



House Journal

# ACAIE

ASSOCIATION OF CORPORATE ADVISERS & EXECUTIVES

SPECIAL ISSUE ON

## REAL ESTATE CONCLAVE Navigating the Undercurrents!



Technical Partner :



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### EDITORIAL BOARD

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CA Anup Kumar Banka

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CA Vasudeo Agarwal, President

CA Anup Kr Sanghai, General Secretary

The Association does not own any responsibility for the information and view published in the journal which are of the contributors.



Dear ACAEians,

I am happy to share the **3rd Edition** of our House Journal of this Committee, being released on the occasion of the **Real Estate Conclave** on the theme **Navigating the Undercurrents!** being held on June 8, 2019 at The Lalit Great Eastern, Kolkata. I thank the President, CA. Vasudeo Agarwal, Conclave Committee Chairman CA Rishi Khator and all Executive Committee Members and

Conference Organising Committee Members in reposing their faith in me and giving me this task. I hope I have been able to stand to their test and have been able to deliver.

The House Journal has articles from speakers in this Conclave and other professionals. I would like to take this opportunity to thank all the article writers and other contributors, who have taken out time from their busy schedule and provided their inputs for this Journal. Articles on wide ranging subjects like the Insolvency and Bankruptcy Code, Direct Tax, Goods & Services Tax (GST) and RERA are published in this Journal. I hope the readers will find these articles relevant and thought provoking. However, as a disclaimer, I would like to state that these articles are personal views of the author and ACAE does not take any responsibility of the same. Readers are advised to seek professional advice on their specific cases.

The Journal also has sections like Members at the Helm, quotations of great persons and leaders on the topic of real estate and Messages from the Governor, ICAI President and ICAI Vice President. We are also thankful to the President, CREDAI, for his Message.

I sincerely hope that this Journal will find a suitable place in your library and will be worth spending time on. I request all the readers to kindly contribute for future such Journals and keep sending your good wishes and comments. These inspiring thoughts help us in going forward and achieve greater heights.

Happy reading.

Thanks and Best Regards.

**Tarun Kr. Gupta**

Chairman

House Journal Sub Committee

June 1, 2019

# Editorial

## PRESIDENT SPEAKS



Dear Members,

This year too, our Association ACAE is holding the 5th edition of the prestigious **"Real Estate Conclave"** on 8th of June, 2019 in technical partnership with CREDAI - Bengal on the theme **"NAVIGATING THE UNDERCURRENTS!"**.

ACAE is reckoned as a leading non- government, non- profit-making organisation devoted to the study of all contemporary issues related to corporate laws, taxation, audit, accounts, NBFC, capital markets, fiscal and monetary policies. It has also proven to be a successful forum for holding lecture meetings, symposium, group discussions, conclaves and conferences on topics relevant for our members. The main objective of ACAE is enrichment and updating the knowledge of our members on relevant topics and changes made by the Government in recent times.

Real Estate sector is passing through a very difficult phase. According to recent reports, the inventory is at an all-time high of 50 months when 18 months is considered to be healthy. The Real Estate sector is struggling with high input costs, stagnant demand from home buyers, complex compliances of GST & RERA, unfinished projects, over-zealous enforcement agencies and like issues. To deliberate on these current problems of real estate industry, ACAE has organised this conclave.

Experts from across the country will be present to deliberate and share their vast knowledge and experiences in facing the challenges of legal transactions, IBC issues in real estate industry and enlightening on various other specific topics. To discuss these topics at length, eminent speakers' i.e. Sri Sumant Batra, Dr (CA) Sanjay Chaturvedi, Shri Juggy Marwaha, CA V.Raghuraman and CA D.S.Damle have been invited.

It is the proud privilege of our members to have an opportunity to be benefitted from the deliberation of such eminent speakers, who will be taking their time out from their busy schedule to put forward their views on issues relating to specific industry.. This conclave will also give inputs on investing and building wealth in real estate. This special issue of our House Journal is dedicated to Real Estate and comprises of various articles on IBC, GST, Income Tax amongst others.

This issue, I sincerely hope, will help the members to have a new outlook on the current real estate situation in our country and in understanding real estate problems and finding the solutions thereof and avenues of investment and building wealth in real estate.

I take this opportunity to thank the Chairman of this Conclave, CA Rishi Khator and all the members of the Conclave organising committee for organising this event on such a large scale by working hard to take this Conclave one-step-up.

I also take this opportunity to thank the Chairman of the Editorial Board, CA Tarun Kr. Gupta for publishing this special issue of our Journal with detailed and knowledge enriching articles on the respective subject which will be useful to our members. I hope that this Journal will be useful for our members and will be appreciated.

Before I end, I would like to quote a famous saying of Mr. Russel Sage (American financier and politician), *"Real estate is an imperishable asset, ever increasing in value. It is the most solid security that human ingenuity has devised. It is the basis of all security and about the only indestructible security"*.

With regards,

**Vasudeo Agarwal**  
President

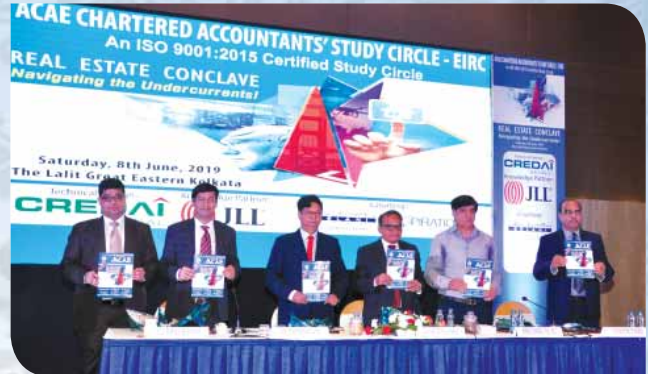
June 3, 2019

President  
Speaks

REAL ESTATE CONCLAVE on *Navigating the Undercurrents!* held at The Lalit Great Eastern Kolkata on Saturday, the 8th June, 2019



**INAUGURAL SESSION :** Chief Guest, Shri Debashis Sen, IAS, Hon'ble Additional Chief Secretary, Govt. of WB, Information Technology & Electronics Department and Chairman-Managing Director, WBHIDCO, accompanied by CA Rishi Khator, Chairman-Real Estate Conclave, Guest of Honour, Shri Nandu Belani, President-CREDAI Bengal, CA Vasudeo Agarwal, President-ACAE and CA Anup Kr Sanghai, Convenor-ACAE CA Study Circle-EIRC.



**INAUGURAL SESSION :** Release of AC AE House Journal - Special Issue on Real Estate Conclave - Navigating the Undercurrents! (L-R) CA Tarun Kr Gupta, Chairman-House Journal Sub-Committee, CA Rishi Khator, Chairman-Real Estate Conclave, Chief Guest, Shri Debashis Sen, IAS, Hon'ble Additional Chief Secretary, Govt. of WB, IT&E and Chairman-Managing Director, WBHIDC, CA Vasudeo Agarwal, President-ACAE, Guest of Honour, Shri Nandu Belani, President-CREDAI Bengal and CA Anup Kr Sanghai, Convenor-ACAE CA Study Circle-EIRC.



**FIRST TECHNICAL SESSION :** On the dais (L-R) Guest Speaker Dr. (CA) Sanjay Chaturvedi, Executive Editor, Accommodation Times, Mumbai, CA Rishi Khator, Chairman - Real Estate Conclave, Guest Speaker Shri Sumant Batra, Managing Partner & Head-Insolvency, Kesar Dass B.& Associates, New Delhi and CA Jitendra Lohia, Vice President-ACAE.



**SECOND TECHNICAL SESSION :** Guest Speaker Shri Juggy Marwaha, Executive Managing Director, JLL India, Bengaluru giving his deliberations. On the dais (L-R) CA Vivek Agarwal, Joint Secretary -ACAE and CA Vasudeo Agarwal, President-ACAE.



**SECOND TECHNICAL SESSION :** Guest Speaker Advocate V Raghuraman, Bengaluru giving his deliberations. On the dais (L-R) CA Vivek Agarwal, Joint Secretary-ACAE and CA Vasudeo Agarwal, President-ACAE.



**QUESTION & ANSWER SESSION :** President CA Vasudeo Agarwal, Panelists - CA D S Damle, Kolkata, Advocate V Raghuraman, Bengaluru, Advocate Shri Shailesh P Sheth, SPS Legal, Mumbai and CA Tarun Kr Gupta, Executive Committee Member-ACAE.

# ACAE ALBUM

➔ **Lecture Meeting cum Interactive Session on (1) Significant Beneficial Ownership Rules (SBO), (2) E-Form Active (INC 22A), MSME Form 1, other Recent Developments in Companies Act, 2013, (3) Interactive Session on Unregulated Deposits** held at Emami Conference Hall (ACAE) on Friday, the 1st March, 2019



(L-R) On the dais, Convenor CA Anup Kr Sanghai, Speaker CA Sumit Binani, President CA Vasudeo Agarwal and Speaker CA Mohit Bhuteria.



Speaker CA Ramesh Kr Patodia giving his deliberations.

➔ **Interactive Session on "Spread your Wings – Fly High"** held at Emami Conference Hall (ACAE) on Friday, the 8th March, 2019



(L-R) Moderator CA Shivani Shah, Panelists - Ms. Saroj Agarwal, Psychotherapist, Ms. Saroj Jalan, Fashion Designer, CA Beena Jajodia, Chairperson-Ladies Wing Sub-Committee, Panelists - Ms. Saroj Agarwal, Chief Embryologist, CARE-IVF and Ms. Purnima Lohia, Nature Care Activist.



Group Photograph

➔ **Lecture Meeting-cum-Interactive Session on "Share Capital Additions - NRA Steel Apex Court Judgement - End of the Road?"** held at Emami Conference Hall (ACAE) on Monday, the 11th March, 2019



Past President CA Ketan Satnalia presenting memento to Speaker CA Ramesh Kr Patodia.

➔ **ACAE CA Study Circle along with other Study Circles joined ICAI-EIRC in Holi Get-together** held at Panache Banquets, Merlin Home Land Mall on Tuesday, the 19th March, 2019



Group Photograph

## Message of the Chairman, Real Estate Conclave Committee



**Dear Valued Member**

As I set down to write this message, there is much optimism in the air. The new council of ministers at the Centre has been sworn in and portfolios allocated. The challenges for the Hon'ble Finance Minister, Ms. N. Sitharaman, are immense: getting the economy move again, addressing financial sector problems, addressing weakening rupee, private investments and exports, creating jobs.

Several of the above can be attended by growth of the real estate industry. FDI, jobs and private investments have been the hallmark of the industry.

Housing sector contribution to GDP is expected to double to 11% by 2020. The Industry requires liquidity support, simplification of compliances. In the backdrop of downward spiral of unfinished projects, the industry needs adequate avenues of funding for all stakeholders. The lack of adequate avenues of funding to developers will not only affect the developers and homebuyers but also the 250+ allied industries who are directly or indirectly dependent on Indian realty.

Much has been done by the Govt and Regulators to formalise and boost the sector - relaxation in FDI policy, infrastructure status to affordable housing, changes in GST, approval of REIT (USD 20 billion worth REIT able office stock is expected by turn of next decade) and making real estate as attractive asset class. With such support, I am sure the industry will be successful in *navigating the undercurrents* in near future.

I am thankful to Credai through its President, **Shri Nandu Belani** for being part of this Conclave for 5th consecutive year. I also express gratitude to **Shri Vasudeo Agarwal**, President ACAE for giving me the responsibility to serve you as Chairman of the Conclave. I acknowledge the wonderful efforts of Conclave committee in organizing the Conclave with consistency and success.

***Wishing you a knowledgeable day***

With Regards

**CA Rishi Khator**

*Chairman, Real Estate Conclave*

Conclave Chairman

# REAL ESTATE CONCLAVE

## Navigating the Undercurrents!

Saturday, 8th June, 2019, The Lalit Great Eastern Kolkata

### PROGRAMME

6 CPE  
HOURS



- Registration : 09.15 am to 09.45 am  
Inaugural Session : 09.45 am to 10.30 am  
Chief Guest & Keynote Speaker : **Shri Debashis Sen, IAS**  
*Hon'ble Additional Chief Secretary, Govt. of WB & Chairman-cum-Managing Director, WBHIDCO Ltd.*  
Guest of Honour : **Shri Nandu Belani**  
*President, CREDAI Bengal*

**TEA BREAK : 10.30 AM TO 10.45 AM**

### FIRST TECHNICAL SESSION – 10.45 AM TO 1.15 PM



#### Topics

1. Issues relating to Real Estate in IBC
2. Legal - Balancing Interest of Consumers & Builders in Agreement

#### Speakers

**Shri Sumant Batra**  
*Managing Partner & Head-Insolvency Kesar Dass B. & Associates New Delhi*

**Dr. (CA) Sanjay Chaturvedi**  
*Executive Editor Accommodation Times Mumbai*

**LUNCH BREAK : 1.15 PM TO 2.00 PM**

### SECOND TECHNICAL SESSION – 2.00 PM TO 5.15 PM



#### Topics

1. Investing and Building Wealth In Real Estate
2. Indirect Tax - Resolving GST Complexities in Real Estate
3. Question & Answer Session on Issues relating to Real Estate  
Direct Tax  
Indirect Tax – GST

#### Speakers

**Shri Juggy Marwaha**  
*Executive Managing Director JLL India, Bengaluru*

**CA V Raghuraman**  
*Advocate, Bengaluru*

**CA D S Damle**  
*Kolkata*

**CA V Raghuraman**  
*Advocate, Bengaluru*

**Shri Shailesh P Sheth**  
*Advocate, SPS Legal, Mumbai*



Keshari Nath Tripathi  
GOVERNOR OF WEST BENGAL



RAJ BHAVAN  
KOLKATA 700 062



31<sup>st</sup> May, 2019

Message

I am glad to learn that Association of Corporate Advisers & Executives is going to organise Real Estate Conclave on the theme “Navigating the Undercurrents” on 8<sup>th</sup> June, 2019 and to bring out its House Journal to commemorate the occasion.

I am sure that the deliberations in the Conclave will be highly informative and useful to enrich the experience of the members for the benefit of both the builders and buyers.

I convey my felicitations to all the members of the Association for taking such initiatives and wish the Conclave all success.

*K.N. Tripathi*  
Keshari Nath Tripathi

## Message of the President, ICAI



I have great pleasure to note that the ACAE Chartered Accountants' Study Circle of EIRC of ICAI is organizing **Real Estate Conclave** on the theme “**Navigating the Undercurrents**” on **8th June 2019 at Kolkata**.

Study Circles are very important wing of the Institute, effectively facilitating and enabling knowledge dissemination to the members of the ICAI. I am happy to note that the Conclave will be attended by around 400 delegates, who will immensely benefit from the discussions on pertinent topics thereat.

Chartered accountancy is an invaluable and indispensable profession for modern businesses. Advances in our profession directly reflect the advancement of the nation’s business and economy. Our Institute has been constantly making notable contributions towards strengthening professionalism of our members. The members of our Institute have emerged to become global leaders of our accounting profession.

The Real Estate (Regulation and Development) Act, 2016 is an Act of the Parliament of India which aims to protect home-buyers as well as help boost investments in the real estate industry. The Act seeks to streamline and regulate the real estate projects by incorporating various measures to safeguard general public by prescribing adequate procedures & penal provisions and gives due importance and role to Chartered Accountants, who have the requisite skills to protect and detect the misapplication of the deposits by the promoters.

I am appreciative of the care that has been taken in selection of befitting topics on various real estate issues. I hope that the delegates attending the said conference shall optimally utilize the opportunity of interaction with the pool of learned and academically proficient professionals in their respective fields.

I extend my warm greetings to all those associated with the program and wish the same a resounding success.

With best regards,

**CA. Prafulla P. Chhajed**  
President, ICAI

## Message of the Vice President, ICAI



Dear Members,

Real estate is a prominent sector of our economy and its growth have direct and indirect impact on the overall economy. Real Estate as a sector is evolving and innovating business models in residential and commercial real estate with concepts like Co-working, Warehousing, Affordable housing etc for fast growth. The potential of real estate sector is huge and it is expected to contribute 13% to GDP by 2025. The Real estate sector has multiplying effect on various economic sectors, and its growth is essential for economic growth.

The Real sector is at crossroads, the regulatory developments like Insolvency and Bankruptcy Code, RERA, Benami Transactions Act, and the GST regime all will drive the economic growth, as sector will become more organized and competitive. Our profession must join hands to support the sector; learning new rules, regulations, guidelines, practices and perspectives will enable our profession to support the real estate sector to be more competent.

It is heartening to note that the ACAE Study Circle of EIRC of the Institute of Chartered Accountants of India is organizing a full day **Real Estate Conclave** on the theme “**Navigating the Undercurrents**” on **8th June, 2019** at **The Lalit Great Eastern, Kolkata**. This conclave will enable our members to develop the domain expertise by way of discussions and deliberations on the latest developments in the real estate sector.

I wish the participants a valuable experience and hope that the event would be a great success.

**CA. Atul Kumar Gupta**  
Vice President, ICAI

## Message of the President, CREDAI, Bengal



It is true that the Real Estate sector has seen expansive policy changes like never before in the last two years. The implementation of RERA and the subsequent setting up of the real estate regulator West Bengal Housing Industry Regulatory Authority (WBHIRA) have made us commit to paving the way for the growth of consumer confidence, self-policing, adopting best practices and laying a strong and transparent foundation for the future of Real Estate. But the sheer number of compliances and regulatory upheavals that the real estate sector has had to face and withstand has also been unprecedented. We, at CREDAI Bengal, as a community have demonstrated a strong resolve to cope and adapt and I'm glad that other ancillary sectors that lend their expertise and services to us have also partaken of the challenges and chipped in efficiently. At ACAE too, you have been in the thick of regulations, legislations, compliances and new laws. So it will surely be interesting to hear from a vertical which supports and feeds the real estate industry in these above referred matters and to learn your point-of-view on how real estate has been affected and what are the challenges before us.

