



# SECTION 45(5A)

CAPITAL GAINS IN CASE OF JOINT  
DEVELOPMENT



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## Section 45(5A)

“(5A) Notwithstanding anything contained in sub-section (1), where the capital gain arises to an assessee, being an individual or a Hindu undivided family, from the transfer of a capital asset, being land or building or both, under a specified agreement, the capital gains shall be chargeable to income-tax as income of the previous year in which the certificate of completion for the whole or part of the project is issued by the competent authority; and for the purposes of section 48, the stamp duty value, on the date of issue of the said certificate, of his share, being land or building or both in the project, as increased by the consideration received in cash, if any, shall be deemed to be the full value of the consideration received or accruing as a result of the transfer of the capital asset :

## Section 45(5A)

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

# Section 45(5A)

Explanation.—For the purposes of this sub-section, the expression—

- (i) "competent authority" means the authority empowered to approve the building plan by or under any law for the time being in force;
- (ii) "specified agreement" means a registered agreement in which a person owning land or building or both, agrees to allow another person to develop a real estate project on such land or building or both, in consideration of a share, being land or building or both in such project, whether with or without payment of part of the consideration in cash;
- (iii) "stamp duty value" means the value adopted or assessed or assessable by any authority of the Government for the purpose of payment of stamp duty in respect of an immovable property being land or building or both.”

# Section 45(5A) – Introduction

- Introduced by the Finance Act, 2017 w.e.f. 01.04.2018
- Memorandum:
  - By virtue of transfer as per Section 2(47), JDA between owner and the developer triggers tax liability in the hands of the owner in the year in which possession is handed over to the developer.
  - To minimise the genuine hardship which the owner of land faces in paying capital gains tax in the year of transfer, Section 45(5A) is introduced to trigger tax liability in the previous year in which completion certificate is issued for whole or part of the project

Section 45(5A)

Where the Capital gain arises to an Assessee, being Individual or HUF

From the transfer of a capital asset, being land or building or both

Under a Specified Agreement

Capital gains shall be chargeable to tax as income of PY

In which completion certificate is issued by Competent Authority

for the whole or the part of the project and

For the purpose of Section 48, Stamp Duty Value on the date of issue of certificate

Of his share, being land or building or both

As increased by the consideration received in cash, if any

Shall be deemed to be Full Value of Consideration received  
or accruing as a result of transfer of capital asset

## Section 45(5A) – Analysis of main provision

- Is it mandatory or optional?
- Is it necessarily beneficial? While there is definitely tax deferral which is beneficial, as regards FVC, it could be adverse. The SDV of share in project as of date of issue of CC would be much higher the SDV of outgoing asset as of the date of transfer.
- It is introduced by FA 2017 wef 1.4.2018. Is it retrospective or retroactive.



# Section 45(5A) – Analysis of main provision

- Applies to Ind/HUF
- Applies irrespective of residential status
- Capital gains should arise from the transfer of a capital asset, being land or building or both, under a specified agreement
- Transfer could be in any manifestation of section 2(47) and it is not confined to section 2(47)(v) alone
- However, if there is no transfer under section 2(47) in the case of a specified agreement, section 45(5A) does not apply

# Section 45(5A) – Analysis of main provision

- The subject asset is land or building or both, whether LTCA or STCA
- If the subject asset is interest in land or building or both like easements, leasehold rights, tenancy rights, TDRs, etc., this section does not apply
- The capital gains shall be chargeable to income-tax as income of the previous year in which the certificate of completion for the whole or part of the project is issued by the competent authority
- If completion certificate is issued for part of the project, question is whether section 45(5A) would apply to whole land or building or both originally transferred or would it apply only proportionately wrt to part of the project

## Section 45(5A) – Analysis of main provision

- For computing capital gains, for the purposes of section 48, the stamp duty value, on the date of issue of the said certificate, of his share [being land or building or both in the project] as increased by the consideration received in cash, if any, shall be deemed to be FVC received or accruing as a result of the transfer of the capital asset
- Stamp duty value is taken as on the date of issue of completion certificate and not as on the date of original transfer
- Date of issue of completion certificate v. date of completion certificate v. date of application for completion certificate [Gurbux Singh v. Kartar Singh [2002] 254 ITR 112 (SC)]. Decisions in the context of section 80IB(10) – Tarnetar 362 ITR 174 Guj, Hindustan Samuh Awas 377 ITR 150 Bby [adv: Global Realty 379 ITR 107 MP]

# Section 45(5A) – Year of transfer & taxability

- **Year of taxability:** PY in which the completion certificate is issued by the competent authority for whole or the part of project is the year of taxability.
- **Year of transfer:**
  - Section 45(5A) deals with two aspects (a) year of taxability and (b) full value of consideration. It does not deal with year of transfer
  - ‘Notwithstanding clause’ under Section 45(5A) would apply only to aforesaid two aspects
  - Therefore year of transfer remains same i.e. the year in which the transfer takes place under Section 2(47)
- Thus, the year of transfer might not be same as year of taxability.
- Can the year of transfer be beyond the year of taxation

# Section 45(5A) – Year of transfer & taxability

- The same may be understood from the following table:

Year of issue of Completion Certificate	Year of transfer	Year of taxability
2025	2020	2025
2026	2024	2026
2024	2027	2024

# Section 45(5A) – Analysis of main provision

- Stamp duty value is not with reference to original asset but with reference to incoming asset [i.e. share in the project]
- Section 45(5A) would not defer the date of transfer. It would only defer the time of taxation.
- Question is how to determine whether the capital asset is long term or short term.
- Further question is whether indexation is only upto the date of transfer or upto the date of issue of completion certificate

# Section 45(5A) – Analysis of main provision

- Chennai Tribunal in Best & Crompton Engineering Ltd. v. Asst. CIT [2014] 30 ITR(T) 688 (Chennai ~ Trib.), CII of year of conversion of asset into stock-in-trade has to be applied and not CII of year of taxation
- If the aforesaid ratio is applied, CII of year of transfer should be applied and not the CII of year of taxability
- With due respect, the aforesaid decision cannot be applied for the following reasons:
  - In the aforesaid case, the consideration is frozen on the date of conversion. Under Section 45(5A), consideration is frozen on the date of issue of completion certificate.
  - Object behind giving benefit of indexation is to enhance the value of the asset by taking estimated rise in the cost of asset year-by-year as a result of inflation.

# Section 45(5A) – Analysis of main provision

- If indexation is restricted upto the year of transfer as against year of taxability, the effect of inflation during the period between the year of transfer and year of taxability will be ignored.
- This may defeat the objective in granting the benefit of indexation.
- Further, while the indexation during the aforesaid period is ignored, the stamp duty value applied will be as on the date of issue of completion certificate [year of taxability]. This causes lack of parity.
- Therefore, it may be said that cost inflation index of the year of taxability should be applied.



# Section 45(5A) – Analysis of main provision

- Various rollbacks will have to be with reference to date of transfer. Section 54H applies only in respect of transfer by way of compulsory acquisition
  
- Mitigating factors:
  1. Iqbal Ahmad [2007] 295 ITR 444 (All) HC wrt section 45(5)
  
  2. Circular No. 791 dated 2-6-200 wrt section 45(2)

Specified Agreement

A registered Agreement

In which a person owning a land or building or both,

Agrees to allow another person

To develop a real estate project on such land or building or both

In consideration of a share, being land or building both in such project

Whether with or without payment of part of the consideration in cash

## Section 45(5A) – Specified agreement

- The agreement is required to be registered
- Ind/HUF should be the owner of land or building or both. Merely holding some interest would not suffice
- He agrees to allow another person to develop a real estate project on such land or building or both
- Can an Ind/HUF who jointly owns land or building or both with another person [not being Ind/HUF] be covered here
- Developer need not be Ind/HUF. It could be any entity

## Section 45(5A) – Specified agreement

- Meaning of ‘real estate project’
- Consideration is share, being land or building or both in such project, whether with or without payment of part of the consideration in cash
- Consideration may be only area or area plus cash. However, it cannot be only cash

# Section 45(5A) – Specified agreement

- The definition of ‘specified agreement’ provides that the consideration shall be land or building or both (kind) whether with or without payment of part of the consideration in cash
- The Legislature has not specified the ratio of the part of the consideration to be received in cash.
- Therefore, a question arises whether the consideration in cash can be more than consideration in kind (i.e. land or building or both)
- Going by the spirit of Section 45(5A) and use of language ‘*whether with or without the payment of part of the consideration in cash*’, consideration in cash cannot be more than consideration in kind.

Proviso

Provisions of Section 45(5A) shall not apply

Where the Assessee transfers his share in the project

On or before the date of issue of Completion Certificate

Capital gains shall be deemed to be the income of PY

In which such transfer takes place and

Provisions of this Act, other than the provisions of Section 45(5A), shall apply

For the purpose of determination of Full Value of Consideration received or accruing as a result of such transfer

## Section 45(5A) – Proviso

- Section 45(5A) would not apply where the assessee transfers his share in the project on or before the date of issue of the said certificate of completion
- Meaning of share in the project: Is it interest in the project or is it his share being land or building or both in the project. Former would not require any specific identification whereas the latter requires the completion of building as well as specific identification.
- Does the proviso apply only when the share in the project is fully transferred or would it apply even if the share is partly transferred?

