CASE STUDY - 1
DIRECT TAX PERSPECTIVE

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In Metro cities, buildings and societies going in to redevelopment is a very common sight. The demand of residential houses due to incoming of people exceeds far more than the supply. Land is a limited resource and hence horizontal expansion is not possible. To fulfill the every growing needs, metros are undertaking vertical and upward expansions. This has lead to redevelopment of buildings and societies. Redevelopment can give rise to various tax complexities. Every redevelopment has to be seen on an independent basis and the same resolution cannot be applied to each case of redevelopment. This article applies to given facts of the case and may not apply to other specific facts of redevelopment.

The facts of the present case study depict a typical case of redevelopment with the above terms being commonly agreed upon between the society, the members of the society and the developer. The article on direct tax implications in the present case study broadly involves

i. The Society

ii. The Members of the society

iii. The Developer

CONCEPT OF REDEVELOPMENT

Generally the society owns land / building. The flats in the building of the societies are occupied by members of the society who hold shares in the share capital of society. Buildings over the period of time become dilapidated and cannot be merely corrected by reparation or renovation work. Therefore societies of such building have to undertake redevelopment activity to make them habitable. The societies do not have sufficient expertise and funds to redevelop the buildings on their own. Therefore the societies approach the developers who bring in their skill of constructing buildings and also finance the construction activity against an entitlement to sell the agreed developed area available for independent sale. In redevelopment the existing structure of the building is demolished and new building is constructed as per the permissible Development Control Regulations.

TAX IMPLICATIONS IN THE HANDS OF SOCIETY

A. Is transfer of development rights by society to developer subject to tax

The Plot of land is owned and held by the society as a Capital Asset. The development right emanates from the plot of land and therefore takes the same colour as that of the land. In order to tax capital gains arising from transfer of capital Asset under the provisions of Sec 45, basic conditions are to be present. Let's check for presence of each of the conditions in the present facts of the case

a. Existence and ownership of the Capital Asset

i. The plot of land belonging to the society continues to belong to the society even after redevelopment and even after the developer has sold flat which he is entitled to new members. What is transferred by the society to the developer is the right to the construct and develop the building and not the plot of land itself. A particular thing, right or interest are capital asset

within meaning of section 2(14) and accordingly development right is also a capital asset within the said definition under the income tax provisions. The development right transferred by the society to the developer is a capital asset.

b. Transfer as per Sec 2(47)

i. The transfer of the development rights does not get covered under provisions of Sec 2(47)(i) and (ii) as it is not in the nature of sale, exchange or relinquishment of the asset or extinguishments of rights. The society is the owner of plot of the land and there by owner of the development rights emanating from the plot of land. Even after redevelopment, the plot of land shall remain with the Society. Hence there is no sale, exchange, relinquishment of asset or extinguishment of right.

ii. The transfer of the development get covered under provisions of Sec 2(47)(v) and (vi). The extract of the provisions Sec 2(47)(v) and (vi) are reproduced as under:

v) any transaction involving the allowing of the possession of any immovable property to be taken or retained in part performance of a contract of the nature referred to in section 53A of the Transfer of Property Act, 1882 (4 of 1882) ; or

(vi) any transaction (whether by way of becoming a member of, or acquiring shares in, a co-operative society, company or other association of persons or by way of any agreement or any arrangement or in any other manner whatsoever) which has the effect of transferring, or enabling the enjoyment of, any immovable property.

In the case of redevelopment, ownership of land is generally vested in the developer in accordance with the provision of Sec 53A of the Transfer of Property Act, 1882. In redevelopment, the possession has to be an absolute possession to enable the developer to enter the property, grant an authority to do all such acts to construct the building, enjoying rights akin to those of the owner. As laid down by Supreme Court in the case of Shirmant Shamrao Suryavanshi 3 SCC 676, six conditions have to be fulfilled for a transfer to be in accordance with Sec 53A as follows:

1. there must be a contract to transfer for consideration any immovable property;
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.

