

**Taxability of JDA under  
Income Tax Act, 1961  
-Advocate Devendra Jain**

# What happens pursuant to JDA?

- JDA is an agreement executed between the Landowner and the Developer/Builder of a real estate project. Also, in urban areas the members of a Co-op. Hsg. Soc. enter into a re-development agreement with builder/developer.
- Whereby the owner of the land provides his land to a developer who undertakes the development/construction of property and other related work.
- When the construction is completed, the developer allots specified number of units to the landowner as per the mutually decided share or the landowner may receive percentage share of the consideration received from sale of the units.
- This agreement may also give the Developer the rights to sell remaining flats to outsiders.

# Taxability of JDA

<b>For Developer</b>	<b>For Land-owner</b>
Income from sale of units in the developed property (developers share)	Income received as lump-sum amount or in the form of units in the developed property or as percentage of sale consideration on sale of units
Taxable under the head of <b>'Profits and gains of business or profession'</b>	Generally taxable under the head of <b>'Capital Gains'</b>

# **Taxability Prior to the Amendment of Finance Act, 2017**

## **Provisions of Sec. 2(47) i.e. 'transfer', which may be attracted:**

Clause (i) - sale, exchange or relinquishment of the asset

Clause (ii) - extinguishment of any rights therein

Clause (vi) - any transaction which has the effect of transferring, or enabling the enjoyment of, any immovable property.

**Provisions of Sec. 2(47) i.e. 'transfer',  
which may be attracted:**

Clause (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.

# Taxability:

a) The definition of 'transfer' u/s 2(47)(v) includes any arrangement or transaction whereby any **rights are handed over** in execution of part performance of contract of the nature referred to in section 53A of the TOPA, 1882 **even though the legal right has not been transferred.**

b) Thus, whenever JDA were executed, the department resorted to definition provided u/s. 2(47)(v) and **imposed capital gain tax liability in the hands of the landowner in the year in which :**

-the JDA is entered into, and

-the possession of immovable property is handed over.

c) Thus, **even though the landowner may not have actually received any consideration** in such year, but still such an arrangement is regarded as 'transfer' and the year of executing such agreement was considered as 'year of transfer' **and accordingly the year of taxability u/s. 45(1).**

d) The landowners were made liable to pay capital gain tax even though in reality; neither the project is completed nor he had received any consideration in the year in which JDA is executed.

**Decisions Favouring this**  
**contention of the Department**



## Decisions in Favour of the Revenue

In a plethora of decisions, various courts have held that **transfer of land in the hands of land owner takes place on entering into JDA when the possession of land is parted with by the land owner to the developer under a written instrument of transfer.**

This is on the basis of section 2(47)(v):

- a) ITO vs. Dr. Arvind Goverdhan. (2018) 61 ITR(T) 159 (Bang. ITAT);
- b) ITO vs. P.A. Sarala [2015] 154 ITD 168-Chen. ITAT;
- c) CIT is. Dr. T.K. Dayalu [2011] 202 Taxaman 531 - Kar. HC;
- d) ACIT vs. Ram Reddy (2012) 23 Taxmann.com 59-Hyd. ITAT;

**Decisions not supporting such  
way of taxability**

## Year of Taxability - When Consideration is actually received

There are decisions in which it was held that capital gains as a result of JDA, **can arise only at point of receipt of consideration by owner** and not on the date of JDA.

Emphasis in these decisions was on the word 'arising' in section 45(1):

- a) CIT vs. Smt. Najoo Dara Deboo [2013] 218 Taxman 473 (All);
- b) Mrs. Aarti Sanjay Kadam vs. ITO [2018] 172 ITD 362 - Mum. ITAT

**On execution of JDA -**  
**there is mere transfer of rights and not land per say.**

In a JDA, the developer only gets right to construct and the ownership of property as such does not get transferred to him, hence no transfer is said to have taken place on execution of JDA. Few such decisions are as under:

- a) CIT vs. Shri Sadia Shaikh [2014] Tax Appeals No.11 & 12 of 2013 (Bom. HC)
- b) CIT vs. Atam Prakash Sons [2008] 219 CTR 164 (Del HC )
- c) C.S. Atwal vs CIT [2015] 378 ITR 244 (P&H HC)
- d) K. Radhika vs. DCIT [2012] 149 TTJ 736 (Hyd. ITAT)