## Section 45(5A) – Proviso

- If the proviso were to apply only when the share is fully transferred, it may frustrate the very objective and taxpayer may resort to transfer of bulk of share retaining a miniscule portion
- If the proviso were to apply even when the share is partly transferred, question is whether the proviso would apply in entirety or would it apply only to the part of the share so transferred.
- If the proviso were to fully apply even when a part of the share is transferred, it would be a case completely covered by the proviso
- If the proviso were to only partly apply even when a part of the share is transferred, it would be a case where both section 45(5A) as well as the proviso would apply. While section 45(5A) would apply to the part retained, the proviso would apply to the part that is transferred.



## Section 45(5A) – Proviso

- The capital gains shall be deemed to be the income of the previous year in which such transfer takes place : ‘such transfer’ is not the original transfer but transfer contemplated in the proviso
- In other words, in the PY in which he transfers his share in the project [before the date of issue of completion certificate], he is liable to pay tax in respect of capital gains on transfer of original asset i.e. land or building under the specified agreement
- The aforesaid interpretation is flowing from literal reading of the Proviso.
- However, Memorandum suggests that by virtue of the proviso, capital gains will be charged to tax in the year of transfer.

## Section 45(5A) – Proviso

- If the aforesaid interpretation is applied, there would be issues of limitation whereby department may not be able to tax the capital gain at all. No extended time limit for re-assessment or rectification is provided
- Further, if the intention is to revert back to normal situation, proviso could have been worded simply that section 45(5A) is not applicable.
- Ideally, proviso ought to have been worded similar to section 45(2)

# Section 45(5A) – Proviso : Gains from original asset

- Full value consideration for transfer of original asset will be determined on the basis of actual consideration as compared with stamp duty valuation under section 50C. If the actual consideration is not ascertainable or indeterminate, section 50D would apply whereby FMV of outgoing asset would be deemed to be FVC
- As the capital gains on transfer of original asset are deemed to be the income of PY of transfer of share in the project, question is how to determine the period of holding and whether FVC/50C/50D and indexation are to be applied in the year of transfer or in the year of taxation?
- As far actual cost and indexation are concerned, the actual cost of original asset would be taken subject to indexation. The period upto which indexation can be made is open to dispute

# Section 45(5A) – Proviso : Gains from share

- In that PY he is also liable to pay tax in respect of capital gains arising from transfer of share in the project
- For the purpose of determination of full value of consideration received or accruing as a result of such transfer, the provisions of this Act, other than the provisions of this sub-section, shall apply.
- This would mean that actual consideration would be determined on the basis of section 48 or 50D. Section 50C may not apply as what is transferred is not land or building or both but a share in the project.
- What would be the cost of acquisition in respect of his share in the project. There is no provision similar to section 49(7). However, it is only fair that the FVC adopted for taxing the gains from original asset should be adopted as actual cost. If not, very taxation is vulnerable to challenge on the basis that the cost is not ascertainable

## Section 194IC

- Notwithstanding anything contained in section 194-IA, any person responsible for paying to a resident any sum by way of consideration, not being consideration in kind, under the agreement referred to in sub-section (5A) of section 45, shall at the time of credit of such sum to the account of the payee or at the time of payment thereof in cash or by issue of a cheque or draft or by any other mode, whichever is earlier, deduct an amount equal to ten per cent. of such sum as income-tax thereon

# Section 194IC : Analysis

- In a case covered by section 45(5A), section 194IA does not apply.
- Therefore, higher TDS of 10% as against 1% would apply
- In case of NRs, section 195 would apply
- TDS is required only in respect of cash component
- If because of proviso, section 45(5A) may no longer apply, will section 194IA cease to apply in respect of cash payments if any made to the assessee

# Section 194IC : Analysis

- When the assessee transfers his share in the project to any other person before issue of CC, the buyer is not covered under section 194IC. He may not be covered under section 194IA also as immovable property would mean land or building or part of a building. What is transferred is only a share of owner before issue of CC and such share cannot be regarded as land or building or part of a building
- When the assessee transfers his share in the project to any other person after of CC, the buyer is not covered under section 194IC. Is he covered under section 194IA? Immoveable property is defined as any land or building or part of the building. What is sold is a composite asset which consists of SBU and UDI. Language used is different from 'land, building or both' used in section 50C/45(5A)

# Balbir Singh Maini 398 ITR 531 SC

- Facts of the case were that members of PCHBS Ltd., entered into tripartite agreement with PCHBS Ltd., HASH and THDC where HASH undertook to develop the land belonging to members and in turn agreed to give them cash and certain flats.
- The lands were to be transferred in parcels and cash consideration to be paid was linked to transfer of lands.
- The table of events is as follows;



Instalment No.	Date	Amounts paid (Rs. in crores)	Lands to be transferred (in acres)
Advance	25.02.2007	3.87	~
1	02.03.2007	15.48	3.08
2	25.04.2007	23.22	4.62
3	6 months from the date of execution of the agreement or 2 months from date of approval of plans/design and drawings and grant of the final license to develop, whichever was later	31.9275	6.36
4	2 months from the date of the last payment	31.9275	7.14
Total		106.425	21.20

# Balbir Singh Maini 398 ITR 531 SC

- Lands corresponding to second and third payments were registered and accordingly, the first three payments were offered to tax
- As HC interdicted the matter in a litigation, the approvals could not be obtained. Accordingly, the assessee terminated the agreement.
- Department sought to tax the assessee invoking section 2(47)(v)/(vi)

# High Court held as follows

1. Perusal of the JDA dated 25.02.2007 read with sale deeds dated 02.03.2007 and 25.04.2007 in respect of 3.08 acres and 4.62 acres respectively would reveal that the parties had agreed for pro-rata transfer of land
2. No possession had been given by the transferor to the transferee of the entire land in part performance of JDA dated 25.02.2007 so as to fall within the domain of Section 53A of 1882 Act
3. The possession delivered, if at all, was as a licensee for the development of the property and not in the capacity of a transferee

# High Court held as follows

4. Further Section 53A of 1882 Act, by incorporation, stood embodied in Section 2(47)(v) of the Act and all the essential ingredients of Section 53A of 1882 Act were required to be fulfilled. In the absence of registration of JDA dated 25.02.2007 having been executed after 24.09.2001, the agreement does not fall under Section 53A of 1882 Act and consequently Section 2(47)(v) of the Act does not apply

5. It was submitted by learned counsel for the assessee-appellant that whatever amount was received from the developer, capital gains tax has already been paid on that and sale deeds have also been executed. In view of cancellation of JDA dated 25.02.2007, no further amount has been received and no action thereon has been taken. It was urged that as and when any amount is received, capital gains tax shall be discharged thereon in accordance with law. In view of the aforesaid stand, while disposing of the appeals, we observe that the assessee-appellants shall remain bound by their said stand

# High Court held as follows

6. The issue of exigibility to capital gains tax having been decided in favour of the assessee, the question of exemption under Section 54F of the Act would not survive any longer and has been rendered academic

7. The Tribunal and the authorities below were not right in holding the assessee-appellant to be liable to capital gains tax in respect of remaining land measuring 13.5 acres for which no consideration had been received and which stood cancelled and incapable of performance at present due to various orders passed by the Supreme Court and the High Court in PILs

# Certain relevant facts

- 2.1 The Owner hereby irrevocably and unequivocally grants and assigns in perpetuity all its rights to develop, construct, mortgage, lease, license, sell and transfer the Property alongwith any and all the construction, Premises, hereditament, easements, trees thereon in favour of THDC for the purpose of development, construction, mortgage, Sale, transfer, lease, license and/or exploitation for full utilization of the Property ('Right') and to execute all the documents necessary to carry out, facilitate and enforce the Right in the Property including to execute Lease Agreement
- 2.1 contd..The owner hereby hands over the original title deeds of the Property as mentioned in the list Annexed hereto and marked as Annexure IV and physical, vacant possession of the Property has been handed over to THDC simultaneous to the execution and registration of this Agreement to develop the same as set out herein

# Certain relevant facts

- 2.3 The Owner hereby irrevocably and unequivocally grants and assigns all its Development Rights in the Property to THDC to develop the Property and undertake the Project at its own costs, efforts and expenses
- 9.3... THDC hereby undertake and assure the Owner that they shall use the title deeds only for the purpose of furtherance of the Project in the manner that it does not adversely effect the Owner/Allottee in any manner whatsoever

# SC on section 2(47)(v)

- SC considered amendment to section 17(1A) and section 49 of the Registration Act 1908 through Registration and Other Related Laws (Amendment) Act, 2001
- SC held that the effect of the aforesaid amendment is that, on and after the commencement of the Amendment Act of 2001, if an agreement, like the JDA in the present case, is not registered, then it shall have no effect in law for the purposes of Section 53A
- A reading of Section 17(1A) and Section 49 of the Registration Act shows that in the eyes of law, there is no contract which can be taken cognizance of, for the purpose specified in Section 53A.
- The ITAT was not correct in referring to the expression "of the nature referred to in Section 53A"



# SC on section 2(47)(v)

■ SC did not examine other contentions like

1. whether under the JDA possession was or was not taken;
2. whether only a licence was granted to develop the property;  
and
3. whether the developers were or were not ready and willing to carry out their part of the bargain.