I'm glad that CREDAI Bengal is technical partner to the day long Conclave happening under the theme "Navigating the Undercurrents". I congratulate ACAE Chartered Accountants' Study Circle – EIRC for organizing this full day conclave wherein experts from across the country will share their vast experience in facing the challenges in legal, taxation and insolvency topics concerning real estate.

Best Wishes for the Conclave.

**Nandu Belani**

*President, CREDAI Bengal*



## ABOUT CREDAI

**Confederation of Real Estate Developers' Associations of India (CREDAI)** was established in 1999 with a mandate to pursue the cause of housing and habit providers. It has grown its membership base since then and has more than 12500 members today spread across 23 state and 205 city chapters. CREDAI is a knowledge sharing network about the latest industry data, technology advancements and industry benchmarks for its members. CREDAI continues to make a conscious effort in bringing Mission Transparency and to protect the interest of buyers. It is in this interest, CREDAI has established a Consumer Grievance Redressal Forum in October 2012, where an aggrieved buyer can register a complaint against CREDAI member developer. By translating investor interest protection into a mechanism, the apex body of real estate developers seeks to resolve consumer complaints expeditiously and promote bestselling practice amongst the developer fraternity.

The Real Estate fraternity has always been compliant and responsive to the environment related issues. CREDAI Clean City Movement (CCCM) is one such environmental initiative by CREDAI. Initiated in the state of Kerala in the year 2007, CCCM has grown with leaps and bounds. Today the initiative covers more than 650 housing condominiums and 80000 apartments giving employment opportunities to about 650 women belonging to the economically backward class. CCCM has achieved accolade both from the general public and civil societies.

**CREDAI Bengal** is the state's chapter of the Confederation of Real Estate Developers' Associations of India (CREDAI). CREDAI Bengal envisions to create a more responsive community of real estate developers in West Bengal and promote uniformity and transparency in real estate transactions keeping end users' interest in mind. It endeavours to minimize consumers' grievances by trying to address their needs and aspirations. It ventures to promote free interactions between members at the national, state and regional levels to obtain best practices.

**We acknowledge with gratitude :**

Our Chief Guest

Our Guest of Honour

Our Chairman

Our Guest Speakers

Our Panelists

Our Authors

Our Sponsors

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And

All Others who assisted us to organise :

**REAL ESTATE CONCLAVE**

*Technical Partner*



*Knowledge Partner*



PROFILE



**Shri Debashis Sen, IAS**

*Hon'ble Additional Chief Secretary, Govt. of WB & Chairman-cum-Managing Director, WBHIDCO Ltd.*

Shri Debashis Sen joined the IAS in 1985. He graduated from Presidency College, Kolkata and got his post-M.Sc. Diploma from Saha Institute of Nuclear Physics. He got his Diploma in Public Administration from ENA, France. He has been trained at the JFK School Harvard University and IMF Institute, Washington D.C., USA.

Shri Sen has served in various capacities including District Magistrate for more than five years and Chief Electoral Officer for five years.

He is presently posted as the Additional Chief Secretary to the Govt. of West Bengal, Information Technology & Electronics Department and Chairman-Managing Director, WBHIDCO which is a government company that is developing New Town, Kolkata. He is also the Chairman of New Kolkata Development Authority(NKDA) and Naba Diganta Industrial Township Authority (NDITA). He can be contacted at debashisen@gmail.com.



**Mr Nandu Belani**

*President, CREDAI Bengal*

Mr. Nandu Belani, heads the Belani Group who are pioneers in real estate development in Kolkata which was established in 1967. Today, he is a driving force behind the group, synonymous with the finest homes, commercial complexes and shopping malls. A Kolkatan in the truest sense of the word attended La Martiniere for Boys school and, thereafter, completed his Bachelors in Commerce from St. Xavier's College. Mr. Nandu Belani's first venture into real estate was a commercial building at Shakespeare Sarani for the IDBI Bank. The Group has completed various landmark buildings like Belmont, IDBI, Woodburn Central, Convent Corner, Palacio just to name a few. He is also a founder member of the Hiland Group which has completed many successful ventures namely Hiland

Park, Hiland Woods, Hiland Willows and is presently completing a 260 acre township namely Calcutta Riverside, the largest township project in eastern India. Presently, Mr. Nandu Belani is the President of Credai Bengal and has been the Honorary Consul of Seychelles in Kolkata since 2009.



**Shri Sumant Batra**

*Managing Partner & Head-Insolvency Kesar Dass B. & Associates, New Delhi*

An insolvency lawyer of international repute, social commentator and thought leader, Sumant Batra is Past President of INSOL International. As senior international insolvency and creditors' rights consultant to the World Bank Group, International Monetary Fund, OECD and other developmental institutions, he has worked extensively on policy matters in Africa, Eastern Europe, Middle East and South Asia. Rated as India's No. 1 insolvency lawyer by Legal 500 for many consecutive years and recognised as Insolvency Game Changer, Sumant currently leads the insolvency practice of Kesar Dass B. & Associates, a leading Indian law firm. The only Indian lawyer with over

20 years of experience in insolvency at global and Indian level, Sumant is the author of Corporate Insolvency – Law & Practice. He has co-authored the essay of Insolvency Reform in Making of New India – transformation Under Modi Government, Co-edited by Dr. Bibek Debroy, Dr. Anirban Ganguly and Kishore Desai.



**Dr. (CA) Sanjay Chaturvedi**

*Executive Editor Accommodation Times, Mumbai*

Dr. Sanjay Chaturvedi is the Executive- Editor of Accommodation Times. He has over three decades of experience as a journalist and has done PhD. in Real Estate Finance, besides this, he is a Chartered Accountant and has also done LLB from Government Law College. He is an author of many Real Estate books; he has conducted many lectures on subjects pertaining to Real Estate sector on a National and International platform. He is visiting faculty at Department of Commerce, University of Mumbai, NMIMS and many other management institutes

including Institute of Chartered Accountant of India. He has been writing content and instrumental in research with Dow Jones, CRISIL, KPMG, Goldman Sach, CIDCO, HUDCO, IL&FS, ICICI Securities, MMRDA, and many other government agencies and authorities.

### PROFILE



#### **Shri Juggy Marwaha**

*Executive Managing Director  
JLL India, Bengaluru*

Currently based out of Bangalore, Juggy Marwaha is a part of the Senior Leadership of JLL India, as the Executive Managing Director. In his current role, Juggy is directly responsible for growth of various business across all key markets in South India, as well as contributing significantly to some of JLL India's larger India initiatives and emerging verticals with over 26 years of cumulative work experience.

An industry veteran and known to be an aggressive deal maker with proven experience in real estate and operations running P&L's for marquee brands in the sector. He has successfully structured some of the most landmark real estate deals that include the sale of JW Marriot hotel floor, lease of Flipkart's 2 million sq.ft campus, Siemen's land sale in Bangalore to name a few key marquee transactions. He has deep relationships with developers, investors and occupiers across the entire spectrum of the Indian real estate industry.



#### **CA V Raghuraman**

*Advocate, Bengaluru*

V. Raghuraman is practicing as an Advocate for the last 25 years. He is also a Chartered Accountant, ACS and Grad. CWA. He specializes in the areas of GST, Excise, Customs, Service Tax, Foreign Trade Policy and FEMA. He is specialising in indirect tax planning and litigation and appears frequently before Courts. He is a visiting faculty at Indian Institute of Management, Bangalore and the CA Institute. He has addressed large number of seminars and published several papers in national magazines on GST/ Excise / Customs / Service Tax /FEMA. He was also a member of the Indirect Tax Committee of the ICAI New Delhi during 2014-15.

He is author of several books including 'GST & Indirect Taxes Principles Demystified' published by international publishing house CCH, 'Central Excise Law and Procedures' published by RK Jain, New Delhi, the largest publisher on indirect taxes and 'Background Material for E-Learning course on SERVICE TAX' and "Technical guide to Cenvat" published by ICAI. Mr. Raghuraman is based in Bangalore.



#### **CA Dilip S Damle**

*Kolkata*

Sri Dilip S Damle is a Commerce graduate from Bombay University. He passed his final examination of Chartered Accountancy in May 1983. Sri Damle is in active practice since 1983. He is associated with tax planning and tax representation work. Apart from advising Corporates on various tax issues, he is actively associated with large Corporates in resolving the tax litigation which arise on day-to-day basis. He regularly appears and represents matters before higher appellate forums like CIT(Appeals) and Income-tax Appellate Tribunal pan India since 30 years. He also advises on international taxation issues, interpretation of Double Taxation Avoidance Agreements and transfer pricing issues. He was also a member of the Central Direct-taxes Advisory Committee constituted

by the Ministry of Finance and headed by the Finance Minister of India. He has delivered lectures in various seminars and contributed articles to various tax journals.



#### **Shri Shailesh P. Sheth**

*Advocate*

Mr. Shailesh P. Sheth is a B.Com., LLB and has over 30 years' experience in Consulting, Advisory and Litigation practice in the field of Indirect Tax Laws that include Central Excise, Service Tax, Customs, State VAT Laws, CST & GST. Mr. Sheth has dealt extensively in these topics across the entire trade and industry spectrum consisting of Manufacturing, Service Sector and Distributive Trade representing diverse sectors. Mr. Sheth is a regular columnist in 'Vyapar'- a Bi-weekly Business Newspaper of Janmabhoomi Group and also 'Mid-Day' on Service Tax, Central Excise & GST and has also contributed number of articles to various magazines as well as Taxation Websites like TIOL.





# Insolvency And Bankruptcy Code: Journey Thus Far

**Sumant Batra**  
Managing Partner and Head – Insolvency Practice,  
Kesar Dass B. & Associates



Insolvency regime is an important part of a well-governed polity and efficient economy. It enables creation of a conducive environment for entrepreneurship and appropriate risk taking, while safeguarding interest of creditors. Particularly for an emerging economy, the existence of an efficient insolvency regime has vital economic ramifications. Investors draw confidence from it to make crucial economic decisions and there is availability of cost-effective credit. Insolvency issues have become more and more decisive in the globalisation of capital and financial markets.

The journey of the Indian insolvency reforms has been painfully slow and incremental. The legal framework for insolvency remained fragmented and ineffective for decades. Average life of cases recommended for restructuring took between 4 to 8 years and those recommended for winding up even longer. The recovery rate (cents on the dollar) in India was 25.7 as opposed to 71.9 in high-income countries. In 2014, India ranked at number 134 in the list of 189 countries in Closing a Business index. The NPAs had assumed an alarming proportion impacting availability of credit needed to inject investment in the economy. Insolvency laws were of no help in resolving NPAs. Although banks were able to repossess fixed assets and enforce security interest, there was not much they could do to restructure or liquidate these assets in the absence of an efficient insolvency law.

Confronted with this crisis, coupled with the desire to

improve ease of doing business in India, Modi government decided to accelerate the enactment of new insolvency law. This led to the enactment of the Insolvency and Bankruptcy Code (IBC) in 2016.

The success of any law depends on its implementation. The Government defied its poor track record on the implementation of laws by deploying unprecedented political will for effective roll out of the IBC. On June 1, 2016, the National Company Law Appellate Tribunal (NCLAT), the Principal Bench of NCLT at New Delhi, and 11 benches of NCLT were constituted. The Insolvency and Bankruptcy Board of India (IBBI) was established on October 1, 2016. Three Insolvency Professional Agencies were set up as membership bodies of Insolvency Professionals (IPs), in the month of November, 2016. With a view to build a cadre of well competent IPs, 897 IPs were provided temporary licence, to be renewed after taking the Limited Insolvency Examination (LIE) which commenced on December 31, 2016. The subordinate legislation was put in place by the IBBI in record time and the IBC was made operational on





Based on the learnings of the first few cases, the Government amended the IBC twice and the IBBI tweaked the regulations over a dozen times. On top of this, section 29A was introduced in November 2017 when many cases had already made significant progress. This was contrary to the recommendations of the Bankruptcy Law Reforms Committee (BLRC) which clearly stated in its report that “the promoters can make a proposal that involves buying back the

December 1, 2016. All this happened in a little over two years.

The IBC has progressed leaps and bounds. In a little over two years, 14,000 cases have been filed out of which NCLT ordered commencement of resolution process in 1,858 cases, 152 were closed on appeal, review or settlement, 91 were withdrawn on account of settlement under section 12A, 94 yielded resolutions and 378 resulted in liquidation. 1,143 cases were undergoing resolution process as on March 31, 2019. The resolution process yielded resolution of 94 cases resulting in the settlement of claims of FCs of Rs. 1,73,359 crore. These cases include 6 out of 12 large accounts. The overall recovery is ~43% (Rs. 74,497 crores) to financial creditors while the corresponding liquidation value was Rs. 38,443 crores. This is, by no means, a small feat to achieve in a little over two years.

Lack of closure in many insolvency cases in the mandatory 270 days has however, been a matter of concern. There are many causes behind the missed timelines. Although a sound legislation, IBC was hastily drafted. Many gaps were spotted in the law following its operationalisation prompting the stakeholders to frequently approach the NCLT to seek clarifications or solutions. The NCLT started functioning with scant infrastructure. Established out of a vacuum, the NCLT had no institutional experience behind it. A dozen non-performing assets, comprising nearly 25 per cent of the total non-performing assets, were pushed into the IBC by the Reserve Bank of India in the nascent stage (July, 2017) of the law. Another three dozen big cases followed. The stakes were high in these cases and surely, they captured the mindscape of the nation. The promoters struggled to reconcile with the reality of losing control of their companies, leading to litigation in many cases.

company for a certain price, alongside a certain debt restructuring” and there should be no “constraints on the proposals that the resolution professional can present to the creditors committee.” Bankrupts are generally viewed with suspicion and the assumption that, in most cases, criminal behaviour could have been the reason behind the failure to repay debts remained a very popular idea. But it is crucial to recognise that where there is credit, there is also default. The use of credit unquestionably makes companies vulnerable to the shifting currents of the overall economy. As people try their luck at business, many learn about success, as well as failure, in the pursuit. People take risks, and the bankruptcy system facilitates this risk by design. Therefore, the BLRC clearly stated in its report that “in a growing economy, firms make risky plans, of which some plans will fail, and will induce default. If default is equated to malfeasance, then this can hamper risk-taking by firms. This is an undesirable outcome, as risk-taking by firms is the wellspring of economic growth. Bankruptcy law must enshrine business failure as a normal and legitimate part of the working of the market economy.” This does not mean that the dishonest promoters can go scot free. Those who indulged in malfeasance can be prosecuted and adequately penalised.

Disqualification of promoters caused disruptions, requiring recommencement of process in many case. With promoters disqualified, the pool of bidders shrunk further. This too caused slowdown of closure. The cadre of insolvency professionals was built from scratch. It is only normal they take a reasonable time to gain a grip on the insolvency process. The bankers too took time to comprehend their new role in the creditor-in-control avatar of the IBC. It was well known that the IBC will have to sail through some rough currents in initial days which might offer some



**The IBC has successfully weathered many initial storms. There is no reason to be alarmed merely because timelines have been missed in some cases. Let us look at the positive side of the story and applaud the results achieved in short time.**

challenges. Why be so terribly disappointed? Compare it with the painfully slow speed of cases in pre-IBC regime, the progress made by IBC in 27 months appears to be an Olympic sprint.

Another cause for disruption was the IBC amendment in the year 2017 classifying buyers of real estate units as 'financial creditors'. An unprecedented move, the classification granted statutory right to individual unit buyers to seek initiation of insolvency against the developer. There was a spurt in insolvency filings in real estate sector pushing the already stressed real estate sector in a turmoil. This also contributed to the disruption in IBC. The 270-day time line is unrealistic for a sector often involving large number of stakeholders whose interests may not be aligned with those of the banks and who may view and approach insolvency process free of emotions and other considerations which could possibly constraint tough commercial decision making.

It is important to recognise that to find a new developer for an insolvent real estate project complex in particular when most unit buyers may have paid entire or most part of sale consideration. This is compounded by uncertainty on account of lack of coherence amongst unit buyers and banks and the approvals required, including from the authorities under the Real Estate (Regulation and Development) Act, 2016 (RERA). There is no visibility of the time obtaining approvals may take and conditions on which such approvals may be granted and whether those could impact the commercial basis on which resolution plan is prepared and approved. The NCLT does not have power to grant approvals that are in the domain of RERA. There are stringent penalties for non-compliances under RERA and in IBC, for non-implementation of approved resolution plan. The amendment has been challenged in the Supreme Court and there is presently a logjam in the

sector. The Supreme Court decision is expected in the next few months which will likely provide clarity. The sector has been facing criticism for years due to many dishonest developers treating their consumers unfairly. RERA was enacted to address the concerns of unit buyers. It is largely a satisfactory legal framework. Perhaps, the solution for consumers lies within RERA and not in IBC for the unit buyers.

Judging the IBC from the prism of the above disruptions will be taking a very narrow and pessimistic view of the law. An insolvency law serves a greater purpose for the economy. A good insolvency law enables market participants to more accurately price, manage and control default risks and corporate failure, and encourage sound credit practice. It enhancing access to credit while reducing its cost. An effective exit law promotes responsible corporate behaviour by encouraging higher standards of corporate governance and financial discipline to avoid consequences of insolvency. With the introduction of the IBC, the defaulter's paradise is lost. A behavioural change can be seen amongst the borrowers. Default is now taken seriously and the debtors are cuffing out money to clear their dues out of fear of losing control of their businesses and assets. In time, IBC can lead to the development of a robust corporate debt market and unlocking the flow of capital.

The IBC has successfully weathered many initial storms. There is no reason to be alarmed merely because timelines have been missed in some cases. Let us look at the positive side of the story and applaud the results achieved in short time. India is in the process of laying the foundations of a mature market economy. The IBC is an endeavour to provide one critical building block of this process. IBC has the potential to significantly change the way business is done in India.

