RECENT AMENDMENTS TO THE INCOME TAX ACT RELATED TO TRANSFER OF IMMOVABLE PROPERTY

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Introduction

The Finance Act, 2013 has brought in significant amendments to the Income Tax Act, 1961 which would have far reaching implications on transactions relating to immovable property. The amendments have been brought in with the avowed objective of increasing the tax base, ensuring that the transactions in Real Estate are declared at proper values and the anomalies in the Act are suitably plugged. This paper deals with the amendments by way of insertion of Section 43CA [w.e.f 01-04-2013] and Section 194 IA [w.e.f. 01-06-2013] and amendments to Section 56(2)(vii)(b) [w.e.f. 01-04-2013] of the Income Tax Act.

Chapter – I Section 194 IA – An analysis

I a) Background
The Finance Act, 2013 has inserted Section 194 IA into the Income Tax Act, 1961 which mandates the deduction of tax at source for payments being made by a transferee to a resident transferor, on any sum by way of consideration for transfer of any immovable property .The said section has come into force w.e.f 1/06/2013 on and from such date all buyers of immovable property shall be liable to deduct tax at source at 1% of the payments being made as a part of the consideration. The definition of the term “immovable property” has been specifically included in the said section. The provisions of the said section will not apply where the consideration for transfer of immovable property is less than Rs. 50 Lakhs and further the transferees have been exempted from the requirements of Section 203A of the Income Tax Act which requires a person who is deducting tax to obtain a TAN.

In order to understand the provisions of the said Section and its applicability or otherwise on various transactions related to immovable property, I have
identified certain issues which would enable us to arrive at larger understanding of the subject.

The requirement mandated by the above Section would have far reaching consequences on the nature of transactions normally entered into for transfer of immovable property and it appears that the Government while displaying its eagerness to prevent tax evasion and widen that tax base has not considered several practical situations and prevalent practices in property transactions. The intention of the Government in bringing in this provision is discernible from the following.

b) Budget Speech of Minister of Finance for 2013-2014 (Para 145)

Transactions in immovable properties are usually undervalued and underreported. One-half of the transactions do not carry the PAN of the parties concerned. With a view to improve the reporting of such transactions and the taxation of capital gains, I propose to apply TDS at the rate of one percent on the value of the transfer of immovable property where the consideration exceeds Rs.50 lakhs. However, agricultural land will be exempt.

c) Finance Bill, Notes on Clauses (Clause 42)

Clause 42 of the Bill seeks to insert a new section 194-IA in the Income-tax Act relating to payment on transfer of certain immovable property other than agricultural land. It is proposed to insert a new section 194-IA to provide that any person, being a transferee, responsible for paying (other than the person referred to in section 194LA) to a resident transferor any sum by way of consideration for transfer of any immovable property (other than agricultural land) shall deduct an amount equal to one per cent. of such sum as income-tax at the time of credit of such sum to the account of the transferor or at the time of payment of such sum in cash or by issue of cheque or draft or by any other mode, whichever is earlier. It is further proposed to provide that no deduction shall be made where consideration for the transfer of an immovable property is less than fifty lakh rupees. It is also proposed to provide an Explanation defining the expressions “agricultural land” and “immovable property”. This amendment will take effect from 1st June, 2013.
d) Memorandum Explaining the Provisions in the Finance Bill, 2013

E. WIDENING OF TAX BASE AND ANTI TAX AVOIDANCE MEASURES

Tax Deduction at Source (TDS) on transfer of certain immovable properties (other than agricultural land)

There is a statutory requirement under section 139A of the Income-tax Act read with rule 114B of the Income-tax Rules, 1962 to quote Permanent Account Number (PAN) in documents pertaining to purchase or sale of immovable property for value of Rs.5 lakh or more. However, the information furnished to the department in Annual Information Returns by the Registrar or Sub Registrar indicate that a majority of the purchasers or sellers of immovable properties, valued at Rs.30 lakh or more, during the financial year 2011-12 did not quote or quoted invalid PAN in the documents relating to transfer of the property.

Under the existing provisions of the Income-tax Act, tax is required to be deducted at source on certain specified payments made to residents by way of salary, interest, commission, brokerage, professional services, etc. On transfer of immovable property by a non-resident, tax is required to be deducted at source by the transferee. However, there is no such requirement on transfer of immovable property by a resident except in the case of compulsory acquisition of certain immovable properties. In order to have a reporting mechanism of transactions in the real estate sector and also to collect tax at the earliest point of time, it is proposed to insert a new section 194-IA to provide that every transferee, at the time of making payment or crediting of any sum as consideration for transfer of immovable property (other than agricultural land) to a resident transferor, shall deduct tax, at the rate of 1% of such sum.

In order to reduce the compliance burden on the small taxpayers, it is further proposed that no deduction of tax under this provision shall be made where the total amount of consideration for the transfer of an immovable property is less than fifty lakh rupees.

This amendment will take effect from 1st June, 2013.
From the speech of the Finance Minister, the notes on clauses and the memorandum explaining the reasons for the amendment, it is clear that the principal object of the Government is to ensure that every transaction of a reasonable size relating to transfer of an immovable property is properly accounted for, taxed and tracked by the Revenue Authorities.

II. Basic ingredients for a transaction to fall within the ambit of Section 194IA:

From a reading of Section 194 IA of Income Tax Act as presently worded, the basic ingredients to be present in the transaction for it to come within the ambit of provisions of Section 194 IA are as follows:

i) There should be a transferor i.e., the owner or any other person claiming ownership rights in an immovable property
ii) The transferor should be a “Resident” as defined under Section 6 of the Income Tax Act
iii) There should be a Transferee i.e., a buyer of the immovable property
iv) There should be an agreement between the transferor and transferee for transfer of an immovable property
v) There should be “Consideration” for transfer of immovable property
vi) The subject matter of transfer should be “immovable property” as defined under Section 194 IA of the Income Tax Act
vii) The Consideration for Transfer of Immovable Property should be Rupees Fifty Lakhs and above,

It should be noted that the term “transfer” has not been defined Under Section 194IA of the Income Tax Act whereas, the said term has been defined Under Section 2(47) of the Income Tax Act, wherein it relates only to a transfer of a “Capital Asset”. It is therefore necessary to import the definition of the word transfer from the Transfer of Property Act, 1882 which reads as follows:

The term “transfer” is not defined under the Transfer of Property Act. Both Sections 4 and 5 of the T.P. Act give an extended meaning to the term transfer by illustrating sale, gift, exchange followed by ‘or otherwise’ so as to give an indication of legislative intent that ‘transfer’ in any form whatsoever and
however styled, if it has the result of effecting the holding held by the holder, it was covered.

The word “transfer” is defined with the reference to the word “convey”. This word in English Law in its narrower and more usual sense refers to the transfer of an estate in land; but it is sometimes used in a much wider sense to include any form of an assurance inter vivos. **The definition in Section 205(1)(ii) of the Law of Property Act is “Conveyance includes a mortgage, charge, is, assent, vesting declaration, vesting instrument, disclaimer, release and every other assurance of property or of any interest therein by any instrument except a Will”**.

Under the provisions of Section 5 of the Transfer of Property Act 1882, “transfer of property” means an act by which a living person conveys property, in present or in future, to one or more other living persons, [or to himself] and one or more other living persons; and “to transfer property” is to perform such act.

In this section “living person” includes a company or association or body of individuals, whether incorporated or not”

The term “consideration” has not been defined under Section 2 of the Income Tax Act whereas it has been defined differently under various sections of the Income Tax Act for the limited purposes of the requirements of the said sections-

Examples: Section 50C, Section 50D, Section 54E, Section 54EA, Section 54F, Section 43CA etc

**In the absence of the definition of the term “consideration” or “deemed consideration”, the consideration mentioned in the document for transfer should ordinarily be reckoned for the purposes of this section:**

Refer:


III. Issues arising out of the provisions of Section 194 IA

1. Dual agreements for purchase and construction of immovable property.

There is a prevalent practice in the Real Estate industry especially in projects for construction of apartments or villa development, for the transferor and the transferee to enter into dual agreements, one for sale of divided/ undivided share of land and the other for construction of the super built area as an apartment or villa as the case may be.