# SC on section 2(47)(vi)

- The High Court had held that Section 2(47)(vi) will not apply for the reason that there was no change in membership of the society, as contemplated
- SC noted that under Section 2(47)(vi), any transaction which has the effect of transferring or enabling the enjoyment of any immovable property would come within its purview.
- The High Court has not adverted to the expression "or in any other manner whatsoever" in sub-clause (vi),
- This expression would show that it is not necessary that the transaction refers to the membership of a cooperative society.

# SC on section 2(47)(vi)

- The object of Section 2(47)(vi) appears to be to bring within the tax net a *de facto* transfer of any immovable property.
- The expression "enabling the enjoyment of" takes color from the earlier expression "transferring", so that it is clear that any transaction which enables the enjoyment of immovable property must be enjoyment as a purported owner thereof<sup>1</sup>
- The idea is to bring within the tax net, transactions, where, though title may not be transferred in law, there is, in substance, a transfer of title in fact
- A reading of the JDA would show that the owner continues to be the owner throughout the agreement, and has at no stage purported to transfer rights akin to ownership to the developer. At the highest, possession alone is given under the agreement, and that too for a specific purpose -the purpose being to develop the property, as envisaged by all the parties

# ‘arising’

- Section 45(1) uses ‘profits and gains arising’ & Section 48 uses “full value of the consideration received or accruing’
- Accrues or arises v. received – ED Sassoon 26 ITR 27 SC : Unless and until there is created in favour of the assessee a debt due by somebody it cannot be said that he has acquired a right to receive the income or that income has accrued to him.
- Morvi Industries 83 ITR 832 SC : income accrues when there "arises a corresponding liability of the other party from whom the income becomes due to pay that amount“
- Excel Industries 358 ITR 295 SC held that though the assesseees are entitled to benefits of advance licences, there was no corresponding liability on the customs authorities to pass on the benefit to the assesseees until the goods are actually imported and made available for clearance. Till then the benefits at the best represent a hypothetical income, which may or may not materialise.

## SC on 'arising' in section 45

- SC applies ED Sassoon and Excel Industries 258 ITR 295 SC to hold that no income accrues as no debt owed to assessee by the developers
- SC held that the income from capital gain on a transaction which never materialized is, at best, a hypothetical income. It is admitted that, for want of permissions, the entire transaction of development envisaged in the JDA fell through. In point of fact, income did not result at all for the aforesaid reason. This being the case, it is clear that there is no profit or gain which arises from the transfer of a capital asset, which could be brought to tax under Section 45 read with Section 48 of the Income Tax Act

## SC on 'arising' in section 45

- SC held that the assessee did not acquire any right to receive income, inasmuch as such alleged right was dependent upon the necessary permissions being obtained. This being the case, in the circumstances, there was no debt owed to the assesseees by the developers and therefore, the assesseees have not acquired any right to receive income under the JDA. This being so, no profits or gains "arose" from the transfer of a capital asset so as to attract Sections 45 and 48 of the Income Tax Act

## SC on 'arising' in section 45

- The aforesaid paragraph dilutes the intensity of analysis of 'arising' made in the preceding paragraphs
- Mere obtaining of approval does not create an obligation on the developer to deliver the SBU to the owner
- Usually under the JDA, such obligation arises only after the completion of construction and obtaining the completion certificate.

# Seshasayee Steels Pvt Ltd 115 taxmann.com 5 (SC)

- On 15.05.1998, assessee land owner entered into an agreement to sell with one Vijay Santhi Builders Limited for Rs.5.5 crores
- It gave permission to the developer to start advertising, selling, construction on the land herein mentioned
- On 27.11.1998, a Power of Attorney was executed, by which, the assessee permitted the developer to execute and join in execution the necessary number of sale agreements and/or sale deeds in respect of the schedule mentioned property after developing the same into flats.
- The Power also enabled the Builder to present before all the competent authorities such documents as were necessary to enable development on the property and sale thereof to persons.



# Seshasayee Steels Pvt Ltd 115 taxmann.com 5 (SC)

- On 19.07.2003, a Memo of Compromise was entered into as agreement to Sell ran into dispute.
- AO passed an order under section 147/144 treating the entire consideration as capital gain for AY 2004-05.
- ITAT agreed with the CIT(A) and found that on or about the date of the agreement to sell, the conditions mentioned in Section 2(47)(v) of the I.T. Act could not be stated to have been complied with, in that, the very fact that the compromise deed was entered into on 19.07.2003 would show that the obligations under the agreement to sell were not carried out in their true letter and spirit.
- As a result of this, Section 53A of the Transfer of Property Act, 1882, (hereinafter referred to as 'T.P. Act' for brevity) could not possibly be said to be attracted.

# Seshasayee Steels Pvt Ltd 115 taxmann.com 5 (SC)

- Memo of Compromise dated 19.07.2003 stated that various amounts had to be paid by the Builder to the owner so that a complete extinguishment of the owner's rights in the property would then take place.
- The last two payments under the compromise deed were contingent upon one M/s.Pioneer Homes also being paid off, which apparently was done.
- ITAT held that *the transfer took place during the assessment year 2004-05 as the last cheque is dated 25.01.2004.*

# Assessee's arguments

- The deemed transfer in fact took place during previous year 1998-99 under section 2(47)(v) as possession was handed over
- In the alternative, the deemed transfer took place during previous year 1998-99 under section 2(47)(vi) as power of attorney was executed
- Therefore, assessee is not liable to tax in AY 2004-05

# SC held as follows:

- Vide clause 16 of the agreement only a license was given to another upon the land for the purpose of developing the land into flats and selling the same.
- Such license is not 'possession' under Section 53A,
- Possession is a legal concept, and which denotes control over the land and not actual physical occupation of the land.
- Section 2(47)(v) is therefore not attracted.

# SC held as follows:

- Reliance was placed on. *Balbir Singh Maini (2018) 12 SCC 354 = 2017-TIOL-374-SC-IT*,
- The expression "enabling the enjoyment of" in section 2(47)(vi) must take colour from the earlier expression "transferring", so that it can be stated on the facts of a case, that a de facto transfer of immovable property has, in fact, taken place making it clear that the de facto owner's rights stand extinguished.
- On the date of the agreement to sell, the owner's rights were completely intact both as to ownership and to possession even de facto.
- Therefore, section 2(47)(vi) is therefore not attracted.

# SC held as follows:

- On the basis of facts found by the ITAT, the assessee's rights in the said immovable property were extinguished on the receipt of the last cheque, as also that the compromise deed could be stated to be a transaction which had the effect of transferring the immovable property in question.
- Countering the contention that the compromise deed may not possibly fit into any of the pigeonholes of section 2(47), the court held that the pigeonhole that would support the orders under appeal would be Section 2(47)(ii) and (vi) of the I.T. Act.

# Take away : Section 2(47)(v)

- Adverting to section 2(47)(v), the most important aspect is what the court held - *a license per se cannot be said to be 'possession' within the meaning of Section 53A.*
- According to the court, possession for this purpose is a legal concept, and which denotes control over the land and not actual physical occupation of the land.
- Therefore, unless and until, the agreement transfers the legal possession either expressly or by necessary implication, section 53A of the TP Act and consequently section 2(47)(v) is not attracted.

# Take away : Section 2(47)(v)

- If JDA were to expressly provide that the instant case is not covered by section 53A of the TP Act and what is conferred is only a permissive license under section 52 of the Easements Act, 1882, section 53A of the TP Act would not apply as the legal possession is not transferred.
- The aforesaid position is not affected by the mere fact that the owner has executed a power of attorney conferring power on the developer even to execute sale deeds in favour his customers.
- As this decision may itself provide for an escape route from the rigours of section 2(47)(v), there may not arise a scope to apply section 45(5A) in such cases.



# Take away : Section 2(47)(vi)

- Adverting to section 2(47)(vi), the court held that while the said clause was not attracted in PY 1998-99 in the year of execution of power of attorney, the same was attracted in PY 2004-05 when the compromise deed was fully implemented.
- The court held that mere execution of power attorney would not suffice unless there is in substance a transfer viz de-facto transfer.
- According to the court, while the power of attorney did not effect a de-facto transfer, the compromise deed did.
- Interestingly, while ruling out applicability of section 2(47)(v), the court insisted on a legal possession and not physical control whereas while ruling out applicability of section 2(47)(vi), the court insisted on a de-facto transfer.

# Take away

- This decision upsets various rulings which applied section 2(47)(v) despite a specific clause in the sale agreement or JDA which provided that the instant case is covered by section 52 of the Easements Act and not covered by section 53A of TP Act.
- The statement in Circular No. 495, dated September 22, 1987 that section 2(47)(vi) would apply to “power of attorney” transactions can now be applied only when there is a de-facto transfer which should go beyond mere execution of power of attorney.
- This ruling may run counter to decision in **Sh Sanjeev Lal Vs CIT 2014-TIOL-63-SC-IT** which held that the agreement to sell executed on 27th December, 2002 can be considered as a date on which the property had been transferred.

# Take away : Form v. substance

- This ruling in so far it deals with possession appears to tilt towards the form rather than the substance and to this extent overlooks ‘substance over form’.
- Whether the GAAR provisions of Chapter X-A would still apply in such case would depend on prevailing facts and circumstances of a particular case.
- Needless to say that the revenue should be able to establish that a particular case is covered by section 96 to be regarded as an impermissible avoidance arrangement and the tax benefit does not exceed the threshold applicable at the relevant point of time.

