land. Therefore, it implies that a project with existing structure shall not be eligible for deduction. **Vandana Properties case (353 ITR 0036- Bom)** may not be applicable for S. 80IBAA



# CONDITIONS FOR U/S 80IBA

Contd...

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- ❑ The carpet area of the residential unit comprised in the housing project does not exceeds 30 Sq. Metres if the project located in Metro Cities and 60 Sq. Metres where the project is located in any other place.
  - ❑ The assessee maintains separate books of accounts for the housing project.

# CONDITIONS FOR U/S 80IBA

# Contd...

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- Where a residential unit in the project is allotted to an individual no other residential unit in the housing project shall be allotted to the individual or the spouse or the minor children of such individual.
  - The project should necessary utilize not less than 90% of the permissible FAR in Metro projects and not less than 80% of the permissible FAR in Non-Metro projects.

# DEFINITIONS OF CERTAIN EXPRESSIONS

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- ❑ Section 80IBA(6) defines some of the expressions used in the section.
- ❑ Sub clause (a) of S. 80IBA(6) states that the “Carpet Area” shall have the same meaning assigned to it in clause (k) of section 2 of Real Estate (Regulation & Development) Act 2016. “Carpet Area” as per clause (k) of section 2 of Real Estate (Regulation & Development) Act 2016 (see next slide)

# DEFINITIONS OF CERTAIN EXPRESSIONS

## Contd..

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- “carpet area” means the net usable floor area of an apartment, excluding the area covered by external walls, areas under services shafts, exclusive balcony, or verandha area and exclusive open terrace area, but includes the area covered by internal walls of the apartment.

# DEFINITIONS OF CERTAIN EXPRESSIONS

## Contd..

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- “Competent Authority” is defined in sub clause (b) to mean the authority empowered to approve the building plan by or under any law for time being in force
- “Floor Area Ratio” is defined to mean the quotient obtained by dividing the total covered area of the plinth area on all floor by the area of the plot of land.

# DEFINITIONS OF CERTAIN EXPRESSIONS

## Contd..

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- **“Housing project”** is defined in sub clause (d) to mean a project consisting predominantly of residential units with such other facilities and amenities as the competent authority may approve subject to the provisions of S. 80IBA.
- This is important from view point of completion of the project-If competent authority has included club house and other amenities they need to be completed before date specified for completion.

# DEFINITIONS OF CERTAIN EXPRESSIONS

## Contd..

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- **“Residential Unit”** is defined in sub clause (e) to mean an independent housing unit with separate facilities for living, cooking and sanitary requirement distinctly separate from other residential unit within the building and which is directly accessible from outer door or interior door in a shared hallway.

# WITHDRAWAL OF DEDUCTION ALREADY GRANTED

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- Sub section 4 of S. 80IBA provides that where the housing project is not completed in specified period and the deduction has been claimed and allowed under this section, the total amount of deduction so claimed or allowed in one or more previous years, shall be deemed to be the income of the assessee of the previous year in which the period for completion so expired.



# COMPARISON BETWEEN S. 80IBA WITH THE PRESENT S. 80IB(10)

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- Section 80IBA is at pari materia with present S. 80IB(10) which was introduced by the Finance Act 1998. S. 80IB(10) is now almost 20 years on statute and lot of litigation has taken place and no. of judgments have been pronounced by various Tribunals, High Courts and the Supreme Court. Therefore, the comparison of section 80IB(10) and 80IBA is imperative.

# COMPARISON BETWEEN S. 80IBA WITH THE PRESENT S. 80IB(10)

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- **Approval of the project:** U/s 80IB(10) was required from the local authority whereas u/s 80IBA the approval is required from the competent authority. There shall be two parallel authorities regulating the development and construction of housing project – one the local authority within whose jurisdiction the plot is located and the other competent authority to be empowered by the Government.

# COMPARISON BETWEEN S. 80IBA WITH THE PRESENT S. 80IB(10)

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- ❑ **Approval time frame:** U/s 80IB(10) time frame for approval of housing project was from 01/10/1998 to 31/03/2008 whereas u/s 80IBA it from 01/06/2016 to 31/03/2019.
- ❑ **Completion period reckoned from:** U/s 80IB(10) from the approval of 1<sup>st</sup> building plan whereas u/s 80IBA from the date on which the project is first approved.

# COMPARISON BETWEEN S. 80IBA WITH THE PRESENT S. 80IB(10)

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- **Completion time:** U/s 80IB(10) the completion time was within 4/5 years from the end of the financial year in which the housing project is approved by the local authority. Whereas u/s 80IBA it is 5 years from the date of approval.

