Section 43CA
Analysis and Select Issues

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

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 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 –

(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**.]

Analysis of Section 43CA

- **Analysis of S. 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).
- **Definition:**

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

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- **Assessee:** The section applies to any assessee. For the section to apply legal status and / or residential status of the assessee are not relevant. Therefore, the section applies to an assessee being individual, hindu undivided family, firm, LLP, company, association of persons, body of individuals, trust, co-operative society, etc.

- **Transferee**: The transferee / buyer could be any person. Legal status and residential status of the buyer is not relevant. The transferee could even be a relative of the assessee or a wholly owned subsidiary, etc.

- **`Profits & Gains"** : The section applies while computing income under the head `Profits & Gains of Business or Profession'. The deeming fiction created by this section is for the purpose of computing "profits and gains" from transfer of such asset. The term "profits & gains" has been used and not `income'. It appears that the term "profits and gains" is used to signify the head under which the income is to be computed.

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- **Consideration received or accruing**: The section postulates comparison of consideration received or accruing as a result of the transfer of an asset with the stamp duty value thereof. The section does not cover transfers without consideration. Therefore, if the asset is transferred by the assessee without consideration by way of gift or otherwise then the section would not apply. The section may not even apply when the asset held as stock-in-trade is given without consideration as a part of scheme / sales promotion activity eg. a flat in a project being given free by way of lucky draw.

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- 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.

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- 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.

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- **An Asset (other than capital asset)**: The section applies to transfer by the assessee of an asset provided –
  - the asset is land or building or both; and
  - the asset is not a capital asset.
- The section applies to transfer of land or building or both which are stock-in-trade of the assessee. Rights in land or building may not be covered by the provisions of this section. In the context of S. 50C of the Act where similar language is used, the Tribunal has, in the following cases, held that the section 50C does not apply to rights in land or building.
  - DCIT v Tejinder Singh (2012) (50 SOT 391) (Kol) - Transfer of leasehold righs in a buildiing 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)
- It is also relevant to note that in the following cases, the Tribunal has held that the provisions of S. 50C apply 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.

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- 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.

- Recently, the Mumbai Bench of ITAT has in the context of s. 50C held that the provisions of s. 50C do not apply to transfer of development rights with respect to land owned by the assessee –
  - **Voltas Ltd. v. ITO [2016] 74 taxmann.com 99 (Mum Trib)**

- Earlier, the Mumbai Bench of the Tribunal had similarly held in the case of 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)

- It appears that the ratio of the said decisions will apply with equal force to S. 43CA as well.

- The section may not apply when the assessee transfers 100% of the shares of a company in which immovable property is the only asset – **Irfan Abdul Kader Fazlani v. ACIT [(2013) 29 taxmann.com 424 (Mum)]**. However, the section may be held to apply to transfer of shares with occupancy rights.

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- **What is covered is only land or buildings or both**. S. 43CA will apply only if it is land as it is or it is buidling as it is and it will not apply if it is anything other than land or building or both. It is an immovable property in its general understanding, under common law. But S. 43CA does not deal with immovable property, it deals with land or building or both.

- Part of building is not covered by the section. Similar is the language in S. 50C / S. 56(2)(vii). However, it needs to be noted that the legislature has in S. 27, S. 194IA, S. 194LA, S. 194LAA and S. 269AB made a specific reference to part of a building. This could mean that the section applies only when the building as a whole is transferred and does not apply to transfer of a part of a building and / or that the section applies only when 100% interest in the building is transferred. If this interpretation is correct then the section may not apply to transfer of flat (because a flat is a part of a building) and section may not apply to transfer of an undivided interest in a building eg transfer of 50% interest in a building. However, considering the intent with which this section is introduced, it is quite likely that such literal interpretation may not be acceptable to Courts.

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- 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.

