DEVELOPMENT AGREEMENT

THIS AGREEMENT made at Bombay this…… day of ……………………… BETWEEN……………………………………………………… all of Bombay Inhabitants, the present partners of Messrs. India Agencies, a partnership firm duly registered under the provisions of Indian Partnership Act, 1932 and having their place of business at……………………………… Bombay………………….. hereinafter called "the Owners" (which expression) shall unless it be repugnant to the context or meaning thereof mean and include the partners or partner for the time being of the said firm the survivors or survivor of them and the heirs executors and administrators of the last surviving partner and their his or her assigns) of the One Part: AND MESSRS……………………………………… also a partnership firm duly registered under the provisions of Indian Partnership Act, 1932 and having their place of business at………………………………. Hereinafter called "the Developers" (which expression shall unless it be repugnant to the context or meaning thereof mean and include the partners or partner for the time being of the said firm the survivors or survivors of them and their heirs executors and administrators of the last survivor and their his or her assigns) of the Other Part:

WHEREAS:

1. The Owners are seized and possessed of or otherwise well and sufficiently entitled to the pieces or parcels of land or ground of land revenue tenure situate lying and being at Village Mouje Kaversar, District of Thane containing by admeasurements______ sq.yards or otherabouts bearing Survey

No………… Hissa No………………………… and more particularly described in the Schedule hereunder written and delineated on the plan thereof hereto annexed and thereon shown surrounded by red coloured boundary line (hereinafter called "the said property");

2. The Owners are desirous of developing the said property;

3. The Developers have approached the owners and have requested the Owners to permit them to develop the said property as per the plans that may be sanctioned by the Thane Municipal Council and other concerned authorities and to put up building/buildings thereon at their own costs and expenses, which the Owners have agreed to do on certain terms and conditions mutually agreed upon by and between them;

4. The parties hereto are desirous of recording the said terms and conditions in the manner hereinafter appearing;

NOW THIS AGREEMENT WITNESSETH AND IT IS HEREBY AGREED BY AND BETWEEN THE PARTIES HERETO as under:-

1. The owners shall permit the Developers and the Developers shall develop at their own costs, risks, expenses and responsibility and on 'principal to principal' basis and not as agents of the owners by putting building/buildings on the property situate lying and being at village Mouje Kavesar Taluka Thane District Thane in the Registration District and Sub-District of Thane containing by ad-measurement …………….. sq. yards equivalent …………….. sq mts or there abouts bearing Survey No…………………….. Hissa No …………………… and more particularly described in the Schedule hereunder written and delineated on the plan thereof hereto annexed and thereon shown surrounded by red coloured boundary line (hereinafter called "the said property") as per the plans that may be sanctioned by

the Thane Municipal Council and as per the terms and conditions that may be imposed by the concerned authorities while sanctioning the said plans and shall consume and utilize thereon Floor Space Index (FSI) of sq.meters that may be sanctioned by the Thane Municipal Council and other concerned authorities.

2. In consideration of the Owners permitting the Developers to develop the said property, the Developers shall pay to the owners a sum of Rs. …………………per sq.yard of the area that may be ascertained by Joint Survey as set out hereinafter. The owners have informed the Developers that as per the records, the total area of the property is approximately ……………………… sq.yards equivalent to …………… sq. meteres or thereabouts and the price payable in respect thereof, at the rate of Rs. ………………….. per sq. yard works out to ………………. Rs. ………………… (Rs……………………………………….. only)

3. The Developers shall pay to the owners the said purchase price of Rs. ………………… in the manner following:-

(a) Rs…………………….. (Rupees ………………………………………………) (10%) as and by way of earnest money or deposit on the execution of this Agreement (the payment and receipt where the Vendors do and each of them doth hereby admit and acknowledge);

(b) Rs…………………….. (Rupees ……………………………… Only) being the balance of the purchase price within a period of ……………….. months from the date the plans for developing the said property are sanctioned as set out hereinabove.

Time being of the essence. In the event of the Developers failing to pay the balance of the consideration amount within the stipulated time, then in that event/the Owners, without prejudice to any other rights the Owners have against the Developers, shall be entitled to terminate this Agreement and forfeit the sum of

Rs………………. Paid as earnest money or deposit at the time of the execution of this agreement and on such termination and forfeiture, this agreement shall come to an end and neither party shall have any claim against the other of any nature whatsoever.

3. The Developers shall for and on behalf of the Owners submit to the Thane Municipal Council plans for getting the said property developed. The Developers shall at their own costs get the said plans sanctioned by the Thane Municipal council and other concerned authorities within a period of 4 months from the date of the execution of this agreement and in case if the Developers are not in a position to get the said plans for developing the said property sanctioned within the said period of four months as aforesaid, then in that event, the Owners shall at the request of the Developers extend the period for getting the plans sanctioned by a further period of four months. The Developers extend the period for getting the plans sanctioned by a further period of four months. The Developers shall however be bound and liable to pay to the owners interest at the rate of ….% per annum on the balance amount from the expiry of the said period of four months till the date of the actual payment. It is further hereby expressly agreed by and between the parties hereto that if within the said extended period of four months the plans for developing the said property are not sanctioned by the concerned authorities, then in that event, this agreement shall come to an end and the owners shall refund to the Developers the earnest money paid by the Developers to the owners without interest and on such payment, neither party shall have any claim against the other of any nature whatsoever.

4. The owners and the Developers shall jointly get the said property surveyed and ascertained the exact area of the said property. The developers shall after the work of joint survey is complete construct at their own costs a boundary wall

surrounding the said property. If at the time of construction of the said boundary wall, any objection or obstruction is received by the Developers then in that even, the Developers shall forthwith bring the same to the notice of the owners and the owners shall at their own costs remove such obstruction or objection.

5. The owners have informed and represented to the Developers that:-

(a) the land are agriculture land and are of land revenue tenure;

(b) that the Joint Director of Industries and ex-officio Deputy Secretary to the Government, General Administration Department has by his order bearing No………… dated …………. Has granted ex-emption to the owners under section 20 of the Urban Land (Ceiling and Regulation) Act, 1976 (hereinafter called "the said Act, to retain the excess vacant land for the purpose of industry and for no other purpose; The Special Land Acquisition offices Thane, by his notification bearing No…………. dated ………….. has notified that the property bearing Survey Nos. and has issued a Notification in the Maharashtra Government Gazettee on …………….. and have taken over the said portion of the property which portion is delineated on the plane thereof hereto annexed and thereon shown surrounded by a brown coloured wash;

(c) that Mr…………………………. is occupying a portion of the said property and is carrying on business of manufacturing bricks and the owners have made arrangement to get vacant possession of the said portion of the property from Mr…………………………. on or before …...

(d) that no part of the said property is falling under reservation and in case at any time before the payment of the amount as set out in Clause 3(b) above any part falls under reservation, then in that event the total price

payable by the Developers to the owners shall be proportionately reduced;

(e) The owners or any one on their behalf has or have/not received any notice for acquisition of the said property or any part or portion thereof;

(f) The owners have not entered into any agreement for sale or development in respect of the said property or any part or portion thereof;

(g) The owners or any one on their behalf has or have not created any adverse right in respect of the said property;

The Developers are fully aware of all the aforesaid facts and have agreed to take the said property for development.

6. The Owners shall within a period of seven days from the date of the execution of this agreement, handover to the Developers' advocates and Solicitors all original documents and title deeds relating to the said property for enabling the Developers' Advocates and Solicitors to investigate the Owners title to the said property. The Developers shall administer requisitions to the owners within a period of two months from the date of receipt of such original documents and title deeds and if within the said period of two months no requisitions to the owners within a period of two months from the date of receipt of such original documents and title deeds and if within the said period of two months no requisitions are received by the owners, the owners shall presume that the Developers has accepted the owners' title to the said property and the Developers has accepted the owners' title to the said property and the Developers shall not be entitled to administer any requisition on title of the owners.

7. The owners shall at their own costs but subject to what is stated hereinabove make out a clear and marketable title to the said property free from all encumbrances and shall at their own costs get in all outstanding estates and clear all defects in title, such as claims by way of sale, exchange, mortgage, gift, trust, inheritance possession, lien or lease or otherwise and deduce a marketable title to the said property.

8. The owners and all other necessary parties shall make and execute a proper Deed of Conveyance and all other necessary documents and papers to complete the title agreed to be given in respect of the said property and such conveyance shall be in favour of the Developers or their nominee or nominees including a Co-operative Housing Society or a limited company.

9. The Developers shall be entitled to a proper Conveyance and all other muniments of title relating to the said property.

10. On the execution of this Agreement, the owners shall grant to the Developers licence to enter upon the said property as bare licensees only for enabling them to develop the said property subject to the payment of the balance consideration amount to the owners as set out hereinabove, It is hereby expressly agreed by an between the parties here to that the possession of the said property is not being given or intended to be given to the Developers in part performance as contemplated by Section 53A of the Transfer of Property Act, 1882. The owners and the Developers hereby confirm that by virtue of the Developers entering upon the said property as Licensees, the same does not amount to take up possession of the said property. The said licence to enter upon the said property and develop the same shall become formal possession of the said property in favour of the Developers only after the full payment of the consideration amount is paid to the owners by the

Developers and upon execution of the Conveyance in respect of the said property in favour of the Developers or their nominee or nominees and the registration of such Conveyance or Conveyances in favour of the Developers or their nominee or nominees. In case if the licence hereby granted is revoked on account of non-payment of the consideration amount payable by the Developers to the owners as set out hereinabove, the owners shall be entitled to terminate and/ or revoke the licence hereby granted and on such termination and/or revocation, the owners shall be entitled to (i) restrain the Developers from entering upon the said property and carry out construction activities thereon and (ii) deal with and dispose of the said property including the incomplete consutrction work thereon to any third party of their choice and the Developers shall not be entitled to claim any compensation from the owners in respect thereof and the Developers shall not be entitled to raise any objection to the same.

11. The Developers shall be entitled to proceed with the development of the said property and construction of the building/buildings on the said property strictly in accordance with the plans in respect thereof as may be got approved by the Developers and also in accordance with the rules and regulations of the Municipal Corporation of Greater Bombay, thane Municipal Council and other concerned authorities and the Development Control Rules and the Scheme that may be sanctioned by the Competent Authority appointed under the Urban Land (Ceiling and Regulation) Act, 1976 (hereinafter called 'the said Act'). The Developers shall throughout hereinafter and always save harmless and keep indemnified the owners and their respective estates and effects of from and against all actions, suits, costs, charges, expenses, damages, fines, penalties etc. resulting on account of any act or

omission or any breach, delay or default on the part of the Developers in developing the said property of any rules, regulations terms or conditions or otherwise.

12. The Developers will be entitled to modify the approved building plans as they deem fit provided the modifications are within or as per the provisions of approved scheme laid down by the Competent Authority. The Developers shall pay all the fees of the Architects, and R.C.C. Consultants appointed by them for the development of this project. It is agreed that while appointing Architect and R.C.C. Consultants the Developers shall procure in favour of the owners in writing that they shall not look to the owners or any of them for their fees or otherwise.

13. The Developers shall in the course of erection and completion of the said buildings do all lawful acts and things required by and perform the works in conformity in all respects with the provisions of the statutes applicable there to and with the bye-laws and the rules and regulations of the Thane Municipal Council, Development Control Rules and the Rules and Regulations of any other public body or/local authority or authorities having jurisdiction to regulate the same and shall throughout save harmless and keep the owners indemnified of, from and against all claims for the fees, charges fines and other payments whatsoever which during the progress of the work may become payable or be demanded by the said authorities in respect of the said work or of anything done or caused to be done or omitted to be done under the authority herein contained and shall generally and from time to time discharge and pay as from the date of possession all claims, easements, outgoings, rates, rents, municipal taxes and other dues duties impositions and burdens at any time hereafter chargeable against the owner or occupier by statutes or otherwise relating to the said property or any building/s thereon as and when they shall

become due and/or payable and shall keep the owners indemnified of from and against the payment thereof.

14. Subject as aforesaid the Developers shall at their own costs, risk and responsibility obtain all other necessary NOCs, permissions and sanctions and extensions, etc. from the Urban Land (Ceiling and Regulation) Authorities and Municipal Corporation of Greater Bombay, Thane Municipal Council and all other concerned authorities for the development of the said property and erection of the buildings on the said property.

15. The Developers shall not at any time cause or permit any public or private nuisance in or upon the said property or do anything which shall cause unnecessary annoyance, inconveniences suffering hardship or disturbance to the owners or to the occupants of the neighbouring properties.

16. It shall be the responsibility of the Developers to complete the development and construction within the prescribed period. If the construction of the said buildings shall be completely finished as per the plans approved by the Municipal Corporation of Greater Bombay and the Thane Municipal Council and the sanctioned scheme or within such period as shall be allowed or fixed and if the Developers shall have paid all amounts payable by them under these presents and shall have observed and performed all the stipulations herein contained then the owners shall grant and the Developers shall accept a Conveyance of the said property. The Conveyance shall be executed in favour of the Developers or their nominee including a Co-operative Housing society or a Limited Company.

17. The owners state that they have already paid all the municipal taxes, land revenue, water charges and electricity charges etc, payable to the MOCB, Thane Municipal Council, State Government and the BSES Ltd. and that there are no dues

payable to any of the aforesaid authorities. The developers shall pay all the outgoings (including the Municipal and collector's bills and BSES Ltd.) from the date the owners put the Developers in possession of the said property as Licensees.

18. The owners shall at the time of handing over possession of the said property as licensees to the Developers, execute Power of Attorney in favour of the nominee or nominees of the Developers in respect of the said property for development, authorizing them jointly and/or severally on behalf of the Developers and at the costs and expenses of the Developers tot do lawful acts, deeds, matters and things pertaining to the development of the said property and for the purpose to approach the authorities including the Municipal Corporation or the authority appointed under the said Act, or any other law and in respect of any act, deed, matter and thing which may be done or incurred by the Developers as also to sign all letters, applications, agreements, documents court proceedings, affidavits and such other papers containing true facts and correct particulars as may from time to time be required in this behalf. It is agreed that the letters, applications, agreements, documents, court proceedings, affidavits and other papers that may be signed by the Developers under this Agreement shall contain only true facts and correct particulars. The Developers hereby agree and undertake to execute and cause the persons in whose favour the Owners shall execute a Power of Attorney as aforesaid a proper Deed of Indemnity in such from as may be required by the owners thereby indemnifying the owners and all persons claiming under them and their respective estates and effects, of from and against all actions suits, proceedings, claims demands costs charges and expenses that may be taken or made by any one claiming under them or that the owners or any one claiming under them or his or her may be liable to pay suffer or incur on account of anything done or caused or committed or omitted to be done

by the Developers or the person in whose favour a Power of Attorney hereby contemplated is executed by the owners and that the said Indemnity shall continue to remain in full force and effect throughout for anything done or caused or committed to be done by the Developers or such persons the Power of Attorney is executed during the tenure of the said Power of Attorney.

19. The owners shall produce or cause to be produced their respective Certificates under Section 230A of the Income-tax Act, 1961.(not applicable to any transfer made on or after 1.7.2002)

20. The stamp duty, registration charges and all other out-of-pocket expenses of this agreement and the Conveyance shall be borne and paid by the Developers alone. Each party shall bear and pay their on respective Advocates and Solicitors and Architects' costs.

21. It is hereby further agreed that if for any reason or on any ground whatsoever the permission granted by the concerned authorities is revoked either wholly or in respect of only a portion of the said property or otherwise modified which modification is in the opinion of the Developers adversely affecting the interest of the Developers or the development of the said property then and in any such event the Developers shall not be entitled to avoid this agreement or refund of any moneys paid by them to the owners but such revocation or modification shall be at the risk of the Developers. Likewise if the said property or any portion thereof is acquired or requisitioned or reserved under any act or otherwise for any public purpose and as a result thereof the same or such part thereof is not available for development to the Developers, then and in any such event also the Developers shall not be entitled to avoid this agreement or for refund of any amount paid by them to the Owners PROVIDED HOWEVER and it is hereby agreed that in any of the events aforesaid

all compensation that may be awarded shall belong to and be receivable by the Developers alone and likewise all costs charges and expenses incurred for recovery and/or realization thereof shall be borne and paid by the Developers alone.

22. The entire development work shall be carried out by the Developers at their own risk costs and expenses. They shall bear and pay the Bills of the suppliers of building materials, wages and salaries payable to the workmen and other persons employed for the purpose of carrying out the constructions work as also all other costs, charges and expenses that may be incurred in regard to the development work. The Developers shall also save harmless indemnify and keep indemnified the owners against any claim that may be made by any one against the owners on account of the Developers carrying out the said development work. The Developers shall specifically ensure that the workmen employed for the purpose of carrying out the development work are insured under the workmen's compensation Act.

23. The Developers shall also be entitled on their own account to allow on ownership basis the premises in the buildings or structures to be constructed by them on the said property and in any part of the said property and in any part of the said property to the prospective purchasers, tenants, leasees, licensees etc. for that purpose to enter into on their own behalf risk and responsibility agreements or letter of allotment or such other writings or documents in their own name, subject to clause ……………. Of this agreement. It is specifically agreed that no obligation of any nature whatsoever of the Developers shall be incurred by the owners quo the prospective purchasers, tenants, lessees, licensees, etc. of the Developers and it shall be the obligation of the Developers alone to comply with and carry out the agreement or letters of allotment writings and documents with the respective person. It is also agreed that the Developers shall be entitled to receive and retain with them

all the moneys from the persons to whom the said premises are sold or allotted as the case may be in the buildings to be constructed by the Developers on the said property and to appropriate the same in such manner as the Developers may deem fit. All the moneys which shall be received by the Developers from such persons shall belong to the Developers and will be received by them on their own account. The owners shall also not be liable or responsible to any such persons so far as the said moneys are concerned either for refund thereof or for any mis-application or non-application thereof or part thereof. This provision shall be specifically brought to the notice of all such purchasers, tenants, lessees, licensees etc. in the Agreement or letters of allotments entered into or passed to them.

24. It is specifically agreed that as from the date hereof the said property shall be at the entire risk of the Developers in all respects.

IN WITNESSES WHEREOF the parties hereto have hereunto set and subscribed their respective hands and seals the day and year first hereinabove written.

THE SCHEDULE ABOVE REFERRED TO:

Signed sealed and delivered by the)
Within named owners the present)
Partners of MESSRS INDIA AGENCIES
In the presence of:

Signed sealed and delivered by the within
Named Developers
Messrs ………………………………………...)
By the handoff its partner Mr.______________ in the
Presence of:

RECEIVED from the within named
Developers a sum of Rs …………………………
(Rupees ……………………………………….) to be
Paid as earnest money or deposit by them to us as
Within-mentioned

Witness: We say received:

Owners

Renting of Immovable Property – Levy of Service Tax

(By CA A.K. Batra of M/s A.K. Batra & Associates)

The issue has now been settled by the Central Government by amending the tax able clause to provide that renting per se is a taxable service. The amendment shall be applicable from retrospective effect i.e. w.e.f. 01.06.2007. The Central Government through validation clause 76 of Finance Bill 2010 has also erased the litigation in this regard. However, author is of the opinion that constitutional validity of this service can still be challenged in court of law on the following tow grounds:

(i) Renting per se does involve any service;

(ii) If at all for the sake of discussion it is [[[[[[[presumed that Renting is a service then this service is in relation to immovable property on which only State Government can levy tax as taxes on land and building falling under list II in the Seventh Schedule can only be levied by the State Government per the provisions of Article 246 of the Constitution of India.

Till the validity of this service is not challenged and any favourable judgment is not pronounced, renting per se has been made taxable w.e.f. 01.06.2007 as per the amendments made by Finance Act 2010. After this development following important issues arise:-

(i) Whether landlords are liable to discharge their respective Service Tax liability since 18.04.2009 (in view of the judgment of Delhi High Court in Home Solutions Retails India Pvt. Ltd.) even though they have not recovered any Service Tax from their concerned tenants?

(ii) If landlords are liable to pay Service Tax then whether they need to pay interest u/s 75 and penalty u/s 76?

(iii) In case landlords have already filed their Service Tax Returns whether they are required to revise their returns. What to do if time limit for revision of return has elapsed? If Service Tax Return is not filed then how they should discharge their Service Tax liability?

(iv) What are the recourses available with the landlords if their tenants have not paid Service Tax to them?

(v) Whether tenants after making payment of Service Tax for the past periods shall be able to claim CENVAT credit in respect of service tax on rent while discharging their output liability?

(i) Whether landlords are liable to discharge their respective Service Tax liability since 18.04.2009 (in view of the judgment of Delhi High Court in Home Solutions Retails India Pvt. Ltd.) even though they have not recovered any Service Tax from their concerned tenants?

Qua the law, it is landlord who is liable to discharge its Service Tax liability on the taxable service provided by him i.e. renting of immovable property. Now who has to bear the incidence of such tax shall depend on the arrangement between two private parties and Service Tax Department has no role to play. If landlord feels that as per the terms of agreement or otherwise it is the tenant who has to bear the incidence of tax he can file civil suit against his occupant/tenant. Service Tax Department cannot help the landlord in this regard in any manner. However, it is pertinent to note that as per the provisions of Section 67 (2) of Finance Act 1994, where the gross amount charged by a service provider, for the service provided or to be provided is inclusive of service tax payable, the value of such taxable service shall be such amount as, with the addition of tax payable, is equal to the gross amount charged. To say it differently, if service recipient i.e. occupant/tenant of the premises does not pay

Service Tax to the landlord for any reason, then the amount realized by the landlord shall be treated as inclusive of Service Tax and landlord can calculate its Service Tax liability by applying the reverse formula i.e.

$$\frac{\text{amount received X Rate of Tax}}{\text{100 + rate of tax}} =$$

(This is the same formula as given in Sec. 8A(i) of CET Act).

Thus, it is clear from the above discussion that the landlord shall have to discharge its Service Tax liability on the amount realized from tenant / occupant treating the amount received as inclusive of Service Tax.

(ii) If landlords are liable to pay Service Tax then whether they need to pay interest u/s 75 and penalty u/s 76?

As discussed above, that the landlord is liable to discharge its Service Tax liability since 18.04.2009 even though Service Tax has not been recovered from the tenants. Now, the next question arises whether such liability paid by the landlord shall be subject to penalties and interest under the provisions of Finance Act, 1994, So far as, the issue of penalty is concerned, in the opinion of author no penalty can be levied because as per the decision of Hon'ble Delhi High Court pronounced on 18.04.2009 in the case of M/s Home Solutions Retails India Ltd., renting per se was held to be non-taxable. Further, in the judgment given by the Hon'ble Delhi High Court in the case of M/s SSIPL [2010] TIOL 84 HC DEL ST in Dec' 09, the aforesaid position has been reiterated and it has been confirmed that the decision of Hon'ble Delhi High Court in the case of M/s Home Solutions Retails Pvt. Ltd. is applicable on all the assesses all over the country.

So far as interest is concerned, payment of interest is compensatory in nature. If an amount is due to the revenue on a particular date and the same is discharged by the

assesses on a later date, then there is no doubt that the assessee is liable to pay interest for the intervening period i.e. the period when liability has become due to the revenue till the date of actual payment made by the assessee. If landlord has been discharging its Service Tax regularly till the pronouncement of judgment by Hon'ble Delhi High Court in the Case of M/s Home Solutions Retails India Pvt. Ltd. on 18.04.2009, no Service Tax was payable to the Government of India from 18.04.2009 till the date of notification in this regard. Thus, the amount becomes due to the Government only on ………… i.e. the day when the notification in this regard is issued.

Therefore, if landlords was from the beginning discharging its Service Tax liability well within due date but has ceased to deposit Service Tax in view of the Judgment of the Delhi High Court in the case of M/s Home Solutions Retails Pvt. Ltd., then, in such case, in the opinion of the Author, no interest is payable to the revenue by the landlord. However, it is pertinent to note that if landlord has not been discharging its Service Tax liability regularly upto 18.04.2009, in such case, the landlord shall be liable for payment of interest on the amount which became due upto 18.04.2009 till the date of payment made by it. To illustrate, if a landlord is liable to pay a sum of Rs. 1 Lac from 01.06.2007 to 18.04.2009, he is liable to pay interest on the said amount from the day of his liability accured to the day of actual payment of such liability.

(iii) In case landlords have already filed their Service Tax Returns, Whether they are required to revise their returns? What to do if time for revision of return has elapsed? If Service Tax Return is not filed then how they should discharge their Service Tax liability?

It is again an important issue, that under the given circumstances how an assessee can discharge its Service Tax liability if he has already filed its Service Tax Return or if he has not submitted its return with the Service Department.

(a) In case, if landlord has already submitted its Service Tax Returns,

Assessee (landlord) need not revise its Service Tax Return if he had already filed it with the department. As per the Provisions of Section 73 (3) where any service tax has not been levied or paid or has been short-levied or short-paid or erroneously refunded, the person chargeable with the service tax, or the person to whom such tax refund has erroneously been made, may pay the amount of such service tax, chargeable or erroneously refunded, on the basis of his own ascertainment thereof, or on the basis of tax ascertained by a Central Excise officer before service of notice on him under section 73(1) in respect of such service tax, and inform the Central Excise Officer of such payment in writing, who, on receipt of such information shall not serve any notice under Section 73(1) in respect of the amount so paid. Therefore, if is clear that assesses can pay the tax along with interest wherever applicable as per the discussions in preceding paragraph and inform the jurisdictional Superintendent that it has already discharged its Service Tax liability after which the department shall not issue the Show Cause Notice. Thus, there is no need to revise the return and assessee shall not get worried about the time limit for revision of return which is 90 days from the filling of original return, as he is not supposed to revise the return.

(b) In case, if landlord has not submitted its return with the Service Tax Department

In the opinion of the author, the assessee was laiable to file the return and in case assessee has failed to do so then he has clearly violated the provision of Section 68

read with rule 70. Thus, assessee shall be liable for penalty under the provisions of the Act.

However, the assessee can still file the Service Tax Return with the department by paying the late filling fees as stipulated in Rule 7C of Service Tax Rules, 1994.

Specimen letter which should be addressed to the Range Superintendent can be obtained from the author.

(iv) What are the recourses available with the landlords if their tenants have not paid Service Tax to them?

As discussed in Query Sl. No. 1 the only option available to the landlord is to contest the issue in Civil Court. It was suggested to the landlords by the author in the past not to deposit Service Tax in view of the Home Solutions judgment and to take an undertaking from their tenants that in case Service Tax becomes payable then the tenants[shall pay the Service Tax amount to their landlords. On the basis of such an undertaking/affidavit the landlords can file a civil suit in the Civil Court if their tenants have still not paid Service Tax to them. The Finance Act, 1994 governing Service Tax cannot provide any assistance in this regard to the landlord.

(v) Whether tenants after making payment of Service Tax for the past periods shall be able to claim CENVAT credit in respect of service tax on rent while discharging their output liability?

As per provisions of Rule 4 sub rule 7 of Cenvat Credit Rules, 2004 which are reproduced below clearly show that credit of Service Tax on input service is available only when the assessee has made payment for the value of Services and Service Tax thereon:-

"The CENVAT credit in respect of input service shall be allowed, on or after the day on which payment is made of the value of input service and the service tax paid or payable as is indicated in invoice, bill or, as the case may be, challan referred to in rule 9"[

Therefore, it is amply clear that once the payment of the value of services as well as of service tax has been made by the Tenant and it is an input service in the hands of occupant/tenant, such amount is available as CENVAT in the month of payment made by him. Needles to mention that occupant/tenant must have duty paying documents as specified in Rule (9) of CENVAT Creit Rules, 2004. A clarification in this regard has recently been given in Circular No. 122 dated 30.04.2010.

DEVELOPMENT AGREEMENT

by

K.K. RAMANI (ADVOCATE)

Development of immovable properties as a Builder is big business in our country in view of the great demand for residential accommodation and commercial premises. Formerly, the matter posed no great complications and the owners of lands used to sell their immovable properties by first entering into Agreements for Sale and later on transferring the properties by executing Conveyance Deeds or Sale Deeds. However, after coming into operation of the Urban Land (Ceilings & Regulations) Act, it was no longer possible for the owners of vacant lands to sell their lands to a prospective purchaser or to a builder as they were statutorily barred from transferring 'vacant' lands within the meaning of the U.L.C. Act. It is under these circumstances that the concept of Development Agreements took shape and became popular in metropolitan cities. The insertion of sub-clauses (v) and (vi) in Sec. 2(47) and amendments of Section 45 from time to time enlarging the definition of the word 'transfer' also came in the way and thus helped in popularizing the concept of Development Agreements to get around the difficulties posed by these statutory changes.

Generally, the owner of a plot of land may not have sufficient resources to develop his property on his own. Hence, he may desire to entrust the task of development of the land to an established builder. The owner of the land normally gives only a licence to a builder to enter upon the land at the same time retaining the legal possession of the land with himself.

When the flats are finally constructed and the land ceases to be 'vacant' within the meaning of the expression used in the Urban Land (Ceilings & Regulations) Act, the owner executes a Conveyance in favour of the Developer or his nominee which is

normally a Co-operative Society or a Limited Company. If the agreement is carefully worded it may not amount to transfer as contemplated in Sec. 269U A of the Income Tax Act, (not applicable to any transfer made on or after 1.7.2007). It is considered that filing of Form 37-I is not necessary at this juncture although the Appropriate Authorities would not endorse this view. In practice, the Appropriate Authorities do not take any action when the subject of development is vacant land. They treat such application as invalid or non-est. They neither give N.O.C. nor purchase the rights under such development agreements.

The Development Agreements help to postpone the incidence of levy of capital gains tax to a later period. The Development Agreements are also beneficial from the point of view of the Stamp Act. The agreement permitting the developer to develop the property which during the course of its development continues to belong to the owner cannot be construed as Conveyance even under the Explanation to Article 25 in the Schedule to the Bombay Stamp Act. Thus one can save oneself from the rigours of the Bombay Stamp Act. A specimen of the development agreement s given for the benefit of the readers.

DRAFT DEVELOPMENT AGREEMENT

ARTICLES OF AGREEMENT made at Bombay this ____ day of _____ between (1) A.B. and (2) C.D. both of Bombay Inhabitants hereinafter called “the owners” (which expression shall unless it be repugnant to the context or meaning thereof, be deemed to include their respective heirs, executors and administrators) of the One Part and XYZ of Bombay Indian Inhabitant carrying on business at ______ hereinafter called “the Developer” (which expression shall, unless it be repugnant to the context or meaning thereon be deemed to include his heirs, executors, administrators and assigns) of the Other Part:

WHEREAS:

(i) The Owners are absolutely seized and possessed of or otherwise well and sufficiently entitled to all those pieces or parcels of land or ground situate lying and being at Bombay in the registration District and sub-District of Bombay City and Bombay Suburban admeasuring – square metres or thereabouts and more particularly described in the Schedule hereunder written (hereinafter for the sake of brevity referred to as "the said property");

(ii) The said property is vacant save and except a portion thereof which is presently occupied and encroached upon by some unauthorized occupants or trespassers who have constructed some unauthorized structures/huts thereon and of which fact the Developer is aware, he having inspected the said property prior to the execution of these presents;

(iii) The Owners have represented to the Developer that a portion of the said property is under reservation under the sanctioned development plan and another portion of the said property is reserved under the draft Development plan and of which fact the Developer is fully aware;

(iv) All of the said property has been declared to be surplus vacant land by the Competent Authority under the provisions of the Urban Land (Ceiling and Regulation) Act, 1976;

(v) The owners have agreed to grant t the developer and the Developer has agreed to accept from the owners exclusive rights of development of the said property upon the terms and subject to the conditions herein recorded.

NOW IT IS HEREBY AGREED BY AND BETWEEN THE PARTIES HERETO AS FOLLOWS:

1. The Owners hereby grant exclusive right to the Developers of Development of the said property on what is known as “as is where is basis” and the Developer accepts the same for the consideration and subject to the terms and conditions herein provided.

2. It is specifically agreed that the Owners shall through the Developers’ Architects submit plans for sanctioning of lay out for construction of buildings and/or other structures on the said property or any part or portion thereof.

3. The said plans shall be prepared by the Architects of the Developer and at the costs of the Developer and the Owners shall submit only such plansas are prepared by the Developer through their Architects and copy of the finally approved plan shall be given to the Owners.

4. Soon after the execution of this agreement, if so required, the owners shall execute a Power of Attorney in favour of the Developer or any other person nominated by the Developer to approach all public authorities and to submit and obtain sanction of plans of lay-out and the buildings and structure/s to be constructed on the said property or any portion thereof from the Municipal Corporation of Greater Bombay and all other concerned authorities.

5. The Developer is aware that certain portions of the said property are under reservation under the sanctioned development plan. It is agreed that the Owners shall under no circumstances be liable to remove the said reservations nor shall the Developer be entitled to any reduction in the consideration payable hereunder on account of the said reservations. However, the Owner shall sign all applications, papers, writings, etc. as may be required by the Developer the purpose of removing such reservations.

6. In consideration of the Owners granting exclusive rights of development to the Developer under this Agreement, the Developer shall pay to the owners a minimum consideration of Rs ………………… (Rupees ……………………………….. only) (hereinafter called "the minimum consideration") or an amount calculated at the rate of Rs. _____ per square foot of the F.S.I. which may be sanctioned by the Municipal Corporation of Greater Bombay, whichever is higher and the said total consideration amount shall be paid in the manner following :

(a) Rs. ……………../-. (Rupees …………………… only) on the execution hereof being the earnest money or deposit (receipt of which sum the owners do hereby admit and acknowledge).

(b) Rs. ………………/- (Rupees ………………………. Only) being the balance consideration which shall be paid by the Developer to the owners on the compliance of the following:

(i) The owners making out the marketable title to the said property free from all encumbrances and reasonable doubts.

(ii) The Appropriate Authority issuing its NOC under Section 269 UL(3) of the Income-tax Act, 1961.

(iii) The owners handing over complete vacant possession of the said property to the Developers under an irrevocable licence.

(iv) Developer the owners giving irrevocable right to construct buildings on their own account and with right to sell the units in the said building/s to the prospective purchasers, on ownership basis or otherwise and to appropriate the Sale Proceeds to themselves although formal possession of the property shall be handed over to the Developer on execution of the Conveyance.

7. Notwithstanding anything contained in the preceding clause it is specifically agreed by and between the parties hereto that after execution hereof the Developer shall be entitled to put up fencing around the said property or any portion or portions thereof, for the purposes of preventing further encroachments but subject to the existing encroachments, and shall also be entitled to put up fencing around the portions of the property in occupation of the unauthorized occupation as hereinabove provided. The Developer shall also make arrangement by trespassers or unauthorized persons upon the said property or any part or portions thereof. All costs, charges and expenses in respect of the above shall be borne and paid by the Developer alone. The owners shall not be liable to remove and/or vacate the encroachments or unauthorized occupants who are already occupying portions of the said property nor shall they be liable in respect of any further encroachment or unauthorized occupation on the said property.

8. As from the date hereof, the Developers shall be solely entitled at his own risk to deal and/or negotiate with the unauthorized occupants and/or trespasses on the said property and to take any proceedings against them and/or to arrive at any arrangement or agreement with them at the costs, charges and expenses of the Developer alone. However, the owners shall empower and authorize the Developer and/or his nominees under the Power of Attorney to be executed as aforesaid to effectively deal and/or negotiate with the trespassers or unauthorized occupants and to receive the possession of the respective area occupied by such trespassers or unauthorized occupants subject to the consideration having been paid to the Owners for the said property as mentioned hereinabove. The Developer shall also be entitled to hand over, on behalf of the Owners, any area of the said property, which falls under reservation and/or set-back and/or requisition or acquisition to the relevant

authorities in the event the same becomes necessary on receiving proper notice from the authorities and for that purpose, the Owners shall grant suitable powers and authorities in the said Power of Attorney to be granted to the Developer and/or his nominee.

9. The Owners declare that:

(a) The owners are the absolute owners of the said property described in the Schedule hereunder written which is also shown on the plan hereto annexed and marked "A" and thereon shown surrounded by a red coloured boundary line and that the said property is vacant save and except the portions thereof, which are at present occupied and/or encroached upon by the unauthorized occupants and portions whereof are under reservations as aforesaid.

(b) Subject to the Competent Authority granting permission and/or sanction under the provisions of the said ULC Act, the Owners have good right, full power and absolute authority to grant exclusive rights to develop the said property described in the Schedule hereunder written to the Developer and the Developer shall be entitled to develop the said property subject to the terms and conditions herein contained.

(c) They have not created prior to the date hereof nor shall they create hereafter during the pendency of the Agreement any right or encumbrance of any nature whatsoever in respect of the said property or any part thereof.

10. Simultaneously with the execution hereof, the owners shall deposit all the title deeds relating to the said property described in the Schedule hereunder written with their Advocates until the completion of the transaction herein. The said Advocates shall after examining the title as mentioned in the previous clause, send, against an accountable receipt all the title deeds to the said Advocates of the Developer for perusal, as and when required by the said Advocates. On the completion of the

transaction herein the Owners through their said Advocates hand over to the Developer all the said title deeds against an ordinary receipt.

11. Upon the Competent Authority under ULC Act granting the requisite permission and/or sanction for the development of the said property and on sanction of the plans by the Municipal Corporation of Greater Bombay and all other concerned authorities as aforesaid the Developers shall after full payment of the consideration amount to the Owners be entitled to commence construction on the said property, for which licence to enter upon would be given by the Owners to the Developer pursuant to this Agreement. The development to be carried out by the Developer shall be in accordance with the permissions granted by the Competent Authority under said ULC Act and shall also be in accordance with the sanctioned plans. The Development shall also be entitled in his own right to enter into agreements on what is popularly called Ownership basis or otherwise and/or arrangements with any person or persons of their choice for the purpose of selling, allotting, and/or transferring any of the flats/shops/premises/garages/units, etc. to be constructed by the Developer on the said property or any portions thereof in accordance with the terms and conditions laid down by the Competent Authority and in the sanctioned plans and to receive and appropriate the consideration payable in respect thereof and/or any part thereof for their own benefit and use. Such agreements and/or arrangements shall be entered into by the Developer in his own name and at his own costs and risk and no risk or liability of any kind shall be incurred by the Owners in any manner.

12. After the receipt of the full consideration by the Owners from the Developers, the Owners shall execute one or more Deeds of Conveyance as may be desired by the Developers but at the costs and expenses in all respects being brone and paid

by the Developer including stamp duty and registration charges, in respect of the said property or portions thereof, as the case may be, in favour of a Co-operative Society or Societies or Association of persons or other body Corporate who have agreed to acquire flats/shops/garages/premises/units etc. from the Developer.

13. On receipt of the full consideration amount by the Owners, if for any reason the Developers do not desire to obtain the Conveyance of the said property, then the Owners shall, at the request of the Developers, simultaneously with the payment of the said balance amount, execute an irrevocable Power of Attorney in favour of the Developer and/or his nominees or nominee or representatives empowering and authorizing the said Attorneys, inter alia, to execute one or more Deeds of Conveyance in respect of the said property or any portions thereof in favour of the Developer or in favour of Co-operative Society or Societies or association/s of persons to be formed and/or incorporated and/or nominated by the Developer herein. No further consideration shall be required to be paid by the Developer to the Owner for execution of such Deed or Deeds of Conveyance.

14. Prior to the execution of one or more Deeds of Conveyance in respect of the said property or any portions thereof in the manner mentioned herein, the Owners shall produce the requisite Certificate under the provisions of Section 230A of the Income-tax 1961 for effectively vesting the said property in favour of the Developer or in favour of the person or persons nominated by the Developer. It is further agreed that in the event the said Deed or Deeds or Conveyance or any of them are not executed at the time of payment of the balance consideration amount an amount representing 10% of the total consideration amount shall be retained by the Owner's Advocates until the production of the said Certificate/s under the provisions of Section 230A of the Income-tax Act.

15. The Owner shall pay and discharge all assessments, outgoings, taxes, etc. payable in respect of the said property upto the date the possession of the said property is handed over by them to the Developer. Thereafter, the same shall be paid and borne by the Developer alone. The Developer shall pay and discharge all outgoings, assessments, taxes, etc. for the entire property after possession of the same whole or in part is handed over to the Developer. If necessary, the same shall be apportioned between the parties hereto.

16. The Owner declares that no notice of acquisition or requisition issued by the Municipal Corporation of Greater Bombay or under the Epidemic Diseases Act or any other statue has been served upto them or anyone on their behalf. If hwoever, any notice or requisition of the Municipal Corporation or other public body is issued in respect of the said property after the date of execution of these presents but before the completion of the transaction the Owners shall comply with the same at their costs and expenses. The owners hereby declare that at present no notice or requisition has been served by the Government of Maharashtra or Municipal Corporation of Greater Bombay for requisition or acquisition or set-back in respect of the said property or any part thereof and that so far as they are aware no such requisition or acquisition or set-back is contemplated. Provided always that if the Owners have concealed any such notice issued, inter alia, under any of the Acts as aforesaid, the Developer will be entitled to cancel this Agreement and on such cancellation to receive forthwith the earnest money and all other payments made, if any.

17. All disputes and differences that may arise between the parties hereto relating to or in connection with the matter of this agreement or between the parties or their representatives shall be referred to the sole and final arbitration of Mr. ___________

or failing him Mr ________________ as the sole Arbitrator whose decision shall be final and binding on both the parties. The Arbitrator shall have summary powers.

18. All out-of-pocket expenses of and incidental to this agreement including the expenses for Deed/s of Conveyance and other documents and writings including stamp duty and registration charges shall be borne and paid by the Developer alone. The parties shall bear and pay their respective Advocates' professional costs.

19. The Developer shall be entitled to develop the said property either by himself and/or through his nominees including a firm, wherein he is a partner or a company wherein he is a Director, provided however, all the obligations and liabilities undertaken by the Developer under this agreement shall remain in full force and be personally binding upon the Developer and in particular his liability for payment of all amounts under this Agreement to the Owners.

20. The Owners hereby declare that they have not entered into with any person or persons Agreement to Sale or Lease or created any third party rights in favour of any person or persons in respect of the said property.

IN WITNESS WHEREOF the parties hereto have hereunto set and subscribed their respective hands the day and the year first hereinabove written.

Signed and Delivered by the within named: Owners

(1) A.B. and (2) C.D.

In the presence of ____________________________

____

Signed and Delivered by the within named: Developer XYZ
In the presence of _____________________________

____

Received the day and year first hereinabove written from the
Within named Developer a sum of Rs. __________________
(Rupees _________________________ only) being the amount
Of deposit to be paid by him to us by a Pay Order bearing
No. _______________ and dated on _________________ Bank
_____________________ Branch ______________________

Witnesses:
We say received
1.
Owners
2.

POWER OF ATTORNEY FOR

DEVELOPEMNT OF THE PROPERTY

TO ALL TO WHOM THESE PRESENTS SHALL COME,

We (1) ____________________________ (2) ________________________ and (3) __________________________________ all of Bombay, Indian Inhabitants SEND GREETINGS:

WHEREAS we are the owners of a piece or parcel of land, hereditaments and premises together with the buildings, messuages and tenements standing thereon and situate, lying and being at Village _________________ Taluka ___________ District Bombay Suburban District and more particularly described in the Schedule hereunder written;

AND WHEREAS by an Agreement for sale of even date executed by ourselves as Vendors of the One Part and (1) ___________________ and (2) _____________ as Purchasers of the Other part we have agreed to sell the said property more particularly described in the Schedule hereunder written to the said purchasers upon the terms and conditions contained in the said Agreement;

AND WHEREAS at the treaty of the said agreement we have agreed to give a Power of Attorney in favour of the Purchasers or as they may direct in order to enable them to get the plans sanctioned by the Bombay Municipal Corporation and other appropriate authority and to do all other acts and things;

AND WHEREAS the purchasers have requested us to grant the said Power of Attorney in favour of ________________________ which we hereby do;

NOW KNOW YE AND THESE PRESENTS WITNESS that we (1) _________ (2) ______________________ and (3) _________________ do and each of us doth hereby nominate, constitute and appoint (1) ____________________ and (2)

_______________ jointly and severally to be our true and lawful Attorneys to do and execute and perform all or any of the following acts, deeds, matters and things viz.

1. To prepare plans for development of the said property described in the Schedule hereunder written and to submit the same to the Municipal Corporation of Greater Bombay and other concerned authorities for obtaining approval to the same and to submit proposals from time to time for the amendments of such Building Plans to the Municipal Corporation of Greater Bombay and other Concerned Authorities for the purpose of obtaining approval to such amendments.

2. To approach the all the Concerned Authorities under the Urban Land (Ceiling & Regulation) Act, 1976 for the purpose of obtaining Exemption under Section 20 of the said Act in respect of the property for the purpose of development and/or re-development of the said property and for that purpose, to sign such applications, papers, writings, undertakings, etc, as may be required and to carry on correspondence with the Authorities under the said Act and also prefer appeal or appeals from any Order of the Competent Authority and/or any other Authority made under the provisions of the said Act in connection with the said property.

3. To enter upon the said property either alone or along with others for the purpose of commencing construction work on the said property and for that purpose to demolish the existing structure standing on the said property and erecting new structures thereon.

4. To supervise the development work in respect of the Building/s on the said property and to carry out and/or to get carried out through contractors, sub-contractors and/or Departmentally and/or in such manner as may be determined by the said Attorney, construction of the structures on the said property in accordance with the plans and specifications sanctioned by the Municipal Corporation of Greater

Bombay and other Concerned Authorities and in accordance with all the applicable rules and regulations made by the Government of Maharashtra, Municipal Corporation of Greater Bombay (hereinafter referred to as 'the B.M.C.'). Town Planning Authorities, Police Authorities, Fire Fighting Authorities and/or other Concerned Authorities, in that behalf for the time being.

5. To carry on correspondence with all concerned authorities and Bodies including the Government of Maharashtra in all its Departments, Municipal corporation of Greater Bombay and/or Town Planning Department and other concerned authorities (in connection with the development of the said property).

6. To appear and represent me/us before and all concerned authorities and parties as may be necessary in connection with the development of the said property as aforesaid.

7. To appoint from time to time Architects, R.C.C. Consultants, Contractors and other personnel and workmen for carrying out the development of the said property as also construction of building/s thereon and to pay their fees, consideration, monies, salaries and/or wages.

8. To pay various deposits to the Municipal Corporation of Greater Bombay and other concerned authorities as may be necessary for the purpose of carrying out the development work on the said property and construction of the structures thereon and to claim refund of such deposits so paid by my/our said Attorney and to give valid and effectual receipts in my/our name and on my/our behalf in connection with the refund of such deposits.