# COMPARISON BETWEEN S. 80IBA WITH THE PRESENT S. 80IB(10)

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- ❑ **Date of Completion:** U/s 80IB(10) the date on which the completion certificate is issued by the local authority whereas u/s 80IBA the date when the CC of the project as a **whole** is obtained in writing from the competent authority
- ❑ **Built up area vis-a-vis Carpet Area:** U/s 80IB(10) the built up area of the residential unit was material whereas u/s 80IBA the carpet area is material.

# COMPARISON BETWEEN S. 80IBA WITH THE PRESENT S. 80IB(10)

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- **Utilization of FAR:** U/s 80IB(10) utilization of FAR was not necessary whereas u/s 80IBA utilization of 90% or 80% for Metro and Non-Metro project respectively of the quotient of the total covered area of the plinth on all floor divided by the area of the plot is must.
- **Housing project:** U/s 80IB(10) the housing project is not defined whereas u/s 80IBA it is defined as a project consisting predominantly residential unit with specified facilities and amenities.

# COMPARISON BETWEEN S. 80IBA WITH THE PRESENT S. 80IB(10)

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- ❑ **Residential Unit:** U/s 80IB(10) the expression residential unit was not defined whereas u/s 80IBA it is defined as an independent housing unit with separate facilities for living, cooking and sanitary requirements and accessible not by walking through the living space of another house.
- ❑ **Size of the plot:** U/s 80IB(10) the minimum area of the plot was one acre whereas u/s 80IBA the minimum size of the plot is 1000 sq. Meters (Metro Cities) and 2000 sq. Meters in other places.

# APPLICABILITY PROVISIONS OF S. 115JB (MAT) OR S. 115JC (AMT)

- Effective rate – MAT on Companies (Prime rate 18.5%)

AY	Income Upto Rs. 1 Cr	Income Rs.1 Cr to 10 Cr	Income Above Rs. 10 Cr
18-19	19.055%	20.38885%	21.3416%
19-20	19.24%	20.5868%	21.5488%



# APPLICABILITY PROVISIONS OF S. 115JB (MAT) OR S. 115JC (AMT) Contd..

- Effective rate – AMT on Other than Companies (Prime rate 18.5%) – Applies only when Adjusted Total Income is more than Rs. 20 Lakhs before deduction

AY	Income Rs. 20 Lakhs to 50 Lakhs	Income Rs. 50 Lakhs to Rs.1 Cr	Income Above Rs. 1 Cr
18-19	19.055%	20.9605%	
19-20	19.24%	21.1640%	22.126%

# ISSUES

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- The proposed section required completion of the project as a **whole**.
- The following decisions in the context of S. 80IB(10) may not be applicable in case of S. 80IBA
  - **Bombay High Court – Hindustan Samuha Awas Ltd 130 ITR 404 & Tarnetar Corporation (Guj)**
  - **Sarkar Builder (SC) 119 DTR 241**

# ISSUES

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- S. 80IBA(6)(d) uses the subjective word “**predominantly**” which may add to the litigation. The use of word predominantly was not necessary especially in case where the quantum of commercial area of 3% of the aggregate Carpet area has been defined.
- Should we understand this issue in terms of space utilised for amenities?

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# **JOINT VENTURE/JOINT DEVELOPMENT AGREEMENTS**

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# **Land owners holds the property as Capital Asset**

# JOINT VENTURE AGREEMENT & JOINT DEVELOPMENT AGREEMENTS

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- Now a days Land Owners and Developers enter into various kinds of agreements to develop properties jointly. Similarly, Land Dealers/ Developers and the developers enter into agreement to develop the properties jointly.
- Taxability of Capital Gain or Business Income depends upon the characterisation of asset in the hands of person holding the property – whether held as a Capital Asset or Stock-in-trade

# TYPES OF JV OR JD AGREEMENT

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JV or JD Agreements can be of following types

- ❑ To share the profits by introducing the asset into partnership or AOP
- ❑ To share the Revenue/Sale Proceeds without bringing into existence any entity such as partnership firm or AOP into existence
- ❑ To share the built up area
- ❑ To share the revenue and/or built up area

# JV OR JD AGREEMENT – CAPITAL ASSET

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Joint Venture or Joint Development Agreement between the land owners (holding the land as Capital Asset)

- Land Owner introduces his land as capital in the partnership firm or AOP and both agree to share profits which is typically a case of forming AOP/firm and the capital gain liability arises on the date of entering into agreement [Refer Section 45(3)].
- The issue here can be whether S. 45(3) will prevail over S. 50C.