## Absence of Furtherance of a Contract

There are several decisions on the subject, where in the **absence of any act in furtherance of contract by the developer**, it was held that transfer did not take place under section 2(47)(v):

- a) CIT vs. Balbir Singh Maini [2017] 398 ITR 531 - SC;
- b) Fibars Infratech (P.) Ltd. vs. ITO [2014] 162 TTJ 228 - Hyd. ITAT;
- c) S. Rajith Reddy vs. DCIT [2013] 144 ITD 461 - Hyd. ITAT;
- d) Mrs Aarti Sanjay Kadam vs. ITO [2018] 172 ITD 362 - Mum. ITAT

## Effect/Taxability of an un-registered JDA

**CIT vs. Balbir Singh Maini [2017] 398 ITR 531 (SC).**

- Vide the Registration and Other Related Laws (Amendment) Act, 2001, amendments were made simultaneously in Section 53A of the Transfer of Property Act and Sections 17 and 49 of the Indian Registration Act.
- The effect of the aforesaid amendment is that, on and after the commencement of the Amendment Act of 2001, **if an agreement, like the JDA, is not registered, then it shall have no effect in law for the purposes of Section 53A.**

## Effect/Taxability of an un-registered JDA

- This being the case, in order to qualify as a "transfer" of a capital asset under Section 2(47)(v) of the Act, there must be a "contract" which can be enforced in law under Section 53A of the Transfer of Property Act.
- A reading of Section 17(1A) and Section 49 of the Registration Act shows that in the eyes of law, **in the absence of registration, there is no contract** which can be taken cognizance of, for the purpose specified in Section 53A.

# Overview of Supreme Court Judgment



# Seshasayee Steels (P.) Ltd. vs. ACIT

## [2020] 421 ITR 46 (SC)

### Brief Facts:

- Assessee entered into an 'agreement to sell' land on 15.05.1998 with a builder/developer (a company).
- As per this agreement assessee **gave permission** to the builder to start advertising, selling and construction.
- On 27.11.1998, assessee gave power of attorney (POA) to the builder to execute sale agreements of the flats which were to be constructed on the land. POA also authorized the builder to represent him before various authorities.
- Certain conditions/obligations as provided in 'agreement to sell' dated 15.05.1998 were not carried out in their true letter and spirit.

# Seshasayee Steels (P.) Ltd. vs. ACIT

## [2020] 421 ITR 46 (SC)

### Brief Facts:

- Some dispute arose between both the parties.
- Hence, a 'Memo of Compromise' was entered on 19.07.2003 whereby various amounts was to be paid by the Builder to the assessee so as to completely extinguish assessee's rights over the property.
- Appellant did not file ROI for AY 2004-05. Subsequently, AO discovered that there was an agreement to sell which was terminated by entering into 'memo of compromise' dated 19.07.2003
- Accordingly, based on the above material, AO reopened the assessment for AY 2004-05.
- As the appellant did not cooperate during assessment proceedings, the AO passed an ex-parte order treating the entire consideration as capital gain for AY 2004-05.

# Seshasayee Steels (P.) Ltd. vs. ACIT

## [2020] 421 ITR 46 (SC)

### Questions before Supreme Court:

- Whether provision of Section 2(47)(v) gets attracted considering the 'agreement to sell' & 'power of attorney' and accordingly taxability will be in AY 1998-99 and not AY 2004-05?
- Whether provision of section 2(47)(vi) gets attracted considering agreement to sell and POA as 'enabling the enjoyment of any immovably property' and accordingly taxability will be in AY 1998-99 and not AY 2004-05?
- Whether 'Memo of Compromise' can in anyway attract any of the clause of Section 2(47)?