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- **`Transfers'**: For the section to apply the assessee should transfer the asset. S. 2(47) defines the term `transfer'. However, the said definition is in relation to a capital asset. S. 43CA applies to an asset which is not a capital asset and therefore, the definition of the term `transfer' as defined u/s 2(47) may not be relevant. Normally, an immovable property being land or building is transferred only by way of a conveyance. Gujarat High Court has in the case of CIT v. Ashaland Corporation (133 ITR 55)(Guj) held that the transfer of stock-in-trade happens only when title is transferred to the buyer. It held that till such time as the sale is complete the amount received constitutes an advance. An advance received cannot be taxed as income. The Court has even observed that handing over of possession in part performance of the contract may be a good defense to the buyer against the seller yet it does not confer any title on the buyer. Also, the Apex Court has in the case of Alapati Venkataramiah v. CIT (57 ITR 185)(SC) held that for determining the year of chargeability, the relevant date is not the date of the agreement to sell but the date of the sale i.e., effective transfer of title as contemplated by the parties. To the same effect is the ratio of the decisions of Chidambaram Chettiar v. CIT [1936] 4 ITR 309 (Mad); CIT v. Motilal C. Patel & Co. (173 ITR 666)(Guj)(HC) and CIT v. Moghul Builders & Planners (252 ITR 488)(AP). However, it would be relevant to note that the Bombay High Court has in the case of Estate Investment Co. Ltd. v CIT (121 ITR 580)(Bom) rejected the contention made on behalf of the assessee that until a conveyance is executed by the vendor

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in favour of the purchaser, the purchaser cannot be regarded as the owner of the property held that the assessee had done everything within its power to carry out its obligations with the purchasers viz. possession was given and price was received. The Court even noticed that the price had been stated to have been received in the Balance Sheet and was carried to reserve fund. It appears that the decision rendered by the Bombay High Court was on typical facts of the assessee.

- Also, **for the transfer to happen the asset has to be in existence**. For the proposition that the transfer can happen only when property is in existence, a useful reference may be made to the provisions of S. 5 of the Transfer of Property Act, 1882 (TOPA) which defines the term `Transfer of property' as under –

  "5. "**Transfer of property' defined**. – In the following sections "transfer of property" means an act by which a living person conveys property, in present or in future, to one or more other living persons, or to himself, or to himself and one or more other living persons : and "to transfer property" is to perform such act.

  In this section "living person" includes a company or association or body of individuals, whether incorporated or not, but nothing herein contained shall affect any law for the time being in force relating to transfer of property to or by companies, associations or bodies of individuals."

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- The following passage from the book by C. L. Gupta, titled Law of Transfer of Property, which has been revised by Justice S. D. Agarwala (Third Edition, 2002) throws light on the proposition that for a transfer to happen the property has to be in existence.
  - Significance of **Conveyance of property "in present or in future"** - A transfer of property may take place not only in the present, but also in future {Sumsuddin v. Abdul Hussein, ILR (1909) 31 Bom 165 (172)}; but the property must be in existence {Jugalkishore Saraft v. Raw Cotton Co. Ltd., AIR 1955 SC 376 : (1955) 1 SCR 1369 : 1955 SCJ 871 : 1955 SCA 440 ; Chief Controlling, Revenue Authority v. Sudarsanam Picutre, AIR 1968 Mad 319 (FB) : 81 Mad LW 75 : ILR (1968) 1 Mad 600 : (1968) 2 Mad LJ 1}. It has been observed by Bhagwati J. in Jugalkishore Saraf v. Raw Cotton Co. Ltd., {AIR 1955 SC 376 : (1955) 1 SCR 1369 : 1955 SCJ 871 : 1955 SCA 440; Chief Controlling, Revenue Authority v. Sudarsanam Picutre, AIR 1968 Mad 319 (FB) : 81 Mad LW 75 : ILR (1968) 1 Mad 600 : (1968) 2 Mad LJ 1} that the words "in present or in future", in Section 5, qualify the word "conveys" and not the word "property". **A transfer of property not in existence operates as a contract to be performed in the future which is specifically enforceable as soon as the property comes into existence. An assignment of future or non-existent property is quite valid and the transfer becomes operative as soon as the property comes into existence** {Purna Chandra Bhowmick v. Barna Kumari Devi, AIR 1939 Cal 715 (DB) : 43 CWN 953 : ILR (1939) 2 Cal 341}. Transfers of non-existent, or as it is conveniently called after-acquired property, provided they are not of the nature contemplated in Section 6(1), Transfer of Property Act, are perfectly valid. **The transfer would be regarded, in a Court of justice, as a**

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contract to transfer after the vendor has acquired title and would fasten upon the property as soon as the vendor acquires it {Holroyd v. Marshall, (1864) 10 HLC 191 ; Coollyer v. Issacs, (1882) 19 Ch D 342 ; Taiby v. Official Receiver, (1888) 13 AC 523 ; Prem Sukh Gulgulia v. Habib Ullah, AIR 1945 Cal 355 (358) (DB) : 49 CWN 371}. Therefore, a contract for sale of non-existent property, that is, of property which is not of the vendor's at the time of the contract, but which the vendor thinks of acquiring by purchase later on, is not bad in law. There is nothing in the Contract Act or in any other law which makes it invalid {Prem Sukh Gulgulia v. Habib Ullah, AIR 1945 Cal 355 (358) (DB) : 49 CWN 371}.