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## Allottee under a real estate project - Secured or Unsecured Creditor in Liquidation

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As per the Insolvency and Bankruptcy Code, 2016 (Code), any amount raised from an allottee under a real estate project shall be deemed to be an amount having the commercial effect of a borrowing, which in turns means that an allottee under a real estate project shall be deemed to be a financial creditor. The definition of a “financial creditor” means any person to whom a financial debt is owed and includes a person to whom such debt has been legally assigned or transferred to.

After the efforts of resolution fail during the corporate insolvency resolution process in the given timeline of maximum 270 days, liquidation of the corporate debtor thereafter is inevitable. Liquidation does not mean end of the dream of the allottee under a real estate project. While

resolution yields a desirable solution which is agreeable to the creditors, liquidation is a process to convert all assets into cash which is to be used for settling claims of creditors and claimants and distribution of proceeds in accordance with the provisions of this Code.

The liquidation process involves various steps to be taken by the Liquidator starting from inviting claims from creditors and verification thereof, taking control and custody of the assets of the corporate debtor and taking steps to protect and preserve them, carrying on the business of the corporate debtor, sell the properties of the corporate debtor and settling claims of creditors and claimants and finally distributing proceeds in accordance with the provisions of the Code.

The distribution of proceeds in accordance with the Code means that the Liquidator has to distribute the proceeds in terms of provisions of Section 52 and 53 of the Code.

Once the claims are consolidated and verified, the Liquidator can now proceed to identify and classify the creditors as secured, workmen, employees or unsecured financial creditors, statutory dues, other debts and capital contributories.

As per Section 52 which deals with the options available to a Secured creditor in liquidation proceedings who may either-

- (a) relinquish its security interest to the liquidation estate and receive proceeds from the sale of assets by the liquidator in the manner specified in section 53
- (b) realise its security interest in the manner

specified in this section, he shall inform the liquidator of such security interest and identify the asset subject to such security interest to be realised. However, before any security interest is realised by the secured creditor under this section, the liquidator shall verify such security interest and permit the secured creditor to realise only such security interest, the existence of which may be proved either –

- (i) by the records of such security interest maintained by an information utility; or
- (ii) by such other means as may be specified by the Board.

The Liquidator as per Section 53 of the Code distributes





the proceeds from the sale of the liquidation assets in the prescribed order of priority.

We have been asked multiple times that upon relinquishment of the security interest by a secured creditor to the liquidation estate, does he become an unsecured creditor for the purposes of ascertaining his priority or position in the waterfall, per Section 53, when the liquidator distributes the proceeds from the sale of the liquidation assets. The query is that does a creditor compromise his status as a secured creditor in case he chooses to relinquish his security interest to the liquidation estate. Let us examine through the process as envisaged by the Insolvency and Bankruptcy Code, 2016 (Code).

Some definitions as per the Code to explain the relevant provisions-

**Section 3(10) “creditor”** means any person to whom a debt is owed and includes a financial creditor, an operational creditor, a secured creditor, an unsecured creditor and a decree-holder;

**Section 3(30) “secured creditor”** means a creditor in favour of whom security interest is created;

**Section 3(31) “security interest”** means right, title or interest or a claim to property, created in favour of, or provided for a secured creditor by a transaction which secures payment or performance of an obligation and includes mortgage, charge, hypothecation, assignment and encumbrance or any other agreement or arrangement securing payment or performance of any obligation of any person:

Provided that security interest shall not include a performance guarantee;

**Section 3(27) “property”** includes money, goods,

actionable claims, land and every description of property situated in India or outside India and every description of interest including present or future or vested or contingent interest arising out of, or incidental to, property;

**Section 3(4) “charge”** means an interest or lien created on the property or assets of any person or any of its undertakings or both, as the case may be, as security and includes a mortgage;

(I) Where the Adjudicating Authority passes an order for liquidation of

the corporate debtor under section 33, an insolvency professional is appointed as a Liquidator. As per Section 35 of Code, the powers and duties of a Liquidator include –

- (a) to verify claims of all the creditors;
- (b) to take into his custody or control all the assets, property, effects and actionable claims of the corporate debtor;
- (I) to invite and settle claims of creditors and claimants and distribute proceeds in accordance with the provisions of this Code;

After the commencement of Liquidation, the Liquidator is required to issue a public announcement inviting claims from creditors. It is worth noting that creditors who had filed claims with the Resolution Professional during the Corporate Insolvency Resolution Process earlier are required to file their respective claims again, now with the Liquidator.

- (II) Once the claims are consolidated and verified, the Liquidator can now proceed to identify and classify the creditors as secured, workmen, employees or unsecured financial creditors, statutory dues, other debts and capital contributories.

As per Section 52 which deals with the options available to a Secured creditor in liquidation proceedings who may either –

- (a) relinquish its security interest to the liquidation estate and receive proceeds from the sale of assets by the liquidator in the manner specified in section 53
- (b) realise its security interest in the manner specified in this section, he shall inform the liquidator



**Provisions of Section 52 clearly talks about the rights of a secured creditor vis-à-vis his security interest and how he can choose to enforce.**

of such security interest and identify the asset subject to such security interest to be realised. However, before any security interest is realised by the secured creditor under this section, the liquidator shall verify such security interest and permit the secured creditor to realise only such security interest, the existence of which may be proved either –

- (i) by the records of such security interest maintained by an information utility; or
- (ii) by such other means as may be specified by the Board.

A secured creditor may enforce, realise, settle, compromise or deal with the secured assets in accordance with such law as applicable to the security interest being realised and to the secured creditor and apply the proceeds to recover the debts due to it.

Where the enforcement of the security interest yields an amount by way of proceeds which is in excess of the debts due to the secured creditor, the secured creditor shall-

- (a) account to the liquidator for such surplus; and
- (b) tender to the liquidator any surplus funds received from the enforcement of such secured assets.

Where the proceeds of the realisation of the secured assets are not adequate to repay debts owed to the secured creditor, the unpaid debts of such secured creditor shall be paid by the liquidator in the manner specified in clause (e) of sub-section (1) of section 53.

Hence the above provisions of Section 52 clearly talks about the rights of a secured creditor vis-à-vis his security interest and how he can choose to enforce

his security interest by either realizing the security interest himself or relinquishing the security interest to the liquidation estate (as per Section 36 of the Code) and receive proceeds from the sale of assets by the liquidator in the manner specified in Section 53. It is to be clarified that the secured creditor if he chooses to relinquishing the security interest to the liquidation estate, just makes a choice out of the options available to him and just relinquishes his right to recover and realise the value of his security interest himself and does not compromise his status as a secured creditor. Let us still examine further.

- (III) After the secured creditor conveys its choice of either relinquish the security interest to the liquidation estate or realise the value of his security interest himself, it is the duty of the liquidator as per Section 35-
  - (f) subject to section 52, to sell the immovable and movable property and actionable claims of the corporate debtor in liquidation by public auction or private contract, with power to transfer such property to any person or body corporate, or to sell the same in parcels in such manner as may be specified:

Provided that the liquidator shall not sell the immovable and movable property or actionable claims of the corporate debtor in liquidation to any person who is not eligible to be a resolution applicant.
  - (j) to invite and settle claims of creditors and claimants and distribute proceeds in accordance with the provisions of this Code;
  - (m) to take all such actions, steps, or to sign, execute and verify any paper, deed, receipt document, application, petition, affidavit, bond

or instrument and for such purpose to use the common seal, if any, as may be necessary for liquidation, distribution of assets and in discharge of his duties and obligations and functions as liquidator

The Liquidator as per Section 53 of the Code distributes the proceeds from the sale of the liquidation assets in the following order of priority and within such period as may be specified, namely: -

- (a) the insolvency resolution process costs and the liquidation costs paid in full;
- (b) the following debts which shall rank equally between and among the following:
  - (i) workmen's dues for the period of twenty-four months preceding the liquidation commencement date; and
  - (ii) debts owed to a secured creditor in the event such secured creditor has relinquished security in the manner set out in section 52;
- (c) wages and any unpaid dues owed to employees other than workmen for the period of twelve months preceding the liquidation commencement date;
- (d) financial debts owed to unsecured creditors;
- (e) the following dues shall rank equally between and among the following: -
  - (i) any amount due to the Central Government and the State Government including the

amount to be received on account of the Consolidated Fund of India and the Consolidated Fund of a State, if any, in respect of the whole or any part of the period of two years preceding the liquidation commencement date;

- (ii) debts owed to a secured creditor for any amount unpaid following the enforcement of security interest;
  - (f) any remaining debts and dues;
  - (g) preference shareholders, if any; and
  - (h) equity shareholders or partners, as the case may be.
- (IV) Where the assets of the corporate debtor have been completely liquidated, the liquidator shall make an application to the Adjudicating Authority for the dissolution of such corporate debtor.

**Conclusion** - Section 53(1)(b)(ii) clearly states that debts owed to a secured creditor in the event such secured creditor has relinquished security in the manner set out in section 52 will have priority alongwith dues payable to workmen. Thus a secured creditor (irrespective of him being a financial creditor or operational creditor), has to choose to either relinquishing the security interest to the liquidation estate or realise the value of his security interest himself. In any case, a secured creditor including a financial creditor like an allottee in a real estate project does not compromise his status as a secured creditor in any circumstance.

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**“Real estate cannot be lost or stolen, nor can it be carried away. Purchased with common sense, paid for in full, and managed with reasonable care, it is about the safest investment in the world.”**

Franklin D. Roosevelt, President of the US, 1933 - 1945



## Effect of IBC on Real Estate

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Real Estate business after being an ideal investment for over almost two decades faced serious saturation resulting in a sharp decline in the investment rate. There were a variety reasons behind a real estate developer becoming insolvent after having collected significant amount of money such as delay in approval of projects, funding issues, demand and supply situation, developer's negligence, delay in land clearance, labour availability problem, ground water shortage, disputes between parties leading to court stays. Hence, many real estate companies defaulted in repayment of debt and were dragged under Insolvency and Bankruptcy Code, 2016.

With commencement of CIRP against these corporate persons, large number of homebuyers who had invested all their life's saving in their dream home as booking/allotment amount protested against the commencement of CIRP as their debt initially was categorised as other unsecured debt. Acknowledging this problem vide amendment No. 26 of 2018 dated 6th June, 2018, the authorities came up with the Insolvency and Bankruptcy Code (Second Amendment) Bill, 2016 granting homebuyers a status of "Financial creditor" therefore strengthening the position of homebuyers by putting them on the same footing as any other stakeholder participating in the real estate project.

### Situation prior to IBC amendment

Under the code the creditors are categorized in two types: **Financial** or **Operational**.

Financial creditors includes person who have lent money to the debtor against the payment of interest whereas Operational Creditors includes person who have established

certain types of relationship with the debtor company such as the provision of goods and services, employment or government dues.

Hence, prior to the amendment "Home buyers" were treated as neither financial creditors nor operational creditors as they haven't lent out money against the payment of interest nor were they operational creditors as that the code does not contemplate immovable property and refers to the provision of "goods and services". They treated as mere 'unsecured creditors' due to which, the homebuyers were not capable of initiating insolvency proceedings against a defaulting Builder or Real Estate developer.

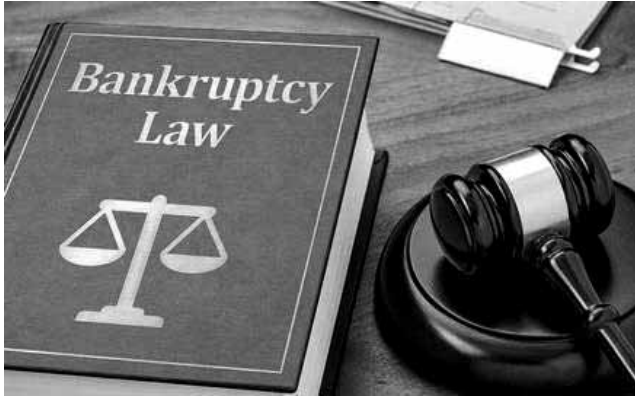


The only recourse available to the Home Buyers was that they could just get the balance proceeds subsequent to payment of insolvency costs, financial creditors, workmen and government dues on the event of builder/developer confronting liquidation. Therefore, the homebuyers were getting only limited reliefs/benefits as they were treated under a third class of creditors created by the Insolvency and Bankruptcy Board of India.

### Real Estate (Regulation and Development) Act, 2016 (RERA)

Before the 2018 amendment was enacted, considering the situation and to protect the home buyers, Real Estate (Regulation and Development) Act, 2016 (RERA) came into effect from May, 1, 2017. The main intention to enact RERA was to protect the interest of homebuyers and enhance transparency in the real estate sector. RERA was enacted with the objective to set in motion the process of making necessary operational rules and creation of institutional





infrastructure for the promotion and growth of real estate sector.

The Real Estate Act makes it mandatory for all commercial and residential real estate projects where the land is over 500 square metres, or eight apartments, to register with the Real Estate Regulatory Authority (RERA) for launching a project, in order to provide greater transparency in project-marketing and execution. Application for registration must be either approved or rejected within a period of 30 days from the date of application by the RERA. On successful registration, the promoter of the project will be provided with a registration number, a login id, and password for the applicants to fill up essential details on the website of the RERA. For failure to register, a penalty of up to 10 percent of the project cost or three years' imprisonment may be imposed.

Real estate agents who facilitate selling or purchase of properties must take prior registration. Such agents will be issued a single registration number for each State or Union Territory, which must be quoted by the agent in every sale facilitated by him.

However, the proper implementation of RERA is still a concern for several state authorities. There have been instances where developers have resorted to selling inventory at a market discount in a bid to raise finances as no sales at pre-launch stage are allowed now.

### Situation post IBC amendment

The Insolvency and Bankruptcy code was amended to cover the loopholes in the Insolvency and Bankruptcy Act along with the Real Estate (Regulation and Development) Act, 2016. The amendment incorporates the key recommendations of the Insolvency Law reform Committee's ("ILRC") report. The amendment to the code was brought with a view to balance the interest of different stakeholders, particularly the **Home buyers**. This amendment treats the Home Buyer

**Section 5 (8)(f)** any amount raised under any other transaction, including any forward sale or purchase agreement, having the commercial effect of a borrowing;

**\*\*Explanation.** - For the purposes of this sub-clause, -

1. any amount raised from an allottee under a real estate project shall be deemed to be an amount having the commercial effect of a borrowing; and
2. the expressions, "allottee" and "real estate project" shall have the meanings respectively assigned to them in clauses (d) and (zn) of section 2 of the Real Estate (Regulation and Development) Act, 2016 (16 of 2016);

**\*\* Amendment-** Insertion by Act No. 26 of 2018, sec. 3 (w.e.f. 6-6-2018).

as financial creditors under the code. The amendment was made in the definition of Financial Debt as follows:-

This amendment was made in cognizance of the fact that since, money is raised from homebuyers as a means to finance construction, and thus they should be treated as any other financial creditor. Now after this amendment, the Home Buyers are treated as "allottee" under a 'real estate project'. The term "allottee" is defined under Real Estate (Regulation and Development) Act as "a person to whom a plot, apartment or building, as the case may be, has been allotted, sold (whether as freehold or leasehold) or otherwise transferred by the promoter, and includes the person who subsequently acquires the said allotment through sale, transfer or otherwise but does not include a person to whom such plot, apartment or building, as the case may be, is given on rent."

Accordingly, if an allottee raises sum under a real estate project then that sum will be considered to have an impact similar to the commercial impact of borrowing. Therefore, the sums paid by the Home Buyers to a builder will be considered as **financial debt** and homebuyers will be categorized as **financial creditors**.

### Benefits of the amendment

The homebuyers after attaining the status of financial creditor under the code have the right to invoke Section 7 of the IBC against an errant developer.

By invoking section 7 of the IBC, the financial creditors can file an application in NCLT (National Company Law Tribunal) for initiating corporate insolvency resolution

(CIRP) against a defaulting company. Also, the homebuyers have representation in the committee of creditors through an *Authorized Representative* and they can expect fast tracking of pending court cases against leading real estate groups.

### Recent Developments in IBC

#### Stay against NCLT Proceedings initiated against Real Estate corporate debtors.

Supreme Court stayed NCLT proceedings against More than 75 Builders. The Hon'ble Supreme Court has admitted the Writ petition challenging the *constitutional validity of Amendment in the Insolvency and Bankruptcy Code (Second Amendment) Act 2018* which clarified that allottees under a real estate project should be treated as financial creditors.

#### Refund with interest on delay beyond 1 year

The National Consumer Disputes Redressal Commission (NCDRC) in its order held that the homebuyers can ask builders for a full refund if the possession of the flats is delayed by a year from the promised date of final delivery. Homebuyers can now seek a full refund from builders with 10% interest if the possession of their flats is delayed beyond one year. The Commission has passed this order in the wake of incessant delays the homebuyers have to face to take the possession of their flats. The Supreme Court and various consumer courts have in the past held that the end buyers can't be made to wait endlessly to take the ownership of their flats, but did not give clarity on the

timeline of the refund.

The Commission has instructed the builder to compensate the buyer at the rate of 6% per year on the total deposit for the delayed period of time even after transferring the possession.

Furthermore, in the case of non-delivery of the flat within the prescribed deadline by the Commission, the builder would have to refund the entire amount with 10% interest.

#### External Commercial Borrowing

Recently, as per notification released by Reserve Bank of India, the External Commercial Borrowing regulation shall be relaxed for the resolution applicants submitting resolution plan to acquire corporate persons under CIRP. The existing guidelines did not permit the proceeds of External Commercial Borrowing (ECB) denominated in either foreign currency or Indian Rupee, to be utilised for repayment or for on-lending for repayment of domestic Rupee loans.

The resolution applicants under Corporate Insolvency Resolution Process (CIRP) under Insolvency and Bankruptcy Code (IBC), 2016 may find it attractive to borrow abroad to repay the existing lenders. In view of the above, it is proposed to relax the end-use restrictions under the approval route of the ECB framework for resolution applicants under CIRP and allow them to utilise the ECB proceeds for repayment of Rupee term loans of the target company.