# Seshasayee Steels (P.) Ltd. vs. ACIT

## [2020] 421 ITR 46 (SC)

Held:

**Section 2(47)(v)-**

- a) In order to attract provision of Section 2(47)(v) , provision of Section 53A of TOPA, 1882 needs to be fulfilled.
- b) As per the agreement to sell only a licence was given to the builder upon the land for the purpose of developing the land into flats and selling the same.
- c) **Such licence cannot be said to be 'possession' within the meaning of Section 53A, which is a legal concept, and which denotes control over the land and not actual physical occupation of the land.**
- c) **Since provisions of Section 53A of TOPA,1882 are not attracted here, hence even section 2(47)(v) cannot be attracted.**

# Seshasayee Steels (P.) Ltd. vs. ACIT

## [2020] 421 ITR 46 (SC)

Held:

**Section 2(47)(vi)-**

- a) Placing reliance on the decision of Hon'ble Supreme Court in case of *CIT vs. Balbir Singh Maini [2018] 12 SCC 354* it was reiterated that the expression "enabling the enjoyment of" must take colour from the earlier expression "transferring". Accordingly, there needs to be transfer on account of extinguishment of the assessee's right over the property.
- b) **Here, it was clear that as on the date of the agreement to sell, the assessee's rights were completely intact both as to ownership and to possession even de facto.**
- c) Thus even Section 2(47)(vi) cannot be attracted in facts of the present case.

# Seshasayee Steels (P.) Ltd. vs. ACIT [2020] 421 ITR 46 (SC)

Held:

Whether any other clause of Section 2(47) applies to 'deed of compromise'-

- a) It was pursuant to the 'deed of compromise' dated 19.07.2003 the assessee received the consideration (after certain reduction) in full and final settlement in respect of the 'agreement to sell'.
- b) Thus, assessee's rights in the said immovable property were extinguished on the receipt of the last cheque.
- c) The 'deed of compromise' dated 19.07.2003 could be stated to be a transaction which had the effect of 'transferring' the immovable property.
- d) Such transaction could fall u/s. 2(47)(ii) [extinguishment of any rights therein] or u/s. 2(47)(vi) [effect of transferring, or enabling the enjoyment of, any immovable property.]

**Rationale for bringing amendment**  
**vide**  
**Finance Act, 2017**

## Reasons for Amendment

- A practical difficulty by virtue of section 2(47)(v) - Capital gain liability arises in the year in which JDA is entered when the developer takes possession of the property, while the land owner receives consideration in form of constructed flats after completion of the project.

- Determination of FVOC ?

Revenue ascertained FVOC by resorting to Section 50D read with section 50C, accordingly the FMV of the project and land was considered as FVOC. Whereas in reality the project may not even be into existence in the year of executing JDA.



**Insertion of Section 45(5A) vide  
Finance Act, 2017  
w.e.f. 01.04.2018**

# Section 45(5A)

- **Notwithstanding anything contained** in sub-section (1),
- where the capital gain arises to an assessee, being an **individual or a Hindu undivided family**,
- from the transfer of a capital asset, being land or building or both, **under a specified agreement**,
- the capital gains shall be **chargeable to income-tax** as income of the previous year in which the **certificate of completion for the whole or part of the project is issued by the competent authority**; and
- for the purposes of section 48, the **stamp duty value, on the date of issue of the said certificate, of his share**, being land or building or both in the project, as **increased by the consideration received in cash**, if any,
- shall be **deemed to be the full value of the consideration** received or accruing as a result of the transfer of the capital asset :

# Section 45(5A) - Proviso

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

# Summary of Section 45(5A)

- Applicable from A.Y. 2018-19 – whether to JDA entered on or after 01.04.2017 or even to JDA entered into prior to that date – point to ponder!
- Applicable only to the Individual and HUF assesseees.
- Landowner must hold Land or building as capital asset .
- Not applicable where **entire sale consideration** is received/receivable **by landowner in monetary terms.**
- Applicable only where a **registered** agreement/deed is executed.
- Not applicable where share is transferred before completion.

## Summary of Section 45(5A)

- Year in which the completion certificate is issued by the competent authority for whole or the part of project is the year of taxability. – **‘Year of taxability’**.
- Year in which any of the clauses of Section 2(47) gets triggered – **‘Year of transfer’**.
- Thus, the ‘year of transfer’ might not be same as ‘year of taxability’.

# **Issues arising out of Section 45(5A)**

**Q. Can the provision of the above section be applied in case of other category of persons?**

Though the provision is introduced to remove hardship, it is a substantive provision made applicable only to Individual and HUF. **Hence it may be very difficult to apply it to other persons.**

**In tax matters, the State is allowed to pick and choose objects, persons, methods and even rates for taxation if it does so reasonably as held in:**

- a) Khyebari Tea Co. v. State of Assam, (1964) 5 SCR 975
- b) Khandige Sham Bhat v. Agricultural income Tax Officer, (1963) 3 SCR 809

**Q. Can an Individual/HUF who jointly owns land or building or both with another person [not being Ind/HUF] be covered here?**

Each assessee is different and hence the provisions of law as may be applicable to each of them to be applied.