In such cases, as far as the consideration for divided/undivided share of land is concerned the provisions of Section 194IA would be squarely applicable if such consideration is Rs.50,00,000/- (Rupees Fifty Lakhs only) or more. As far as the payment towards construction of the super built up area is concerned the said arrangement would amount to a works contract and the provisions of Section 194C of the Income Tax Act would be squarely applicable.

It is to be noted that while the provisions of Section 194 IA are applicable to “All persons” who are transferees, the provisions of Section 194 C do not apply to an Individual/HUF unless their accounts were subjected to Tax Audit under Section 44AB in the immediate preceding financial year. **Further there is a specific relief provided to an Individual/HUF under section 194C (4) exempting them from deducting Tax at Source towards amount credited or paid to a contractor exclusively for the personal purposes of such individual or member of HUF.** This exemption would squarely apply to payments being made by a prospective transferee/buyer of an apartment or villa to the builder/developer/owner as the case may be who are constructing the said apartment/villa on behalf of the transferee under a construction agreement.

However in the case of the transferee being a “person” other than an individual or HUF, such person would have to deduct Tax at Source on payments made towards construction of super built area under section...
194C of the Income Tax Act. A combined reading of the above could lead to an inference that where there is a dual agreement for purchase of land for say Rs.48 Lakhs and an agreement of construction for say Rs One crore between an individual/HUF and the owner/developer/builder, there is no requirement for deducting Tax at Source both under the provisions of Section 194 IA and 194 C of the Income Tax Act.

This contention though legally tenable may not find favour with the Revenue Authorities and the registration authorities who may refuse to register the document for transfer of the immovable property unless the challan for depositing the tax at source u/s 194 IA is produced before it. The Income tax department Bangalore has vide its letter dated 5/6/2013 issued by the Income Tax Officer (HQ) for the Chief Commissioner of Income Tax Bangalore-I, instructed the Sub Registrars to ensure compliance with the provisions of Section 194 IA before registration of the documents presented for transfer, and it is presumed that similar instructions would have also been given by the jurisdictional CCIT’s of other cities.

It has been held in the case of East India Hotels Ltd and Another v C.R. Shekhar Reddy and Another (1997) 230 ITR 622 (KAR), 101 TAXMAN 0119 that the instructions issued by an Officer in the rank of the Deputy Commissioner was beyond the power and functions entrusted to him and it is only the CBDT which has specific power U/s 119 of the Income Tax Act to issue circulars, notifications, instructions etc for proper administration of the Act.

2. Composite Agreement for Purchase.

In the case of a composite agreement for sale being entered into between the Owner/Developer/Builder i.e., the Resident transferee for the sale of undivided/divided share of land and Super Built Area as an immovable property, the transferee would have to deduct Tax at Source under provisions of Section 194IA on the combined value of consideration if the same is Rupees Fifty Lakhs and above. In the case of agreements designed on this manner, the provisions of Section 194C would not apply even if a distinct value is attributed to the building portion (Super
Built Area) in the composite agreement even though for the purposes of the VAT and Service Tax the same would be considered differently.

3. Payment/Credit to Confirming Party.

It is common practice in the Real Estate Trade wherein a person who has acquired rights in an immovable property transfers/assigns such rights in favour of a Third party for a higher consideration. Such persons normally join the final documents for conveyance either as a confirming party or as a consenting witness. The question which arises for consideration is whether the payments made by the buyer who is ultimate transferee of the immovable property to the confirming party would be subject to TDS under provisions of Section 194 IA of the Income tax Act. A careful reading of the term immovable property is necessary to arrive at a logical conclusion on this matter. The term immovable property has been specifically defined under explanation (b) to Section 194 IA as follows-

“Immovable property” means any land (other than agricultural land) or any building or part of the building. It is to be noted that the above definition is a restrictive definition very specific with its intent and not an inclusive definition. The above definition is also significantly different from the definition of immovable property under Section 269UA (d) r/w Section 2(47) (v) and (vi) of the Income Tax Act wherein the term immovable property would include rights in or with respect to such immovable property or the definition of “land” for the purpose of Section 35 of the Income Tax Act which under Explanation 2 of the said section includes an interest in land and the definition of “immovable property u/s 3(26) of the General Clauses Act wherein the term “immovable property” has been defined to include land, benefits to arise out of land, and things attached to the earth are permanently fastened to anything attached to the earth.

Therefore, there would be no requirement of deducting Tax at Source under section 194 IA on payments made by a transferee to an agreement holder, as he is not the transferor of “immovable property” as defined under section 194 IA. This contention may however not be in accordance
with the objective of the revenue for introducing this provision as mentioned earlier and therefore may not be accepted by the revenue authorities.

The above analogy could equally be applied to the amount paid to a developer by a buyer of an apartment pertaining to the developers share in a development agreement, to the extent of the amount paid by the buyer for undivided share of land which is conveyed by the developer to the buyer of an apartment by using the general power of attorney given by the Owner of the property to execute deeds of conveyance on his behalf in favour of such buyers, as the developer is conveying only his development rights on the property. However in case of the view being taken that the immovable property has already been transferred in favour of the Developer to the extent of the Developers Share as on the date of entering into the development agreement, as has been held in a catena of decisions rendered by various courts recently, the provisions of section 194 IA would apply to payments being made to the Developers towards the undivided share of land being conveyed by him as a power of attorney holder of the Owner as part of the “Developers Share”, as the Developer will be considered as the “transferor” for the purpose. The decisions which could be referred to in this regard are-

5. Dr. Maya Shenoy (2009) 124 TTJ 692 (Hyd Tribunal)

In case the deductor insists on deducting tax only on the Owner and not the Developer the only option for the Owner and Developer would be to take refuge under Rule 37BA of the IT Rules. The Owner shall have to file a
declaration as provided in the said rule with the deductee (Transferor) that the Tax has be deducted at source on the Developer.

As a related issue, where the Owner is getting a specified super built area in future in exchange for the undivided/divided share of land being transferred to the Developer and/or his nominees in terms of the Development Agreement, it would be rather prudent and advisable for the Owners to adopt the view taken in the cases referred above as in that way, the credit for the tax deducted at source by the Developer on the Owners Share can be taken in the year when the income from Capital Gains is being offered by the Owner. The Owner could for this purpose adopt the guideline value for the land as permitted u/s 50D of the Income Tax Act as the “consideration” for the purpose of transfer and instruct the Developer to deduct tax u/s 194 IA based on such consideration.


The buyers of immovable property often approach banks/Financial Institutions/Housing Finance Companies for a loan to defray part of the cost of the immovable property which is being acquired by them. The buyer (transferee), the financer, i.e., the bank/Financial Institution/Housing Finance Company normally enter into an agreement where the financer on behalf of the transferee based on several mile stones reached during construction, makes payment of the consideration agreed upon directly to the transferor.

In the above arrangement the financer is acting purely for and on behalf of the transferee.

In such cases even though the payments are being made by the financer directly to the transferor, the obligation to deduct Tax at Source under Section 194 IA or Section 194 C as the case may be, would be that of the transferee and not the financer.
It would therefore be necessary for all transferees to consider and adopt the following options -

a) Instruct the financer to pay the agreed amounts to the transferor after reducing the amount attributable to Tax Deducted at Source and pay the Tax Deducted at Source on behalf of the transferee using the PAN of the Transferee directly to the Government in the prescribed challan.

b) Instruct the financer to pay the amount attributable to Tax Deducted at Source to the transferee for the onward remission of Tax Deducted at Source by the transferee.

c) Instruct the transferors to remit the Tax Deducted at Source by using the PAN of the transferees on the prescribed challan in case they receive the entire amount from the financers directly.

5. Necessity for double deduction under Section 194 IA and 194 C

The issue which needs clarity is in the case where the transferee/buyer has discharged his obligation towards TDS by making the deduction u/s 194C on payments being made towards construction, would he be liable to deduct tax at source again at the point of the super built area being conveyed to him as an immovable property u/s 194IA. In my opinion, as the buyer/transferee has already discharged his obligation towards the entire payment for construction which represents the consideration for the super built area u/s 194C during the construction period, he cannot be called upon to deduct tax once again on the same consideration under the provisions of Section 194IA. It is pertinent to note that the CBDT has issued Circular No 720 dated 30-8-1995 reproduced below -

Circular No. 720, dt. 30-8-1995

It has been brought to the notice of the Board that in some cases persons responsible for deducting tax at source are deducting such tax by applying more than one provision for the same payment. In particular, it has been pointed out that the sums paid for carrying out work of advertising are being subjected to deduction of tax at source under section 194C as payment for works contract as also under section 194J as payments of fees for professional services.
It is hereby clarified that each section, regarding TDS under Chapter XVII, deals with a particular kind of payment to the exclusion of all other sections is this Chapter. **Thus, payment of any sum shall be liable for deduction of tax only under one section.**

This contention though legally tenable may not find favour with the Revenue Authorities and the registration authorities who may refuse to register the document for transfer of the immovable property unless the challan for depositing the tax at source u/s 194 IA is produced before it.