The terms of the development agreement entered into between the society, the society members and the developer will have to be checked for fulfillment of all the above six

conditions to conclude the transfer to be in accordance with Sec 53A of the Transfer of the Property Act, 1882. The year of transfer shall be the year in which the above contract becomes enforceable.

iii. The transfer if not qualified to be transfer within the provisions of Sec 2(47)(v), should be checked for qualifying as a transfer within the provisions of Sec 2(47)(vi). The Supreme Court in the case of Balbir Singh Maini 86 Taxmann.com 94 has interpreted the provisions of Sec 2(47)(vi). It has held as under:

The expression "enabling the enjoyment of" takes colour from the earlier expressions "transferring", so that it is clear that any transaction which enables the enjoyment of immovable property must be an enjoyment as a purported owner thereof. The idea is to bring within the tax net, transactions where, though title may not be transferred in law, there is, in substance a transfer of title in fact.

The terms in the development agreement has to be checked to test whether the transfer is within the provisions of Sec 2(47)(vi)

c. Transfer is for a Consideration

i. No consideration is paid by the developer to society. Instead every member of the society is entitled to corpus of Rs. 20 Lakhs. It can be presumed that the said amounts received by the members would be on account of transfer of development rights as the member is already receiving rent as well as hardship compensation. It is a practice in many cases where consideration for transfer of development rights is paid to the members of the society in place of the society itself.

ii. As there is no receipt of consideration in the hands of the society, apparently no capital gains can be computed. But can it be said that amounts received by the members of the society accrues to the society as the plot of land is owned by the society and hence the development right is also owned by the society. Can the amount received by the member be regarded as full value of consideration and be taxed in the hands of the society.

iii. A similar case arose in the case of Raj Ratan Palace 46 SOT 217 (Mum ITAT) where developer paid to the society a consideration of Rs. 2.51 lakhs for granting consent and in addition, paid to members of the society amounts aggregating to Rs. 302 lakh. The Assessing Officer taxed the amounts received by the members also in the hands of the society on the ground that it was the society which was the owner of the land and by virtue of certain clauses in the agreement, according to the Assessing Officer, the society was entitled to the entire consideration. The Assessing Officer taxed the society, under section 2(24), even on amount received by the members. The Tribunal held that *"the society continued to be the owner of the land and no change in ownership of land had taken place." The Tribunal held that "mere grant of consent would not amount to transfer of land/or any rights therein." The Tribunal also noted that some of the individual members had offered the receipts from the developer to tax and the same had also been brought to tax in the hands of the individual members. In these facts, the Tribunal held the addition made in the hands of the Assessee society to be without any basis.*

There is no consideration received by the society and therefore the full value of consideration is NIL and hence no capital gains can be taxed in the hands of the society on transfer of development rights by the society to the developer.

Can full value of consideration be computed applying the provisions of Sec 50D?

As per the provisions of Sec 50D, where consideration received or accruing as a result of transfer of a capital asset is not ascertainable or cannot be determined, then the fair market value of the capital asset as on the date of transfer shall be deemed to be the full value of consideration.

In the present case, it is not a scenario where the consideration is not ascertainable or consideration cannot be determined. The developer has not given any consideration to the society against transfer of development rights. Therefore the consideration is Nil and hence NIL consideration cannot be substituted for unascertainable consideration. Accordingly Sec 50D cannot be applied to the present facts of the case.

B. Are provisions of Sec 50C applicable to transfer of Development rights in the hands of the Society

1. Section 50C of the Act provides that where capital asset transferred by an assessee is land or buildings or both and full value of consideration of the asset so transferred is less than its stamp duty value then capital gains in respect of the asset transferred (viz., land or building or both) shall be computed by considering stamp duty value of the asset transferred to be full value of consideration.

2. The provisions of Section 50C apply to transfer of land or building or both. Development rights are rights in land and not land. In fact, in case of a society land is never transferred by the society. A mere development potential, not followed by transfer of undivided interest in land, should not come within the net of S. 50C. Various judicial pronouncements have held that provisions of Section 50C shall not apply to transfer of rights in land or building or both

   a. Shakti Insulated Wires Private Limited ITA No. 3710/Mum/07

   b. Voltas Limited 74 Taxmann.com 99 (Mum)

   c. Ronak Marble Industries ITA No. 3318/Mum/2015

   Therefore provisions of Sec 50C are not applicable to transfer of development rights.