# JV OR JD AGREEMENT – CAPITAL ASSET

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- ❑ Land owner and developers enter into agreement share Revenue or Built up area or both on principal to principal basis i.e. no partnership/AOP or any kind of relationship come into existence.
- ❑ Under such circumstances the capital gain tax liability depends on the terms & conditions of the agreement and the point of time as to when the transfer of capital asset takes place will depend on reading of the contract as a whole.

# JV OR JD AGREEMENT – CAPITAL ASSET

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- Section 2(47) of the I T Act defies transfer in relation to “Capital Asst”. Accordingly, if the agreement is for the consideration and possession of the property is given in terms of sub clause (v) –Part performance of the contract S. 53A of Transfer of Property Act] the transfer is complete. There are several judgments on the issue **Chaturbhuji Dwarkadas Kapadia 260 ITR 491(Bom), Nageshwar Potla Rao 365 ITR 249 (AP) Jasbirsing Sarkaria 294 ITR 196 (AAR)**

# Chaturbhuj Dwarkadas Kapadia Explained

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- Bombay HC - the following conditions need to be fulfilled and if fulfilled, it will amount to transfer:
  - There should be contract for consideration;
  - **It should be in writing; (G Saroja 301 ITR 0124- HC Madras)**
  - It should be signed by the transferor or on behalf of him
  - It should pertain to the transfer of immovable property;
  - The transferee should have taken possession of property in furtherance of contract;
  - Lastly, transferee has performed or should be willing to perform his part of the contract".

# Major change after **C. S. Atwal 378 ITR 244** the decision of Supreme Court in the case of **Balbir Singh Maini 398 ITR 0531**

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- ❑ Supreme Court has held that the transfer u/s 2(47)(v) can not be said to have happened if the agreement is not registered (TOPA S. 53A requires registration w.e.f. 24-09-2001)
- ❑ Appeal against **C. S. Atwal 378 ITR 244 (P&H)** is part of the above decision.
- ❑ This is a major change.

# POSSESSION OF THE PROPERTY

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- What is the meaning of the expression “**Possession**” contemplated by section 53A of the TOPA?
- Whether “possession of the transferee” as postulated under Section 53A of TOPA is it that it must have been delivered in **furtherance to the contract** ?
- Whether physical delivery of document to title constitutes possession?
- Can the possession be concurrent of the transferor as well as of the transferee and would it be enough if the transferee has, by virtue of the transaction, a right to enter upon and exercise acts of possession effectively pursuant to the covenants in the contract ?

# POSSESSION OF THE PROPERTY

## Contd..

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- "The **possession** contemplated by 2(47)(v) need not necessarily be sole and exclusive possession. So long as the transferee is, by virtue of the possession given, enabled to exercise general control over the property and to make use of it for the intended purpose, the mere fact that the owner has also the right to enter the property to oversee the development work or to ensure performance of the terms of "Agreement" does not introduce any incompatibility."

■ **Jasbir Singh Sarkaria 294 ITR 196 (AAR)**

# POSSESSION OF THE PROPERTY

## Contd..

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- ❑ Ownership is strictly a legal concept and possession is both a legal and a non-legal or pre-legal concept.
- ❑ The test for determining whether any person is in possession of anything is to see whether it is under his general control. He should be actually holding, using and enjoying it, without interference on the part of others.
- ❑ Whether a License to enter premises can be considered to be possession?

# POSSESSION OF THE PROPERTY

## Contd..

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- The expression “License” has been defined in section 52 of the Indian Easement Act, 1882.

*“Where one person grants to another, or to a definite number of other persons, a right to do, or continue to do, in or upon the immovable property of the grantor, something which would, in the absence of such right, be unlawful, and such right does not amount to an easement or an interest in the property, the right is called a license.”*

- Therefore, possession if delivered, as a license for development of property, -it cannot be equated with possession.



# WILLINGNESS TO PERFORM

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- A plain reading of Section 53A of the TOPA shows that in order for a contract to be termed "of the nature referred to in Section 53A of the TOPA" it is one of the necessary preconditions that transferee should have or is willing to perform his part of the contract.
- It is clear that 'willingness to perform' for the purposes of Section 53A is something more than a statement of intent; it is the unqualified and unconditional willingness on the part of the transferee to perform its obligations.

## **WILLINGNESS TO PERFORM      Contd..**

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- Unless the party has performed or is willing to perform its obligations under the contract, and in the same sequence in which those are to be performed, it cannot be said that the provisions of Section 53A of the TOPA will come into play on the facts of that case.