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**“If you don’t own a home, buy one. If you own a home, buy another one. If you own two homes, buy a third. And, lend your relatives the money to buy a home.”**

John Paulson, Investor and multi-billionaire



# The Real Estate Sector in Context of IBC 2016 & RERA

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## Introduction

The term real estate means real, or physical, property. “Real” comes from the Latin root *res*, or things. Others say it’s from the Latin word *rex*, meaning “royal,” since kings used to own all land in their kingdoms.

Real estate, as a general term, describes the built environment, which plays a vital role in every aspect of an economy, society and environment. Real estate is an imperative part of the society, be it in business in a commercial front or in residential or industrial front.

Giving a brief idea on the real estate sector in India, real estate has been a part of its developing economy with its own share of ups and downs. Some years may seem to not have been so in favour of the sector as the others. The government is well in-tune with the issues and is trying its best to restore the sheen of this sector as was a couple of years ago.

Initiatives of the government such as urban development policies and various such other programmes (e.g., JNNURM, Land Acquisition Act, Affordable Housing, Ease in housing finances, widening the scope of real estate market, change in FDI Regulation), are expected to contribute to enhance urbanisation. This already started reflecting in the upward trend again in 2019 in the real estate sector.<sup>1</sup> There had been numerous landmark changes in the year 2017-19 in the real estate sector that has impacted it. Though the result of the changes needed further moulding and the impact is to be better observed in the coming years, it can be safely concluded that real estate sector is one of the blue-eyed sectors and the government will definitely try to plug-in any loopholes that might cause damage to it.



According to a report by IBEF<sup>2</sup>, the real estate sector in India is expected to reach a market size of US\$ 1 trillion by 2030 from US\$ 120 billion in 2017 and contribute 13 per cent of the country’s GDP by 2025. Sectors such as IT and ITeS, retail, consulting and e-commerce have registered high demand for office space in recent times. Commercial office stock in India is expected to cross 600 million square feet by 2018 end while office space leasing in the top eight cities is expected to cross 100 million square feet during 2018-20.

In terms of investments in real estate sector between 2009-18 Indian real estate sector attracted institutional investments worth US\$ 30 billion. Private Equity and Venture Capital investments in the sector reached US\$ 4.47 billion in 2018 and US\$ 546 million in Jan-Feb 2019.

According to data released by Department of Industrial Policy and Promotion (DIPP), the construction development sector in India has received Foreign Direct Investment (FDI) equity inflows to the tune of US\$ 24.91 billion in the period April 2000-December 2018.<sup>3</sup>

## REITs & Real Estate

Diving into another spectrum, India also saw the very first IPO by Real Estate Investment Trusts (REITs) in 2019, through Embassy Office Parks a Bangalore-based real estate developer backed by Blackstone Group LP, a global private equity firm. As a positive move SEBI has reduced the minimum investment limit in REIT to 1 50,000 from 1 2 lakh.<sup>4</sup>

REITs are securities linked to real estate that can be traded on stock exchanges once they get listed. Akin to mutual funds, there are sponsors, trustees, fund managers and unit

holders in REITs. In REITs the underlying asset is physical real estate. The money collected is deployed in income-generating real estate.

The taxation perspective of REITs as explained in one of his interviews by Mr. Rakesh Nangia, Managing Partner, Nangia Advisors LLP is that,

*“.....According to SEBI Rules, REITs are to distribute 90% or more of its earnings (be it dividend, interest or rent) to investors or unit holders at least twice a year. Income received by the REITs in the nature of dividend, rent, and interest and distributed to its unit holder shall be deemed as dividend, rental and interest income, respectively, in the hands of the unit holder.*

*According to section 10(23FD) read with section 115UA of the Income Tax Act, 1961 all the incomes received from REITs shall be exempt from taxation except the interest income received from the special purpose vehicle by the REIT and rental income from the property that is owned directly by the REITs. Largely, REITs will distribute most of their income in the form of dividend, which is tax free in the hand of the investor.”*

Irrespective of the numerous positives, considering our economic scenario and socio-political environment, REITs may still need some time to cement its place in the economy as it is still a novel concept for most people. REITs will require some time to be understood by the people to and only then will we see the best outcome of REITs.

### **Legal framework behind real estate**

In terms of legal framework, though the Consumer Protection Act, 1986 had been available as a forum to the buyers in the real estate market, the recourse was only curative and it was felt that it was not adequate to address all the concerns of buyers and promoters in the sector. In view of the above, the Parliament enacted the Real Estate (Regulation and Development) Act, 2016 which was framed with the aim to protect the rights and interests of consumers and promotion of uniformity and standardization of business practices and transactions in the real estate sector.<sup>5</sup>

Then, came in the Insolvency and Bankruptcy Code, 2016 (IBC 2016) which provides measures for financial and operational creditors to work with the corporate debtor in order to revive the corporate debtor and use the best possible resolution plan available to get the debts paid-off and the business to run viably again.

Recently, another development in the scenario of homebuyers was that the apex consumer commission,

NCDRC has quantified a time period of one year for delayed projects beyond which investors can claim for refund from builders.

Unquestionably there are a number of issues revolving around real estate at this hour, but in this article we wish to deal with the implication of inclusion of homebuyers as financial creditors in IBC 2016 and the issue of bulk withdrawal which was addressed in RERA recently.

### **Homebuyers as financial creditors: the builder's perspective**

Diving straight into the issue, when we speak of including homebuyers as financial creditors in the Code this move was applauded by large. But another perspective that has been observed by some practitioners critiques and authors where this move might bring in collateral damage to the philosophical framework of the Code. Somehow when it comes to homebuyers, considering their plight, it seems that the Code is a tad biased towards the homebuyers. But, wasn't the Code introduced to aid the corporate debtor? To gain clarity we will walk through a few points revolving around it.

One of the biting issues in treating homebuyers as a financial creditor is that when the 'default' is said to have been committed by the builder and when 'debt' becomes due remains unanswered. Speaking in generic context repayment of the monies by the developer is provided in formal documents such as allotment letters and purchase agreements only upon termination of the allotment. But in the cases of delay, allotment agreements are not terminated.

As for the definition of 'default', only once the refund is demanded by the homebuyer, it can be said that the amount of debt has become due. However, in the situations of delay in the delivery of possession which is largely the substratum of the dispute between the homebuyer and the developer, in the absence of termination of the agreement, there remains lack of clarity as to when the 'debt' has become due and the 'default' has been committed.<sup>6</sup>

Moreover, inclusion of homebuyers as financial creditors increase the debt finance cost of the builders. Additionally another aspect to be considered is that loan rates may increase if recovery rates go lower for banks with homebuyers being included in the waterfall and brought higher up.

In the case of Jaypee Infratech, when the aggrieved homebuyers approached the Hon'ble Supreme Court it took an affirmative action in that pursuit. An issue that surfaced was whether NCLT which was introduced to

eliminate multiple judicial proceeding in different forum living up to the expectation? As in the instant case, the proceeding went on in 3 forums i.e. NCLT, NCDRC and the Apex Court.<sup>7</sup>

It can also be understood that running multiple cases in different forums for the same issue can cause a blockhead in all forums and the builder may end up being a victim of double jeopardy. It also takes up time and money and hence a single forum to handle cases with regard to one kind of issue seems more logical. Why can't an existing law be modified and moulded to keep in best interest of all associated parties?

Another scenario highlighted by ICRA in one of its reports is that, *"there have been various instances of aggrieved home-buyers initiating insolvency proceedings against developers who have delayed project execution.*

*The time-bound nature of the insolvency process provides a limited window for developers to reach settlement with the aggrieved buyers, failing which the resolution professional takes over the management.*

*"Even a single buyer in a single project pursuing such a remedy can put the company at risk of financial default, irrespective of the liquidity position of the company."<sup>8</sup>*

One positive for builders that can be highlighted is that once homebuyers are included as financial creditors, case proceedings might move in a tad more speedy manner due to self-interest involved. Also, considering various cases where builders might have not been able to deliver, homebuyers lose faith in the market which gives a severe blow to the sector. Hence, the move of inclusion of homebuyers, though welcomed needs to be moulded further in order to be just to both the homebuyers and the builders.

### **Withdrawal by a handful should not jeopardize completion of an entire project: RERA's view**

9<sup>th</sup> January 2019 witnessed an instance where plea of some 10 odd flat buyers who wished to exit from a project based out of Mumbai was declined under MahaRERA citing that bulk withdrawal from the project may mean 'jeopardizing

completion of the project' and impact the remaining 500 home buyers.<sup>9</sup>

*"Keeping in mind the larger interest of approximately 520 allottees of the said project, allowing bulk withdrawal from the MahaRERA registered project to so many complainants at this stage would mean jeopardising the project completion. Money for the refund will have to be taken out from the separate account, which is meant specially for the completion of the project and would eventually slow down the progress of the project work especially at a stage where the project is nearing completion with more than 800 of the super structure work completed,"* the order said.

Also, Chairman of Gurugram Haryana Real Estate Regulatory Authority (HARERA) KK Khandelwal had also made it clear at a later date that in projects where construction is 40 percent complete, refund may not be allowed to ensure that the project is completed.

The purpose of RERA is to balance the interests and protect the rights of the key stakeholders: builders, buyers and agents.

### **Conclusion**

This article was an attempt to bring into light the perspectives related to real estate sector that might not have been in the rounds as much as it should have been. Ours is a developing economy and most of the legal framework is being revamped in order to serve the best interest of the stakeholders. We cannot state at any point that a particular section is always correct and thus the law must be framed in such a way that justice is served in the best interest and nobody takes undue advantage of the legal system to water their ulterior motives. Real Estate Sector is a sector with humungous potential to bring in more strength to the economy provided that a middle ground is achieved where no party conducts detrimental actions to negatively impact the other stakeholders.

*This article is a part of the knowledge resource of Mamta Binani & Associates and any form of plagiarism will not be entertained. This document is only for knowledge sharing purpose and is not to be construed in any other manner whatsoever.*

<sup>1</sup><https://www.cbre.com/report-download?PUBID=eb9d9f73-1464-4933-b2aa-ee83b75066fb>

<sup>2</sup><https://www.ibef.org/industry/real-estate-india.aspx>

<sup>3</sup><https://www.ibef.org/industry/real-estate-india.aspx>

<sup>4</sup>[https://www.sebi.gov.in/reports/reports/jan-2019/consultation-paper-for-amendment-of-sebi-infrastructure-investment-trusts-regulation-2014-and-sebi-real-estate-investment-trusts-regulation-2014\\_41840.html](https://www.sebi.gov.in/reports/reports/jan-2019/consultation-paper-for-amendment-of-sebi-infrastructure-investment-trusts-regulation-2014-and-sebi-real-estate-investment-trusts-regulation-2014_41840.html)

<sup>5</sup>[https://www.icsi.edu/media/webmodules/REAL\\_ESTATE\\_REGULATION\\_AND\\_DEVELOPMENT\\_ACT.pdf](https://www.icsi.edu/media/webmodules/REAL_ESTATE_REGULATION_AND_DEVELOPMENT_ACT.pdf)

<sup>6</sup><https://barandbench.com/unexamined-aspects-treating-homebuyers-financial-creditors-under-ibc/>

<sup>7</sup><http://www.mondaq.com/india/x/682398/Insolvency+Bankruptcy/Jaypee+Infra+Insolvency+Case>

<sup>8</sup><https://economictimes.indiatimes.com/industry/banking/finance/banking/homebuyers-as-financial-creditors-developers-default-risks-spike-articleshow/68063348.cms>

<sup>9</sup><https://www.moneycontrol.com/news/business/real-estate/can-homebuyers-be-deprived-of-a-refund-under-rera-3417721.html>



## Legal - Balancing Interest of Consumers & Builders in Agreements

**Dr Sanjay Chaturvedi**  
LLB, PhD



Post RERA regime where the transparency in real estate transaction process and real estate development process is main objective, real estate is transforming into new era. All the stock holders, be it fund providers, PE or international Hedge Funds, ECB, FDI or small investors, have been protected by a very strong real estate Act which has established Real Estate Authority in every state. Housing being state subject hence every state has its own rules and regulations, but the main Act remains committed to real estate buyers.

In the matter of PCIT Vs Vaidyanathan ( Bombay High Court) the Hon'ble Court observed with reference to section 45 Capital Gains for property : " The Allottee gets title to property on issue of allotment letter. The payment of installments is only a follow-up action. Taking delivery of possession is only a formality. Accordingly, the date of allotment is the date on which the purchaser of a residential unit can be stated to have acquired the property (CBDT Circulars applied).

The contractual obligations between home buyer and builder started immediately after the later accepts the earnest / advance / token money towards a property/ flat/ apartment. A third party right is already created and nothing unilaterally terminated by either party but within the covenants of Agreement/ Allotment letter.

Can an allotment letter be treated as Agreement? Any advance taken by the builder against any property and issue an allotment letter /

holding receipts or whatever name called is nothing but an acceptance of an obligation under an Agreement. Yes, an allotment letter is an Agreement.

Agreement for sale is very important document as far as the real estate transaction is concern. Often Agreement for Sale were one sided and home buyers were asked to signed on dotted lines. But for the first time RERA have brought model agreement for sale. The document not only inserted a binding effect on parties but also made it compulsory for parties to execute it if more than 10% of purchase consideration is paid. Tamil Nadu RERA insisted that all Agreement for Sale must be executed as per the model Agreement for Sale in RERA Act and no deviation was allowed. In Maharashtra, RERA allowed the modification in clauses but with main object of the document kept intact. Other states too followed Maharashtra's model and allowed modifications in Model Agreement for Sale as provided in RERA.

For the first time, the document recognized the right of the builder to charge interest under section 19(6) of RERA





where the builder can charge and recover all maintenance and other charges. A termination clause is also very important.

Biggest concern of parties signing the Agreement for Sale is Force Majeure. Builders now days inserting economic recession as the Force Majeure clause as they feel that it is beyond their control, besides war, civil disturbance, non-

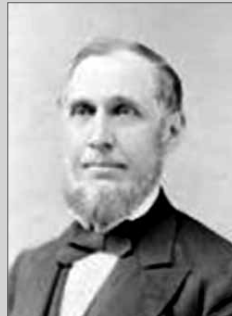
availability of building materials etc. Buyer, though having understood the clause, never object to such clause as it is provided in the state housing Acts and now in RERA.

Bombay High Court in Writ Petition 2737 in the matter of Neelkamal Properties Pvt Ltd observed that Section 18 is compensatory in nature. Although Force Majeure is provided but buyer cannot be punished for bad acumen of the builder and hence said that you may continue project with delay possession dates for want of permissions or reasons for Force Majeure, but provide compensation to the buyer.

At the same time in one of the case in RERA, a disposition came that buyer must have paid interest on 20% but builder too have paid interest on 80% to complete the project under subvention schemes. Counter arguments came up while asking for interest on delay possession that if builder pays the interest to few home buyers then how he is going to complete the project?

Balancing the interest of buyer and builder is must as it may affect the other buyers in the project.

\* \* \* \* \*



**“Real estate is an imperishable asset, ever increasing in value. It is the most solid security that human ingenuity has devised. It is the basis of all security and about the only indestructible security.”**

Russell Sage, American Financier and Politician



## Investing and Building Wealth in Real Estate

**Mr Juggy Marwaha**  
Executive Managing Director,  
JLL India, Bengaluru

Investing and wealth creation has been a topic of unending interest over the ages. Investing involves balancing risk and returns over a period in various assets. Traditionally gold and land were the measures of wealth, but over years, various asset classes have emerged with the introduction of money as means of exchange and value. Real estate has been the most popular asset class and has been a socio-economic indicator of wealth. Investing in real estate for medium to long term, has helped to mitigate risk and provide stable returns. Real estate helps in diversification as its returns have a lower correlation with other asset classes like equity stocks and bonds.

In India, real estate investments have been the first choice of investment due to its return potential, tangible nature and emotional value. The returns from the sector over long term have been stable even after accounting for periods of exuberance as well as shocks. The challenges of inefficiency, transparency, accountability, and professionalism plaguing the sector have been addressed through various regulations in the last 5 years. The impact of the enhancements in real estate were reflected in the increase in institutional investments over the last few years.

Indian real estate sector attracted approximately US\$ 30 bn institutional investments during 2009-2018, the decade post-Global Financial Crisis. Of this, 32% of the investments



**In India, real estate investments have been the first choice of investment due to its return potential, tangible nature and emotional value.**

came in between 2009-2013 while 2014 - 2018 witnessed a whopping 68% share of total institutional investments i.e. US\$ 20 bn. A slew of reforms in various segments improved investors' perception. The adoption phase of reforms introduced by Real Estate Regulation Act (RERA), The Benami Prohibition Act and Goods and Services Tax (GST) witnessed improved office space absorption, while the residential segment faced slow recovery.

As the Indian real estate sector witnessed a decade of recovery, the investments saw a shift in various asset classes. The residential real estate, which was once the best investment option, was affected by the global financial crisis. It staged a smart recovery in 2010-11 but could not sustain the momentum. Since 2014, a series of reforms like RERA, GST and The Benami Prohibition Act was introduced to increase transparency and accountability of the sector. This led to teething issues leading to a slowdown in the

residential sector during 2016-17. However, the residential sector has shown signs of reversal with sales growth of 42% in 2018 over the previous year in the key 7 cities.. The sector is expected to move with caution and we expect volumes to come back with the modest price rise.

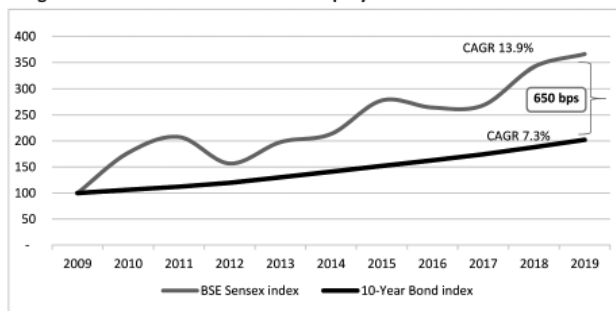
Institutional investments in Commercial Office Space moved up to US\$ 8.2 bn (2014-18) from US\$ 1.6 bn (2009-13), while the residential segment saw a decline



as the sector took time to align with the various reforms introduced to bring level playing field among home buyers and developers. Investments in Commercial real estate in India have become easier especially for the retail investor with the successful listing of its first Real Estate Investment Trust (REIT) IPO issue by Embassy Office Parks recently. Real Estate Investment Trust provides access to all investors, especially small investors, to own share of income-producing real estate. Return from REITs includes regular rental income (similar to an annuity) as well as capital appreciation of the underlying real estate assets. Globally REIT has been able to deliver high risk-adjusted returns as it strives to deliver the best of equity and debt market returns.