TAX IMPLICATIONS IN THE HANDS OF THE EXISTING SOCIETY MEMBERS

A. Is Corpus of Rs. 20 lakhs received by each of the existing society members be subject to tax in their hands

i. Each of the existing members have received a Corpus amount of Rs. 20 lakhs in addition to Rent, hardship compensation and additional area in exchange of the existing area occupied by them. It can be presumed that the said amounts received by the members would be on account of transfer of development rights. The existing society members per se don't own the development rights in the plot of land or the land itself. What they own is the flat in the building on the said plot of land. The corpus amount is received by them by virtue of them owning a flat in the building. The flat owned is a capital asset for the society members. Therefore the corpus amount emanating from and taking the colour of the underlying asset being the flat shall be capital receipt and not revenue receipt.

ii. A few of the judgments have held that corpus amounts being capital receipts shall not be taxable in the hands of the Assessee.

   a. Kushal K Bangia 50 SOT 1

   It is only elementary that the connotation of income howsoever wide and exhaustive takes into account only such capital receipts, which are specifically taxable under the provisions of the Act. Section

2(24)(vi) provides that income includes 'any capital gains chargeable under section 45. Thus, it is clear that a capital receipt simplicitor cannot be taken as income. This clearly implies that a capital receipt in principle is outside the scope of income chargeable to tax and a receipt cannot be taxed as income unless it is in the nature of revenue receipt or is brought within the ambit of income by way of a specific provision in the Act. No matter how wide be the scope of income under section 2(24), it cannot obliterate the distinction between capital receipt and revenue receipt. It is not even the case of the Assessing Officer that the compensation received by the assessee is in the revenue field, and rightly so because the residential flat owned by the assessee in society building is certainly a capital asset in the hands of the assessee and compensation is referable to the same. The only defence put up by the revenue is that cash compensation received by the assesseee is nothing but his share in profits earned by the developer, which are essentially revenue items in nature. This argument, however, proceeds on the fallacy that the nature of payment in the hands of payer also ends up determining its nature in the hands of the recipient. It is now well settled that in order to find out whether it is a capital receipt or revenue receipt one has to see what it is in the hands of the receiver and not what it is in the hands of the payer. The consideration for which the amount has been paid by the developer is, therefore, not really relevant in determining the nature of receipt in the hands of the assessee. In view of these discussion additional compensation received by the assessee cannot be said to be of revenue nature and, accordingly, the same is outside the ambit of income under section 2(24).

b. Jitendra Kumar Soneja ITA No. 291/Mum/2015.

c. Rajnikant D. Shroff ITA No. 4424/Mum/2014.

d. Pradyot B. Borkar ITA No. 4070/Mum/2016.

iii. There is once such judgment of Mumbai tribunal in the case of Deepak Shah 29 SOT 26 which has stated that no Capital Gains shall accrue in the hands of the member as he /she was neither holding any Capital Asset nor the same had been Sold, Exchanged or Relinquished.

It was held as under

Following conditions are necessary to attract section 45(1) : –

a. there should be a 'capital asset';

b. that 'capital asset' should have been held or owned by the assessee;

c. a 'transfer' of that capital asset should have been 'effected';

d. such 'transfer' should have been 'effected' in the previous year, relevant to particular assessment year;

e. profits or gains should have arisen from such 'transfer'.

If these conditions are satisfied then profits and gains-in-question are chargeable to income-tax under the head 'Capital gains' and would be deemed to be the income of the year in which transfer took place. In order to tax capital gains, subject-matter of transfer should be capital asset.

The definition of capital asset given in section 2(14) is for the purpose of the entire Act and not only for the purpose of capital gains. Although a particular thing, right or interest may be a capital asset within meaning of section 2(14), yet transaction in relation thereto may not give rise to taxable capital gains, because of the fact that no transfer as envisaged by the Act is involved. Similarly, certain capital asset which could not give rise to capital gain because of the fact that no cost of acquisition could be envisaged in the acquisition of that asset. It was found that neither the assessee nor the society was in a possession of any T.D.R. The builder was in possession of T.D.R. The Commissioner (Appeals) clearly noted the fact that the society or the members had not technically transferred T.D.R. in the sense of legal authorization. Thus, neither the society nor the members owned or possessed any transferable development rights which were owned and possessed by the builder and in terms of the regulations framed by the Municipal