# WILLINGNESS TO PERFORM Contd..

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- ❑ How to ascertain that the transferee has not performed or is not willing to perform his part of the contract?
- ❑ The transferee has not commenced the work
- ❑ Transferee denies to make payment as agreed
- ❑ Now various Tribunals have applied different parameters to decide this issue.
- ❑ In the following judgements tribunals have held that the transferee is not willing to perform his part of the contract

# WILLINGNESS TO PERFORM Contd..

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- **General Glass Co. Ltd. Vs DCIT 108 TTJ 854 (Mumbai)**
  - Where payment of balance consideration within stipulated time is essence of the agreement of sale and such payments are not made in time by the transferee, such a contract does not confer any right on the transferee as envisaged under Section 53A of the TOPA and provisions of Section 2(47)(v) cannot be applied in such a situation
  
- **S. Ranjith Reddy 35 Taxmann.com 41 (Hyderabad)**
  - ITAT Hyderabad has held that where nothing happened during the relevant previous year except execution of the agreement or no progress or construction had taken place it could not be held that the developers had performed its obligation as envisaged by Section 53A of TOPA.

# WILLINGNESS TO PERFORM Contd..

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- **Fibars Infratech Pvt. Ltd. 162 TTJ 228 (Hyderabad)**
  - ITAT Hyderabad has held that since no consideration passed to the assessee and no construction activity had commenced and no Development Plan was approved which is the utmost important condition or step for implementation of project it cannot be said that transferee was willing to perform and conditions of Section 53A of TOPA were complied with.
- **Arvind S Phadke ITA No 236/PN/2013**
  - Pursuant to development agreement, handing over of possession of land was conditional, subject to full payment of consideration; As complete consideration was not paid as on agreement date, holds 'possession date' as 'transfer date' of land; Rejects Revenue's contention that developer took possession in part performance of contract u/s. 53A of TOPA thereby reckoning 'development agreement date' as 'transfer date';

# **WILLINGNESS TO PERFORM      Contd..**

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- **Finian Estate Developers Pvt. Ltd. 2361 & 1953 (Delhi) 2011**
  - Delhi ITAT has held that income accrues only upon obtaining necessary approval from local authorities by the developer.
  - Coromandal Cables Pvt. Ltd. ITA No 1779 ITAT Chennai
  - Binjusaria Properties Pvt. Ltd. 164 TTJ 417 (Hyd)
  - K Radhika 149 TTJ 746 (Hyd)

# JV OR JD AGREEMENT – CAPITAL ASSET

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- All High Courts have held that if the reading of the contract as a whole indicates passing of or transferring complete control over the property, then the date of contract will be the date of transfer.
- However, there are few decisions of tribunals wherein it is held that even if the land owners have given the possession but no building plans have been sanctioned or no progress of the project has taken place or there is no willingness to perform his obligations by the developer the capital gain does not arise on entering into contract.

# JV OR JD AGREEMENT – CAPITAL ASSET

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- All the judgments discussed earlier are based on the facts of the case and the same may not be considered to be laying down principle as such and therefore, should be used on only in case the mistake has already committed and should not be used as guideline for drafting the agreement.



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# **S. 45(5A)– “SPECIFIED AGREEMENTS”**

## SECTION 45(5A) OF THE I T ACT

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- Liability to Capital Gain tax in case of sharing of Revenue or Built up area on transfer of capital asset arises on the date of transfer but the land owner has no money to pay the tax. Similarly, some of the times if transaction of JV for JD agreement does not go through and landowner has already paid C. G. Tax, what would happen?. In order to overcome this anomalous situation sub section (5A) is inserted in section 45 by the Finance Act 2017 w. e. f. 01/04/2018

## SECTION 45(5A) OF THE I T ACT

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- As per the newly inserted sub-section 5A where the capital gain arises to an assessee, being individual or HUF, from the transfer of the capital assets, being land or building, or both, under the "**Specified Agreements**" the capital gain shall be chargeable to tax as the income of the previous year in which the certificate of completion for whole or the part of the project is issued by the competent authority & for the purposes S. 48 the stamp duty value of share in the built up area or developed land as increased by the consideration received in cash shall be considered as full value consideration.
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## SECTION 45(5A) OF THE I T ACT

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- **“Specified agreement”** means a registered agreement in which a person owning the land and building or both, agrees to allow another person to develop a real estate project on such land or building or both, in consideration of a share, being land or building or both, in the project whether with or without payment of part of the consideration in cash.

# SECTION 45(5A) OF THE I T ACT

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Main features of S. 45(5A) are as follows

- ❑ Applicable to individual or HUF
- ❑ Applicable to Capital Assets only
- ❑ Assessee receives some part of the consideration in the form of share in the project – built up area or develop land
- ❑ Capital gain shall be chargeable to tax in the year in which the completion certificate is issued by competent authority instead of the year in which liability arises on transfer .