Note:

Developer need not be Individual/HUF. It could be any kind of entity.



**Q. In case of individuals /HUFs, can it be applied retrospectively to development agreements already entered into?**

Section 45(5A) being substantive provision, cannot be applied to development agreement entered into during year 2008-09, in which section 2(47)(v) would certainly get attracted.

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

(However, the issue as to applicability of s. 45(5A) was not discussed in detail and it was only held that s. 45(5A) is a substantive provision).

In Mrs. Aarti Sanjay Kadam v. ITO [2018] 172 ITD 362 (Mumbai - Trib.) –

Though section 45(5A) was argued but the Tribunal even without considering the retrospectivity of section 45(5A) held that **Capital Gain is taxable only when the constructed area is received under the JDA.**

**Q. The safeguards contained in section 50C do not find place in section 45(5A). What is the remedy in such case?**

Is section 55A the answer?

If not, the provision becomes unconstitutional as held in decisions relating to section 50C.

## **Q. How to claim the exemptions u/s 54 etc. in 45(5A) scenario?**

45(5A) begins with a non obstante clause. Effect of a non obstante clause is explained in

*UOI v. G. M. Kokil (1984) SCR 196*

*R. S. Raghunath v. State of Karnataka, AIR 1992 SC 81*

U/s 45(5A), the full value of consideration under section 48 is dependent on the stamp duty value as on the date on which the completion certificate is obtained.

In the absence of the stamp duty value, the consideration cannot be ascertained and without a quantified consideration, it is impossible to calculate the capital gains which is a precondition for conferment of exemption under section 54/54F.

It is now well settled that legislature does not expect a person to perform impossibility [*Life Insurance Corporation of India v. CIT* [1996] 85 Taxman 313 (SC)]

*In view of the above, a view could be taken that the reinvestment in a residential house for the purpose of section 54/54F could be made from the date of completion certificate.*

## Issues in case of Re-development of a 'Co-op. Housing Society'

Redevelopment arrangements of existing property -the members of co-operative housing society individually own their respective units and own undivided share in land. The owners of the existing building allow the developer to demolish the existing building and allow him to develop a new building which would have built up area more than that of the existing building.

**Q. Is there a transfer involved in such cases? If yes, under which sub-clause of s.2(47)? What shall be the year of taxability and the method of calculation and exemption?**

**Q. And what will be the answer if the redevelopment is of a building other than residential building (non-depreciable)?**

**Q. JDA in case of existing building being a depreciable business asset:**

**How to harmonise sections 32, 43[6], 50 and 45(5A) in such cases?**

One View: There is no transfer by a member of a co-operative housing society owning a unit in the building:-

- There is no sale – Refer Sec 54 of TOPA
- There is no exchange – Refer Sec 118 of TOPA
- There is no relinquishment of asset / extinguishment of rights in asset.

Only possibility could be of sub clause (v) or (vi) of Sec.2(47)

If it is considered that there is a transfer of undivided share in land in favor of developer / prospective buyers, sub-clause (v) or (vi) can be invoked.

Otherwise, there is no transfer and hence there is no question of calculating CG or exemption.



**Q. If it is considered to fall under sub-clause (v) or (vi) of Sec.2(47)**

In case of a residential house, CG can be calculated u/s 45(5A) and exemption be availed u/s 54.

In case of non depreciable business assets, CG can be calculated u/s 45(5A) and exemption, may be availed by other investment like 54EC or 54F.

In case of a depreciable business asset, the applicability of Sec.32 read with Sec. 43(6) need to be examined independent of the calculation of CG u/s 45(5A).

**Q. How to interpret and apply the words "part of the project"? Does it mean any part of project or does it mean only that part in which the assessee is to get a share?**

Explanatory Memorandum provides that- provision introduced to remove hardship of paying tax in the year of transfer.

Hence, part of the project should be interpreted as that part in which assessee is to get the share.