9. To approach the Hydraulic Engineer, City Engineer, City Engineer and Authorities and Officers of the Municipal Corporation of Greater Bombay for the purpose of obtaining various permissions and other service connections including

water connection for carrying out and completing the development of the said property and construction of buildings thereon and also to obtain water connection and service connections to the said building/s constructed.

10. To execute in favour of the Bombay Municipal Corporation and/or Bombay Suburban Electric Supply Company Limited, a Lease in respect of any portion of the said property for the purpose of enabling the Municipal Corporation of Greater Bombay and/or the Bombay Suburban Electric Supply Company Limited to put up and erect an Electric Sub-station for the supply of electricity to the said building/s.

11. To make necessary applications to the Bombay Suburban Electric Company Limited and other Concerned Authorities for obtaining electric power for the said property and the buildings constructed thereon.

12. To make necessary representations including filing of complaints and appeals before the Assessor & Collector, Bombay Municipal Corporation and other Concerned Authorities including in the Courts of Small Causes at Bombay in regard to the fixation of ratable value in respect of the building/s on the said property and/or any portion thereof by the Assessor & Collector and the Bombay Municipal Corporation of Greater Bombay.

13. To apply from time to time for modifications of the Building Plans in respect of the buildings to be constructed on the said property.

14. To apply for and obtaining water connection for the Building to be constructed on the said property and/or Occupation and Completion Certificate in respect of the said building/s or any part or parts thereof from the Municipal Corporation of Greater Bombay and other Concerned Authorities.

15. To give such letters and writings and/or undertakings as may be required from time to time by the Municipal Corporation of Greater Bombay and/or other

Concerned Authorities for the purpose of carrying out the development work in respect of the property as also in respect of the construction work of the buildings thereon and also for obtaining Occupation and/or Completion Certificate in respect of the said building/s or any part or parts thereof.

16. To give necessary letters, writings and undertakings to the Municipal Corporation of Greater Bombay (Fire Brigade Department for occupying the said building/s and/or obtaining necessary No Objection Certificate (N O C) from the said Department in connection with the said building/s.

17. To approach the Bombay Municipal Corporation and all other Concerned Authorities for the purpose of obtaining release of any portions of the said property and/or structures thereon from reservation (if any).

18. To approach the Government of Maharashtra in all its Departments as also the Municipal Corporation of greater Bombay and in all other Concerned Authorities for the purpose of obtaining necessary No Objection Certificate and/or permission and/or sanction in regard to the carrying out the construction of the said building/s and completion thereof and for obtaining Occupation and Completion Certificate in connection with the running and establishing Units therein.

19. To do all other acts, deeds, matters and things in respects of the said property described in the Schedule hereunder written including to represent before and correspond with the Municipal Corporation of Greater Bombay and other Concerned Authorities for any of the matters relating to the sanctioning of the Plans, obtaining the Floor Space Index (FSI) for the construction proposed to be carried out on the said property and any other matters pertaining to the said property.

20. To make necessary applications under the Land Acquisition Act for the purpose of getting the property released from acquisition or any reservation and also

for the purpose of such applications, sign or execute such writings and undertakings as may be required and to prefer an appeal from the Order of the Competent Authority and/or to arrive at such arrangements with the occupants/tenants of the structures standing on the said property and to acquire possession of the said structures as also the said property.

21. To make applications and submit the amended or new Buildings Plans to the Municipal Corporation of Greater Bombay including all its Departments or any other Authorities for the purposes of getting the Building Plans, I.O.D. and Commencement Certificate sanctioned and/or revalidated and to give such other applications, writings, undertakings as may be required for the purpose of the development of the said property.

22. To make applications for water connection, electric supply and other incidental requirements which may be required for the development of the said property.

23. To apply to the controller of Cement and Steel and any other Authorities for the purpose of making applications for Cement and Steel and other materials and procure the same and for that purpose to give such undertakings or execute such documents and applications as also to correspond with and do such other acts, matters and things as the Attorney may think fit and proper for the purpose of developing the said property.

24. To enter into Ownership Agreement for Sale of Building and will be constructed on the said property in the name of Attorneys or their Partnership firm and to retire and appropriate the sale proceeds to themselves.

25. To execute Agreements for Sale of the said property or any part thereof, described in the Schedule hereunder written or any part thereof and/or other premises in respect of the Buildings to be constructed on the said property.

26. To approach the Purchasers of the said building/s and other premises in such building/s and/or the persons to whom the same may have been agreed to let out by the said Attorney the possession thereof.

27. To agree sell/to let out the said buildings or any part thereof and/or other premises in respect of the said property to such persons and on such terms and conditions as the said Attorney may in their absolute discretion think fit and proper.

28. To sell and dispose off all or any of the flat or flats, shops or shop and parking space and may be constructed on the said Plot of land on Ownership basis and/or in any other manner that may bethought fit by the said Attorney at the price or for the amount that the said Attorney may think fit and proper. To collect and receive of and from the acquirers, occupants, or purchasers of such flat or flats shops and parking space the price of such flat, shop or parking space that may be payable by such aforesaid person or persons and also to receive and collect or demand the rent from the tenants of the building standing on the said Plot and for that act or purpose to make sign and execute and/or give proper and lawful discharge for the same.

29. To execute from time to time agreements or agreement for sale on Ownership basis of such flats shops or garages, conveyance in respect of the building or buildings that may be constructed on the said Plot and also to execute and sign conveyance, transfer or surrender in respect of the said portion of the land and lodge the document or documents for registration and admit the execution of any such document or documents before the sub-registrar or registrar of assurances.

30. To execute the Conveyance and Conveyance in respect of the said property and building/s constructed thereon or any part thereof in favour of such persons as the said Attorney shall determine including in favour of any Co-operative Society/Limited Company that may be formed for the purpose.

31. To apply for and obtain Income Tax Certificates under Section 230-A of the Income-tax Act, 1961 for the purpose of registration of the Conveyance, Lease and/or other documents of transfer in respect of the said property that may be executed by the said Attorney.

32. To lodge the Conveyance, Lease and/for other documents of transfer that may be executed by the said Attorney for registration and to admit execution thereof before the concerned Sub-Registrar of Assurances.

33. To make applications to the Municipal Corporation of Greater Bombay and other Revenue Authorities for the transfer of the said property to them of the Transferees in whose favour the Conveyance, Lease and/or other documents of transfer as aforesaid may have been executed.

34. To correspondence with the Authorities under the Income-tax Act, 1961 including the Authorities appointed under Chapter XXA/XX-C (Appeals and Revision) Of the said Act in regard to all or any matters pertaining to the said property or any portion or portions thereof as also to make various representations and file appeals, revisions, reviews and references against any order direction and/or instruction given to and/or issued by the Authorities under the said Act in respect of the said property or any portion or portions thereof.

35. To negotiate with the tenants in the building for the purpose of vacating the premises in their use and occupation by giving any alternative accommodation either in the said property or in any other property and to sign and execute the necessary

agreements and/or writings in that behalf and if required to register the same with any competent authority. To file the necessary suit in the competent court of Law for the purpose of ejectment of such tenants and for that purpose to engage advocates, solicitors and/or counsels to appeal and plead and/or defend on my/our behalf and to submit to consent terms and/or any other arrangements as they may deem fit and proper and for that purpose to sign plaints, applications, written statements, affidavits etc.

36. To sign and given notices to the existing tenant or tenants in the building and the purchasers and occupiers of the flats, shops or parking space and as and when required or necessitated by the occasion.

37. To attom tenants for the time being occupying the said property or any portion or portions and/or structure or structures thereof to any such transferee and/or purchaser of the said property and/or portion or portions and/or structure or structures thereof and for that purpose, to sign the necessary papers.

38. To execute Lease in respect of the said property and/or portion or portions and/or structure or structures standing thereon in favour of such person or persons as the said Attorney may from time to time determine and on such terms and conditions and on such rent as may be determined by the said Attorney.

39. To attend before any Registrar, sub-registrar or Dy. Registrar of assurances in Bombay/or and to execute and present for registration and admit execution by me/us of any agreement, deed, conveyance, transfer, assignment, assurances, releases, indemnity or other instrument or writing the registration of which is compulsory and generally to do all things, necessary or expedient for registering the said deed, instruments and writings or any of them as fully and effectually as I/We myself/ourselves could do.

40. To take all necessary steps for the registration of the co-operative society of the flat purchasers and for that purpose to sign and execute all necessary applications, papers and writings and represent any person before the Registrar, Co-operative Societies and when required to do so.

41. To insure the said property against damages, fire, tempest, riots, civil commotion, floods earthquakes otherwise as my/our said Attorney may think fit and proper.

42. To receive every sum of money whatsoever which may become due and payable to me/us upon or virtue of any agreement, charges or other security and on receipt thereof to make sign, execute and give sufficient releases or other discharges for the same.

43. To ask, receive and recover from all the flat purchasers and other occupiers whatsoever all rents, charges, profits, emoluments and sums of moneys now due or owing and payable or at any time hereafter to become due owing and payable in respect of the said plot in any manner whatsoever and also on non payment thereof or any part thereof to enter upon and restrain and/or take legal steps for the recovery thereof or to eject such defaulting acquirers and/or occupants.

44. To lodge for registration the documents that may be required from time to time before the Sub-Registrar or Assurances and to admit execution thereof.

45. I/We hereby agree and undertake that I/we will not in any way write any letters and/or correspond with the Government of Maharashtra in all its departments, the Municipal Corporation of Greater Bombay in all its Departments and other concerned Local Authorities countermanding any acts, deeds, matters and things done by the said Attorney pursuant to this Power of Attorney. I/we hereby expressly agree and undertake that if any such instructions shall be issued by me/us the same shall not

affect the acts, deeds, matters and things by the said Attorney and all the concerned Authorities shall be entitled to disregard all such instructions given by me/us.

46. For me/us in my/our name to accept service of any Writ of Summons or other legal process and to appear in any Court and before all Courts, Magistrates or Judicial or other Officers whatsoever as by the said Attorney shall be thought advisable and to commence any action or other proceedings in any Court of Justice or Authority and the same action or proceedings to prosecute or discontinue or become non-suited therein and to settle, compromise or refer to Arbitration any suit, action or proceeding as the said Attorney shall think fit and if the said Attorney shall see cause and also to take such other lawful ways and means for the recovering or getting in any such money or other thing whatsoever which shall by the said Attorney be conceived to be due owing belonging or payable to me/us by any person firm or body corporate and also to appoint any Solicitor and/or Advocate or Lawyer to prosecute or defend in the premises aforesaid or any of them as occasion may arise either in my/our name or in the name of him or them the said Attorney.

47. To appoint Pleaders, Solicitors, Advocates or Attorney or Lawyers to appear and act in any Court of Justice or before any Custom or Port Trust or Revenue or other Officer or Officers of any State or Local Authority and to revoke such appointment and to substitute any others in their place and stead.

48. To sign, verify and execute Plaints, Written Statement, Counter-Claims, Appeals, Reviews, Applications, Affidavits, Authorities and papers of every description that may be necessary to be signed, verified and executed for the purpose of any suits, actions appeals and proceedings of any kind whatsoever in any court of Law or Equity whether of Original, Appellate, Testamentary or Revisional jurisdiction or Judicial Authority established by lawful Authority and to do all acts and

appearances and applications in any such Court or Courts aforesaid in any suits, actions, appeals or proceedings brought or commenced and to defend, answer or oppose the same or suffer Judgments or Decrees to be had given, taken or pronounced in any such suits, actions, appeals, proceedings and to execute Decrees as the said Attorney shall be advised or think proper and to execute Decrees and also to bid at the Auction Sales that may be held by or on my/our behalf under the powers reserved to me/us under any Mortgage or Charge or by any Court or any Officer thereof and to purchase any land hereditaments and premises at such Auction Sales and to sign, verify and execute any applications, affidavits, agreements or other documents.

49. To receive from any Court or any Officer thereof or from any person firm or body corporate amounts due and payable to me/us either alone or jointly with others on any account whatsoever including under any Deed of Mortgage or Deed of Charge or any other instrument in respect of such investments or otherwise howsoever and to give sign and execute all papers receipts releases and discharges for the same.

50. GENERALLY TO DO AND PERFORM all acts, deeds matters and things necessary and convenient for all or any of the purposes aforesaid and for giving full effect to the Authorities hereinbefore contained as full and effectually as I/we could in person.

51. For the better doing performing and executing all the matters and things aforesaid, I/we hereby further grant unto the said Attorney full power and absolute authority to substitute and appoint in their place and stead on such terms as they shall think fit one or more Attorneys to exercise all or any of the powers and authorities hereby conferred and to revoke any such appointment from time to time

and so substitute or appoint any other or others in place of such Attorney as the said Attorney shall from time to time think fit and proper.

52. To do all other acts, deeds matters and things which may be necessary to be done for rendering these presents valid and effectual to all intents and purpose according to Laws and Customs of India.

53. AND I/WE HEREBY DECLARE that this Power of Attorney is given in favour of the said Attorney jointly and severally and accordingly the said Attorney shall be entitled to exercise independently of each other the powers conferred upon them.

54. AND I/WEHEREBY AGREE to ratify and confirm whatsoever the said Attorney shall do in the premises by virtue of these presents AND WE HEREBY DECLARE that I/we shall not enforce this Power of Attorney.

55. AND I/We hereby declare that the powers and authorities hereby granted are irrevocable till the said property is fully and properly developed as per the Sale Agreement as per rules and regulations of the Bombay Municipal Corporation and that the transfer and/or conveyance of the said land with building is conveyed and/or transferred in favour of the ultimate transferee.

IN WITNESS WHEREOF we have hereunto set our hands at Bombay this …………… day of ……………………,

SIGNED AND DELIVERED by the
Within named (1) ______________________
(2) ________________________________
and (3) _______________________________
in the presence of:

BEFORE ME,

AGREEMENT FOR SALE OF IMMOVEABLE PROPERTY

ARTICLES OF AGREEMENT made at Bombay this …………….. day of ………………………………BETWEEN………………………and ……………………….. of Bombay Hindu/Parsi/ Christian/Muslim/Indian Inhabitants (hereinafter unless otherwise specifically designated collectively called “the Vendors” which expression shall unless repugnant to the context or meaning thereof be deemed to include their respective heirs executors and administrators) of the One Part AND ……………………………………….. PRIVATE LIMITED, A company incorporated and registered in India under the Companies Act, 1956 and having its registered office at …………………………………. Bombay-400000 …… (hereinafter called “the Purchasers”) which expression shall unless repugnant to the context or meaning thereof be deemed to include its successors and assigns) of the Other Part.

WHEREAS the Vendors are seized and possessed of or otherwise well and sufficiently entitled to all that piece or parcel of Government/Municipal/Lease hold land hereditaments and premises situated at …………………………………. Bombay more particularly described in the First Schedule hereunder written and delineated on the plan thereof hereto annexed and thereon shown surrounded by red coloured boundary line;

AND WHEREAS subject to the permission of the Lessors/ The Trustees of the Port of Bombay/the Charity Commissioner, Bombay Region/Maharashtra, the Competent Authority under the Urban Land (Ceiling and Regulation) Act, 1976 being obtained in that behalf and also subject to such terms and conditions as may be imposed by the said Lessors/Trustee of the Port of Bombay/The Charity Commissioner, Maharashtra Region, Maharashtra/The Competent Authority at the time of granting such permission the Vendors have agreed to sell and the

Purchasers have agreed to purchase the said land hereditaments and premises at or for the price of Rs…………………….. and otherwise upon the terms and subject to the conditions as hereinafter appearing;

NOW THIS AGREEMENT WITNESSETH AND IT IS HEREBY MUTUALLY AGREED BY AND BETWEEN THE PARTIES HERETO as follows :

1. Subject to the prior permission of the Lessor/Trustees of the Port of Bombay/Charity Commissioner, Bombay Region, State of Maharashtra the Competent Authority under the Urban Land (Ceiling & Regulation) Act, 1976 being obtained in that behalf in writing and subject to such terms and conditions as may be imposed by the Lessor The Trustees of the Port of Bombay/The Charity Commissioner/The Competent Authority at the time of granting such permission, the Vendors shall sell and the Purchasers shall purchase all and singular the said land hereditaments and premises situated at ……………………… Road in Greater Bombay and delineated on the plan thereof, hereto annexed being thereon shown surrounded by red coloured boundary line and more particularly described in the First Schedule hereunder written with their appurtenances (hereinafter called "the Said Property") free from all encumbrances at or for the price of Rs………………)

OR

at or for the price to be calculated at the rate of Rs………….. (Rupees ……………………………………………..) per Square Yard of the total area of the said property as may be determined by a joint survey to be held as hereinafter provided

OR

at or for the price to be calculated at the rate of Rs……………….. per square foot of floor space index (hereinafter called “FSI”) on the total FSI that may be sanctioned by the Municipal Corporation for Greater Bombay or other authorities concerned.

2. THE price of the said property as (or, calculated as) aforesaid shall be paid by the Purchasers to the Vendors in the manner following that is to say, sum of Rs………………… (Rupees …………………………………….) as deposit or earnest money shall be paid on or before the execution of these presents (the payment and receipt whereof the Vendors do and each of them doth hereby admit and acknowledge) and the balance of the said price shall be paid on completion of the sale as hereinafter provided subject to deduction there out and retention as deposit by the Purchaser’s Solicitors/Advocates of a sum of Rs……………………. (Rupees ……………………………………………………..) which will be paid by them to the Vendors without interest after the said property is transferred to the names of the Purchasers in the records of the Government, the Collector, Mamlatdar, Tahsildar, the Municipal Corporation for Greater Bombay and any other local or public body or authority after appropriating there from any fine or penalty which the Vendors may have to pay. The said earnest money of Rs…………………………………………….. (Rupees ………………………………………………………) shall remain deposited with Messrs ……………………………………… Solicitors/Advocates for the Vendors who shall pending the completion of sale hold it as stake-holders.

3. AFTER the execution of this agreement, the Vendors will apply in writing to the Trustees of the Port of Bombay/Charity Commissioner/Lessors/The Competent Authority under the provisions of Urban Land (Ceiling & Regulation) Act, 1976 for their permission for sale of the said property and transfer of their said Lease to the purchasers and the Purchasers agree to abide by observe and perform such terms

and conditions as may be imposed by the said Trustees while granting the said permission. The Purchasers agree and undertake to give all active co-operation as may be required of them for procuring the permission from the Trustees of the Port of Bombay/Charity Commissioner/The Lessors/The Competent Authority. If for any reason whatsoever the said permission is not granted for a period of three months from the date thereof or the same is refused, then unless the time for obtaining the permission is extended further by mutual consent their agreement will be treated as cancelled and the Vendors will return to the Purchasers the said earnest money but without any interest while each party will bear and pay their own costs charges and expenses as may be have been incurred by them.

4. The area of the said property shall be ascertained by a Surveyor of the Vendors and the Architect or Surveyor of the Purchasers. The Vendors and the Purchasers shall bear and pay their respective Architects or Surveyors, charges for such Joint Survey.

5. The area of the property is ………………………….. square yards equal to ………………………. Square meters according to the documents of title and/or Government Records and the same shall be taken as correct and accepted by the Purchasers. The price of the said property has been agreed to between the parties on a lump sum basis without any reference to the said area and if the said area is ultimately found to be more or less the same shall not be a ground for any increase or decrease in the price or for rescinding this agreement.

Note : Clause to be deleted if price is payable according to area.

6. If the area of the said property upon joint survey as aforesaid is found to be deficient by more than two per cent, the purchase price payable will be reduced proportionately, or in the alternative the Purchasers at their, option may rescind this

Agreement in which event they shall be entitled to receive back the earnest money but without interest or costs.

7. The Vendors shall within 7 (seven) days from the execution of these presents deliver or produce or cause to be delivered or produced all documents of or relating to the said property including Wills Probates Letters of Administration Orders of Courts and certified copies of documents in the vendor's possession or control to the Purchasers' Solicitors/Advocates Messrs………………………………………….. for examination and investigation of the title of the Vendors to the said property.

Note : Clause to be kept in view when acting for Vendors.

8. The title to the said property shall commence with the document dated the ………………….. day of……………………., 20……. And made between ………………………………………….. of the one part and ………………………….. of the other part. It shall be assumed without enquiry that the said …………………………………………….. died duly seized and possessed of the said property for an estate equivalent to an estate in fee simple in possession. No objections or requisition in respect of the title prior to the said documents shall be made and none, if made, shall be required to be answered or complied with by the Vendors, nor shall the same be enquired into or investigated howsoever. (Insert other conditions as may be necessary).

9. Subject to what is stated above, the Vendors shall make out a marketable title to the said property free from all encumbrances doubts and claims and shall at their own costs and expenses obtain all necessary orders of the Court including orders for the transfer of the interest of minors (if any) in the said property and get in all outstanding estates and clear all defects in the title encumbrances and claims by way of sale exchange mortgage gift trust inheritance possession lease lien easement

or otherwise. The fact that any part of the said property is within the set-back line will not be a good objection to title or any ground for refusal to complete the purchase.

Note : Insert clause when acting for Vendors

10(a) The Vendors shall before the completion of sale apply for and procure from the authorities concerned their respective tax clearance certificate as required by the provisions of S. 230A of Income-Tax Act, 1961 (Section omitted w.e.f. 1.6.2001)

10(b) For the purposes aforesaid the Purchasers will within one month from the date hereof furnish the Vendors ten copies of the finalized Deed of Conveyance/Assignment in order to enable them to furnish them to the authorities concerned along with their applications to be made as aforesaid.

11. The Vendors will at the request cost and expense of the Purchasers apply for and the purchasers will at their own cost and expenses procure from the authorities concerned all permission and sanctions for development reconstruction or additional construction in the said property but obtaining of such permissions and sanctions shall not be a condition precedent for completion of sale and the purchasers shall complete the sale within the time stipulated irrespective of the fact that such permissions or sanctions are not till then obtained.

12. The Vendors will give a suitable and irrevocable General Power of Attorney to the Purchasers and/or their nominees to deal with the said property as full owners thereof including appointing Architects, preparing and submitting building and other plans for development of the said property making representations to and appearing before various authorities to make sign deliver and carry on correspondence, applications, writings undertakings affidavits, etc.

13. In the event of the tenure of the said property being subjected to any alteration modification or change due to imposition of any levy by way of land revenue or otherwise by reason of any legislation or by any other public body or authority prior to the completion of the sale, the Purchasers shall not be entitled to avoid this Agreement by reason of such legislation or imposition and/or to claim any compensation or reduction in the purchase price even if such alteration modification or change involves payment of rents rates taxes charges and assessments which are not payable so far in respect of the said property.

14. The sale will be completed within six months from the date of this Agreement or from the date of delivery of all documents of or relating to the said property by the Vendors' Solicitors/Advocates to the purchasers' Solicitors/Advocates or within one month from the date of the permission given by the Trustee of the port of Bombay/Lessors/Charity Commissioner/the Competent Authority time being the essence of contract.

OR

14. The sale will be completed on or before the day of ………………….. time being essence of contract in this behalf. If for any reason whatsoever other than the default on the part of the Vendors to carry out any obligations on their part to be carried out before the sale can be completed the sale cannot be completed on or before the said stipulated date the Vendors will be entitled to refuse to complete the sale and rescind this Agreement for Sale without being liable for any compensation or damages in that behalf and also will be entitled to forfeit the earnest money unless and until the purchaser reimburses the Vendors the full amount of the loss that the Vendors have suffered or are likely to suffer on account of the loss of exemption

from payment of capital gains tax if any that may be levied upon them by the authorities concerned.

15. The Vendors declare and shall satisfy the Purchasers that the said property is situated within the limits of the Municipal Corporation for Greater Bombay and that the Bombay Tenancy and Agricultural Lands Act, 1948 does not apply to the said property and no permission from the Collector of Bombay or any other authority is required to be obtained for the sale of the said property to the purchasers. If the said Bombay Tenancy and AGRICULTURAL LANDS ACT, 1948, is applicable to the said property, the Vendors will at their own costs and expenses obtain necessary permissions for the sale of the said property to the Purchasers from competent authorities as required by the provisions of the said Act.

16. The Vendors undertake before the completion of the sale to obtain at their own costs necessary permissions from the authorities concerned for the user of the said property for non-agricultural purposes and also for its user for industrial purposes on such terms and conditions as may be acceptable to the purchasers.

17. The Vendors hereby declare that :

(a) the said property is equivalent to freehold property subject only to payment of annual non-agricultural assessment of Rs. ………… (Rupees ……………….) to Government and subject to the provisions contained in The Maharashtra Land Revenue Code, 1966, and is not held under any Sanad or Agreement;

(b) The Taxes payable to Municipal Corporation for Greater Bombay are Rs…………………. Per year for property taxes and Rs……………… per year for Repair Cess and Rs……………….. per year for education cess;

(c) the said property is the self-acquired property of the Vendors (having been purchased by them with moneys belonging exclusively to them and

contributed jointly by them in or about the year …………..) and is fully and absolutely vested in them OR The said property is the ancestral property of the Vendors and is fully and absolutely vested in them as the only co-parceners of the joint and undivided Hindu family of which they are members and Shri …………………………… is the Karta and manager.

(d) there are no outstanding encumbrances, mortgages charges, liens, notices for acquisitions, requisition, set-back, easements, rights of tenants (protected or otherwise) or agriculturists or outstanding interest in or claim by any parties other than the Vendors in respect of the said property nor is the said property the subject matter of any pending litigation or attachment either before or after judgments;

(e) no notification has been issued under any Ordinance Act, Statute, Rules or Regulations (State of Central) affecting the said property;

(f) the Vendors did not hold nor are they now holding, agricultural land in excess of the ceiling areas prescribed by the Maharashtra Agricultural Lands (Ceiling on Holdings) Act, 1961;

OR

The Vendors do not hold any vacant land in excess of the ceiling prescribed by the Urban Land (Ceiling & Regulation) act, 1976;

(g) Neither the Vendors nor their predecessors-in-title nor any body claiming from or under them nor any of them have or has granted any right of way, easement or licence or created any other rights to or in favour of any person in over or in respect of the said property that no such right has become effective by prescription or otherwise howsoever and that the owners or occupiers of the adjoining lands or their tenants or the public do not use or

have lawful access to any part of the said property for passing and repassing between any points within the said property and;

(h) the main electrical lines and the water mains of the Municipal Corporation for Greater Bombay are laid along side the said property.

This Agreement is executed by the purchasers on the faith, truth and strength of the aforesaid representations and declarations made by the Vendors.

18. The Vendors (jointly with a respectable and responsible person well acquainted with them and their families for a considerable number of years) shall make a Declaration before a Commissioner of Oaths or Notary setting out facts in evidence and support of their claim that the said property is their self-acquired/joint property purchased out of moneys belonging absolutely to and jointly contributed by them (OR) that the said property is the ancestral property of the Vendors and setting out fully the Constitution of the joint and undivided Hindu family, of which they claim to be members at all material dates and stating the reasons for alienating the said property. The draft of the said Declaration shall be previously approved by the purchasers' Solicitors/Advocates and the said Declaration after it has been made as aforesaid shall be registered in the office of the Sub-Registrar of Assurances at Bombay (OR) Bandra along with the Conveyance/Assignment and other Deeds of Assurance (if any) in favour of the purchasers.

19. The Vendors shall execute and deliver or cause to be executed and delivered to the purchasers or their nominee or nominees such Conveyance/Assignment document or documents or assurances as may be required for effectuating a proper transfer of the said property to the names of the Purchasers of their nominee or nominees and in the latter event the Purchasers shall if so required by the Vendors join in the execution of such document or documents as confirming parties. The

Vendors shall at their own costs procure all other necessary parties to join in the execution of the said document or documents.

20. On the completion of the sale the Vendors shall deliver to the Purchasers all title deeds documents and papers exclusively relating to the said property in their possession and enter into with the purchasers or their nominee or nominees the usual covenant for production of such documents as the Vendors may be entitled to retain with them. The Vendors shall at the costs of purchasers also give to the purchasers if they so require official or notarial certified copies (as the case may be) of the title deeds documents and papers which they shall retain with them as aforesaid as also copies as aforesaid of such other title deeds documents and papers relating to the said property as may not be in the possession of the Vendors.

N.B. Clause to be kept in view when acting for Vendors who are mortgages, trustees or legal representatives.

21. The Vendors will sell under a Power of Sale contained in a Deed of Mortgage/Deed of Trust/Deed of Settlement dated the …………… day of ………. 20……….. and made between ……………………….. of the one part and …………………………….. of the other part (or the Will of ……………………………… deceased dated the ……………………. Day of ………………. 20……..) and the purchasers shall assume that the said Power of Sale is sufficient to enable the Vendors to sell the said property and shall not make any objection or requisition in regard thereto.

22. The Vendors are selling the said property as the administrators of the estate of ……….. deceased (or, as the executors of the Will of …………………… Deceased dated the ………… day of ………….. 2010……………. Or as trustees of…………) and will therefore give only the usual covenant against encumbrances.

23. The purchasers shall after the execution of the Agreement apply to different Government or local authorities for permissions licenses; no-objection certificates and/or consents to their utilizing the said property for the purposes of their business. The vendors shall give to the purchasers from time to time all active co-operation for obtaining such permissions licenses certificates and consents. If any of the said permissions licenses certificates or consents shall be refused or not obtained by the purchasers they shall within three months from the date hereof have the option to cancel this agreement and in that event the Vendors shall forthwith on demand return to the purchasers the earnest money without interest and each party shall bear and pay their own costs charges and expenses incurred herein. Neither party shall in that event be entitled to any damages or compensation whatsoever under these presents or otherwise howsoever.

24(a) The Vendors are arranging at their cost to provide access to the said property through lands belonging to one Mr. ……………….. which are situate to the …………………….. of the said property. The purchasers shall at all times have free access to and full right to use (with or without animals or vehicles) the said property road, and in case such access is not made available to the purchasers they shall have the option to cancel this Agreement.

(b) The purchasers shall have the option to cancel this Agreement if they shall not have direct access to the said property from the public road.

25. The purchasers are negotiating for the purchase of certain pieces of land adjacent to or in the vicinity of the said property and more particularly described in the second schedule hereunder written and delineated on the said plan hereto annexed being thereon surrounded by yellow coloured boundary lines and indicated by their respective Survey and Hissa numbers. The purchasers shall have the

option to cancel this agreement if the said negotiations fail or the sale and purchase of any of the said piece of land described in the Second Schedule hereunder written is not completed for any reason whatsoever.

26. If the division of the said property from the other property of the Vendors requires to be sanctioned under the provisions of the Bombay Municipal Corporation Act, 1888, the Maharashtra Regional Town Planning act or any other law for the time being in force, then the Vendors will at their own costs apply for and obtain such sanction and shall alone be responsible for complying with the terms and conditions thereof. In the event of the vendors are not being able to obtain the said sanction within two months from the date hereof or within such further time as may from time to time he extended by the purchasers or in the event of such sanction being refused (whichever is earlier) this Agreement shall be treated as cancelled and the Vendors will forthwith return to the purchasers the earnest money without interest and each party will bear and pay their own costs, charges and expenses.

27. In the event of the sale not being completed due to any willful default on the part of the Vendors the purchasers shall have the right to require specific performance by the Vendors of this Agreement or to require the Vendors to pay to the purchasers the costs incurred by the purchasers from the commencement of the negotiations for the purchase of the said property till the date of the cancellation by the purchasers of this Agreement in addition to the return of the said earnest money but no further or other damages.

28. IN THE event of the sale not being completed due to any willful default on the part of the purchasers the vendors shall have the right to require specific performance by the purchasers of this agreement or alternatively to forfeit the earnest money and to require the purchasers to pay to the vendors the costs

incurred by the vendors from the commencement of the negotiations of the sale of the said property till the date of the cancellation by the vendors of this agreement but no further or other damages.

29. THE VENDORS declare that so far as they are aware of the said property or any portion thereof is not included in any intended or published scheme of improvement or development by the Municipal Corporation of Greater Bombay or other public body or authority. If any notice be issued, to, received by or served on the Vendors or any of them or his or her agent in respect of any such Scheme or if the said property or any portion thereof is included in any such scheme before the completion of the sale, it shall be at the option of the purchasers to rescind this Agreement in which event the Vendors shall forthwith return to the purchasers the earnest money – without interest and each party will bear and pay their own costs charges and expenses.

30. THE VENDORS declare that no notices including any notice for acquisition, requisition or set back by the Government Central or State or by the Municipal Corporation of Greater Bombay or any other local, or public body or authority in respect of the said property have been issued to, served upon or received by the Vendors or any of them or their or his or her agent or any person on their or his or her behalf and that all previous notices and requisitions have been duly complied with by the Vendors. If any such notices other than a notice for acquisition requisition or set-back is hereafter issued to, served upon or received by the Vendors or any person on their his or her behalf in respect of the said property before the completion of the sale herein, the Vendors shall forthwith give notice thereof to the purchasers and shall comply with the same at their own costs and expenses. If before the completion of the sale herein any notice for requisition or

set-back is issued to, received by or served upon the Vendors or any of them or their or his or her agent, it shall be at the option of the purchasers to determine this Agreement and upon such determination of this agreement the Vendors shall forthwith return to the Purchasers the earnest money but without interest and each party shall bear and pay all costs of and incidental to the sale incurred by them upto the date of such determination. If the Vendors shall have willfully concealed any notice issued served or received as aforesaid the purchasers will be entitled to all costs charges and expenses of and incidental to the Agreement for sale incurred by them up to the date of such determination. If any notice is issued published served by Government or any local or public authority for acquisition of the said property or any part thereof (for any party other than the purchasers) this Agreement shall at the option of the purchasers to be exercised within 10 days of the knowledge of such notice be null and void and the vendors shall thereupon forthwith return to the purchasers the earnest money but without interest and each party will bear and pay their own costs charges and expenses.

31. IF THE Vendors fail to make out a marketable title as agreed or if the purchasers shall insist upon any requisition or objection in respect of title to the property or otherwise which the Vendors shall be unable or on ground of expenses exceeding Rs………………… (Rupees ………………………..) or on other ground unwilling to remove or comply with (notwithstanding any attempt on the part of the Vendors to remove or satisfy such requisition or objection or any negotiations or litigations in respect thereof) the Vendors shall be at liberty to give to the purchasers or his Solicitors or Advocates notice in writing of the Vendors' intention to rescind this Agreement unless such requisition or objection be withdrawn, and if such notice be given and the said requisition or objection be not withdrawn within 10 (ten) days after

the date of the service of such notice on the purchasers or their Solicitors or Advocates this Agreement shall without any further notice be deemed to have been rescinded and the Vendors shall thereupon forthwith return to the purchasers and earnest money but without interest and each party will bear and pay their own costs charges and expenses.

32. UPON COMPLETION of sale the Vendors will deliver vacant possession of the said property to the purchasers after lawfully removing at their own costs and expenses from the said property all huts or structures standing thereon and on production of proper proofs in respect thereof (such as certified copies of finally confirmed entries from the Mutation Register and certified extracts from the Record of Rights PROVIDED HOWEVER that the purchasers shall pay to the Vendors Rs…………….. as their contribution towards the cost and expenses of the removal of the tenants occupants and adverse claimants from the said property.

33. THE SAID property shall be at the risk of the vendors till completion and shall be delivered over at the time of the execution of the Conveyance/Assignment in the state in which it now is (reasonable wear and tear always excepted). The Vendors agree and undertake not to cut down or lop off or allow to be cut down or lopped off any tree plant or bush standing on the said property at the date hereof.

34. THE VENDOR shall pay all assessments, rents, rates, taxes and dout goings in respect of the said property previous to the day of handing over possession or the completion of the sale whichever of the two is earlier and the same, if necessary, shall be apportioned between the vendors and the purchasers.

35. SAVE AND except as herein otherwise provided all out-of-pocket expenses for search fees, advertisements (one in an English, a Gujarati and a Marathi newspapers to be selected by the purchasers), joint survey, plans, stamp duty, costs

of certified and Notarial copies of documents and registration charges shall be borne and paid by the vendors and the purchasers in equal shares and each party shall bear and pay their own expenses including their own lawyer's professional fees.

36. THE VENDORS shall pay brokerage to Mr. …………………………. at ……………………………. Percent on the sale price and the purchase shall pay brokerage to Mr. ……………………………………… at …………….. per cent on the sale price if and when the sale is completed but not otherwise whatsoever may be the cause of non-completion and even if the agreement is cancelled by mutual consent of the parties.

IN WITNESS WHEREOF the parties hereto have executed these presents and a duplicate thereof the day and year first hereinabove written.

THE FIRST SCHEDULE ABOVE REFERRED TO

(Description of the property agreed to be sold)

ALL THAT piece or parcel of vacant agricultural/non-agricultural land hereditaments and premises admeasuring (…………………..) square meters or thereabouts and situate at …………………….. Road in Village …………………… (in Greater Bombay), Taluka ……………………… District ………………………. And bearing Survey and Hissa Numbers with their respective areas and yearly assessment as follows :

Serial No.	Survey No.	Hissa No.	Area Acre - Gunthas Sq. Yds. Sq.Mts.	Assessment Rs.
	Total		-- --	

And bounded as follows : that is to say, on or towards the NORTH by ……………… and or towards the EAST by ………………………. On or towards the SOUTH by ……………….. on or towards the WEST by ……………… and delineated in the Plan thereof hereto annexed being thereon shown surrounded by red coloured boundary lines.

THE SECOND SCHEDULE ABOVE REFERRED TO:

Property proposed to be purchased for which negotiations are going on.

SIGNED AND DELIVERED by the
Within named VENDORS …………………………..
In the presence of:

THE COMMON SEAL of the within named
Purchasers …………………………………………..
Was pursuant to a Resolution of their
Board of Directors passed in that behalf
On the …………… day of ………………………..,
(1) Mr………………………………… and
(2) Mr. ……………………………….. two DIRECTORS
of the Directors and Mrs……………………………
…………………………………….. Secretary of the SECRETARY
Said Company.

RECEIVED the day and year first herein above
Written of and from the within named Purchasers,
…………………………. the sum of
Rs…………………………. (Rupees …………………….)
Rs…………………………………
Being the amount of the earnest money or deposit as
Within mentioned agreed to be paid by them to us.

Rs. …………………….

WITNESSES:
WE SAY RECEIVED

MEMORANDUM OF UNDERSTANDIN/LOAN AGREEMENT

This agreement is made at Delhi, on ________.2010, between ____ hereinafter called the FIRST PARTY.

AND

____ hereinafter called the Second party of the other part.

The expression of the terms First party & second party wherever they occur in the body of this MOU/LOAN AGREEMENT shall mean and include their respective legal heirs, successors, nominees, representatives, assigns etc.

AND WHEREAS the said First party herein is the owner and in lawful possession of ____ hereinafter called the said property.

And whereas the FIRST PARTY is in dire need of money and has approached and requested the SECOND PARTY for a friendly loan of Rs.____________/- (Rupees ______________________________ Only) to which the Second party has acceded to give the loan following terms and conditions:-

<u>THIS INDENTURE OF MOU/LOAN AGREEMENT WOTNESSETH AS UNDER:-</u>

1. That the FIRST PARTY has taken a sum of Rs.______________/-(Rupees _______________________________Only) as a loan without interest from the SECOND PARTY and in lieu of that has mortgage all the documents IN ORIGINAL pertaining to the said property to the Second party.

2. That it has been mutually agreed upon by both the parties of this deed that the actual physical possession of the said property shall remain with the Second

party of this deed along with all the previous documents IN ORIGINAL pertaining to the said property till the repayment of the loan amount.

3. That the first party hereby undertakes to repay the loan amount on or before ___________, to the second party, without any delay of default.

4. That in case the First party fails to repay the loan amount to the second party within the stipulated time period, then the Second party is entitled to get the sale deed in respect of the said property executed in his favour or in the name of any of his nominee, from the First party through Specific performance of the contract from the Court of law on the cost and expense of the First party.

5. That in case of any dispute between both the parties of this deed the same will be settled through sole arbitrator namely -------------------, to be appointed by the mutual consent of both the parties and his decision shall be final and binding upon both the parties.

6. That the First Party has taken the said loan for his personal use and has signed this agreement without any pressure, threat, coercion, allurement etc. from any side/corner and rather out of his bonafide need and requirement.

7. That the First party shall hereby undertakes not to initiate any legal action, notice, court Case etc. against the Second party herein.

8. That both the parties of this MORTGAGE DEED/ MOU have not been debarred by the prevailing laws of the land to enter into this Loan agreement.

9. This Loan Agreement/MOU shall be binding upon both the parties and their legal heirs, and in case of any eventuality, the legal heirs of both the parties shall also comply with the terms and conditions of this Agreement as mentioned above.

10. That if any court Case is initiated by any of the party of this deed, the case shall be exercised within the jurisdiction Courts of the Delhi courts.

11. That both the parties are citizen of India.

In witnesses whereof, the parties to this MOU/ loan agreement have signed and executed this Agreement at Delhi on _______.2010 in the presence of the following witnesses:-

WITNESSES :-

1. (SIGNED FIRST PARTY)

2. (SIGNED SECOND PARTY)

BUILDING AGREEMNTS

FORMAT NO. 1

IN A CASE WHERE THE OWNER SUPPLIES THE PLOT OF LAND ONLY AND THE BUILDER SUPPLIES MATERIALS TO BE USED AS WELL AS THE LABOUR AND BUILDING TOOLS, ETC.

This agreement is made the …………… day of ………….. between ‘A’ of etc. (hereinafter called the Builder of the one part) and ‘B’ of etc. (hereinafter called the owner of the other part).

Whereas the second party is the owner of the plot of land measuring ……… sq.yards situated at ……………….. and more particularly described in the plan attached and therein delineated as red:

And whereas the second party, the owner being desirous of erecting a building over the said plot of land has appointed Mr……………………. as the architect.

And whereas plans, drawings and elevations of the said intended building and a specification of the works to be done and of the materials to be provided in and for the erection of the same have been prepared by the said architect and approved of by the parties and has been subscribed for purposes of identification by both the parties; And whereas the builder is willing to contract for the execution of the said works for the sum of Rs……………..

Now it is hereby agreed as follows:

1. The builder shall erect on the said plot of land a building in conformity with the plans, drawings and elevations and complete all the said works with the material of best quality and in the most substantial and workman like manner, and to the

satisfaction of the said architect and will in all respects comply with and abide by the true intent and manner of the said specifications, plans, drawings and elevations and of this agreement.

2. The builder will finish and complete the said building on or before the ………. day of ………….., and if the said building shall not be completed on or before the said date the builder shall forfeit, out of the moneys which shall be due to him by virtue of this agreement, the sum of Rs………….. for every day which shall elapse after the …………. day of …………. Until the said building shall be completed.

Provided that if the builder is prevented by any strike among the workmen or by reason of any event beyond his control, the said architect may extend the time for the completion of the works for such reasonable period as he may think fit.

3. If the builder shall become bankrupt, or shall from any cause whatsoever be prevented from or delayed in proceeding with and completing the said works according to the terms and conditions of this agreement, or shall not proceed in the said works to the satisfaction of the said architect, it shall be lawful for the said architect to leave or cause to be left at the usual place of abode or business of the builder, a notice or notices in writing for the said builder to proceed regularly and effectually with the said works; and in case the said builder shall, for seven days after such notice is so left as aforesaid, make default in regularity and effectual proceeding with the said work, it shall be lawful for the said architect to employ any other workmen either by contract or measure and value or otherwise to proceed with the said works and complete the same and pay to the said workmen out of the moneys which shall be then due to the said builder on account of this agreement, the amount of their charges for the same and for all necessary materials to be found and provided for such completion, and if the amount of blance to the credit of the builder

be insufficient to cover such charges for workmen and materials as are last hereto-before directed to be paid there out, and then in such case the said builder shall and will make good and pay such deficiency on demand.

4. If the said architect shall at any time or times consider any of the workmen employed by the said builder on the works as in anywise incompetent or as acting improperly it shall in every such case be lawful for the said architect to discharge such workman or workmen, and the said builder shall without delay put another workman or other workmen in his or their place.

5. In case any of the materials brought on the said premises by the said builder shall be considered by the said architect unsound or in any respect improper, the said builder will, upon notice in writing to them or their foreman on the premises given by the said architect cause the same to be removed from off the ground and proceed with the said works with materials corresponding with the said specifications and instructions and approved of by the said architect and on default of such removal within ……….. days after such last mentioned notice, it shall be lawful for said architect to cause the same to be removed to such place or places as he may thing proper, without being in anywise answerable or accountable for the los or damage that shall happen to any materials so removed as aforesaid, and to cause proper materials to be substituted for the same, and to pay all expenses attending such removal and substitution out of the moneys which shall become due to the said builder by virtue of this agreement.

6. In case the said architect shall consider any part of the said works executed in an unsound and improper manner, the said builder will cause the same immediately to be taken down and executed in a proper manner to the satisfaction of the said architect without any extra charge or expense whatsoever.

7. If the said architect or the party hereto of the second part, shall think proper at any time or times to make any alterations or additions to or omission in the works hereby contracted for, he shall give to the said builder, written instructions for such alterations or omission signed by the said architect, but the said builder shall not be considered to have authority, for any alterations, additions, omissions or to make any claim for the value or otherwise in respect thereof, without such written instructions so signed as aforesaid. Any additional charge by the builder with respect to such alterations if certified to be correct by the architect shall be paid for in the same manner and at the same time as hereinafter expressed for the payment of the ultimate balance of the said sum of Rs…………

8. Any damage arising from accidents or carelessness of the workmen or otherwise to the said work hereby contracted for, or to the materials or implements therein used, shall be borne and effectually made goods by the said builder at his own costs and charges.

9. The said builder shall provide all the materials of the best kind available in the market for the said building in accordance with the specification mentioned above.

10. The said builder will not, unless with the consent of the said architect, make any sub-contract for the execution of the works hereby contracted for, or any part thereof, nor unless with such consent as aforesaid assigned or underlet the present contract.

11. The builder shall be paid Rs. ………… as his remunerations for the labour supplied and materials used by him for the aforesaid building in the following manner:

Rs…………… shall be paid by 12 monthly installment of Rs……………. Each, the first installment to be paid on …………… and the balance of Rs. …………..

within three months of the completion of the building, provided that in the case of each payment the architect certifies that the work and materials to a sufficient amount shall have been done, executed or provided by the said builder to the satisfaction of the said architect.

Provided also that the builder shall not be entitled to payment or receive the said balance of Rs…………… until the said architect shall certify under his own hand that whole of said works have been completed and finished to his satisfaction. The decision of the architect shall be binding on the parties and shall be final.

Witness:

1.

2.