## **SECTION 45(5A) OF THE I.T. ACT**

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- ❑ Consideration – stamp duty value prevailing on the date of completion as increased by consideration payable in cash, if any.
- ❑ TDS on the consideration payable in cash shall be deducted @ 10% of the amount paid or credited whichever is earlier in terms of S. 194IC. TDS will be given credit in the year in which project is completed or part completed.

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# **LAND OWNER HOLDS THE LAND AS STOCK IN TRADE**

# LAND HELD AS STOCK IN TRADE

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- JDA in respect of land held as stock in trade & the developer agrees to allot built up area whether entire value of the built up area will be taxable in the year in which JDA is signed?
- Since the provisions of section 2(47) (v) r. w. s. 53A of the Transfer of Property Act are not applicable to transaction of stock in trade and similarly, there is no sale within the meaning of section 54 of the TP Act no profit will be taxable immediately on execution JD Agreement and the same will be taxed in the year in which it is sold.



# LAND HELD AS STOCK IN TRADE

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- ❑ **Skyline Great Hills Income Tax Appeal No 2299 of 2013.**
- ❑ Bombay HC held that the provision of section 53A of T P Act can not be extended to stock in trade as section 2(47) of the I T Act is artificially extended the definition of transfer of capital asset.

# LAND HELD AS STOCK IN TRADE

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- **R. Gopinath (HUF) Vs ACIT 133 TTJ 595 (Chennai)**
  - Concept of S. 53A of the Transfer of Property Act is borrowed concept only with respect to the transfer of capital assets as provided under S. 2(47)(v) of IT Act and the same is not applicable in other cases which do not fall under S 2(47) of the I T Act

# LAND HELD AS STOCK IN TRADE

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- The capital gain arising from the conversion of the land and building into stock-in-trade were assessable proportionately in the previous years in which the constructed property was sold by the assessee and not in the year of development agreement.
- S. 53A of the TOPA does not provide the conditions for transfer but it provides protection to the transferee for possession of the property

# LAND HELD AS STOCK IN TRADE

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## □ **Dheeraj Amin ITA No. 1709/Bang/2013**

- ITAT held that the land (Stock-in-trade) deal can not be taxed as business income on entering into JDA
- ITAT held that against the land (held as stock in trade) what assessee receives is "Right to sell" constructed area which would again be in the nature of "Stock in trade" for the assessee business.
- Profit from sale of such rights in constructed area are taxable only when such rights are actually exercised by the assessee

# LAND HELD AS STOCK IN TRADE

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- Until such rights in the constructed area are sold it would be regarded as inventory in the business and shall be valued at cost price (being lesser than actual market price)
- Mumbai ITAT has taken a similar view in the case of Fardeen Khan Vs ACIT 1588/Mum/2013 and The Hindoosthan Spinning & Weaving Mills Ltd ITA No. 3820/Mum/2003

# PRECAUTION TO BE TAKEN IN DRAFTING JV OR JD AGREEMENT

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- Incidence of capital gain tax liability or business income depends on several factors and especially on the basis of the terms and conditions of the JV or JD agreement. The main issue to be seen in case of capital assets is that whether the terms and conditions of the agreement indicate transfer of complete control and domain in favour of transferee. Whether the transferee has unfettered right to transfer the subject property.

# PRECAUTION TO BE TAKEN IN DRAFTING JV OR JD AGREEMENT

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- ❑ In case of other agreement the accrual of income i.e. Right to receive money as income is important. (E. D Sassoon 26 ITR 27.
- ❑ Therefore, once the agreement is drafted by the lawyer/counsel looking after the civil matters such as clear market title, authority to transfer the subject property to the third party etc, the same should be vetted by the CA or Tax counsel.

# PRECAUTION TO BE TAKEN IN DRAFTING JV OR JD AGREEMENT

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- After the introduction of RERA 2016 the responsibility of land owner has increased to a great extent. Land owners are treated as co-promoter. The liability towards the flat purchasers is strictly governed by the agreement between the promoters and land owner. Therefore, the agreement should be vetted by the expert in RERA 2016. Similarly, withdrawals out of the sale proceeds also depends on the provisions of RERA 2016.



# PRECAUTION TO BE TAKEN IN DRAFTING JV OR JD AGREEMENT

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- Similarly, under GST Act GST is payable on the sharing of built up area immediately on entering into agreement as per the recent circular under GST Act. Therefore, it is important to consult the GST counsel.

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# THANK YOU