Section 5, Transfer of Property Act, makes it clear that a transfer of property can effectively take place not merely where a person conveys property in present, but also when a living person conveys property in future, and this aspect has to be borne in mind, while considering the operation of Section 33(1)(b), Bombay Tenancy and Agricultural Lands Act, 1948 {Ganpati Joti v. Jayasingrao Abasaheb, AIR 1956 Bom 749 (751) (DB)}."

- Therefore, S. 43CA may not apply to a flat under construction since the subject matter of transfer is not in existence. However, upon the flat coming into existence the section may apply.

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- **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 section contemplates comparison of consideration for transfer of an asset with 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. Therefore, in case the State Government levies stamp duty not on market value but on the consideration stated in the agreement then in such cases the section shall not apply. Also, in Union Territories, where the value of the property is adopted or assessed by an authority of a Central Government then this section may not apply. It appears that the Legislature has consciously kept areas where value is not adopted or assessed by any authority of State Government out of purview of this section. This is evident if one looks at the definition of "stamp duty value" in Explanation (f) to S. 56(2)(vii) which makes a mention of authority of a Central Government as well. Also, the section will not apply to transfer of an asset situated outside India because in such cases there will not be stamp duty value. It may be noted that S. 43CA and S. 50C make a mention of only authority of State Government whereas S. 56(2)(vii) makes a mention of authority of Central Government as well.

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- **Provisions of sub-section (2) and sub-section (3) of S. 50C shall apply in relation to determination of the stamp duty value:** Sub-section (2) of S. 43CA provides that the provisions of sub-section (2) and sub-section (3) of S. 50C shall apply in relation to determination of stamp duty value. The implication of this is as under –

1. In case the assessee has accepted the stamp duty value and claims before the AO that the value adopted or assessed or assessable by the stamp valuation authority exceeds the fair market value of the asset on the date of transfer then the AO may refer valuation of such asset to the DVO. Though the section uses the term `may', in the context of S. 50C, in the following cases, the Tribunal has held that the AO is bound to make a reference to the DVO.
   i. M/s Fortuna Structures Pvt. Ltd. v ACIT (2008)(60 itatindia 886)(Lucknow)
   ii. Meghraj Baid v ITO 23 SOT 25 (Jodh)
   iii. Kalpataru Industries v ITO (Mum)(41-B BCAJ 32)(ITA No. 5540/Mum/2007, Mum H Bench, Asst Year 2005-06, Order dated 24.8.2009)
   iv. Abbas T. Reshamwala v ITO (41-B BCAJ 33)(Mum)(ITANo. 3093/Mum/2009)(AY 2006-07)(Decided on 30.11.2009)

   Upon a reference being made certain provisions of the Wealth-tax Act, 1957 shall apply in relation to such reference as they apply in relation to a reference made by the AO u/s 16A(1) of the Wealth-tax Act, 1957.

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2 In case the DVO determines the fair market value of the asset transferred to be less than the value adopted or assessed or assessable by the stamp valuation authority, the value determined by DVO shall be considered by the AO to be full value of consideration received or accruing as a result of such transfer. In other words, the computation of profits and gains arising on such transfer will be with reference to value determined by DVO and not the stamp duty value. However, if the DVO determines the fair market value of the asset transferred to be more than the value adopted or assessed or assessable by the stamp valuation authority, the stamp duty value shall be deemed to be full value of consideration received or accruing as a result of such transfer. In other words, the valuation done by the DVO in excess of stamp duty value needs to be ignored and computation of profits and gains is to be made with reference to stamp duty value.

3 In case the assessee has disputed the value adopted or assessed or assessable by the stamp valuation authority in any appeal or revision or reference has been made before any other authority, court or the High Court then the AO shall not be bound to make a reference to the DVO. In such cases, the value upheld in an appeal or revision or reference shall be deemed to be full value of consideration received or accruing as a result of the transfer of such asset.