Returns from the REIT is guided by the risk-free rate at the lower end of the returns spectrum and equity returns at the higher end. In India, the repo rates have been higher due to underlying inflation rates and the risk premium

Long term returns trend of Bonds and equity markets in India



Source: BSE website and RBI reports, JLL report on India REITs

for investments. This has led to higher yields from risk-free instruments compared to other developed markets globally. The higher risk is also reflected in higher capital appreciation from stocks. And this is one of the reasons why return expectations from REITs in India is higher compared to other developed markets where the risk-free rate is much lower.

Apart from the inflation-linked return expectations, REITs returns from rental income is expected to see an upward trend, due to the robust demand-supply scenario in office space markets. The flow of investments in office spaces is assumed to drive capital values upwards, providing capital appreciation to REIT valuations. The combined impact can drive higher returns from REITs in India.

In the current scenario, investment in commercial office space offers stable returns with prospects of capital appreciation over the medium term for retail investors. Other asset classes like warehousing and retail are also expected to benefit from reforms introduced in these segments coupled with the impact of technology.

The current real scenario in India is moving towards a more organized, accountable and transparent system with the increasing role of institutions. The recent electoral mandate is expected to lend continuity to the reform measures undertaken and provide stability to the real estate sector. This will ensure an atmosphere of confidence and growth of the sector and deliver competitive returns across assets classes in the years to come.

\* \* \* \* \*



**“Ninety percent of all millionaires become so through owning real estate. More money has been made in real estate than in all industrial investments combined. The wise young man or wage earner of today invests his money in real estate.”**

Andrew Carnegie – Scottish businessman and philanthropist



# Resolving GST Complexities in Real Estate

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*assisted by*  
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## Taxation and realty sector

Right from sales tax days, taxation of realty sector has been a challenging task to the Government. The levy of sales tax on the construction activity lead to introduction of Article 366(29A), deeming the works contract as sale of goods. With advent of joint developments and construction of multi-storied apartment complexes, the complexities of levy of works contract tax on such construction and sale came into picture and disputes on taxability of such sale of apartments went on for decades and till the Apex Court of the Country decided that the levy of works contract tax would be applicable on the agreement to sell the 'to be constructed' apartment.

Levy of service tax on the real estate sector, again was not smooth. Repeated conflicting clarifications and amendments to law, kept the confusion of taxation of the construction activities, alive.

GST was introduced w.e.f. 1.7.2017 to levy tax on supply of goods or services or both. Power to impose such a tax emanates from, Article 246A of the Constitution, which was introduced through Constitution (101st) Amendment Act, 2016.

It is to be noted that though there appears to be no express constitutional power to bring transactions relating to immovable property under the ambit of GST, the provisions of GST are so drafted that the except sale of land or building, all other activities, such as construction, sale during construction, mortgage, rent, leasing or licensing of

land or building has been termed to be supplies liable to GST and therefore is subject to constitutional challenges.

## ***GST on real estate activities - Certain open issues***

### ***A. Levy of GST on immovable property***

Section 7(1) of the CGST Act, 2017 defines scope of supply to include all forms of supply, such as sale, transfer, barter, exchange, licence, rental, lease or disposal **of goods or services or both** and no reference to the immovable property.

However, in terms of Section 7(1A) read with entry 2 of the Schedule II certain activities relating such as lease, tenancy, letting out of immovable property is considered to be service. Further, entry 5 of Schedule III read with section 7(3) of the CGST Act, 2017, sale of land and, subject to clause (b) of paragraph 5 of

Schedule II, sale of building is deemed to be a transaction which is not a supply.

However, the moot question would be whether immovable property could be termed as service. It shall be noted that though, the phrase service is defined in the GST statute, to mean 'anything other than goods, money and securities', it appears to be no express constitutional power to bring transactions relating to immovable property under the ambit of GST.

Pertinent to note that under the Article 246 read with Schedule VII of the Constitution of India, power to make laws relating to land, assessment and collection of land revenue, taxes on land and building, fall under the exclusive



domain of the States. In such a scenario, it would be an important to understand whether activities relating to land and building, except sale / transfer of such immovable property could be brought under the levy of GST.

It is interesting to note that the issue as to whether service tax could be levied on renting of immovable property is now pending before the Hon'ble Supreme Court as reported in UoI Vs. UTV News Ltd. 2018 (13) G.S.T.L. 3 (S.C.). The Court while keeping it pending, observed that the issue of validity of levy and collection of royalty on mining rights vis a vis taxes on land and building, has been referred to a 9 member bench of the Supreme Court in the case of Mineral Area Development Authority v. Steel Authority of India, (2011) 4 SCC 450. One of the issues involved in the said case is whether "taxes on lands and buildings" in List II Entry 49 of the Seventh Schedule to the Constitution contemplate exclusive domain to the state and excludes others from such powers. Since the said decision has also a bearing on levy of service tax on the land and building, the matter is kept pending till the 9 member bench of the Apex Court decides the issue.

Therefore, it is a larger question, which the Apex Court has to decide, as to whether, service tax / GST could be levied and collected on the transactions relating to land and buildings.

### B. Rate of tax:

Since from the date of introduction of GST, there has been revision of rate of taxes on various goods and services, including the rate of tax on construction activities. The latest change in rate of tax which is made effective from 1.4.2019 is discussed herein below:

Summary of the proposals by the GST council in its meeting on 24.02.2019 and on 19.03.2019, on the real estate sector is as below:

#### I. GST rate:

GST shall be levied at effective GST rate of 5% without ITC on residential properties outside affordable segment and 1% without ITC on affordable housing properties.

#### II. Effective date: New rate shall become applicable from 1st of April, 2019.

#### III. GST exemption on TDR/ JDA, long term lease (premium), FSI:

Intermediate tax on development right, such as TDR, JDA, lease (premium), FSI shall be exempted only for such residential property on which GST is payable.

**IV. Option in respect of ongoing projects:** The promoters shall be given a one -time option to continue to pay tax at the old rates for ongoing projects (where construction and actual booking have both started before 01.04.2019) which have not been completed by 31.03.2019.

#### New tax rates :

- (i) New rate of 1% without input tax credit (ITC) on construction of affordable houses shall be available for,
  - (a) all houses which meet the definition of affordable houses as decided by GSTC (area 60 sqm in metros / 90 sqm in non- metros and value upto RS. 45 lakhs), and
  - (b) affordable houses being constructed in ongoing projects under the existing central and state housing schemes presently eligible for concessional rate of 8% GST (after 1/3rd land abatement).
- (ii) **New rate of 5% without input tax credit shall be applicable on construction of -**
  - (a) all houses other than affordable houses in ongoing projects whether booked prior to or after 01.04.2019. In case of houses booked prior to 01.04.2019, new rate shall be available on instalments payable on or after 01.04.2019.
  - (b) all houses other than affordable houses in new projects.
  - (c) commercial apartments such as shops, offices etc. in a residential real estate project (RREP) in which the carpet area of commercial apartments is not more than 15% of total carpet area of all apartments.

Present rate structure (w.e.f. 1.4.2019) for the real estate sector, as per the notification No. 3/2019 CT (R ) dt. 29.03.2019, could be summarised as below:

- i. **Affordable housing projects:** 1% GST subject to NO ITC [1.5% less 1/3rd deduction for land]: [Entry 3(i) & (ic)]

Location of project >>	METRO AREA	OTHER THAN METRO
House area	60 Sq. Mts.	90 Sq. Mts.
Value of the house	Upto 45 Lakhs	Upto 45 Lakhs
Metropolitan area = Bengaluru, Chennai, Delhi National Capital Region (NCR) (limited to Delhi, Noida, Greater Noida, Ghaziabad, Gurgaon, Faridabad), Hyderabad, Kolkata and Mumbai (whole of Mumbai Metropolitan Region (MMR)		

II. **Non affordable housing projects and other projects:**  
5% without ITC [3.75% less 1/3rd deduction for land] [Entry 3(ia), (ib) & (id)]

III. Above rates are applicable for the projects commencing on or after 1.4.2019. The developer, could also opt to the above rates for the ongoing projects also.

IV. **For the ongoing projects, not opting for the above rates:**

The developer may continue to pay under existing rates as per entry (ie) and (if) with input tax credit (subject to reversal as per Rule 42 and 43).

Fully commercial projects (non-residential) projects will continue to attract tax at 18% (12% effective rate) with input tax credit as per entry (xii).

It is to be noted that, an “ongoing project” is one which satisfies all the below conditions:

- a) Commencement of the project is before 31.03.2019;
- b) Completion of the project is after 31.03.2019;
- c) At least one flat is booked before 31.03.2019;

If all three conditions are conjunctively not satisfied, it would be treated as a “new project” and the 5% rates without ITC could be attracted.

Though, the intention of prescribing new rate structure, as explained in the GST Council decisions, is to simplify the rate and make the reality sector more tax efficient, the same appears not to have served its purpose because of the complex way of drafting the notifications, certain impractical conditions, restrictions / lapse of input tax credit, and the complex formulae prescribed in the notification.

Further, restricting input tax availment would go against the basic structure of the GST, which is tax on value addition

**C. Levy on developmental rights:**

Joint development or re-development of the existing buildings are the emerging things in the reality sector in India. The Courts have taken a view that developmental right is immovable property<sup>1</sup>. However, under GST, notifications [Refer Notification 4,5 & 6/2019 CT( R) dated 29.03.2019] have been issued to define the time of supply of transfer of such development right and also to tax such transfer under reverse charge in the hands of the developer. In terms of the new set of notification taxability of developmental rights could be summarized as below :

<sup>1</sup> Chheda Housing Development Vs Bibijan Shaikh Farid 2007 (3) MhLj 402

	Taxability	Condition
TDR / development rights /FSI / Lease Premium	Exempt	Where GST is paid on the constructed flats/ building
	Taxable – reverse charge	Where no GST is paid on the constructed flats/ building. Developer is liable to pay GST on reverse charge basis on the value of TDR/ Developmental right / FSI.
TDR / development rights /FSI / Lease Premium- Where certain number of constructed flats are allotted/ transferred to land owner	Exempt	GST shall be paid by builder/ developer on such portion of the flats allotted to land owner.

It shall also be noted that, the notification exempting the supply of development rights / FSI etc., defines the value of such supply where FSI etc., is supplied against consideration in the form of certain number of constructed property, as below:

Value of shall be value of similar apartments / building charged by the promoter from the independent buyers nearest to the date on which such TDR or FSI is transferred to the promoter.

It shall be noted that similar valuation methodology was proposed in the circular No 151/2/2012-S.T., dated 10-2-2012 under the erstwhile service tax provisions and the said clarification has been legalised by bringing in into the notification. It appears that this valuation mechanism is not workable as the date for its application is the date of transfer of the developmental rights while the measure is with reference to completed flats which event takes place much later.

**D. Land value :**

Other important issue which is affecting the real estate sector is the deduction for the value of land. The notification, which were issued earlier as well as those which are applicable currently, prescribe a general rate of deduction of 1/3rd of the total price of the building towards land. From the wordings of the notification it appears that the value of deduction of 1/3rd is compulsory and the assessee does not have an option to adopt a different land value.

However, for instance in a villa project or a residential project in middle of the city, it is obvious that the land value would be much higher than 1/3rd portion of the total sale value of the project. Therefore, there should be provided a methodology to adopt deduction of actual value of land rather than deemed value at 1/3rd.

*There are several other issues which arise in the real estate sector which would be open for discussion in the conference.*

\* \* \* \* \*



# Real Estate Sector: Changes in GST & Income Tax

**Mr. Vivek Jalan, LL.B**  
Co-Chairman of The Indirect Tax  
Committee of The Bengal Chamber



## Changes In GST in the Real Estate Sector

GST on construction service relating to residential and related commercial apartments has gone through a sea change. From 1st April 2019, the effective GST rate is reduced to 1% from 8% for affordable category houses and to 5% from 12% for non-affordable category houses. However the reduced rate of output Tax has come with conditions that No ITC would be available to the Builders, 80% of the project-wise purchases (barring few items like diesel, electricity, grant of development rights, etc) by the builder would mandatorily be required to be made from registered vendors, Cement should be purchased only from registered vendors, etc.

For a project that has commenced operations on or after 1st April 2019, the new scheme is mandatory where construction services are provided along with transfer of land. For pure construction services, existing rate of 18% would continue to apply. Further incase of Pure Commercial Projects, there would also not be any change in the GST Rates.

However, for ongoing residential projects, the builders have an option to choose (**Before 20th May 2019**) either the new scheme or continue charging the old rates of GST. This decision would have a huge impact on the cost structure and future sales of promoter. **If he opts for the new scheme of 1%/5%,**

the promoter needs to reverse the credit pertaining to un-booked flats and instalments not due, pertaining to flats booked as on 31st March 2019. However, **If he opts for the old scheme of 8%/12%**, no commercial impact is there in case the promoter would be able to collect 8%/12% from customers. Also under the old scheme, credit will be available on purchase and it will reduce the costs to some extent. It is also to be noted that the promoter of projects covered under RERA (Real Estate Regulations Act) may not be able to revise the price for the booked flats also.



**Taxation continues to test the builders of their resilience change... In recent times, there has been tremendous changes in the Taxation in the real estate Sector in both GST And Income Tax. In this article an effort has been made to understand the impact of such changes in toto.**

Hence it is expected that If the price of the flat quoted to the customer is inclusive of taxes, then the new scheme would be beneficial for the builder. However, if the price quoted to the customer is exclusive of taxes, then the old scheme may be better for the builder. Further, if the project is almost completed i.e. 80%-90%, then it may be beneficial for the builder if he could pay GST under existing scheme. In this case a majority of inputs or input services would have been procured and credit on such procurements would have been availed. However, if the project is in initial stages of construction where major part of inputs or input services is not procured, then it may be beneficial for the builder to opt for new scheme. As for consumers, the new scheme looks to be a booster if all the costs are not passed on by builders to the customers by increase in rates.



**Input Tax Credit shall not be eligible and any available accumulated ITC balance also cannot be used for payment of such GST liability.**

A summary of the changes in GST in the real estate sector is as follows –

**1. New Notifications & Amendment in Rules -**

- A. Six Notifications No. 3 to 8/2019-Central Tax (Rate) all dated 29th March, 2019
- B. Six Notifications No. 3 to 8/2019-Integrated Tax (Rate) all dated 29th March, 2019
- C. Six Notifications No. 3 to 8/2019-UT Tax (Rate) all dated 29th March, 2019
- D. One Notification No. 16/2019 –Central Tax dated 29th March, 2019 amending the CGST Rules, 2017

**2. Summary of Effective rate of GST from 1st April 2019:**

- a. 1% in case of apartments under affordable housing,
- b. 5% for residential apartments, being non – affordable housing,
- c. 5% for commercial apartments in projects with commercial area not more than 15%.

Affordable Residential Apartment is defined to mean residential apartments with carpet area not exceeding 60 sqm in metropolitan cities [covering Bengaluru, Chennai, Delhi NCR, Hyderabad, Kolkata and Mumbai (whole MMR)] or 90 sqm in other places for which gross consideration does not exceeds Rs. 45 lakhs.

**3. Option:**

- A. This scheme mandatory for all new projects commencing from 1st April, 2019. For the ongoing projects, onetime option is given to continue with the existing tax structure and mechanism. In case the developer wished to continue with

the existing scheme, he had to opt for the same by filing the prescribed form on or before 20th May 2019. However the invoice that needs to be issued from 1st April 2019 onwards has to contain the rate as per the option exercised.

- B. The option of going into new scheme or continue with the existing scheme is based on the project and the said project is as per the meaning given for Real Estate Project under Real Estate Regulation Act (RERA).
- C. For the purpose of this scheme, projects have to be identified as Residential Real Estate Project (RREP) or others. RREP is a project in which carpet area of commercial premise is not more than 15%. Such project including the commercial portion shall be treated as a residential project and the concessional GST rate of 5% shall will be applicable even for commercial apartments also.
- D. In projects which are not RREP, the benefit of concessional rate will be applicable only to residential apartments and not for commercial apartments.

**4. Input Tax Credit & Procurements -**

- A. Input Tax Credit shall not be eligible and any available accumulated ITC balance also cannot be used for payment of such GST liability.
- B. On the ongoing projects, wherein the promoter who opts to the concessional rate from April 2019, attributable input tax credit of GST including transitional credit to the extent of GST become payable before April 2019 has to be worked out notionally. If the credit already availed is more than such credit worked out it has to be paid back immediately or on permission

in 24 instalments along with interest. On the other hand if the credit already availed is less than credit notionally worked out, the difference amount can be availed out of future purchases. However such credit availed cannot be used for making payment of tax at concessional rate, it can be used for any other supplies on which GST is payable.

- C. The existing ITC provisions have been amended to ensure that the ongoing projects would be required to reverse credit availed during the project execution from 1st July '17 or project commencement, whichever is later, to the extent of the units sold after completion certificate or first occupation, whichever is earlier.
- D. An additional condition is that 80% of the inputs and input services (except grant of development rights, long term lease of land or FSI, electricity, high speed diesel, motor spirit, natural gas) shall be procured from registered suppliers only (includes tax paid under reverse charge mechanism). All purchases of cement from unregistered persons shall be liable under reverse charge basis at the rate of 28%, which has to be paid monthly. Once such tax is paid it would be considered as procurement from registered person while computing 80%. In case of all capital goods purchased from un-registered persons by promoters, it would be liable for GST under reverse charge at the applicable rate of tax on such capital goods.
- E. In case of failure by the promoters any shortfall GST needs to be paid at the rate of 18% under reverse charge by the builder by 30th June of the next financial year, for a particular financial year.
- F. Project-wise account of inward supplies needs to be maintained for supplies procured from registered suppliers and unregistered suppliers. Such details are to be electronically submitted



on the portal before 30th of June of subsequent year in the prescribed form..