Corporation, it was permissible for the builder to utilize the said transferable development rights in or with respect to the prescribed area, including the land and building owned by the society. The members of the society had consented to suffer the hardships and in terms of the regulations of the society or otherwise or, in law, the members did not have any say in the matter once the society decided to give its consent. The members of the society had paid for the purchase of the flat, which conferred very limited rights in terms of the regulations of the society and 'right to grant permission for additional construction', as such, did not form part of any rights, but it arose on account of the volition or voluntary desire of a person. Such permission could not be obtained by enforcing any rights or obligations arising from the agreement to purchase the flat and/or the regula- tions of the society. Accordingly, the voluntary consent given could not constitute or form part of the bundle of rights which were owned or possessed by the member in or with respect to the tenure of the flat granted to the member by the society. The area occupied by the members was only a 'measure' in quantitative terms inasmuch as the extent of hardship which might have been faced could not be quantified; when an additional construction is made, the location of the flat, as such, is of no significance or importance, since everyone suffers the hardship and the extent cannot be determine through any 'measure'. The assessee had not transferred any rights in or with respect to flat or compromised any rights in or with respect to flat or suffered any deficiency or limitation in or with respect to the rights in the flat. In fact, they had added the risk of adding load to the building. Accordingly, the cost of flat could not be any measure for the purpose of finding out the cost of the alleged 'capital asset' and the alleged 'transfer' of such an asset.

The assessee was neither holding any capital asset nor the same had been sold, exchanged or relinquish. In other words there was no transfer of capital asset in accordance with the Act. Therefore, section 45 was not attracted in the light of the above discussion. The assessee was not liable to capital gain under section 45.

iv. Based on the above if it is contented that the society members are not the owners of the development right, can the corpus amount received by the members of the society be subjected to tax under the provisions of Sec 56(2)(x). The receipt of corpus money by the society members of Rs. 20 lakhs is above the prescribed limit of Rs. 50,000/-. Can it be taxed on the pretext that the said amounts are received without consideration. Even though there is no direct ownership by the society members in the development rights, there are bundle of rights that are given by them to the developer being permission to demolish their flat, agreeing to the terms of the arrangement, becoming a confirming party to the arrangement, bearing the inconvenience for displacement, cooperating with the developer etc. Hence it cannot be said that the said receipt of corpus amount by the society member is without consideration.

Accordingly the corpus amounts received by the society members are capital receipts not taxable under the head Capital Gains. The same cannot be taxed under Sec 56(2)(x) as receipt of corpus amount cannot be said to be without consideration.

B. Is rent of Rs. 80,000/- per month and hardship compensation of Rs. 10 lakhs received by each of the existing society members from the developer subject to tax in their hands

i. In the redevelopment process, the old building is demolished and the new building is constructed. The existing flat owners are required to move out and stay on temporary accommodation till the new building is constructed and ready for occupation. The developer pays a fixed monthly rent to existing flat owners to enable them to meet the cost of rent. The process of moving out causes a lot of hardships and inconveniences to the flat owners and therefore hardship compensation is paid by the developer to each of the existing member. The taxability of these payments have always been a matter of litigation. The compensation amounts received are not income or revenue receipts within the definition of Sec 2(24).The payments are made by the developer to flat owners

by virtue of them owning the existing flats and the expenses they may incur to shift from their homes to alternate accommodation due to redevelopment. The payments are not in the nature of any earnings made by the society members. Though the tax authorities always want to consider them as revenue receipts taxable under the head Income from Other sources.

ii. There are various judgments which have held that the rent for alternate accommodation and hardship compensation are capital receipts as under:

a. Ajay Parasmal Kothari 159 taxmann.com 570 (Mum ITAT)

It was held that where Assessee received compensation from builder for alternate accommodation on account of vacating flat for redevelopment but Assessee had not utilized rent received for his accommodation, since Assessee had faced hardship by vacating flat for redevelopment, said receipt of compensation for hardship was in nature of capital receipt

b. Narayan Devarajan Iyengar 152 taxmann.com 188 (MUM ITAT)

It was held that where assessee received rent money for alternate accommodation from builder during time of redevelopment of his flat which was distributed by assessee among his brothers and sisters as per will of his father, since, assessee had already offered to tax his share of rent, impugned addition made on account of entire rent amount in hands of assessee was to be deleted

c. Delilah Raj Mansukhani vs ITO, ITA No. 3526/Mum./2017

The coordinate bench of the Tribunal held the rent received on alternate accommodation to be in the nature of capital receipt since the property has gone into re-development and payment is made by the builder on account of hardship faced by the owner of the flat due to displacement of the occupants of the flats.