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4 The term `assessable' is used in S. 43CA(1) but the same is not defined. The expression `assessable' is defined in Explanation 2 to S. 50C. The term `Valuation Officer' is defined in Explanation 1 to S. 50C. Both the Explanations to S. 50C clearly state that the meanings therein are for the purpose of the said section i.e. S. 50C. S. 43CA makes sub-sections (2) and (3) of S. 50C applicable to S. 43CA but not the Explanations. However, since sub-sections (2) and (3) of Section 50C use the terms defined in Explanations to S. 50C it may be possible to contend that the said Explanations are also applicable to S. 43CA.

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- **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.

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- 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]

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- A question could arise as to whether letter of allotment is an agreement for transfer and therefore for the purpose of computing the difference between stamp duty value and consideration, the stamp duty value of the asset on the date of letter of allotment be considered. A letter of allotment which is dated and is for transfer of specific asset and is accepted by the purchaser and which fixes the value of consideration for transfer of the asset would be regarded as an agreement for transfer for the purposes of sub-section (3) of section 43CA provided the condition mentioned in sub-section (4) of section 43CA is satisfied viz. that consideration or part thereof has been received on or before the date of letter of allotment. However, if such a letter of allotment is not specific in terms of the property to be transferred / allotted but only mentions the area (i.e. size) without identifying the property it may be difficult to contend that such a letter of allotment constitutes an `agreement for transfer'. It could be a debatable question as to whether a letter of allotment which grants an option to the buyer to buy or not to buy the property but take interest on the amount given by him to the assessee would be regarded as an agreement for transfer. It appears that even such a letter of allotment would be regarded as an agreement for transfer envisaged by sub-section (3) of section 43CA if the property is specific and other conditions as stated earlier are satisfied.

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- For the proposition that the letter of allotment constitutes an agreement for transfer reliance can be placed on the ratio of the decision of the Supreme Court in the case of DLF Universal Ltd. v Appropriate Authority & Another (243 ITR 730)(SC) and also the following observations from the decision of the Division Bench of Delhi High Court in the case of Ansal Properties & Industries Ltd. v. Appropriate Authority which have been quoted by the Delhi High Court in the case of R. N. Soin and Sons (P) Ltd. v Appropriate Authority & Others (330 ITR 455)(Del).

  "27.1 The parties may enter into any private agreement for transfer. They must wait for arrival of the day on which the property has assumed the shape in which it is proposed to be transferred. On that day they must enter into the proforma agreement (Form 37-I) and file the same seeking no objection from the Appropriate Authority. It was submitted that this interpretation may put the parties to the agreement in a disadvantageous position. The initial private agreement may have been made in the year 1990. The property may take the shape in which it is to be transferred in the year 1998. The price would be one agreed upon between the parties in the year 1990. The value as shown on the date of proforma agreement in Form 37-I would appear to be undervalued persuading the Appropriate Authority to direct the purchase of the property by the Central Government. This is a misapprehension which has to be dispelled. The proforma agreement of the year 1998 would be accompanied by the private agreement entered into in the year 1990 and that will be a relevant fact to be kept in view by the Appropriate Authority while exercising its jurisdiction under Chapter – XXC."

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- One may therefore conclude that the letter of allotment which is dated and is accepted by the buyer and which is specific in terms of the property to be transferred, the consideration therefor, the dates of payment of consideration agreed between the parties can be regarded as the agreement for transfer of asset.

Can the agreement of transfer contemplated by sub-section (3) of section 43CA be an oral agreement?

- **Can the agreement of transfer contemplated by sub-section (3) of section 43CA be an oral agreement?** While, in law, an agreement may be an oral agreement, at first blush it appears that the section does not contemplate oral agreement because the section refers to date of the agreement fixing the value of consideration for the transfer of asset.

- Also, sub-section (4) of section 43CA contemplates that the consideration or part thereof has been received by any mode other than cash on or before the date of the agreement for the transfer of such asset.

- The use of the word `date of the agreement' gives an impression that the section contemplates a written agreement. Also, in the absence of a written agreement, it may be difficult to establish the date of the agreement except that the payment of consideration or part thereof may be one of the factors indicating the earliest date on which the agreement could have been entered. However, if the assessee is in a position to lead impeccable evidence to substantiate the date on which such oral agreement was entered into the Courts may accept such oral agreement as well as an agreement contemplated by sub-section (3) of section 43CA since this is a provision which is charging fictional amount to tax and sub-section (3) is intended to dilute the rigors of this provision.