**Q. There may arise a situation where the owner sells only few of the flats out of his share in the project which is still under construction.**

**In such case, will the taxability be triggered? In other words, does the proviso apply even if only part of the entire share is transferred prior to the date of issue of CC?**

Sec 13 of General clauses Act provide that “words importing the masculine gender shall be taken to include females; and words in the singular shall include the plural, and vice versa.”

There is no such provision that reference to whole includes a reference to part

Section 45(5A) itself in the main part refers specifically to completion certificate for **the whole or part of the project**. However the proviso does not refer to whole or part of the share in project.

**Hence, it should be triggered only when entire share is transferred.**

**Q. In cases where under JDA the assessee-owner is to receive only cash consideration and no share in the developed property, will Section 45(5A) apply?**

The definition of specified agreement in clause (ii) to Explanation to sec 45(5A) provides for 2 situations

-Consideration in the form of share in project plus cash consideration.

-Consideration only in the form of share in project without any cash consideration.

Hence if the assessee owner is to receive only cash consideration, it is not a 'specified agreement' & hence Sec. 45(5A) can not apply.

**Q. Will section 45(5A) apply in JDA where the developer only acquires development rights and the owner does not transfer land or building under a JDA?**

Sec 45(5A) covers only a situation of transfer of land or building or both.

-Being a charging provision, it needs to be strictly construed.

- If there is no transfer of building or land, Sec 45(5A) can not apply.

## Q. Period of Holding - LTCA or STCA?

**Upto the date of transfer vs. Upto the date of taxability**

As per Section 2(42A) in case of land/building, the period of holding for qualifying to be a STCA is maximum of 24 months immediately preceding the date of **its transfer**.

Question is whether the period of holding should be counted only till date of transfer or till the date of receipt of completion certificate when taxability arises?

Does section 45(5A) alter the date of transfer or only the year of taxability, without changing the date of transfer!

## Q. Benefit of Indexation:

In case if the specified capital assets are LTCA, then benefit of indexation is available.

However, question here is upto which year indexation will be allowed-

→ only upto the date of transfer of capital asset (**as per Explanation to section 48**) or

→ upto the date of issue of completion certificate (i.e. year of taxability)?

As per clause (iv) of Explanation to Section 48, indexation is calculated from the year in which the long-term capital asset was first held by the assessee **to the year of 'transfer of such asset'**.



In case of JDA, generally, the 'year of transfer' will precede the 'year of taxability'.

When it comes to determination of FVOC, the SDV of the property **in the year in which completion certificate is received is considered (i.e. year of taxability)**.

So, stamp duty value is taken as on the date of issue of completion certificate and not as on the date of original transfer.

Whereas, as per the strict interpretation of Section 48, it appears that indexation will be allowed upto the year in which transfer took place (i.e. year in which JDA is executed)

Thus, there is lack of parity.

Logically, indexation should be allowed till the year of taxability.

## **Q. Completion Certificate – Date of Issuance vs. Date of Application**

**As per the provisions of section 47 of Indian Registration Act, 1908, a document on subsequent registration will take effect from the time when it was executed and not from the time of its registration.**

*-Gurbux Singh v. Kartar Singh [2002] 254 ITR 112 (SC)*

## **Q. Completion Certificate – Date of Issuance vs. Date of Application**

- Assessee got approval for development of housing project from local authority before 1-4-2004 .
- It completed construction in year 2006 and also applied for permission to local authority on 15-2-2006
- However, Local authority for technical reasons granted business use permission only on 19-3-2009
- **Held that since assessee had completed housing project in the year 2006 i.e. well within statutory time frame, it was entitled to deduction under section 80-IB(10) and the delay in issue of certificate by local authority till 2009 for technical reasons should not be considered as completing the project in 2009.**
- *CIT vs. Tarnetar Corporation [2014] 362 ITR 174 (Gujarat)*

# **TDS Provisions**

## **Section 194-IC**

# Section 194-IC

- 'Transfer' which are covered by section 45(5A) – Corresponding TDS provision of Section 194-IC will apply and NOT of section 194-IA.
- Rate of TDS for residents = 10% (whereas, in case of Section 194-IA it is 1%)
- TDS is not required to be deducted on 'consideration received in kind'.
- Point of deduction = at the time of payment or credit, whichever is earlier.

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