C. Is the Additional Area of 4200 sq ft received free of cost by the existing society members from the developer subject to tax in their hands

All the existing society members aggregately own an area of 12000 sq. ft. in the existing building. In lieu of their existing area, the developer shall be giving them an additional area of 4200 sq. ft. free of cost. Against smaller units, the flat owners after redevelopment are getting bigger units at no additional cost. This is a common practice in most of the redevelopment case. In this scenario there is transfer of existing flat in lieu of new flat. Accordingly even though there is no flow of money or transaction of money but an exchange, capital gains would accrue to the flat owner.

TIME OF ACCRUAL

Capital gains would accrue to the flat owner when the redevelopment agreement has been signed and a vacant possession has been handed over by the flat owner to developer.

VALUE OF CONSIDERATION

There is no provision under law which gives what value has to be adopted for determining the full value of consideration in case of such transactions. The stamp duty value of the new flat to be received would be one of the values that can be adopted to determine the full value of consideration. However adoption of different value for determining the full value of consideration is still open for both the department as well as the Assessee.

EXEMPTION U/S. 54 ON CAPITAL GAINS

In case the flat owners are Individuals and HUFs, then they can claim exemption for Capital Gains u/s. 54 arising on transfer of existing flat against the new flat after redevelopment provided other condition of Sec 54 are fulfilled by them. The Capital Gains computed can be claimed to be utilized for making investment in the full value of consideration of the new flat to claim exemption u/s. 54.

D. Is TDS required to be deducted by the existing society members towards the Additional Area of 4200 sq ft received free of cost from the developer u/s. 194-IA

TDS under Sec 194-IA is deductible when the transferee makes payment of any sum by way of consideration to the resident transferor for transfer of immovable property. In the present case, the allotment of additional area is free of cost. Hence there is no payment of consideration by the member to the developer. The presence of consideration is relevant for deducting TDS under the provisions of Sec 194-IA. Unlike Capital Gains getting accrued in the hands of the member, the consideration has to be actually present and cannot be deemed to be present. Therefore no TDS is required to be deducted by the member against allotment of the said additional area by the developer under the provisions of Sec 194-IA in the absence of consideration.

E. Is the new Area purchased by the existing society members from the developer at 20% lower than the prevailing Stamp Duty Reckoner value taxable u/s. 56(2)(X)

i. It is a usual tendency for the members to negotiate with the developer to grant additional area over and above their entitlement at a rate lower than the fair market rate being offered to the customers. In the present case too, it has been agreed upon between the developer and the existing society members to grant additional area at price at 20% lower than the prevailing market Stamp Duty reckoner value.

ii. As per sec 56(2)(x), receipt of an immovable property at a consideration lower than the stamp duty value, the difference between the stamp duty value and consideration is more than the limit prescribed under Sec 56(2)(x) will be taxable as income under the head Income from Other Sources. Going by the literal interpretation of the provisions of Sec 56(2)(x), the consideration at 20% lower than the stamp duty value if is more than the prescribed limit shall be taxed in the hands of the existing society members as Income from other sources.

iii. In order to tackle the above proposed additions under Sec 56(2)(x), one can argue that the consideration of the new flat though in monetary terms is at less than 20% of Stamp duty reckoner value, the consideration in addition to monetary factors also consist of non monetary factors being accepting the inconvenience at the time the property is being redeveloped, permitting the developer to redevelop the building, agreeing to cooperate with the developer in the course of redevelopment etc. Since there is no provision to value the non monetary factor under the provisions of Sec 56(2)(x), one can argue that provisions of Sec 56(2)(x) are not applicable and hence there should be no questions of additions under the head Income from Other Sources.

iv. The current transaction of the additional area purchased by the existing society members cannot be compared with or cannot be at par with the normal sale transaction entered into with the 3rd party customers. The transaction of the developer with the society member stands on a different footing. The transaction is a composite arrangement between the developer and the

society member and has various components of give and take. It cannot be equated with a usual sale transaction. Therefore literally applying the provisions of Sec 56(2)(x) on the said transaction will be incorrect as the said provisions do not consider those factors which are not monetary in nature.