## 5. Joint Development Agreement –

- A. With respect to JDA (relating to residential real estate projects i.e. including projects where the commercial area is less than 15% of the total project area) entered into on or after 1st April, 2019, the Developer needs to pay GST on the built-up area handed over to Landowner (value shall be equal to the flats sold [registered] by developer to their customer nearest to joint development agreement) at the effective rate of 5% for apartments in case of non-affordable housing and effective rate of 1% for apartments in case of affordable housing. It has to be paid at the time of obtaining completion certificate. This liability would arise on the date of issuance of completion certificate or first occupation, whichever is earlier. GST so charged shall be eligible as ITC in the hands of the Landowner in case the said flats are sold prior to issuance of completion certificate.
- B. The GST w.r.t. the transfer of development rights or FSI given to the Developer for such JDAs would be exempt to the extent of the units sold by the Developer from his share, prior to completion certificate or first occupation, whichever is earlier, and to the extent of the units remaining unsold as on such date, the Developer would be liable under reverse charge mechanism.
- A. The JDA (relating to other projects) entered on or after 1st April, 2019 would also be liable under reverse charge mechanism and such liability would arise on project completion only.

## Changes in Income Tax in the Real Estate Sector in the Interim Budget 2019

- 1. Section 23 of the Income-tax Act has been amended so as to provide relief to the taxpayer by allowing him an option to claim NIL Annual value in respect of any 2 houses, declared as self-occupied, instead of 1 such house as currently provided.

A further relief has been provided to the tax payers that notional rent in respect of unsold inventory shall not be charged to tax upto 2 years, instead of existing 1 year, from the end of the financial year in which the certificate of completion is obtained from the competent authority.

Currently, income tax on notional rent is payable if one has more than one self-occupied house. Considering the difficulty of the middle class having to maintain families at two locations on account of their job, children's education, care of parents etc. the levy of income tax on notional rent on a second self-occupied house has been exempted.

2. Section 24 of the Income-tax Act has been amended to provide that the monetary limit of deduction on account of interest payable on borrowed capital shall continue to apply to the aggregate of the amounts of deduction in case of more than 1 self-occupied houses.
3. Section 54 of the Income-tax Act has been amended so as to provide relief to the taxpayers having long-term capital gains up to 2 crore rupees, arising from transfer

of a residential house, by affording the assessee a one time opportunity, at his option, to utilise the said amount for the purchase or construction of 2 residential houses in India instead of 1 residential house.

The benefit of rollover of capital gains will be increased from investment in one residential house to two residential houses for a tax payer having capital gains up to 2 crore. This benefit can be availed once in a life time.

4. Section 80 – IBA of the Income-tax Act has been amended so as to augment the supply of affordable houses by extending the time limit from 31st March, 2019 to 31st March, 2020 for obtaining approval of the housing project for availing deduction.

The main motive to amend this section was to make more homes available under affordable housing, for one more year.

5. Section 194-I of the Income-tax Act has been amended to rationalise the threshold limit from Rs 1,80,000 to Rs 2,40,000, for deduction of tax at source on rental income.

\* \* \* \* \*



**“In any market, in any country, there are developers who make money. So I say all of this doom and gloom, but there will always be people who make money, because people always want homes.”**

Sarah Beeny, English property developer and television presenter





## Recent Judgements related to Real Estate w.r.t. Goods & Services Tax (GST)

By **CA. Tarun Kr. Gupta**  
Chairman, Indirect Tax / GST Sub-Committee, ACAE

- 1. Developer needs to pass on benefit of ITC to home buyers** - Applicant filed application alleging profiteering by respondent in respect of purchase of flat in respondent's project 'East Crest' in Bangalore on ground that respondent had charged 12 per cent GST on 2/3rd of agreement value and 12 per cent GST on additional charges on which there was no Service Tax prior to GST and that benefit of Input Tax Credit (ITC) had not been passed on to him by respondent

by way of commensurate reduction in price of flat after implementation of GST with effect from 1-7-2017. It was held that respondent had failed to pass net benefit of ITC to tune of 1.45 per cent of taxable turnover post GST, which needed to be passed on to all home buyers who had booked flats prior to 1-7-2017 but made payments after 1-7-2017 and, thus, respondent had denied benefit of ITC to buyer of flats being constructed by him in contravention of provisions of section 171(1), where he had not only collected more price than entitled amount but also collected more GST on increased amount. [2019] 105 taxmann.com 362 (NAA) NATIONAL ANTI-PROFITEERING AUTHORITY, Sahil Mehta v. Salarpuria Real Estate (P.) Ltd.

- 2. Builder liable to profiteering if ITC is not passed on to buyers** - Where respondent builder's ratio of Input Tax Credit to taxable turnover during pre GST period was to extent of 0.61 per cent as compared to post GST period of 3.45 per cent thus, there was net

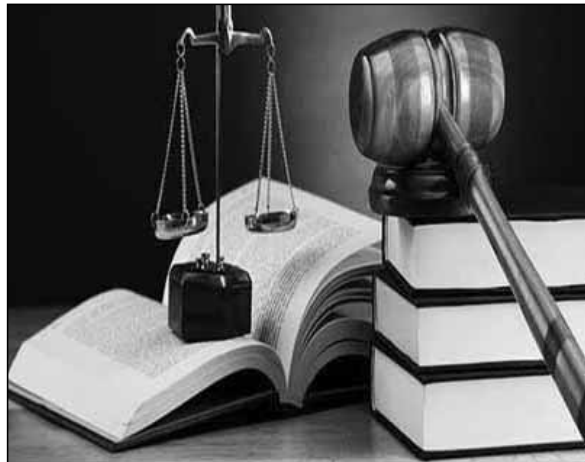
benefit of 2.84 per cent of ITC to respondent, however respondent had not reduced prices to be realised from buyers of flats commensurate with benefit of ITC received by him, he would be liable for profiteering. He had not only collected extra amount from buyers but also compelled them to pay more GST on additional amount realised. The act of the respondent appears to be deliberate and conscious violation of provisions of section 171 of the CGST Act, 2017. Thus, he had

committed an offence under section 122 of the CGST Act, 2017 and therefore, would be liable for imposition of penalty under provisions of section 122 the CGST Act, 2017. [2019] 105 taxmann.com 345 (NAA) NATIONAL ANTI-PROFITEERING AUTHORITY, Varun Goel v. Eldeco Infrastructure & Properties Ltd.

- 3. Input Tax Credit was not available for lease rent**

**paid during pre-operative period for leasehold land on which applicant was constructing resort to be used for furtherance of its business, when said lease rent was capitalized and treated as capital expenditure** –

The appellant was in the hospitality and real estate business. It had embarked on a project of starting a hotel and banquet. For the purpose of this project the appellant had taken land on lease from West Bengal Housing Infrastructure Development Corporation Limited (WBHIDCL) for 32 years on a lease premium with an annual lease rent at the rate of 10 per cent of the lease premium for the first two years, which would be escalated at the rate of 5 per cent per



annum in the subsequent years from the start of the third year over the last annual lease rent per annum. The project was proposed to be completed within a period of 2 years and the lease rent paid during the aforesaid pre-operative period was capitalized in the books of accounts by the appellant. The WBHIDCL charged GST at the rate of 18 per cent on the lease rent. The appellant sought an advance ruling on the question that whether credit was available on input tax paid on lease rent during pre-operative period for the leasehold land on which the resort was being constructed to be used for furtherance of business, when the same was capitalized and treated as capital expenditure. The West Bengal Authority for advance ruling pronounced its advance ruling that input tax credit was not available to the appellant for lease rent paid during pre-operative period for the leasehold land on which the resort was being constructed on his own account to be used for furtherance of business, when the same was capitalised and treated as capital expenditure. The appellant had filed the instant appeal against the above advance ruling with the prayer to set aside/modify the impugned advance ruling on the grounds that GST paid on input supplies during the pre-operative period were available even though the appellant was not providing taxable output supply. The premium paid by the appellant is exempted under Sl. No. 41 (SAC 9972) of Notification No. 12/2017-CT (Rate) dated 28-6-2017, as amended vide Notification No. 32/2017-CT (Rate) dated 13-10-2017 and Notification No. 23/2018-CT (Rate) dated 20-9-2018. Whereas lease rental paid by the appellant is taxable under Sl. No. 16 (iii) (SAC 9972) of Notification No. 11/2017-CT (Rate) dated 28-6-2017, as amended vide Notification No. 1/2018-CT (Rate) dated 25-1-2018. Lease premium and lease rental both are parts of the project cost, the former being one time fixed amount and the latter being a variable cost. Both lease premium and lease rental are classified under SAC 9972 being real estate services. As the lease premium paid by the appellant is exempted under Sl. No. 41 of the Rate Notification under GST Act on satisfaction of stipulated criteria the question of availing input tax credit does not arise. So the moot question is whether input tax credit on lease rental paid is available in the pre-operative period. It transpires from the facts that the appellant is constructing the eco resort on his own account in course of furtherance of its business of providing hospitality service, for which one of

the input service availed is lease rental service. The ambit of the blocked credit as per clause (d) of sub-section (5) of section 17 is broad as it includes such goods or services or both when used in the course of furtherance of business. So clause (d) of sub-section (5) of section 17 restricts the appellant from availing input tax credit on lease rental paid. [2019] 105 taxmann.com 248 (AAAR-WEST BENGAL) APPELLATE AUTHORITY FOR ADVANCE RULING, WEST BENGAL, GGL Hotel & Resort Company Ltd.

4. **Taxability of services e.g. preferential location of unit supplied with residential complex** - Where applicant is providing service of construction of a dwelling unit in a residential complex, bundled with services relating to the preferential location of the unit and right to use car parking space and common areas and facilities, it is a composite supply, construction service being the principle supply and entire value of the composite supply is, therefore, to be treated, for the purpose of taxation, as supply of construction service, taxable under Sl. No. 3(i) read with Paragraph 2 of Notification No. 11/2017-Central Tax (Rate) dated 28-6-2017. [2019] 105 taxmann.com 58 (AAR-WEST BENGAL), AUTHORITY FOR ADVANCE RULINGS, WEST BENGAL, Bengal Peerless Housing Development Co. Ltd.
5. **Eligibility to take benefit of input credit on GST, which has been paid for construction under section 17(5)(d)** - If assessee is required to pay GST on rental income arising out of investment made in construction of shopping mall on which he has paid GST, it is eligible to take benefit of input credit on GST, which he has paid for construction and restriction under section 17(5) (d) is not applicable. [2019] 105 taxmann.com 324 (Orissa), HIGH COURT OF Orissa, Safari Retreats (P.) Ltd., v. Chief Commissioner of Central Goods & Service Tax.
6. **Rate of GST applicable to an Affordable Housing Project** - Once a project qualifies as an Affordable Housing Project, the benefit of concessional rate of tax @ 12 percent would be available in respect of works contract services pertaining to Low Cost Houses, irrespective of it being supplied by the Developer or the Contractor - [2019] 105 taxmann.com 91 (AAR - MAHARASHTRA), AUTHORITY FOR ADVANCE RULINGS, MAHARASHTRA, Puranik Construction (P.) Ltd.
7. **Chargeability of GST on electricity bills** - Where

assessee operated a commercial complex and it obtained high-tension electric supply from Electricity Company and converted it to low-tension supply and supplied it to occupants of complex and thereafter raised bills on such occupants and realised electricity consumption charges from them, activity undertaken by assessee was a service exigible to service tax. [2019] 104 taxmann.com 225 (Calcutta), HIGH COURT OF CALCUTTA, Srijan Realty (P.) Ltd. v. Commissioner of Service Tax.

8. **Applicability of ITC on works contract used for warehousing service** - Where applicant is constructing a warehouse on a land taken on lease for 30 years using pre-fabricated technology, warehouse being constructed is an immovable property and input tax credit is not admissible on inward supplies for construction of warehouse, as credit of such tax is blocked under section 17(5)(d). [2019] 102 taxmann.com 295 (AAR-WEST BENGAL), AUTHORITY FOR ADVANCE RULINGS, WEST BENGAL, Tewari Warehousing Co. (P.) Ltd.

9. **Valuation of land in case of separate agreements** - Where applicant is involved in construction of apartment units on land owned by it and it has entered into two agreements with customers simultaneously-one for sale of undivided share in land and other for construction of super-structure, measure of levy of GST on supply of construction shall be two-third of total value charged for construction service and amount charged for transfer of undivided share of land. [2019] 103 taxmann.com 279 (AAR - TAMILNADU), AUTHORITY FOR ADVANCE RULINGS, TAMIL NADU, Kara Property Ventures LLP.
10. **Charging of GST on electricity charges provided on actual basis** – GST is levied on reimbursement of expenses from lessee by lessor at actuals and as reimbursement of expenses constitute composite supply, GST would be payable at a rate as applicable to principal supply. [2019] 104 taxmann.com 121 (AAR - MAHARASHTRA), AUTHORITY FOR ADVANCE RULINGS, MAHARASHTRA, E-Square Leisure (P.) Ltd.

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## Members at the Helm



**CA. Sumit Binani**  
– Appointed as  
Chairman of EIRC  
of ICAI for  
2019-20



**CA. Sushil Goyal**  
– Appointed as  
Chairman of Indirect  
Tax Committee,  
ICAI, New Delhi for  
2019-20



**CA Vinod Goyal** -  
Elected as Director  
of A.N.M.I. National  
Board for the year  
2019-20



**CA Arun Kumar Gupta**  
– Appointed as Secretary  
of Kolkata National  
Company Law Tribunal  
Bar Association for  
2019-20



## Joint Development Agreements – The Tax Conundrum continues

By **CA Dilip S Damle, FCA**  
Chartered Accountant



### **Introduction**

Joint Development Agreements (JDAs) is one of the favourite mode adopted by the real estate sector for development of real estate and civic infrastructure. JDA route is mutually beneficial both for land owners and developers. Under this arrangement the Developer is not required to make upfront investment in outright purchase of land and thereby he obviates the need to block his capital. At the same time the land owner can access the expertise and construction abilities of the Developer as well realise higher sale price from fully developed/constructed spaces rather than disposing off bare tracts of land at fractional value. In spite of the fact that JDAs is most favoured route followed by the parties in the Indian real estate market, the taxation of JDAs is still a conundrum which is yet to be satisfactorily resolved. Over the years much water has flown under

the bridge and with varying JDA structures being devised and executed by parties, the disputes between the tax payers and the tax administration have multiplied over the years and there being numerous interpretations by the Tribunals and the Courts with regard to taxing provisions, the problems for the tax paying assessee have multiplied over the years rather than there being clarity on various issues connected with JDAs. The issue of taxation of profits, arising from JDA transactions, therefore has provided lot of challenging professional opportunities to tax practising fraternity in the recent years.

Commonly, the JDAs provide for payment of consideration to the land owners either (a) on the basis of area sharing

or (b) by way of share in the revenues. In the 'area sharing' arrangements, JDAs provide that demarcated specified constructed spaces to be handed over by the Developer to the Land Owner upon completion of the project. In 'revenue sharing' arrangements, JDAs lay down the manner in which the proceeds derived from sale of the constructed spaces to intending purchasers shall be shared between the land owner and the developer. The questions for our consideration in such arrangements is the point of time at which the liability to pay income-tax arises and the manner in which the consideration is required to be computed. In this article an attempt is made to list out certain important issues connected with determination of tax liability in the hands of the land owners under the JDAs.



### **Point of Taxation**

The point of time at which the liability of the land

owner to pay tax on the profits generated from JDA is most debatable issue which has engaged attention of various judicial authorities. Ordinarily the land owner holds the "land" by way of "capital asset". Accordingly the tax liability in the hands of the land owner is assessable under the head 'Capital Gains'. In order to determine the year of taxability, the material event is the 'transfer' of the capital asset. The expression 'transfer' is defined in Section 2(47) as follows:

*"transfer", in relation to a capital asset, includes,-*

- (i) *the sale, exchange or relinquishment of the asset; or*
- (ii) *the extinguishment of any rights therein; or*

- (iii) *the compulsory acquisition thereof under any law; or*
- (iv) *in a case where the asset is converted by the owner thereof into, or is treated by him as, stock-in-trade of a business carried on by him, such conversion or treatment; or*
- (v) *any transaction involving the allowing of the possession of any immovable property to be taken or retained in part performance of a contract of the nature referred to in section 53A of the Transfer of Property Act, 1882 (4 of 1882); or*
- (vi) *any transaction (whether by way of becoming a member of, or acquiring shares in, a co-operative society, company or other association of persons or by way of any agreement or any arrangement or in any other manner whatsoever) which has the effect of transferring, or enabling the enjoyment of, any immovable property."*

The applicable sub-clause in the context of JDA is Section 2(47)(v) of the Income-tax Act, 1961 read with Section 53A of the Transfer of Property Act, 1882 ('TOPA'). On harmonious reading of Section 2(47)(v) with Section 53A, the judicial view is that the 'transfer' of the "capital asset" takes place when the Land Owner hands over the possession of the premises to the Developer and permits the Developer to enter the premises and do the necessary things for construction of spaces and also allows the Developer to enter into agreements for sell with the intending purchasers. However in such case the dilemma which the Land Owner faces is that he is called upon to pay the tax on the "capital gain" which he has not realised either in cash or in kind. The difficulty which the land owner faces in such situation is that even without the consideration in kind being not in existence, he is legally compelled to pay tax on a hypothetical consideration which the Developer has promised to deliver in future.