6. **Payments of consideration in installments**

Section 194 IA refers to the payment of any sum by way of consideration for transfer of any immovable property. It is to be noted that Section 5 of the Transfer of Property Act 1882 defines “**transfer of property**” to mean an act of conveying a property in present or future. As payment of installments is towards the purchase of a property in future it would squarely fall under the definition of “transfer of property” and hence the provision of Section 194 IA would apply even to payment of consideration in installments. The argument that the Seller and Buyer do not have the status of a “Transferor” and “Transferee” till the point of transfer, is not tenable and may not hold before judicial authorities. This view would also not be in consonance with the objects for which the provision of Section 194 IA has been introduced into the statute, as mentioned earlier in this paper.

The Tax deducted at source on installments will be taken credit by the Transferor only in the year in which the income on which tax was deducted at source would be offered to tax. A harmonious reading of the provisions of Section 199(3) of the Income Tax Act r/w Rule 37 BA(3) of the Income Tax Rules would lead to the above conclusion.

7. **Transfer of Immovable Property by way of exchange:**

In a case where there is an exchange of immovable properties between persons wherein no monetary consideration is exchanged, the question which arises is what would be the consideration to be adopted for the purpose of transfer under section 194 IA of the Income Tax Act. It is relevant to state that transfer under section 2(47)(i) of the Income Tax Act
includes an “exchange” and “exchange” under Section 118 of the Transfer of Property Act is the Transfer of Ownership of one thing for the Ownership of another between two persons.

As consideration is not defined under section 194 IA, it is the value which would be adopted in the exchange deed or the deed of transfer for the purpose of payment of stamp duty which have to be reckoned as consideration for the purposes of section 194IA.

It is significant to note that Sec 194 IA refers to “any sum by way of consideration” and further refers to “credit of such sum to account of the transferor” or “at the time of payment of such sum”. The qualifying word appears to be “sum”. It is to be noted that the Supreme Court has in the case of H. H. Sri Rama Verma v CIT (1990) 187 ITR 308 has held that the word “sum” refers to the amount of money paid taking the above analogy into consideration it could be well argued that payment of consideration in any other mode other than through a sum of money would be outside the purview of Sec 194 IA.

8. Transfer of Immovable Property by Co Owners:

Section 194 IA of the Income Tax Act, applies only in cases where the transfer of “Immovable Property” as defined in the said section is for a consideration of Rupees Fifty Lakhs and above. In the case where the share of each Co Owner of the property is less than the threshold limit but the consideration being paid for the transfer of immovable property to all the Co Owners exceeds Rupees Fifty Lakhs, would the provisions of section 194 IA apply?

As detailed in Para 2 of this article, the consideration for transfer of Immovable Property between any person being a transferee to a resident transferor should be Rs. 50 Lakh (Rupees Fifty Lakhs) and above. The consideration refers to that being paid to a person who is a resident transferor (emphasis supplied) and therefore only the consideration which flows to each transferor should be taken as relevant for the purposes of determining the applicability of section 194IA and consequently the consideration being paid by a transferee to all the
transferors put together cannot be aggregated for the purpose of determining the applicability of section 194 IA.

Similarly where there are more than one transferee and the aggregate consideration to a single transferor exceeds Rupees Fifty Lakhs, the consideration with respect to the immovable property to be transferred to each transferee should be reckoned for the purpose of determining whether the provisions of Section 194 IA are applicable or not. It is well settled law that an immovable property can be owned/held as a whole or in parts and that share of each co owner in a property should be treated as a distinct and separate property of each co owner.

9. Whether the term consideration would include taxes and levies such as Service Tax and VAT, water and electricity deposit, payment toward car park etc.

Payment of VAT and Service Tax

It is to be noted that the consideration mentioned in Section 194 IA should be for the transfer of an immovable property and amounts charged towards Service Tax and VAT are statutory obligations mandated by law which arise in the course of construction of the immovable property and are not in any way a part of the consideration for transfer of immovable property.

The Tax Authorities may however take a different view as till date there is only a specific exemption to exclude Service Tax in the case of rent under Section 194 I as per circular No. 4/2008 dated 28/04/2007- IT (B) dt 30/6/2008, whereas as far as payments towards Professional or Technical Service is concerned, tax would have to be deducted on the Service Tax component also.

It is also to be noted that the transferor could be construed only as a collection agent on behalf of the government for collecting Vat and Service Tax and therefore if the argument of “pass through” is applied, it could well be concluded that Service Tax and VAT would not be a part of the term “consideration” for the purpose of Section 194 IA.
Further Service Tax and VAT collected by the transferor would not have an element of “Income” as understood under the Income Tax Act and would at best be considered as part of the turnover or gross receipts of the assessee for the purposes of other sections of the Income Tax Act. The above proposition is supported by various judicial decisions which are listed hereunder:

- Hanjin Shipping Company Ltd Vs ADIT ITA No 8672/Mum/2010 rendered on 31st October, 2012.
- Islamic Republic of Iran Shipping Lines Vs DCIT, 11 Taxmann.com 349 (Mum)
- Sedco Forex International Drilling Inc Vs ADIT, 24 Taxmann.com 390 (Del)
- DIT Vs Schlumberger Asia Service Ltd 317 ITR 156 (Utt)

However if the Sales Tax (VAT) and Service Tax collected are not remitted to the Government it could be construed as “income” as held in-

Chowringhee Sales Bureau (P) Ltd Vs CIT, WB(1973) 87 ITR 542(SC)
CIT Vs Thirumalaiswamy Naidu and Sons (1998) 230 ITR 534 (SC)
Pandyan Hotels Ltd Vs CIT (2004) 266 ITR 172(Mad)

It is critical and rather fundamental to note that the obligation to deduct tax at source under the Income Tax Act arises from the provisions of Section 4(2) of the Income tax Act, a reading of which makes it clear that tax shall be deducted at source only in respect of income chargeable under sub section 4(1) of the Income Tax Act.

Payment of Deposits

With regard to the payments towards electricity and water deposits paid to the Developer/ Builder/ Owner, the same partakes only a character of a deposit to be treated as such in the hands of the Developer/ Builder/ Owner to be used by them specifically for payments to the respective Statutory Authorities for obtaining the requisite service connections. However, where the Developer/ Builder/ Owner retains the surplus of the deposits collected after making all payments to the Statutory Authorities, the difference would amount to “consideration for transfer of
“immovable property” and would therefore be liable for deduction of Tax at Source.

Payments towards car park

It is to be noted that the payment is made only for the right to use and enjoy a specified area earmarked and no part of such area is transferred to the buyer/ transferee. The payments made towards car park could therefore at the maximum be construed as payments towards a license as understood under the Indian Easements Act 1882 and hence there would be no requirement of Tax Deducted at Source under Section 194 IA on payments towards car park.

It is however to be noted that there could be a requirement under the provisions of Section 194 I of the Income Tax Act, to deduct tax at source by treating the license fee paid/ payable by the tenant towards car park as “rent” under the said section. Reference in this regard can be made to the following judicial decisions:

- United Airlines Vs CIT (2006) 287 ITR 281 (Del)
- CIT Vs Vimal Lalchand Mutha (2001) 248 ITR 6 (SC)
- Continental Construction Ltd Vs CIT (1992) 195 ITR 81 (SC)

10. Transfer of Immovable Property by a Partner as his / its Capital contribution to a firm/AOP/BOI

There are several instances where an individual or a corporate entity brings in the Immovable Property owned by him/it to a Partnership Firm/AOP/BOI as the case may be, in order to develop or transfer or sell the Immovable Property jointly with any other person/entity as part of a business arrangement. The limited questions which arise for consideration in this regard is as follows:

Whether the contribution of an immovable property as a capital contribution is a “transfer” for the purposes of Section 194 IA.