# Take away : Benami Law

- Benami Property Transactions Act, 1988 has been amended by the Benami Transactions (Prohibition) Amendment Act, 2016 (BTP Amendment Act).
- The rules and all the provisions of the BTP Amendment Act came into force on 01.11.2016.
- The courts with the exception of Chattisgarh High Court have held the 2016 amendments to be prospective.
- On the basis of per section 2(47)(v) before the aforesaid interpretation, an argument was being taken that the effective transfer took place before 01.11.2016 and hence the amended provisions are not applicable.
- Post aforesaid interpretation, it is necessary to establish transfer of legal possession before the aforesaid date to argue on non applicability of amended provisions.

# Illustration 1 ~ Facts

- Developer and owner enter into JDA in the PY 2018-2019.
- The land held by the owner is transferred to him by way of gift from his father before 01.04.2001.
- The consideration for transfer of land is 40% of super built up area (SBU) [proportionate undivided interest in land (UDI) is retained by the owner]. Thus, the sharing ratio of the developer and owner is 60:40.
- By virtue of Section 2(47)(v)/(vi), transfer of land has taken place in the PY 2021-2022
- The Competent Authority issued completion certificate in the PY 2023-2024.

# Illustration 1 ~ Analysis

- We may examine the computation under Section 48.
- There would be two-fold computation under Section 48 in the hands of owner:
  - For transfer of 60% of land to the developer
  - For transfer of 40% of SBU along with proportionate 40% of UDI
    - For transfer of 40% of UDI
    - For transfer of 40% of SBU

# Transfer of 60% of land – Section 45(5A)

- We may analyse the following aspects:
  - Year of transfer & year taxability
  - Full value of consideration
  - Cost of Acquisition
  - Benefit of Indexation
  - Rate of Tax
  
- **Year of transfer:** As per Section 2(47)(v), PY 2021-2022
  
- **Year of taxability:** The PY in which the completion certificate is issued i.e. PY 2023-2024.
  
- **Full Value of Consideration:** The Stamp Duty Value of the owner's share i.e. 40% of SBU on the date of issue of completion certificate

# Transfer of 60% of land – Section 45(5A)

- **Cost of Acquisition:** Section 55(2)(b)(i) defines ‘cost of acquisition’ in relation to immovable property acquired before 01.04.2001 to mean:
  - the purchase cost of the capital asset or
  - the FMV of the same as on 01.04.2001, at the option of the assessee
- **Benefit of Indexation:**
  - As per Explanation (iv) to Section 48, cost of inflation index (CII) is calculated from the year in which the long-term capital asset was held by the assessee to the year of ‘transfer of such asset’
  - In the instant case ‘year of transfer’ is different from ‘year of taxability’.



# Transfer of 60% of land – Section 45(5A)

- Chennai Tribunal in Best & Crompton Engineering Ltd. v. Asst. CIT [2014] 30 ITR(T) 688 (Chennai ~ Trib.), CII of year of conversion of asset into stock-in-trade has to be applied and not CII of year of taxation
- If the aforesaid ratio is applied, CII of year of transfer should be applied and not the CII of year of taxability
- With due respect, the aforesaid decision cannot be applied for the following reasons:
  - In the aforesaid case, the consideration is frozen on the date of conversion. Under Section 45(5A), consideration is frozen on the date of issue of completion certificate.
  - Object behind giving benefit of indexation is to enhance the value of the asset by taking estimated rise in the cost of asset year-by-year as a result of inflation.

# Transfer of 60% of land – Section 45(5A)

- If indexation is restricted upto the year of transfer as against year of taxability, the effect of inflation during the period between the year of transfer and year of taxability will be ignored.
- This may defeat the objective in granting the benefit of indexation.
- Further, while the indexation during the aforesaid period is ignored, the stamp duty value applied will be as on the date of issue of completion certificate [year of taxability]. This causes lack of parity.
- Therefore, it may be said that cost inflation index as stood in the year of taxability should be applied.

■ **Rate of Tax: 20%**

# Transfer of 60% ~ Section 45(5A) ~ Summary

<b>Particulars</b>	<b>Transfer of 60% of land</b>
Section	Section 45(5A)
Year of Taxability	Previous year in which the completion certificate is issued
Full value of consideration	Stamp Duty Value of 40% of SBU on the date of issue of completion certificate
Cost of Acquisition	Proportionate [i.e. 60%] purchase cost of land or Proportionate fair market value of the land as on 01.04.2001 subject to indexation
Rate of Tax	20%

# Transfer of 40% of UDI – Section 45(1)

- Now we shall examine implications on transfer of 40% of UDI. We may analyse the following aspects:
  - Year of taxability
  - Full value of consideration
  - Cost of Acquisition
  - Benefit of Indexation
  - Rate of Tax
  
- **Year of taxability:** The PY in which 40% of SBU is sold along with proportionate 40% of UDI

# Transfer of 40% of UDI – Section 45(1)

## ■ Full Value of Consideration:

- Actual consideration received for transfer of land
- If a composite consideration is received towards both SBU along with UDI, it is necessary to split between SBU and land
- If the actual consideration received is lesser than SDV under Section 50C, SDV shall be deemed to be the FVC. This is subject to 10% bandwidth as provided is 3<sup>rd</sup> proviso to Section 50C(1)

# Transfer of 40% of UDI – Section 45(1)

- **Cost of Acquisition:** As per Section 55(2)(b)(i):
  - purchase cost of the proportionate 40% of the cost of land or
  - the fair market value of the same as on 01.04.2001
  
- **Benefit of Indexation:**
  - As land is long-term capital asset, benefit of indexation is available
  
- **Rate of tax: 20%**

# Transfer of 40% of SBU – Section 45(1)

- Now we shall examine implications on transfer of 40% of SBU
- We may analyse the following aspects:
  - Year of taxability
  - Full value of consideration
  - Cost of Acquisition
  - Benefit of Indexation
  - Rate of Tax
- **Year of taxability:** The PY in which 40% of SBU is sold along with proportionate 40% of UDI

# Transfer of 40% of SBU – Section 45(1)

## ■ Full Value of Consideration:

- Actual consideration received for transfer of land
- If a composite consideration is received towards both SBU along with UDI, it is necessary to split between SBU and land
- If the actual consideration received is lesser than SDV under Section 50C, SDV shall be deemed to be the FVC. This is subject to 10% bandwidth as provided is 3<sup>rd</sup> proviso to Section 50C(1)



# Transfer of 40% of SBU – Section 45(1)

## ■ Cost of Acquisition:

- Section 49(7) has been introduced by the FA, 2017 for the purpose of Section 45(5A)
- As per said Section, the cost of acquisition, in relation to transfer of SBU, shall be the FVC determined under Section 45(5A) in relation to transfer of land to the developer
- Owner acquired 40% of SBU by transferring 60% of land to the developer.
- Section 45(5A) deems SDV of 40% of SBU as FVC for transfer of 60% of land.
- Therefore, FVC determined under Section 45(5A) for transfer of 60% of land constitutes ‘cost of acquisition’ of 40% of SBU

# Transfer of 40% of SBU – Section 45(1)

## ■ Benefit of Indexation:

- If SBU is held by owner for more than 24 months immediately preceding the date of its transfer, it constitutes short-term capital asset. Hence, benefit of indexation is not available.
- If SBU is held for more than 24 months, it constitutes long-term capital. Hence, benefit of indexation is available.

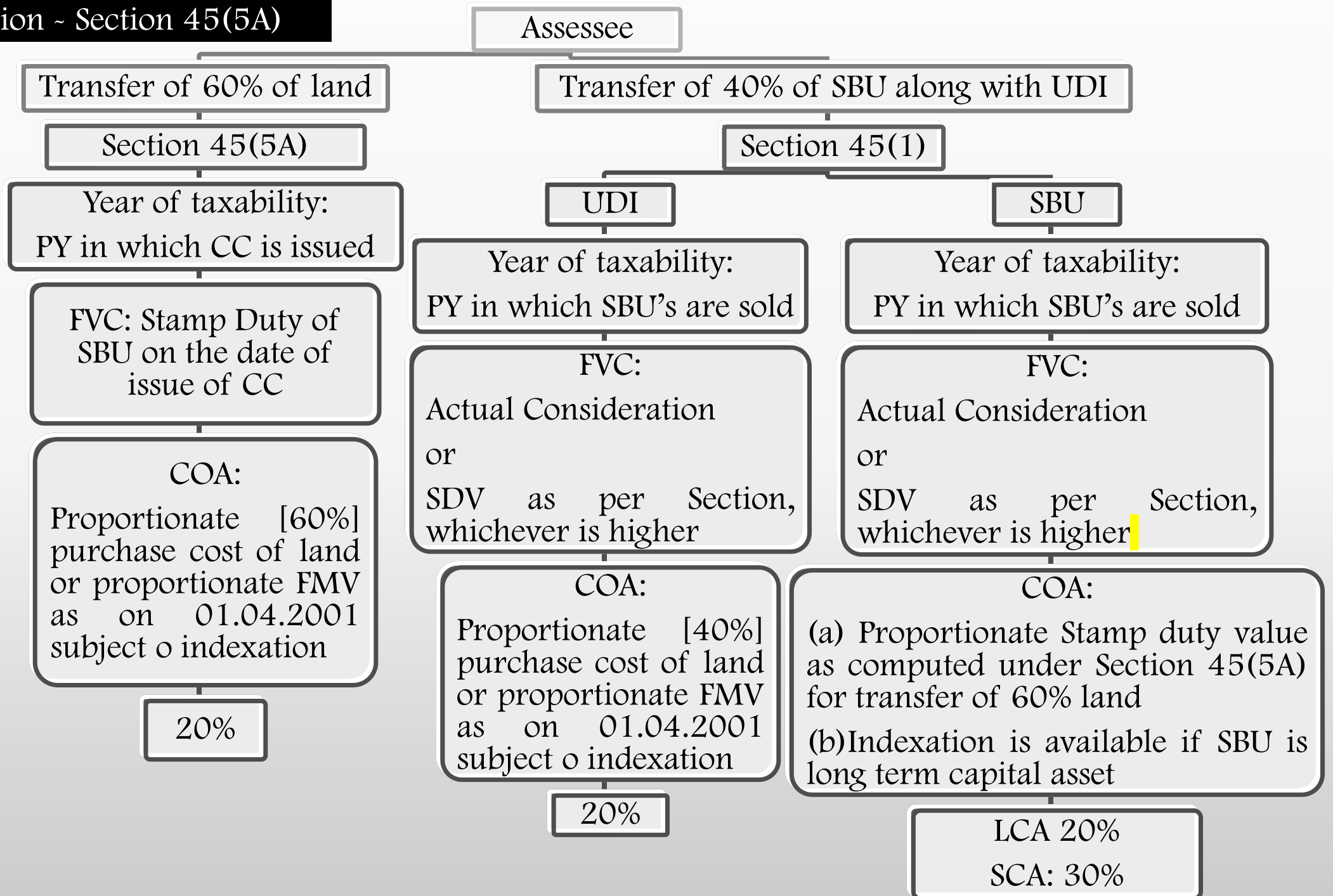
## ■ Rate of tax:

- In case of long-term capital asset: 20%
- In case of short-term capital asset: 30%

# Transfer of 40% SBU along with UDI- Section 45(1) ~ Summary

Particulars	Transfer of 40% of UDI	Transfer of 40% of SBU
Section	Section 45(1)	
Year of Taxability	Previous year in which SBU's are sold along with UDI	Previous year in which SBU's are sold along with UDI
Full value of consideration	Actual consideration received or SDV as per Section 50C, whichever is higher	Actual consideration received or SDV as per Section 50C, whichever is higher
Cost of Acquisition	Proportionate [i.e. 40%] purchase cost of land or Proportionate fair market value of the land as on 01.04.2001 subject to indexation	Proportionate SDV as computed under Section 45(5A) on transfer of 60% land  Indexation is available if SBU is long term capital asset
Rate of Tax	20%	If long-term capital asset: 20% If short-term capital asset: 30%

Illustration ~ Section 45(5A)



## Section 45(5A) – Proviso

- As per Proviso, Section 45(5A) would not apply where the assessee i.e. Individual or HUF ‘transfers his share’ before the issue of completion certificate

## Section 45(5A) – Proviso ~ Issues

- Whether expression ‘Transfers his share’ would mean ‘complete transfer’ of owner’s share or it includes even ‘part transfer’?
  - Under Section 45(5A) the taxable event takes place, even when the competent authority issues completion certificate for the part of the project.
  - Similarly, even transfer of part of owner’s share would come under proviso to Section 45(5A),

## Section 45(5A) – Proviso ~ Issues

- However in case of ‘part transfer’ of owner’s share, whether Proviso would apply:
  - To entire land or
  - Only to the extent of land proportionate to the transfer of part of owner’s share
- Whether in case of ‘part transfer’ of owner’s share, applicability of Section 45(5A) is barred wholly or only to the extent of part transfer?
- **There is no clarity.** Therefore, we may examine the implications of Proviso considering both the interpretations i.e. non-applicability of Section 45(5A) **wholly as well as partially.**

## Section 45(5A) – Proviso – Issues

- Non-applicability of Section 45(5A) **wholly**, would mean application of Proviso [i.e. Section 45(1)] to the entire land.
- Non-applicability of Section 45(5A) **partially would mean application of:**
  - Proviso [i.e. Section 45(1)] to the extent of land proportionate to the transfer of owner's share before the issue of completion of certificate
  - Section 45(5A) to the extent of completion certificate issued by the Competent Authority



# Illustration 2 ~ Facts

- Developer and owner enter into JDA in the PY 2018-2019.
- The land held by the owner is transferred to him by way of gift from his father before 01.04.2001.
- The consideration for transfer of land is 40% of super built up area (SBU) [proportionate undivided interest in land (UDI) is retained by the owner]. Thus, the sharing ratio of the developer and owner is 60:40.
- By virtue of Section 2(47)(v), transfer of land has taken place in the PY 2021-2022
- Owner transferred part of his share [say 10% out of 40% of SBU along with UDI in the PY 2022-2023 i.e. before issue of completion certificate
- The Competent Authority issued completion certificate in the PY 2023-2024.

## Illustration 2 ~ Analysis

- It is a case part transfer.
- In case of part transfer, it is not known whether the non-applicability to Section 45(5A) is to the extent of transfer of
  - Entire 60% of land or
  - Land proportionate to the transfer of share
- Therefore, we may have to examine the issue under both aspects i.e. non-applicability of Section 45(5A) **wholly as well as partially**

# Illustration 2 – Analysis – Section 45(5A)~ Wholly

- At first we may examine the issue assuming that Section 45(5A) is wholly not applicable.
- There will be two-fold computation as under:
  - On transfer of 60% of land to the developer
  - On transfer of proportionate rights to receive in 40% of SBU along with UDI
    - On transfer of proportionate rights to receive in 40% of SBU
    - On transfer of proportionate 40% of the undivided interest in land

# Transfer of 60% of land – Section 45(5A) r.w. Proviso

- We may analyse the following aspects:

- Full value of consideration
- Cost of Acquisition
- Benefit of Indexation
- Rate of Tax

- **Full Value of Consideration:**

- As per JDA, the consideration for transfer of 60% of land is 40% of SBU
- On the date of part transfer of right in SBU, entire 40% of SBU would have not been constructed
- Till the completion of construction, the value of 40% of SBU cannot be determined

# Transfer of 60% of land – Section 45(5A) r.w. Proviso

- In such case, as per Section 50D, the FMV of incoming asset shall be deemed to the FVC
- Therefore, FMV of 60% of land constitutes FVC
- Section 50C do not apply for the reason that Section 50D itself is a deeming fiction. It is not possible to impose one deeming fiction over the other in the absence of express provision.
- However, the question for consideration is at what point of time FMV is to be determined, whether on the date of :
  - transfer of land as per Section 2(47)(v)/(vi) or
  - Transfer of owner's share (i.e. 40% of SBU)

# Transfer of 60% of land – Section 45(5A) r.w. Proviso

- A reading of Proviso Section 45(5A) suggests that ‘year of transfer’ is not altered, while ‘year of taxability’ is altered.
  - The proviso clearly provides that the full value consideration is to be determined under normal provisions of the Act without regard to section 45(5A)
  - On this basis, it may be said that FMV is required to be determined as on the date of transfer of land in terms of Section 2(47)(v)(vi)
- **Cost of Acquisition:** As per Section 55(2)(b)(i):
- Purchase cost of 60% of land
  - FMV as on 01.04.2001

# Transfer of 60% of land – Section 45(5A) r.w. Proviso

- **Benefit of Indexation:**

- As land is long term capital asset, the benefit is available
- Indexation is available upto the year of transfer and not the year of taxable as the consideration is frozen as on the year of transfer

- **Rate of Tax: 20%**

# Transfer of 60% of land ~ Section 45(1) ~ Summary

Particulars	Transfer of 60% of land
Section	Section 45(1)
Year of Taxability	Previous year in which owner transfers his right in 40% of SBU before issue of completion certificate
Full value of consideration	The value of the SBU on the date of transfer is not ascertainable.  Therefore, as per Section 50D, FMV of 60% of land on date of transfer constitute full value of consideration. Section 50C is not applicable.
Cost of Acquisition	Proportionate [i.e. 60%] purchase cost of land or Proportionate FMV of the land as on 01.04.2001 subject to indexation
Rate of Tax	20%



# Transfer of right to receive 40% of SBU

## Section 45(5A) r.w. Proviso

- We may analyse the following aspects:
  - Full value of consideration
  - Cost of Acquisition
  - Benefit of Indexation
  - Rate of Tax
  
- **Full Value of Consideration:**
  - Actual consideration received towards transfer of right to receive 40% of SBU
  - As right in SBU is neither land or building, Section 50C does not apply
  - Giridhar G. Yadalam v. CWT [2016] 384 ITR 52 (SC): Building under construction is not a building

# Transfer of right to receive 40% of SBU Section 45(5A) r.w. Proviso

- Section 50C does not apply to rights in land or rights in building:
  - Kancast Pvt Ltd v. ITO 2015-TIOL-151-ITAT-PUNE upheld in Pr. CIT v. Kancast Pvt Ltd. 2018-TIOL-845-HC-MUM-IT
  - CIT v. Greenfield Hotels & Estates (P.) Ltd. [2016] 389 ITR 68 (Bombay)
  - Voltas Ltd. v. ITO [2016] 74 taxmann.com 99 (Mumbai ~ Trib.)
  - Atul G. Puranik v. ITO [2011] 132 ITD 499 (Mumbai)
- Therefore, actual consideration constitutes FVC

# Transfer of right to receive 40% of SBU Section 45(5A) r.w. Proviso

## ■ Cost of Acquisition:

- Section 49(7) does not apply in relation to transfer falling under proviso
- there is no mention under Section 55(2)(b), specifying the determination of cost of acquisition in respect of the property owned by the assessee on or after 01.04.2001
- However, as per general understanding whatever cost the owner has incurred in acquiring the asset, should constitute 'cost of acquisition'.
- Here, the owner acquired 40% of SBU, upon transferring 60% of land to the developer. By virtue of Section 45(1) r.w.s 50D, the FVC for transfer of 60% of land is FMV of 60% of on the date of transfer as per Section 2(47)(v)/(vi)
- Therefore, the FMV of 60% of land computed above, constitutes 'cost of acquisition' for 40% of SBU

# Transfer of right to receive 40% of SBU

## Section 45(5A) r.w. Proviso

### ■ Benefit of Indexation:

- Benefit of Indexation would apply to long-term capital asset.
- Right in SBU is neither a land nor building not both
- In respect of any right in a capital asset constitutes long-term capital asset, the same should have been held by the assessee for more than 36 months before the date of transfer
- If such right is held for 36 months, it constitutes long-term capital asset and benefit of indexation is available
- If such right is held for less than 36 months, it constitutes short-term capital asset. Hence benefit is not available.