The legal view that the 'transfer' of the capital asset takes effect upon handing over possession of the land in part performance of the JDA was first canvassed by the Hon'ble Bombay High Court in the case of Chaturbhuj Dwarkadas Kapadia Vs. CIT (260 ITR 491). The view expressed by Justice S.H. Kapadia (as he then was) in this celebrated decision was thereafter followed by most judicial forums.

It is however pertinent to mention that the judgment of the Hon'ble Bombay High Court was rendered in the context of the JDA transaction which was executed prior to the period when the amendment was made to Section 53A of the TOPA in 2001. By the Amendment of 2001, Section 53A

of the TOPA provided that the deemed transfer qua the transferor can be construed only if the agreement for sale is registered in terms of the provisions of Indian Registration Act. The applicability of the amended provisions of Section 53A in the context of JDA and Section 2(47)(v) of the I.T. Act, 1961 was considered by the Hon'ble Supreme Court in the recent judgment in case of CIT Vs Balbir Singh Maini (398 ITR 531). In this judgment the Hon'ble Supreme Court held that unless the JDA between the land owner and the developer is registered in terms of Indian Registration Act, the liability to pay tax on capital gain does not arise in the hands of the transferor upon mere execution of JDA. In view of this judgment of the Hon'ble Apex Court it is now well settled that no tax liability can be fastened in the hands of the land owner at the time of execution of the JDA followed with delivery of possession, if the JDA with the Developer is not registered. In such cases therefore the liability to pay tax on capital gains can be said to arise only when the agreement is performed and the Developer physically hands over Land Owner's share in the constructed space in part performance of the JDA.

There is yet another angle added by the Legislature in the context of year of taxability under JDA where the land owner / transferor is an individual or HUF. Sub-Section (5A) was inserted by the Legislature in Section 45 with effect from 01.04.2017 which now provides as follows:

*"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 :*

**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**



**As regards the JDAs providing for revenue sharing arrangement, the question arises as to when the transfer of the capital asset takes effect and when will the liability to pay tax arise in the hands of the Land Owner / Transferor.**

*accruing as a result of such transfer.*

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.”*

A bare perusal of this provision shows that it is applicable only to assesseees who are individuals and HUFs, and not to other “persons”. The Legislature has thus artificially provided for distinct “taxable events” depending on the classification of “person” so as to attract charge of tax arising from JDA. As can be seen from provisions of Section 2(47) read with Section 45 of the Act, for attracting charge of tax on capital gains, the taxable event is ‘transfer’ of the “capital asset”. Save & except the land and building which is subject matter of transfer under JDA, in respect of the remaining “capital assets” the taxation provisions relating to capital gains are applicable to all “persons” uniformly. The Act has not created any artificial distinction as regards “taxable event” depending on the status of the “person”. It is only in the case of land & building held by the individuals or HUFs, the Act has however provided that the charge of tax on JDA stands deferred upto completion of the project

whereas in all other cases the Act is silent. The corollary which seems to flow from the language employed in S 45(5A) therefore is that in the case of ‘persons’ other than individual and HUF the ‘transfer’ in relation land and building which is subject matter of a JDA occurs upon execution of the JDA followed by the handing over of its possession. In this context there is a likelihood that there may be a challenge to the legality of this provision because it is ex-facie discriminatory in nature or that the interpretation of the point of taxation of the JDAs may be extended to non-individuals as well.

As regards the JDAs providing for revenue sharing arrangement, the question arises as to when the transfer of the capital asset takes effect and when will the liability to pay tax arise in the hands of the Land Owner / Transferor. In the celebrated judgment of the Hon’ble Supreme Court in the case of B.C. Srinivasa Shetty Vs CIT (128 ITR 294); it was held that the charging provisions and computation provisions together constitute complete code and therefore in absence of computational provisions governing the manner in which income is to be computed, the charge of tax fails. For determination of charge of tax on capital gains, it was held that the existence of capital asset, its cost of acquisition and consideration for transfer must exist and these should be quantifiable in monetary terms at the time of transfer. In the case of JDAs providing for revenue sharing arrangement, no consideration passes from the Developer to the Land Owner. The JDAs provide for an arrangement under which the Owner merely permits the Developer to enter upon his land and construct civil structure on the Land at Developer’s own cost. It also provides that as and when the constructed spaces are sold and/or otherwise transferred to the intending purchasers, the sale proceeds or other revenues generated from the developed/ constructed spaces would be shared between the Developer and the Land Owner in the agreed proportion. However such consideration becomes receivable by the Land Owner at

much later point in time after the JDA is executed and the possession is delivered to the Developer for carrying out development obligations. In the circumstances since at the point of delivery of possession the consideration is absent, one can certainly say that computational provisions fail and consequently therefore the charge of tax under Section 45 also fails. In such cases however the issue still remains open as to what point in time the liability of the land owner arises or accrues to pay tax on capital gains under Section 45 of the Act.

It is a standard practice in real estate sector that once the construction of the new building commences then the Developer enters into agreements for sell with prospective buyers who agree to pay the agreed consideration amount in installments linked with performance of the work onsite. As such with progress of work, the flat purchasers pay the agreed consideration to the Developer and in most of the cases such consideration is paid over fairly long period of time which encompasses more than two financial years. Under such agreements the flat purchasers make progressive payments from time to time which under the JDA gets shared between the land owner and the Developer in the agreed proportion. The Developer being in the business of real estate development is permitted to recognize revenue and pay tax either on percentage completion method or project completion method. The Developer has thus flexibility under the Act to account the income and pay tax with reference to method of accounting followed by him under Section 145 of the Act. In the hands of the land owner however the income is chargeable to tax under the head 'Capital Gains' and method of accounting is of no consequence in determining the year of taxability. The incidence of tax on capital gains is inextricably linked with the 'transfer' of the capital asset and therefore the question arises as to when the liability to pay tax on capital gain accrues or arises in the hands of the land owner under the JDA involving revenue sharing arrangement. One school of thought provides that since on receipt of consideration on progressive basis the land owner proportionately transfers his interest in land, the capital gain will accrue proportionately. The alternative view is that the entire capital gain shall accrue in the year which the possession of the completed flat is delivered to the flat purchaser in terms of the agreement for sale which the land owner executes jointly with Developer in favour of the flat purchaser. There is yet another proposition put forth by counsels is that the capital gain will arise only in the year in which the relevant conveyance is executed by the land owner in favour of the purchaser. This issue is however open to much debate in

absence of any clarity in law.

#### ***Valuation of JDAs***

The valuation of the consideration involved in JDAs is yet another area of dispute and litigation between the tax payers and the tax authorities. Let us first consider the area sharing arrangements. In case of registered JDAs involving area sharing, the first question that arises is whether provisions of Section 50C are applicable. There is divergence of judicial view with regard to applicability of Section 50C of the Income-tax Act, 1961 in connection with JDA. Admittedly under the JDA, the rights of ownership remain with the land owner and the Developer is granted license to enter and construct a new building at his own cost. Under the JDA thus only certain rights reletable to land owned by the land owner are granted in favour of the Developer. Since Section 50C of the Act is a deeming provision of the statute, it needs to be construed strictly. Section 50C provides for deemed full value of consideration where the subject matter of transfer is a capital asset being land and/or building. Any rights in or associated with land and/or building are different in law from the capital asset being land and building proper. In this context therefore judicial forums have held that Section 50C is applicable only when the subject matter of transfer is land or building in strict sense and not rights in or associated with land or building. If such view is entertained then the value adopted by the stamp duty authorities cannot be made the sole basis for determination of the value of consideration.

There is any yet another aspect with regard to stamp duty valuation. The intent and object of State registration authorities is to collect stamp duty on the instruments of transfer and for that purpose the stamp duty authorities determine the value of the entire property since under the JDA mutual assurances are given by the parties which are reduced into an instrument. In other words even though under the JDA involving area sharing or revenue sharing, the Land Owners agree to transfer only part of their right, title & interest in Land in favour of the Developer yet the stamp duty authorities evaluate the entire property for the purposes of stamp duty. In the circumstances therefore question arises as to on what basis the consideration for the land owner is determined when for stamp duty purposes the value of the entire property is taken into consideration. This problem further gets accentuated where the registration authorities evaluate the property before registration but the stamp duty is collected at the flat rate. For instance, in the State of West Bengal the stamp duty in respect of JDAs is collected at uniform rate of

Rs.75000/- per instrument where value of property exceeds Rs.300 lacs. The minimum stamp duty is however fixed at Rs.50,000/-. In such scenario since the stamp duty payable is not dependent on the value of the property, there is no provision for the parties to even dispute the valuation of property made by the registration authorities. However if the tax liability of the land owner arising from such JDAs is linked with such arbitrary valuations which have no bearing on actual payment of stamp duty then it leads to avoidable litigation.

Under JDAs, involving area sharing arrangement, the Developer incurs the cost of construction in respect of the Owner's share in the new construction. As such the cost of construction borne or to be borne by the Developer in respect of the Owner's Allocation is the consideration which actually flows from transferee's coffers and therefore that is the fair indicator of the consideration which is actually paid by the transferee.

However under Section 45(5A) of the Act, radical changes have been brought about with regard to valuation of consideration where individual or HUF receives developed areas under JDA. As can be seen from the language employed in Section 45(5A), upon completion of the project, the value of consideration is taken to be the stamp duty value of the area allocated under the JDA in favour of the land owner. However this provision has one anomaly. It is universally known fact that cost of construction in any given city will more or less be same for given construction specifications. However the market value of the completed constructed area substantially varies depending on the value of underlying land on which the building is constructed. When the stamp duty / circle rate of the property is adopted as the basis for determination of consideration, such value substantially represents the value of land on which the building is constructed. Admittedly in the case of JDA, the Owner's share in the completed building includes not only the value of the constructed space but also the proportionate interest in land attributable to the area delivered to the land owner as his allocation. However since the land owner never transfers his interest in land attributable to area allocated as Owner's share, he is called upon to pay the tax on the value of land which is not subject matter of transfer under JDA.

As regards the determination of consideration under revenue sharing arrangements; as already discussed in the foregoing, the valuation of the consideration involved is indeterminate at the point at which the JDA is executed and Developer is permitted to enter upon the property

to construct. Ordinarily in the case of revenue sharing arrangements if the tax collection is deferred until the area gets actually sold, the consideration should be the price at which the Developer and Land Owner mutually agree to transfer the constructed space to the buyer and therefore there should not be any dispute with regard to determination of consideration. However in many instances the Revenue Authority in its enthusiasm to collect the tax at the earliest point in time, requires the land owner to pay the tax in the year in which the JDA is executed and the possession is delivered. In such cases drawing strength from Section 50D of the Act, the fair market value of the land/property is considered as the full value of consideration and the tax is sought to be collected in the year in which JDA is entered into. However in such cases a very serious issue of taxation arises in future years when the Land Owner actually realizes his share under the JDA. In such cases the actual consideration ultimately received is either higher or lower than the market value estimated at the time of execution of JDA. If the consideration actually received in future is higher, then the tax authorities do not have any recourse for levy tax on the higher realization because in such later years there being no transfer of capital asset, the charge of tax fails.

There is yet another controversial issue connected with taxation of capital gain in the hands of the land owner under revenue sharing arrangement which concerns application of Section 50C of the Act. Under Section 50C, the full value of consideration in relation to transfer of land & building is deemed to be the value adopted by the State authorities for payment of stamp duty. Under the revenue sharing arrangement, the question arises as to in whose hands provisions of Section 50C or Section 43CA will be made applicable. Whether they will be applied only to the land owner or only to the Developer or whether it can be applied to both on pro-rata basis. Yet again the year of taxability will also be another contentious issue.

### **Conclusion**

In the foregoing paragraphs, a feeble attempt has been made to draw attention of the readers to various contentious issues which are involved in determining tax liability of the parties to the JDAs. These questions have been posed for the consideration of readers in the hope that in the forthcoming seminar, the Members shall have in-depth discussion on the issues raised. The Members are also welcome to put forth their own views on the issues mentioned in the Article as also the issues which they may raise on analyzing the provisions of the Act.

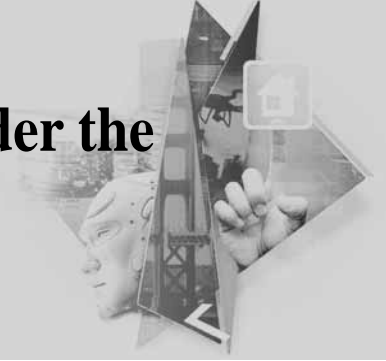
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## Income from Renting of Real Estate-taxability under the Income-tax Act, 1961

By **CA Ramesh Kumar Patodia**  
Chairman, Direct Taxes Committee, ACAE



1. The Real Estate Industry in India has come of age and with the gradual opening up of the economy allowing participation of foreign players in the market, the market is gradually expected to perform better in the coming days with uncertainty regarding the elections and its outcome having gone. It is expected that the Budget for the year 2019 is going to give tax holiday benefits to those in Real Estate Rental Sector so as to give a boost to the sector as a whole and thereby leading to all round benefits to the economy. The country is booming with the constructions of Malls, Hospitals, Hotels and Shops etc. Rental Income is an important source of income for all real estate players throughout the country.

2. A question arises as to how the Rental Income of a Real Estate Company or an entity is to be taxed- Is it to be taxed under the head "Income from Business or profession" or under the head "Income from House Property". This question arises because there is a specific head "Income from House property" which as the nomenclature itself suggest seeks to bring within its ambit any income from house property. In such a situation, where a real estate player who may be in the business of renting of real estate either belonging to its own or after taking the same on rent, the taxability under a particular head becomes important. A question may arise as to how the head becomes relevant- the answer lies in the fact that the manner of computation of income prescribed under both the heads of income are different and at

times, it may be beneficial for a person to try to offer the income for taxation under the head Income from House Property whereas it may prove to be beneficial for a person to offer the income under the head Income from Business.

The reasons are not far and can be understood with the help of the statutory provisions in this regard:-

### **Statutory Provisions**



### **Income from House Property**

3. The provisions are contained in in Section 22 to 27 of Chapter IV-C of the Income-tax Act 1961. Section 22 states that "the annual value of property consisting of any buildings or lands appurtenant thereto of which the assessee is the owner other than such portions of such property as he may occupy for the purpose of any business or

profession carried on by him the profits of which are chargeable to income-tax shall be chargeable under the head "Income from house property".

Section 23 deals with the manner in which the annual value is to be determined.

Section 24 deals with deductions from Income from house property. The way this section has been structured, there are limited deductions which are allowed while computing income from house property which contains a standard deduction of 30% of the annual value as per section 24(a) and deduction towards interest on loan where the property has



**The question therefore arises as to how to distinguish an income as to whether it is to be offered under the head Income from house property or under the head Income from Business**

been acquired, constructed, repaired, renewed or reconstructed with borrowed capital, the amount of any interest payable on such capital. There are certain restrictions prescribed in Section 24(b) in relation to the claim of interest on borrowing.

Thus, an assessee having income from house property is eligible for these two limited deductions while computing the Income from house property.

Section 25 deals with Amounts not deductible from Income from house property. Section 25A deals with Special provisions for arrears of rent and unrealized rent received subsequently. Section 26 deals property owned by co-owners and Section 27 defines "Owner of house property", "annual charge" etc.

For the sake of brevity these sections have not been reproduced.

**Income from Profits and gains of business or profession**

4. The provisions are contained in Sections 28 to 44DB of Chapter IV-D of Income-tax Act, 1961. The said provisions are elaborate and deal with various deductions which are allowed while computing the income under the head Profits and gains of business or profession which inter alia includes interest on borrowed capital which is also allowed while computing income from house property as seen above albeit subject to certain limitations in certain cases.
5. It therefore appears that an income which is declared under the head Income from House property, the assessee is eligible straight away to get a standard deduction of 30%. Even though there is no actual expenditure incurred and thus the cash flow of the said assessee is substantially increased assuming tax rate to be 30%. However, in case the same income is

declared under the head Income from Business, this standard deduction is not allowable, though other expenses incurred are allowable.

6. The question therefore arises as to how to distinguish an income as to whether it is to be offered under the head Income from house property or under the head Income from Business since the manner of taxation under the both the heads is materially different and there is a perennial fight between the assessee and the department to try to tax the same in a manner which is beneficial to them.
7. The issue has been subject matter of litigation from time to time and the Apex Court had the occasion to deal with the same in various decisions.
8. The Apex Court recently in the case of PCIT Vs E City Real Estate (P) Ltd(2018) 100 taxmann.com 94(SC) granted leave to the department against the decision of the Bombay High Court in the case of CIT vs E-City Project Construction Private Ltd (2018) 100 taxmann.com93 (Bom) where the Bombay high court had dismissed the appeal of the department in a case where the assessee had disclosed the income from business of leasing and rentals of property as business income in accordance with the policy consistently followed in earlier years. The court noted that the principle of res judicata is not applicable to income-tax proceedings and as such the manner in which the income was taxed in earlier years was of no avail, though it can be of some guidance. The Court also noted that *no straight jacket formula can be laid down to conclude as to an income being an income from house property or business income. The same will have to be decided based on facts existing in each case.* The court referred to the following earlier decisions of

the apex court and held that as the intention of the assessee was to exploit commercially the property by way of complex commercial activities and it was not a case of letting out the property simplicitor and the rental income and the service charges thus were received by the assessee company as business income during the course of business carried out by them of operating and running a Mall as a commercial activity.

- i) Sultan Bros Private Ltd Vs CIT(1964) 51 ITR 353(SC)
- ii) Shambhu Investment (P) Ltd Vs CIT(2003) 263 ITR 143(SC)
- iii) Chennai Properties & Investments Ltd Vs CIT(2015) 373 ITR 673 (SC)
- iv) Raj Dadarkar & Associates vs Assistant CIT(2017) 394 ITR 592(SC)
- v) Rayala Corporation (P) Ltd vs Asstt CIT (2016) 386 ITR 500(SC)

In spite of so many authorities relied upon, the apex court granted leave and this only proves that the facts of each case has to be considered and there cannot be any straight jacket formula.