Signature of parties

FORMAT NO. 2

AN AGREEMENT BETWEEN OWNER AND BUILDER

(Lump Sum Contract)

This agreement is made on ……….. day of ………..20 ……. Between AB, son of ………………………. R/o ………………….. the one part hereinafter called the "owner" and CD Corporation Ltd., having its registered office at …………… (acting through its Managing Director ……….) carrying on the business of engineers and contractors of the other part (hereinafter called the "company") on the terms and conditions hereafter set forth:

Whereas the owner is possessed of an old bungalow situated on ……. Bearing Municipal No……….. with an area of about …………. Square yards, belonging to him and which bungalow is intended to be dismantled and a new bungalow of a modern type is intended to be created on the said premises;

And whereas the company is willing to undertake and to do the said job for a lump sum in accordance with the plan and specifications and on terms specified below:

Now it is mutually agreed between the parties as under:

1. That in consideration of the sum of Rs……………. To be paid as hereinafter named the company agrees with the owner to …………

   (i) dismantle at his own cost the structure already built on the premises and clear the ground and prepare the site for digging the foundations according to the plain attached to this agreement as sanctioned by the Municipal Committee;

   (ii) forthwith commence, erect build and completely finish in a good, substantial and workmanlike manner, with the material previously

approved by the architect of the owner, namely ……….. of …………..
or such other architect as may hereafter to be nominated and notified to the company in writing by the owner, in accordance with the specifications, and drawings which have been respectively signed by the company and the said architect of the owner, and the company hereby admits that the said specifications, plans and drawings are sufficient for their intended purpose and that the works can be successfully executed in accordance therewith. The architect will, however, furnish to the company such further drawings or explanation as may be necessary to detail and illustrate the work to be done, and the company shall conform to the same as part of this contract so far as they may be consistent with the drawings and specifications referred to in the schedule aforementioned;

(iii) abide by any directions given by the owner during the progress of the work through his architect in writing making any alteration in the work under this agreement by way of addition or omission or otherwise deviating therefrom; and the said work shall be executed according to the said alterations or deviations. The value of the work added or omitted shall be computed by the architect and the amount so ascertained shall be added to or deducted from the contract price. If the architect is for any reasons unable to compute the value of such added or omitted work in advance, the work shall proceed under the architect's order in writing countersigned by the owner and the architect's shall compute the said value as soon as practicable. In case of dissent from the architect's assessment by any part to this agreement, the value of the work added or omitted shall be referred

to arbitration of two competent architects who shall appoint an umpire and the decision of the majority shall be binding on the parties;

(iv) finish the work to the satisfaction of the architect originally appointed or subsequently substituted by the owner on the demise, refusal or removal of the architect, with in a period of ……… months from the date of this agreement.

Provided that if any delay shall arise from fire, tempest, or other inevitable cause or accident or from any strike or lock-out or hartal or disturbances or by the default of the owner in paying in due course any moneys payable to the company under this agreement, then such further time shall be allowed for the completion thereof as the architect shall in writing certify to be reasonable provided further that the architect shall also take into account the deviations or alterations, if any, effected pursuant to the directions as aforementioned.

2. That the owner shall pay to the company, weekly during the progress of the work such sum or sums or money as may be sufficient to defray the out of pocket-expenses or the company in respect of the materials used on the premises as supported by vouchers for the purchases made thereof, checked and certified by the architect and Rs. …………… so soon as the architect shall certify that the said bungalow has been duly carried up to the first floor joints, the further sum of Rs……. So soon and the architect shall have certified that the said bungalow is duly roofed in and covered; and the residue thereof so soon as the architect shall have certified that the said bungalow has been duly finished in all respects according to the agreement and that the company has at its own expenses removed and cleared away all scaffolding, fencing, unused materials and rubbish from the premises and

made and prepared the whole of the bungalow and the site along therewith clean and fit for use and habitation and immediate occupation.

3. The owner shall allow free ingress to and egress from the premises to company's servants, employees, sub-contractors and all persons who shall have anything to do with the company undertaking to carry on the work under this agreement. The owner shall indemnify the company against all suits or proceedings on the part of any person having or claiming ancient rights.

4. The company shall indemnify the owner in respect of all claims, damages, compensation or expenses payable in consequence of any injury or accident sustained by any workman artisan or invitee or other person on the premises whether in the employment of the company or not, while in or upon the said premises and the owner shall not be bound to defend any action field in respect of such injury brought under the Workmen's Compensation Act or other provision of law unless the company first deposits with the owner a sum sufficient to cover any liability which the owner may incur by reason of defending any such claim. The company shall further indemnify the owner with respect to any line or charge claimed or enforced against any materials used in the premises by any supplier of such materials. The company shall also indemnify the owner against any action or proceedings which may be brought or taken against the owner in respect of damage caused to the adjoining ground, building, highway, electric poles or other things, by the company in the performance of the carrying on the work under this agreement.

5. If the company shall in any manner neglect or fail to carry on the work of construction or performance of the terms of the agreement with due diligence the owner or the architect on behalf of the owner may serve a notice on the company or deliver at its office such a notice specifying the neglect or default or omission of the

company requiring the company to proceed with such work and to perform such agreement or to pull down or remove any work or materials which the architect shall have certified in writing to be defective or not according to the specification or subsequent directions as the case may be, within…………..days after the receipt or delivery of the said notice, or in case the company shall assign or sub-let the executions of the work without previous permission in writing of the owner, then and in any such case, after the architect certifies in writing that the neglect, omission, delay, default or misfeasance aforesaid is sufficient ground for such action the owner shall be entitled to enter upon the premises and without avoiding the contract, to take the said work wholly or partially out of the hands of the company and its employees or such contractors, and to complete or to employ any other person or persons to execute the same and to use or authorize any other contractor or person to use therefore any plant, tools, materials implements, scaffolding and thing lying or kept on the premises by the company and in the event the company shall receive no further payment under this agreement unless the amount payable under this agreement shall exceed the expense incurred by the owner in the completing of the said work and any damage incurred by the owner in the completing of the said work and any damage incurred by the owner by reason of the company's default in which event the company shall be entitled upon such completion to receive payment of the amount of such excess, but, if the expense so incurred by the owner in this behalf together with any damage incurred by him liability incurred by him for storing the excess material shall exceed such amount of the contract price remaining unpaid, the company shall pay the amount of such excess to the owner, the amount.

4. The company shall indemnify the owner in respect of all claims, damages, compensation or expenses payable in consequence of any injury or accident

sustained by any workman artisan or invitee or other person on the premises whether in the employment of the company or not, while in or upon the said premises and the owner shall not be bound to defend any action filed in respect of such injury brought under the Workmen's Compensation Act or other provision of law unless the company first deposits with the owner a sum sufficient to cover any liability which the owner may incur by reason of defending any such claim. The company shall further indemnify the owner with respect to any line or charge claimed or enforced against any materials used in the premises by any supplier of such materials. The company shall also indemnify the owner against any action or proceedings which may be brought or taken against the owner in respect of damage caused to the adjoining ground, building, highway, electric poles or other things, by the company in the performance of the carrying on the work under this agreement.

5. If the company shall in any manner neglect or fail to carry on the work of construction or performance of the terms of the agreement with due diligence the owner or the architect on behalf of the owner may serve a notice on the company or deliver at its office such a notice specifying the neglect or default or omission of the company requiring the company to proceed with such work and to perform such agreement or to pull down or remove any work or materials which the architect shall have certified in writing to be defective or not according to the specification or subsequent directions as the case may be, within……………days after the receipt or delivery or the said notice, or in case the company shall assign or sub-let the executions of the work without previous permission in writing of the owner, then and in any such case, after the architect certifies in writing that the neglect, omission, delay, default or misfeasance aforesaid is sufficient ground for such action the owner shall be entitled to enter upon the premises and without avoiding the contract, to take

the said work wholly or partially out of the hands of the company and its employees or such contractors, and to complete or to employ any other person or persons to execute the same and to use or authorize any other contractor or person to use therefore any plant, tools, materials implements, scaffolding and thing lying or kept on he premises by the company and in the event the company shall receive no further payment under this agreement unless the amount payable under this agreement shall exceed the expense incurred by the owner in the completing of the said work and any damage incurred by the owner by reason of the company's default in which event the company shall be entitled upon such completion to receive payment of the amount of such excess, but, if the expense so incurred by the owner in this behalf together with any damage incurred by him liability incurred by him for storing the excess material shall exceed such amount of the contract price remaining unpaid, the company shall pay the amount of such excess to the owner, the amount in either case to be computed and certified by the architect, and the materials, scaffolding or plant, if any belonging to the company shall be deemed to be pledged, charged or encumbered with the amount so payable by the company to the owner.

6. The company shall be bound to appoint some foreman or other person competent to receive instructions from the architect from time to time, on behalf of the company at the premises aforementioned at all reasonable hours and all directions given to him by the architect shall be deemed to have been given to the company. The clerk of the works shall be appointed and paid by the owner and shall at all times be allowed to inspect the works and materials on behalf of the architect and subject to an appeal to the architect, no materials to which the said clerk objections shall be used.

If any dispute should arise in connection with or under this agreement between the parties thereto, the same shall be referred to the decision of the architect originally appointed in writing by the owner and agreed to by the company, except in the case occurring as envisaged in sub-para (3) of clause 1 of this agreement relating to assessment of alteration and abrogation of any part of the work, in which later event the provisions of that sub-paragraph shall apply. In all other cases the reference shall be to the architect originally appointed as aforesaid. Either party may state his grievance, notify the same to the other party and within a week of notification refer the matter to the award of the architect mentioned above. In case the architect refuses or neglects to act or is incapable of acting or dies, each party may serve another party with a notice, if both parties do not agree upon the appointment of singe arbitrator, each party shall nominate his own arbitrator who shall, before entering on the reference, appoint an umpire. The decision of the majority shall prevail and bind the parties; if the arbitrators so appointed do not agree to the appointment of the umpire the Court may on application made therefore appoint an umpire. The decision of the three persons so appointed to decide the dispute or disputes shall bind the parties. The fees of the umpire and other arbitrator appointed by a party shall be paid by the party so appointing and the arbitrator shall certify to the Court appointing an umpire the amount received by him prior to his entering on the reference.

Witness:

1………………..

2…………………….

Signature of Parties

FORMAT NO. 3

SCHEDULE OF LABOUR RATE

S.No.	Name of Items	Rate Per	Remarks
1.	Earth work excavation of foundation including leveling, dressing, and making the walls at right angle to ground horizontally with lead and life of earth.		
2.	Earth filling in foundation and plinth including watering, ramming, dressing and leveling.	%cft	
3a.	Lime concrete in foundation and floor in layers Not exceeding 6” in thickness including mixing Mortar, ramming, watering and leveling as Per mark on the walls.	“	
3b.	Dry concrete or kanker ramming in foundation And floor in layers as per direction.	“	
3c.	Cement concrete ramming in foundation and Floor in layers as per direction.	“	
3d.	Lime concrete in roof not exposed to sun Including rounding of comers 3” to 5” thick.	“	
3e.	Cement concrete in roof not exposed to sun Including rounding of corners.	“	
3f.	Lime concrete in roof (terracing) exposed to Sun including rounding of corners.	%cft	
4.	Brick work in lime or in cement in foundation and plinth and superstructure upto one storey.	%Sq.ft	
5.	Brick work in mud from foundation to top of wall below roof of one storey.	“	
6.	Brick work in lime or cement in pillars, ordinary.	“	
7.	Brick work in lime and cement in arches.	“	
8.	Brick work in mud in pillars, ordinary.	“	
9.	Brick work in lime or in cement in parapet of roof 4-1/3” thick.	“	

10.	Brick work in lime in cement 3” thick.	“
11.	Sun dried brick work in mud.	“
12.	Mud walling.	“
13.	Cement mortar plastering on brick floor including flat brick laying in floor joints filled up with sand.	“
14.	Terraced flooring in rendering surface of floor of rammed concrete with lime mortar.	“
15.	Brick on edge flooring with cement mortar rendering at the top or pointed.	%cft
16.	Bick flooring 3” or 4” thick set in lime or cement mortar without pouring it from the top finished off with lime or cement plaster or lime or cement pointing.	
17.	Flag stone flooring set in lime mortar and lime or cement pointed including ordinary dressing.	
18.	Flag stone flooring as per item 17 including superior dressing.	
19.	Cement concrete flooring 1” to 10” thick including Rendering surface with near cement thick or thin as per direction (in panels).	%Sq.ft.
20.	Cement rendering with thick or thin mortar or Lime concrete bed.	“
21.	Mosaic flooring 1” to 10” thick. Gray with one border And dado of walls laying and polishing only.	“
22.	Mosaic flooring coloured with border or borders Laying and polishing.	“
23.	Colouring surface of cement floor.	“
24.	Coloured border in cement flooring extra over floor rate.	“
25.	Cement concrete door sills, ordinary artistic.	“
26.	R.B. almirah shelves complete with plastering 2” to 4”	“
27.	R.B. sunshades without bracket including plastering Nosing and drip course.	“

28.	R.C. sunshades without bracket including plastering, noising and drip course.	Per Sq.ft.
29.	R.B. roofing without top plaster 3” thick with plaster	% Sq.ft.
30.	R.B. roofing without top plaster 4” thick and with plaster	% ft.
31.	R.B. roofing without top plaster 6” thick with plaster	% Sq.ft.
32.	R.C. roofing with top plastering 2” to 3” thick	“
33.	R.C. .roofing with top plastering 4” to 5” thick.	“
34.	Lifting and fixing beam or joint	“
35.	R.B. lintels over doors and verandah openings	Per md
35a.	R.C. lintel beams including centering and plastering complete with iron bending	
36.	Cement plastering walls with rendering surface with Neat cement including watering for 4 days at least.	“
37.	Cement pointing, flushed and ruled	% Sq.ft.
38.	Lime pointing, flushed and ruled	% Sq.ft.
39.	Cement pointing rules	“
40.	Cement plaster on the top of R.B. Roof. If done After the execution of the roof.	“
41.	Lime plastering on walls with rendering surface with Neat lime including rounding or corners.	“
42.	Lime plaster with cement rubbing	Per
43.	Distemper colour washing without lining	“
44.	Lining on walls 0” to 1”	“
45.	Fixing doors, windows, ventilators, almirah stones, Brackets, pegs, nails, hook, rain water pipe.	Each
46.	White-washing one coat	“
47.	Ordinary colour washing	“
48.	R.C. almirah shelves complete with plastering 2” to 4”	each
49.	Cornice in lime or cement per inch projection	Per ft.
50.	Marking patri of Gola in lime or cement 1” to 2” thick.	Per ft.
51.	Making khara	

52.	Making concrete apron after filling up the gap of Foundation with earth by soaking water properly	Per Sq.ft.
53.	Making brick apron on kanker bed including lime or cement pointing.	“
54.	Making brick apron with rendering surface either In cement mortar or lime mortar	Per Sq.ft.
55.	Channel drain including lime or cement concrete, brickwork in lime or cement finished off with plaster	“
56.	Breaking brickbats for concrete 1” to 2” for Foundation.	“
57.	Breaking brickbats for roofing ¾” to 1”	“
58.	Picking up brickbats and stacking	% cft.
59.	Dismantling wall in lime or in mud	“
60.	Dismantling country tiled roof with scantling and staking materials.	
61.	Bending iron bars for reinforced work	each md.
62.	Dressing ground including cutting, filling Earth, average 3” to 6” thick	% SJ. Ft.
63.	Brick soling (flat brick) including dressing	“
64.	Kanker or dry ballast consolidation	% cft.
65.	Making cisterns for storage water complete With plaster upto 2X2X2…… 4X5X4, 8X8X5	each
66.	Making holes in wall for electric or other pipe Line work.	“
67.	Water outlet including fixing granting	“
68.	Making ventilators upto 1X1, 1X3	“
69.	Country tiled roofing including fixing ballies, bamboos, split up or unsplit up bamboo frame making fixed in wire or badh	% SJ. Ft.
70.	Coal tarring 2 coats	
71.	Kothai in mud, i.e. gap filling between roof and wall	
72.	Asbestos roofing including fixing wooden or iron scantling	“

73.	Gal, shett iron (corrugated) roofing including supporting material fixing	“
74.	Iron work as gate making	each md.
75.	Iron work as hold fasts and other small articles	“
76.	Cornice projection complete per inch projection	“
77.	Contraction joints of roof	rft
78.	Cutting bricks	“
79.	C.C. or R.R. jail work	% No.
80.	Making katcha well upto 50 ft. deep 7” to 8” dia	each
81.	Cutting brick for steaming	%cft
82.	Brick work in steaming in cement or lime Mortar	“
83.	Brick work in mud in well	“
84.	Making concrete well curb including iron bending 5ft. diameter well, etc.	each
85.	Fixing of hold fast or rings in well	“
86.	Sinking well 1 to 5 ft., 6 to 10 ft, 11 to 15 ft., 16 To 20 ft.	“
87.	Dry brick work downwards, i.e. ulti jarasi	% cft, or rft
88.	Cleaning well	each
89.	Jhari filling	“
90.	Lead of earth beyond 200 ft. wood work	% cft.
91.	Making chaukhats for big doors to small window and almirah	each cft.
92.	Panel shutters 0” to ¾” thick for door and windows And almirah	each sq.ft.
93.	Glazed and panel cmb, for door and windows And almirah	each sq.ft.
94.	Battened doors and windows	“
95.	Sawing of frame or other scantlings	% Sq.ft.
96.	Any wood work panel or glazed if artistic	each sq.ft.

PAINTING

PAINTING AND VARNISHING

97.	Door and windows deducting the space glass-panels complete 3 coats	% Sq.ft.
98.	White lead painting " "	"
99.	Enamel painting 3 coats	"
100.	Wall painting with oil colour complete 3 coats	"

Name of work…………………

CONDITIONS OF CONTRACT

1. Contractor shall have to arrange for tools, basket, tasla, balti, etc. with the exception of scaffolding materials, and its binding article as rope or wire, etc.

2. Work shall have to be finished within………… months at the rate of the following progress, first installment upto roof level; second installment roofing and plastering complete; third installment roof concrete and flooring; fourth installment finishing as latrine work and general colour washing, apron, etc.

3. Work shall have to be executed by competent skilled labour where necessary.

4. Adequate arrangement shall have to be made for watering as 4 days in plastering, 3 days in cement work, 8 days in roof work, one or two days in brick work, 3 to 5 days in R.B., lintels, etc. etc., beyond this as per instructions.

5. The mixing of mortar to be strictly according to the written instruction of the supervisor; no mortar to be used fresh, in case of lime it shall be used after one day's mixing in Tagar; the mortar must be left open without water; it shall remain under water always before use.

6. Cinder or stone lime should on no account be used without screening through proper sieve.

7. All centering for roof work shall have to be supported with brick pillars as far as possible.

8. Bad or defective work will not be accepted. In case it is allowed the contractor shall have to make good the loss.

9. Contractor shall have to remain present in the work continuously, in case or his absence on any day he shall have to keep such agent at the work who can answer the question so put to him and receive instruction with responsibility.

10. In case of dissolution of work, slow progress, mismanagement in the work, the contractor will be treated as disqualified and suitable arrangement will be made to execute the work by different agency without loss of time.

11. In case any loss if so occurs due to contractor's action the contractor shall have to make good the same.

12. Payment to be made fortnightly on submission of a detail bill showing measurement 2 days before ………….. 5 percent shall be held up in each running bill as security against the work.

13. No payment shall be made on frivolous or created items to increase amount.

14. In case the contractor leaves or stops the work abruptly he will not get his dues out of his withheld money, so deducted from contractor's bil.

15. In case contractor keeps incompetent workmen his rates are likely to be reduced.

16. In case of unusual delay due to supply of material and payment on account of which contractor's work suffers he shall be entitled to get compensation to make up his loss.

17. Rate of attached schedule shall be followed. Payment of all sorts of work from rough to fine shall be on the basis of schedule rates.

Signature of Contractor tendering …………………………

Signature of owner accepting the tender ………………….

Witness …………………….

Witness …………………..

Date of Agreement ………………..

BUILDING ARRANGEMENT IN CASE THE OWNER SUPPLIES PLOT OF LAND AS WELL AS THE BUILDING MATERIAL AND THE BUILDER SUPPLIES LABOUR AND TOOLS

This agreement is made the ………… day of……………. Between ‘A’ of etc. (hereinafter called the Builder to the one part) and ‘B’ of etc. (hereinafter called the owner of the other part).

Whereas the second party is the owner (or lessee) of a plot of land measuring …………… sq.yards situated at ………………………… and more particularly described in the plan attached and therein delineated as red:

And whereas the second party, the owner (or lessee) being desirous of erecting a building over the said plot of land have appointed Mr. ……………………… as their architect.

And whereas plant, drawings and elevations of the said intended building and a specification of the works to be done and of the materials to be provided in and for the erection of the same have been prepared by the said architect and approved of by the parties and has been subscribed for purposes of identification by both the parties.

And whereas the builder is willing to contract for the execution of the said works for the sum of Rs……………

And whereas the material to be used for the building will be supplied by the owner himself and the builder will supply labour as well as the building tools and other accessories necessary for completion of that building.

Now it is hereby agreed as follows:-

1. The builder shall erect on the said plot of land a building in conformity with the plans, drawings and elevations and complete all the said works with the material supplied by the owner and in the most substantial and workmanlike manner and to

the satisfaction of the said architect and will in all respect comply with and abide by the true intent and manner of the said specifications plans, drawings and elevations of this agreement.

2. The builder will finish and complete the said building on or before the ……. Day of ………….. and if the said building shall not be completed on or before the said date the builder shall forfeit, out of the moneys which shall be due to him by virtue of this agreement, the sum of Rs. ……………… for every day which shall elapse after the …………………. day of …………… until the said building shall be completed: Provided if the builder is prevented by any strike among the workmen or by reasons of any event beyond his control the said architect may extend time for the completion of the works for such reasonable period as he may thing fit.

3. If the builder shall become bankrupt, or shall from any cause whatsoever be prevented from or delayed in proceeding with and completing said works according to the terms and conditions of this agreement, or shall not proceed in the said works to the satisfaction of the said architect, it shall be lawful for the said architect to leave or cause to be left at the usual place of abode or business of the builder, a notice or notices in writing for the said builder to proceed in the said works to the satisfaction of the said architect, it shall be lawful for the said architect to leave or cause to be left at the usual place of abode or business of the builder, a notice or notices in writing for the said builder to proceed regularly and effectually with the said works; and in case the said builder shall, for 7 days after such notice is so left aforesaid, make default in regularly and effectually proceeding with the said work, it shall be lawful for the said architect to employ and other workmen either by contract or measure and value or otherwise to proceed with the said works and complete the same and pay to the said workmen out of the moneys which shall be then due to the said builder on

account of this agreements the amount of their charges for the same and if the amount of balance to the credit of the builder be insufficient to cover such charges for workmen as are last hereto before directed to be paid there out, then and in such case and said builder shall and will make good and pay such deficiency on demand.

4. If the said architect shall at any time or times consider any of the workmen employed by the said builder on the works as in anywise incompetent or as acting improperly, it shall in every such case be lawful for the said architect to discharge such workman or workmen and the said builder shall without delay put another workman or other workmen in his or their place.

5. In case the said architect shall consider any part of the said works executed in an unsound and improper manner, the said builder will cause the same immediately to be taken down and executed in a proper manner to the satisfaction of the said architect without any extra charge or expenses whatsoever.

6. If the said architect or the party hereto of the second part, shall think proper at any time or times to make any alterations or additions to or omissions in the work hereby contracted for, he shall give to the said builder written instructions for such alterations, additions or omissions signed by the said architect, but the said builder shall not be considered to have authority for any alterations, additions or omission or to make any claim for the value or other wise in respect thereof without such written instructions so signed as aforesaid. Any additional charge by the builder with respect to such alterations, if certified to be correct by the architect, shall be paid for in the same manner and at the same time as hereinafter is expressed for the payment of the ultimate balance of the said sum of Rs. ……………..

7. Any damage arising from accident or carelessness of the workmen otherwise to the said works hereby contracted for, or to the materials or implements therein

used, shall be borne and effectually made good by the said builder at his own costs and charges.

8. The said builder will not, unless with the consent of the said architect, make any sub-contract for the execution of the works hereby contracted for, or any part thereof, nor unless with such consent as aforesaid assigned or under-let the present contract.

9. The builder shall be paid Rs. …………….. as his remunerations for the labour supplied by him for the erection of aforesaid building in the following manner:-

Rs………………… shall be paid by 12 installments of Rs. …………… each, and the balance of Rs. …………………within three months of the completion of the building, provided that in the case of each payment the architect certifies that the work to a sufficient amount shall have been done or executed by the said builder to the satisfaction of the said architect: Provided also that the builder shall not be entitled to payment or receive the said balance of Rs………… Until the said architect shall certify under his own hand that whole of the said works have been completed and finished to his satisfaction. The decision of the architect shall be binding on the parties and shall be final.

Witness:

1…………………

2………………….

Signature of Parties

FORMAT NO. 5

AGREEMENT TO DEMOLISH STRUCTURE

AND CLEAR THE SITE

I hereby agree to demolish your house bearing Municipal No. …………. (which) has been declared unfit for habitation by the Municipal Committee of……… or which is required to be demolished as per notice of Municipality of ……………. Situated in …………… street in the city of …………….. within a period of …………… days. I hereby agreed to save you harmless from any or all liability which might arise from any injury caused to any labourer or any other person during the process of such demolition. I further undertake to remove all debris from the site at my cost and responsibility, I shall be paid Rs. …………….for the said job.

Dated:

Agreed.

(Sd)………………	(Sd)……………..
Owner	Contractor

FORMAT NO. 6

AGREEMENT TO EFFECT REPAIRS AND WHITE WASHING

I hereby agree to white wash in the usual manner and to repair your building bearing Municipal No………….. every year about one week before Diwali, at a remuneration of one month's rent at which the building is let/is expected to be let (whether actually let or not) during the previous year which shall be deemed to commence at Diwali.

Dated:

Accepted,

(Sd)………………	(Sd)……………..
Owner	Contractor

FORMAT OF ARBITRATION

(A) ARBITRATION CLAUSES IN BUILDING CONTRACT

In case any dispute should arise between the owner and the contractor, whether in respect of delay in supply of materials by the owner or delay in execution of work by the contractor, or the quality of the materials so supplied or the quality of the work done or in respect of decorations or alterations suggested or made or extra work required to be done and so executed or not, or in respect of measurements of work done or required to be done, of demand and payment for part or whole of the work done or not done or delay or refusal in grant of architect's certificate of the Engineer or its correctness or touching the interpretation, fulfillment or breach of any of the terms of these presents or in respect of deductions to be made or extra payments to be recovered for work improperly done or not executed or in respect of work got done through another contractor for default or breach or non-completion of work agreed to be done under the particulars and for assessment of the value thereof and fixation of liability for the same between the parties hereof or in respect of any act or omission arising out of the performance or non-performance or the obligations or duties pursuant to these presents, the said dispute or disputes shall be referred to the arbitration and final award to a single arbitrator to be appointed by the President of the Institute of Engineers) (or falling which to the arbitration of the municipal or corporation engineer or any competent engineer or architect nominated by him in writing) on a reference being made to him by any of the parties by notice in writing, a copy whereof will be served on the other party at the address mentioned above or such other address as may be notified by that other party sent by registered

post. The arbitrator shall be entitled to proceed ex parte after notifying the parties by a reasonable notice as to the time and place therefore. The arbitrator shall also be entitled to associate with himself a surveyor, if necessary at his discretion. The arbitrator shall have power to reopen and revise any certificate granted by the architect engineer under these presents.

(B) STANDARD ARBITATION CLAUSE

In case any dispute between the parties under this agreement, the same-shall be referred to a panel of 3 Arbitrators, one each to be appointed by each parties and an empire who shall be appointed by two arbitrators

COLLABORATION AGREEMENT

This Agreement is made and executed at Delhi on ______.2010, by and between ____, hereinafter called the first Party of one part, (Which Expression of the First Party Shall mean and include the Parties, his respective heirs, successors, Executors, Administrators, Legal representatives and assignees)

AND

____, hereinafter called the Second Party (Which Expression of the Second Party Shall mean and include the Parties, his respective heirs, Successors, Executors, Administrators, Legal representatives and assignees)

AND WHEREAS the party of the First part is the owner of__________________, hereinafter called the said Property.

AND WHEREAS the First Party wishes to reconstruct the said property after demolishing the old structure and in pursuant to their wish, the First Party, who is the owner and in lawful possession of the

____approaches the Second Party herein who is also a well established

builder engaged in the business of development, promotion and construction of real estates and has approached him to reconstruct the ENTIRE STILT PARKING/FLOOR , ENTIRE GROUN FLOOR, ENTIRE FIRST FLOOR, ENTIRE SECOND FLOOR and ENTIRE THIRD FLOOR, with COMMON LIFT,

As per Annexure attached herewith, part of ENTIRE above mentioned property, on certain terms and conditions appearing hereunder:-

NOW THIS COLLOBRATION AGREEMENT WITNESSESS AS UNDER:-

1. That the subject matter of this collaboration agreement between both the parties is to reconstruct the ____ _____________________, which is owned and possessed by the party of First part.

2. That it has been mutually agreed upon between both the parties that Second Party will construct the Entire above mentioned property out of his own funds, costs and expenses etc. within ______months from the date of SANCTIONING OF THE BUILDING PLAN of the said ENTIRE PROPERTY and the First party shall handover the actual vacant physical possession of the said property for demolition to the second party on or before_______________.

3. That it has been agreed between both the parties that, in addition to the Second party incurring the entire costs and expenses etc. for the construction, will also pay a sum of Rs._________/- (Rupees ______________________only) as Collaboration money to the First Party and out of which the second party has paid a sum of Rs.________________/- (Rupees_________ only) in cash dated _____________. And The balance payment shall be paid by the second party to the first party on or before execution of this agreement.

4. That the First Party will execute/get registered the sale deed of the Entire Ground floor, Entire First floor & Entire second Floor without Roof/Terrace Rights with proportionate right of stilt parking. **PART OF ABOVEMENTIONED PROPERTY**, in favour of the Second Party or his nominee at the time of payment of the Balance amount as mentioned herein above by the second party to the first party and further all expenses of stamp duty in respect of execution of sale deed shall be paid and borne by the Second Party or his nominee.

5. That the First Party have assured the second party that the property in questions freehold in nature and is free from all kinds of encumbrances, such as prior sale, gift, will, lien, litigations, lease, loan, surety, security, acquisition etc.

6. The portions falling to the share of the parties in the newly constructed building shall be as under:-

FIRST PARTY'S ALLOCATION:-

A. ENTIRE THIRD FLOOR WITH ROOF/TERRACE RIGHTS

WITH PROPORTIONATE UNDIVIDED, INDIVISIBLE AND IMPARTIBLE OWNERSHIP RIGHT IN PLOT OF LAND MEASURING _____SQ. YARDS/METERS WITH PROPORTOINATE RIGHTS OF STILT PARKING/FLOOR.

SECOND PARTY'S ALLOCATION:-

A. ENTIRE GROUN FLOOR

A. ENTIRE FIRST FLOOR

B. ENTIRE SECOND FLOOR WITHOUT ROOF/TERRACE RIGHTS.

WITH PROPORTIONATE UNDIVIDED, INDIVISIBLE AND IMPARTIBLE OWNERSHIP RIGHTS IN PLOT OF LAND MEASURING ____ SQ. YARDS/METERS WITH PROPORTOINATE RIGHTS OF STILT PARKING/FLOOR.

7. That the First Party will extend full co-operation, in regard to signing of all required relevant documents without any hitch so that there is no hold up at any stage with any of the administrative agency etc and all the expenses for the construction including to any govt. department shall be paid and borne by the Second party.

8. That the second party shall be liable to get the plan of the said Entire building duly Sanctioned by the competent authorities, out of his own funds and resources and the entire construction work shall be carried out as per the approved Sanctioned Plan/Bye-Laws and Site Plan and working drawing as signed by both the parties prior to the commencement of the construction work.

9. That the strength of the foundation of The Entire building should be so strong that it can hold all the i.e. stilt parking/floor + Ground Floor+3 Floor above Ground floor during any earthquake.

10. That the first party shall not interface/obstruct in any manner in execution and completion of the work of development and construction of the Project/Building as long as the construction is being carried out by the second party/builder as per the working drawing and Annexure, duly signed by both the parties of this deed, but the first party of this deed shall have the right to inspect the Project and check the material at any time and shall further be liable to inform the second party/builder regarding any deviation at the spot.

11. That after construction of the entire building the second Party shall hand over the portions under allocation of the first party to the first party to the first party who shall be the rightful owner of the same.

12. That the Second Party shall be entitled for the sale proceeds of all the Malba/Debris of the Demolition of the existing structure.

13. That the First Party, agree to keep the Second Party harmless from any demand of electric and water charges or any other dues and demands/dispute for the period before the handing over possession of the said property for construction as per date mentioned hereinabove.

14. That the Builder/Second Party shall be liable to pay for all the charges against the consumption of the electricity and water during the course of construction and the first party shall not be held accountable for the same.

15. That the first party shall be liable and responsible to provide NO DUES of the Electricity, Water and House tax of the entire property to the Second party and after completion and handing over of the actual physical possession of the portion under the allocation of the first party, both the parties shall be liable to pay the Electricity Charges, Water Charges and House Tax, directly to the concerned authorities for their respective portions/floors.

16. That the Builder shall provide _____ (_______) separate electric and water meter(s)/connection for the each floor on ______ floor and ____ (_______) separate Overhead Water storage Tanks for each floor on the roof/terrace of the Building and one common submersible for the under ground water for all the floors.

17. That in case of any eventuality or miss-happening with either of the party of this deed, this agreement is conclusive and binding on their respective heirs.

18. Both the parties shall co-operate and accommodate each other in spirit of give and take, cordiality and forbearance.

19. That due care shall be taken by the party of the second Part to maintain the high standard of cleanliness and congenial atmosphere.

20. That the Second Party shall have a proportionate right in the Freehold Land underneath and in the Building constructed thereupon in case the structure/building is completely damaged or is un repairable due to any natural calamity or act of God like Flood, Earthquake etc.

21. That the second party has a right to enter into any agreement to sell/bayana agreement, with any third party/intending purchaser, in respect of portion falling into

his allocation on the basis of this collaboration agreement and to receive the earnest money there from and the first party shall have No Objection to the same.

22. That the Second party shall provide a working LIFT as per the Annexure along with a separate three phase electric meter for the same and the maintenance of the same along with all the common conveniences provided and installed in the building shall be paid and borne by the residents of the building proportionately.

23. That both the parties of this agreement have signed and executed and entered into this agreement with their sweet will and without any outside pressure, force, fraud, coercion while in position of sound health and disposing mind.

24. That in case of any dispute between both the parties of this deed during the course of construction the same will be settled through arbitrators by the mutual consent of both the parties and they decision shall be final and binding upon both the parties.

25. That if any Court Case is initiated by any of the party of this deed, the case shall be exercised within the jurisdiction Courts of The Delhi Courts.

26. That both the parties of this Agreement are Citizens of India, have not been debarred from entering into this Agreement.

ANNEXURE

IN WITNESSES WHEREOF, BOTH THE PARTIES HAVE SIGNED THIS AGREEMENT AT DELHI ON ____________.2010, IN THE PRESENCE OF THE FOLLOWING WITNESSES.

WITNESSES:-

1. (SIGNED FIRST PARTY/OWNER)

2. (SIGNED SECOND PARTY/BUILDER)

SERVICE TAX ISSUE RELATING TO IMMOVABLE PROPERTY

BY CA. MADHUKAR N. HIREGANGE AND CA. SUDHIR VS

Renting of Immovable Property Services:

Renting of immovable property service was brought under service tax net with effect from 01.06.07. This levy has led to a lot of confusion as one does not associate letting out of immovable property with the concept of service for the simple reason that there is strictly speaking, no service involved. This aspect however this year has been addressed by the Delhi High Court in responding to the writ petition filed by certain assesses who had challenged the levy of service tax on the renting of immovable property. The High Court has in Home Solution Retail India Ltd Vs Union of India (2009-TIOL-196-DEL-HC-ST) sought to draw a distinction between "service in relation to renting of immovable property" and "renting of immovable property" and held that renting in itself would not amount to provision of taxable service and held both notification 24/2007 ST and circular 98/1/2007 ST to be ultra vires the Act as far as requirement for levy of service tax on renting is concerned. In the meantime the Finance Act 2010 has amended the definition of the taxable service in this respect, retrospectively from the date of introduction of the service, to include mere renting of immovable property also in the tax net. But Delhi High Court has again granted stay to Home solution Retail (I) Ltd. in W.P. (c) No 3398 of 2010 on 18.05.2010 from payment of service tax on mere renting of immovable property. This, in view of the authors is an indicator as to the interpretation which could possible be take by the Courts though the Supreme Court is yet to decide in respect of writ petitions lying before it further there could be questions as to the applicability of the decision of the High Court to areas outside its jurisdiction if one were to consider Article 226 of the

Constitution of India. Service provides who have been charging service tax would be better off continuing to do so until the matter is finally decided by the Supreme Court.

One of the main drivers in taxing this category could have been the fact that in developed countries which are under a unified VAT the rents are also liable one saving grace is that the property should be used for business or commerce. In other words where letting out is not for business or commerce, there would be no liability.

Renting by or to a religious body has been exempted as well as renting to an educational body other than commercial training or coaching centre. Moreover, renting of vacant land would not be liable except where vacant land is given on lease or license and a building or a temporary structure is constructed for use in furtherance of business or commerce. Buildings used solely for residential purposes or for accommodation including hotels, hostels, boarding houses, tents, camping facilities etc. would also not be liable.

From the gross amount charged, deduction would be available for the property tax levied and collected by the local authorities with the calculation of deduction being on a proportionate basis under Notification 24/2007 ST dated 22.05.07 There is no deduction for interest and penalty and what is deductible is property tax paid.

Where there is a case of co-ownership, one should proceed on a reasonable basis to ascertain his respective share in the property and the basis being adopted for income tax assessment could possibly be followed here. However the agreements would be critical here. Even those cases where there is temporary letting out of spaces without there being an associated transfer of the right of position and effective control over such space, to the user, is to be covered under the tax net. Thus spaces let out in malls for vending machines, cinema theatres etc, would be liable.

2. CONSTRUCTION RELATED SERVICES

A) Works contract service

This entry would be applicable to the following existing service providers :

- Industrial and Commercial Construction
- Construction of Complex
- Erection, installation and Commissioning

If there are works contracts which cover activities not coming under the ones specified above, they would have to be taxed under other existing heads and consequently, the composition benefit in such cases would not be available. In such a scenario, the existing notifications such as 12/2003 ST and 1/2006 ST would have to be relied upon to get any deduction.

For pure labour services where there is no material involved the service would continue to be covered under the above categories as the definition of works contract makes it clear as to the requirement of transfer of property in goods for a contract to be liable under this category.

Whether joint development liable ?

One thing the assessees have to analyse is whether there exists a service provider who provides the works contract service and a service receiver who receives such service. In the absence of such service, there would not be a liability under service tax. Sometimes, the construction activity may not be undertaken on behalf of a client/customer but may be undertaken by the builder/developer on his own account and the constructed property sold to buyers. In such situations, there would be no liability under service tax as there is no distinct service provider and service receiver and the builder/developer cannot provide service to himself. This has also been

decided by the Gauhati High Court in Magus Construction (P) Ltd. Vs. UOI (2008 (11) STR 225 (Gau)

The assessees are advised to be careful even where partly constructed property plus land is transferred to prospective buyers and then the remainder of construction work undertaken on their behalf as the entire amount involved in the project would not be liable to service tax because of the land and partly built up unit being sold/transferred to the buyers and then works contract service in relation to construction being provided. Due care is to be taken to ensure that the agreements are properly drawn up to indicate the various components and the amounts being charged for the same.

Composition Scheme

Works contract (Composition Scheme for Payment of Service Tax) Rules 2007 has been notified vide Notification 32/2007 ST dated 22.05.2007 by the Central Government for the purpose of specifying the scheme for composition. The person executing works contract has the option to pay tax under the composition scheme at the rate of four percent (rate changed from earlier rate of 2% by notification 7/2008 ST wef 01.03.2008) on the gross amount charged for the works contract. Gross amount shall not include the VAT or sales tax paid on the goods transferred during the execution of such works contract but shall include the value of all goods used in or in relation to the works contract whether supplied under any contract for a consideration or otherwise and all services used for execution of the works contract (notification 23/2009 dated 07.07.2009). The option is to be exercised prior to payment of service tax in respect of the said works contract and once exercised, shall be in force till the completion of the works contract.

Exemption

Services in relation to execution of works contract provided by any person to any other person in relation to construction of ports or other ports has been exempted from service tax. This exemption shall not extend to services of completion, finishing, repair, alteration, renovation, restoration, maintenance or repair.

A new Rule 2A has been inserted by notification 29/2007 ST dated 22.05.2007, which prescribes the valuation method in case of works contract service. The value of works contract service shall be equivalent to the gross amount charged for works contract less the value of goods transferred in respect of which VAT/sales tax has been paid, during the course of execution of works contract. The gross amount shall not include the VAT and sales tax paid on the goods transferred. The service provider shall ensure that the value of works contract service as aforesaid shall include the following –

- Labour charges for execution of the works
- Amount paid to sub-contractor for labour and services.
- Charges for planning, designing and architect's fees
- Charges for obtaining on hire or otherwise, machinery and tools used for execution of the works contract.
- Cost of consumables such as water, electricity, fuel used in the execution of the works contract.
- Cost of establishment of the contractor relatable to supply of labour and services
- Other similar expenses relatable to supply of labour and services and

- Profit earned by the service provider relatable to supply of labour and services

Cenvat Credit:

Where the service provider opts for the composition scheme for the purpose of payment of service tax, he shall not take cenvat credit of duty and cess paid on inputs used in relation to such works contract. However the credit on capital goods used for providing the service as well as the input service credit (sub contractors, insurance, telephone, manpower supply, architect, security, supply of tangible goods, etc) would be available. Where the service provider does not opt for composition scheme, he should be entitled to cenvat credit on inputs, input services and capital goods used in execution of such works contract.

Possible Issues:

(1) Whether the works contractor can continue under the existing entries for ongoing contracts?

Comments : Since there is a new entry it is presumed that service providers may have to choose considering the principles of Section 65A on classification. However if they do not transfer any materials they would continue under construction or erection categories. Herein it is important to note that the department letter F.No. B1/16/2007 TRU dated 22.05.2007 goes on to say that contracts which are treated as works contract for levying VAT/sales tax shall also be treated as works contract for levying service tax. However, this letter would have to be seen in the light of the explanation to section 65(105)/zzzza), which deals with the contracts which can be regarded as works contract under this category.

(2) Whether the works contracts involving materials in progress can also opt for the new entry though earlier they were registered under the old entries?

Comments: Assessees may note that the department had come out with circular 98/1/2008 ST dated 04.01.2008 which clarified that where service providers had classified their services under other categories viz., erection, commissioning or commercial or industrial construction or construction of complexes, they could not reclassify the single composite service under works contract. This circular also emphasized the fact that a works contract could not be vivisected and that the same was not legally sustainable.

(3) Whether the option of availing the credit on all the inputs (cement, steel, glazing, titles etc) and paying the service tax on the gross amount is still available?

Comments: The composition scheme is optional and the works contractor can even pay service tax on a value arrived at as aforesaid at the normal rate. The law as it stands today is silent regarding the cenvat credit on inputs in such a scenario as the credit has been expressly barred only in case of an assessee opting for composition scheme. The assesee can as per the humble view of the authors, pay service tax on the gross amount for the service which should include the value of materials transferred if they are to avail cenvat credit of the excise duties on the materials used for the construction work/works contract service. This could enable the contractor to bring down his construction costs and the benefit of such reduced costs, can be passed on to his buyer.

(4) Whether the option chosen under VAT law has any bearing for the classification or valuation under this new entry?

Comments: The WC option provides for the option of deducting the value on which VAT has been paid and on the balance the service tax would be leviable. This option if chosen would require that the regular scheme under VAT has been opted for. However for the composition scheme the method under VAT is not relevant.

(v) Whether the service providers under the categories were not liable for works contracts earlier to this entry?

Comments: The entry read with the department circular indicates that works contracts were not earlier covered. The purpose for which this entry was bought in also is favourable to this interpretation. Therefore it can be construed that there was no liability earlier. This could lead to a situation where the service provider who has paid the service tax from his pocket (not recovered from the customers) could go for a refund especially if the same was done in pursuance of an investigation.

(vi) Whether the sub contractors would be exempt as the main contractor is paying the service tax?

Comments : The sub contractors would also have to discharge the ST under works contract or other categories and would be liable for the tax unless they are below Rs. 10 Lakhs.

(B) Construction of Complexes:

Section 65(91a) defines "residential complex" to mean any complex comprising of –

(a) A building or buildings, having more than 12 residential units;

(b) A common area; and

(c) Any one or more of facilities or services such as park, lift, parking space, community hall, common water supply or effluent treatment system, located within a premises and the layout of such premises is approved by an authority under any law for the time being in force,

But does not include a complex which is constructed by a person directly engaging any other person for designing or planning of the layout, and the construction of such complex is inended for personal use as residence by such person.

Further an explanation is added to the construction of complex service definition vide the Finance Bill, 2010 in section 65 (105)(zzzh) which states that where the complex in intended for sale, wholly or partly, then any sum received from the prospective buyer by the builder before, during or after construction; before the grant of the completion certificate by the competent authority would be deemed to be service provided and hence taxable.

There are two explanations to this clause which are as follows –

(a) “personal use” includes permitting the complex for use as residence by another person on rent or without consideration;

(b) “residential unit” means a single house or a single apartment intended for use as a place of residence

Thus, in order to be regarded as a residential complex, a complex should have more than 12 residential units. Where this condition is not satisfied, there cannot be a liability under this heading. Readers may note that the definition of “residential complex” given above would hold good even under works contract category. Thus

where the service of construction of complex is involved with transfer of property in goods during such execution, the said complex is required to have more than 12 residential units in the absence of which, the said service would not be liable even under works contract service.

The term “complex” has not been defined and if one refers Random House Webster’s Unabridged Dictionary, “complex” has been defined to be composing of many interconnected parts.

Service provider-service receiver relationship:

Circular No. 96/2007 ST dated 23.08.2007 talks about the importance of service provider and service receiver relationship existing in order to attract liability under service tax. This circular clears doubts about liability when the builder/developer himself constructs the residential complex. When the construction work is not taken up by another contractor and the builder/developer/promoter himself undertakes the same, there is no service provider-service receiver relationship and the services are in the nature of self supply and hence not liable to service tax.