### ■ Rate of tax: If long-term capital asset: 20%. If short-term capital asset: 30%

# Transfer of 40% of UDI

## Section 45(5A) r.w. Proviso

- We may analyse the following aspects:
  - Full value of consideration
  - Cost of Acquisition
  - Benefit of Indexation
  - Rate of Tax
  
- **Full Value of Consideration:**
  - Actual consideration received towards transfer of right to receive 40% of SBU
  
  - If such consideration is less than SDV under Section 50C, SDV shall be deemed to be the FVC

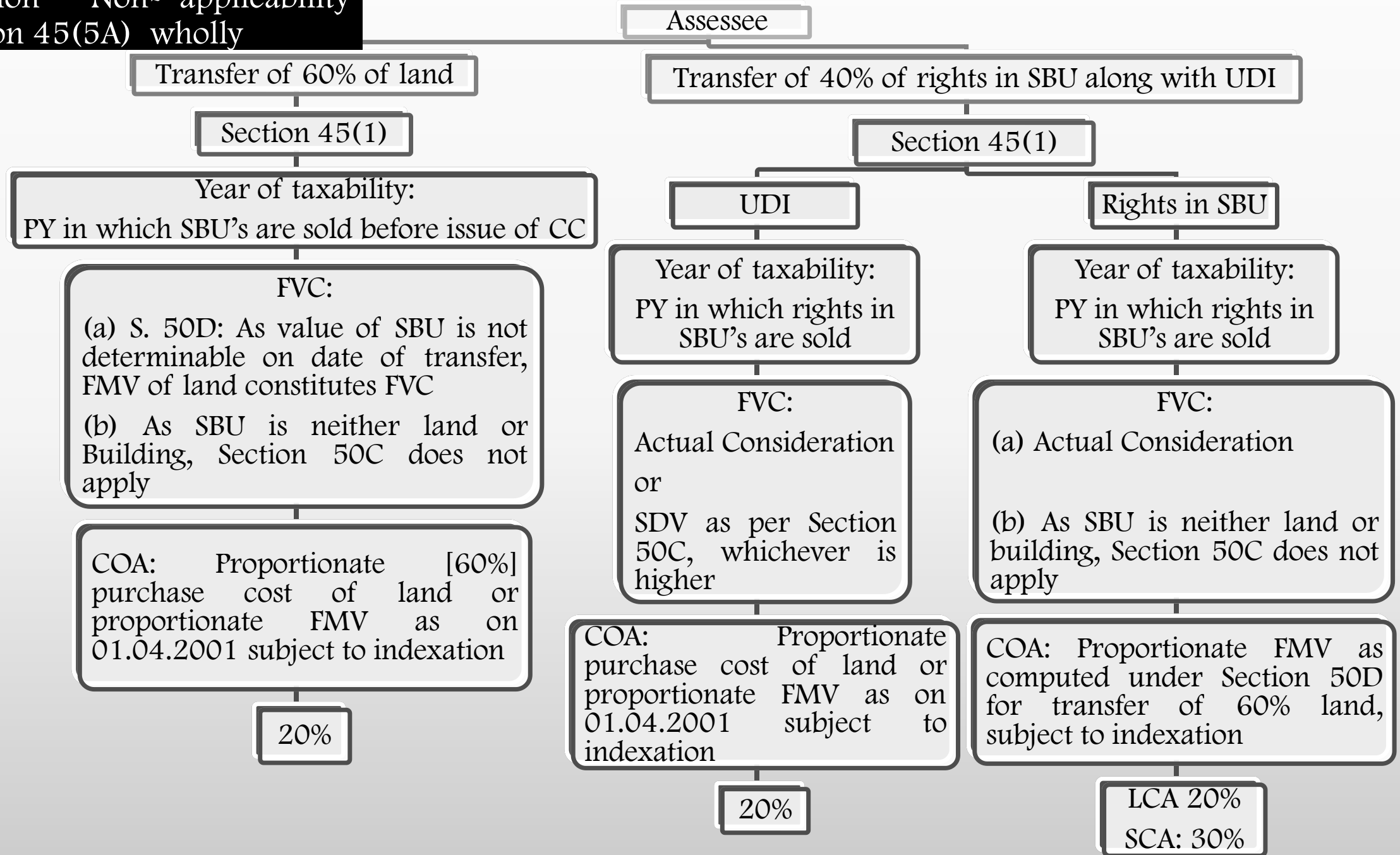
# Transfer of 40% of UDI Section 45(5A) r.w. Proviso

- **Cost of Acquisition:** As per Section 55(2)(b)(i):
  - Proportionate [40%] purchase cost of the land or
  - FMV as on 01.01.2001
- **Benefit of Indexation:** As land is long-term capital asset, the benefit is available
- **Rate of Tax:** 20%

# Transfer of right to receive 40% of SBU along with UDI- Section 45(1) ~ Summary

Particulars	Transfer of rights in 40% of SBU	Transfer of 40% of UDI
Section	Section 45(1)	
Year of Taxability	Previous year in which SBU's are sold	Previous year in which SBU's are sold
Full value of consideration	Actual consideration  Section 50C does not apply	Actual consideration received or SDV as per Section 50C, whichever is higher
Cost of Acquisition	Proportionate FMV as computed under Section 50D for transfer of 60% land, subject to indexation	Proportionate purchase cost of land or Proportionate fair market value of the land as on 01.04.2001, subject to indexation
Rate of Tax	If long-term capital asset: 20% If short-term capital asset: 30%	20%

**Illustration – Non- applicability of Section 45(5A) wholly**





# Illustration – 2 – Analysis – Section 45(5A) ~ Partially

- Partial non-applicability of Section 45(5A) would mean:
  - The application of Proviso to Section 45(5A) to the extent of transfer of:
    - Land (out of 60%) to the developer proportionate to the rights in SBUs sold by land-owner before the issue of completion certificate
    - Transfer of owner' share i.e. SBU (out of 40%)
    - Transfer of undivided interest in land proportionate to right in SBU which is transferred