**Ans:** It is to be noted that the term transfer, has not been defined specifically under section 194 IA therefore its meaning should be derived from the definition of transfer in section 2 (47) of the Income Tax Act and from its definition under other relevant enactments.
When a partner brings in his immovable property as a capital contribution to the firm, the said immovable property becomes the firm’s property under the explicit provisions of Section 14 of the Indian Partnership Act, 1932. Further such a transfer of immovable property is also capable of being registered under the provisions of Indian Registration Act, 1908, although the same is not compulsorily registerable.

The act of a partner bringing in his immovable property held by him as a “capital asset” as capital contribution to a firm would fall under the definition of “transfer” under section 2 (47)(vi) of the Income Tax Act which reads as hereunder “any transaction which has the effect of transferring, or enabling the enjoyment of, any immovable property”. Further there is a transfer of immovable property from one “person” namely an individual or a Company as the case may be in favour of another “person” namely a Firm/AOP/BOI. It is to be noted that all the above entities are distinct persons under Section 2(31) of the Income Tax Act and are different assessable entities although under the general law the firm is not a legal entity and is only abridged name of partners.

It can therefore be concluded that a contribution of an immovable property as a capital contribution to a firm/AOP/BOI would be regarded as a “transfer” for the purposes of Section 194 IA.

What is the definition of consideration for this purpose?

The question which arises is whether the partner/member contributing their/its immovable property as their/its capital contribution into a firm/AOP etc is receiving any consideration and if so whether the same can be quantified?

The following paragraphs from the judgment of the Supreme Court in the case of Sunil Siddharthbhai v. Commissioner of Income Tax, Ahmedabad (Civil Appeal No. 1841 of 1981) and Kartikeya V. Sarabhai v. Commissioner of Income Tax. (Civil Appeal No.1777 of 1981)(1985) 156 ITR page 509 are reproduced below which are highly relevant to evaluate the above proposition.

Where a partner of a firm makes over capital assets which are held by him to a firm as his contribution towards capital, there is a transfer of a capital
asset within terms of Section 45 of the Income Tax Act, 1961, because an exclusive interest of the partner in personal assets is reduced, on their entry into the firm, into a shared interest.

The consideration for the transfer of the personal asset is the right which arises or accrues to the partner during the subsistence of the partnership to get his share of profits from time to time and, after the dissolution of the partnership or with his retirement from the partnership, to get the value of his share in the net partnership assets on the date of the dissolution or retirement after deduction of liabilities and prior charges. The credit entry made in the partner’s capital account in the books of the partnership firm does not represent the true value of consideration. It is a notional value only, intended to be taken into account only at the time of determining the value of the partner’s share in the net partnership assets on the date of the dissolution or on the date of his retirement, a share which will depend upon deduction of the liabilities and prior charges existing on the date of dissolution or retirement. It is not possible to predict beforehand what will be the position in terms of monetary value of partner’s share as on that date. At the time when the partner transfers his personal assets to the partnership firm, there can be reckoning of the liabilities and the losses which the firm may suffer in the years to come. All that lies within the womb of the future. It is impossible to conceive of evaluating the consideration acquired by the partner when he brings his personal asset into the partnership firm when neither can the date of dissolution or retirement be envisaged nor can there be any ascertainment of liabilities and prior charges which may not have even arisen yet..


When his personal assets merge into the capital of the partnership firm, a corresponding credit entry is made in the partner’s capital account in the books of the partnership firm, but that entry is made merely for the purpose of adjusting the rights of the partners inter se when the partnership is dissolved or the partner retires. It evidences no debt due by the firm to the partner. Indeed the capital represented by the notional entry to the credit of the partner’s account may be completely wiped out
of the losses which may be subsequently incurred by the firm, even in
the very accounting year in which the capital account is credited.

It is clear from the above judgment of the Supreme Court, that a partner
does not receive any consideration and even if it is held as having been
received, the consideration received by such partner or member is not
determinable. It is also a well settled proposition of law that a partner of
a firm does not have a specific right to a specific property of the firm and
has only a “partnership interest” in the firm which by itself is movable
property and therefore it is not possible to determine the consideration
received by the partner for converting his exclusive interest into a shared
interest by contributing the property owned by him as his capital
contribution into a firm.(Refer- CIT Vs Kunnamkulam Mill Board(2002)
257ITR 544(Ker).

In the case of Ratan Lal Vs. Purshottam Harit – AIR 1967 SC 401), the
Supreme Court held thus “It is well settled now that the share of a partner
in the assets of the partnership which has also immovable properties, is
movable property and the assignment of the share does not require
registration under Section 17 of the Registration Act.”

It is to negate the above decision of the Supreme Court in the case of Sunil
Siddharthbhai(supra) that an amendment was brought in by the Finance
Act 1987 by introducing provision of Section 45(3) of the Income Tax Act
which is a deeming provision to the tax the transfer of a capital asset by a
partner or member to a firm/AOP/BOI as capital gains. The said section
also defines the term “consideration” which is for the limited purpose of
the said section and cannot be imported and held applicable for the
purposes of Section 194 IA.

Conclusion

As one of the essential requirements for applicability of the provisions
of section 194IA as mentioned in Para II above i.e the determination of
the quantum and flow of consideration between the transferor and
transferee is not met, the provisions of Section 194 IA of the income tax
will not be applicable in this case.

However in case it is held that the provisions of Section 194IA are
applicable to the transfer of immovable property by a partner/member to
a firm/AOP/BOI by way of capital contribution, the consideration and point of deduction of tax at source are discussed below-

What is the consideration to be reckoned for the purpose of Section 194 IA?

**Ans:** In the absence of the definition of the term “consideration” in Section 194 IA and in the absence of any deeming provision defining consideration for the purpose, it would be the amount credited to the account of the partner who brings in the Immovable Property as his/its Capital contribution in the books of the firm, which will be reckoned as consideration for this purpose.

**Point of deduction of Tax at Source.**

**Ans:** Section 194 IA provides that the tax would be deducted by the transferee (in this case the Firm/AOP/BOI) on the transferor (in this case the individual or company) at the time of credit of such sum to the account of transferor or at the time of payment of such sum whichever is earlier. Therefore the firm would have to deduct TDS at the point of giving credit to the partners account in its books.

11. Transfer of an immovable property to a partner of a firm or a member of an AOP or BOI on the dissolution of the Firm/AOP/BOI or otherwise.

Whether the distribution of an immovable property to a partner/member on dissolution or otherwise would amount to a “transfer” for the purpose of Section 194 IA.

**Ans:** It is to be noted that the term transfer, has not been defined specifically under section 194 IA therefore its meaning should be derived from the definition of transfer in section 2 (47) of the Income Tax Act and from its definition under other relevant enactments.

The act of a firm/AOP/BOI distributing the immovable property owned/held by it as a “capital asset” to a partner of a firm or a member of an AOP/BOI as the case may be, would fall under the definition of
“transfer” under section 2 (47)(vi) of the Income Tax Act which is reproduced hereunder-

“any transaction which has the effect of transferring, or enabling the enjoyment of, any immovable property”.

Further there is a transfer of immovable property from one “person” namely a firm/AOP/BOI as the case may be in favour of another “person” namely an individual or a company who is a partner or member as the case may be. It is to be noted that all the above entities are distinct persons under Section 2(31) of the Income Tax Act and are different assessable entities.

It is to be noted that there is an explicit provision under Section 45(4) of the Income Tax Act, wherein the distribution of Capital assets on the dissolution of a firm/AOP/BOI or otherwise to its partners or members will be chargeable to tax as the income of the firm/AOP/BOI under the head Capital Gain. The said provision is applicable for the limited purpose of determining the Capital Gain assessable on the firm/AOP/BOI and cannot be extended for any other purpose.

Normally in the case of the dissolution of the firm/AOP/BOI must, in point of time, be anterior to the actual distribution, division or allotment of the assets that takes place after making accounts and discharging the debts and liabilities due by the firm. Upon dissolution, the firm ceases to exist, then follows the making up of the accounts, then discharge of debts and liabilities and thereupon distribution, division or allotment of assets takes place inter se between the erstwhile partners by way of mutual adjustment of rights between them. The distribution, division or allotment of assets to the erstwhile partners, is not done by the dissolved firm. In this sense there is no transfer of assets by the assessee (dissolved firm) to any person. It is not correct to say that the distribution of assets takes place eo instanti with the dissolution of the firm or that it is effected by the dissolved firm.