Whether sub-contractor liable?

The aforesaid circular also clarifies the liability of the sub-contractor who provides taxable service in relation to construction of residential complex (i.e. complex having more than 12 residential units). Where the builder/developer/promoter appoints a contractor for carrying out the construction work, such contractor would be liable to service tax. The liability would be on the gross amount for the taxable service. The circular also goes on the clarify that wherever apportion of the work is sub-contracted and the sub-contractor provides taxable service, he would be liable to pay service tax.

In Magus Construction Pvt. Ltd. Vs UOI (2008 (11) STR (Gau.)), the High Court held that where the flats/premises were constructed and then transferred to the buyers/customers under a sale agreement on completion of construction and the agreements had been relied on by the registering authorities and stamp duty levied on the basis of such agreement, the transaction was one of sale and not service and hence service tax could not be levied. This position had also been maintained earlier by the Allahabad High Court in Assotech realty Pvt. Ltd. Vs State of UP (2007 (07) STR 129 (All).

Circular 108/02/20098 ST 29.01.2009:

This circular discusses the liability where the flats/properties are transferred by the builders/promoters/developers after completion of construction by them and transfer is by executing a sale deed after receipt of full payment. Where the property is so transferred, there would not be service tax liability.

However, if the construction work is undertaken by another contractor hired by the builder/promoter/developer, then such contractor would be liable to service Tax as the service provider-service receiver relationship would come into play. This has also been indicated by the circular 96/7/2007 ST stated earlier.

Another aspect which has been clarified by the circular is with regard to liability where the construction, planning and design are undertaken by the builder or promoter or developer in pursuance of a contract with the ultimate owners (being the flat owner/residents). In such a scenario, the service tax liability would not arise where the property is intended for personal use of the ultimate owner. This is an important clarification as the builder/flat owners can no examine the option of refund where service tax had been collected from them.

Where however, a contractor is hired for construction by the developer/builder, the position for the contractor would be the same as explained earlier i.e. the contractor would be liable to service tax.

Exemption:

Assessees who are liable under this heading would be entitled to the benefit of notification 1/2005 ST dated 01.03.2006 which exempts taxable service of the value of 67% of the gross amount charged from service tax. In other words, service tax would be payable on 33% of the gross amount. The assesses would have to keep couple of points in mind –

1. This exemption is not available in respect of completion and finishing services alone being provided.
2. The gross amount shall have to include the value of materials and goods transferred during construction as well
3. The service provider would not be entitled to benefit of Cenvat credits on inputs, input services and capital goods used for the said service as well as benefit of notification 12/2003 ST

Assessees are also advised to be careful while opting for the benefit of this notification where the contract involves transfer of property in goods which are of high value. In such circumstances, the assessee would lose out on the credits of excise duties on construction materials as the benefit of credits can be claimed only when the service provider pays service tax at the normal rate i.e. 10.3%. This can at times prove to be a better option as the excise duties would go towards reducing the cost of materials used in construction, a benefit which can be passed on to the service receiver.

What is the distinction between the category of works contract service and this category?

Readers may note that there are two categories which virtually which virtually cover the same set of activities though with a difference. The works contract category covers the activities specified in clauses (a), (b) and (c) in the definition of “construction of complex” given above within its scope. However, assessees would have to ensure that the service they provide is classifiable under the heading works contract service. This can happen where the service in relation to construction of complex involves transfer of property in goods during its execution. Unless there is transfer of property in goods, the same would not be classifiable under works contract.

Whether the buyers of the apartment can opt for claiming refund of service tax?

Yes, if the buyer has borne the incidence of the amount collected as service tax they can apply for the refund. The amounts paid for the past 1 year as set out in section 11B would be clearly available. However for the period prior to that the matter may have to be litigated on the argument that the amount was not a tax at all as there was no liability under law for the same.

Special Service by Builder:

This service intends to cover the charges collected by the builder from the prospective buyer for providing preferential location or for the development of residential complex, or a commercial complex. This service does not include the service provided in relation to Repairs, Management or Maintenance, commercial or industrial construction, construction of complex and in relation to parking place.

Explanation defines “preferential location to mean to have any location having extra advantage which attracts extra payment over and above the basic sale price. The

definition is very wide to cover the development of commercial or residential complex, However the TRU circular has clarified that scope of tax under this service to be internal or external development charges which are collected for

a) developing/maintaining parks,
b) laying of sewerage and water pipelines,
c) providing access roads and common lighting etc;
d) fire-fighting installation charges;
e) power back up charges etc.

Hence any amount collected by the builder in this respect will not get taxed prior to the introduction of this service.

TRU circular also clarifies Development charges, to the extent they are paid to State Government or local bodies, would be excluded from the taxable value levy, however the notification for the same is not in place as of now.

CONVEYANCE ON SALE OR SALE-DEED

FORMAT NO. 1

CONTRACT FOR THE SALE OF HOUSE

An agreement made the …………….. day of …………….. 20…………between (vendor) of the one part and ………………… (purchaser) of the other part. The said A as absolute owner will sell and the said B will purchase free from all encumbrances all that house with land and out-houses attached thereto situated at ………………….. and numbered…………………… bounded as follows: North by …………………. East by ………………….South by ……………………and West by ………………………. Containing ……………………… square yards of land, and all the furniture therein according to the list annexed hereto, for the sum of Rs. ………… whereof Rs. ………………….have been paid as earnest money at the time of the execution of these presents and the residue shall be paid on the day of ………………. Next when the purchase shall be completed. The vendor shall within………… days from the date hereof adduce before the purchaser or his nominee evidence of his good and marketable title to the premises hereby agreed to be sold and thereafter upon the payment of the said sum of Rs………………. The vendor and all other necessary parties, if any, will execute a proper sale-deed of the premises to the purchaser; such sale-deed to be prepare by and at the expense of the purchaser and to be submitted by him to the vendor for approval not less than ……………… days before the said …………. day of ……………………..

Possession will be retained by the vendor up to the said …………… day of …………….. and from that day all rates and taxes and outgoing relating the said premises shall be discharged and possession taken by the purchaser; if necessary an apportionment of such rates, taxes and outgoings shall be made between the

vendor and the purchaser. If from any cause whatever the purchase shall not be completed on the said day of ……………… the purchaser shall pay interest at the rate of Rs. …………………… percent per annum on the unpaid purchase-money from that day until the completion of the purchase. No error, misstatement or omission in the description of the property shall annual the sale; but compensation shall be allowed or given as the case may require and shall be settled by two arbitrators, one to be named by the vendor and the other by the purchaser, or by an umpire to be appointed by the arbitrators before they enter upon the reference, and the decision of such arbitrators, or of their umpire if they disagree, shall be final.

In witness where of ……………………..

Signature of Parties

FORMAT NO. 2

AGREEMENT WHEN POSSESSION GIVEN TO PURCHASER

BEFORE COMPLETION OF SALE

This agreement made between ………………….. (hereinafter called the vendor) and ………………. (hereinafter called the purchaser).

Whereas by a contract in writing bearing date …………… and made between the parties hereto the said vendor has agreed to sell to the said purchaser who has thereby agreed to purchase freed from all charges and encumbrances all that (description of the property) together with the appurtenances thereunto belonging and whereas the said purchaser being desirous of taking immediate possession thereof the said vendor has consented thereto on his entering into the arrangement hereinafter expressed;

Now these presents witness that in pursuance of such arrangement and in consideration of the agreement on the part of the said purchaser hereinafter stated he the said vendor, hereby agrees that he will on or before the ……………. day of ………… deliver up to him, the said purchaser, complete possession of the said premises as if the sale thereof to him had now been completed;

And also that the said purchaser shall be at full liberty to make all such alterations in and additions to the said dwelling-house and out-offices as he shal require, but subject to the previous approval in writing of the said vendor which shall not be unreasonably withheld but so as the said premises shall not in any manner deteriorate in value;

And also that such taking of possession and making such alterations and additions shall not be deemed in any manner to prejudice or affect the rights of the said parties under the said contract of sale;

And it is hereby further mutually stipulated and agreed that the entry by the purchaser into possession shall not be deemed an acceptance by him of the title of the vendor to the said premises or a waiver of the said purchaser's rights to require proof of a good and marketable title hereto of the vendor according to the hereinbefore recited contract but that such possession shall be considered as taken conditionally upon and without prejudice to the due performance of the said contract by the said vendor in all respects:

In witness whereof…………………….

(Signature of Parties)

FORMAT NO. 3

AGREEMENT FOR SALE OF A HOUSE

This agreement made ………………. the day of …………….between A, adult son of B resident (hereinafter called the seller of the one part) C adult son of D resident (hereinafter called the purchaser) of the other part:

Witnesseth as follows:

1. That the seller agrees to sell and the purchaser agrees to purchase for the sum of Rs. …………….. House No. ………………... owned and possessed by the seller as an absolute owner and situated on ……………… and bounded as follows:-

North ……………….. South ………………. East …………… West …… Containing by admeasurement ………… Square meters of land together with all buildings, structures and outhouses and rights, easements and privileges enjoyed and privileges enjoyed therewith.

2. That Rs. ……………. Have been paid as earnest money by the purchaser to the seller by means of Cheque ………………Demand Draft No……………….. dated …………………. On the ………………. and the balance of Rs………………… shall be paid at the time of the execution of the sale-deed (or before the Registering Officer).

3. That the sale-deed shall be executed on or before the day of …………… Where upon the purchaser shall be entitled to immediate possession of the property sold to him.

4. That the seller shall guarantee his sole and absolute title in the property to be sold and shall enter into all the usual covenants.

5. That the property sold is free from encumbrances (or that the property is subject to the following encumbrances (details of encumbrances) and shall be sold

subject to them, or which shall be discharged by the seller before the completion of the sale in favour of the purchaser).

6. That within two days from today the seller shall produce all the title-deeds of the house for inspection of the purchaser or of his nominee at ………… (place) and that in case the seller is unable to prove the marketable title that he has agreed to sell to the purchaser in the property agreed to be sold, it shall be open to the purchaser to cancel this agreement and to demand the return of the earnest money paid by him, and which shall be immediately returned by the seller.

7. That all taxes and expenses relating to the property upto the date of the completion of the sale shall be paid by the seller, and thereafter by the purchaser, and that all rents, profits and income upto that date shall be taken by the seller and thereafter by the purchaser.

8. That if the seller makes default in the performance of any of the conditions of this agreement, he shall pay Rs. …………………….by way of compensation to the purchaser for such default; and if the purchaser makes default in the performance of any of the conditions to be performed by him under this agreement, then the seller shall be entitled to forfeit the whole of the earnest money of Rs……………… paid to him; and that the party not in default shall be further entitled at his discretion either to annual this agreement or to specifically enforce it, in addition to any remedy that may be open to him.

9. That the expenses of the sale shall be paid by the seller/purchaser/by both parties in equal shares.

10. That the title deeds of the property shall be handed over to the purchaser by the seller at the time of the completion of the sale. Or (That the seller shall retain but will undertake to produce for inspection by the purchaser, whenever reasonably

required to do so, the following title deeds which relate to the property sold alongwith the other property of the seller) (List of the title deeds)………………..

11. That this agreement shall bind the above parties and their respective heirs, representatives and assigns.

12. That if there by any difference or dispute between the parties on any matter arising hereunder or claimed so to arise the same shall be referred to the arbitration of………………….. whose award thereon shall be final and binding on the parties.

In witness whereof…………..

(Signature of Parties)

FORMAT NO. 4

SALE-DEED

This conveyance / sale-deed made on the …………….. day of 20…… between A, adult son of B, resident of …………………….. (hereinafter called the seller / vendor of the one part and C, adult son of D, resident of ………………….. (hereinafter called the purchaser of the other part.

Whereas the Seller/Vendor is in possession as an absolute and sole owner/beneficial owner of the house/premises intended or expressed to be hereby sold and transferred free from all encumbrances:

And whereas the Seller/Vendor has agreed with the purchaser for the absolute sale to him of the said house/premises for the sum of Rs………………….

Now this conveyance/sale-deed witnesseth that in pursuance of the agreement in consideration of the sum of Rs. ……………… paid to the seller/vendor by the purchaser (the receipt whereof the seller/vendor hereby acknowledges in manner following, that is to say, Rs. …………. Received as earnest money on the ………… day of 20…… by means of a cheque No. on the …………. Drawn and the balance amount of Rs………………… received at the time of the execution of these presents, or before the Registering Officer) the seller as sole and absolute owner/beneficial owner hereby sells/conveys/transfers to the purchaser.

All that residential house No………… and bounded as follows:-

North…………….. South………………… East……………. West…………

Containing by admeasurements ……………….. square meters or thereabouts of land and more particularly delineated and described in red on the map or plan hereto annexed together with all lands, structures, servant quarters, out-offices and other buildings attached hereto, and all rights, privileges and appurtenances held or enjoyed with or appurtenant to the same or reputed or known so to be; To have and

to hold the same unto the purchaser in absolute ownership, free from encumbrances.

And the seller/vendor hereby covenants with the purchaser that he the purchaser may at all times hereinafter possess and enjoy the said house/premises hereby sold/conveyed /transferred to him without any obstruction or hindrance by or on behalf of the seller or any person or persons or persons claiming under or through him;

And also that the seller/vendor and all such person or persons shall at any time hereafter at the request and cost of the purchaser do and execute al such acts and deeds as may be reasonably required more effectively to transfer and sold assure the house/premises hereby sold/conveyed/transferred to the purchaser.

It is further declared that the expressions the 'seller' and the 'purchaser' include the respective heirs, legal representatives, executors, administrators and assigns of the said A and the said C.

In witness whereof the seller/vendor and the purchaser have hereunto set and subscribed their respective hands/signatures in the presence of;

Witnesses

1. Sd……………….. A.

2. Sd………………… B

Service Tax on Realty is Reality

By: CA Ashok Batra & CA Abhishek Batra

At present, everyone wishes to enjoy the gains of real estate and so do our Government as the Finance Ministry has taken necessary legislative actions to collect service tax from all who are enjoying the gains of real estate.

Service tax has been levied on all real estate transactions starting from the first transaction of appointing an agent for negotiating a deal between the buyer and seller of real estate till the end use of the real estate i.e. renting or self use by the buyer of the real estate. According to the provisions of law governing Service Tax, there are seven different categories of taxable services which bring everyone associated with real estate transactions within the ambit of Service Tax. These seven taxable services are as under:

a) Real Estate Agent's Services
b) Works Contract Service
c) Commercial or Industrial Construction Service
d) Complex Construction Service
e) Erection, Commissioning & Installation Services
f) Special Services by Builders
g) Renting of Immovable Property Services

Real Estate Agent's Services

Real Estate Agent's Services was introduced way back on 16.10.98 in the primitive years of service tax. Service tax under this category is payable by *Real Estate Agent* who is a person engaged in providing any service in relation to sale, purchase, leasing or renting of real estate and includes a *real estate consultant*. *Real Estate Consultant* is a person who provides in any manner, either directly or indirectly, advice, consultancy or technical assistance, in relation to evaluation, conception, design, development, construction, implementation, supervision, maintenance, marketing acquisition or management of real estate.

It is one of the simplest service amongst all the taxable services wherein tax is payable by the real estate agent on the gross amount charged by him for providing any service to any person in relation to real estate. However off late, the Department has sought service tax under this category from real estate developers on the amount of administrative charges recovered by them from the owners of the flats at the time of sale/purchase of flats on which final view has yet to be taken by court.

Construction related Services

Construction i.e. actual construction and not deemed construction related services are mainly taxable under the category of Works Contract Service as in the present world the developer/builder of real estate irrespective of its size prefers to have a comprehensive contract of construction involving supply of material as well as provision of labour .

Taxable service in relation to Works Contract Service means any service provided or to be provided to any person, by any other person in relation to the execution of a *works contract*, excluding works contract in respect of roads, airports, railways, transport terminals, bridges, tunnels, dams and canals. Section 65 (105) (zzzza) of Chapter V of the Finance Act 1994 which defines taxable service in relation to works contract service has specifically defined and restricted the service tax applicability to a contract wherein,—

(i) transfer of property in goods involved in the execution of such contract is leviable to tax as sale of goods, and

(ii) such contract is for the purposes of carrying out,—

- (a) erection, commissioning or installation of plant, machinery, equipment or structures, whether pre-fabricated or otherwise, installation of electrical and electronic devices, plumbing, drain laying or other installations for transport of fluids, heating, ventilation or air-conditioning including related pipe work, duct work and sheet metal work, thermal insulation, sound insulation, fire proofing or water proofing, lift and escalator, fire escape staircases or elevators; or
- (b) construction of a new building or a civil structure or a part thereof, or of a pipeline or conduit, primarily for the purposes of commerce or industry; or
- (c) construction of a new residential complex or a part thereof; or
- (d) completion and finishing services, repair, alteration, renovation or restoration of, or similar services, in relation to (b) and (c); or
- (e) turnkey projects including engineering, procurement and construction or commissioning (EPC) projects;.

Service Tax in respect to services provided in execution of works contract was introduced with effect from 01.06.2007 and is payable upon gross amount charged for the works contract less the value of transfer of property in goods involved in the execution of the said works contract.

The gross amount charged for the works contract shall not include Value Added Tax (VAT) or sales tax, as the case may be, paid, if any, on transfer of property in goods involved in the execution of the said works contract. However it shall include the following-

- (i) labour charges for execution of the works;
- (ii) amount paid to a sub-contractor for labour and services;
- (iii) charges for planning, designing and architect's fees;
- (iv) charges for obtaining on hire or otherwise, machinery and tools used for the execution of the works contract;

(v) cost of consumables such as water, electricity, fuel, used in the execution of the works contract;

(vi) cost of establishment of the contractor relatable to supply of labour and services;

(vii) other similar expenses relatable to supply of labour and services; and

(viii) profit earned by the service provider relatable to supply of labour and services;

Contractors have also been given an alternative option for making payment of service tax in respect to Works Contract Services provided by them. The Works Contract (Composition Scheme for Payment of Service Tax) Rules 2007 has been introduced whereby the Contractor may discharge its liability towards payment of service tax by paying an amount equivalent to 4% of the gross amount charged for the works contract. The gross amount charged for the works contract shall be the sum including:-

(i) value of all goods used in or in relation to execution of works contract, whether supplied under any other contract for a consideration or otherwise, and

(ii) value of all services that are required to be provided for execution of the works contract, and

(iii) charges for obtaining machinery and tools used in execution of said works contract on hire.

However, the gross amount charged for the works contract shall exclude-

a) VAT/Sales tax paid on transfer of property in goods involved in execution of said works contract, and

b) The cost of machinery and tools used in the execution of the said works contract.

Composition Scheme available to Contractors has been marred by number of issues, however with the passage of time these issues got resolved. The gist of the issues related with Composition Scheme along with their resolutions is hereunder:

S. No	Issue	Resolution
1.	Availability of Cenvat Credit	Cenvat Credit of service tax paid on input services and duty paid on purchase of capital goods is available to Contractor opting for Composition Scheme. No credit of duty paid on inputs is available to Contractors
2.	Whether cess is payable on the amount paid under composition scheme.	Amount paid by the Contractor under Composition Scheme is in lieu of service tax payable, therefore cess is payable over and above the amount paid. In other words, the effective rate of payment of amount under

		Composition Scheme is 4.12.%
3.	Whether gross amount charged shall include the value of material provided by Contractee.	This issue got settled with the amendment to the Composition Scheme Rules on 07.07.2009 with the insertion of explanation to Rule 3 vide notification no 23/2009. The inserted explanation provided that the gross amount shall include value of all goods used in or in relation to execution of works contract, whether supplied under any other contract for a consideration or otherwise. Hence, prior to 07.07.2009, the gross amount charged did not included the value of material provided by Contractee.
4.	What is the position of contracts which were under execution as on 01.06.2007 i.e. on the date of introduction of this taxable service and whether Composition Scheme can be availed by such a Contractor	Circular no 96/7/2007 dated 23.08.2007 clarified that pre existing contracts as on 01.06.2007 shall continue to be classified under the category of taxable service in which they were classifiable at the time of initiation of the contract. The clarification given by the Board has also got support from the latest judgment of Andhra High Court in the case of Nagarjuna Constructions. In the judgment the Hon'ble Court has held that the Contractor cannot avail Composition Scheme for a contract under execution as on 01.06.2007, if payment of service tax has been made under any other taxable service in the prior periods

So far the discussion regarding taxability of construction related services was limited to Works Contract Services. However, such services were taxable under the following three categories of taxable services prior to introduction of Works Contract Service i.e. till 31/05/2007:

a) Commercial or Industrial Construction Service
b) Complex Construction Service
c) Erection, Commissioning & Installation Services

The scope of these categories of taxable services is determined and limited to the definition of following terms:

Commercial or Industrial Construction	**Construction of Complex**	**Erection, Commissioning & Installation**
(a) construction of a new building or a civil structure or a part thereof; or (b) construction of pipeline or conduit; or (c) completion and finishing services such as glazing, plastering, painting, floor and wall tiling, wall covering and wall papering, wood and metal joinery and carpentry, fencing and railing, construction of swimming pools, acoustic applications or fittings and other similar services, in relation to building or civil structure ; or (d) repair, alteration, renovation or restoration of, or similar services in relation to, building or civil structure, pipeline or conduit, which is – (i) used, or to be used, primarily for; or (ii) occupied, or to be occupied, primarily with; or (iii) engaged, or to be engaged, primarily in, commerce or industry, or work intended for	(a) construction of a new residential complex or a part thereof, or (b) completion and finishing services in relation to residential complex such as glazing, plastering, painting, floor and wall tiling, wall covering and wall papering, wood and metal joinery and carpentry, fencing and railing, construction of swimming pools, acoustic applications or fittings and other similar services, or (c) repair, alteration, renovation or restoration of, or similar services in relation to, ***residential complex*** - Section 65 (30a) "Residential Complex" means any complex comprising of- (i) a building or buildings, having more than twelve residential units, (ii) a common area, and (iii) any one or more facilities or services such as park, lift, parking space, community hall, common water supply or effluent treatment system, located within a premises and the layout of such premises is approved by any authority under law for the time being in force, but does not include a complex which is constructed by a person directly engaging any other person for designing or planning of the layout, and the construction of such complex is intended for personal use as residence by such person. Explanation-For the removal of doubts, it is hereby declared that for	Any service provided by a commissioning and installation agency in relation to,- (i) erection, commissioning or installation of plant, machinery, equipment or structures, whether pre-fabricated or otherwise, or (ii) installation of – (a) electrical and electronic devices, including wirings or fitting therefore; or (b) plumbing, drain laying or other installations for transport of fluids; or (c) heating, ventilation or air-conditioning including related pipe work, duct work and sheet metal work; or (d) thermal insulation, sound insulation, fire proofing or water proofing; or

commerce or industry, but does not include such services provided in respect of roads, airports, railways, transport terminals, bridges, tunnels and dams'- Section 65 (25b)	the purpose of this clause,- (a) "residential use" includes permitting the complex for use as residence by another person on rent or without consideration, (b) "residential unit" means a single house or a single apartment intended for use as a place of residence.- Section 65 (91a)	(e) lift and escalator, fire escape staircases or travelators; or (f) such other similar services- Section 65(39a)

These three categories of services were introduced on different dates and were amended again and again so as to bring to their current state.

Service tax is payable on the gross amount charged by a person for the aforementioned services provided or to be provided to any person. As stated above, presently comprehensive construction contracts are undertaken by contractor wherein material as well as labour is supplied by contractor and keeping into consideration the nature of industry, the Government provided an alternative to the contractors for payment of service tax in these categories of services. The alternative which has been made available to the contractor is to make payment of service tax after availing an abatement of 67% of the gross amount charged with restriction towards non availment of Cenvat Credit. The gross amount charged in this case shall include value of goods sold while providing Erection Commissioning & Installation Services and provided or used while providing Commercial or Industrial Construction Services as well as Complex Construction Services.

In addition to the above, there is another mechanism available to the contractors for discharging their liability of service tax in respect to construction related services provided by them. The contractors can avail exemption provided to all service providers vide notification no. 12/2003 towards the value of goods and materials sold by service provider to the recipient of service subject to condition that there is documentary proof specifically indicating the value of said goods and materials. There is another rider attached with this exemption notification in respect to non availment of Cenvat Credit of duty paid on inputs and capital goods. However there is no restriction towards availment of Cenvat Credit of service tax paid on input services. It wont be inappropriate to state that sale has been defined as transfer of physical possession as per the provisions of law governing excise duty and the same has been extended to service tax also as per section 65(121) of the Finance Act 1994. Hence the availability of Cenvat Credit of service tax paid on input services is the distinguishing feature between abatement provided vide notification no. 1/2006 an exemption granted notification no. 12/2003 as both intends to provide relief for goods and materials supplied while provision of service.

Taxability of Services provided by Builders/Developers while selling Real Estate

The Hon'ble Supreme Court of India in its decision in case of M/s. Raheja Development Corporation v. State of Karnataka [2005 NTC (Vol. 27)-243] [2006] 3 STR 337 (SC) has clarified "that the activities undertaken by builders for construction

of flat/building for or on behalf of the prospective customers for consideration in cash or deferred payment is covered under the works contract and not under sale". As per this judgment, builders are acting as contractor for the buyer of flat if such builder is getting payment in installments from the buyers of flats during the construction period.

This led to a precarious situation under service tax as the Board vide Circular No. 80/l0/2004-S.T., dated 17-9-2004 [(172) E.L.T. T3} has clarified that "Estate Builders" (i.e. who gets such construction done) are not covered under the ambit of these services. However DGST Mumbai considering the above decision issued a clarification vide Order No. V/DGST/22/AUDIT / MISC/1/2004, dated 16.02.2006 that if the construction is undertaken by the builder for prospective customer under an agreement for sale and after construction, the rights in property have been transferred to the said prospective purchasers, the activity will amount to "work contract" or taxable service is covered under the Service Tax and not sale. Notices were issued and writs were being filed in all these against the notices issued for recovery of service tax from developer/builders in respect to sale of flats made by them wherein payment was linked to the construction of flat.

In 2009, the Government gave a breather to the real estate industry on this issue by issuing Circular No. 108/02/2009-ST dt. 29.01.2009. This Circular clarified that the initial agreement between the promoters / builders / developers and the ultimate owner is in the nature of 'agreement to sell'. Such a case, as per the provisions of the Transfer of Property Act, does not by itself create any interest in or charge on such property. The property remains under the ownership of the seller (in the instant case, the promoters/builders/developers). It is only after the completion of the construction and full payment of the agreed sum that a sale deed is executed and only then the ownership of the property gets transferred to the ultimate owner. Therefore, any service provided by such seller in connection with the construction of residential complex till the execution of such sale deed would be in the nature of 'self-service' and consequently would not attract service tax.

But somehow this Circular did not fit into the scheme of affairs planned by our new Finance Minister and other officials of his Ministry and therefore in Finance Act 2010, an amendment has been carried to relevant definitions of taxable services governing Commercial or Industrial Construction and Construction of Complex. An explanation has been added to the said definitions whereby the clarification issued by the Board on 29.01.2009 has been brought to nullity. The explanation which has been added is as under:

"For the purposes of this sub-clause, the construction of a new building which is intended for sale, wholly or partly, by a builder or any person authorised by the builder before, during or after construction (except in cases for which no sum is received from or on behalf of the

prospective buyer by the builder or the person authorised by the builder before grant of completion certificate by the authority competent to issue such certificate under any law for the time being in force) shall be deemed to be service provided by the builder to the buyer"

The said provision of the Finance Act 2010 has been made effective vide notification no 24/2010 dated 22.06.2010 with effect from 01.07.2010. Hence all developers/builders are brought under the service tax net and sale of flat made by them before the complete construction of flat shall attract service tax. One thing which is most important regarding taxability of developers/builders is the fact that the taxability is linked with the construction of the building which is intended to be sold by the developer/builder. In other words, taxability arises on construction of building however payment is required to be made on realization of sale proceeds of flat being constructed. This led to an ambiguity regarding payment of service tax on the advance amount received by builders/developers prior to 01.07.2010. in respect to construction which is in progress or where construction has not been started yet. Looking into public interest and undue hardships which everyone would have faced, the Government has granted exemption to service tax on the amount of advance amount realised prior to 01.07.2010 vide notification no. 36/2010 dated 29/06/2010.

According to rule 6 of Service Tax Rules 1994 read along with Section 67 of the Finance Act 1994, service tax is payable on receipt of advance payment in case such advance is adjustable against the services to be provided by the developer/builder, therefore the same will become payable on or before 06/08/2010. Developers/Builders may exercise the option to pay service tax after availing abatement of 75% of the gross amount charged with restriction towards non availment of Cenvat Credit and the gross amount charged shall include value of goods and land being sold with the sale of flat as per notification no 1/2006 duly amended by notification no 29/2010 dated 22.06.2010.

The option of availing exemption provided to all service providers vide notification no. 12/2003 towards the value of goods and materials sold by service provider to the recipient of service subject to condition that there is documentary proof specifically indicating the value of said goods and materials is also available with developers/builders. A developer/builder whether availing the exemption provided by notification no.12/2003 or not is not required to pay service tax on the value of land, but in case the developer/builder decides for availment of abatement granted vide notification no.1/2006 then service tax is payable by including the value of land in the gross amount charged also.

Special Services by Builders etc

In addition to the imposition to tax on the sale of flat by builders/developers before the completion of construction, service tax has also been levied on the amount charged by builders/developers from the buyer in respect to prime location, internal development, external development etc. An altogether new category of taxable

service with the name of ***Special Services provided by Builders*** has been introduced with effect from 01.07.2010.

Taxable service in relation to this service means *any service provided or to be provided to a buyer, by a builder of a residential complex, or a commercial complex, or any other person authorised by such builder, for providing preferential location or development of such complex but does not include services covered i.e. Management, Maintenance or Repair Services, Commercial or Industrial Construction Service, Complex Construction Service and in relation to parking place. Here ''preferential location'' means any location having extra advantage which attracts extra payment over and above the basic sale price – Section 65 (105) (zzzzu).*

At the time of introduction of the proposal to tax builders of residential or commercial complexes providing other facilities which are charged separately and do not form part of the taxable value for construction services provided by builders/developers, few examples of the said facilities were cited by the government. Those are:-

(a) Prime/preferential location charges for allocating a flat/commercial space according to the choice of the buyer(i.e. Direction-sea facing, park facing, corner flat; Floor-first floor, top floor; Vastu- having bed room in a particular direction, Number-lucky numbers);

(b) Internal or external development charges which are collected for developing/maintaining parks, laying of sewerage and water pipelines, providing access roads and common lighting etc.;

(c) Fire-fighting installation charges; and

(d) Power back up charges etc.

The above charges for other facilities do not form part of the taxable value for charging tax on construction. Since these charges are in the nature of service provided by the builder to the buyer of the property over and above the construction service, such charges are brought under the new service namely 'Special Services provided by the Builder etc.". However, following charges have been specifically excluded from the scope of this new service:-

(a) Charges for providing parking space;

(b) Development charges to the extent they are paid to State Government/Local Bodies.

(c) Any service provided by Resident Welfare Associations or Cooperative Group Housing Societies.

Another important aspect which has not been dealt by the Legislators is abatement to the builders/developers in respect to these services as these services certainly qualify for abatement. However the benefit of notification no. 12/2003 (discussed

above) granting exemption to the value of goods and materials supplied while providing the service shall still to available to Builders.

Incidence of Service Tax on Builders/Developers as Service Recipients

Service tax is an indirect tax and its incidence is borne by the recipient of services, hence it is essential to touch upon the transactions related with real estate from the perspective of service recipient. Builder/Developer is a service recipient of almost all the taxable services on which they are paying service tax to the providers of those services. Architect's Services, Interior Decorator's Services and Consulting Engineer's Services are categories of taxable services which are directly linked with services provided by Builders/Developers. Apart from these, other taxable services like security, telephone, insurance etc are received by Builders/Developers. In other words, Builders/Developers are liable to a substantial amount as service tax as a recipient and the same shall be available to them as Cenvat Credit.

Imposition of Service Tax on Renting of Immovable Property

Imposition of Service Tax on Renting of Immovable Property so far has been a thorn in the flesh. The Government of India introduced service tax on renting of immovable property with effect from 01.06.2007 but had to face lot of resentment on its imposition. In 2007 when service tax was firstly implemented on renting, the taxable service meant any service provided or to be provided to any person, by any other person, in relation to renting of immovable property or any other service in relation to such renting of immovable property for use in the course or, for furtherance of, business or commerce.

At that time Section 65 (105) (zzzz) defined "Immovable property" as

(i) building and part of a building, and the land appurtenant thereto;
(ii) land incidental to the use of such building or part of a building;
(iii) the common or shared areas and facilities relating thereto; and
(iv) in case of a building located in a complex or an industrial estate, all common areas and facilities relating thereto, within such complex or estate,

but does not include-

(a) vacant land solely used for agriculture, aquaculture, farming, forestry, animal husbandry, mining purposes;
(b) vacant land, whether or not having facilities clearly incidental to the use of such vacant land;
(c) land used for educational, sports, circus, entertainment and parking purposes; and
(d) building used solely for residential purposes and buildings used for the purposes of accommodation, including hotels, hostels, boarding houses, holiday accommodation, tents, camping facilities.

Further it was clarified by an explanation appended to the definition of taxable service that an immovable property partly for use in the course or furtherance of business or commerce and partly for residential or any other purposes shall be deemed to be immovable property for use in the course or furtherance of business or commerce.

Section 65(90a) of the Finance Act 1994 defined "Renting of Immovable Property" as renting, letting, leasing, licensing or other similar arrangements of immovable property for use in the course of furtherance of business or commerce but does not include –

(i) renting of immovable property by a religious body or to a religious body; or

(ii) renting of immovable property to an educational body, imparting skill or knowledge or lessons on any subject or field, other than a commercial training or coaching centre;

The said section also clarified that the term "for use in the course or furtherance of business or commerce" includes use of immovable property as factories, office buildings, warehouses, theatres, exhibition halls and multiple–use buildings and "renting of immovable property" includes allowing or permitting the use of space in an immovable property, irrespective of the transfer of possession or control of the said immovable property.

However the imposition of service tax on renting of immovable properties was challenged in various High Courts. On 18.04.2009 the Hon'ble High Court of Delhi in the case of Home Solution Retail India Ltd. delivered a judgment categorically stating that Section 65(105)(zzzz) does not in terms entail that renting of immovable property for use in the course or furtherance of business or commerce would by itself constitute a taxable service and be exigible to service tax. Consequently, Notification No. 24/2007 dated 22.05.2007 and Circular No.98/1/2008-ST dated 04.01.2008 were held to be ultra vires the Finance Act and to the extent the said Notification and the circular authorizing the levy of service tax on renting of immovable property per se, were set aside.

However the Finance Act, 2010 has amended the definition of taxable service regarding renting of immovable property by replacing the words '*in relation to*' to 'by' to circumvent the decision given by the Hon'ble Delhi High Court. The new clause explicitly provides that the activity of 'renting' itself is a taxable service. Moreover, this amendment has been made retrospectively with effect from 01.06.2007. In other words the definition of taxable service regarding renting of immovable property would stand as under with effect from 01.06.2007:

Taxable service means any service provided or to be provided to any person, by any other person, by renting of immovable property or any other service in relation to

such renting of immovable property for use in the course or, for furtherance of, business or commerce.

Further, it has been provided to levy service tax on renting of vacant land, where there is an agreement or contract between the lessor and the lessee for undertaking construction of buildings or structures on such land for furtherance of business or commerce during the tenure of the lease. Earlier, renting of vacant land was specifically excluded from the levy of service tax.

The Finance Act, 2010 specifically states that notwithstanding anything contained in any judgment, decree or order of any court, tribunal or other authority, any action taken or anything done or omitted to be done at any time during the period commencing on and from the 1st day of June, 2007 shall be deemed to be and deemed always to have been, for all the purposes, as validly and effectively taken or done or omitted. It has also been stated that no suit or other proceedings shall be maintained or continued in any court for the levy and collection of such service tax. Further, it also explicitly provides for recovery of service tax, interest or penalty or other charges which may not have been collected or refunded, as the case may be.

In other words, service tax has been imposed on renting of immovable properties for commercial use and all the landlords are liable to service tax on the amount of rent realised retrospectively with effect from 01.06.2007. Hence qua the law, it is landlord who is liable to discharge its Service Tax liability on the taxable service provided by it i.e. renting of immovable property provided by him, therefore even though they have not recovered any Service Tax from their concerned tenants. However, landlords shall seek the benefit of cum duty as per the provisions of Section 67 (2) of Finance Act 1994 i.e. the amount realized by the landlord shall be treated as inclusive of Service Tax and landlord can calculate its Service Tax liability by applying the reverse formula i.e. Amount Received * Rate of Tax / 100 + Rate of tax.

Besides threshold exemption limit of Rs. 10 lacs, Notification No. 24/2007 dated 22.05.2007 exempts the value of taxable services to the extent of taxes on such property, namely property tax levied and collected by local bodies. In other words, service provider shall be liable to pay service tax on the gross amount charged for renting of such immovable property less taxes on such property, namely property tax levied and collected by local bodies. However, wherever the period for which property tax paid is different from the period for which service tax is paid, property tax proportionate to the period for which service tax is paid shall be calculated and the amount so calculated shall be excluded from the gross amount charged for renting of the immovable property for the said period, for the purposes of levy of service tax.

Finally the issue which comes to mind with the retrospective effectiveness of imposition of service tax on rent is whether penalties and interest can be imposed. So

far as, the issue of penalty is concerned, no penalty can be levied as it being a question of law and as per the decision of Hon'ble Delhi High Court pronounced on 18.04.2009 in the case of M/s. Home Solutions Retails India Ltd., renting per se was held to be non-taxable. However payment of interest is compensatory in nature on account of late payment of tax and there is no provision in the statute books which grants relief to the service providers from the payment of interest.

But the race of cat and mouse i.e. legislators and landlords/tenants is still not over as once again Delhi High Court vide its order dated 18.05.2010 has granted stay to Home Solutions Retail India Ltd. This again has led to various numbers of writs being filed in various High Courts challenging the levy of service tax on renting of immovable property.

However looking to the attitude of the legislators so far, regarding imposition of service tax on real estate transactions under all the categories of taxable services, it gives a feeling that Service Tax on Realty is Reality, if not today then tomorrow.

<u>MORTGAGE DEED</u>

FORMAT NO. 1

MORTGAGE OF PROPERTY FREE FROM PRIOR ENCUMBRANCES

This Mortgage made the ………. day of ………… between A of etc. (hereinafter called the borrower which expression, where the context so admits, includes persons entitled to redeem this security) of the one part and B of etc., (hereinafter called the mortgagees which expression, where the context so admits, includes persons deriving title under him) of the other part.

Whereas the borrower is entitled to the property hereinafter described as absolute owner free from encumbrances;

And whereas the mortgagee has agreed with the borrower to lend him the sum of Rs………………… upon having the re-payment thereof with interest thereon at the rate hereinafter mentioned, secured in manner hereinafter appearing.

Now this Deed witnesseth that in pursuance of the said agreement and in consideration of the sum of Rs…………….. now paid to the borrower by the mortgagee the receipt whereof the borrower hereby acknowledges:

1. The borrower hereby covenants with the mortgagee to pay to the mortgagee on the ………….. day of ………………… next the said sum of Rs…………….. principal with interest thereon at the rate of……………. p.c. p.a. and if the said moneys are not so paid, to pay interest at the aforesaid rate, half-yearly in every year on the principal money for the time being remaining due till the date of payment of the entire mortgage-money.

2. The borrower as beneficial owner hereby mortgages the property known as………………. and situated at …………….. and more particularly described in the

schedule attached herewith as security for the payment to the mortgagee of all principal moneys and interest, and other money hereby secured.

3. The borrower further covenants with the mortgagee:-

(a) That the borrower will during the continuance of this security keep the mortgaged property in good and substantial repairs and insured against loss or damage by a fire for Rs……………….. in some Insurance Company approved by the mortgagee in the name of mortgagee and will duly and punctually pay all premiums and other moneys necessary for effecting and keeping up such insurance. And if default shall be made by the borrower in keeping the mortgaged property in good and substantial repairs or in effect or keeping up such insurance, the mortgagee may repair with power to enter upon the mortgaged premises for that purpose and without becoming liable as mortgagee in possession or may insure and keep the same insured in any sum not exceeding Rs……………… and that all moneys expended by |the mortgagee under this provision shall be deemed to be properly paid by him.

(b) That during the continuance of this security no timber standing or growing on the mortgaged property or any part thereof shall be cut except in the ordinary course of good management and with the previous consent in writing of the mortgagee.

(c) The borrower shall not lease the mortgaged property for any term exceeding one year or accept surrender of any existing lease without the previous consent in writing of the mortgagee.

4. And it is hereby further agreed and declared as follows –

   (a) That if the borrower fails to pay the mortgage-money with interest as agreed upon, the mortgagee shall be entitled to realize his dues by sale of mortgaged property, and if the sale proceeds thereof are insufficient to satisfy the mortgagee's dues, to recover the balance from the person and other property of the borrower.

   (b) That if interest for any two installments remains in arrears, the mortgagee shall be entitled to have a Receiver appointed of the mortgaged property.

5. Provided always that if the borrower shall pay to the mortgagee on ………… the sum of ……………. With interest thereon from the date, of hereof at the stipulated rate, the mortgagee will at any time thereafter at the request and cost of the borrower execute a receipt of the mortgage amount or a deed of redemption and surrender the mortgaged premises to the borrower or his nominee………………..

Witnness:

1.

2.

Signature of Parties

FORMAT NO. 2

SECOND MORTGAGE OF PROPERTY SUBJECT TO A PRIOR CHARGE

This mortgage made the …………. day of ……………., between A of etc., (hereinafter called the borrower which expression shall also, where the context so admits, include persons entitled to redeem the security) of the one part and B of etc. (hereinafter called the mortgagee) of the other part.

Whereas by a mortgage deed (hereinafter called the first Mortgage) dated …………. made between the borrower of the one part and D of etc., of the other part, the property hereinafter mentioned was mortgaged to the said D for securing payment of Rs………………. principal mortgage money plus interest at the rate specified therein.

And whereas the sum of Rs……………….. remains due on the security of the First Mortgage.

And whereas the mortgagee has agreed with the borrower to lend him the sum of Rs……………..upon having the re-payment thereof with interest thereon at the rate hereinafter mentioned, secured in manner hereinafter appearing.

Now this deed witnesseth that in pursuance of the said agreement and in consideration of the sum of Rs……………….. now paid to the borrower by the mortgagee the receipt whereof the borrower hereby acknowledges.

1. The borrower hereby covenants with the mortgagee to pay to the mortgagee on the…………….. day of ………………. next the sum of………………… principal amount with interest at the rate of…………….. p.c. p.a. and if the said moneys are not paid on the aforesaid date, to pay interest at the above-mentioned rate till payment of the entire amount.

2. The borrower as beneficial owner hereby mortgages with the mortgagee the property known as……………… and situate at ………………….. and more particularly described in the schedule attached herewith subject to the First Mortgage and the sum of…………………. thereby secured as aforesaid.

3. Provided that if the borrower shall pay to the mortgagee on ………… the sum of Rs…………………. With interest thereon from this date till payment, the mortgagee shall at any time at the request and cost of the borrower surrender the premises herein before mortgaged to the borrower or his nominee.

4. The borrower further covenants with the mortgagee and it is hereby agreed and declared as follows:-

(a) That the borrower will during the continuance of this security keep the mortgaged property in good and substantial repairs and insured against loss or damage by fire for Rs………………… in some insurance company approved by the mortgagee in the name of the mortgagee and will duly and punctually pay all premiums and other moneys necessary for effecting and keeping up such insurance. And if default shall be made by the borrower in keeping the mortgaged property in good and substantial repairs or in effecting or keeping 'up such insurance, the mortgagee may repair (with power to enter upon the mortgaged premises for that purpose and without becoming liable as mortgagee in possession) or may insure in any sum not exceeding Rs………………… and that all moneys expended by the mortgagee under this provision shall be deemed to be properly paid by him.

(b) That during the continuance of this security no timber standing or growing on the mortgaged property or any part thereof shall be cut except in the ordinary course of good management and with the previous consent in writing of the

mortgagee.

(c) The borrower shall not lease the mortgaged property for any term exceeding one year or accept surrender of any existing lease without the previous consent in writing of the mortgagee.

5. It is hereby further agreed and declared as follows:

   (a) That if the borrower fails for any cause whatever to pay the mortgagee's dues on or before ……………. the date fixed for payment, the mortgagee shall be entitled to realize his dues from the sale of the mortgaged property subject to the First Mortgage, and in case the sale proceeds are insufficient to satisfy the mortgagee's dues, the balance shall be realizable from the person and other property of the borrower.

   (b) The power of sale aforesaid shall be exercisable by the mortgagee even before the period fixed heretofore for payment of mortgagee's dues after the happening of any of the events following that is to say:-

      (i) If the borrower becomes insolvent or enters into any agreement or composition for the benefits of his creditors or commits any other act of insolvency.

      (ii) If on account of non-payment of dues of the First Mortgagee, steps are taken or proceedings instituted by way of sale or appointment of Receiver for the purpose of enforcing the security constituted by the First Mortgagee.

   (c) The mortgagee may pay the First Mortgagor the amount secured by and payable in connection with the First Mortgage and all money expended by the Mortgagee under this power shall be deemed to have

been properly paid by him and recoverable from the mortgaged property and other property of the mortgagor.

The schedule above referred to containing description of the mortgaged property.

Witness:

1.

Signature of Parties

2.

FORMAT NO. 3

SALE-DEED BY MORTGAGOR AND MORTGAGEE

This sale-deed made between A of ……….. (mortgagee) of the first part, B of ……………. (mortgagor and vendor) of the second part, and C of ………………… (purchaser) of the third part.