Can the agreement of transfer contemplated by sub-section (3) of section 43CA be an oral agreement?

- While, in the absence of a written agreement, it may be difficult to establish the date of the agreement except that the payment of consideration or part thereof may be one of the factors indicating the earliest date on which the agreement could have been entered. In law, an agreement can be an oral agreement. Even an agreement to transfer an immovable property may also be an oral agreement. This proposition is supported by the decision of the Delhi High Court in the case of ***Ansal Properties & Industries Ltd. v. Appropriate Authority (supra)*** *wherein the Court while distinguishing the characteristics of a private agreement from an agreement in Form No. 37I mentioned that a private agreement can even be an oral agreement. Also,* the following observations of the Apex Court in the case of ***Brij Mohan and Others v. Sugra Begum and Others (1990) (004 SCC 0147)(SC)*** are relevant –

Can the agreement of transfer contemplated by sub-section (3) of section 43CA be an oral agreement?

- "We agree with the contention of the Learned Counsel for the appellants to the extent that there is no requirement of law that an agreement or contract of sale of immovable property should only be in writing.

- However, in a case where the plaintiffs come forward to seek a decree for specific performance of contract of sale of immovable property on the basis of an oral agreement alone, heavy burden lies on the plaintiffs to prove that there was consensus ad-idem between the parties for a concluded oral agreement for sale of immovable property. Whether there was such a concluded oral contract or not would be a question of fact to be determined in the facts and circumstances of each individual case***. It has to be established*** by the plaintiffs ***that vital and fundamental terms of sale of immovable property were concluded between the parties orally and a written agreement if any to be executed subsequently would only be a formal agreement incorporating such terms which had already been settled and concluded in the oral agreement***." (emphasis supplied)

- Thus, the agreement referred to in the proviso may even be an oral agreement. The onus to establish that there was an agreement would be on the assessee and this would be quite a heavy burden to discharge.

Significance of the word `may' in sub-section (3)

- **Significance of the word `may' in sub-section (3) of section 43CA –** Sub-section (3) of section 43CA " ……., the stamp duty value on the date of the agreement *may* be taken for the purposes of this sub-clause". What is the significance of the word `may'? Does it mean that the AO has discretion not to consider stamp duty value on the date of the agreement? It appears that for the following reasons the answer is in the negative.
- Sub-section (3) carves out an exception to the main provision contained in sub-section (1) viz. sub-section (3) deals with a situation where there is an agreement for transfer of an asset; such agreement fixes the value of consideration for the transfer of asset and the date of registration and date of the agreement are not the same. Once these conditions are satisfied sub-section (3) contemplates that the stamp duty value on the date of agreement may be taken for the purpose of comparison with the amount of consideration. The issue is whether the use of the word `may' signifies discretion to the AO to consider or not to consider the stamp duty value on the date of the agreement. It appears that the legislature has used the word `may' because this sub-section has to be read along with sub-section (4). Sub-section (4) states that 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 the agreement for transfer. Therefore, if this condition is not satisfied then the AO will be justified in not considering the stamp duty value on the date of the agreement. However, if this condition is satisfied then the AO will have to mandatorily consider the stamp duty value on the date of the agreement.

Significance of the word `may' in sub-section (3)

- It is relevant to note that the Legislature is conscious of the fact that there is a time gap between the booking of a property and its receipt by the purchaser on registration and there can be a considerable value difference between the two dates. Finance Act, 2009 had w.e.f. 1.10.2009 inserted S. 56(2)(vii) so as to interalia provide that when an individual or hindu undivided family receives an immovable property for a consideration less than its stamp duty value, the difference between the stamp duty value and the consideration is chargeable. Realizing that timing difference can give rise to a tax liability the Finance Act, 2010 deleted the portion of cl. 56(2)(vii)(b) dealing with receipt of immovable property for a consideration which is less than its stamp duty value with retrospective effect from 1.10.2009 for the following reasons stated in the Explanatory Memorandum.

  "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."