TAX IMPLICATIONS IN THE HANDS OF THE DEVELOPER

A. Whether Percentage completion Method OR Completed Contract method to be adopted by the Developer for Revenue Recognition

1. In case of redevelopment, the plot of land is not transferred to the Developer. It remains with the society before and even after the development of the building. In redevelopment, the development rights are transferred by the society to the developer. Against the development rights, the developer constructs area pertaining to the existing flat owners and he is also entitled to construct additional area using the eligible fungible FSI. The developer is entitled to sell the additional area to customers wherein his income shall be the net earning he makes from such sale after deducting the cost of construction. The developer in case of redevelopment projects is akin to real estate developer even though land is not owned by him.

2. For a real estate developer the income tax does not prescribe any specific method to be adopted to compute taxable income. Further there is no ICDS for the Real Estate Developer. As the real estate activity is spread over several years, the method of recognition of income over the years of the activity become important. For real estate developers there are 2 methods of recognizing revenue

   a. Completed Contract method (CCM)

   Under this method of accounting, revenue is recognized after completion of the whole of the construction project. So when the construction goes on for several years, the year in which the completion certificate is issued is the year in which the income is computed. Tax authorities do not appreciate this method of accounting as it defers payment of tax liability.

   b. Percentage of Completion Method (PCOM)

   Under this method, revenue is recognized on a year to year basis as per the stage of completion of the project at the end of each year. Revenue is recognized even before the property comes into existence and possession is handed over. The tax authorities prefer this method as it results in tax collections on year to year basis.

3. There are no specific ICDS issued by the CBDT for real estate developers. In the absence of any specific provision under the income tax provisions, the method of accounting regularly followed by the developer has to be considered for the purpose of computing tax on income. As on today, AS-7 Accounting for construction contracts are not applicable to Real Estate Developer as in a pure construction contact, the contractor has no interest in either the land or the construction which is carried out. So the real estate developer has to fall back on revenue recognition principles as per AS - 9. There is also a Guidance Note issued by the ICAI being ***Guidance Note on Accounting for Real Estate Transactions (Revised 2012).*** The said guidance note prescribes POCM method of accounting only for Real Estate Projects undertaken on or after 1st April, 2012. Can a Real Estate Developer advance an argument that the Guidance Note issued by the ICAI is binding on its members being Chartered Accountants, but it is not binding on the Real Estate developers and they are not bound to mandatorily

follow and adopt the Guidance Note. Further following the principles of consistency, the CCM method of accounting has regularly been followed by the Real Estate Developer. In the light of Guidance Note, the tax authorities do not approve the CCM method of accounting as it defers the liability to pay tax.

4. There is no bar on the developer to adopt CCM to determine his business income. However, a question might arise that whether the department can dispute the said method and allege that income from business of the Developer cannot be properly deduced from the project completion method on account of the reason that adoption of CCM leads to deferment of tax till the year in which the project is completed. In this regard, it is to be noted that the hon'ble Supreme Court in the case of Hyundai Heavy Industries Company Limited 291 ITR 482 and Bilahari Investment Private Limited 299 ITR 1 (SC) and various other High Courts have accepted CCM as an acceptable method of accounting for determination of income under the Act. It has further held that it cannot be said that the CCM followed by the Assessee would result in deferment of the payment of the taxes which are to be assessed annually under the Act.

5. The Real estate developers therefore can adopt CCM for determination of their income from real estate business. However, as due to the adoption of the said method, the income tax department will be entitled for income tax only after completion of the project, the developers should also be ready for litigation on account of possibility of non-acceptance of CCM by the departmental authorities. Therefore, before taking the decision on adoption of CCM, one should compare the benefit associated with the CCM in form of saving in notional interest by not paying tax early with the possible litigation expenditure which may occur due to the adoption of project completion method.

B. Whether the Developer shall be required to deduct TDS on corpus, rent and hardship compensation payments made to existing society members

i. The existing society members have to hand over possession of their property to the developer for the purpose of redevelopment. To facilitate this, the developer is providing Transit rent & hardship compensation for them to relocate to a temporary alternative accommodation. The question that arises is whether TDS is required to be deducted by the developers for these payments made.