Whereas by a mortgage-deed dated the ……………… day of …………….. and expressed to be made between the said B of the one part and the said A of the other part in consideration of Rs…………………. By the said A paid to the said B, the said B did mortgage the premises hereby intended to be sold (together with other premises) unto and to the use of the said A, his heirs, and assigns, subject to a proviso in the said mortgage-deed contained for redemption of the same on payment by the said B, his heirs, executors, administrators, or assigns, unto the said A, his executors, administrators, or assigns, of the sum of Rs…………………… with interest for the same at the rate therein mentioned and on the day thereby appointed:

And whereas the said B as an absolute owner thereof has agreed with the said C for the sale to him of the premises intended hereby to be sold free from incumbrances for the sum of Rs………………… and whereas the sum of Rs………is now owing to the said A from the said B on the basis of the said mortgage-deed dated the………………….. and it has been agreed that on receipt on the sum of Rs…………….. out of the said purchase money by the said A in part/full satisfaction of the said mortgage debt, he shall join in these presents in manner hereinafter appearing:

Now this sale-deed witnesseth that in pursuance of the said agreements and in consideration of Rs………………. to the said A this day paid by the said C at the

request of the said B (the receipt whereof the said A doth hereby acknowledge), and of Rs…………………. to the said B this day paid by the said C (the payment and receipt respectively of which said sums of Rs……………… and Rs……………… making together the said purchase-money of Rs………………. the said B doth hereby acknowledge) he the said A as mortgagee by the direction of the said B doth hereby grant and he the said B, as Beneficial owner doth hereby grant and confirm and sell unto the said C and heirs and assigns the aforesaid premises to hold the said premises prescribed in the schedule hereunder written unto and to the use of the said C, his heirs and assigns, discharged from all principal monies and interests secured by and from all claims under the hereinbefore recited mortgage-deed and otherwise free from incumbrances.

The schedule.

All that house without offices, lands and compound attached thereto containing by admeasurement……………….. square yards or thereabouts of land and bounded and butted as follows:-

North……………. East……………. South……………… West……………. and more particularly described on the plan hereto, annexed as annexure A together with all rights and easements (and the furniture therein).

Witnesses:

(Signature of Parties)

FORMAT NO. 4

FORMAL DOCUMENT ACCOMPANYING A DEPOSIT OR TITLE DEED BY WAY OF MORTGAGE

I……………………….. (mortgagor) do hereby declare that I have this day of…………. deposited with ……………. (mortgagee) the title-deeds as detailed in the schedule hereunder written by way of mortgage of the properties comprised in the said title-deeds and owned and possessed by me for securing the repayment to the said …………….. (mortgagee) of the sum of Rs…………………. advanced by him to me with interest for the same at the rate of Rs………………… percent per annum payable to him the said …………… (mortgagee), on the basis of a Promissory Note executed by me in his favour on …………….. (date).

Witnesses:

(Signature of Mortgagor)

FORMAT NO. 5

DEED OF REDEMPTION

This deed of redemption made this…………. day of…………. 2010 between (hereinafter called the mortgagee) of the one part and ……………. (hereinafter called the mortgagor) of the second part.

Whereas by a deed of mortgage dated…………. Registered in the office of the Sub-Registrar of………….. as No……………… the said mortgagor did for the consideration in the said deed recited mortgage unto the said mortgagee the property intended hereby to be re-transferred and released; And whereas the said mortgagor having paid to the said mortgagee all moneys due and payable to him under the said mortgage is now desirous to secure a redemption or a re-conveyance of said property and has requested the mortgagee accordingly;

Now this deed of redemption witnesseth that in consideration of the premises and of the sum of Rs…………. paid by the said mortgagor to the said mortgagee on or before the execution of these presents (the receipt whereof the said mortgagee doth hereby acknowledge) the said mortgagee hereby releases and transfers unto the said mortgagor al those premises situated at………….. (description of the mortgaged property); To hold the same discharged and freed from all claims, demands and rights of the said mortgagee under or by virtue of the said mortgage.

In witness whereof the said mortgagee and the said mortgagor have hereunto set and subscribed their respective hands in the presence of:-

Witness

1.………………. Mortgagee

2.……………. Mortgagor

Acquisition and Transfer of Immovable Property

And Status of Resident

1. Statutory Provisions

Foreign Exchange Management (Acquisition and Transfer of Immovable Property outside India) Regulations, 2000 framed by the RBI in exercise of the powers conferred by section 6(3)(h) and section 47(2) of FEMA, 1999 govern and regulate the acquisition and transfer of Immovable property outside India by a person resident in India.

2. General Prohibition

It is generally prohibited for a person resident in India to acquire or transfer any immovable property situated outside India except where such acquisition or transfer is permitted by FEMA, 1999 or the Regulations made hereunder or where RBI has accorded general or special permission in this respect.

2.1 Exemption to general prohibition

General prohibition is not applicable in the following causes:

(i) where a foreign national resident in India holds immovable property outside India;

(ii) where a person resident in India acquired the immovable property outside India on or before 8.7.1947 and the same is continued to be held by him with the permission of the RBI.

3. Permitted cases of acquisition and transfer of Immovable property outside India

3.1 Acquisition

A person resident in India is permitted to acquire immovable property outside India:

(i) When the same is acquired by way of gift or inheritance –

- From a person who acquired the property when he was resident outside India or from a person who inherited the property from a person resident outside India;
- From a person resident in India who acquired the property on or before 8.7.1947 and is validly holding it with the permission of RBI

(ii) when the same is acquired by way of purchase from balances held in Resident Foreign Currency (RFC) Account.

3.2 Transfer

Any person who has acquired property as per Para 3.1 above is permitted to transfer the same by way of gift to his close relative (i.e. husband, wife, brother or sister or any of his lineal ascendant or descendant) who is a person resident in India.

4. Acquisition of property outside India by a company incorporated in India

An Indian company having overseas offices may be permitted by the RBI, on an application made to it, to acquire immovable property outside India for the purpose of its business or the residential purposes of its staff members. Application Form in this respect has been prescribed by AP (DIR) Series Circular No. 71, dated 13.1.2003. The same may be submitted to the Chief General Manager, RBI, Central Office, Exchange Control Department, Trade Division (Exports), Amar Building, Mumbai through the authorized dealer (Copy of form enclosed & marked Annexure A).

Note: For remittances permitted by AD Category-I Banks to acquire immovable property outside India, refer para 4.1 below.

4.1 Permissible remittances by AD Category-I Banks for acquiring immovable property outside India

As a matter of liberalization, in terms of AP (DIR Series) Circular No. 18, dated 4-12-2006 AD Category-I Banks have been permitted by the RBI to allow limited remittances on behalf of the Indian company having overseas offices for acquiring immovable property outside India for its business and for residential purpose of its staff. The limited remittances are not to exceed the limits meant for initial and recurring expenses that may be allowed for the purpose of normal business operations of the branch or office or representative abroad of an Indian entity under FEM (Foreign Currency Accounts by a person Resident in India) Regulations, 2000.

4.2 Extension of facility

In terms of AP (DIR Series) Circular No. 71, dated 13.01.2003 facility of acquiring property outside India by a company incorporated in India was available til June 30, 2003. However, the same stands extended beyond June, 30, 2003 till further notice vide AP (DIR Series) Circular No. 104, dated May 31, 2003.

ANNEXURE 'A'

Application for Acquisition of Immovable Property Overseas –

Branches/Trading Offices

1. Name and address of the company –
   (i) In India
   (ii) Abroad
2. Date of establishment of office abroad
3. Net worth for the previous 3 years based on audited balance-sheet
4. Overdue export outstandings, if any

5. Details of property proposed to be acquired

6. Purpose for acquiring property

7. Amount of funds to be remitted

8. Source of funds

9. Whether under investigation of Enforcement Directorate/Directorate of Revenue Intelligence, etc.

We hereby certify that the particulars given above are true to the best of our knowledge and belief. We undertake to strictly abide by the instructions issued and the conditions that may be stipulated by Reserve Bank.

Place: (Signature of Authorized Official)

Date: Name:

Acquisition and Transfer of Immovable Property in India

1. Statutory Provisions

Foreign Exchange Management (Acquisition and Transfer of Immovable Property in India) Regulations, 2000 framed by the RBI in exercise of the powers conferred by section 6(3) (i) and section 47 (2) of FEMA, 1999 govern and regulate the acquisition and transfer of immovable property in India by a person resident outside India.

2. Acquisition and transfer of immovable property in India

An Indian citizen resident outside India (NRI) or a person of Indian Origin (PIO) also resident outside India have been permitted to acquire and transfer an immovable property in India subject to certain conditions. Provisions in this respect are stated below:

2.1 Acquisition and transfer of immovable property by a non-resident Indian Citizen

(i) Acquisition of property: An Indian citizen resident outside India (NRI) is permitted to acquire by way of purchase immovable property in India other than agricultural property/plantation/farm house by paying the purchase price:

- Out of funds received in India through normal banking channels by way of inward remittance; or
- Out of funds held in any non-resident account.

  Note: Payment of purchase price is not permitted to be made either by traveller's cheque or by foreign currency notes or by any other mode except those specifically permitted.

(ii) Transfer of Property: Such a person is permitted to transfer -

- Any immovable property (other than agricultural or plantation property or farm house) to a person resident outside India who is a citizen of India or to a person of Indian origin resident outside India or a person resident in India.
- Agricultural land/plantation property/farm house only to Indian citizens permanently residing in India.

2. Acquisition and transfer of immovable property by a person of Indian Origin (PIO)

(i) Acquisition of Property: A PIO resident outside India is permitted to acquire immovable property in India (other than agricultural property/plantation/farmhouse) in the following manner:

- by way of purchase through paying the purchase price:
- out of funds received in India by way of inward remittance; or
- out of funds held in any non-resident account.

Note: Payment of purchase price is not permitted to be made either by traveller's cheque or by foreign currency notes or by any other mode except those specifically permitted.

- By way of gift from a person resident in India or an Indian citizen resident outside India or a PIO.
- By way of inheritance from a person resident in India or a person resident outside India who had acquired such property as per the provisions of the foreign exchange law in force or as per the present regulations at the time of acquisition of the property.

(ii) Transfer of Property : A PIO is permitted to transfer:

(a) Any immovable property including residential or commercial property (but excluding agricultural land/plantation property/farmhouse in India) in the following manner:

- By way of sale to a person resident in India
- By way of gift to a person resident in India or a non-resident Indian citizen or a PIO

(b) Any agricultural land/plantation property/farmhouse in India by way of sale or gift to an Indian citizen resident in India.

3. Purchase/sale of immovable property by Foreign Embassies /Diplomats/Consulate General

Foreign Embassies/Diplomats/Consulate General in India are permitted to purchase or sell immovable property in India (other than agricultural land/plantation property/farm house) on the following conditions:

(i) Clearance from MEA: Clearance from Ministry of External Affairs is obtained for such purchase/sale; and

(ii) Payment of consideration in case of acquisition: In case of acquisition of immovable property the consideration shall be paid out of funds remitted from abroad through banking channel.

4. Acquisition/mortgage of property of property for carrying on a permitted activity

(i) Acquisition: A non-resident person who has established a branch, office or other place of business, (excluding a liaison office) in India for carrying on his business activity with requisite approval is permitted to acquire an immovable property in India which is necessary for or incidental to carrying on such activity subject to the following:

- For such acquisition it is a must that all applicable laws, rules, regulations or directions for the time being in force are duly complied with.
- The entity/concerned person is required to file a declaration in the form IPI with the RBI within ninety days from the date of such acquisition (copy of fote enclosed and marked annexure B)

(ii) **Transfer by way of Mortgage**: The non-resident mentioned at clause (i) above is permitted to transfer by way of mortgage the said immovable property to an authorized dealer as a security for the purpose of borrowing funds from it.

5. Repatriation of sale proceeds

Where a non-resident Indian citizen or a PIO sells his immovable property in India (other than agricultural land/farm house/plantation property), the authorised dealer is permitted to allow repatriation of sale proceeds outside India subject to the following conditions:

(i) **Property was acquired validly**: such immovable property was acquired as per the foreign exchange law in force at the time of acquisition or the provisions of the present Regulations:

(ii) **Repatriable amount** : The amount to be repatriated should not exceed :

- The amount which was paid for acquisition of the immovable property in foreign exchange (such foreign exchange being received through normal banking channels or out of funds held in Foreign Currency Non-Resident Account); or
- The foreign currency equivalent as on the date of payment, of the amount paid where such payment was made from the funds held in Non-Resident External account for acquisition of the property.

Note : In terms of AP (DIR Series) Circular No. 101 dated 05.05.2003 authorised dealers are permitted to allow repatriation of sale proceeds of residential accommodation purchased by NRIs/PIOs out of funds raised through housing loans from the authorized dealers/housing finance institutions to the extent such loan/s are repaid by them out of foreign inward remittances or by debit to their NRE/FCNR accounts. This is so because such repayments of rupee loans in foreign exchange are treated as equivalent to foreign exchange received.

(iii) Repatriation in the case of residential property : In the case of residential property, the repatriation of sale proceeds is restricted to only two such properties.

Note : In respect of clauses (i), (ii) and (iii) the RBI has removed the existing lock-in-period of three years for repatriation of the sale proceeds of immovable property vide Notification No. 65/2002-RB, dated 29.06.2002. Accordingly, the authorized dealers may allow remittance of sales proceeds irrespective of the period for which the property was held. The sale proceeds allowed to be repatriated should, however, not exceed the foreign exchange brought into acquire the property.

5.1 Repatriation of refund of application/earnest money/purchase consideration etc.

(i) Authorized dealers are permitted to allow repatriation of amounts representing the refund of application/earnest money/purchase consideration made by the house building agencies/seller on account of non-allotment of flat/plot/cancellation of bookings/deals for purchase of residential/commercial property, together with interest, if any (net of income tax payable thereon), subject to the following :

* the original payment was made out of NRE/FCNR (B) account of the account holder, or by way of remittance from outside India through normal banking channels; and

* the authorized dealer is satisfied about the genuineness of the transaction.

(ii) Such funds may also be credited to the NRE/FCNR (B) account of the NRIs/PIO, if they so desire.

5.2 Repatriation where immovable property purchased out of Rupee funds (i.e. resources in India) is sold

(i) In such a case ADs may allow the facility of repatriation of funds out of balances held by NRIs/PIO in their NRO accounts upto US$ 1,000,000 (US$ one million per financial year (April-March) subject to the condition that the remitter produces an undertaking and a certificate from the Chartered Accountant in the formats prescribed by the CBDT.

(ii) AD-Category I banks may furnish, on a quarterly basis, a statement on the number of applicants and total amount remitted, as per the prescribed proforma, to the Chief General Manager-in-charge, Foreign Exchange Department Foreign Investments Division (NRFAD), RBI, Central Office, Mumbai-400001 within 10 days of the reporting quarter. A soft copy of the statement may be sent by e-mail.

6. Prohibition on acquisition or transfer of immovable property in India by Citizens of certain Countries.

Citizens of Pakistan, Bangladesh, Sri Lanka, Afghanistan, China, Iran, Nepal or Bhutan are prohibited to acquire or transfer immovable property in India,

(other than lease, not exceeding five years) unless they have obtained prior permission of the RBI.

7. Acquisition or transfer of immovable property by Foreign Nationals of non-Indian origin.

Following provisions are applicable in respect of foreign nationals of non-Indian origin desiring to acquire or transfer immovable property in India.

7.1 Restricted acquisition

Such foreign nationals resident outside India are not permitted to acquire any immovable property in India unless such property is acquired by way of inheritance from a person who was resident in India.

7.2 Restricted transfer

The foreign nationals who acquired immovable property in India by way of inheritance or purchase with the specific approval of the RBI are not permitted to transfer such property without prior permission of the RBI.

Annexure-B

(See Regulation 5)

Declaration of immovable property acquired in India by a Person resident outside India

Instructions

The declaration should be completed in duplicate and submitted directly to the Chief General Manager, Exchange Control Department, (Foreign Investment Division – III), RBI, Central Office, Bombay-400001 within 90 days from the date of acquisition of the immovable property

Documentation

Certified copies of letter of approval from RBI obtained under section 6(6) of FEMA, 1999 (42 of 1999).

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1. Full name and address of the acquirer who has acquired the immovable property

2. a) Description of immovable property (a)

   b) Details of its exact location stating the name of the state, town and municipal/survey number etc. (b)

3. a) Purpose for which the immovable property has been acquired (a)

   b) Number and date of Reserve Bank's Permission, if any (b)

4. Date of acquisition of the immovable property

5. a) How the immovable property was (a)

acquired i.e. whether by way of

purchase or lease

b) Name, citizenship and address of (b)

the seller/lessor

c) Amount of purchase price and sources ©

of funds

I/we hereby declare that-

a) the particulars given above are true and correct to the best of my/our knowledge and belief.

b) no portion of the said property has been leased/rented to, or is otherwise being allowed to be used by any other party

Encls :

(Signature of Authorised official)

Place ………………… Stamp Name ………………………………………

Date …………………..

Designation ………………………………

Statement indicating the details of remittances made by NRIs/PIO/Foreign nationals out of the NRO accounts for the quarter ended …………………

Name of the Bank

No.of remittance on account			Amount (in USD)		
Sale Proceeds of immovable property	Other assets	Total	Sale Proceeds of immovable property	Other assets	Total

Signature of the authorized official

Name and Designation

Date :

FREQUENTLY ASKED QUESTIONS

1. Acquisition of Immovable Property in India

Q.1 Who can purchase immovable property in India ?

Under the general permission available, the following categories can freely purchase immovable property in India :

(i) NRI – that is a citizen of India resident outside India

(ii) PIO – that is an individual (not being a citizen of Pakistan or Bangladesh or Sri Lanka or Afghanistan or China or Iran or Nepal or Bhutan), who

1) at any time, held Indian passport, or
2) who or either of whose father or grand father was a citizen of India by virtue of the Constitution of India or the Citizenship Act, 1955 (57 of 1955)

The general permission, however, covers only purchase of residential and commercial property and not for purchase of agricultural land/plantation property/farm house in India.

Q.2 Whether NRI/PIO can acquire agricultural land/plantation property/farm house in India ?

No. Since general permission is not available to NRI/PIO to acquire agricultural land/plantation property/farm house in India, such proposals will require specific approval of RBI and the proposals are considered in consultation with the Government of India.

Q.3 Do any documents need to be filed with RBI after purchase ?

NO. An NRI/PIO who has purchased residential/commercial property under general permission, is not required to file any documents with the RBI.

Q.4 How many residential/commercial properties can NRI/PIO purchase under the general permission ?

There are no restrictions on the number of residential/commercial properties that can be purchased.

Q.5 Can a foreign national of non-Indian origin be a second holder to immovable property purchased by NRI/PIO ?

NO

Q.6 Can a foreign national of non-Indian origin resident outside India purchase immovable property in India ?

NO. A foreign national of non-Indian origin, resident outside India cannot purchase any immovable property in India. But, he/she may take residential accommodation on lease provided the period of lease does not exceed five years. In such cases, there is no requirement of taking any permission of or reporting to RBI.

Q.7 Can a foreign national who is a person resident in India purchase immovable property in India ?

Yes, but the person concerned would have to obtain the approvals, and fulfil the requirements if any, prescribed by other authorities, such as the concerned State Government etc. However, a foreign national resident in India who is a citizen of Pakistan, Bangladesh, Sri Lanka, Afghanistan, China, Iran, Nepal and Bhutan would require prior approval of RBI. Such requests are considered by RBI in consultation with the Government of India.

Q.8 Can an office of a foreign company purchase immovable property in India ?

A foreign company which has established a Branch Office or other place of business in India, in accordance with FERA/FEMA regulations, can acquire any immovable property in India, which is necessary for or incidental to carrying on such

activity. The payment for acquiring such a property should be made by way of foreign inward remittance through proper banking channel. A declaration in form IPI should be filed with RBI within ninety days from the date of acquiring the property. Such a property can also be mortgaged with an Authorised Dealer as a security for other borrowings. On winding up of the business, the sale proceeds of such property can be repatriated only with the prior approval of RBI. Further, acquisition of immovable property by entities who had set up Branch Offices in India and incorporated in Pakistan, Bangladesh, Sri Lanka, Afghanistan, China, Iran, Nepal and Bhutan would require prior approval of RBI to acquire such immovable property. However, if the foreign company has established a Liaison Office, it can not acquire immovable property. In such cases, Liaison Offices, can take property by way of lease not exceeding 5 years.

Q.9 Whether immovable property in India can be acquired by way of gift ?

(a) Yes, NRIs and PIOs can freely acquire immovable property by way of gift either from

i) a person resident in India or

ii) an NRI or

iii) a PIO

However, the property can only be commercial or residential. Agricultural land/plantation property/farm house in India cannot be acquired by way of gift.

(c) A foreign national of non-Indian origin resident outside cannot acquire any immovable property in India through gift.

Q.10 Whether a non-resident can inherit immovable property in India?

Yes, a person resident outside India i.e.

(i) An NRI

(ii) A PIO and

(iii) A foreign national of non-Indian origin can inherit and hold immovable property in India from a person who was resident in India. However, a citizen of Pakistan, Bangladesh, Sri Lanka, Afghanistan, China, Iran, Nepal and Bhutan should seek specific approval of RBI.

Q.11. From whom can the non-resident inherit immovable property?

A person resident outside India (i.e. NRI or PIO or foreign national of non-Indian origin) can inherit immovable property from

(a) A person resident in India.

(b) A person resident outside India

However, the person from whom the property is inherited should have acquired the same in accordance with the foreign exchange regulations applicable at that point of time.

II. Transfer of immovable property in India

(i) Transfer by Sale

Q.12 Can an NRI/PIO/Foreign national sell his residential/commercial property ?

a) NRI can sell property in India to –

i) a person resident in India or

ii) an NRI or

iii) a PIO

b) PIO can sell property in India to

i) a person resident in India

ii) an NRI or

iii) a PIO – with the prior approval of Reserve Bank

c) Foreign national of non-Indian origin including a citizen of Pakistan or Bangladesh or Sri Lanka or Afghanistan or China or Iran or Nepal or Bhutan can sell property in India with prior approval of RBI to

i) a person resident in India

ii) an NRI

iii) a PIO

Q.13 Can an agricultural land/plantation property/farm house in India owned/held by a non-resident be sold ?

a) NRI/PIO may sell agricultural land/plantation property/farm house to a person resident in India who is a citizen of India.

b) Foreign national of non-Indian origin resident outside India would need prior approval of RBI to sell agricultural land/plantation property/farm house in India

ii) Transfer by gift

Q.14 Can a non-resident gift his residential/commercial property ?

Yes

a) NRI/PIO may gift residential/commercial property to –

i) Person resident in India or

ii) An NRI or

iii) PIO

b) Foreign national of non-Indian origin needs prior approval of RBI

Q.15 Can an NRI/PIO/Foreign national holding an agricultural land/plantation property/farm house in India gift the same ?

a) NRI/PIO can gift but only to a person resident in India who is a citizen of India.

b) foreign national of non-Indian origin needs prior approval of RBI

iii) Transfer through mortgage

Q.16 Can residential/commercial property be mortgaged ?

i) NRI/PIO can mortgage to

a) an authorized dealer/housing finance institution in India – without the approval of RBI

b) a party abroad-with with prior approval of RBI

ii) a foreign national of non-Indian origin can mortgage only with prior approval of RBI

iv) a foreign company which has established a Branch Office or other place of business in accordance with FERA/FEMA regulations has general permission to mortgage the property with an authorized dealer in India.

III Mode of payment for purchase

Q.17 How can an NRI/PIO make payment for purchase of residential/commercial property in India ?

Payment can be made by NRI/PIO out of

a) funds remitted to India through normal banking channel or

b) funds held in NRE/FCNR (B)/NRO account maintained in India

No payment can be made either by traveller's cheque or by foreign currency notes.

No payment can be made outside India.

Q.18 What shall be the option if there is refund of application money/payment made by the building agencies/seller because of non-allotment of flat/plot/cancellation of bookings/contracts ?

The amount of refund, together with interest (net of income tax) can be credited to NRE account. This is subject to condition that the original payment was

made by way of inward remittance or by debit to NRE/FCNR (B) account. (Please refer to AP (DIR) Series Circular No.46 dated 12.11.2002)

Q.19 Can NRI/PIO avail of loan from an authorized dealer for acquiring flat/house in India for his own residential use against the security of funds held in his NRE Fixed Deposit account/FCNR (B) account ?

Yes, such loans are subject to the terms and conditions as laid down in Schedules 1 and 2 to Notification No. FEMA 5/2000-RB, dated May 3, 2000 as amended from time to time. However, banks cannot grant fresh loans or renew existing loans in excess of Rupees 20 lakh against NRE and FCNR (B) deposits either to the depositors or to third parties [cf. AP (DIR Series) Circular No.29 dated January 31, 2007]

Such loans can be repaid

a) by way of inward remittance through normal banking channel; or
b) by debit to his NRE/FCNR (B)/NRO account; or
c) out of rental income from such property
d) by the borrower's close relatives, as defined in section 6 of the Companies Act 1956, through their account in India by crediting the borrower's loan account.

Repatriation

a) In case the amount has been received from inward remittance or debit to NRE/FCNR (B)/NRO account for acquiring the property or for repayment of the loan, the principal amount can be repatriated outside India. For this purpose, repatriation outside India means the buying or drawing of foreign exchange from an authorized dealer in India and remitting it outside India through normal banking channels or crediting it to an account denominated in

foreign currency or to an account in Indian currency maintained with an authorized dealer from which it can be converted in foreign currency.

b) In case the property is acquired out of Rupee resources and/or the loan is repaid by close relatives in India (as defined in Section 6 of the Companies Act, 1956), the amount can be credited to the NRO account of the NRI/PIO. The amount of capitals grains, if any, arising out of sale of the property can also be credited to the NRO account.

NRI/PIO are also allowed by the Authorized Dealers to repatriate an amount up to USD 1 million per financial year out of the balance in the NRO account for all bona fide purposes to the satisfaction of the authorized dealers, subject to tax compliance.

Q.20 Can NRI/PIO, avail of housing loan in rupees from an authorized dealer or housing finance institution in India approved by the National Housing Bank for purchase of residential accommodation or for the purpose of repairs/renovation/improvement of residential accommodation ? How can such loan be repaid ?

Yes, NRI/PIO can avail of housing loan in rupees from an Authorized Dealer or housing finance institution subject to certain terms and conditions. (Please refer to Regulation 8 of Notification No. FEMA 4/2000-RB dated 3.5.2000 and AP (DIR) Series Circular No.95 dated April 26, 2003). Such a loan can be repaid.

a) by way of inward remittance through normal banking channel; or

b) by debit to his NRE/FCNR (B)/NRO account; or

c) out of rental income from such property

d) by the borrower's close relatives, as defined in section 6 of the Companies Act, 1956, through their account in India by crediting the borrower's loan account.

Q.21 Can NRI/PIO avail of housing loan in rupees from his employer in India?

Yes, subject to certain terms and conditions (Please refer to Regulation 8A of Notification No. FEMA 4/2000-RB, dated May 3, 2000 and AP (DIR Series) Circular No. 27, dated October 10, 2003)

IV. Repatriation of sale proceeds of residential/commercial property purchased by NRI/PIO

Q.22 Can NRI/PIO repatriate the sale proceeds of immovable property? If so, what are the terms?

NRI/PIO may repatriate the sale proceeds of immovable property in India

(a) If the property was acquired out of foreign exchange sources i.e. remitted through normal banking channels/by debit to NRE/FCNR(B) account. The amount to be repatriated should not exceed the amount paid for the property.

1. In foreign exchange received through normal banking channel; or
2. By debit to NRE account (foreign currency equivalent, as on the date of payment) or debit to FCNR (B) account.

Repatriation of sale proceeds of residential property purchased by NRI/PIO out of foreign exchange is restricted to not more than two such properties. Capital of foreign exchange is restricted to not more than two such properties. Capital gains, if any, may be credited to the NRO account from where the NRI/PIO may repatriate an amount up to USD one million, per financial year, as discussed below.

(b) If the property was acquired out of Rupee sources, NRI or PIO may remit an amount up to USD one million, per financial year, out of the balances held in the NRO account (inclusive of sale proceeds of assets acquired by way of inheritance or settlement), for all the bonafide purposes to the satisfaction of the Authorized Dealer bank and subject to tax compliance.

Q.23 Can an NRI/PIO repatriate the proceeds in case the sale proceed was deposited in NRO account?

From the NRO amount, NRI/PIO may repatriate up to USD one million per financial year (April-March), which would also include the sale proceeds of immovable property.

Q.24 If a Rupee loan was taken by NRI/PIO from Authorised Dealer or housing finance institution for purchase of residential property can an NRI/PIO repatriate the sale proceeds of such property?

Yes, provided the loan has been subsequently repaid by remitting funds from abroad or by debit to NRE/FCNR(B) accounts (Please see AP (DIR) Series Circular No. 101, dated 05.05.2003)

Q.25 If the property was purchased from foreign inward remittance or from NRE/FCNR (B) account, can the sale proceeds of property be repatriated immediately?

Yes.

Q.26 Is there any restriction on number of residential properties in respect of which sale proceeds can be repatriated by NRI/PIO?

Yes, sale proceeds of not more than two residential properties can be repatriated.

Q.27 If the immovable property was acquired by way of gift by the NRI/PIO, can he repatriate abroad the funds from sale?

The sale proceeds of immovable property acquired by way of gift should be credited to NRO account only. From the balance in the NRO account, NRI/PIO may remit up to USD one million, per financial year, subject to the satisfaction of Authorized Dealer and payment of applicable taxes.

Q.28 If the immovable property was received as inheritance by the NRI/PIO can he repatriate the sale proceeds?

Yes, general permission is available to the NRIs/PIO to repatriate the sale proceeds of the immovable property inherited from a person resident in India. NRIs/PIO may repatriate an amount not exceeding USD one million, per financial year, on production of documentary evidence in support of acquisition/inheritance of assets, an undertaking by the remitter and certificate by a Chartered Accountant in the formats prescribed by the Central Board of Direct Taxes vide their Circular No. 10/2002, dated October 9, 2002. [cf. AP (DIR Series) Circular No. 56, dated November 26, 2002].

In case of a foreign national, sale proceeds can also be repatriated even if the property is inherited from a person resident outside India. But this is allowed only with prior approval of Reserve Bank. The foreign national has to approach RBI with documentary evidence in support of inheritance of the immovable property and the undertaking and the C.A. Certificate as mentioned above.

The general permission for repatriation of sale proceeds of immovable property is not available to a citizen of Pakistan, Bangladesh, Sri Lanka, China, Afghanistan and Iran and he has to seek specific approval of RBI. As FEMA specifically permits transactions only in Indian Rupees with citizens of Nepal and

Bhutan, the question of repatriation of the sale proceeds in foreign exchange to Nepal and Bhutan would not arise.

V. Provisions for Foreign Embassies/Diplomats/Consulate Generals

Q.29 Can Foreign Embassies/Diplomats/Consulate General purchase/sell immovable property in India?

Yes, Foreign Embassies/Diplomats/Consulate Generals can purchase and sell any immovable property other than agricultural land/plantation property/farm house in India with prior clearance from the Government of India, Ministry of External Affairs. The payment should be made by foreign inward remittance through normal banking channel.

VI. Other issues

Q.30 Can NRI/PIO rent out the residential / commercial property purchased out of foreign exchange/rupee funds?

Yes, NRI/PIO can rent out the property without the approval of the RBI. Rent received can be credited to NRO/NRE account or remitted abroad. Powers have been delegated to the Authorized Dealers to allow repatriation of current income like rent, dividend, pension, interest, etc. of NRIs/PIO who do not maintain an NRO account in India based on an appropriate certification by a Chartered Accountant, certifying that the amount proposed to be remitted is eligible for remittance and that applicable taxes have been paid/provided for. [cf. AP (DIR Series) Circular No. 45 dated May 14, 2002].

Q.31 Can a person who had bought immovable property when he was a resident, continue to hold such property even after becoming an NRI/PIO?

Yes, he can continue to hold the residential/commercial property/agricultural land/plantation property/farm house in India without the approval of the RBI.

Q.32 In which account can the sale proceeds of such immovable property be credited?

The sale proceeds may be credited to NRO account.

Q.33 Can the sale proceeds of the immovable property referred to in Q. 31 be remitted abroad?

Yes, provided the amount to be remitted does not exceed USD one million per financial year, for all bonafide purposes to the satisfaction of Authorized Dealers and subject to tax compliance.

Q.34 Can foreign nationals of non-Indian origin resident in India or outside India who had earlier acquired immovable property under FERA with specific approval of RBI continue to hold the same? Can they transfer such property?

Yes, they may continue to hold the immovable property. However, they can transfer the property only with the prior approval of RBI.

Q.35 Is a resident in India governed by the provisions of Foreign Exchange Management (Acquisition and transfer of immovable property in India) Regulations, 2000?

A person resident in India who is a citizen of Pakistan or Bangladesh or Sri Lanka or Afghanistan or China or Iran or Nepal or Bhutan is governed by the provisions of Foreign Exchange Management (Acquisition and transfer of Immovable Property in India) Regulations, 2000 i.e. he would require prior approval of RBI for acquisition and transfer of immovable property in India even though he is resident in India. Such requests are considered by RBI in consultation with the Government in India.

STATUS OF RESIDENT

1. Non Resident Indian Status

An Indian citizen or a foreign citizen of Indian origin who stays abroad for employment/carrying on business or vocation or under circumstances indicating an intention for an uncertain duration of stay abroad is a NON-RESIDENT INDIAN (NRI). (Those who stay abroad on business visit, medical treatment, study or such other purposes which do not indicate an intention to stay there for an indefinite period will not be considered as NRIs).

2. Who is an NRI?

An Indian abroad is popularly known as Non-Resident Indian (NRI). The NRI status is legally defined under the Foreign Exchange Management Act, 1999 (FEMA, Act, 1999) and the Income-tax act, 1961 for applicability of respective laws.

3. Non residents under FEMA, 1999

The FEMA Act, 1999 provide definitions of non residents as under:

3.1 Person resident outside India (NRI)

Section 2(w) provides that a person resident outside India means a person who is not resident in India.

Thus if a person comes as a tourist, or for any purpose (not for employment or business in India), AND, he comes for a fixed or certain period of time he will be a non-resident.

The term NRI, generally, means a non-resident who is either an Indian Citizen residing outside India and includes Foreign Citizen of Indian origin residing outside India.

3.2 Person Resident in India

Section 2(v) provides that an individual person resident in India means:

3.2.1 An individual person

A person residing in India for more than one hundred and eighty-two days during the course of the preceding financial year but does not include

(A) a person who has gone out of India or who stays outside India, in either case-

(a) for or on taking up employment outside India, or

(b) For carrying on outside India a business or vocation outside India, or

(c) For any other purpose, in such circumstances as would indicate his intention to stay outside India for an uncertain period.

(B) a person who has come to India or who stays in India, in either case, otherwise than -

(a) for or on taking up employment in India, or

(b) for carrying on in India a business or vocation in India, or

(c) for any other purpose, in such circumstances as would indicate his intention to stay in India for an uncertain period.

The above definition is explained in simple terms for individuals hereunder.

(1) The residential status of person leaving India will be determined if a person leaves India for the purpose of employment, business or for any other purpose that indicates his intention to stay outside India for an uncertain period; then he becomes a non resident from the day he leaves India for such purpose.

(2) The residential status of a person returning to India will determined. If a person comes to India for the purpose of employment, business or for any other purpose that indicates his intention to stay in India for an uncertain period; then he becomes a resident from the day he come to India for such purpose.

In the definition, stay for a period of 182 days is also stated. However, the period of stay does not affect determination of status as stated in (1) and (2).

3.2.2 Person other than Individual

(a) any person or body corporate registered or incorporated in India,

(b) an office, branch or agency in India owned or controlled by a person resident outside India.

An office, branch or agency outside India owned or controlled by a person resident in India.

4. Meaning of Non-Resident under Income-tax Act, 1961

The definition of a non-resident for the purpose of Indian Income-tax Act is different than that of FEMA 1999 or for that matter of Exchange Control purposes.

Liability to pay tax does not depend on the nationality or domicile of the tax payer but on his residential status.

The residential status is to be determined in following three broad categories:

(a) Residents in India

(b) Resident but not ordinarily resident

(c) Non-residents

Residential status is determined on the basis of physical presence for every year separately as per the provision of Income-tax Act, 1961 explained in the following paragraphs.

4.1 Basic conditions for a Resident as per Income-tax Act

A Resident is one who during a Financial Year (FY), which is from April to March, satisfies any one of the following 2 basic conditions:

An individual is said to be a resident in India if he fulfils any of the following two condition:

(a) he is present in India for a period of more than 182 days or more during previous year; or

(b) if he is present in India for a period of 60 days or more during previous year AND at least 365 days or more during the 4 years prior to the previous year.

The stay in India need not be continuous.

In case an individual does not satisfy any of the above two basic conditions, then he is said to be a non-resident.

4.1.1 Exceptions permitted in the basic conditions

In the following two cases, an individual needs to be present in India for a minimum of 182 days or more in order to become resident in India:

(a) An Indian citizen who leaves India during the previous year for the purpose of taking employment outside India or an Indian citizen leaving India during the previous year as a member of the crew of an Indian ship.

(b) An Indian citizen or a person of Indian origin who comes on visit to India during the previous year (a person is said to be of Indian origin if either he or any of his parents or any of his grandparents was born in undivided India).

5. Additional conditions for Resident and Ordinarily Resident

Under section 6(6), a resident individual is treated as “resident and ordinarily resident” in India if he satisfies the following two conditions in addition to basic condition for a resident:

(a) Resident in India at least 9 out of 10 previous years prior to the previous year; AND

(b) In India for 730 days or more during 7 years prior to the previous year.

In brief it can be said that an individual becomes resident and ordinarily resident in India if he satisfies at least one of the basic conditions for a resident and the two additional conditions said above.

6. Meaning of Resident but Not Ordinarily Resident (RNOR)

In the case of an individual who is a resident, it is to be further determined whether he is an ordinary resident or not an ordinary resident.

A person is said to be resident but not ordinary resident (RNOR) if he satisfies any of the following additional conditions:

(a) If he has been a non-resident in India in nine out of the 10 previous years preceding the relevant previous year; OR

(b) If he has been in India for 729 days or less in the seven immediately preceding the relevant previous year. If none of the above two conditions are satisfied, then a person is said to be an ordinary resident.

An individual who is non-resident for 9 consecutive years, shall remain RNOR for 2 subsequent years and as such his foreign income is not taxable in India while his status is that of RNOR. The status of RNOR renders certain income of such individual non-taxable as explained in Tax liability of NRIs.

A person who is returning to India after 9 years of stay outside India (and who was non-resident for each of the 9 years under the Income Tax Act, 1961), shall remain RNOR for a period of two years only.

7. Residential status of HUF

A Hindu Undivided Family (HUF) is said to be resident in India if control and management of its affairs is wholly or partly situated in India during the relevant previous year.

8. Residential status of other than an Individual & HUF

In case of other than an individual and HUF, the residential status depends upon the place from which its affairs are controlled and managed.

As per Section 6(2), a partnership firm or an association of persons are said to be resident in India if control and management of their affairs are wholly or partly situated within India during the relevant previous year. They are, however, treated as non-resident if control and management of their affairs are situated wholly outside India.

As per Section 6(3), an Indian company is always resident in India. A foreign company is resident in India only if, during the previous year, control and management of its affairs is situated wholly in India. Where part or whole of control and management of the affairs of a foreign company is situated outside India, it shall be treated as a non resident company.

As per Section 6(4), every other person is resident in India if control and management of his affairs is wholly or partly, situated within India during the relevant previous year. ON the other hand, every other person is non-resident in India if control and management of its affairs is wholly situated outside India.

9. Non resident status under the Income-tax/Wealth-tax Act

The term non-resident is negatively defined under section 6 of the Income tax Act. An individual who is not a resident under the income tax act is a non-resident (general termed NRI).

The status of a person as a resident or non-resident depends on his period of stay in India. The period of stay is counted in number of days for each financial year beginning from Ist April to 31st March (known as previous year under the Income-tax Act). The definition is explained in simple terms as under.

If an individual who satisfies understand both the conditions of section 6 of the Income-tax act, then he becomes a Non-Resident.

No.	Condition	Status
1.	He is not in India for 182 days or more during the relevant previous year.	If yes, then he is a non-resident, (so check the next condition)
2.	He is not in India for 60 days or more during the previous year and he is not in India for 365 days or more during the 4 years prior to the previous year.	If yes, then he is a non-resident

If a person is not satisfying any of the above conditions to become non-resident, check whether following assists to become a non-resident.

In the case of an individual on visit to India or a member of the crew of an Indian ship or a person leaving India for employment outside India, the requirement of stay in India of 60 days in condition 2 above is extended to 182 days.

10. Residential status under Companies Act, 1961

Schedule XIII of the Companies Act, 1961 deals with conditions to be satisfied for the appointment of a managing or whole-time director or a manager of the Company without the approval of the Central Government.

Explanation to Clause (e) of Part I of the Schedule provides that a resident in India includes a person who has been staying in India for a continuous period of not less than twelve months immediately preceding the date of his appointment as a managerial person and who has come to stay in India for taking up employment in India or for carrying on a business or vocation in India.

11. Comparison of residential status under Income-tax Act, FEMA & Companies Act.

Since the criteria for determining an individual's residential status differs under FEMA and Income-tax Act, it is possible that an individual can be regarded as a resident under the Income-tax Act and a non-resident under FEMA, and vice versa.

Under the Income Tax Act, an individual's residential status determined for a particular year and is relevant to determine the taxability of income earned in that year. Under FEMA, the residential status is not only to be determined for a particular point of time, it is an ongoing process and is relevant for determining whether an individual can undertake a particular transaction at that particular point of time.

A person who qualifies to be a non-resident under the Income-Tax Act, 1961 will also be considered a non-resident for the purposes of application of FEMA, but a person who is considered to be non-resident under FEMA may not necessarily be a non-resident under the Income-tax Act. For instance a resident Indian goes abroad to conduct a business in December 2009. Under the Income-tax Act, he will be regarded as resident during financial year 2009-10 as period of stay in India is more than 182 days. However, under FEMA, he will be regarded as non-resident the moment he leaves the country for business purposes.

Under the Companies Act, 1956 a resident in India includes a person who has been staying in India for a continuous period of not less than twelve months immediately preceding the date of his appointment as a managerial person. Therefore, a person who has come to stay in India for taking up employment or for carrying on a business or vocation may not be eligible to be appointed as a managerial person of a company, without approval of the Central Government, till the time he has stayed in India for a continuous period of twelve months even though he wil be treated as resident under FEMA the day he arrives in India for taking up employment or for carrying on business or vocation as would indicate his intention to stay for an uncertain period and under Income-tax Act upon his stay in India for at least 182 days in the previous year.

12. Person of Indian Origin (PIO)

FEMA defines a person of Indian Origin (PIO) as person, being a citizen of any country

(a) who at any time held an Indian Passport, or

(b) a person who himself or either of his parents or any of his grand parents were citizens of India by virtue of the Constitution of India or the Citizenship Act, 1955, or

(c) Spouse of an Indian citizen, or

(d) Spouse of a person covered under (a) or (b) above. However, the citizens of Bangladesh, Pakistan, Sri Lanka, Afghanistan, China, Iran, Nepal and Bhutan are not considered as PIO even if they satisfy the above conditions under FEMA for different purposes under different regulations.

13. Status of NRIs Returning to India

Status of non-residents on temporary visits/stay in India in India shall be as under:

(a) If visit/stay in India is without any intention to stay in India for an uncertain period, shall continue to be treated as 'non-residents' during their stay in India.

(b) He will continue to get all the benefits/advantages that are available to non-residents. Non-resident accounts/investments etc. would continue without any change.

(c) He will not be required to surrender foreign exchange available with them.

14. Key points to be consider while determining the residential status of an Individual

(i) Residential status is always determined for the Previous Year because the assessee has to determine the total income of the Previous Year only. In other words, as the tax is on the income of a particular previous year, the enquiry and determination of the residence qualification must confine to the facts obtaining in that previous Year.

(ii) If a person is resident in India in a previous year in respect of any source of income, he shall be deemed to be resident in India in the previous year relevant to the Assessment Year in respect of each of his other sources of Income.

(iii) Relevant previous Year means, the previous year for which residential status is to be determined.

(iv) It is not necessary that the stay should be for a continuous period.

(v) It is not necessary that the stay should be at one place in India.

(vi) Both the day of entry and the day of departure should be treated as the day of stay in India.

(vii) Presence in territorial waters in India would also be regarded as stay in India.

(viii) A person is said to be of Indian Origin if he or either of his parents or any of his grand parents was born in undivided India.

(ix) Official tours abroad in connection with employment in India shall not be regarded as employment outside India.

(x) A person may be resident of more than one country for any previous year.

(xi) Citizenship of a country and residential status of that country are two separate concepts. A person may be an Indian national/citizen but may be a resident in India and vice versa.

15. Key points to be considered by NRIs

(i) Previous Year is period of 12 months from Ist April to 31st March. Number of days stay in India is to be counted during this period.

(ii) Both the Day of Arrival into India and the Day of Departure from India are counted as the days of stay in India (i.e. 2 days stay in India).

(iii) Dates stamped on Passport are normally considered as proof of dates of departure from and arrival in India.

(iv) It is advisable to keep several photocopies of the relevant passport pages for present and future use.

(v) Ensure that date stamped on the passport is legible.

(vi) Keep track of number of days in India from year to year and check the same before making the next trip to India.

16. Indian Students Studying Abroad – Revision in the Residential Status

The RBI has vide circular No. (DIR Series) 45, dated 8.12.2003 clarified that the definition of residential status in terms of section 2(v)(i) FEMA.' Person resident in India' means –

(i) a person residing in India for more than one hundred and eighty-two days during the course of the preceding financial year but does not include-

1. A person who has gone out of India or who stays outside India, in either case-

   (a) for or on taking up employment outside India, or

   (b) for carrying on outside India a business or vocation outside India, or

(c) for any other purpose, in such circumstances as would indicate his intention to stay outside India for an uncertain period".

2. It is observed from the representations that when students leave India for prosecuting a course of specified duration, such stay outside India exceeds the period officially intended for various reasons. While taking up studies, or further advance courses, students may have to take up job or seek scholarships to supplement income to meet their financial requirements aboard. As they have to earn and learn, their stay for educational purposes gets prolonged than what is intended while leaving India.

3. Furthermore, the purport of their argument is that they are students, they are, in reality, not dependent for a dominant part of their expenses on remittances from their households in India. Often they are permitted to work and have to undertake certain related financial transactions. They urge, therefore, that the definition needs to be revised.

4. Having regard to the circumstances stated above, it is clear that on both counts viz. their stay abroad for more than 182 days in the preceding financial year and their intention to stay outside India for an uncertain period when they go abroad for their studies, they can be treated as Non-Resident Indians (NRIs).

5. As non-residents, they will in any case be eligible for receiving remittances from India, as follows-

(i) up to USD 100,000 from close relatives from India on self-declaration towards maintenance, which could include remittances towards their studies also,

(ii) up to USD 1 million out of sale proceeds/balances in their account maintained with an AD in India,

(iii) all other facilities available to NRIs under FEMA,

(iv) educational and other loans availed of by students as resident in India which can be allowed to continue as per provisions of Notification No. 4/2000-RB, dated May 3, 2000.