9. Now let us consider the above supreme court judgements as well as some other judgements in order to further understand the guiding principles in this regard in the paragraphs to follow.
10. The constitution bench of supreme court in the case of Sultan Bros Private Ltd Vs CIT(supra) was dealing with an assessee who had after constructing a building fitted up with furniture & fixtures for being run as a hotel let it out for being run as a hotel with a monthly rent for the building and a separate monthly rent for furniture & fixture. The assessee contended that the income was taxable under the head Business or in the alternate it was chargeable under the head Other sources. The court noted that the reason for the preference of the assessee to claim taxation under the head business income was that it would be entitled to much larger allowances as



deductions in the computation of income then it would be eligible under other heads of income. The assessee argued that letting out of a commercial asset is a business and the assessee having let out the hotel, it was a business. The apex court observed that *whether a particular letting is business has to be decided in the circumstances of each case. Each case has to be looked at from a businessman's point of view to find out whether the letting was done of a business or the exploitation of his property by an owner. A thing is by its very nature not a commercial asset. A commercial asset is only an asset used in a business and nothing else, and business may be carried on with practically all things. Therefore it is not possible to say that a particular activity is business because it is concerned with an asset with which trade is commonly carried on.* The apex court also noted the decision of East Indian Housing and Land Development Trust Ltd Vs CIT(1961) 42 ITR 49(SC) where it was observed that *the income derived by a company from shops and stalls is income received from property and falls under the specific head Income from house property. The character of that income is not altered because it is received by a company formed with the object of developing and setting up markets.* After noting the covenants of the lease, the court held that income from the leasing or letting out of the building to be run as a hotel simplicitor cannot be held to be a business income and had to be taxed under the head income from house property, though the rental income for the furniture and fixtures was to be assessed under the head income from other sources with corresponding deductions towards depreciation etc.

11. The apex court in the case of Shambhu Investment (P) Ltd Vs CIT(supra) in a short judgement found no reason to interfere with the conclusion arrived by the Calcutta High Court from which the case arose as reported in CIT Vs Shambhu Investment Pvt Ltd (2001) 249 ITR 47(Cal) wherein the Calcutta high court held that *merely because income is attached to any immovable property, that cannot be the sole factor for assessment of such income as income from property. If the main intention of the*

*assessee is to let out the property or any portion thereof the income must be considered as rental income or income from property whereas if the primary object is to exploit the immovable property by way of complex commercial activities, in that event it must be held as business income.* The Calcutta high



court in this case examined several decisions including the decision of the supreme court in the case of CIT Vs National Storage Pvt Ltd (1967) 66 ITR 596(SC) where the apex court held the income from letting out of a film laboratory to be business income since the letting was a complex one.

12. In the case of Chennai Properties & Investments Ltd Vs CIT (supra), the apex court in a case where the appellant's main object was to acquire certain properties in the city of Madras to let out such properties and earn rent from the same. The Apex Court noted the following points:-

- i) The assessee had no other income except the income from letting out of the properties;
- ii) The main object of the company was holding the subject properties and earning income from letting out those properties;

The Court besides referring to the case of Sultan Brothers (supra) referred to an earlier decision in the case of Karanpura Development. Co Ltd Vs CIT(1962) 44 ITR 362(SC) where it was pointed out that the deciding factor is not the ownership of land or leases but the nature of the activity of the assessee and the nature of the operations in relation to them. It was also observed that the objects of the company must also be kept in mind to interpret the activities.

Ultimately the apex court held that the income was to be taxed under the head income from business.

13. In the case of Rayala Corporation Pvt Ltd Vs ACIT(2016) 386 ITR 500(SC), the apex court noted that admittedly the assessee had only one business and that was of leasing its property and earning rent therefrom. The business of the company

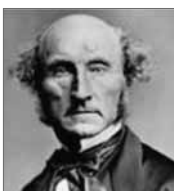
was to lease its property and to earn rent therefrom. In such circumstances the court held that the income was to be treated as business income.

14. Again the apex court in the case of Raj Dadarkar and associates Vs ACIT(2017) 394 ITR 592(SC) after referring to all the above judgements, held that the income from operating Saibaba Shopping centre was to be taxed under the head Income from House property since the Tribunal had recorded a finding that the assessee had not established that it was engaged in any systematic or organized activity of providing service to the occupiers of the shops or stalls so as to constitute business income. The Apex Court declined to interfere with this finding of the tribunal as the findings of ITAT were not challenged as being perverse before the High Court.

### Conclusion

Thus, from the catena of judgements referred to hereinabove right from the decision in the case of Sultan Brothers(Supra) to E City Real Estate (P) ltd (supra), it can be seen that there is no straight jacket formula to determine the head of income in which rental income is to be taxed and each case has to be decided on its own fact as held and in such a situation the never ending disputes between assessee and department continues with each one of them trying to extract its own pound of flesh in the form of taxes.

\* \* \* \* \*



**“Landlords grow rich in their sleep without working, risking or economising.”**

John Stuart Mill, English philosopher and economist



# Capital Gains pursuant to Joint Development Agreements: Section 45(5A)

CA Aditya Dhanuka

CA Namrata Jodhani



A joint development agreement (JDA) is an arrangement wherein a landowner, who contributes land, allows a developer, who develops that land, to construct a real estate project, in consideration of a share in such project in the form of either a portion on the developed area or monetary consideration (generally called revenue sharing). The developer doesn't purchase land from the landowner. Once the structure is constructed, the developer finds the buyer and enters into an agreement to sell with the buyer wherein landowner is the consenting or confirming party.

In case of area sharing agreements, there was always a dispute between the landowner and taxman in relation to the taxability of the transaction. Thereby,

number of court decisions were made, which usually held that tax is applicable on the hands of the landowner on entering the JDA. This interpretation was based on Sec. 2(47)(v) defining transfer as 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 Sec. 53A of the Transfer of Property Act, 1882.

This raised a lot of difficulties in the hands of the landowner as the tax implication arose at the time of entering the JDA, however, the consideration would be received by him at a future date.

Accordingly, Sec. 45(5A) was introduced vide Finance Act, 2017 as under, effective Assessment Year 2018-19, for computation of capital gain, in the year in which the developed area is received against the transfer of land in

relation to JDA.

*“(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 :*

**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.”**

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.]

### Objective behind insertion of section

To reduce the genuine hardship in case of an assessee being Individual or HUF who enters into a specified agreement for development of a project, so that the capital gain is chargeable to income-tax as income of the previous year in which the CC (Certificate of completion) for the project (whole or part) is received by competent authority and not in the year in which the possession of immovable property is handed over to the developer for development of the project through a JDA.

Correspondingly, 194-IC was also inserted vide Finance Act, 2017, effective Assessment Year 2018-19 as under:

*“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.”.*

Therefore, developer shall, while making payment / crediting consideration to the account of landowner under JDA is required to deduct tax at source @ 10% of such consideration payable (not being consideration in kind).

### Condition to be fulfilled for application of Section 45(5A):

- The assessee has to be an individual or an HUF.
- Capital gain arises in the hand of the assessee from transfer of capital asset.
- The capital asset should be land or building or both
- The transfer should be made under specified agreement.

- The consideration for the assessee should consist of share in land or building or both.
- The transfer of assessee’s share in the project should not take place on or before date of issue of CC for the whole or part of project as issued by competent authority.

### The provisions of section 45(5A) do not apply in the following cases:

- Joint development agreements executed by two developers who are holding land and building as stock in trade; it applies only when the same is held as capital asset.
- A tenant who receives constructed area from the developer. The assessee should be “owning land or building”.
- Transfer of lease hold interest in land or building.
- Where the assessee transfers his share in the project on or before the date of issue of the certificate of completion.

### Will section 45(5A) apply to revenue sharing agreements?

Based on the definition of specified agreement in section 45(5A), a revenue sharing agreement would not form part of consideration, since part consideration in cash is included but not entire consideration.

### Will section 45(5A) apply in case of only a contract to construct and to a contractor?

The provision applies only if the assessee has received land or building or both in the project as his share. The word “share” suggest that a part of the total developed area is retained by the buyer. In other words, the provision will not apply to an individual or HUF who gets the entire land developed & retains it (as this, any ways would be a works contract agreement and not a JDA). In such a scenario, capital gains would arise as and when the assessee transfers the whole or part of the developed asset.

The section is applicable only if the owners allows another person to develop a real estate project. Following judicial references are relevant in this connection:

#### 1. **Arihant Heirloom v. ITO (2017)**

In the above case law, it has been referred that “developer” is a person or company that designs and creates new products, whereas “contractor” is a person or a company that has a contract to do work or provides services or goods to another.

If the developer along with the designing of the project executes the construction work, he will be considered to be working in the capacity of the contractor too.

2. **Modern Construction Co (P) Ltd v. Dy. CIT (2014)**

A developer is a person who undertakes the responsibility to develop a project and is, therefore, not a civil contractor simpliciter. A developer has to execute both managerial as well as financial responsibility. A developer is under obligation to design the project. He has not only to execute the construction work in the capacity of a contractor but also, he is assigned with the duty to develop, maintain and operate such project. To ascertain whether a civil construction work is assigned on development basis or contract basis can only be decided on the basis of the terms and conditions of the agreement

**Whether benefit of reduction in stamp duty value (SDV) is available under sec 45(5A) like 50C (2):**

Sec 45(5A) speaks about capital gain payment on stamp duty value, wherein stamp duty value has been defined as under:

*“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.]*

The definition above speaks about value to be adopted or assessed or assessable by statutory authority. Unlike Sec

50C wherein assessee can claim before Assessing Officer (AO) that the SDV exceeds the FMV (fair market Value) of the property & the AO may refer the matter to the valuation officer for valuation, no such safeguard / reduction in stamp duty value is present under sec 45(5A).

**Few other open issues in 45(5A)**

- The application of this section only to individuals and HUFs and not to other assessees will continue to bear the hardship of payment of taxes to other assesses at the time of executing the agreement itself.
- Indexation benefit whether available in the year of receiving Completion certificate or in the year of executing agreement is not clear.
- Section 45(5)(A) overrides section 45(1), therefore does it also override the exemption under section 54 etc. as stated in section 45(1)?
- If exemptions are allowed, then while time limit for payment of taxes has been extended vide this section, however exemption from Long term capital gain under sec 54 / 54F is counted from date of transfer only.

This insertion is a welcome change as it brings about an important reprieve to the concerned assessees and removes the confusion in relation to determination of taxable event as well as taxable value. However, considering the limited applicability and some open areas, it would be a major relief if the legislature could also address the same and bring about necessary clarifications.

\* \* \* \* \*



**“Buying real estate is not only the best way, the quickest way, the safest way, but the only way to become wealthy.”**

Marshall Field, American entrepreneur and the founder of Marshall Field and Company, the Chicago-based department stores



## Winner also do Loss Something.....

CA. Vinod Agrawal  
(FCA,FCS,ACMA,DISA)  
Chairman- Vinod Positive Foundation



I was jogging in the morning and noticed a person about half a km ahead, who was running a little slower than me and that made me feel good, I decided to catch up him and started running faster and after just a few minutes I was only about 100 feet behind him, so I further paced my speed and finally I could pass him. Inwardly, I felt very good. "I beat him".

Of course, he didn't even know we were racing.

After I passed him, I realized I had been so focused on competing against him that .....

I had missed...  
my turn to my house,  
focus on my inner peace,  
to see the beauty of greenery around,  
to wish my friends crossing me  
to do my inner soul searching meditation,  
and in the needless hurry stumbled and slipped thrice and might have hit the sidewalk and could broken my limb.

It then dawned on me, isn't that what happens in life when we focus on unnecessary competing with co-worker, neighbour, friend, family, trying to outdo them or trying to prove that we are more successful or more important and in the bargain we miss on happiness within our own surroundings?

We spend valuable time and energy running after for undesirable things and miss out on our own path to real destination.

The biggest problem with unnecessary competition is that it's a never ending cycle.

Please accept this very very important fact of life that.....

### IN YOUR LIFE

There will always be somebody ahead of you,  
someone with a better job,  
nicer car,  
more money in the bank,  
more education,  
a prettier wife,

a more handsome husband,  
better behaved children,  
better circumstances or less peoblem  
But one important realisation is that

**You can be the best that you can be, when you are not competing with anyone.**

Some people are insecure because they pay too much attention to

What others are doing?, Where he/she is going ,wearing and driving?, What others are talking?.

### BUT MY HUMBLE ADVICE TO MY PROFESSIONAL FRIENDS

Enjoy Whatever you have - height, weight and personality.  
Accept it and realize that you are blessed with many things which others do not have .

Stay focused and live a healthy and content life.

There is no competition in Destiny. Each has his own destiny and journey.

Travel on your own path for steady, peaceful and happy life

Comparison is the thief of your joy and happiness.It kills the Joy of Living your Own Life.

**George Benuard Shaw**, GREAT PHILOSPHAR, also supported above realisation.

**"TO BE SATISFIED WITH YOUR POSSESSION IS THE GREATEST WISDOM AND A COTENT MIND IS ONLY A REAL TREASURE."**

### SOME INTERESTING FACTS

- Initial four Alaphabet of English language - A,B, C,D do not appear from 1 to 99 numbers
  - D is first time used when one writes "Hundred"
  - Alaphabet A,B,C do not appear from 1 to 999
  - Alaphabet A is used first time when one writes "Thousand"
  - Most surprising B & C is not used from 1 to 999999
  - Alaphabet B is used first time in writing "Billion"
- And MOTHER OF ALL SURPRISE - Alaphabet C is never used in writing a number WHATSOEVER.

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# A

# Well Wisher

◆ Seminar on Audit of Bank Branches (1) Using Excel and IT System in Audit of Bank Branches, (2) Planning, Sampling and Documentation in Bank Branch Audit, (3) Prudential Norms on Income Recognition, Asset Classification and Provisioning pertaining to Advances – Critical Aspects held at Emami Conference Hall (ACAE) on Friday, the 15th March, 2019 ◆



(L-R) CA Vivek Agarwal, Chairman-Accounts & Audit Sub-Committee, Guest Speaker CA D S Premnath, Partner, C Ramachandram & Co., Hyderabad, CA Jitendra Lohia, Vice President and Speaker, CA Ajay Agrawal.



Past President CA Chirajit Goswami presenting memento to Speaker CA Abhijit Bandhyopadhyay.

◆ ACAE Outing held at Holiday Inn Resort, Uluberia on Saturday & Sunday, the 23rd & 24th March, 2019 ◆



Group Photograph of ACAE Outing at Holiday Inn Resort, Uluberia

◆ Lecture Meeting on Goods and Services Tax (GST) on (1) Recent Amendment in GST (2) Impact of GST changes on Real Estate Sector held at Emami Conference Hall (ACAE) on Monday, the 25th March, 2019 ◆



(L-R) CA Niraj Agrawal, Dy. Convenor, Guest Speaker CA Pankaj Kr Agarwal, Associate Director, Grant Thornton India LLP, Kolkata and CA Tarun Kr Gupta, Chairman-GST/Indirect Tax Sub-Committee.

◆ Interactive Session on Recent GST Notifications in Real Estate Sector (1) Department's views on Recent GST Notifications in the Real Estate Sector, (2) Deliberation on Recent GST Notifications in the Real Estate Sector held at Bengal Chamber of Commerce & Industry (BCCI) on Saturday, the 13th April, 2019 ◆



(L-R) CA Tarun Kr Gupta, Chairman-GST/Indirect Tax Sub-Committee, Guest Speaker CA Ashok Batra, Sr. Partner, M/s. A K Batra & Associates, New Delhi, Chairman of the Session, CA Arun Kr Agarwal, Keynote Speaker Mr. Khalid Aizaz Anwar, I.A.S., Joint Secretary (Finance), Govt. of West Bengal and Convenor CA Anup Kr Sanghai.

◆ Lecture Meeting-cum-Interactive Session on ◆  
**(1) Tax Planning through LLP, (2) Buy-Back of Shares** held at at Emami Conference Hall (ACAE) on Saturday, the 20th April, 2019



Speaker CA R R Modi giving his deliberations.



Speaker CA Mohit Bhuteria giving his deliberations.

Lecture Meeting on **(1) New Income-Tax Return Forms – An insight analysis with respect to changes made, (2) Unique Document Identification Number (UDIN) : New era of attest functions : "An easy way to Secure your Signature"** held at Emami Conference Hall (ACAE) on Thursday, the 25th April, 2019



(L-R) Speaker CA Ranjeet Kr Agarwal, Convenor, UDIN Monitoring Group, ICAI, President CA Vasudeo Agarwal, Speaker CA S S Gupta and Dy. Convenor CA Niraj Agrawal.

Lecture Meeting on **Critical Issues in GST Audit & Discussion on GSTR 9C** held at Emami Conference Hall (ACAE) on Saturday, the 18th May, 2019



Convenor CA Anup Kr Sanghai introducing the Guest Speakers. (L-R) On the dais, CA Amit Tibrewal, Manager, Ernst & Young LLP, Indirect Tax Division, CA Avisekh Jaiswal, Director, Ernst & Young LLP, Indirect Tax Division and CA Tarun Kr Gupta, Chairman-GST/Indirect Tax Sub-Committee

**Felicitation of the Flag Bearers of ICAI and Chairman of EIRC of ICAI**



◆ Seminar on Audit for Small and Medium Companies on **(1) Walkthrough of Audit Documentation including Sampling for Small and Medium Companies, (2) Common Mistakes in Financial Statements with regard to Schedule III & Accounting Standards (14-29), (3) Changes in Audit Report including SA 700, 701 & 705, (4) Common Mistakes in Financial Statements with regard to Schedule III & Accounting Standards (1-13)** held at Emami Conference Hall (ACAE) on Friday & Saturday, the 24th & 25th May, 2019



(L-R) Speaker CA Vivek Newatia, Chairman-Accounts & Audit Sub-Committee, CA Vivek Agarwal and Speaker CA Mohit Bhuteria.



Guest Speaker CA Sunita Kedia with a cross-section of the participants.



Speaker CA (Dr.) Debashis Mitra, Central Council Member, ICAI, also Vice President-ACAE, giving his deliberations.

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