# Illustration – 2 – Analysis – Section 45(5A) ~ Partially

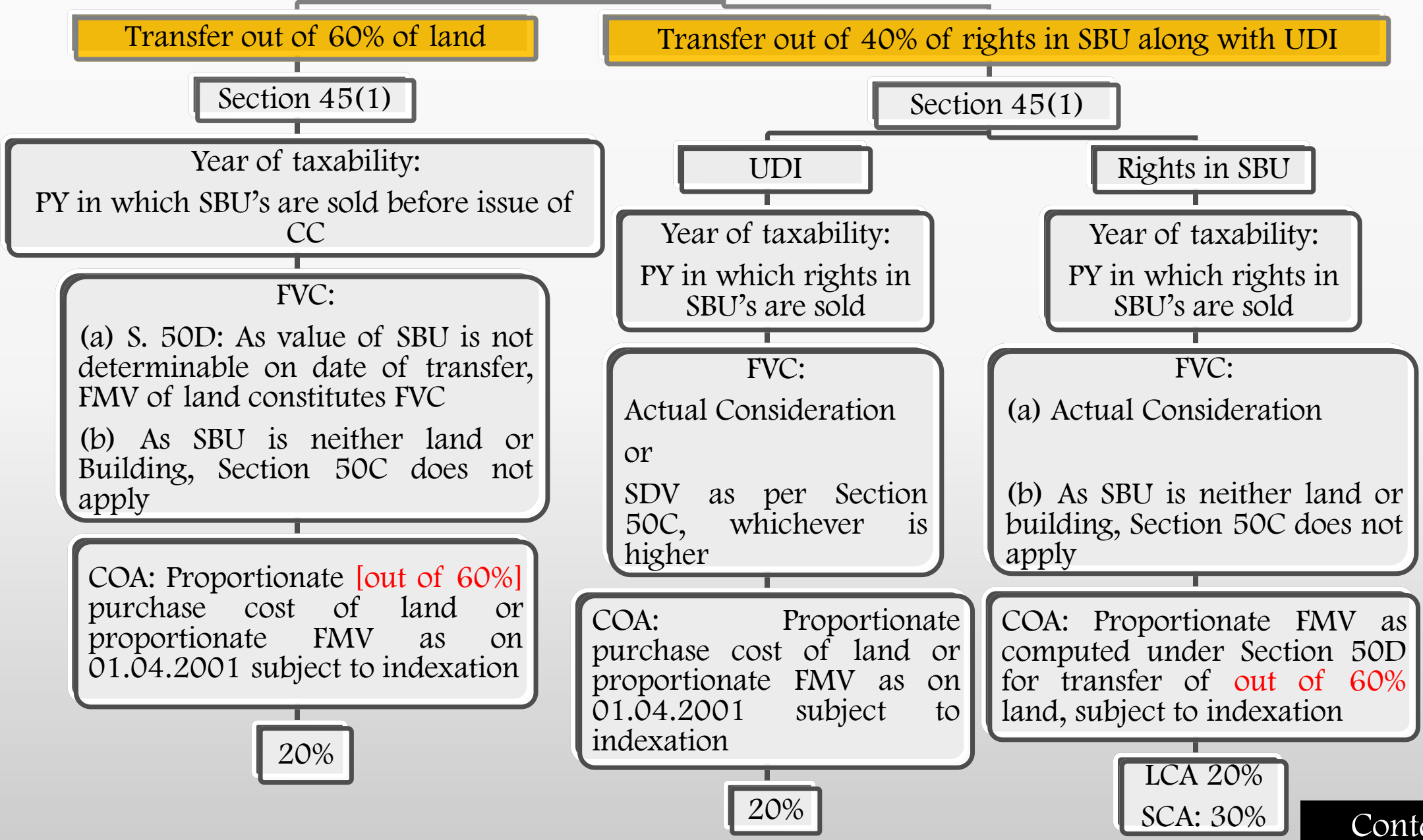
- The application of Section 45(5A) to the extent of transfer of:
  - Land (out of 60%) to the developer proportionate to the SBUs retained by land-owner (out of 40%);
  - Transfer of owner' share i.e. SBU (out of 40%)
  - Transfer of undivided interest in land proportionate to right in SBU which is transferred

# Illustration – 2 – Analysis – Section 45(5A) ~ Partially

- Tax implication analysed with respect to **non-applicability of Section 45(5A)** as a whole, would apply respectively to the transfer of:
  - Land (out of 60%) to the developer proportionate to the rights in SBUs sold by land-owner before the issue of completion certificate
  - Transfer of owner' share i.e. SBU (out of 40%)
  - Transfer of undivided interest in land proportionate to right in SBU which is transferred

Illustration – Non- applicability of Section 45(5A) Partially

Application of Proviso to the extent of



Contd...

Application of S. 45(5A) to the extent of

Transfer out of 60% of land

Section 45(5A)

Year of taxability:  
PY in which CC is issued

FVC: Stamp Duty  
Value of SBU on the  
date of issue of CC

COA:  
Proportionate [out of  
60%] purchase cost of  
land or proportionate  
FMV as on 01.04.2001  
subject o indexation

20%

Transfer out of 40% of SBU along with UDI

Section 45(1)

UDI

Year of taxability:  
PY in which SBU's are sold

FVC:  
Actual Consideration  
or  
SDV as per Section,  
whichever is higher

COA:  
Proportionate [out of  
40%] purchase cost of  
land or proportionate  
FMV as on 01.04.2001  
subject o indexation

20%

SBU

Year of taxability:  
PY in which SBU's are sold

FVC:  
(a) Actual Consideration  
(b) As SBU is neither land  
or building, Section 50C  
does not apply

COA:  
(a) Proportionate Stamp duty value  
as computed under Section 45(5A)  
for transfer of out of 60% land  
(b) Indexation is available if SBU is  
long term capital asset

LCA 20%  
SCA: 30%

# Illustration 3 ~ Facts

- Developer and owner enters into JDA in the PY 2018-2019.
- The **agricultural land** held by the owner is transferred to him by way of gift from his father before 01.04.2001. Owner converts the said land into stock-in-trade
- The consideration for transfer of land is 40% of super built up area (SBU) along with proportionate undivided interest in land (UDI). Thus, the sharing ratio of the developer and owner is 60:40.
- By virtue of Section 2(47)(v)/(vi), transfer of land has taken place in the PY 2021-2022

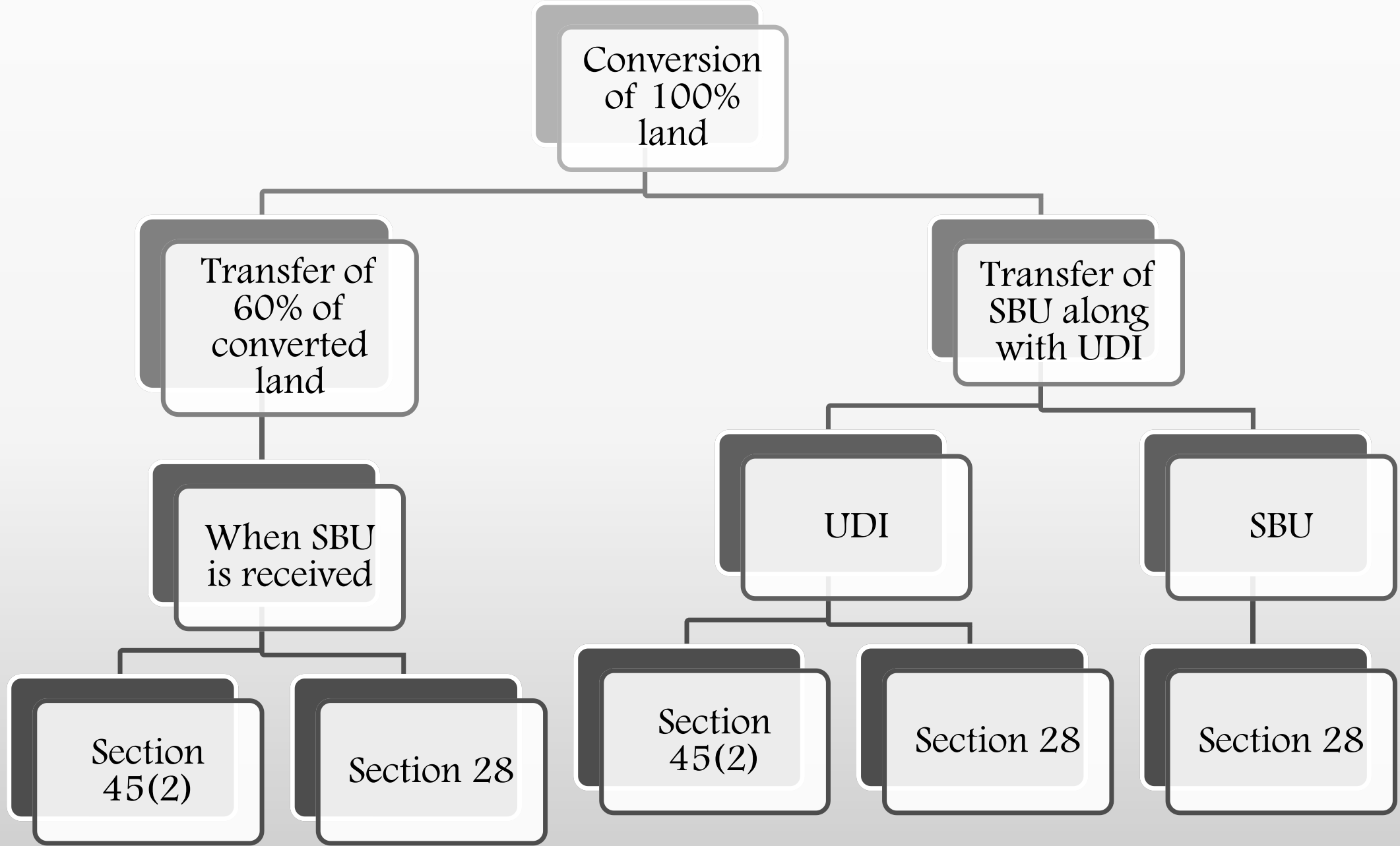
# Illustration 3 ~ Analysis

- The provisions of Section 45 do not apply to a case of stock-in-trade. Therefore, even if it is a case of JDA, the provisions of Section 45(5A) do not apply.
- However, the provision of Section 45(2) would apply in case a capital asset is transferred to stock-in-trade.
- Income arising out of transfer of land or building or both held as stock-in-trade constitute business income chargeable to tax under Section 28

# Implications of JDA – Stock-in-Trade

- We may understand the implications in the following structure:
  - On Conversion of land held as capital asset into stock-in-trade.
  - On transfer of 60% of converted land to the developer: Capital gains under section 45(2)
  - On transfer of 60% of converted land to the developer: Business profits under Section 28
  - On transfer of 40% of converted land [when 40% of SBU is sold]: Capital gains under Section 45(2)
  - On transfer of 40% of converted land [when 40% of SBU is sold]: Business profits under Section 28
  - On transfer of 40% of SBU: Business profits under Section 28





# Transfer of 60% of converted land ~ Section 45(2) ~ Analysis

- The following issues have to be examined:
  - Year of taxability
  - Full value of consideration
- **Year of Taxability:**
  - As per Section 45(2), the year of taxability is the year in which stock-in-trade (SIT) is 'sold or otherwise transferred'.
  - In case of JDA, when 60% of the converted land is said to be 'sold or otherwise transferred'?