6. It is clarified that these instructions do not dilute in any way the utilization of the existing foreign exchange remittance facilities to students in regard to their academic pursuits.

7. Necessary amendments to the Foreign Exchange Management Regulations, 2000 are being issued separately.

8. Authorized Dealers may bring the contents of their circular to the notice of their constituents concerned.

9. The directions contained in this circular have been issued under section 10(4) and section 11(1) of the Foreign Exchange Management Act, 1999 (42 of 1999).

17. Foreign citizen of Indian Origin

For the purposes of availing of the facilities of opening and maintenance of bank accounts, a foreign citizen (but not a citizen of Pakistan or Bangladesh) is deemed to be of Indian Origin, if he, at any time was an Indian citizen or either of his parents or any of his grandparents was a citizen of India. A spouse (not being a citizen of Pakistan or Bangladesh) of an NRI is also treated as an NRI for the above purposes. For investments in shares/securities in India, a foreign citizen (but not a citizen of Pakistan, Bangladesh or Sri Lanka) is deemed to be of Indian Origin, subject to

satisfaction of the other conditions above. For investments in immovable properties, a foreign citizen (but not a citizen of Pakistan, Bangladesh, Afghanistan, Bhutan, Nepal or Sri Lanka) is deemed to be of Indian Origin, if he, at any time, was an Indian citizen or his father or paternal grandfather was an Indian citizen.

18. Overview

The definition of a NRI is significant from the perspective of FEMA, Investment and Taxation in India. The definition of a NRI under the Income-tax Act is different from that under FEMA.

Under Section 115(e) of the Income-tax Act, a NRI is defined as ‘An individual being a citizen of India or a person of India origin (PIO) who is not a resident. A person is deemed to be a PIO if he or either of his parents or any of his grandparents, was born in undivided India.

The term NRI is defined under FEMA rules and regulations s “A person resident outside India who is either a citizen of India or is a person of Indian origin (PIO).

However the term PIO is defined differently in different regulations and therefore the term NRI will have different meaning under different regulations i.e. the term NRI & PIO are contextual. Under the Foreign Exchange Management (Deposit) Regulations, 2000, which deal with banking accounts in India by NRIs, the term PIO is defined as below:

A person of Indian Origin (PIO) is a citizen of any country other than Bangladesh or Pakistan, if –

(a) he at any time held an Indian passport; or

(b) he or either of his parents or any of his grandparents was a citizen of India by virtue of the Constitution of India or the Citizenship Act, 1955 or

(c) he is spouse of an Indian citizen or a person referred to in 'a' or 'b'

This is the most common definition adopted under most regulations. Significantly, Foreign Exchange Management (Acquisition and Transfer of Immoveable property in India) Regulations, 2000 exclude clause (c) above and further restrict clause (b) to paternal relationships i.e. father and grandfather only. In Foreign Exchange Management (Transfer or issue of security by a person resident in India) Regulations, 2000 that govern investments in companies, stock market and other instruments as also Foreign Exchange Management (Investment in firm or property concern in India) Regulations, 2000 the term excludes a citizen of Sri Lanka.

18.1 Basic concepts under FEMA

Residential status and nature of transaction i.e. capital account transaction (e.g. purchase/sale of shares, property) or current account transaction (e.g. remittance of income on shares, property) are the cornerstones of FEMA. The golden rule of FEMA is, "All capital account transactions other than those permitted are prohibited while al current account transactions other than those prohibited are permitted". Under FEMA, certain types of transactions do not require RBI permission while others either require prior approval of RBI/Government or it is mandatory to inform RBI of the same. Although total capital account convertibility does not exist under FEMA, there is full convertibility to the extent of USD 1 million per calendar year for NRIs See Repatriation for details.

18.2 Residential status under FEMA

Residential status under FEMA is the basis of applicability of FEMA i.e. transactions of a resident even outside India are covered by FEMA. The

determination of residential status under FEMA is substantially different as compared to that under the Income-tax Act. Under the Income-tax Act, residential status is determined based only on the number of days of stay in India. Under FEMA, residential status is primarily determined based on the intention of the person.

'A' would be a non-resident under FEMA as soon as he goes out of India for employment/business outside India irrespective of the duration of his stay in India. Accordingly, 'A' would be outside the ambit of FEMA as far his transactions outside India are concerned (e.g. he can freely invest or carry on business abroad out of his earnings abroad).

18.3 Benefits associated with NRI status

Apart from various types of investments in India, which 'A' can make, there are several other advantages of the NRI status, which are outlined below:

'A' can freely acquire immoveable properties abroad out of earnings abroad. He can invest anywhere in the world. He can start any business abroad. He can become trustee-beneficiary of a trust set up abroad. He can retain all these even on his return to India and need not even intimate RBI about his foreign assets.

'A' can set up family trusts abroad for education of his children/maintenance of his family members. Such trusts can also be asset Protection Trusts where the assets held by the trust are free from attachment by the creditors.

'A' can bring 10 Kgs of gold and 100 Kgs. Of Silver (on payment of prescribed duty) once in six months on his visit to India.

'A's foreign income is not liable to tax in India.

'A' can enjoy several tax concessions in India on his assets in India.

'A' can seek advance ruling from Advance Ruling Authority on taxability (income tax) of transactions.

'A' can avail the benefits of the Double Tax Avoidance Agreement (DTAAs) entered into by India with several countries which attempt to minimize double tax on the same income (i.e. if tax is payable in India by NRIs on their income in India, credit for tax payable is available against tax payable in foreign country on such income). Also tax on dividends, royalty, fees for technical services earned in India by NRIs are offered concessional tax treatment under most DTAAs. Further, in few cases, tax may not be payable at all on such income if the NRI is a tax resident of a treaty country.

There are special reserve seats for children of NRIs for Engineering/Medical/MBA courses in certain institutions in India provided the fees are paid in foreign exchange.

Even in case of Initial Public Offerings (IPO's), there are special quotas for NRI.

18.4 Who qualifies as a NRI for India Income-tax purposes?

To be eligible for the 'NRI' status, a person should be a non-resident under the Income Tax Act and should either be a citizen of India or a person of Indian origin. A person is of Indian origin if he or his parents or grand parents were born in Undivided India.

A person who has been in India for 60 days or more during a financial year and 365 days or more during the preceding four financial years qualifies as a 'Resident' of India Considering the fact that NRIs may end up staying in India for longer periods while visiting relatives or to take care of India property and investments, the 60 days period is relaxed to 182 days. NRIs based outside India can continue to enjoy non-resident status in India if their presence in India is more than 60 days but less than 182 days, even if their stay in India during the past four financial years is 365 days or more.

Deputation abroad for more than six months makes a person NRI.

18.5 Income Tax implications

For the purposes of levy of tax, the Income-tax Act in India has classified the status of an individual assessee into three viz.

Resident and ordinarily resident (FOR) Resident but not ordinarily resident (R but NOR)

The residential status of an Individual is determined based on the number of days of stay in India, Financial year (FY) is April to March.

Basic Conditions

In India > or = 182 days in FY

No Yes

*In India > or = 60 days in FY and > or = 365 days in preceding 4 years FYs

Yes

Resident

Further Conditions

No Yes

NR in India in 9 out of 10 Preceding FYs

Non- Residents

No

Yes

RNOR

In India for < or = 729 days in Preceding 7 years

No

FOR

*Not applicable to a resident going outside India for employment, a resident who leaves India as a member of crew of an Indian ship, an Indian citizen or person of Indian origin who is abroad and comes to India for a visit i.e. if such a person stays in India for less than 182 days, he would be a non-resident.

In the case of a FOR, his global income is taxed in India. Normally a returning Indian would be assessed as RNOR on his return to India (See FAQs of the website of RBI for returning Indians for more details)

In the case of a Non-resident, only the income earned or received in India is taxed in India. Accordingly, income earned outside India by 'A' would not be taxable in India.

India has contracted Double Tax Avoidance Agreements (DTAAs) with various countries. Taxability of A's Indian income would be decided as per the provisions of these DTAAs. Most of these DTAAs contain provisions for lower rates of tax in case of income like dividend, royalties, fees for technical services etc. Provisions of some DTAAs provide interesting opportunities for efficient tax planning. For instance, the DTAA with Mauritius. Structuring of likely income in India therefore requires a 'case to case' study depending on facts of each case.

19. FAQ on status

See Appendix 2 for FAQ relating to status of resident

Appendix-1

Table for definitions with the related sources

S.No.	Terms	Definitions and sources
1.	Non-resident Indian	A person resident outside India who is citizen of India or is a person of Indian origin. (Sources: (i) Regulation 2(vi) of FEM (Deposit)

		Regulation, 2000); (ii) Regulation 2(iv) of FEM (Investment in Firm or Proprietary Concern in India) Regulations, 2000, (iii) Regulation 2(b) of FEM (Borrowing or Lending in Rupees) Regulations, 2000; and (iv) Regulation 2(viia) of FEM (Transfer or Issue of Security by a person resident outside India) Regulations, 2000
2.	Not Permanently Resident	A person resident in India for employment of a specified duration (irrespective of length thereof) or for a specific job or assignment, the duration of which does not exceed three years. (Source: (i) Explanation to Regulation 4 of FEM (Transfer or Issue of any Foreign Security) Regulations, 2004); and (ii) Explanation to Regulation 5 of FEM (Remittance of Assets) Regulations, 2000)
3.	Person	'Person' includes – (i) an individual, (ii) a Hindu Undivided family, (iii) a company, (iv) a firm, (v) an association of persons or a body of individuals, whether incorporated or not, (vi) every artificial juridical person, not falling within any of the preceding sub-clauses,

		and (vii) an agency, office or branch owned or controlled by such person. (Source: Section 2(u) of FEMA, 1999)
4.	Person of Indian Origin	(i) 'Person of Indian origin' means a citizen of any country other than Bangladesh or Pakistan, if: (a) he at any time held Indian passport; or (b) he or either of his parents or any of his grand parents was a citizen of India by virtue of the Constitution of India or the Citizenship Act, 1955: or (c) the person is a spouse of an Indian citizen or a person referred to in sub-clause (a) or (b). (Source: Regulation 2(xii) of FEM (Deposit) Regulations, 2000) (ii) Same definition of 'person of Indian Origin' as in (i) above is to be followed for the purpose of FEM (Borrowing and Lending in Rupees) Regulations, 2000. (Source: Regulation 2(b) of FEM (Borrowing and Lending in Rupees) Regulations, 2000 (iii) Same definition of 'Person of Indian Origin' as

		in (i) above is to be followed for the purpose of FEM (Remittance of Assets) Regulations, 2000. (Source: Regulation 2 (iv) of FEM (Remittance of Assets) Regulations, 2000) (iv) "Person of Indian Origin" means a citizen of any country other than Bangladesh or Pakistan of Sri Lanka, if – (a) he at any time held Indian passport; (b) he or either of his parents or any of his grand-parents was a citizen of India by virtue of the Constitution of India or the Citizenship Act, 1955; or (c) the person is a spouse of an Indian citizen or a person referred to in sub-clause (a) or (b); (Source: Regulation 2(vi) of FEM (Investment in Firm or Proprietary concern in India) Regulations, 2000) (v) "Person of Indian origin" means an individual (not being a citizen of Pakistan or Bangladesh or Sri Lanka or Afghanistan or China or Iran or Nepal or Bhutan), who- (i) At any time, held Indian passport; or (ii) Who or either of whose father or whose

		grandfather was a citizen of India by virtue of the Constitution of India or the Citizenship Act, 1955, (Source: Regulation 2(c) of FEM (Acquisition and Transfer of Immovable Property in India) Regulation, 2000)
5.	Person Resident India	'Person resident in India' means, - (i) A person resident in India for more than 182 days during the course of the preceding financial year but does not include: (A) a person who has gone out of India or who stays outside India, in either case – (a) for or on taking up employment outside India; or (b) for carrying on outside India a business or vocation outside India; or (c) for any other purpose in such circumstances as would indicate his intention to stay outside India for an uncertain period; (B) a person who has come to or stays in India, otherwise than – (a) for or on taking up employment in India; or (b) for carrying on in India a business or vocation in India; or

		(c) for any other purpose in such circumstances as would indicate his intention to stay in India for an uncertain period; (ii) Any person or body corporate registered or incorporated in India; (iii) An office, branch or agency in India owned or controlled by a person resident outside India; (iv) An office, branch or agency outside India owned or controlled by a person resident in India. (Source: Section 2(v) of FEMA, 1999)
6.	Person Resident outside India	A person who is not resident in India. (Source: Section 2(w) of FEMA, 1999
7.	Meaning of erstwhile Overseas Corporate Body (OCB)	(i) The term "overseas corporate body (OCB)" means and includes an entity defined in clause (xi) of regulation 2 of the FEM (Deposit) Regulations, 2000 i.e. "a company, partnership firm, society and other corporate body owned directly or indirectly to the extend of at least sixty per cent by Non-resident Indians and includes overseas trust in which not less than sixty per cent beneficial interest is held by non-resident Indians directly or indirectly but irrevocably" (ii) OCBs defined in clause (i) above have been

		derecognized in India w.e.f. 16.09.2003 and accordingly, 'withdrawal of general permission' Regulations have been issued by the Reserve Bank.

Appendix-2

Frequently Asked Questions

Q.1 Where are the terms a ‘person resident in India’ and a ‘person resident outside India’ defined?

Section 2(v) and section 2(w) of the FEMA, 1999 defines ‘person resident in India’ and a ‘person resident outside India’ respectively.

Q.2 What is meant by a person resident in India?

Under FEMA, a person resident in India is defined as a person residing in India for more than one hundred and eighty-two days during the course of the preceding financial year (April-March) and who has come to or stays in India either for taking up employment, carrying on business or vocation in India or for any other purpose, that would indicate his intention to stay in India for an uncertain period. In other words, to be treated as ‘a person resident in India’ under FEMA, a person has not only to satisfy the condition of the period of stay (being more than 182 days during the course of the preceding financial year) but has also to comply with the condition of the purpose/intention of stay.

Q.3 What is meant by a person resident outside India?

The Act defines a ‘a person resident outside India’ as a person who is not a person resident in India’

Q.4 Who can determine whether a person is resident in India or not?

RBI does not determine the residential status. Under FEMA, residential status is determined by operation of law. The onus is an individual to prove his/her residential status, if questioned by any authority.

Q.5 Who is non-resident Indian (NRI)?

An Indian Citizen who stays abroad for employment/carrying on business or vocation outside India or stays abroad under circumstances indicating an intention for an uncertain duration of stay abroad is a non-resident. (Persons Posted in U.N. organizations and official deputed abroad by Central/State Governments and Public Sector undertakings on temporary assignments are also treated as non-temporary assignments are also treated as non-residents). Non-resident foreign citizens of Indian Origin are treated on par with non-resident Indian citizen (NRIs).

Q.6 Practical considerations

When an Indian goes abroad either for employment or for doing business he should take care of the following:-

(i) Financial year is from April Ist to 31st March, Number of days of stay in India for deciding residential status is counted qua this period.

(ii) Day of arrival into India and day of departure from India is to be counted as one day each in India.

(iii) Dates stamped on passport are normally considered as proof of dates of departure from and arrival to India and hence to keep photocopies of passport & ensure that date stamped on passport is legible.

(iv) Keep track of number of days in India from year to year and check the same before making the next trip to India.

Q.7 Who is a person of Indian Origin?

For the purposes of Availing of the facilities of opening and maintenance of bank accounts and investments in shares/securities in India, Foreign citizen (other than a citizen of Pakistan or Bangladesh) is deemed to be of Indian origin, if,

(a) he, at any time, held an Indian passport, or

(b) he or either or his parents or any of his grand parents was a citizen of India by virtue of the Constitution of India or Citizenship Act, 1955 (57 of 1955).

Note: A spouse (non being a citizen of Pakistan or Bangladesh) of an Indian citizen or of a person of Indian origin is also treated as a person of Indian origin for the above purposes provided the bank accounts are opened or investments in shares/securities in India are made by such persons only jointly with their NRI spouses.

For investments in immovable properties a foreign citizen (other than a citizen of Pakistan, Bangladesh, Afghanistan, Bhutan, Sri Lanka or Nepal), is deemed to be of Indian origin if,

(a) he held an Indian passport at any time, or

(b) he or his father or paternal grand-father was a citizen of India by virtue of the Constitution of India or the Citizenship Act, 1955 (57 of 1955).

Q.8 What is an OCB?

Overseas Corporate Bodies (OCBs) are bodies predominantly owned by individuals of Indian nationality or origin resident outside India and include overseas companies, partnership firms, societies and other corporate bodies which are owned, directly or indirectly, to the extent of at least 60% by individuals of Indian nationality or origin resident outside India as also overseas trusts in which at least 60% of the beneficial interest is irrevocable held by such persons. Such ownership interest should be actually held by them and not in the capacity as nominees. The various facilities granted to NRIs are also available with certain exceptions to OCBs so long as the ownership/beneficial interest held in them by NRIs continues to be at least 60%.

Q.9 Are OCBs required to produce any certificate regarding ownership/beneficial interest in them by NRIs?

Yes, in order to establish that the ownership/beneficial interest in any OCB held by NRIs is not less than 60%, the concerned body/trust is required to furnish a certificate from an overseas auditor/chartered accountant/certified public accountant in form OAC where the ownership/beneficial interest is directly held by NRIs, and in form OAC 1 Where the ownership/beneficial interest is directly held by NRIs, and in form OAC 1 where it is held indirectly by NRIs and further that such ownership interest is actually held by them and not in the capacity as nominees.

Acknowledgements:Bharat's Taxation of Capital Gains with Illustrations as amended by the Finance Act,2010 by Dr.Girish Ahuja & Dr.Ravi Gupta

Capital Gains – Index of Important Cases

Sec. 54EC. Capital Gain not to be charged on investment in certain Bonds

1. [Cello Plast V DCIT (2010) TIOL 60 ITAT (Mum)]

2.. [ITO V Vikash Behal (2010) 36 DTR 385 (Kol 'C']

3. [ITO v Saraswati Ramanathan (2008) 300 ITR (AT) 410 (Del)].

Sec. 50C : Computation of Capital Gains in Real Estate Transactions

1. [CIT v Thiruvengadam Investments Pvt. Ltd. (2010) 320 ITR 345 (Mad)]

2. [Inderlok Hotels Pvt. Ltd. v. ITO (2009) 318 ITR (AT) 234 (Mum)].

3.[Punjab Poly Jute Corporation v ACIT (2009) 3134 ITR (AT) 178 (Amritsar)].

4. [Mohd. Shoib v. Dy. CIT (2009) 29 DTR 306 (Lucknow 'B')].

5. [Navneet Kumar Thakkar v ITO (2008) 110 ITD 525 (Jodh)(SMC)].

Section 45(4) & Sec. 45 (3) Capital Gain on Transfer of Capital Asset by a partner to firm or vice versa

1. [CIT v Gurunath Talkies (2010) 214 Taxation 729 (Kar)].

2. [DLF Universal Ltd. v DCIT (2010) TIOL 16 ITAT-D-L-SB].

3. [P.P. Menon v CIT (2009) 183 Taxman 246(Ker)].

4. [Dharamshibhai B. Shah v ITO (2009) 32 DTR (Ahd 'B') (TM) 106].

Sec. 70, 71, 74 : Set off of Capital Losses

1. [G.K. Ramamurthy v JCIT (2010) 2 ITR (Trib) 139 (Mum)]

2.[Indore-Malwa United Mils Ltd. v. CIT (1962) 45 ITR 210 (SC); CIT v. Thiagorajan (S.S.)(1981)129 ITR 115 (Mad)].

Section 55(2) : Cost of Acquisition of Capital Assets

1. [CIT v. Sri Hariram Hotels (P) Ltd. (2010) 229 CTR 455 (Kar)]

2. [Arun Sunny v Dy CIT (2009) 184 Taxman 498 (Ker)].

3. Mrs. Pushpa Sofat (2002) 81 ITD 1 (Chd)(SMC);Kamal Mishra v ITO (2008) 19 SOT 251 (Del.) ; M. Siva Paravathi v ITO (2009) 37 DTR 124 (Visakha).;[DCIT v Manjula J. Shah (2009) 318 ITR (AT) 417 (Mum) (SB)].

4. [Prabhandham Prakash v ITO (2008) 22 SOT 58 (Hyd)].; [Charanbir Singh Jolly v ITO (2006) 5 SOT 89 (Mum) ;See also Smt. Lata G. Rohra V. DCIT (2008)21 SOT 54 (Mum)].

Sec. 2(14)(iii) and Sec. 54B: Agricultural land not capital in certain cases + capital gain in certain circumstances

1.[CIT v Satinder Pal Singh (2010) 33 DTR (P & H) 281]

2.[CIT v Devarajalu (G.K.)(1991) 191 ITR 211 (Mad)].; [K.M. Jain & Sons (HUF) v ITO (2008) 173 Taxman 114 (Del-Trib)].

Misc. Capital Gain V Business Income + Long Term/Short Term Distinguished etc.

1. [Cherukuri Ramesh v Asstt. CIT (c010) 36 DTR 269 (Visakha)]

2. [CIT v A.S. Aulakh (2008) 304 ITR 27 (P&H)]

3. CIT v. AMARJIT INDERJIT CHOPRA (2006) 153 Taxman 39 (P & H)

   Union of India v Muthyam Reddy (S.) (1999) 240 ITR 341

4. CIT v CITI BANK NA Reported in (2003) 261 ITR 570 (Bom)

Capital Gains – Summary of Some Important Cases

Sec. 54EC. Capital Gain not to be charged on investment in certain Bonds

1. Where the assessee could not invest the money due to non availability of bonds qualifying for deduction under section 54EC it was held there was a reasonable cause for not purchasing the bonds within the time specified in section 54EC. Since the assessee purchased the bonds as soon as same were available it was eligible to claim deduction under section 54EC. [Cello Plast V DCIT (2010) TIOL 60 ITAT (Mum)]

2. Under the development agreement which resulted in conferring of the rights of ownership of the developer's share of the land unto the developer on the date on which it was entered into, the same would constitute a 'transfer' in relation to developer's share in that capital asset, and that agreement having been entered into in the year 2000-01, the capital gains accrued in the assessment year 2001-02and sale of flat in assessment year 2005-06 received from the developer gave rise to long term capital gains, eligible for exemption under section 54EC. [ITO V Vikash Behal (2010) 36 DTR 385 (Kol 'C']

3. Where the investment in bonds for claiming exemption was made in joint name it was held that there was no requirement in the section that the investment should be in the name of the assessee. The object of insertion of Section 54EC was to give an incentive to the development of infrastructure. In 2001 the section was widened to include bonds issued by Rural Electrification Corporation Ltd. If development of infrastructure was the object, it would not matter whether the investment was made in the name of the assessee exclusively or in the joint names of the assessee and somebody else. The only condition was that the funds used for the investment must be traceable to the sale proceeds of the capital asset. That

condition was satisfied by the assessee. The Commissioner (Appeals) had found that the son did not contribute anything to the investment and this finding was not in dispute. The consequences that flow from including the son's name as a joint name were not relevant for the purpose of granting exemption under section 54EC to the assessee. The Commissioner (Appeals) had noted that the assessee was 69 years of age at the relevant time and it was only a matter of convenience and to avoid any problem in future that the son's name was included. The assessee was eligible for the exemption under section 54EC of the Act. [ITO v Saraswati Ramanathan (2008) 300 ITR (AT) 410 (Del)].

Sec. 50C : Computation of Capital Gains in Real Estate Transactions

1. Section 50C providing for deeming the value for stamp duty purposes as full value of consideration is applicable only for capital assets and not for business assets. [CIT v Thiruvengadam Investments Pvt. Ltd. (2010) 320 ITR 345 (Mad)]

2. Section 50C is not applicable where the asset is held as stock-in-trade. [Inderlok Hotels Pvt. Ltd. v. ITO (2009) 318 ITR (AT) 234 (Mum)].

3. The assessee sold its land for Rs. 16.34 lakhs at the rate of Rs. 22.81 per sq.yd., which value was accepted by the State Authority for Stamp valuation purposes. As per the Assessing Officer, the value according to Punjab State Rules was Rs. 1500 per sq.yd. He referred the matter to the DVO for valuation, who fixed the value of the land at Rs. 72,00,000. The Assessing Officer assessed capital gains accordingly.

It was held that the value which was accepted for registration purposes cannot be replaced by the valuation fixed by the DVO. The stamp valuation authority

having accepted the value as shown, there was no question of referring the same to DVO. [Punjab Poly Jute Corporation v ACIT (2009) 313 ITR (AT) 178 (Amritsar)].

4. Clauses (a) and clause (b) of sub-section (2) of section 50C are in continuation to each other and, therefore, conditions laid down in both the clauses are required to be satisfied together – AO has to refer the valuation to the DVO for determining the fair market value if the property under transfer is less than valuation made by SVA and further that he has not disputed the valuation by SVA before appellate authorities under stamp Duty Act. [Mohd. Shoib v. Dy. CIT (2009) 29 DTR 306 (Lucknow 'B')].

5. Section 50C embodies the legal fiction by which the value assessed by the stamp duty authorities is considered as the full value of consideration for the property transferred. It does not go beyond the cases in which the subject transferred property has not become the subject-matter of registration and the question of valuation for stamp duty purposes has not arisen. [Navneet Kumar Thakkar v ITO (2008) 110 ITD 525 (Jodh)(SMC)].

Section 45(4) & Sec. 45 (3) Capital Gain on Transfer of Capital Asset by a partner to firm or vice versa

1. When there were only four partners, first change in June 1994 when two partners retired and two new partners inducted. Second change in 2004 when remaining two partners also retired and two more partners, who have brought the capital. The court held that the provisions of section 45(4) is applicable as it amounts to transfer Hence capital gain is applicable. [CIT v Gurunath Talkies (2010) 214 Taxation 729 (Kar)].

2. Where stock-in-trade was brought in as capital contribution by the partner and the assessee claimed that section 45(3) is not applicable as section 45(3) applies when a capital asset is introduced into a firm as capital contribution. It was held that section 45(3) applies also when stock-in-trade is introduced into a firm is on capital account. At the point of time of introduction, the stock-in-trade does not retain its character as stock-in-trade. This is also shown by the fact that the assessee revalued the stock-in-trade to its market value prior to introduction into the firm. Consequently, the gains on such transfer are taxable under section 45(3). [DLF Universal Ltd. v DCIT (2010) TIOL 16 ITAT-D-L-SB].

3. Period of holding of asset acquired by the partner on dissolution: Where the assessee sold building which he got on dissolution of firm, it was held the period of holding of such asset shall be considered from the date of dissolution of firm and it cannot be reckoned from the date when he was a co-owner of the building in capacity in capacity of partner of firm. [P.P. Menon v CIT (2009) 183 Taxman 246(Ker)].

4. Assessee having converted his proprietary concern into a partnership firm, revalued the assets and straightaway credited the capital accounts of the partners by the revalued figure at the end of the same previous year, section 45(3) is clearly applicable and the said value has to be taken to be the full value of consideration and not the amount credited to the capital account of the assessee. [Dharamshibhai B. Shah v ITO (2009) 32 DTR (Ahd 'B') (TM) 106].

Sec. 70, 71, 74 : Set off of Capital Losses

1. Non-exempt capital loss cannot be set off against exempt capital gains [G.K. Ramamurthy v JCIT (2010) 2 ITR (Trib) 139 (Mum)]

Capital loss on the transfer of an asset not allowed to be set off: Where capital gain on the transfer of an asset is exempt under section 10,any loss from transfer of such asset shall not be taken into consideration as it has been held that losses attributable to a source, the income from which is exempt from tax cannot be set off. [Indore-Malwa United Mils Ltd. v. CIT (1962) 45 ITR 210 (SC); CIT v. Thiagorajan (S.S.)(1981)129 ITR 115 (Mad)].

Section 55(2) : Cost of Acquisition of Capital Assets

1. Interest payable is to be includable in the cost of acquisition of property for computing capital gains on the sale of property, though such interest was not paid till the time the property was sold. [CIT v. Sri Hariram Hotels (P) Ltd. (2010) 229 CTR 455 (Kar)]

2. The property transferred must be a capital asset on the date of transfer and it is not necessary that it should have been capital asset also on date of its acquisition by the assessee. Further cost of acquisition of such property should be taken as fair market value as on 1.4.1981 even if such property was not notified as capital asset before 1.4.1981. [Arun Sunny v Dy CIT (2009) 184 Taxman 498 (Ker)].

3. In the case of Mrs. Pushpa Sofat (2002) 81 ITD 1 (Chd)(SMC), the indexation of cost was allowed from the date of acquisition of the asset by the previous owner and not the date when the asset was acquired by the assessee from the previous owner under any mode given under section 49(1). In Kamal Mishra v ITO (2008) 19 SOT 251 (Del.) and M. Siva Paravathi v ITO (2009) 37 DTR 124 (Visakha) it was held that the indexation of cost will be allowed with reference to the year in which the previous owner acquired the asset. Further, the Mumbai Special Bench overruled the contrary decision given in the case of DCIT v Kishroe C. Klanugo (2009) 290 ITR

(AT) 298 (Mum) in this regard and held that the indexation of cost will be allowed with reference to the year in which the previous owner acquired the asset. [DCIT v Manjula J. Shah (2009) 318 ITR (AT) 417 (Mum) (SB)].

4. Cost of demolition of existing building should be part of cost of acquisition: An assessee entered into an agreement with a promoter/developer as per which promoter was to demolish existing structure and build a new residential-cum-non-residential complex. Promoter was to give 43 percent of built-up area to assessee in new complex and 57 per cent of this area was to be owned by promoter. Cost of construction of 43 percent of built up area was to be total sale consideration for assessee for transferring land and existing structure. The assessee computed long-term capital gains at a certain loss by, inter alia, reducing cost of construction of superstructure from total sale consideration. It was held that unless superstructure was transferred along with land, promoter could not take possession and demolish same so as to make new complex, cost of construction of superstructure was to be allowed to assessee while computing capital gains. [Prabhandham Prakash v ITO (2008) 22 SOT 58 (Hyd)].

Where payment is made in installment indexation of the whole cost of acquisition to be done from the date of first instalment paid: The assessee sold a house for certain consideration. He had acquired the said house through agreement and made payments towards acquisition of the house in instalments. While computing capital gains exigible on the sale of house property, the assessee had computed indexed cost of house at cost inflation index pertaining to previous year 1992-93, in which first instalment of payment was paid by the assessee. The Assessing Officer rejected the claim of the assessee and treated the first instalment paid by the assessee as the cost of acquisition of house property and treated the

subsequent instalments paid by the assessee as cost of improvements made from time-to-time. The result was that the total cost incurred by the assessee for acquiring house was not taken as cost of acquisition for the purpose of indexation, but, on other hand, the cost was taken at static points corresponding to the instalment paid by the assessee.

It was held that the Assessing Officer had adopted the original cost of acquisition at the first instalment value, whereas the assessee had claimed the original cost of acquisition at the total payment made by him. Cost of acquisition of house for purpose of indexation and computation of long-term capital gains was the total cost incurred by the assessee and not first instalment value as determined by lower authorities. [Charanbir Singh Jolly v ITO (2006) 5 SOT 89 (Mum) See also Smt. Lata G. Rohra V. DCIT (2008)21 SOT 54 (Mum)].

Sec. 2(14)(iii) and Sec. 54B: Agricultural land not capital in certain cases + capital gain in certain circumstances

1. Measurement of distance from the municipality etc. to find out whether agricultural land is rural or not has to be measured in terms of the approach by road & not by a straight line distance on horizontal plane or as per crow's flight. [CIT v Satinder Pal Singh (2010) 33 DTR (P & H) 281]

2. Section 54B is applicable only to individuals and not to any other assessee this is because the section uses the expression used by "his or a parent of his" which clearly indicate that the "assessee" refers to an individual. [CIT v Devarajalu (G.K.)(1991) 191 ITR 211 (Mad)].

However, a contrary view has been given by the Delhi Tribunal as under:

The deduction under section 54B is available where the capital gain arises from the transfer of a capital asset being land which in the two years immediately preceding the date on which the transfer took place was used by the assessee or his parents for agricultural purposes, and the assessee has, within a period of two years after that date, purchased any other land for being used for agricultural purposes. Thus, deduction under section 54B is available to all the assessee who are using the original asset for agricultural purposes and the word 'assessee' is not qualified by any class of the assessee. [K.S. Jain & Sons (HUF) v ITO (2008) 173 Taxman 114 (Del-Trib)].

Misc. Capital Gain V Business Income + Long Term/Short Term Distinguished etc.

1. Assessee having purchased land jointly with his wife and son, applied for sanction for converting the same into housing plots soon thereafter and sold all the plots some years after obtaining the sanction, the obvious intention behind the purchase of land was to sell the same at a profit and, therefore, though an isolated transaction, it was an adventure in the nature of trade and the income therefrom has to be treated as business income. [Cherukuri Ramesh v Asstt. CIT (c010) 36 DTR 269 (Visakha)]

2. Where an incomplete house was sold by the assessee, it was held that the Tribunal had taken a balanced view by bifurcating the profit or gain arising out of the sale of the incomplete house, into long-term capital gain by keeping in view the date of acquisition of the plot and the construction of super-structure made on the plot. [CIT v A.S. Aulakh (2008) 304 ITR 27 (P&H)]

3. CIT v. AMARJIT INDERJIT CHOPRA (2006) 153 Taxman 39 (P & H)

Capital gains – Chargeable as – Assessment year 1980-81 – Profit from sale of agricultural land is not an agricultural income, but is capital gain liable to tax. Section 45, Income tax Act, 1961.

RULING

The controversy raised in this question was purely legal and was covered by the judgment in Tuhi Ram v Land Acquisition Collector (1993) 199 ITR 490, wherein it had been held that the capital gain of sale of agricultural land within 8 kms. from the Municipality as capital asset is liable to tax. In Union of India v Muthyam Reddy (S.) (1999) 240 ITR 341, the Apex Court has also held that profit from sale of agricultural land is not an agricultural income but is capital gain liable to tax.

4. CIT v CITI BANK NA Reported in (2003) 261 ITR 570 (Bom)

Capital gains – Determination of the nature of the gains – Assessee purchasing land in 1975 – Construction of building thereon in the year 1978 – Sale of the property comprising of the land and the building in the year 1978 – Whether the gains arising from such sale represents short term or long term capital gains – Held that the superstructure and land are separate assets and the capital gain on the land will be long-term while the capital on superstructure will be short-term.

RULING

Section 32 inter alia lays down that in respect of depreciation of buildings, machinery, plant or furniture owned by the assessee used for the purposes of business or profession, the assessee is entitled to deduction. Under section 32(1)(ii), the assessee was entitled to deduction for depreciation in case of buildings, machinery, plant or furniture, etc. That deduction was to consist of a certain percentage on the written down value. Therefore under section 32, the assessee was entitled to depreciation only in respect of the buildings and not the land. Since

land is not a depreciable asset, section 50 will not apply to the site on which the building is erected. Section 50 provides for determination of the cost of acquisition of a depreciable asset which in the present case is a superstructure on the site. Section 50 refers to the provision of section 48 which in turn deals with mode of computation and deductions in respect of the income chargeable under the head "Capital gains". Section 48 states that such income shall be computed by deducting from the full value of the consideration received, the expenditures incurred wholly in connection with such transfer and the cost of acquisition of the capital assets as also the cost of improvement thereto. Section 43(6) defines the expression "written down value" to mean the actual cost to the assessee less depreciation actually allowed to him under the Act in the case of asset acquired before the previous year. Therefore, one has to read section 50 which provides for determination of cost of the acquisition of the asset along with section 43(6) and section 48 of the Act. Therefore section 48 read with section 50 provides for computation of income chargeable under the head "Capital gains" whereas, section 45 is the charging section and it states, inter alia, that any profits or gains arising from the transfer of capital asset shall be chargeable to income-tax under the head "Capital gains". It is well-settled that in the matter of capital gains, the charging section 45 and the computation provisions under sections 48 and 50, constitute one integrated code. That, the character of computation provisions bear direct relationship to the nature of the charge under section 45 of the Income-tax Act. This point is important to decide the point at issue in this case because, without the computation provisions, the charge by itself under section 45 cannot stand. Hence, bifurcation is necessary between the site and the building for the purposes of capital gains. Therefore, profits arising from the sale of site are required to be treated separately from profits arising from the sale of building. In the

instant case, the assessee received Rs. 14,00,000 for land under a conveyance of 1978 as against the cost of Rs. 9,20,530 resulting in the capital gain of Rs. 4,79,470. According to the Department, this working is correct. However, according to the Department since the land was a part of the superstructure, the said amount of Rs. 4,79,470 was not a long-term capital gain but it was to be treated as short-term capital gain. This view is erroneous for two reason. Firstly, under section 32(1)., no depreciation is admissible for land (Judgment of the Supreme Court in the case of Alps Theatre (1967) 65 ITR 377). Secondly, the Department can assess the company to short-term capital gains only qua depreciable assets which in the present case is the superstructure erected on the site. In view of these reasons, on the sale of land carried to the building vide conveyance dated August 7, 1978, the gain which accrued to the asessee was long-term capital gain and the DEapartment was wrong in treating such gains as short term capital gain.. This view is supported by the judgment of the Madras High Court in the case of CIT v Dr. D.L. Ramachandra (1999) 236 ITR 51, which has taken the view that if the lands are held by assessee for a period more than the period prescribed under section 2(42A) the Income-tax Act, 1961, viz.36 months, then, it is not possible to say that construction of the building thereon, the land which was a long term capital assets ceases to be such long-term capital asset. This is because, the land is independent and identifiable capital asset and it continues to remain so even after construction of the building thereon.

CIT v ITTY IPE (T.C.)(2001) 249 ITR 591 (Mad)

Capital gains – Assessment – Whether value of land and superstructure thereon be split up and assessed separately as “long term” and “short term” capital asset – Tribunal holding there is nothing wrong in treating land as

separate asset and building separately – Held, Tribunal correct and matter decided in favour of assessee and against Revenue. Section 2(42A) and 45, Income-tax Act, 1961.

Ruling

A similar question came up for consideration in CIT v Dr. D.L. Ramachandra Rao (1999) 236 ITR 51 (Mad), wherein it was held that the definition of capital asset includes property of any kind and land held by the assessee is a capital asset and a building held by the assessee is also a capital asset and it is impossible to bifurcate the capital gain arising with reference to the sale of the land and building even if they are sold as one unit, if the lands are held by the assessee for a period more than that prescribed under section 2(42A), namely, 36 months. It is not possible to say that by construction of the building, the land which was a long term capital asset, has ceased to be a long term capital asset. The land is an independent and an identifiable capital asset and it continues to remain as an identifiable capital asset even after construction of the building. Applying the ratio of the said judgment, it is to be held that the Tribunal was correct in coming to the conclusion that the land and the superstructure can be assessed separately as "long term capital asset" and as "short term capital asset" for the purpose of capital gain.

Where assessee company had sold its land and building for a composite consideration, it was held that the assessee would be well within its right to segregate consideration amongst two assets and compute capital gain accordingly and hence computation of short-term capital gain in relation to proportionate consideration of building and long term capital gain in relation to proportionate consideration of land on which no depreciation had been claimed by the assessee was justified. [ACIT v Yamuna Syndicate Ltd. (2007) 162 Taxman 167 (Chd. Trib)].

Sec. 54F: Capital Gain on Transfer of asset, other than a residential House exempt if not sales consideration invested in a Residential house within specified period.

1. Assessee having invested long term capital gains with a company for purchase of a residential house under construction after canceling the earlier deal for purchase of a row house, the same was for construction of a house and not for purchase, hence, allocable limit for investment was three years and not two years. [Mukesh G. Desai (HUF) v. ITO (2009) 18 DTR 71].

2. The assessee sold land and invested the capital gains in a plot of land on which a residential house was under construction and claimed exemption under section 54F. The assessee also claimed exemption under section 54F in respect of investment in another continuous plot of land which, according to him, was land appurtenant to the building constructed on the first plot.

It was held that investment in vacant land appurtenant to and forming a part of a residential unit is eligible for exemption under section 54F, even if no construction is done on the appurtenant land. [Addl. CIT v Narendra Mohan Uniyal (2009) 34 SOT 152 (Del)]

3. When a house is located in a commercial complex, it can not be accepted that it is residential house or that it was used for residential purposes, in the absence of any evidence or record for use of residential purpose. [Sunita Oberoi (2009) 126 TTJ 745 (Agra)(T M).

4. Benefit under section 54F allowed even if the agreement for purchase of a house is cancelled and subsequently a new house is purchased: Where for claiming exemption under section 54F the assessee entered into an agreement for purchase of house and later on agreement was cancelled which was not proved to be bogus

by Assessing Officer and the assessee invested the refund in purchases of a flat, it was held that –

(a) the assessee's intention to invest the capital gains in the residential house to avail exemption was evident.

(b) the cancellation of agreement by the assessee fell within the ambit of the doctrine of caveat emptor and surrender of house was legally justified unless proved to be bogus by Assessing Officer.

(c) the refund received by the assessee in respect of surrender of the house was not relatable to any transfer of a new asset and as such there is no violation of condition that new house should not be transferred within a period of 3 years of its acquisition.

(d) that the transaction of assessee's investment of refund amount in the purchase of another flat is composite and interlinked and the benefit of section 54F shall be allowed.

5. Where the assessee sold a capital asset and invested the sale proceeds in the purchase of house in name of adopted son, it was held exemption under section 54F shall not be allowed as the property should have been purchased in the name of assessee only. [Prakash v ITO (2009) 312 ITR 40 (Bom).

6. Where HUF sold its agricultural land and purchased the flat in the co-operative society in the individual name of the assessee alongwith his mother, it was held benefit of section 54F cannot be given as the residential flat purchased or constructed has to be of the same assessee whose agricultural land is sold. [Vipin Malik (HUF) v CIT (2009) 183 Taxman 296 (Del)].

7.. The expression "a" residential house should be understood in a sense that building should be of residential nature and "a" should not be understood to indicate

a singular number. |The combined reading of sections 54(1) and 54F of the Income-tax Act discloses that, a non-residential building can be sold, the capital gain of which can be invested in a residential building to seek exemption of capital gain tax. However, the proviso to section 54F of the Income-tax Act, lays down that if the assessee has already one residential building, he is not entitled to exemption of capital gains tax, when he invests the capital gain in purchase of additional residential building. [CIT v. D. Ananda Basappa (2009) 309 ITR 329 (Karn)].

8. The benefit of section 54F is available for construction of a house. Where a person purchases an old building, demolishes it and contrast a new building, the entire exercise could be understood as one of construction, so that relief need not be limited to the cost of the old building but the entire cost of construction. [M. Vijaya Kumar v ITO (2008) 307 ITR 4 (AT) (Bang)].

9. Where the assessee had purchased the land by investing the capital gains and had constructed residential houses it was held that Circular No. 667 dated October 18, 1993](1993)] 204 ITR (St.) 103], did not stipulate that the construction would have to be completed in order to have the benefit under section 54F of the Act. In order to get the benefit under section 54F of the Act, the assessee need not complete the construction of the house and occupy it; it was enough if the assessee established the investment of the entire net consideration within the stipulated period. [CIT v Sardarmal Kothari and Another (2008) 302 ITR 286 (Mad)].

10. For claiming exemption under section 54F, the assessee can purchase or construct a residential house property before filing the return under section 139. There is no mention of any sub-section of section 139 in section 54F. Hence, if the house property is purchased or constructed after the due date of filing the return of income mentioned under section 139(1), the benefit of section 54F will be available

to the assessee if the return is filed by him under section 139(4) after the purchase or construction of the house even though the capital gain was not deposited under the Capital Gain Scheme. [Nipun Mehrotra v ACIT (2008) 110 ITD 520 (Bang)].

11. CIT v PRADEEP KUMAR (V). (2006) 153 Taxman 138 (Mad)

Capital gains – Exemption – Assessment year 1986-87 – Section 54F emphasizes construction of residential house – Said construction must be real one – It should not be a symbolic construction. Section 54F, Income tax Act, 1961.

RULING

The burden is on the assessee to prove that they had actually constructed new residential houses for purpose of the exemption under section 54F of the Income-tax Act. It is stated by the counsel for the assesses, that the assesses had constructed new residential houses, but they were unauthorized construction and the same unauthorized construction were later demolished for purpose of modernization. In this case, there was no tangible material to even infer that a residential house was constructed. One of the assessees says there was an extension to an existing structure and the other says the out-house was demolished; a new construction was put up in its place and both being unauthorized, have been pulled down on their own voluntarily. Section 54F emphasizes construction of residential house. The said construction must be real one. It should not be a symbolic construction.

Profit on Transfer of house property used for residence exempt if capital gain is used for purchase of another residential house within specified period.

1. Where the assessee utilized the sale consideration for other purposes and borrowed the money for the purpose of purchasing the residential house property to claim exemption under section 54, it was held that the contention that the same amount should have been utilized for the acquisition of new asset could not be

accepted. [Bombay Housing Corporation v Asstt. CIT (2002) 81 ITD 454 (Bom). Also followed in Prema P. Shah, Sanjiv P. Shah v ITO (2006) 282 ITR (AT) 211 (Mumbai)].

However, in the case of Milan Sharad Ruparel v ACIT (2009) 27 SOT 61 (Mum), it was held that the assessee is not eligible for deduction under section 54F if the assessee constructs or purchases a residential house out of borrowed funds. In this case the above case were also referred to the Learned Tribunal.

2. CIT v Natarajan (V.)(2006)287 ITR 271 (Mad)

Capital gains – Exemption – Assessment year 1990-91 – Even where assessee had purchased house in his wife's name after selling his residence which was in his name, he was entitled to exemption under section 54 when income from said purchased property was assessed in his name.

Section 54, Income-tax Act, 1961.

RULING

It was admitted by the assessee that he sold a house property at Bangalore, Therefore, it was clear that the assessee owned a house property and sold the same. He also admitted that he purchased a property at Madras in the name of his wife out of the money obtained by him by sale of the property at Bangalore.

Section 54 of the Act clearly says that if the assessee is the owner of the property, he is entitled for exemption. In the instant case, the assessee purchased a house at Anna Nagar in the name of his wife after selling the property at Bangalore. But the same was assessed in the hands of the assessee. Hence, as correctly held by the Commissioner of Income-tax (Appeals) as well as by the Tribunal that the assessee was entitled for exemption under section 54 of the Act.