The said principle was amply enunciated by the decision of the Supreme Court in the case of Malabar Fisheries Co v Commissioner of Income Tax, Kerala (1979)120 ITR 49.
Taking a leaf out of the above judgment in case where there is a distribution of immovable property to a partner or member as the case may be, post dissolution of the firm/AOP/BOI and it is done for the purpose of settlement of mutual rights amongst the partners, there would be an incidence of Capital Gain under Section 45 (4) as mentioned above. **However, as the firm is already dissolved there will be no “transferor” as on the date of distribution of assets to the partners and hence the provisions of Section 194 IA will not apply.**

It is also well settled that what is received by a partner on the dissolution or retirement is only that entitled to him towards his share of assets by virtue of his pre-existing right.

**Refer:**

Tribhuvan Das G. Patel v CIT (1996) 236 ITR 515 (SC)  
CIT (ADDL) v Mohanbhai Pamabhai (1987) 165 ITR 166 (SC)

**Conclusion:**

In the absence of the “transferor” as on the date of distribution of assets (immovable property) to the partner or member as the case may be, one of the essential requirements of applicability of Section 194 IA as mentioned in Para II above is not met and therefore there would be no requirement to deduct Tax at Source under Section 194IA.

However in case it is held that the provisions of Section 194IA are applicable to the transfer of immovable property to a partner/member on dissolution, the consideration and point of deduction of tax at source are discussed below-

**What is the consideration to be reckoned for the purpose of Section 194 IA?**

**Ans:** In the absence of the definition of the term “consideration” used in Section 194 IA and in the absence of any deeming provision defining consideration for the purpose, the amount debited in the account of the partner as the value of immovable property in the books of the firm shall be reckoned as consideration for the purpose of Section 194 IA. The deeming fiction of adopting the market value of such immovable property
as the “consideration” cannot be adopted for the purpose of Section 194 IA.

**Point of deduction of Tax at Source.**

**Ans:** Section 194 IA provides that the tax would be deducted by the transferee (in this case the partner or member as the case may be) at the point when their account is debited in the books of the firm/AOP/BOI.

12. **Transfer of an Immovable Property by a Company to its Subsidiary Company.**

It is to be noted that a transfer of a capital asset including “immovable property” by a company to its subsidiary company is not regarded as “transfer” under section 47 (iv) of the Income Tax Act subject to satisfaction of certain conditions provided therein. The transfer of an immovable property by a Company to a Subsidiary Company would however have to go through the process of normal conveyance and registration formalities. The exemption under section 47 (iv) mentioned above is for the purpose of exempting such transfers from the incidence of Capital Gains and the scope of such exemption cannot be read into the provisions of Section 194 IA. Therefore the Subsidiary Company being the distinct “person” under the Income Tax Act would have to deduct Tax at Source on the Holding Company i.e., the resident transferor.

As per the provisions of Section 194 IA of the Income Tax Act, the amount to be reckoned as a “consideration” would be that mentioned in the document for transfer. Further it is the holding company which will be receiving the consideration either in monetary terms or by way of allotment of shares in the subsidiary company.

In conclusion although the transfer of immovable property by a Holding Company to a subsidiary is not a “transfer” for the purpose of “capital gains”, the said transfer would attract the provisions of Section 194 IA as all the requirements mentioned in Para II are satisfied.
It is significant to note that Sec 194 IA refers to “any sum by way of consideration” and further refers to “credit of such sum to A/c of the transferor” or “at the time of payment of such sum”. The qualifying word appears to be “sum”. It is to be noted that the Supreme Court has in the case of H. H. Sri Rama Verma v CIT (1990) 187 ITR 308 has held that the word “sum” refers to the amount of money paid taking the above analogy into consideration it could be well argued that payment of consideration in any other mode other than through a sum of money would be outside the purview of Sec 194 IA.

13. Transfer of an Immovable Property by a Subsidiary Company to a Holding Company.

It is to be noted that a transfer of a capital asset including “immovable property” by a subsidiary company to a holding company is not regarded as “transfer” under section 47 (v) of the Income Tax Act subject to satisfaction of certain conditions provided therein. The transfer of an immovable property by a Subsidiary Company to a Holding Company would however have to go through the process of normal conveyance and registration formalities. The exemption under section 47 (v) mentioned above is for the limited purpose of exempting such transfers from the incidence of Capital Gains and the scope of such exemption cannot be read into the provisions of Section 194 IA. Therefore the Holding Company being the distinct “person” under the Income Tax Act would have to deduct Tax at Source on the Subsidiary Company i.e., the resident transferor.

As per the provisions of Section 194 IA of the Income Tax Act, the amount to be reckoned as a “consideration” would be that mentioned in the document for transfer. Further it is the Subsidiary Company which will be receiving the consideration in monetary terms only as allotment of shares to the Subsidiary Company in the Holding Company is specifically prohibited under Section 42 of the Companies Act 1956.

In conclusion, although the transfer of immovable property by a Subsidiary Company to a Holding Company is not a “transfer” for the purpose of “capital gains”, the said transfer would attract the provisions
of Section 194 IA as all the requirements mentioned in Para II are satisfied.

The contention that the consideration should be only in the form of a sum of money as detailed in the earlier para equally applies in this case only.

14. Any transfer in a scheme of amalgamation of a capital asset (immovable property) by the amalgamating company to the amalgamated company if the amalgamated company is an Indian Company.

It is to be noted that a transfer of a capital asset including “immovable property” by an amalgamating company to an amalgamated company, is not regarded as “transfer” under section 47(vi) of the Income Tax Act subject to satisfaction of certain conditions provided therein. The transfer of an immovable property by an Amalgamating Company to an Amalgamated Company would however have to go through the process of normal conveyance and registration formalities. The exemption under section 47 (vi) mentioned above is for the limited purpose of exempting such transfers from the incidence of Capital Gains and the scope of such exemption cannot be read into the provisions of Section 194 IA. Further the Amalgamated Company and the Amalgamating Company are distinct “persons” under the Income Tax Act.

It is to be noted that on the approval of the scheme of the amalgamation u/s 394 of the Companies Act, there is a transfer of assets and liabilities of the Amalgamated Company to the Amalgamating Company by operation of law. On and from the date of amalgamation the Amalgamating Company i.e transferor ceases to exist in the eyes of law. Further the consideration for transfer of Assets and Liabilities of the Amalgamating Company to the Amalgamated Company is satisfied by way of allotment of shares to the Share holders of the Amalgamating Company in the Amalgamated Company and payment of money to the shareholders where there is a fractional ownership of shares. In other words the consideration for transfer of immovable property of the Amalgamating Company to the Amalgamated Company does not flow to the Amalgamating Company but to its share holders.
In conclusion as two essential requirements for applicability of Section 194IA as mentioned in Para II above are not satisfied in this case, namely the absence of a Transferor and the absence of a flow of consideration between the Transferor and the Transferee, there is no requirement to deduct tax at source u/s 194 IA

15. Any transfer, in a Demerger, of a Capital Asset (immovable property) by the demerged company to the resulting company, if the resulting company is an Indian Company.

It is to be noted that a transfer of a capital asset including “immovable property” by a demerged company to a resulting company is not regarded as “transfer” under section 47(vib) of the Income Tax Act subject to satisfaction of certain conditions provided therein. The transfer of an immovable property by a Demerging Company to a Resulting Company would however have to go through the process of normal conveyance and registration formalities. The exemption under section 47(vib) mentioned above is for the purpose of exempting such transfers from the incidence of Capital Gains and the scope of such exemption cannot be read into the provisions of Section 194 IA. Further, the Demerged Company and the Resulting Company are distinct “persons” under the Income Tax Act.

It is to be noted that on the approval of the scheme of the demerger u/s 394 of the Companies Act, there is a transfer of assets and liabilities of the Demerged Company to the Resulting Company by operation of law. On and from the date of demerger, the Demerged Company i.e. transferor continues to exist in the eyes of law as it has transferred only an undertaking which is a part of the company. However, the consideration for transfer of Assets and Liabilities of the Demerged Company to the Resulting Company is satisfied by way of allotment of shares to the shareholders of the Demerged Company in the Resulting Company and/or payment of money’s in case of fractional ownership of shares. In other words the consideration for transfer of immovable property of the Demerged Company to the Resulting Company does not flow to the Demerged Company but flows to the shareholders of the demerged company. A reference to Section 2 (19AA) (iv) and Section 2(41A) would
support the proposition that it is the shareholders of the demerged company who will be issued shares in the resulting company.