# Transfer of 60% of converted land ~ Section 45(2) ~ Analysis

- Decisions on the expression ‘sold or otherwise transferred’:
  - Wipro Ltd. [2016] 382 ITR 179 (Karnataka): The case of ‘otherwise transferred’ would arise only if SIT is not ‘sold’. The expression ‘otherwise transferred’ should take colour from the expression ‘sold’ and therefore, the said expression would mean **transfer of all his interest in the property except the title coupled with receipt of consideration** for such transfer. This would mean such transfers require receipt of consideration.
  - R. Gopinath (HUF) [2010] 133 TTJ 595 (Chennai): The expression ‘sold or otherwise transferred’, should be understood in ordinary popular and natural sense and not in the context of Section 2(47) of the Act.
- Therefore, the year in which owner transfer all his interest in land except the title is the year of taxability. In JDA, generally the owner does not transfer all his interest in land unless the developer delivers 40% of SBU to the owner.
- Therefore, the year in which developer delivers 40% of SBU, is the year of taxability

# Transfer of 60% of converted land ~ Section 45(2) ~ Analysis

## ■ Full Value of Consideration:

- As per Section 45(2), FMV of the asset on the date of conversion shall be deemed to be FVC received or accruing as a result of the transfer of capital asset.
- Section 2(22B)(i) defines FMV in relation to capital asset to mean the price that the capital asset would ordinarily fetch in the open market on the relevant date
- Therefore, FMV of 60% of converted land on the date of conversion constitute FVC.
- Once Section 45(2) is applied, deeming fiction Section 50C does not apply
- In Carlton Hotel Pvt Ltd 399 ITR 611 [SLP dismissed in 2017-TIOL-417-SC-IT] held that ordinarily if section 45(3) applies, Section 50C does not apply
- However, it is advantageous to apply Section 50C for the reason that higher stamp duty would mean higher capital gains chargeable at 20% and a corresponding higher actual cost while determining business profits chargeable at 30%.

# Transfer of 60% of converted land ~ Section 45(2)

## ~ Summary

Particulars	Transfer of 60% of converted land
Section	Section 45(2)
Year of Taxability	Previous year in which the developer delivers 40% of SBU
Full value of consideration	Fair market value of the 60% land on the date of transfer as determined under section 2(22B)(i)
Cost of Acquisition	Proportionate purchase cost of land or Proportionate fair market value of the land as on 01.04.2001 subject to indexation
Rate of Tax	20%

# Transfer of 60% of converted land ~ Section 28 ~ Analysis

- The following issues have to be examined:
  - Chargeability
  - Year of taxability
  - Full value of consideration
  - Deductions
  
- **Chargeability:**
  - When the land is held as stock-in-trade, any sale/transfer of stock-in-trade constitutes business income under Section 28(i) of the Act.
  - Therefore, sale/transfer of 60% of land to the developer constitutes business income under Section 28 of the Act.

# Transfer of 60% of converted land ~ Section 28 ~ Analysis

## ■ Year of Taxability:

- The year of taxability of business profits would be the same year when capital gains under Section 45(2) would be charged to tax i.e. in the year in which the converted land is sold or otherwise transferred.

## ■ Full Value of Consideration:

- Generally FMV of the incoming asset may be considered for determining the consideration. Therefore, FMV of SBU constitutes consideration for transfer of 60% of the land to the developer.
- Section 43CA provides that where consideration as result of transfer of business asset is less than SDV, SDV shall be deemed to be FVC.
- Proviso to 43CA provides that if SDV does not exceed 105% of FMV of 40% of SBU, the FMV shall deemed to be FVC

# Transfer of 60% of converted land ~ Section 28 ~ Analysis

## ■ Deductions

- Upon conversion of capital asset in SIT, the FMV of 60% of land on the date of conversion, constitutes expenditure incurred for transfer of 60% of land.
- All other admissible business expenses incurred in relation to transfer of 60% of land.



# Transfer of 60% of converted land ~ Section 28 ~ Summary

Particulars	Transfer of 60% of converted land
Section	Section 28
Year of Taxability	Previous year in which the SBU's are received by the Assessee
Full value of consideration	<p>(a) FMV of the 40% of SBU on the date of transfer.</p> <p>(b) As per Section 43CA, if such fair market value is less than the stamp duty value adopted by the stamp duty authority, the stamp duty value shall be deemed to be the full value of the consideration.</p> <p>(c) If such stamp duty value does not exceed 105% of the fair market value of the 40% of the SBU, the said fair market value shall be deemed to be the full value of the consideration.</p>
Deductions	Fair market value computed under Section 45(2) on conversion of 60% of land and all other admissible business expenses and allowances.
Rate of Tax	30%

# Transfer of 40% of converted land (when 40% of SBU is sold) – Section 45(2) ~ Analysis

- The following issues have to be examined:
  - Year of taxability
  - Full value of consideration
- **Year of Taxability:**
  - As per Section 45(2), the year of taxability is the year in which such stock-in-trade is sold or otherwise transferred
  - The 40% of the land would get transferred when the 40% of the SBU gets transferred
  - Therefore, the year in which the SBU's are sold, is the previous year in which the liability to pay tax under Section 45(2) is attracted in relation to transfer of 40% of the land.

## Transfer of 40% of converted land (when 40% of SBU is sold) – Section 45(2) ~ Analysis

- **Full Value of Consideration:**

- As per Section 45(2) r.w. Section 2(22B)(i), FMV of 40% of converted land on the date of conversion constitute FVC.
- Section 50C does not apply

# Transfer of 40% of converted land ~ Section 45(2)

## ~ Summary

Particulars		Transfer of 40% of converted land
Section		Section 45(2)
Year of Taxability	of	Previous year in which the 40% of SBU's are sold on pro-rata basis
Full value of consideration	of	Proportionate FMV of the 40% land on the date of transfer as determined under section 2(22B)(i) on pro rata basis
Cost of Acquisition	of	Proportionate purchase cost of land or Proportionate fair market value of the land as on 01.04.2001 subject to indexation
Rate of Tax		20%

# Transfer of 40% of converted land ~ Section 28 ~ Analysis

- The following issues have to be examined:
  - Chargeability
  - Year of taxability
  - Full value of consideration
  - Deductions
- **Chargeability:** Sale/transfer of 60% of land to the developer constitutes business income under Section 28 of the Act.
- **Year of Taxability:** The year in which the SBU is sold (i.e. as and when the SBU's are sold)

# Transfer of 40% of converted land ~ Section 28 ~ Analysis

## ■ Full Value of Consideration:

- Actual consideration or
- If actual consideration is less than SDV, as per Section 43CA, SDV shall be deemed to be FVC
- If such SDV does not exceed 105% of the actual consideration, such actual consideration shall be FVC

## ■ Deductions:

- FMV computed under Section 45(2) on conversion of 40% of land.
- All other admissible expenses

# Transfer of 40% of converted land ~ Section 28 ~ Summary

Particulars	Transfer of 40% of converted land on Pro-rata basis
Section	Section 28
Year of Taxability	Previous year in which the SBU's are sold on pro-rata basis
Full value of consideration	<p>(a) Actual Consideration received or</p> <p>(b) As per Section 43CA, if such consideration received is less than the stamp duty value adopted by the stamp duty authority, the stamp duty value shall be deemed to be the full value of the consideration.</p> <p>(c) If such stamp duty value does not exceed 105% of the actual consideration received, the said actual consideration shall be deemed to be the full value of the consideration.</p>
Deductions	Fair market value computed under Section 45(2) on conversion of 40% of land and all other admissible business expenses and allowances.
Rate of Tax	30%

# Transfer of 40% of SBU ~ Section 28 ~ Analysis

- The following issues have to be examined:
  - Chargeability
  - Year of taxability
  - Full value of consideration
  - Deductions
- **Chargeability:** Sale/transfer of 40% of SBU constitutes business income under Section 28 of the Act.
- **Year of Taxability:** The year in which the SBU is sold (i.e. as and when the SBU's are sold)



# Transfer of 40% of SBU ~ Section 28 ~ Analysis

## ■ Full Value of consideration:

- Actual consideration or
- If actual consideration is less than SDV, as per Section 43CA, SDV shall be deemed to be FVC
- If such SDV does not exceed 105% of the actual consideration, such actual consideration shall be FVC

## ■ Deductions:

- Assessee acquired 40% of SBU, by transferring 60% of converted land
- FVC computed under Section 45(2) on conversion of 60% of land.
- All other admissible expenses

# Transfer of 40% of SBU - Section 28 - Summary

Particulars	Transfer of 40% of SBU
Section	Section 28
Year of Taxability	Previous year in which the SBU's are sold on pro-rata basis
Full value of consideration	<p>(a) Actual Consideration received or</p> <p>(b) As per Section 43CA, if such consideration received is less than the stamp duty value adopted by the stamp duty authority, the stamp duty value shall be deemed to be the full value of the consideration.</p> <p>(c) If such stamp duty value does not exceed 105% of the actual consideration received, the said actual consideration shall be deemed to be the full value of the consideration.</p>
Deductions	Proportionate FVC computed under Section 45(2) on conversion of 60% of land and all other admissible business expenses and allowances
Rate of Tax	30%