3. CIT v SUNITA AGGARWAL (2006) 192 Taxation 274 (Del)

Capital gains – Exemption under section 54 – Even though assessee purchased a property from two different persons through four sale deeds but as it constituted one single residential house in which assessee was residing, exemption under section 54 available. Section 54, Income-tax Act, 1961.

RULING

The Tribunal had on an appreciation of the available material recorded a clear finding of fact to the effect that the property purchased by her was a single unit and was being used for residential purposes continuously ever since the possession of the different portions of the said property was taken over from the vendors. The Tribunal held that execution of four different sale deeds in respect of four different portion of the property did not materially affect the nature of the transaction or the nature of the property acquired since the property in question was being used by the assessee for her own purposes investment made in the purchase of the same was therefore eligible for deduction under section 54.

4. LAHIRI (P.K.) v CIT (2005) 189 Taxation 489 (All)

Capital gains – Exemption – Assessment Year 1979-80 – Land appurtenant to building does imply that ownership of building and land appurtenant should be of same person, if building is owned by one person and land is owned by another, then it will be a case of land adjoining to building and not land appurtenant to said building.

Section 54, Income-tax Act, 1961.

RULING

Exemption under section 54 is available only where the building of the land appurtenant thereto is sold and within two years immediately preceding the date on which the transfer took place, was being used by the assessee or a parent of his

mainly for the purposes of his own or the parent's own residence and the assessee has within a period of one year before or after that date purchased, or has within a period of two years after the date constructed, a house property for the purpose of his own residence. The question is as to where the residential bungalow belonged to the applicant's father and the land belonged to the applicant, can the land be said to be appurtenant to the building or not. The land appurtenant to the building does imply that the ownership of the building and the land appurtenant should be of the same person. If the building is owned by one person and the land is owned by another person then it will be a case of land adjoining to the building and by no stretch of imagination can it be called land appurtenant to the said building. In the present case, the land was adjoining to the building and, therefore, the benefit under section 54(1) of the Act would not be available.

5. ATWAL (DR. A.S.) v CIT (2005) 189 Taxation 261 (P & H)

Capital gains – Exemption – Profit on sale of property used for residence – Structure on plot sold was only a tin shed surrounded by barbed wire – There was neither kitchen or bathroom nor was any electricity provided – Held, it was not possible that assessee who was a senior teacher in university would use such a structure for his residence especially when he had been provided residential accommodation nearby in university campus – Thus, assessee was not entitled to exemption under section 54 on sale of said plot. Section 54, Income-tax Act, 1961.

RULING

The reasoning given by the Tribunal to hold that the tin shed was not a house used by the assessee for his residence, was quite justified. It stood admitted that the structure on plot was only a tin shed surrounded only by barbed wire. There was neither any bathroom or kitchen nor was any electricity provided in the said shed. It

was therefore, not possible to believe that a person of the status of senior teacher in the University would use such a structure for his residence especially when he had been provided residential accommodation nearby in the university campus. It was not in dispute that the university campus was located opposite village where the plots in question were located. Thus, there was no infirmity in the finding of the Tribunal that the tin shed on plot even if considered a house, was not occupied by the assessee or a parent of his for their residence in the two years immediately preceding the date of transfer. Thus, the assessee was not entitled to exemption under section 54 of the Act on this ground alone.

6. CIT v SOOD (R.L.) (2000) 108 Taxman 227 (Del)

Capital gains – Exemption – Assessment year 1982-83 – Profit on sale of property used for residence – Assessee within four days of selling his residential house entering into agreement for purchase of residential flat and making considerable payment to the builder – However, actual possession given after the prescribed period and sale deed registered thereafter – Assessing Officer subjecting to tax the capital gains on the ground that the assessee failed to purchase the flat within the stipulated period – Tribunal holding the provision of section 54(1) were satisfied by the assessee and deciding in his favour – Held, Tribunal justified in its order. Section 54, Income-tax Act, 1961.

RULING

Admittedly, the assessee had paid a sum of Rs.239850 out of the total sale consideration of Rs. 2,75,000 for purchase of flat within the period of one year from the date of sale of his old residential house. Thus, on payment of a substantial amount in terms of the agreement, i.e., within four days of the sale of his old property, the assessee acquired substantial domain over the new residential flat

within the specified period of one year and complied with the requirements of section 54. Merely because the builder failed to hand over possession of the flat to the assessee within the period of one year, the assessee cannot be denied the benefit of the said benevolent provision. This would not be in consonance with the provisions of section 54.

Sec. 50 Capital Gain on Transfer of Depreciable Assets

1. Section 50 provides that where the capital asset is on an asset forming part of the block of assets in respect of which depreciation has been allowed, then the provisions of section 48 and 49 shall be subjected to the modifications as stated in clauses (1) and (2) of this section. Hence, it clearly transpires that in order to be covered within the provisions of this section, not only the capital asset transferred by the assessee should be an asset forming part of the block of assets but should also be such 'in respect of which depreciation has been allowed under this act'. The twin conditions should be simultaneously satisfied so as to fall within the ambit of the section , viz., the falling of capital asset in a block of asset and the actual allowing of depreciation on such as asset. [Dr. (Mrs.) Sudha S. Trivedi v ITO (2009) 31 SOT 38 (Mum). See also DCIT, Circle 24(1), New Delhi v National Travel Services (2009) 31 SOT 76 (Del)].

Section 2(47) R/W and Sec. 46 & 47 : Capital Gains arises only on Transfer of Capital Asset, Certain Transactions are not treated as Transfer

1. The assessee entered into a joint development agreement with a builder in the assessment year 1995-96 and, accordingly, transferred certain portion of land to the builder for the purpose of putting up a multi-storey building. The builder handed over the flats to the assessee in January 1998. The Assessing Officer taxed the transaction as capital gain chargeable for the assessment year 1998-99. The

Tribunal held that the transfer of vacant land, taxable as capital gain had taken place in the previous year, relevant to the assessment year 1995-96 and it could not be taxed in the assessment year 1998-99. Thus, the decision went in favour of the assessee. [Vemanna Reddy (HUF) v ITO (2009) 30 SOT 11 (Bang) (URO)]

2. Capital gain on sale of immovable property was chargeable to tax in the year in which actual physical possession of the property is given to the purchaser even though the agreement is entered into in earlier year. [CIT v Geetadevi Pasari (2009) 17 DTR 280 (Bom)].

3. CIT v MORMASJI MANCHRJI VAID (2001) 250 ITR 542 (Guj) (FB)

Capital gains – Transfer – What amounts to "transfer" for the purpose of determining exigibility to capital gains tax – Whether date of execution of transfer of immovable property or date of registration of transfer document under the Registration Act – Assessee transferring leasehold rights in favour of transferee on 13.10.1973 – Assessee's accounting year ending on 26.10.1973 – Lease documents presented for registration on 5.1.1974 and registration completed on 2.3.1974 – Whether the transfer took place in the accounting year relevant to assessment year 1974-75, i.e., on 13.10.1973 or in the assessment year 1975-76 when the deed was registered on Tribunal holding transfer wa completre when the deed was registered on 2.3.1974, in the assessment year 1975-76 – Held, definition of 'transfer' as given in the Act be taken into account and not the term 'sale' as indicated in the Transfer of Property Act – Held further, 'transfer' of immovable property of the value exceeding Rs. 100 can be said to have been effected on the date of execution of the document. Sections 2(47) and 45, Income-tax Act, 1961. Section 54, Transfer of Property Act, 1982. Section 47, Registration Act, 1908.

RULING

Considering judicial precedents and the object of the Act, the definition given in the Act is required to be taken into consideration. When the document is executed and the property passes and merely because there is no registration certificate, the State coffers should not suffer. If the view is propounded that only on registration the act of transfer will be complete then in that case, if the document is not registered, though the assessee will be enjoying the property, he will say that he is not liable to pay the tax. But that is not the intention of the Legislature. The word, 'transfer' as indicated in the Act is required to be considered and not 'sale' as indicated in the Transfer of Property Act. If the intention of the Legislature was different, then there would have been specific reference.

If the words are defined in the Act itself, then it is not proper to read the meaning of the similar word given in another statute unless otherwise expressly provided. In the Act wherever the Legislature has thought fit to have the meaning of the word provided in a different statute, specific provision has been made. Therefore, 'transfer' as defined in the Act is to be given simple meaning as indicated.

There are various methods by which there can be avoidance of tax. The tax evaders always keep faith in their counterparts. Even property is being transferred by merely executing special power of attorney on stamp paper of Rs. 20 and the transfer deed is not executed as contemplated under the law. The transferor puts the transferee in possession but in view of the document, namely, the power of attorney executed by the transferor it is said that the transferee is not the owner of the property though for all practical purposes the transferee acts as the owner, in view of the irrevocable power of attorney. By this method tax evaders are securing double benefits, i.e., avoidance of income-tax and stamp duty. It seems that considering

various devices which the tax evaders are applying, the Legislature, therefore amended by inserting clauses in the definition of transfer by clause (47) of section 2.

In case of ownership there is a transfer of capital assets. This is a case of lease. The transferee was put in possession and was enjoying the property as a lease holder. There cannot be different criteria for transfer of capital asset. For the purpose of tax even if the document, i.e., conveyance is not executed but the transferee exercises all the rights of the true owner, one cannot emphasize for taxation purposes that unless and until the deed of conveyance transferring the rights in property is executed, the transferee is not liable though he did every thing which is required for acquiring a property. As pointed out, the vendor is not permitted in law to dispossess or question the title of the vendee.

Under the circumstances, the answer would be that transfer of immovable property of the value exceeding Rs. 100 can be said to have been effected on the date of execution of the document.

4. Where conveyance deed is registered – Immovable property is not conveyed by delivery of possession, but by a duly registered deed. Further, it is the date of the execution of registered document, not the date of delivery of possession or the date of registration of document which is relevant. Once the executed documents are registered,the transfer will take place on the date of execution of documents and not on the date of registration of documents. [Alapati Venkataramiah v CIT (1965) 57 ITR 185 (SC); CIT v Podar Cements Pvt. Ltd. (1997) 226 ITR 625 (SC) and CIT v Vishnu Trading & Investment Co. (2003) 259 ITR) 724 (Raj.)]

Section 45(2) : Capital gain on Conversion of Capital Asset into Stock in Trade or vice versa

1. Conversion of stock-in-trade into a capital asset: While incorporating sub-section (2) to section 45, the Legislature has not visualized the situation in other way round, where the stock-in-trade is to be converted into the investment and later on the investment is sold on profit. In the absence of a specific provision to deal with this type of situation, a rational formula should be worked out to determine the profits and gains on transfer of the asset. In the absence of a specific provision to deal with the present situation, two formulas can be evolved to work out the profits and gains on transfer of the assets. One formula which had been adopted by the Assessing Officer, i.e., difference between the book value of the shares and the market value of the shares on the date of conversion should be taken as a business income and the difference between the sale price of the shares and the market value of the shares on the date of conversion, be taken as a capital gain. The other formula which was adopted by the assessee, i.e., the difference between the sale price of the shares and the cost of acquisition of share, which was the book value on the date of conversion with indexation from the date of conversion, should be computed as a capital gain. In the absence of a specific provision, out of these two formulas, the formula which was favourable to the assessee, should be accepted. Therefore, the Commissioner (Appeals) had properly examined this issue in the present situation and directed the Assessing Officer to accept the capital gain offered by the assessee. Hence, the order passed by the Commissioner (Appeals) deserved to be upheld. [ACIT v Bright Star Investment (P). Ltd. (2008) 24 SOT 288 (Mum)].

Section 48: Full value of Consideration received

1. The expression "full value of consideration denotes only real and actual consideration and not a notional consideration. [K.P. Varghese v. ITO (1981) 131 ITR 597 (SC)]. See also CITV Smt. Nilofer I. Singh (2009) 176 Taxman 252 (Delhi).

Where the assessee has given part possession of a property and received a part of the agreed consideration, capital gains should be assessed on the basis of the transfer of the possession in proportion to the consideration. [CIT v. Jeelani Basha (2002) 256 ITR 282 (Mad)].

In case of exchange the full value of consideration shall be market value of the property granted in exchange: Where there was an exchange of property, the fair market value of the property granted in exchange as on the date of exchange will have to be ascertained in order to arrive at the full value of consideration. [CIT v George Henderson & Co. Ltd. (1967) 66 ITR 622 (SC)].

In case of an exchange, it would be necessary to value the property or goods received in exchange. Unless there is clear material to show that an asset of higher value has been exchanged for one of a lower value, there can be no capital gain. [CIT v Shirinbhai Pundole (Mrs.) (1981) 129 ITR 448 (Bom); Nile Products Ltd. v CIT (1984) 148 ITR 99 (Bom)].

Capital gains arise on accrual basis: Capital gain is attracted, the moment the assessee has acquired the right to receive the price. It is not necessary that the consideration should have been actually received. What the parties did subsequently will not have any bearing on the liability of the assessee to tax of the year in which the right to receive the consideration arises. [T.V. Sundaram Iyengar & Sons Ltd. v CIT (1959) 37 ITR 26 (Mad).

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Income under the Head Capital Gains – Summary of Illustrations Relating to Immovable Property.

Illustration 1 & 2... Treatment of Earnest Money forfeited, when it is received more than once.

Illustration 3. .... Treatment of Earnest Money when it is more than cost of acquisition.

Illustration 4. .... Treatment of Assets acquired from previous owner before 01-04-1981.

Illustration 5. .... Treatment of expenditure incurred before and after 01-04-1981.

Illustration 6. ... Treatment of Insurance claim in case of loss of property fire.

Illustration 7. ... Treatment of Property converted into stock in Trade.

Illustration 8. ... Treatment of Property acquired by Gift and Introduce in Firm as a Capital

Illustration 9. .... Treatment of Property given to partners on dissolution of firm.

Illustration 10. ... Treatment of property given to partners on retirement.

Illustration 11 & 12. ... Treatment of Purchase of Residential House from the Amount of Capital Gain which has come from Sale of Another residential House.

Illustration 13. ... Treatment of Sale of Rural and Urban Agriculture Land.

Illustration 14. .... Treatment of Gain on Compulsory acquisition by Government.

Illustration 15. ... Treatment of Gain on Sale of Residential house

Illustration 16. ... Treatment of Gain on Sale of Immovable and movable assets.

Illustration 17. ... Treatment of Gain on Sale of Immovable Property.

Illustration 18. ... Treatment of gain of compulsory acquisition of Land + Sale of other land.

Illustration 19. .... Treatment of Gain on sale of Residential house.

Illustration 20 ... Treatment of Gain on Sale of Property as per value ascertained by stamp valuation authority.

Illustration 21. ... Treatment of forfeiture of earnest money in case of sale.

Illustration 22. ... Treatment of gain on sale of Gifted house with improvements made theorem.

Illustration 23. ... Treatment of gain on sale of House with investment in another house.

Illustration 24. ... Compulsory acquisition by Government, enhanced compensation with interest received treatment thereof.

Illustration 25. ... Treatment of gain on division of Filem's property by bark entries.

Illustration 26 ... Gain on sale of right to obtain a conveyance of immovable property.

Illustration 27. ... Treatment of gain on Sale of Residential property when another residential property purchased.

Illustration 28. ... Whether cost of land forms part of residential house.

Illustration 29. ... Significance of Registration in case of Sale of immovable property for ascertaining date of transfer.

Illustration 1: R purchased a house in Delhi in December 2007 for Rs. 1,20,000. In March, 2009 he entered into an agreement to sell the property to X for a consideration of Rs. 2,00,000 and received earnest money of Rs. 20,000. As per the terms of the agreement, the balance payment was to be made within 30 days of the agreement. If the intending purchaser does not make the payment within 30 days, the earnest money would be forfeited. As X could not make the payment within the stipulated time the amount of Rs. 20,000 was forfeited by R.

Subsequently on 15-5-2009, R sold the house to M for Rs. 2,50,000. He paid 2% brokerage on sale of the house. Compute the capital gains chargeable to tax for the assessment year 2010-11.

		Rs.	Rs.
	Sales consideration		2,50,000
Less:	1. Expenses on transfer being brokerage@2%	5,000	
	2. Cost of acquisition (1,20,000–20,000)	1,00,000	1,05,000
			1,45,000

Illustration 2 : R acquired a house property in Delhi on 4-1-1979 for Rs. 2,40,000. He forfeited Rs. 15,000 on the said asset on 21-10-1980. R again forfeits Rs. 25,000 on the said asset on 16-7-1998. The asset is finally sold by R on 15-5-2009 for Rs. 34,00,000. The fair market value of the asset as on 1-4-1981 is Rs. 5,00,000. Compute the capital gain for the assessment year 2010-11.

Solution

		Rs.
Long-term capital gain		
Sale consideration		34,00,000
Less: Indexed cost of acquisition $4,60,000 \times \frac{632}{100}$		29,07,200
Long-term capital gain		4,92,800
Note.-The cost of acquisition has been computed as under:-		
Fair market value as on I-4-1981 (cost of acquisition or F.M.V. whichever is more).		5,00,000
Less: Amount received and retained		
(i) On 21-10-1980	Rs. 15,000	
(ii) On 16-7-1998	Rs. 25,000	40,000
		4,60,000

Illustration 3 : Mrs. R purchased a residential house in Delhi on 15-5-1988 for Rs. 3,80,000. She entered into an agreement to sell the house to G on 10-8-1997 for Rs. 18,00,000. G paid an earnest money of Rs.

5,00,000 and promised to pay the balance within 60 days. G was not able to honour the Agreement and Mrs. R forfeited the earnest money of Rs. 5,00,000. Mrs. R subsequently sold the house to S on 21-10-2009 for Rs. 25,00,000. Discuss the treatment of the amount forfeited by Mrs. R and also compute the capital gain.

Solution

It has been held by the Supreme Court that where advance money forfeited is more than the cost of 'acquisition', the excess of the advance money forfeited over the cost of 'acquisition' of such asset shall be a capital receipt not taxable [Travancore Rubber & Tea Co. Ltd. v CIT (2000) 243 ITR 158 (SC)]. Therefore, the excess of amount forfeited over the cost of the house will be a capital receipt.

	Rs.	Rs.
Sale consideration		25,00,000
Less. Cost of acquisition	3,80,000	
Less: Amount forfeited	5,00,000	Nil
Long-term capital gain		25,00,000

Note.- Rs. 1,20,000 (i.e. Rs. 5,00,000 — Rs. 3,80,000), the amount forfeited in excess of the cost of acquisition, shall be treated as capital receipt in view of the above case and hence shall not be taxable.

Note : Any advance money received and forfeited by assesse then only to be deducted. If received and forfeited by previous advance then not to be deducted.

Illustration 4 : Asset acquired by the assessee from the previous owner before 1-4-1981):

X acquired a land in 1977-78 for Rs. 2,00,000 and gifted it to his major son Y on 1-6-1980, when the market value of the land was Rs. 2,50,000. The fair market value of that land as on 1-4-1981 was Rs. 3,00,000. Y sold the land on 15-9-2009 for Rs. 25,00,000. Compute the capital gain for assessment year 2010-11, assuming that the expenses on transfer were Rs. 1,00,000.

What would be the capital gain if the land was gifted by X to his son Y on 15-5-1995?

Solution

		Rs.	Rs.
A.	If the land is gifted on 1 -6-1980		
	Sale consideration		25,00,000
Less:	1. Expenses on transfer	1,00,000	
	2. Indexed cost of acquisition	18,96,000	19,96,000
	Long-term capital gain		5,04,000

Indexed cost of acquisition has been calculated as under:

Cost or fair market value as on 1-4-1981

whichever is more i.e. Rs. 3,00,000 $\times \frac{\text{CII of the year of transfer}}{\text{CII of 1981-82}}$

Rs. 3,00,000 $\frac{632}{100}$ = RS. 18,96,000

B.	If the land is gifted on 15-5-1995		
	Sale consideration		25,00,000
Less:	1. Expenses on transfer	1,00,000	
	2. Indexed cost of acquisition	6,74,733	7,74,733
Long-term capital gain		17,25,267	

1. Indexed cost of acquisition has been calculated as under:

Cost of the previous owner or fair market $\times \frac{\text{CII of the year of transfer}}{\text{CII of the year in which asset is first held by the assessee i.e., previous year 1995-96.}}$

value as on 1-4-1981 whichever is more the i.e. Rs. 3,00,000

Rs. 3,00,000 $\times \frac{632}{281}$ = Rs. 6.74,733

2. In the above illustrations, all the figures were the same excepting the date of acquisition of the asset by the assessee from the previous owner, due to which the indexed cost of acquisition in both the cases is different.

However, in the case of Mrs. Pushpa Sofat (2002) 81 ITD 1 (Chd) (SMC), the indexation of cost was allowed from the date of acquisition of the asset by the previous owner and not the date when the asset was acquired by the assessee from the previous owner under any mode given under section 49(1). The decision in the case has not been considered in the illustrations/ questions as the decision is only of a Tribunal and no decision of any High Court is available on this issue. Similarly in Kamal Mishra v ITO (2008) 19 SOT 251 (Del) it was held that the indexation of cost will be allowed with reference to the year in which the previous owner acquired the asset.

Illustration 5 : R acquired a residential house on 1-9-1978 for Rs. 1,00,000. He spent Rs. 25,000 on 1-7-1980 for the improvement of this house property. A further amount of Rs. 50,000 was spent by him on 15-11-1985 on improvement of the house. R gifted the said property to his son B on 12-10-1994. B also spent the following amounts on improvement of the house:

Date of expenditure	Amount Rs.
15-7-1995	60,000
15-6-2009	40,000

B sold the above house on 30-11-2009 for a sum of Rs. 15,00,000. Expenses on transfer were 2% of the sale consideration. Compute the capital gain for the assessment year 2010-11, assuming the fair market value of the house as on 1-4-1981 to be Rs. 3,00,000.

Solution

	Rs.	Rs.
Sale consideration		15,00,000
Less: 1. Expenses on transfer	30,000	
2. Indexed cost of acquisition — Rs. 3,00,000 × $\frac{632}{259}$	7,32,046	

3. Indexed cost of improvement

(i) by the previous owner Rs. 50,000 × $\frac{632}{133}$	2,37,594	
(ii) by the assessee Rs. 60,000 × $\frac{632}{281}$	1,34,947	
Rs. 40,000 × $\frac{632}{632}$	40,000	
		11,74,587
Long-term capital gain		3,25,413

Expenses on improvement of Rs. 25,000 before 1-4-1981 are to be ignored. 259 is the CII of the year in which the asset was first held by the assessee i.e. 1994-95. 133 is the CII of the year in which the improvement was made by the previous owner i.e. 1985-86. 281 is the CII of the year in which the improvement was made by the assessee in 1995-96.

Illustration 5 : The written down value of the block of assets as on 1-4-2009 was Rs. 5,00,000. An asset of the same block was acquired on 11-5-2009 for Rs. 3,00,000. There was a fire on 18-9-2009 and the assets were destroyed by fire and the assessee received a sum of Rs. 11,00,000 from the insurance company. Compute the capital gain assuming:

(a) All the assets were destroyed by fire

(b) Part of the block was destroyed by fire

Solution

	Rs.
W.D.V. at the beginning of year	5,00,000
Additions during the year	3,00,000
	8,00,000
Less money received from insurance company to the extent of WDV i.e. Rs. 8,00,000	8,00,000
	Nil
Capital gain	
Consideration price	11,00,000

Less: Cost of acquisition

W.D.V. at the beginning of year plus additions during the year

8,00,000

Short-term capital gain 3,00,000

(b) Same as above but Block will continue next year at Nil Value.

Illustration 7 : R acquired a plot of land on 1-6-1973 for Rs. 4,00,000. He converts the plot into stock-in-trade of his real estate dealing business on 10-2-2007 when the fair market value of the plot was Rs. 36,00,000. The stock-in-trade is sold by R on 10-2-2010 for Rs. 40,00,000. (FMV as on 1-4-1981 was Rs. 6,00,000 and FMV as on 1-4-1974 was Rs. 4,50,000).

Solution

Long-term capital gain

	Rs.
Full value of consideration (FMV on date of conversion)	36,00,000
Less: Indexed cost of acquisition	
FMV as on 1-4-1981 i.e. Rs. 6,00,000 (Rs. 6,00,000 $\times \frac{519}{100}$)	31,14,000
Long-term capital gain	4,86,000

Business income

Sale price — FMV on the date of conversion (Rs. 40,00,000 - Rs. 36,00,000)	4,00,000

Illustration 8 : R acquired a property by way of gift from his father in the previous year 1991-92 when its FMV was Rs. 3,00,000. The father had acquired the property in the previous year l983-84 for Rs. 2,00,000. This property was introduced as capital contribution to a partnership firm in which R became a partner on 5-6-2009. The market Value of the asset as on 5-6-2009 was Rs. 10,00,000, but it was recorded in the books of

account of the firm at Rs. 7,00,000. Is there any capital gain chargeable in the hands of R? If yes, compute the amount.

Solution

	Rs.
Full value of consideration	7,00,000
Less: Indexed cost of acquisition – Rs. 2,00,000 × $\frac{632}{199}$	
6,35,176	
Long-term capital gain	64,824

1. Full value of consideration is taken as the value at which it is recorded in the books of account of the firm.
2. Cost of acquisition is taken as cost to the previous owner but indexation has been done from the date it was first held by the assessee.

Illustration 9 : PQR & Company is a partnership firm, consisting of 3 partners P, Q and R. The firm is dissolved on 31-3-2010. The assets of the firm were distributed to the partners as under:

Particulars	*Block of Machinery (Given to P)*	*Stock (Given to Q)*	*Land (Given to R)*
Year of acquisition	1989-90	2001-02	1977-71
	Rs.	Rs.	Rs.
Cost of acquisition	7,20,000	4,00,000	10,000
Market value as on 31-3-2010	5,00,000	5,00,000	5,00,000
WDV as on 31-3-2010	4,40,000	—	—
Value at which given to partners as per agreement	3,00,000	4,10,000	3,00,000
Market value as on 1-4-1981	—	—	70,000

Compute the income taxable in the hands of the firm for the assessment year 2010-11. Further what shall be the cost of acquisition of such assets to the partners of the firm.

Solution

		Rs.
Short-term capital gain on block of machinery		
Sale consideration (i.e. the market value)		5,00,000
Less: Cost of acquisition		
(i.e. the written down value of block)		4,40,000
Short-term capital gain		60,000
Business income on transfer of stock		
Market value of stock	5,00,000	
Less: Cost of stock	4,00,000	1,00,000
Long-term capital gain on land		
Sale consideration	5,00,000	
Less: Indexed cost of		
acquisition — Rs. 70,000 × $\frac{632}{100}$	4,42,400	57,600

Cost of acquisition of assets to the partners

Partner 'P'	Rs. 3,00,000 for block of machinery
Partner 'Q'	Rs. 4,10,000 for stock
Partner 'R'	Rs. 3,00,000 for land

Illustration 10 : A firm consists of 3 partners namely R, G and S. S retires from the firm on 15-10-2009. His capital balance and the profits till the date of retirement stood at Rs. 15,00,000. The firm transferred its land to S in settlement of his account. The market value of the land as on that date was Rs. 25,00,000. The land was acquired of by the firm on 1-5-1994 for Rs. 5,00,000. Vs Compute capital gain in the hands of the firm.

Solution

	Rs.
Consideration price	25,00,000

Less: Indexed cost of acquisition – Rs. 5,00,000 × $\frac{632}{259}$

12,20,077

12,79,923

Long-term capital gain

In the case of CIT v A.N. Naik Associates (2004) 136 Taxman 107 (Bom) it has been held that the expression 'otherwise' would cover any possible situation of transfer of capital asset by the firm to the partner. Therefore, in view of this judgment the consideration price of the land should be taken at Rs. 25,00,000.

Illustration 11 : R owns a residential house which was purchased by him in 1975 for Rs. 60,000. The fair market value of the house as on 1-4-1981 was Rs. 1,70,000. This house is sold by him on 16-7-2009 for a consideration of Rs. 15,00,000. The brokerage and other expenses on the transfer were Rs. 12,000. The due date of furnishing the return of income is 31-7-2010. Compute the capital gain for the assessment year 2010-11 in the following situations:

(a) he invests Rs. 3,00,000 for purchase of a new house on 14-5-2010.

(b) he purchased a piece of land for construction of a house on 21-10-2009 for Rs. 1,60,000 and deposited Rs. 1,30,000 in the Capital Gains Accounts Scheme on 15-7-2010 and a further sum of Rs. 1,50,000 on 31-7-2011.

(c) he invested Rs. 3,15,000 on construction of an additional floor at a residential house already owned by him. The investment is made during the period 1-10-2009 to 31-12-2009.

(d) he invested Rs. 3,40,000 in Capital Gains Accounts Scheme on 29-7-2010 and Rs. 1,00,000 on 1-8-2010. He purchased a house property on 5-8-2010 for Rs. 3,25,000 by withdrawing this amount from the Scheme. No further investments were made by him.

Solution

	Rs.	Rs.
Sale consideration		15,00,000
Less: 1. Expenses on transfer	12,000	
2. Indexed cost of acquisition – Rs. 1,70,000 $\times \frac{632}{100}$	10,74,400	10,86,400
Long-term capital gain		4,13,600

The exemption u/s 54 from long-term capital gain under various situations will be as under:

(a) The exemption will be Rs. 3,00,000. Hence taxable capital gain will be Rs. 1,13,600.

(b) The exemption will be Rs. 1,60,000 + Rs. 1,30,000 = Rs. 2,90,000. Hence taxable capital gain will be Rs. 1,23,600. No deduction of Rs. 1,50,000 as it is deposited on 31-7-2011.

(c) The exemption will be Rs. 3,15,000. Hence taxable capital gains will be Rs. 98,600.

(d) Exemption for assessment year 2010-11 will be Rs. 3,40,000 i.e. the amount deposited in the Capital Gains Accounts Scheme before the due date of furnishing the return specified under section 139(1) or the amount of capital gain, whichever is less. Hence, taxable capital gain for assessment year 2010-11 will be 73,600. However, as a sum of Rs. 3,25,000 only has been utilised for purchase of the house, the balance amount of Rs. 15,000 remaining unutilised for which exemption was claimed under section 54 shall be the taxable capital gain of the assessment year 2013-14 (previous year 2012-13).

Illustration 12 : G sold a residential house on 28-6-2009 for Rs. 13,00,000. He had purchased this house on 1-10-1985 for Rs. 1,20,000 and had spent Rs. 70,000 on improvement of the house during the year 1986-87. He purchased a new house on 21-10-2009 for Rs. 3,50,000. This house was also sold by him on 16-7-2010 for Rs. 6,00,000. He

purchased another house on 21-11-2010 for Rs. 8,00,000. Compute the capital gains for the assessment year 2010-11 and 2011-12.

Solution

Assessment year 2010- 11	Rs.	Rs.
Full value of consideration		13,00,000
Less: (i) Indexed cost of		
acquisition – 1,20,000 $\times \frac{632}{133}$	5,70,226	
(ii) Indexed cost of improvement		
– Rs. 70,000 $\times \frac{632}{140}$	3,16,000	8,86,226
Long-term capital gain		4,13,774
Less: Exemption u/s 54 - Amount invested Rs. 3,50,000 3,50,000		
Long-term capital gain		63,774
Assessment year 2011-12		
Full value of consideration		6,00,000
Less: Cost of acquisition (3,50,000 - Capital gain exempt u/s 54 earlier i.e., 3,50,000)		Nil
Short-term capital gain		6,00,000

There will be no exemption under section 54 for house purchased on 21-11-2010 because the above capital gain is a short-term capital gain.

Illustration 13 : R had purchased certain agricultural land in 1984-85 for Rs. 3,00,000. The was being used for agricultural purposes by him. This land is sold by him on 2-9-2009 for Rs.19,00,000. He has spent Rs. 1,70,000 for acquiring an urban agricultural land on 21-10-2009 and has deposited Rs. 2,00,000 under the Capital Gains Accounts Scheme on 15-4-2010. Out of the amount deposited, he withdrew Rs. 1,70,000 for purchasing agricultural land on 15-3-2011. The remaining amount could not be utilised by him for purchase of agricultural land upto 14-4-2012.

Compute the taxable capital gains for the assessment year 2010-11, 2011-12, 2012-13 and 2013-14. If:

(a) the agricultural land which was sold is urban agricultural land;

(b) the agricultural land which was sold is rural agricultural land.

Solution

	Rs.	Rs.
(A) If land sold is urban agricultural land		
(a) Assessment year 2010-11		
Full value of consideration		19,00,000
Less: Indexed cost of		
acquisition — Rs. 3,00,000 $\times \frac{632}{125}$		15,16,800
Long-term Capital Gain		3,83,200
Less: Capital gain exempt u/s 54B		
Agricultural land purchased	1,70,000	
Investment in Capital Gain Deposit Scheme	2,00,000	3,70,000
but limited to capital gain		
Balance Long-term capital gain		13,200

(b) Assessment year 2011-12: No treatment for this year

(c) Assessment year 2012-13: The period of 2 years will end on 1-9-2011 i.e. 2 years from the date of original transfer and not from the date of deposit of the amount. Therefore, the unutilised amount of Rs. 30,000 will be taxable as long-term capital gain of the previous year 2011-12 i.e. assessment year 2012-13.

(d) Assessment year 2013-14: No treatment for this year. .

(B) If land sold is rural agricultural land:

There is no capital gain as rural agricultural land is not a capital asset.

Illustration 14 : The house property of A is compulsorily acquired by the government for Rs. 10,00,000 vide Notification issued on 12-3-2006. A had purchased the house in 1986-87 for Rs. 2,00,000. The compensation

is received on 15-4-2009. The compensation is further enhanced by an order of the court on 15-5-2010 and a sum of Rs. 2,00,000 is received as enhanced compensation on 21-10-2010. A wants to claim full exemption of the capital gains. Advise A in this respect. Compute the capital gain and determine the year in which it is taxable. Also specify the period upto which the investment in the new house should be made by the assessee.

Solution:

Although the house property is compulsorily acquired on 12-3-2006, the capital gain will arise in the previous year in which full or part of the compensation is first received i.e. previous year 2009-10. However, indexation will be done till the year of compulsory acquisition. Therefore, capital gains will be calculated as under:

Assessment year 2010-11	Rs.
Full value of consideration	10,00,000
Less: Indexed cost of acquisition – Rs. 2,00,000 × $\frac{497}{140}$	7,10,000
Long-term capital gain	2,90,000

The assessee should either invest at least Rs. 2,90,000 for the purchase/construction of a residential house property on or before 31-7-2010 (relevant due date) and/or deposit the amount under the capital gain scheme on or before 31-7-2010, to be utilised for purchase of house property by 14-4-2011 and/or Construction of the house property by 14-4-2012

Assessment year 2011-12	Rs.
Enhanced compensation	2,00,000
Less: Cost/Indexed cost of acquisition	Nil
Long-term Capital Gain	2,00,000

The assessee should either invest at least Rs. 2,00,000 for the additional construction of the residential house property already acquired for claiming under section 54 on or before 31-7-2011 (relevant due date) and/or deposit the amount under the capital gain scheme on or before

31-7-2011 to be utilised for additional construction of the house property by 20-10-2013 Alternatively, he may invest Rs. 2,00,000 in the bonds specified under section 54EC.

Illustration 15 : A owns 2 residential house properties. Property X was purchased by him in 1978 for Rs. 50,000 and property Y was purchased in 1991-92 for Rs. 3,00,000. Market Value of property X and Y on 1-4-1981 was Rs. 1,00,000 and Rs.75000 respectively.Both the house properties were sold by him on 6-7-2009 for Rs. 12,00,000 each. Brokerage of Rs. 20,000 was paid by A for the sale of such properties.

The sale proceeds was invested by him in the following manner:

Rs.

(1) Purchase of residential property on 5-3-2010 5,00,000

(2) Purchase of agricultural land on 15-5-2010 3,00,000

(3) Deposit ,in capital gain scheme for construction of additional floor on the residential house property purchased

Date of deposit	Amount deposited
	Rs.
16-5-2010	2,50,000
25-6-2010	1,00,000
31-7-2011	2,00,000

Compute capital gain for the assessment year 2010-11.

Solution

Assessment year 2010-11

	Property X	Property Y
	Rs.	Rs.
	12,00,000	12,00,000

Full Value of consideration

Less: Expenses of transfer20,00020,000

Indexed cost of acquisition

Property 'X'

(Rs. 1,00,000 $\times \frac{632}{100}$)6,32,000

Property 'Y'

(Rs. 3,00,000 $\times \frac{632}{199}$) 9,52,764 6,52,000 9,72,764

Long-term capital gain 5,48,000 2,27,236

Total long-term capital gain 5,48,000 + 2,27,236

7,75,236

Less: Capital gain exempt u/s 54 (5,00,000+

2,50,000 + 1,00,000) but limited to

7,75,236

Taxable long-term capital gain Nil

Illustration 16 : A had the following assets which were sold/compulsorily acquired during the previous year.

Particulars	Dt. of acquisition	Mode of acquisition	Dt of sale/ Compulsory acquisition	Sale price/ compensation Rs.	Cost of acquisition by assessee or previous owner Rs.
Gold	1981-82	Self	31-10-2009	7,25,000	1,00,000
Urban Agricultural land	1986-87	Gift from father on 1-5-1982	15-11-2009	11,60,000	2,00,000
Rural Agricultural land	1978-79	-do-	15-12-2009	4,00,000	50,000
Motor Car for personal use	1990-91	Self	15-1-2010	1,50,000	80,000

land & Building formingpart of Industrial undertaking	15-10-1995	Self	15-2-2010 (Compulsorily acquired)	6,00,000	4,00,000 (W.D.V. as on 1-4-2009

'A' purchased a residential house property on 20-2-2009 by investing Rs. 5,00,000. He purchased an agricultural land on 13-4-2010 for Rs. 1,40,000. He also purchased a building for Rs. 1,50,000 on 31-7-2010 to be used for industrial undertaking.

Compute capital gain of A for the assessment year 2010-11.

Solution

	Rs.
(A) Capital Gain on sale of gold	
Full Value of consideration	7,25,000
Less: Indexed cost of acquisition - Rs. 1,00,000 $\times \frac{632}{100}$	6,32,000
Long-term capital gain	93,000
Less: Exempt u/s 54F - See later in this solution	
(B) Capital Gain on sale of urban agricultural land	
Full Value of consideration	11,60,000
Less: Indexed cost of acquisition - Rs. 2,00,000 $\times \frac{632}{140}$	9,02,857
Long-term capital gain	2,57,143

For exemption under sections 54B and 54F see later in this solution.

(C) Capital Gain on sale of rural agricultural land

Nil. As it is not a capital asset.

(D) Capital gain on sale of motor car.

Nil. As it is not a capital asset.

(E) Capital Cain on compulsory acquisition of land & building.

Full value of consideration		6,00,000
Less: Cost of acquisition		4,00,000
Short-term capital gain		2,00,000
Less: U/s 54D		
Amount invested in purchase of building		1,50,000
Taxable short-term capital gain		
(u/s so being depreciable asset)		50,000

Long-term capital gain u/s 54F can be claimed as, the house property is purchased within one year prior to the date of transfer of long-term capital asset other than residential house property.

Long-term capital gain on sale of gold		93,000
Long-term capital gain on sale of urban agricultural land before availing exemption u/s 54B		2,57,143
Total long-term capital gain		3,50,143
Less: Exemption u/s 54B allowed to the extent of actual amount spent on purchase of agricultural land or Rs. 2,57,143 (L.T.C.G. on sale of land) whichever is less	1,40,000	
Exemption u/s 54F (See Note below)	1,10,838	2,50,838

Taxable long-term capital gain	99,305
Taxable short-term capital gain	50,000

Note.—He can claim exemption under section 54F in respect of the investment in new house either against long-term capital gain from sale of gold or against long-term capital gain from sale of urban land.

Option 1: If he claims exemption against long-term capital gain on sale of gold, the exemption shall be: $\frac{93000}{725000} \times 500000$ = Rs. 64,138

Option 2: If he claims exemption against long-term capital gain on sale of urban land, the exemption shall be: $\frac{257143}{1160000} \times 5,00,000$ = Rs. 1,10,838

Therefore, he should claim exemption of Rs. 1,10,838.

Illustration 17 : A acquired a plot of land on 15-6-1993 for Rs. 10,00,000, which was sold on 5-1-2010 for Rs. 44,00,000. The expenses of transfer were Rs. 1,00,000.

A made the following investments on 4-2-2010 from the proceeds of the above plot:

1. Bonds of Rural Electrification Corporation Ltd. redeemable after a period of 3 years Rs. 12,00,000.
2. Deposits under Capital Gain Scheme for purchase of a residential house as he does not own any house Rs. 8,00,000.

Compute the Capital Gain chargeable to tax for the assessment year 2010-11.

Solution

Assessment year 2010-11

	Rs.	Rs.
		44,00,000

Total consideration		
Less: (i) Expenses of transfer	1,00,000	
(ii) Indexed cost of acquisition – Rs. 10,00,000 × $\frac{632}{244}$	25,90,164	26,90,164
Long-term capital gain		17,09,836
Less: Exemption u/s 54EC		12,00,000
Exemption u/s 54F (17,09,836 × 8,00,000/43,00,000)	3,18,109	15,18,109
Taxable long-term capital gain		1,91,727

Illustration 18 : A piece of land owned by Mr. Mishra located on Jaipur-Delhi highway was acquired by NHAI in the F.Y. 2006-07, but the award ordered in F.Y. 2007-08 was paid in the F.Y. 2009-10. This land was purchased by him on 2-4-1977 for Rs. 1,000. The fair market value of the land on 1-4-1981 was Rs. 900. Compensation paid was Rs. 5,00,000.

The other piece of land located in Chennai purchased in April 2005 for Rs. 25,00,000 was also sold by him in February, 2010 for Rs. 35,00,000, but sale deed therefore could not be executed by 31-3-2010. The value for the purpose of stamp duty applied by the stamp valuation authority was Rs. 38,00,000.

Compute the income chargeable to tax arising as a result of these transactions in the A.Y. year 2010-11. The CIIs for the F.Y. 2005-2006, 2006-2007 and 2008-2009 are 497, 519 and 632 respectively.

Solution

Computation of capital gain for A.Y. 2010-11

(i) Long-term capital gain derived from transfer of land on Jaipur – Delhi highway acquired by NHAI in F.Y. 2006-07 for which

award was paid in 2009-10 is chargeable to tax in A.Y. 2010-11.

Sale consideration i.e. compensation paid	5,00,000
Less: Indexed cost of acquisition	
(1000×519/100)	5,190
	4,94,810

Note : Cost or M.V. as on 1.4.81 whichever is more is to be indexed

(ii) Sale of land at Chennai

Deemed value of consideration as per section 50C	38,00,000
Less: Indexed cost of acquisition	
(25,00,000 x 632/497)	31,79,074
	6,20,926

Illustration 19 : V, an individual, owned three residential houses which were let out. Besides, he and his four brothers co-owned a residential house in equal shares. He sold one residential house owned by him during the previous year relevant to the assessment year 2010-11. Within a month from the date of such sale, the four brothers executed a release deed in respect of their shares in the co-owned residential house in favour of V for a monetary consideration. V utilized the entire long-term capital gain arising out of the sale of the residential house for payment of the said consideration to his four brothers. V is not using the house, in respect of which his brothers executed a release deed, for his own residential purposes, but has let it out to another person, who is using it for his residential purposes. Is V eligible for exemption under section 54 of the Income-tax Act, 1961 for the assessment year 2010-11 in respect of the long-term capital gain arising from

the sale of his residential house, which he utilized for acquiring the shares of his brothers in the co-owned residential house? Will the ownership of two more houses by him on the date of sale of the residential house and non-use of the new house for his own residential purposes disentitle him to exemption?

Solution:

The problem is based on a case of CIT v T.N. Aravinda Reddy (1979) 120 ITR 46 (SC) where it was held that release by the other co-owners of their share in co-owned property in favour of co-owner would amount to 'purchase' for the purpose of claiming exemption under section 54. Since such purchase is within the stipulated time of two years. V is eligible for exemption under section 54. As V has utilized the entire long-term capital gain arising out of the sale of the residential house for payment of consideration to the other is owners who have released their share in this favour, he can claim full exemption u/s 54.

Further for claiming exemption u/s 54, in does not matter whether the assessee has one house or more than one house on the date of transfer. Such condition is relevant for sec. 54 F.

Illustration 20 : 'X', purchased on 18-6-1982, house property for Rs. 2,25,000 which was sold to A on 18-10-2009 for Rs. 8,75,000. The sub-registrar, at the time of registration of sale deed, charged stamp duty on Rs. 13,50,000 which was paid by the buyer. The Assessing Officer while assessing for capital gain referred the matter to the valuation officer who determined the value of property at Rs. 15,00,000 on the date of transfer. X seeks your advice on the following:

(i) In the Assessing Officer correct to charge capital gain on the value of Rs. 15,00,000 as determined by valuation officer.

(ii) The amount of capital gain on which 'X' is required to pay capital gains tax. (The CII for financial year 1982-83 is 109 and of financial year 2009-10 is 632).

Solution:

(i) According to section 50C, the Assessing Officer can refer the property to the valuation officer, only when the following two conditions are satisfied:

(a) the value fixed by the stamp valuation authority is not disputed in appeal or revision, etc.

(b) the assessee claims before the Assessing Officer that the value adopted or assessed by the stamp valuation authority exceeds the fair market value (FMV) of the property as on the date of transfer.

In the instant case, the assessee paid the stamp duty as fixed by the Stamp Valuation Authorities. The assessee did not request the Assessing Officer to refer the property to the Valuation Officer for valuation. Hence, the Assessing Officer's action, in referring the property to the Valuation Officer, is not correct. Further, even if the assessee had made a claim of value adopted by Stamp Authority to be more, the price determined by the Valuation Officer shall not be taken into account for the purpose of capital gain as the value determined by the Valuation Officer is more than the price determined by the stamp valuation authority. Hence, the consideration price this case shall be Rs. 13,50,000.

(ii) The amount on which the assessee is required to pay capital gains tax will be as under:

Rs.

Sale consideration of the house property to be adopted u/s 50C(1)	13,50,000
Less: Indexed cost of acquisition Rs. 2,25,000 × 632/109	13,04,587
Long-term capital gain	45,413

Illustration 21 : R entered into an agreement with G for the sale of his property and received earnest money of Rs. 1,00,000 on 1-4-2009. The balance of Rs. 4,00,000 was to be paid within 3 months, failing which R was entitled to a compensation of Rs. 50,000. The earnest money was also liable to be forfeited. G defaulted in the payment of the balance amount within the time specified and, therefore, the earnest money was forfeited. A suit was also filed for breach of contract and Rs. 50,000 was awarded, which was received on 24-3-2010. Discuss the nature of the two receipts from the point of view of liability to tax.