It is also important to note that the definition of “demerger” u/s 2(19 AA) of the Income Tax Act, postulates the transfer of the undertaking of the Demerged Company to the Resulting Company on a going concern basis. In other words the consideration arrived at for the same is on a lump sum basis without the need to bifurcate the consideration for the individual assets. Consequently the consideration for the transfer of the immovable property as part of the entire assets and liabilities of the undertaking being demerged cannot be arrived at and therefore is not determinable.

In conclusion, as the quantum of consideration and between the Transferor and the Transferee is not determinable and as the consideration does not flow to the demerged company, the essential requirements for applicability of Section 194 IA as mentioned in Para II above are not satisfied in this case, and hence there is no requirement to deduct tax at source u/s 194IA.

It has been well settled in various judicial decisions including the ones referred below that the consideration cannot be split or vivisected at the discretion of the authorities when it is a composite consideration for a transfer of a basket of assets along with related liabilities.

Refer:
CIT v NIIT Ltd (2009) 318 ITR 289 (DELHI)
Vodafone International Holdings B.V. v UOI (2012) 341 ITR 1 (SC)

The above rationale can also be applied in the case of a slump sale as well.
16. Any transfer of a capital asset (immovable property) or intangible asset by a firm to a company as a result of succession of the firm by a company in the business carried on by the firm

It is to be noted that there is a specific exemption in the case where the business of the firm is succeeded by a company in the process of which the capital assets (immovable property) of the firm is transferred to a company, such a transaction is not regarded as a transfer under specific provision of section 47(xiii) of the Income Tax Act subject to certain conditions stipulated in the said section. A careful reading of the section would indicate that as on the date of the transfer both the firm and the company exist and therefore if there is a transfer of an immovable property held as a capital asset from the firm to a company, the provision of Section 194 IA would prima facie apply. However it is important to note that the consideration for the transfer of immovable property along with the other assets and liability of the firm should be clearly determinable and discernible from the agreement. In the event of the consideration not being determinable especially where the firm has liabilities attached to the assets, it can be argued that due to the consideration not being determined, one of the essential ingredients as detailed in Para II are not met and hence the provisions of Section 194IA cannot apply in this case.

The contention that the consideration cannot be split or vivisected by the authorities at their discretion would very well apply to this case also

17. Any transfer of a capital asset (immovable property) or intangible asset by a private company or unlisted public company to a Limited Liability Partnership as a result of conversion of the company into an LLP.

It is to be noted that there is a specific exemption in the case where there is a transfer of a capital asset (immovable property) or intangible asset by a private company or unlisted public company to a Limited Liability Partnership as a result of conversion of the company into an LLP, under the specific provision of section 47(xiiiib) of the Income Tax Act subject to certain conditions stipulated in the said section. A careful reading of the section would indicate that as on the conversion of the company into an LLP is in accordance the provisions of Section 56 or Section 57 of the LLP
Act 2008 read with the provisions of the Third Schedule and the Fourth Schedule of the said Act, there is a vesting of the assets and liabilities of the company in the LLP as per the specific provisions of Section 58 of the LLP Act and the company shall be deemed to be dissolved from such date. In other words the transfer of assets is by operation of law without any further assurance, act or deed.

In conclusion, as there is no transferor/ transferee co-existing as on date of transfer and hence in the absence of an essential requirement as mentioned in Para II above not being met, the provision of Section 194 IA will not apply in this case.

18. Any transfer of a Capital Asset (Immovable Property) by a proprietary concern to a company as a result of succession of the business by the company of that carried on by the proprietor.

It is to be noted that there is a specific exemption in the case where the business of the sole proprietary is succeeded by a company in the process of which the capital assets (immovable property) of the sole proprietary is transferred to a company, such a transaction is not regarded as a transfer under specific provision of section 47(xiv) of the Income Tax Act subject to certain conditions stipulated in the said section. A careful reading of the section would indicate that as on the date of the transfer both the sole proprietary and the company exist and therefore if there is a transfer of an immovable property held as a capital asset from the sole proprietary to the company, the provision of Section 194 IA prima facie would apply. However it is important to note that the consideration for the transfer of immovable property along with the other assets and liability of the sole proprietary should be clearly determinable and discernible from the agreement. In the event of the consideration not being determinable especially where the proprietor has liabilities attached to the assets being transferred, it can be argued that due to the consideration not being determined, one of the essential ingredients as detailed in Para II are not met and hence the provisions of Section 194 IA cannot apply in this case. The contention that the consideration cannot be split or vivisected by the authorities at their discretion would very well apply to this case also.
19. Transfer of an immovable property where a firm is registered as a company under Part IX of the Companies Act.

It has been held in a catena of decisions that where there is a transfer of capital assets (including immovable property) of a firm on its registration as a company under Part IX of Companies Act by operation of law, there is no “transfer” so as to have an incidence of Capital gains. In the methodology followed in the above case, the firm itself is registered as a company.

Refer:

(1) Texspin Engineering and Manufacturing works (2003) 263 ITR 345 (Bom)

(2) Wellpack Packaging v CIT 78 TTJ 448 (Ahd-Trib)

(3) ACIT v M/s Unity Care and Health Services ITA 611/ Bang/2005 – AY 2001-2002 order dated 17-06-2005 reported in the tribunal which was confirmed by the Karnataka High Court vide its judgement dated 5-7-2010 in Income Tax Act No 3170/2005

(4) Sachdeva & Sons (EOV) v Dy CIT (2004) 82 TTJ (Assam Trib) 847

(5) Chetak Enterprises P Ltd v Asst CIT (2006) 281 ITR (AT) 162 (Jodh-Trib)

(6) CIT v Rita Mechanical Works (2011) 38 (I) ITCL 7 (P&H- HC)

In conclusion, as there is no transferor/ transferee co-existing as on date of transfer and hence in the absence of an essential requirement as mentioned in Para II above not being met, the provision of Section 194 IA will not apply in this case.
20. Can the Transferor apply for a certificate for lower deduction of tax or no deduction of tax under section 197 of the Act or furnish a declaration in writing in the prescribed form as specified under section 197A?

It is noted that section 197 of the Income Tax Act has not been amended to include section 194IA within its ambit and neither is there any change incorporated in Form No.13. Under the circumstances, the transferor cannot obtain relief under section 197 of the Income Tax Act with regard to the tax to be deducted at source by the Transferee under section 194IA.

It is noted that section 197A of the Income Tax Act has not been amended to include section 194IA within its ambit and neither is there any change incorporated in Form No. 15G and 15H. Under the circumstances, the transferor cannot issue any declaration in writing to the transferee authorizing not to deduct tax at source.

21. Can tax be deducted at source on incomes not chargeable to tax?

In case of transfers which are exempt under section 47 of the Income Tax Act as enumerated in various paragraphs earlier, the income arising out of the transfer would not be chargeable to tax under the provisions of the Income Tax Act. It is reiterated that the obligation to deduct tax at source under section 4(2) of the Income Tax Act arises only if the said income is liable to be taxed under section 4(1) of the Income Tax Act.

There are several judicial decisions which have upheld the principle that tax need not be deducted at source where the income is exempt and not chargeable to tax. A few of such decisions are given below:

- Transmission Corporation of A.P Ltd & Another Vs CIT (1999) 239 ITR 587 (SC)
- Hyderabad Industries Limited Vs ITO and Another 188 ITR 749 (Kar)
- GE India Technology Centre (P) Ltd. Vs CIT & Another (2010) 327 ITR 456 (SC)
Although the above argument is legally tenable and has the force of law, it will be practically difficult to convince the registration authorities responsible for registering the document of conveyance, that the provisions of tax deducted at source are not applicable.

As a matter of prudence, it is advisable for transferees who are purchasing immovable property to be held by them as stock in trade and claimed as business expenditure at the appropriate point of time to err in favour of the revenue by deducting tax at source at the rates prescribed under section 194IA, as otherwise there could be a possibility of disallowance of expenditure under Section 40(a)(ia) thereby resulting in substantial income tax liability on the transferee. As per the provisions of Section 40(a)(ia) at present, there would be no disallowance as the section does not cover purchase of immovable property.