TDS on Rent u/s. 194I

ii. The payment made by the developer is in the nature of compensation for alternative accommodation on account of hardship due to dispossession faced by the existing society member. There is no tenancy agreement or landlord tenant relationship between the developer and the existing society member. The payment made is purely in the nature of compensation. As per Explanation 1 to section 194-I of the Act, 'rent' inter alia included payment for use of land or building. The developer had not made the payment for use of any land or building. Hence, the payment is not in the nature of 'rent', but in the nature of compensation. Further TDS is deducted on the income chargeable under the provisions of the Act. The rent compensation paid by the Developer to the existing society member is not the income of the member and accordingly no TDS ought to be deducted by the developer on these payment

iii. A few of the judicial pronouncements which have held that the no TDS is liable to be deducted on

rent compensation paid by the developer to the society members.

a. Sahana Dwellers Private Limited 67 taxmann.com 202 (Mum ITAT)

b. Jitendra Kumara Madan v. ITO [2012] 32 CCH 59 (Mum ITAT)

c. Sarfaraz Sharafali Furniturewalla WP 4958 of 2024 (BOM HC)

d. Shanish Construction Private Limited ITA 6087/6088/Mum/2014 (Mum ITAT)

TDS on Hardship Compensation and Rent u/s. 194C

iv. The payments made by the developer to the existing society members in the form of hardship compensation, and rent are towards the inconvenience faced by the members at time of displacement and the expenses to be incurred in the course of displacement. As per the provisions of Sec 194C, if the payment is made to a person for work to be carried out by the person in pursuance to an agreement or a contract, then TDS shall be deducted under the provisions of Sec 194C. In the present case there is no services are being given by the members to the developer and hence there is no question of deducting TDS u/s. 194C on the said payments.

TDS on Hardship Compensation, Rent, Corpus u/s. 194-IA

v. TDS under Sec 194-IA is deductible when the transferee makes payment of consideration to the resident transferor for transfer of immovable property. Immovable property has been defined in the provisions of Sec 194-IA to mean land or building or any part of the building. In the present case the existing society members are giving their property to enable the developers to demolish and construct a new building in which the members will get an entitled area equivalent to original area owned by them along with the additional area. The ownership in the flat is not getting transferred by the member to the developer. Further these payment being in the nature of compensation, no TDS is liable to be deducted u/s. 194-IA.

vi. Corpus amounts are paid by the developer to the existing society members towards payment for agreeing, cooperating and confirming the transfer of development rights by the society to the developer. The development rights are owned by the society and per se are not owned by the existing society members. Further 194-IA covers immovable property in the nature of land or building or part of the building but does not cover in its ambit the rights in immovable property. Therefore for the above stated reasons no TDS is liable to be deducted by the developer on the corpus amounts in the hands of the society members.

C. Is the new Area sold to the existing society members by the developer at lower than the Stamp Duty Reckoner value subject to tax u/s. 43CA

i. On account of limitations of applicability of Sec 50C to immovable property held as stock in trade, the provisions of sec 43CA were incorporated. As per Sec 43CA if the builder receives consideration for sale of immovable property at a value lower than the stamp duty value, then stamp duty value shall be deemed to be the full value of consideration. In the present case, the real estate builder intends to sale additional area to existing society members at a value lower than 20% of the Stamp duty reckoner value. Going by the literal interpretation of the provisions of Sec 43CA, the consideration at 20% lower than the stamp duty value if is more than the safe harbour limit prescribed in the provisions, then the same shall be taxed in the hands of the developer.

ii. In order to tackle the above proposed additions under Sec 43CA, one can take similar argue as that

considered above for the purpose of sec 56(2)(x) that the consideration of the new flat though in monetary terms is at less than 20% of Stamp duty reckoner value, the consideration in addition to monetary factors also consist of non monetary factors being acceptance of inconvenience by the existing society members at the time the property is being redeveloped, permission given by the existing society members to the developer to redevelop the building, agreement by the existing society members to cooperate with the developer in the course of redevelopment etc. Since there is no provision to value the non monetary factor under the provisions of Sec 43CA, one can argue that provisions of Sec 43CA are not applicable.

Redevelopments comprises of multiple parties, lots of complexities, taxation and legal issues. Understanding and the terms of each and every redevelopment case is going to be different and unique from the other. The redevelopment agreement in which the terms will be recorded between the parties is going to play a very crucial role. It will be the base document which will form the very basis on which legal and taxation matters will arise. Hence due consideration has to be given to the drafting of the said agreement. Further the tax issue arising in case of redevelopment are ever evolving and hence there can never be a thumb rule that will apply in all cases. Hence it is advisable that the facts and as well the legal position to be revisited every time a transaction involved redevelopment of the property.

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