Significance of the word `may' in sub-section (3)

- Finance Act, 2013 reintroduced the same provision but with two provisos which are identical to sub-section (3) and (4) of section 43CA. The Memorandum to the Finance Bill, 2013 clearly states as under –

  "Considering the fact that there may be a time gap between the date of agreement and the date of registration, it is proposed to provide that where the date of the agreement fixing the amount of consideration for the transfer of the immovable property and the date of registration are not the same, the stamp duty value may be taken as on the date of the agreement, instead of that on the date of registration. This exception shall, however, apply only in a case where the amount of consideration, or a part thereof has been paid by any mode other than cash on or before the date of the agreement fixing the amount of consideration for the transfer of such immovable property."

- Thus, the Legislature has through the first proviso to S. 56(2)(vii)(b)(ii) carved out an exception which shall apply if the conditions mentioned in subsequent proviso are satisfied viz. that the consideration or a part thereof has been paid on or before the date of the agreement by any mode other than cash. Exactly identical to the two provisos are sub-sections (3) and (4) of section 43CA. If a view is taken that the first proviso to S. 56(2)(vii)(b)(ii) or sub-section (3) of section 43CA is discretionary then it would defeat the purpose of introduction of these provisions.

Can the benefit of sub-section (3) be denied in a case where the initial amount is received by cash but subsequent amounts are received by cheque

- **Can the benefit of sub-section (3) be denied in a case where the initial amount is received by cash but subsequent amounts are received by cheque**: Sub-section (4) of section 43CA states that the provisions of sub-section (3) shall apply only when the consideration or part thereof has been received by any mode other than cash on or before the date of agreement for transfer of asset. In a given case the assessee may have entered into an agreement for transfer of asset say on 1.7.2017 and on that date received a sum of Rs 1,00,000 in cash towards part of consideration under the said agreement and two days later received further sum of Rs. 2,00,000 by cheque under the same agreement. Can the benefit of sub-section (3) be denied on the ground that the conditions prescribed by sub-section (4) are not satisfied. It appears that the Court in such case may take a liberal view and hold that if it is otherwise evident that the assessee is entitled to benefit of sub-section (3) the same may not be denied only on the ground that the initial amount was received by cash. Possibly the assessee may have to explain the reason for receiving the amount by cash. The intention of prescribing that the consideration should be received by mode other than cash appears to be to ensure that the assessee is gets the benefit only in genuine cases and therefore if the Court is convinced that the assessee's case is bonafide it may hold that the benefit should not be denied only for the reason that initial amount was received by cash.

Can the assessee opt not to be covered by sub-section (3)

- **Can the assessee opt not to be covered by sub-section (3)**: In a case where the stamp duty value on the date of registration of transfer of asset has fallen as compared to stamp duty value on the date of agreement fixing value of consideration for the transfer of the asset it would be beneficial to the assessee to contend that since the provisions of sub-section (3) are intended to grant a benefit, he does not seek to avail of the same and therefore the stamp duty value on the date of agreement fixing the value of consideration for the transfer of the asset be ignored and the computation be done with reference to stamp duty value on the date of registration of transfer of asset. It appears that the assessee does not have any option in this regard. If the conditions of sub-section (4) are satisfied then the application of sub-section (3) would be mandatory. Also, the intention of the legislature appears to be that the value of consideration on the date it was fixed should have been equal to or greater than the stamp duty value of the asset.

Is S. 43CA a computation provision or a charging provision?

- **Is S. 43CA a computation provision or a charging provision?** : The section appears to be a computation provision and not a charging provision. Therefore, the section will apply when there is a charge created by the charging provision. The view that the section is a computation provision and not a charging provision is supported by the language of sub-section (1) which says that **for the purposes of computing** profits and gains from transfer of such asset. The stamp duty value of the asset is deemed to be full value of consideration received or accruing as a result of the transfer. The words `full value of consideration' are used in the context of computation of capital gains where section 48 states that capital gains are computed by subtracting from full value of consideration the cost of acquisition of the asset transferred, expenditure incurred in connection with transfer, etc. While computing income under the head `Profits and Gains of Business or Profession' the sales turnover, gross receipts are considered on the credit side of profit & loss account. The Memorandum states that section 50C applies to transfer of capital asset being land or building or both but when these assets are transferred by an assessee holding them as stock-in-trade, the provisions of S. 50C are not applicable. S. 43CA has been introduced so as to cover cases where land or building or both transferred by the assessee are held as stock-in-trade.

Is the section retroactive?

- **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 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 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."

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