22. **Mode and Method of Payment:**

It is to be noted that Form 26QB has been notified for the purpose of payment of Tax Deducted at Source by the Transferee vide notification no 1404(E) dated 31st May 2013 issued by the Government Of India, Ministry of Finance, Department of Revenue, CBDT which has to be electronically uploaded in accordance with the procedures, formats and standards specified. A careful reading of the form would reveal that the PAN of the Transferor and Transferee would have to be filled in along with their complete address, the details of the property being transferred and the date of the agreement/ booking, multiplicity of transferors/ transferees if any etc. Rules 30 and 31 of the Income tax rules have been suitably amended, prescribing the time within which such tax deducted needs to be deposited by the payer with the Central Government, and the obligation of the payer (transferee) to issue a certificate to the payee (transferor) in Form 16 B.
The Transferee (Buyer) can generate the TDS certificate in form 16B from the Income tax website and serve to the Transferor (Seller). The said certificate needs to be issued within 15 days from the due date for furnishing the challan cum statement in Form 26 QB. The Seller (Transferor) can view the tax credit in his 26AS statement.
Chapter - II  Section 43CA – An analysis

Finance Bill, Notes on Clause (Clause 8)

Clause 8 of the Bill seeks to insert a new section 43CA in the Income-tax Act to provide for a special provision for full value of consideration for transfer of assets other than capital assets in certain cases.

The proposed sub-section (1) of the aforesaid section seeks to provide that where the consideration received or accruing as a result of the transfer by an assessee of an asset (other than a capital asset), being land or building or both, is less than the value adopted or assessed or assessable by any authority of a State Government for the purpose of payment of stamp duty in respect of such transfer, the value so adopted or assessed or assessable shall be deemed to be the full value of the consideration received or accruing as a result of such transfer for the purposes of computing profits and gains from transfer of such asset.

The proposed sub-section (2) of the aforesaid section seeks to provide that the provisions of sub-section (2) and sub-section (3) of section 50C shall, so far as may be, apply in relation to determination of the value adopted or assessed or assessable under sub-section (1).

The proposed sub-section (3) of the aforesaid section provides that where the date of agreement fixing the value of consideration for transfer of the asset and the date of registration of such transfer of asset are not the same, the value referred to in sub-section (1) may be taken as the value assessable by any authority of a State Government for the purpose of payment of stamp duty in respect of such transfer on the date of the agreement.

The proposed sub-section (4) of the aforesaid section provides that the provisions of sub-section (3) shall apply only in a case where the amount of consideration or a part thereof has been received by any mode other than cash on or before the date of agreement for transfer of the asset.
This amendment will take effect from 1st April, 2014 and will, accordingly, apply in relation to assessment year 2014-15 and subsequent assessment years.

**Memorandum explaining the provisions in the Finance Bill 2013**

Computation of income under the head “Profits and gains of business or profession” for transfer of immovable property in certain cases

Currently, when a capital asset, being immovable property, is transferred for a consideration which is less than the value adopted, assessed or assessable by any authority of a State Government for the purpose of payment of stamp duty in respect of such transfer, then such value (stamp duty value) is taken as full value of consideration under section 50C of the Income-tax Act. These provisions do not apply to transfer of immovable property, held by the transferor as stock-in-trade.

It is proposed to provide by inserting a new section 43CA that where the consideration for the transfer of an asset (other than capital asset), being land or building or both, is less than the stamp duty value, the value so adopted or assessed or assessable shall be deemed to be the full value of the consideration for the purposes of computing income under the head “Profits and gains of business of profession”.

It is also proposed to provide that where the date of an agreement fixing the value of consideration for the transfer of the asset and the date of registration of the transfer of the asset are not same, the stamp duty value may be taken as on the date of the agreement for transfer and not as on the date of registration for such transfer. However, this exception shall apply only in those cases where amount of consideration or a part thereof for the transfer has been received by any mode other than cash on or before the date of the agreement.

These amendments will take effect from 1st April, 2014 and will, accordingly, apply in relation to the assessment year 2014-15 and subsequent assessment years.
It appears that the reason for the insertion of the above section is to negate several judicial decisions some of which are listed below which have held that the provisions of the Section 50C of Income Tax Act do not apply to transfer of Immovable property held as stock in trade by the assessee.

Refer:

(1) KR Palaniswamy vs UOI (2009) 180 Taxman 253(Mad)
(2) CIT Vs Kan Construction and Colonisers Private Ltd (2012) 208 Taxmann 478(All), 70 DTR 169(All)
(3) Inderlok Hotels Pvt Ltd Vs ITO(2009) 318 ITR (AT) 234(Mum-Trib), 122 TTJ 145(Mum)
(4) CIT Vs Thiruvengadum Investments (P) Ltd 320 ITR 345(Mad)
(5) ACIT V Aashish Gupta (2011) 42(II) ITCL 443 (Chen C Trib)
(6) CIT Vs Mukesh and Kishore 33 Taxmann.com 87(Guj HC)

The amendment is also brought in to ensure that the consideration for transfer of immovable property is not undervalued to reduce tax burden.

**Issues with regard to Section 43 CA of the Income Tax Act**

1. Sale of agricultural land held as Stock in Trade.

   It is to be noted that the provisions of section 43CA applies to a transfer by an assessee of an Asset (Other than a Capital Asset) being land or building or both. In other words the section squarely applies to assets being Land or Building or both owned and held by assessee as stock-in-trade (Business Asset). The issue to be examined would be the case of Agricultural lands “which are not Capital Assets” as defined under section 2(14)(iii) of the Income Tax Act i.e., Agricultural Lands which are situated in areas beyond the notified limits from a municipality or cantonment board.

   In case of such Agricultural Lands which are held as “Investment Asset” there will be no Income Tax on their transfer as “they are not Capital Assets” as defined under section 2(14) of the Income Tax Act. However where such Agricultural Lands are developed by the owner thereof into a
Residential layout or Farm house project, echo-villas etc., there could be a case of the owner having converted or treated the “Investment Assets” into a “Business Asset” and the Agricultural Lands owned and held by him would by default constitute a Stock-in-trade in his case. Consequently as when such lands are sold post development as Stock-in-trade, the provisions of section 43CA would apply.

It is to be noted that where an owner of an Agricultural Land which is not a “Capital Asset”, sells or transfers such a Land as part of his business, the profit arising there from would be assessed as a Business Income on the ground that the assessee has carried out an activity which is an adventure in the nature of trade.

Refer:

(1) G.Venkatswamy Naidu & Co., Vs CIT [1959] 35 ITR 594 [SC]
(2) DCIT Vs Gopal Ramnarayan Kasat 2010 ITR 328 pgno.556

Needless to say that in the event of such activity not considered as an adventure in the nature of trade, the income derived from sale of such lands would be exempt from Income Tax as long as such lands are not capital assets.

2. Double-taxation where there is transfer of Capital Asset from a person to another who treats such asset as Stock in Trade.

In case of the sale of Land and/or Building held by a person as an Investment Asset (Capital Asset) to another person being an individual or HUF who purchases the same to be held by him as a Business Asset (Stock-in-trade) for a consideration which is less than that adopted for the purpose of payment of stamp duty the transaction would be taxed as follows

i. In the case of the transferor the provisions of section 50C would apply and the value deemed as consideration for the purpose of Capital
Gains would be the value adopted for the purpose of payment of stamp duty i.e., such value would be higher than the consideration actually received.

ii. In the case of the purchaser being an individual or HUF, the value to be recorded as cost in his books would only be the actual consideration paid for and not the deemed consideration assessed in the hands of transferor for the purpose of section 50C. It is also to be noted that the Transferee would be liable to be taxed on the difference between the Stamp Duty value and the actual consideration under the head “Income from Other Sources” as per the provisions of section 56(2)(vii)(b) of the Income Tax Act. When the purchaser (Transferee) sells the asset in future the sale value minus the actual cost paid for acquisition would be treated as the Surplus to be taxed, in other words the purchaser would be taxed on the difference between the Stamp Duty value and the actual consideration once under “Income from Other Sources” and again under “Income from Profits and Gains and Business”.