Solution:

Section 51 of the Income-tax Act provides that in computing cost of acquisition, where any capital asset was, on any previous occasion, subject to negotiations for its transfer, any advance, or other money received and forfeited by the assessee in respect of such negotiation is to be deducted from the cost for which the asset was acquired or from the written down value or fair market value, as the case may be.

The Supreme Court in the case of Travancore Rubber & Tea Co. Ltd. v CAT (2000) 243 ITR 158 (SC) held that the phrase 'other money' would cover, for example, deposits made by the purchaser for guaranteeing the performance of the contract and not forming part of the consideration. However, the money received on the previous

occasions and retained by the vendor/assessee cannot, therefore, be treated as a revenue receipt.

In view of the aforesaid provisions, both amounts in question [i.e. Rs. 1,00,000 (earnest money) + Rs. 50,000 (compensation)] received and retained by R in respect of the above transaction are capital receipts and not liable to tax. However, the amount so forfeited shall be deducted from the cost of acquisition of the asset while computing capital gains in future.

Illustration 22 :

(a) R received a house in May, 1996 by way of Gift from Mr. G who had purchased the same in April, 1979 for Rs. 12,00,000. The cost of improvements incurred by G were Rs. 2,55,000 in March, 1980 and Rs. 3,40,000 in November, 1988. The fair market value of the house as on 1-4-1981 was Rs. 9,14,000. Before this house was gifted to R, G had received an advance of Rs. 3,00,000 in March, 1996 towards sale of this house from S but the sale did not materialise and the advance was forfeited by G. The house was sold by R in March, 2010 for Rs. 48,00,000. Ascertain the capital gains chargeable to tax.

(b) A plot of land purchased 5 years back by Ram Janki trust was acquired by Government of India for construction of an over-bridge in Mumbai. The compensation awarded by Revenue Authorities was at Rs. 5,00,000. The trust preferred an appeal against the order for increase in the compensation awarded to it. The appellate authority increased the compensation by further Rs. 4 lakhs in August, 2009 but the amount was actually received in April, 2010.

You are required to compute the capital gains, if any, arising to the trust in respect of additional compensation by it and state the year of its taxability.

Solution:

(a) Section 49(1)(ii) provides that where a capital asset became the property of an assessee under a gift or will, the cost of acquisition shall be taken to be the cost to the previous owner. Thus, cost of acquisition for R will be Rs. 12 lakhs. Although the advance money was received by G, it will not affect cost of acquisition for R. Computation of capital gain:

		Rs.
Sale consideration		48,00,000
Less: Indexed cost of acquisition		
$(12,00,000 \times \frac{632}{305})$	24,86,557	
Indexed cost of improvement		
$(3,40,000 \times \frac{632}{161})$	13,34,658	38,21,215
Long-term capital gain		9,78,785

Notes: (1) As the asset was acquired through gift, the period of holding should be reckoned with reference to the date of acquisition of the previous owner i.e. April, 1979. The asset is a long-term capital asset and the resultant capital gain would be long-term capital gains.

(2) As regards cost of improvement, the sum expanded by the previous owner prior to 1-4-1981 cannot be taken into account [section 55(1)(&)(i)]. Cost of improvement of Rs. 3,40,000 spent in November, 1988 alone needs to be indexed.

(b) As per section 45(5)(b) the amount by which the compensation or consideration is enhanced or further

enhanced by the court, tribunal or other authority shall be deemed to be income chargeable under the head "Capital gains" of the previous year in which such amount is received by the assessee.

Hence, the additional compensation of Rs. 4 lakhs is chargeable in the assessment year 2011-12.

By virtue of Explanation (/) to section 45(5), in case of enhanced compensation granted by the Government or other authority in any subsequent year, the cost of acquisition and the cost of improvement is taken as Nil. In view of this Ram Janki Trust will have to pay capital gains tax on the full amount of Rs. 4,00,000.

Illustration 23 : R owns a residential house which is self-occupied and also a house plot. He sells 'the house on 31-1-2010 and the house plot on 15-2-2010 for Rs. 12,00,000 and Rs. 7,00,000, respectively. The house was purchased on 15-1-1995 for Rs. 4,00,000 and the plot on 30-5-1995 for Rs. 2,00,000. R has purchased a new residential house on 25-4-2010 for Rs. 10,00,000. Compute the income chargeable under the head 'Capital gains' for the assessment year 2010-11.

Solution:

As regards the sale of residential house, R, having purchased a new residential house in April. 2010. would be entitled to claim exemption under section 54.

On 15-2-2010 when the plot is sold, R does not hold any other house property. A new house has been purchased in April, 2010. Hence he would be eligible to claim exemption under section 54F. In fact w.e.f. assessment year 2001^02, he is eligible for exemption

u/s. 54F even if he holds one house property on the date of transfer of any asset other than house property.

There is no bar under the Income-tax Act, 1961 for R claiming deduction under section 54 as well as under section 54F though the new house property is the base for relief under both the sections.

The computation of income chargeable to tax under the head capital gains would be:

Assessment year 2010-11

Residential house	Rs.
Full value of consideration	12,00,000
Less: Indexed cost of acquisition (4,00,000 × $\frac{632}{259}$)	9,76,062
Long-term capital gain	2,23,938
Less: Exemption under section 54	
(limited to long-term capital gain)	2,23,938
Taxable long-term capital gain	Nil
House plot	
Full value of consideration	7,00,000
Less: Indexed cost of acquisition (2,00,000 × $\frac{632}{281}$)	4,49,822
Long-term capital gain	2,50,178
700000	
Less: Exemption under section 54F 2,50,178 × $\frac{700000}{700000}$	2,50,178
Taxable long-term capital gain	Nil

Net income chargeable under the head 'capital gains' for assessment year 2010-11 Nil

Illustration 24 : R Ltd is engaged in certain industrial activity. It owned a plot of land for industrial purpose. The said land was

acquired by the State Government in 1995-96 under a special legislation for which compensation of Rs. 10 lakhs was paid in that year. The cost of land to the company was Rs. 2 lakhs acquired in 1984-85. Being aggrieved with the amount of compensation, the company sued the State Government and the High Court enhanced the compensation by Rs. 25 lakhs and also awarded interest thereon from the date of payment of the original compensation to the date of the judgment amounting to Rs. 5 lakhs in aggregate. The State Government has filed an appeal to the Supreme Court against the High Court's order. The said appeal is pending. However, the State Government paid Rs. 30 lakhs (including interest) to R Ltd. on 4-4-2009 as per the direction of the High Court after obtaining an undertaking from the company that in case the High Court's order is reversed or modified by the Supreme Court, the company would make refund fully or partly, as the case may be, of the sum so received to the State Government. Discuss the tax implications of the above facts. Computation of capital gain is not required.

Solution:

When a capital asset is compulsorily acquired by Government such acquisition is a 'Transfer' within the meaning of section 2(47). Therefore, compensation received from the Government for such acquisition attracts capital gains tax liability.

Section 45(5) provides that in case of initial compensation, capital gain is taxable in the year of receipt. The additional compensation shall be deemed to be income chargeable under the head "Capital gains" of the previous year in which such amount is received by the assessee. Cost shall be deemed to be nil in such case.

In the present problem, the assessee has received an additional compensation of Rs. 30 lakhs on 4-4-2009 and Rs. 25,00,000 shall

be taxable as long-term capital gain in the year of receipt i.e. assessment year 2010-11 in view of the amendment by the Finance Act, 2003, by inserting clause (c) to section 45(5) which has nullified the judgment of CAT v Hindustan Housing & Land Development Trust Ltd. (1986) 161 ITR 524 (SC). However if the High Court order is later on modified and any refund is granted, the Assessing Officer shall recompute the capital gain of that year and shall grant refund. However, for balance of Rs. 5,00,000, the judgement of Hindustan Housing & Land Development Trust Ltd. shall hold good where it was held that such receipt shall be taxable in the year in which the dispute is settled.

In view of the amendment made by the Finance (No. 2) Act, 2009, interest on enhanced compensation shall now be taxable under the head other source in the previous year in which such interest is received. Further, the assessee shall be eligible for deduction of 50% of such interest as per section57(iv) inserted by the Finance (No. 2) Act, 2009.

Illustration 25 : A firm RGS had an immovable property purchased out of the firm's funds for Rs. 6,00,000. On 31-3-2001, the property was divided among the partners equally by making entries in the capital accounts of the partners. The property was subsequently sold on 1-7-2009 for Rs. 9,00,000 The Assessing Officer assessed the resultant capital gain in the hands of the firm. Discuss the validity of the order of the Assessing Officer.

Solution:

This problem is based on the case decided by Bombay High Court in CIT v JM Mehta & Bros (1995) 214 ITR 716, where the court held that the transfer of immovable property belonging to the firm to its

partners by means of book entries was not valid and the capital gains arising on the sale of the immovable property was assessable in the hands of the firm.

During the subsistence of the partnership no partner can deal with any portion of the property as his own, not even to the extent of his share in the partnership. The property of the firm means the property in which all the partners have a common interest. But even on that basis there cannot be a division of the properties purchased in the name of the firm between the partners by mere entries in the books during the subsistence of the partnership. Common immovable properties cannot be divided, possessed and enjoyed in severalty without a registered document in writing if its value is Rs. 100 or more in view of section 17(1)(6) of the Indian Registration Act, 1908, because it involves a declaration that the interest of the firm in the property is extinguished and thereafter the property would belong to the partners.

In view of the aforesaid, the Assessing Officer has correctly assessed the capital gain in the hands of. the firm.

Illustration 26 : Discuss the following:

R entered into an agreement with G for the purchase of a property for Rs. 10 lakhs and paid Rs. 10,000 as earnest money. On G failing to execute a conveyance in respect of the property, a suit for specific performance was filed by R. The suit was compromised and R agreed to receive Rs. 50,000 by way of damages and gave up his right to specific performance. What will be the position of this amount under the Income-tax Act.

Solution:

This problem is based on the case decided by Bombay High Court in CIT v Vijay Flexible Containers (1990) 186 ITR 693, where the court held that:

The right to obtain a conveyance of immovable property falls within the expression "property of any kind" used in section 2(14) of the Income-tax Act, 1961, and is, consequently, a capital asset. The payment of earnest money in order to obtain such a right constitutes its cost of acquisition. Where such a right is given up, there is a transfer of a capital asset.

In view of the aforesaid case, the tax liability of R can be calculated as follows:

	Rs.
Full value of consideration	50,000
Less: Cost of acquisition	10,000
Capital gains	40,000

Illustration 27 : is a member of a Hindu undivided family which owned a house for the purpose of residence. There was a partial partition of the family and instead of selling property to an outsider, the property was allotted to R for a consideration of Rs. 5 lakhs. Release deeds were accordingly executed in favour of R by the other members of the family. R had also his individual property which he sold during the same previous year, thereby making a capital gain of Rs. 5 lakhs, which he wants to set off against the consideration fixed for the family property. Discuss the impact of these arrangements on the assessments of the family and R.

Solution:

Tax implication for Hindu Undivided Family: Section 47(i) provides that any distribution of capital assets on the total or partial partition

of a Hindu undivided family is not treated as transfer, hence, in the hands of Hindu Undivided Family, no tax liability to capital gains will arise.

Tax implication for R: Section 54 provides that any long-term capital gain, arising to an individual or Hindu Undivided Family, from the transfer of a residential house property, (income from which is chargeable under the head 'Income from house property') shall be exempt to the extent such capital gain is invested in-the purchase of another residential house property, within one year before or two years after the date of transfer and/or in the construction of a residential house property, within three years after the date of such transfer.

Now, the point to be considered is whether the transactions in the present case amount to purchase. The Supreme Court in CIT v Aravinda Reddy (1979) 120 ITR 46 held that the word 'purchase' in section 54(1) has to be given its common meaning and there is no reason to divorce the ordinary meaning of the word as buying for a price or equivalent to a price by payment in kind or adjustment towards certain debts, etc. Thus, where a property was owned by more than one person and the other co-owner or co-owners released his or their respective share or interest in the property in favour of one of the co-owners, it could be said that the property had been 'purchased' by the release. Such release also fulfils the conditions of section 54 as to 'purchase'.

In view of the aforesaid provisions, R can claim exemption of capital gain of Rs. 5 lakhs.

Illustration 28 : Under section 54, a deduction is allowed, against capital gains, of the cost of a new residential house constructed

within three years from the date of transfer of a capital asset. The assessee claims that the cost of land is deductible in the cost of new residential house for the purpose of the above deduction in particular case. Discuss the correctness of the claim.

Solution:

This Problem is based on Circular 667 issued by Central Board of Direct Taxes on 18-10-1993. According to this circular the cost of the land is an integral part of the cost of the residential house, whether purchased or built. Accordingly, if the amount of capital gain for the purposes of section 54, and the net consideration for the purposes of section 54F, is appropriated towards purchase of a plot and also towards construction of a residential house thereon, the aggregate cost should be considered for determining the quantum of deduction under section 54/54F, provided that the acquisition of plot and also the construction thereon are completed within the period specified in these sections. Hence, in view of this circular, the assessee can claim deduction under section 54 by including the cost of plot.

Illustration 29 : owns a plot of land acquired on 1-6-1994 for a consideration of Rs. 2 lakhs. He enters into an agreement to sell the property on 15-3-2010 for a consideration of Rs. 5 lakhs, in part performance of the contract, he handed over the possession of land on 21-3-2010 on which date he received the full consideration. As on 31-3-2010, the sale was not registered. Discuss the liability to capital gain for the assessment year 2010-11. Computation need not be made.

Solution:

As per section 2(47), transfer, in relation to capital asset, includes 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 53 A of the Transfer of Property Act, 1882. Hence, R will be liable to tax on capital gain for assessment year 2010-11 despite the fact that the sale is not registered till 31-3-2010.

Indirect Taxes on Construction and sale of Flats

by CA Bimal Jain

Budget 2010 introduced service tax on constructions of property by builders w.e.f 1 July 2010. What does it mean for you as a buyer? Budget 2010 brought a shock to prospective home buyers. It stipulated that construction of house (in any form – apartment / flat / row house, etc.) by a builder in a complex is a "service", and introduced the service tax of 10.3% on such a service.

It was argued that service tax for construction services was avoided by builders on premise that construction of building is not a service but the transaction of sale and hence requested to avoid service tax on construction activities. Government also came to the conclusion that any service provided by such seller in connection with the construction of residential complex till the execution of such sale deed would be in the nature of 'self-service' and consequently would not attract service tax.

Government even allowed buyer or builder to claim refund of service tax. However, Budget 2010-11, contains a very significant proposal seeking to bring such construction activities under the tax net. As per the budget 2010, construction would be deemed to be a taxable service if the building or complex is still under construction and Completion certificate from the concerned regulatory authority hasn't yet been granted.

Most of us buy a house through a home loan. We book the house when the builder launches the scheme or when it is under construction, and make the payments based on the stage of the construction.

Effectively, it means that we make most of the payment before the builder gets the completion certificate. This means that the entire amount paid by us to the builder would be subject to service tax.

Further, the builder would absorb this burden and pay the tax. Of course, the onus of paying this tax is on the builder. So, you would not have to go through the hassle of paying it.

However, ultimately this burden would be transferred to the home buyers in the form of higher price. Thus, its people like you and me who would end up paying this service tax.

Also, this tax would not be applicable to resale properties, as resale properties would essentially have obtained a completion certificate.

Further, Service Tax on Preferential Location Services and Internal & External Development of Complexes has also been levied on any payment made by you to the builder for getting a preferential location for your house / flat – covers

- Any floor rise amount paid for getting an apartment on a higher floor

- Any amount paid to get an apartment / house with a specific number
- Any amount paid to get an apartment / house facing a specific amenity, say a swimming pool, lake, park, sea, etc
- Any amount paid to get an apartment / house facing a specific direction (may be as per vaastu).

Also, the service tax has also been levied on any amount spent by the builder for the development of the complex – like building internal roads, paving the garden, etc.

Many builders also sell parking space. It has been categorically mentioned in the Budget 2010 that any amount paid for getting a parking slot allotted would not be subject to service tax.

In terms of Section 65 (105) (zzzh), taxable service means any service provided or to be provided, to any person, by any other person, in relation to construction of complex;

> *"Explanation is added w.e.f 1 July 2010 - For the purposes of this sub-clause, construction of a complex which is intended for sale, wholly or partly, by a builder or any person authorized by the builder before, during or after construction (except in cases for which no sum is received from or on behalf of the prospective buyer by the builder or a person authorized by the builder before the grant of completion certificate by the authority competent to issue such certificate under any law for the time being in force) shall be deemed to be service provided by the builder to the buyer;"*

"**Construction of complex**" means

(a) construction of a new residential complex or a part thereof; or

(b) completion and finishing services in relation to residential complex such as glazing, plastering, painting, floor and wall tiling, wall covering and wall papering, wood and metal joinery and carpentry, fencing and railing, construction of swimming pools, acoustic applications or fittings and other similar services; or

(c) repair, alteration, renovation or restoration of, or similar services in relation to, residential complex;

"residential complex" means any complex comprising of—

(i) a building or buildings, having more than twelve residential units;

(ii) a common area; and

(iii) any one or more of facilities or services such as park, lift, parking space, community hall, common water supply or effluent treatment system, located within a premises and the layout of such premises is

approved by an authority under any law for the time being in force, but does not include a complex which is constructed by a person directly engaging any other person for designing or planning of the layout, and the construction of such complex is intended for personal use as residence by such person.

Explanation. — For the removal of doubts, it is hereby declared that for the purposes of this clause, —

(a) "personal use" includes permitting the complex for use as residence by another person on rent or without consideration;

(b) "residential unit" means a single house or a single apartment intended for use as a place of residence;

It should be noted that the service tax would be levied only on under construction property. A property is considered "under construction" till the builder receives a "completion certificate" from the relevant authorities.

Thus, if an amount for the purchase of a property is paid to the builder before he obtains a completion certificate, it would be subject to service tax. Only if the entire amount for the property purchase is paid after the receipt of a completion certificate, there would be no levy of the service tax.

Let's examine the positions of chargeability of service tax prior to 1 July 2010:

In terms of Master Circular No.96/7/2007 dated 23.8.2007, it has been clarified that "In a case where the builder, promoter, developer or any such person builds a residential complex, having more than 12 residential units, **by engaging a contractor for construction of the said residential complex, the contractor in his capacity as a taxable service provider (to the builder/promoter/developer/any such person) shall be liable to pay service tax on the gross amount charged for the construction services under 'construction of complex' service."** Therefore from the aforesaid clarification, it is clear that in such case, the builder, promoter, developer or any such person builds a residential complex is not liable to pay service tax but service tax liability has to be discharged by such contractor who actually does the construction for such builder/ developer.

As Per above clarification "If no other person is engaged for construction work and the builder/promoter/developer/any such person undertakes construction work on his own without engaging the services of any other person, then in such cases

- Service provider and service recipient does not exist;

- Services provided are in the nature of self-supply of services.

Hence in the absence of service provider and service recipient relationship and the services provided are in the nature of self-supply of services, the question of providing of taxable service to any person by any other person does not arise.

Effects of Budget 2010 Post 1 July 2010:

But after addition of explanation w.e.f 1.7.2010 the above clarification becomes redundant. Now, the construction of complex which is intended for sale by a builder or any other person authorized by the builder, before, during or after construction shall be deemed to be service provided by the builder to the buyer. The only exception provided is that in case no amount has been received prior to grant of completion certificate no service tax shall be charged at the time of the same of such complex.

Thus from the above it can be concluded that prior to 1.7.2010 the tax liability was only on the contractor who is constructing the complex for the builder whereas there was no tax liability if the **builder undertakes construction work on his own**. The new explanation effective from 1st July, 2010 has made the builder liable to charge tax from the buyer if the construction is done by the **builder undertakes construction work on his own**.

The **Major conclusion** coming out with above comparisons is that the builder shall not charge the tax from the buyer in case the builder has got the construction done by using the contractor for construction of complex as there is no change in the scenario that if contractor does construction for the builder and the contractor shall charge service tax from the builder.

Further there would be specified abatement allowed before charging the service tax under the category of Construction services.

When Services would be classified as works contract services:

If VAT/ Sales Tax is payable on goods involved in the contract, the service would be classified under the Works Contract services for the chargeability of Service tax w.e.f 1 June 2007.

The finance bill 2007 has introduced sub-clause (zzzza) to clause (105) of section 65 finance act, 1994 to cover works contract also under the scope of service tax for the first time as detailed herein below :-

The *Explanation* under this sub-clause defines the term 'works contract' for this purpose as follows:

"For the purposes of this sub-clause, means a contract wherein.—

(i) transfer of property in goods involved in the execution of such contract is leviable to tax as sale of goods, and

(ii) Such contract is for the purposes of carrying out,—

(a) erection, commissioning or installation of plant, machinery, equipment or structures, whether pre-fabricated or otherwise, installation of electrical and electronic devices, **plumbing, drain laying or other installations for transport of fluids,** heating, ventilation or air-conditioning including related pipe work, duct work and sheet metal work, thermal insulation, sound insulation, fire proofing or water proofing, lift and escalator, fire escape staircases or elevators; or

(b) construction of a new building or a civil structure or a part thereof, or **of a pipeline or conduit,** primarily for the purposes of commerce or industry; or

(c) construction of a new residential complex or a part thereof; or

(d) completion and finishing services, repair, alteration, renovation or restoration of, or similar services, in relation to (b) and (c); or

(e) turnkey projects including engineering, procurement and construction or commissioning (EPC) projects;”

The works contract till June 1, 2007 were not covered under service tax, as elaborated above.

Further it was clarified by the Board through TRU letter dated 22.05.2007, that contracts which are treated as works contract for the purpose of levy of VAT/ sales tax shall also be treated as works contract for the purpose of levy of service tax and VAT / sales tax is leviable on transfer of property in goods involved in the execution of works contract {Art, 366(29A)(b) of the Constitution of India] and service tax will be leviable on services provided in relation to the execution of works contract.

Therefore, once, service tax is levied for the first time w.e.f. 01.06.2007 by the Finance Act, 2007 on the works contract services as a separate taxable service without tinkering with the existing taxable services, earlier, then it should not be treated a taxable services under any other category of taxable services.

The following cases in support of the said contention, in which it was held that when an existing Tariff definition remains the same, then the introduction of new Tariff entry would imply that the coverage under the new Tariff for purpose of Tax is an area not covered by the earlier entry:

- ***M/s Glaxo Smithkline Pharmaceuticals Ltd v. Commissioner Of Central Excise, Mumbai-iv 2005-TIOL-688-CESTAT-MUM; 2005 (188) ELT 171 (Tr….Mum)*** in which it was held that When an existing Tariff definition remains same, then the introduction of new Tariff entry would imply that the coverage under the new Tariff for purpose of Tax is an area not covered by the earlier entry. The new entry is extension of the scope of coverage of Service Tax and not carving out of a new entry, from the erstwhile entry”. The Appellant further relies on the decision on the following cases on the classification of taxable services;

- Dr. Lal Path Lab Pvt. Ltd. v CCE, Ludhiana 2006 (4) STR 527 (Tn-Del.) : 2006-TIOL-1 1 75-CESTAT-DEL

- Gujarat Chemical Port Terminal Company Ltd. v CCE&C, Vadodara-II 2007-TIOL-1898-CESTAT-AHM . 2008 (9) STF 386 (Tn. -Ahmd.);

<u>Works Contract for chargeability of VAT/Sales tax:</u>

Works contract under the CST Act is defined under Section 2(ja) of the CST Act, which is reproduced below:

> *"**works contract**" means a contract for carrying out any work which includes assembling, construction, building, altering, manufacturing, processing, fabricating, erection, installation, fitting out, improvement, repair or commissioning of any movable or immovable property law."*

The term 'works contract' is defined under Section 2(z)(au) of the UP VAT Act, which is reproduced below:

> "*works contract" includes any agreement for carrying out, for cash, deferred payment or other valuable consideration, the building construction, manufacture, processing, fabrication, erection, installation, fitting out, improvement, modification, repair or commissioning of any movable or immovable property."*

Distinction of works contract with contract for sale:-

Under many circumstances, it is difficult to ascertain whether a particular contract is a "works contract" or "sale contract". Whether a contract is a works contract or a sale contract depends on the intention of the parties to the contract, circumstances, place of execution and usual conditions of the agreement, etc.

The Supreme Court in the case of **Hindustan Shipyard Ltd. Vs. State of A.P. [(2000) 119STC 533 (SC)] {'the Hindustan Shipyard case'}** has held as under:

- It is difficult to lay down any inflexible rule applicable alike to all transactions so as to distinguish between contract of sale and a contract of work and labour
- Transfer of property in the goods for a price is the linchpin of definition of "sale". Whether a particular contract is one of sale of goods or for work and labour depends upon the main object of the parties determined from an overview of the terms of the contract, circumstances of transaction and custom of the trade. It is the substance of the contract documents and not merely the form, which has to be looked into. The Court may form an opinion that the contract is one whose main object is transfer of property in a chattel as chattel to the buyer, though some work may be required to be done under the contract as ancillary or incidental to sale, then it is a sale. If the primary object of the contract is carrying out of work by bestowal of labour and

services and materials are incidentally used in execution of such work then the contract is one of work and labour.

- If the thing to be delivered has any individual existence before delivery as sole property of the party who is to deliver it, then it is a sale. On the other hand where main object of work undertaken by payee of price is not the transfer of a chattel qua chattel, the contract is one of work and labour.
- The bulk of material used in construction belongs to the manufacturer who sells the end product for a price, than it is a strong pointer to a conclusion that the contract in substance is one for sale of goods and not for work and labour. However the test is not decisive. If major component of the end product is material consumed in producing chattel to be delivered and skill and labour are only incidentally used, delivery of the end product by seller to buyer would constitute a sale. On the other hand if main object of the contract is to avail skill and labour of seller though some material or components may be incidentally used during process of the end product being brought into existence by the investment of skill and labour of supplier, transaction will be of a contract for work and labour.

Further the three judges-bench of the Supreme Court, in the matter of **State of A.P. Vs. Kone Elevators (India) Limited [(2005) 140 STC 22 (SC)] {'the Kone Elevators case'}** has held:

> *"There is no standard formula by which one can distinguish a 'contract of sale' from a 'works contract'. The question is largely one of fact depending upon the terms of the contract including the nature of the obligations to be discharged there under and the surrounding circumstances. If the intention is to transfer for a price a chattel in which the transferee had no previous property, then the contract is a contract for sale. Ultimately, the true effect of an accretion made pursuant to a contract has to be judged not by artificial rules but from the intention of the parties."*

Important aspects of sale incidental to a works contract:

Unless parties to the contract specifically intends for sale and purchase of goods involved in execution of works contract property in the goods transferred cannot be held liable to tax under VAT/ CST. The Supreme Court in the matter of **Rainbow Colour Lab Vs State of M.P.[(2000) 118 STC 9 (SC)] {'the Rainbow Colour Lab case'}** has held that unless there is sale and purchase of the goods, either in fact or deemed, and that sale is primarily intended and not incidental to the contract, the State cannot impose sales tax on a works contract in the guise of the expanded definition found in Article 366 (29A) (b) of the Constitution.

Meaning of materials & it's usage in works contract:

For taxability of a transaction of works contract under VAT/ CST what is relevant is transfer of property in the goods involved in execution of works contract and not the quantity of material transferred. In the case of **CCT Vs. Matushree Textiles Ltd. [(2003) 132 STC 539 (Bom)] {'the Matushree case'},** it has been held that chemical solution used for dyeing retains its property even after dyeing and the solution prepared for dyeing grey fabrics of one customer cannot be used for dyeing grey fabrics of another customer and on completion of dyeing of a particular fabric, chemical solution become worthless and is thrown as waste. Therefore it is clear that on completion of dyeing, the entire property of the materials used in dyeing is passed on and what remains as solution is nothing but the residue or the waste. In other words, the colored shade of the fabrics represents entire property of the materials used in dyeing.

Taxability of contracts when material is supplied by contractee:

Works contract of the nature of printing works wherein material used for execution of works contract is supplied by the contractee such contracts are covered within the ambit of works contracts. The Hon'ble Punjab and Haryana High Court in the case of **Thompson Press (I) Ltd. Vs. State of Haryana {(1996) 100 STC 417 (P&H)} ['Thompson Case']** has held that contracts where printers carry out printing jobs only and materials like papers, cards, etc. are supplied by the contractee, such contracts are covered within the meaning of works contract.

Further the Delhi VAT Commissioner, while determining, whether printing contracts where the paper is supplied by the contractee would be covered under works contract or not, relying on the judgment of the Hon'ble Supreme Court in the case of **Bharat Sanchar Nigam Ltd. Vs. U.O.I [(2006) 145 STC 91 (SC)]** has held that in such cases, tax is payable on material e.g. ink, involved therein.

Post VAT Scenario – Levy of VAT on Indivisible Works Contracts (Deemed Sales):

All the VAT States have incorporated in their respective State VAT Acts, the provisions of `Works Contracts' for levying the Sales Tax /VAT on the deemed sales involved in the execution of works contracts. There is no Works Contract Tax (WCT) now, it is a VAT on the Works Contract transactions (Deemed Sales). The Advantage to the Contractors is that under the VAT system, the Contractors like manufacturers can avail VAT set off / Credit of the VAT paid to the local vendors, which was not available in the Pre-VAT Regime.

Please note that there is a Uniform Scheme of Taxation for levy of VAT on Works Contracts under all the State VAT Acts. There are no separate or different taxation schemes in different States like in pre-VAT period for works contracts. There is

uniformity under the works contract provisions in the Post VAT Regime. This is a positive factor for Contractors under VAT Regime. In all the State VAT provisions, there are three options available for the Contractors to levy VAT on deemed sales (Works Contracts) and VAT is leviable on the `Material Value' of the Contract. The said three options (Uniform in all the VAT States) are as under,

A. Actual Labour Deduction
B. Standard Labour Deduction
C. Composition Tax (Alternative Option)

General Negative list Items for Works Contracts under State VAT Act & Rules:

- Purchases effected by way of works contract where the contract results into an immovable Property.

- Purchases of Building material which are not resold but are used in the activity of Construction. (Free issues)

- Purchases of works contracts made by the Contractee in Civil Contracts.

- Any purchases of Consumables or of goods treated as Capital Assets by the Contractor/dealer where he is principally engaged in doing job work or labour work and is not engaged in the business of manufacturing of goods for sale by him.

(Please refer to the specific provisions of works contracts under the relevant state VAT Acts for such Negative lists)

Tax deducted at source (TDS) provisions of works contracts under the State VAT Act & Rules:

In most of the State VAT Acts, the provisions of Tax deducted at source (TDS) are incorporated. The logic behind the TDS (WC) provisions is that the Contractors are not organized in many cases and they do not pay taxes on time , therefore in this provision the contractee / customer deducts the prescribed % of TDS from the Contract Price and pays the same before the prescribed dates, directly, to the respective State Government through the specified challan. The TDS is to be deducted by the specified customers only as notified by the State Governments. Generally, the dealers registered under the State VAT Acts, State and Central Governments, Corporations, Government Undertakings, Co-operative Societies only have to deduct the said TDS (WC) and not by all the Customers. The monetary limit of the turnover is prescribed between Contractor and Contractee for such deduction in the hands of the Customer in most of the VAT Acts.

It is responsibility of the Contractee / Customer to deduct the prescribed % of TDS (As provided in the relevant VAT Act & Rules) and pay the same to the State Government before the prescribed date, otherwise interest / penalty is leviable on such Contractees / Customers.

However, as per the State VAT Act provisions, the Seller (Contractor) is liable to pay VAT, if No TDS is made by the Contractee/Customer. The State Governments have prescribed different VAT Forms under the provision of TDS (WC). In certain States, the Contractee has to obtain TANs (Tax deductible Account Number) and file Annual Returns of TDS under the TDS provisions.

In Maharashtra, under MVAT Act, 4% TDS is applicable (instead of 2%) in the case where the Contractor has not obtained the VAT TIN certificate (URD Contractor).

Provisions of Works Contract for Main and Sub-Contractor under the State VAT Laws:

The following two types of VAT levies are provided for the transactions of works contracts between the Main contractor and the Sub-Contractor,

- In certain States, (like Maharashtra) Main and Sub Contractors are treated as single legal Entity. Therefore, there is no VAT/TDS applicable between the transactions of the Main and the Sub-Contractor. The VAT Forms are exchanged between the Main and the Sub Contractors to declare that they have discharged VAT liability for their portions of the Contracts. In such cases, the Main Contractor gets the deduction of the value of the work executed by the Sub Contractor. The main and the Sub Contractor are jointly and severally responsible for the compliance under the works contract provisions of the VAT Act.
- In certain states (other than Maharashtra), the Main and the Sub Contractors are treated as separate legal Entities, like separate two dealers under the VAT Act. Therefore, in such provisions, Sub contractor charges applicable VAT/Composition Tax to the Main Contractor, avails Credit of the VAT paid on the inputs and the Main contracts also charges VAT/Composition Tax applicable to the Contractee/Customer and avails the Credit available to him against the VAT paid to the Sub-Contractor. They are assessed / audited separately under the State VAT Act provisions.

It is advisable that the Main Contractor and the Sub Contractor should discuss all the relevant VAT provisions before opting for the specific method of levy of VAT / Composition Tax to avoid complications at a later date.

VAT & Service Tax, both, Applicable on certain Works Contracts:

On certain Works Contracts both VAT (WC) & Service Tax are applicable on the Contract price since there involves the transfer of property in goods (sale of goods / materials) subject to VAT levied by the State Government and rendering of Taxable Service subject to Service Tax levied by the Central Government. Thus, the both the state & the Central Governments levy VAT & Service tax on the same taxable base i.e. Contract Price, respectively.

The Contracts /Taxable services where both VAT and Service Tax are applicable are shown as under,

- Construction contracts, Civil Jobs

- Annual Maintenance Contracts (AMCs)
- Erection of Plant and Machinery etc.

Please note that in such Works Contracts / Taxable Services, the working for levy of VAT & Service Tax is to be done, separately, as per the provisions of VAT & Service Tax. Only in the case where the Contractor opts for A legal option of actual labour deduction method, he can pay Service Tax on the actual labour portion and VAT on actual Material value. Otherwise only B (Standard deduction) and C (Composition Tax) options are available under VAT and No deduction for levy of Service Tax for the Contractor. The Abatements are available under the Service Tax law for specific Taxable Services towards the value of material / goods involved in the same. Like 67% abatement from the contract value is available under the Construction Services.

Concept & Levy of Central sales tax on Interstate Works Contracts:

The Central Government amended the definition of ` Sale' under the Central Sales Tax Act, 1956 from 11.5.2002. With the said amendment, the states are empowered to levy C.S.T. on the interstate works contract. By the said amendment, the concept of `Interstate works contract' was introduced in the C.S.T. Act by inserting in the definition of `Sale' , the words "Transfer of Property in goods involved in execution of works contract" .

When the Contractor dispatches his goods from one State to another under a individuals works contract, it is a interstate works contract. The sections 3, 4, 5 of the C.S.T. Act are applicable to such deemed sales in the interstate works contract. Accordingly, the State of dispatch can collect the Central Sales Tax on such deemed interstate sales. The Contractors may not be allowed the interstate depot transfers in the cases of indivisible works contracts since such dispatches are made to the sites of the contractee situated in other state and the same are earmarked for the specific contractee. The Contractor would invoice to the Contractee from the state of dispatch and would charge CST as applicable, with or without C/D Forms.

Recently, the CST Act was further amended to explain, the deductions available on the total contract price to the Contractor to arrive at the material value. Please note that in interstate works contracts also, the C.S.T. is payable only on the Material Value/Price' of the Contract and not on the Labour' portion of the Contract.

Please note that when it is an interstate works contract, the Contractee would raise an invoice on the Customer situated in other state with applicable rate of CST on the Material value of the contract, but the Customer would not deduct any amount towards TDS since there is no provision of T.D.S. under the CST Act. TDS is to be deducted only in the local works contracts where the Contractor has charged VAT/Composition Tax.

In short, if the Contractor dispatches goods from his state to the State of the Contractee (Customer) under an indivisible works contract, it is a interstate Works contract in the hands of such Contractor subject to levy of CST which is collected by the state of dispatch. However, in the interstate works contracts also, C.S.T. is payable only on the `Material Value' of the Contract.

How the Contractee / Customer should look into the Works Contract purchases for Minimum cost:-

Under the VAT System, the Contractee/Customer can avail the full VAT Credit/Set off of the VAT paid to the Contractor through the tax Invoices, provided such purchases are not in the Negative list of set off/VAT Credit.

However, in the cases where the Contractees / Customers do not get any VAT set off / Credit, they should note the following points to reduce their VAT Cost,

- To decide the Best option of "Levy of VAT/Composition Tax" before the execution of the Works Contract Commences.

- To insist the Contractor to buy maximum inputs from local vendors only and the VAT Credit thereof should be passed on to the Contractee by reducing his sale price, accordingly .

- In case of free issues supplied by the Contractee / Customer to the Contractor, if the price of the contractor is `Net off' the material value supplied by the Contarctee then there is no negative VAT impact to the Contractee. Otherwise, there is VAT cost in the hands of the contractee with regards to the VAT paid on the purchases made by the Contractee and given as free issues to the Contractor.

- Prescribed % of TDS payment to the government and timely issuance of TDS certificates to the Contractors.

- To insist the Contractor to show the VAT applicable, separately on the invoice (Tax Invoice, in the case if the Contractee can avail the credit)

- To add the clause in the agreement with the Contractor, "If any additional liability on Account of VAT (WC) arises at a future date shall be borne by the Contractor".

Note: This issue is highly debatable and subjective on case to case basis. My article is purely covering general aspects of indirect taxes on Construction services or works contract services. For more details, you may contact the writer directly.

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Service Tax on Renting of Immovable Properties-Way Forward

By CA Bimal Jain

"Nothing is certain except death and taxes" a quote made by Benjamin Franklin was surely in right spirit but when we talk about Indian tax system we cannot contemplate with surety that *"taxes are certain"* because we do not know in many instances whether

- It is by authority of law – Union list/State list/ Concurrent list
- Date of enforcement – prospective or retrospective
- For the growth of trade, industry & commerce and ultimately consumer, etc.
- Who is final authority to decide in case of litigation – the Hon'ble Supreme Court or CBEC ('the Board)

We have become used to live in mess, dispute, and litigation…so on then We try our best endeavor to correct it either by tax reform or make obligatory with retrospective amendments….Recent Budget 2010 is also no exception with so called retrospective amendment in various provisions.

As per the Finance Bill 2010, definition provided in Section 65(105) (zzzz) for chargeability of service tax on renting of immovable properties shall be deemed to have been substituted with effect from the 1st day of June 2007.

Prior to this amendment this entry read as *'to any person, by any other person in relation to renting of immovable property for use in the course or furtherance of business or commerce'*.

Now it would read as *'to any person by any other person by renting of immovable property or any other service in relation to such renting for use in the course or furtherance of business or commerce'*. And any action taken or not taken under new clause shall be deemed to have been taken legally and recovery would be made as if the amendment was always in force at all material times and accordingly notwithstanding anything contained in any judgment, decree or order of any court, tribunal or other authority.

<u>Background of disputes on chargeability of service tax on renting of the immovable properties:</u>

The Hon'ble Delhi High Court in a landmark judgment dated 18 April 2009 in the matter of Home Solution Retail India Ltd and Others vs.

Union of India and others wherein it is held that *mere renting* of immovable property for furtherance of business or commerce by itself cannot be regarded as a taxable service and held that not exigible to charge service tax in terms of the Section 65 (105) (zzzz) of Finance Act, 1994 and opined on legality, validity and vires of Notification No. 24/2007-ST dated 22/05/2007 and Circular No. 98/1/2008-ST dated 04/01/2008 for interpretation on service tax on renting of immovable properties in terms of Section 65 (90a) and Section 65 (105) (zzzz) of the Finance Act, 1994 as amended by the Finance Act, 2007.

Further the Hon'ble Bombay high court in the case of Retailers association of india v. union of india [2008] 16 STT 127 (Bom) decides that Assessee was an association of retailers. In respect of let out premises of members of assessee-association, revenue demanded service tax in category of 'Renting of immovable property service'. Tribunal confirmed said demand, against which assessee filed writ petition. During pendency of writ petition, revenue moved Supreme Court for transferring these matters to Supreme Court for hearing and, therefore, High Court could not take up matter for final hearing. It was found that few High Courts had granted interim relief to respective assessees in relation to said statutory provision. Such interim relief directed members of assessee to file an undertaking in High Court stating that in event challenge was disallowed, they would make payment of service tax due and payable in accordance with legal provisions and further, that they would not be entitled to transfer their interest in property in relation to which demand of service tax was made, without first giving two weeks prior notice to revenue about their intention to transfer interest and nature of transfer. It was further directed that in case such undertaking is given, the person who is submitting the undertaking shall not be entitled to transfer his interest in the property in relation to which the demand of service tax is made without first giving two weeks prior notice of his intention to transfer his interest and the nature of the transfer to the respondents. In case within the period of two weeks, objection is raised on behalf of the respondents to the proposed creation or transfer of interest, then no interest will be created or transferred without seeking leave of the Court. It goes without saying that if the objection is not raised within the period of two weeks, the person shall be free to create or transfer proposed interest in the property.

On the undertaking mentioned above, being filed by the members of the petitioners, The High Court directed that no coercive steps shall be taken by the respondent for recovery of service tax in respect of the premise of such members of the petitioners.

Then Service tax department instruction irks the Delhi High Court during pendency of SLP filed at the Supreme Court:

The Govt as usual filed an appeal in the Supreme Court and the whole Department is under the impression that by mere filing an appeal in the Supreme Court, the High Court order has become inoperative. So demands, threats, Show Cause Notices are playing wild games in the field. Even the TRU, by a letter dated 15.07.2009 directed the Departmental officers to either pursue the tax payers to pay up the Service tax due or take necessary action to safeguard revenue as the dispute has not reached finality and the department has filed an appeal against the order of the Delhi High Court.

It is true the SLP of the Department is pending before the Supreme Court, but the Apex Court has not stayed the order of the Delhi High Court and therefore as of now, the Delhi High Court order is valid, though the Department thinks otherwise. The present position is the matter is posted for 24.02.2010 in the Supreme Court.

Some assessees have assailed the TRU instructions as well as some letters issued by some field officers, in the Delhi High Court.

The Delhi High Court observed,

"Even when the judgment of this Court is challenged by filing SLP, till date there is no order passed by the Supreme Court staying the operation of that judgment. In these circumstances, the respondent could not instruct their officers to pursue the matter with tax payers calling upon them to pay service tax or to resort to other means under the law to protect the Revenue. The manner in which the letters are written clearly indicate that the payment of tax is demanded and the threat is also extended that if there is no compliance, Department would initiate further necessary action against them."

The ASG appearing for the Government assured that corrective steps shall be taken by issuing further instructions, in supersession of earlier instructions, to the officers not to write such letters demanding the payment of service tax or threatening coercive steps.

The Court held, "on this assurance no further orders are required to be passed".

The Registrar General of the High Court had forwarded a copy of the order on 13.01.2010, to the TRU, DGST, CBEC and Delhi Service Tax Commissioner for immediate compliance/necessary action.

Who is superior the Hon'ble High Courts/ Supreme Court or the Board/ Govt:

WHO is the final authority in the matters of disputes pertaining to taxation? It is the Hon'ble High Courts/ Supreme Court or the Board/ Govt. It is again reminded that the Board/ Govt. is the final authority and not the Court. Before challenging the Government Policy in the higher

courts, the tax payers of the country should realize that however high the courts are, there is a still a higher authority namely the bureaucrat who has an undo button which can simply delete the best of judgments. This is exactly what happened in this Budget 2010.

Before discussing way forward of retrospective amendment, let's note brief background of chargeability of service tax on renting of the immovable properties

Brief background of chargeability of service tax on renting of the immovable properties:

The Finance Act of 2007 has introduced Section 65 (105) (zzzz) levying Service tax with effect from 01/06/2007 on the services provided or to be provided to any person, by any other person, in relation to renting of immovable property for use in the course or furtherance of business or commerce.

Further the Notification No. 24/2007-ST dated 22/05/2007 exempts property tax levied by the local bodies from the gross value of rent for the purpose of chargeability of service tax and the Circular No. 98/1/2008-ST dated 04/01/2008 clarifies that the "right to use immovable property is leviable to service tax under the renting of immovable property service".

Ground of Appeals in writ Petitions on chargeability of service tax on renting of the immovable properties:

- Merely allowing use of land or building does not amount to provision of a service.

- The grant of lease or license tantamount to transfer of rights and does not amount to a provision of service rendered by one to another since the lessor is not a service provider but a transferor of rights in the immovable property which the lessor makes in favor of the lessee or the licensee, who is the transferee of such rights and enjoys such rights during the tenure of lease or the license in terms of contract signed by the parties.

- Levy of Service tax on renting of Immovable Property amounts to levy of tax on land/ buildings where in The Central Government does not have the right to levy tax on land / buildings as the same falls within the State List (List II 49) of the Constitution of India.

Highlights of the Hon'ble Delhi High Court's judgment:

- Service in relation to renting of immovable property means a service which is distinct and different from *mere renting* of immovable property itself

- The transaction of renting of immovable property by itself is not taxable in terms of Section 65 (105) (zzzz) of the Finance Act

- Service tax is Value Added Tax and hence only the '"value added" is liable to be taxed by way of service tax

- The Act of renting of immovable property by itself does not provide any value addition to any person

- In the case of lease, the right of possession is transferred whereas in the case of license, there is a transfer of permissive possession. Such transfer of right cannot be considered as service; and

- The Hon'ble court has not given judgment on validity of Section 65 (105) (zzzz) of the Finance Act but quashed or set aside the operative part of the subject notification and circular which entails levy of service tax on renting of immovable property

<u>Conclusion:</u>
Hence, it may be safely concluded that Govt. has already shown the intention by making retrospective amendment that it wants to levy service tax on *mere renting* of the immovable property and on transactions involving transfer of rights, in some form or other in immovable property like Lease agreements, Leave and License agreements, etc. and wants to done away effects of recent judgment of the Hon'ble Delhi High Court.
But, the issue is still open for debate and litigation as recently two petitions is pending for decision by the Hon'ble Delhi High Court and AP High Court respectively and it is appropriate to be decided by the assessee depending upon their business exigencies.