In other words the transferee is not permitted to take advantage of the tax paid by the transferor on the deemed consideration and to the extent of the difference between deemed consideration and actual consideration, both the transferor and transferee would be liable to tax at different points of time.

It is significant to note that the provisions of section 49(4) of the Income Tax Act which provides for step up of cost to the transferee is applicable only to transfers to which the provisions of section 56(2) (vii) and (vii a) of the Income Tax Act are applicable, and is only for the purpose of computing Capital Gains.

This hardship could be mitigated only with an identical provision such as section 49(4) is inserted into Section 43CA of the Income Tax Act as well.

The taxation of the same income in the hands of two persons and also in the hands of the same person under the Income Tax Act could be held to be ultra vires Article 265 of the Constitution of India and also against the well established principle enunciated by several judicial pronouncements.
Refer:
- ITO ‘A’ Ward, Lucknow v Bachu Lal Kapoor (1965) 60 ITR 74 (SC)

Although this ground could be canvassed before the courts of law, it may not find favour as the Constitutional Validity of the provisions of Section 50C have been upheld by the Madras High court in the case of K R Palaniswamy and Others V Union of India 2008-TMI-30601 in Appeal No W.P No 4387 of 2003 vide order dated 5-8-08 and the said decision has been reaffirmed by the Mumbai High Court in the case of Bhai Nagar Co-op Society Ltd Vs Union Of India (2011) 197 Taxmann 249 and 6 taxmann.com 120(Mum).

The courts have consistently held that the Legislature has the authority to bring in deeming provisions into the Act to tax incomes which would have otherwise escaped taxation.

3. The term “otherwise than in cash” whether it includes payments through bearer cheque, Promissory Notes, Transfer through Hundi, RTGS, NEFT etc and book entries

The new section 43CA has attempted to address the issue of the difference in value for the purpose of stamp duty (Guide Line value) between the date of agreement to sell and the sale deed as in certain case there could be a considerable time gap between the two dates. The section provides that in such cases it is the stamp duty valuation as on the date of agreement and not on the date of registration which shall be reckoned for the purpose of determining the value of “Consideration”.

In order to prevent the misuse of the provisions [as the general presumption is that the stamp duty valuation will always be on the incline], sub-section (4) of section 43CA specifies that the date of agreement will be considered only where the consideration or part thereof has been received on or before the date of the agreement by “any mode other than cash”.
This sub-section has been introduced to prevent the predating of agreements to take the advantage of a reduced Stamp Duty Value.

The question which arises for consideration is whether payment received through bearer cheque, through Hundi, promissory note, transfer via RTGS, NEFT etc., would be regarded as payment received by a mode other than cash.

As the objective of Section 43 CA (4) is only to prevent predating of the agreement, in case if it is proved that the consideration as actually passed through evidence of credit in the bank account of the transferor, it would suffice to invoke the Provision of Section 43 CA (3) of the Act. However, in the case of a book entry it could be very difficult for the transferor and transferee to prove to the satisfaction of the revenue authorities that the consideration had actually passed between the parties on the date of book entry.

4. Adoption of Fictional Sale Value as consideration in books of accounts.

In the case of the sale of an asset to which the provision of Section 43CA applies, can the seller take the fictional sale value as income in his books, show the difference between the fictional value and actual consideration received as due from the purchaser and write it off as Bad Debt/ business loss in the same or subsequent year?

It is to be noted that for the purpose of the accounting, it is the actual value of the consideration received and not the deemed value which can be accounted in the books of accounts. The provision of Section 43CA has limited applicability to accounting of the transaction of sale and is a deeming provision only for computation of business profit under the Income Tax Act and hence the question of accounting the consideration at the fictional value and the claiming setoff either as a bad debts or as a business loss does not arise.

5. Whether Land and Building includes transfer of Development Rights, Transferable Development Rights, Lease Hold Rights etc.

It is to be noted that the provisions of section 43CA refers to a transfer of an Asset being Land or Building or both and does not contain a definition.
of immovable property per se. There is no link to the definition of immovable property as defined under section 269UA (d) of the Income Tax Act to this section and therefore the section 43CA can apply only to the transferor who is the owner of the land and the building and not to a person who has any rights in or with respect to the land or building. This view could however be contentious as the department could well take a view that rights in an immovable property such as development rights, TDR’s, lease rights in excess of 12 years etc., amount to deemed ownership of land or building.

It has been held by the Mumbai Tribunal in the case of Akhtar Hussain Vs ITO ITA No 541 of 2010 and ITA No 706 of 2010 that the provisions of Section 50C are applicable to transfer of Development Rights also as they fall within the deeming provisions of Section 2(47) relating to transfer and the said analogy could also be extended to section 43CA.

However in the case of transfer of leasehold rights the provisions of Section 50C have been held not applicable on the ground that the transfer does involve payment of stamp duty and there is no requirement to register such a document for transfer of leasehold interest.

Carlton Hotels Pvt Ltd Vs ACIT 35 SOT 26 (Lucknow “A” Bench) 122 TTJ 515

ACIT Vs Shrikishan Das ITA No 915/Del/ 2012-ITAT Del Bench-rendered on 7-6-2013.

6. Applicability of section 43 CA to Demerger/ Slump Sale.

The conclusion which has been arrived at in the case of the applicability of Section 194 IA in Para III. 15 of the portion of this paper dealing with the provisions of Section 194 IA is equally applicable and should apply to this case also.
7. **Applicability of section 43 CA for introduction of Land and Building held as Stock in Trade to a Partnership Firm/AOP/BOI.**

The conclusion which has been arrived at in the case of the applicability of Section 194 IA in Para III. 10 of the portion of the paper dealing with the provisions of Section 194 IA is equally applicable and should apply to this case also. Moreover there is no machinery provision under the Income Tax Act dealing with the introduction of stock in trade as a capital contribution by a partner into a firm/AOP/BOI.

8. **Whether deemed income under Section 43CA can be deferred over the period of the project based on Percentage Completion Method of accounting.**

The revenue from sale of land and/or building will normally be accounted in the year when the risks and rewards of ownership are transferred to the buyers as per the principles laid down in para 10 and 11 of Accounting Standard 9 on Revenue Recognition. The Institute of Chartered Accountants of India has also issued a guidance note on accounting for Real Estate Accounting (in Feb 2012), wherein the option of accounting for Real Estate sales in the year of transfer of risks and rewards has been permitted. The said guidance note has also recommended the Percentage Completion method for accounting of revenues in the case of certain projects as laid down in Para 5 of the said Guidance Note.

It is relevant to the Jurisdictional Income Tax Appellate Tribunal Bangalore ‘B’ Bench in the case of M/S.Prestige Estate Private Limited Vs DCIT (ITA No.218/Bang/09) 129 TTJ (2010) 680(Bang) has held that AS-9 should be followed to recognize revenue for a developer and the revenue cannot thrust following of AS-7 by a developer. Similar view is taken in case of ACIT Vs IBC knowledge Park (P) Ltd (2009) Tax Corp (ITAT) 20698 – ITA No.1079 (Bang) 2008.

In a case where an assessee opts for the percentage completion method to account revenues from sale of Land and/or Building, the amount offered for revenue in a Financial Year could be done based on the fictional revenue.
It is to be noted that the **Tax Accounting Standards issued by the Government of India**, Ministry of Finance, Department of Revenue and Central Board of Direct Tax in August 2012 includes a Tax Accounting Standard on Construction Contracts the said Tax Accounting Standard recognizes only the “Percentage of Completion Method” from service transactions. The term “Contract Revenue” and the said Tax Accounting Standard comprises of

a) The initial amount of revenue agreed on the contract including retentions and
b) Variations in the contract work, claims and incentive payments
   i. To the extent that it is probable that they will result in revenue and
   ii. They are capable of being reliably measured

From a bare reading of the above, it appears that only the actual value of consideration and not the fictional value is required to be adopted as the basis for recognizing revenue on the percentage of completion method. However as the fictional value is deemed consideration which will be offered as revenue from operations, it could well be the basis which can be adopted to declare revenues under the percentage of completion method.
Chapter – III  Section 56(2)(vii)(b) – An analysis

Finance Bill, Notes on Clauses (Clause 9)

In section 56 of the Income-tax Act, in sub-section (2),—

(I) In clause (vii), for sub-clause (b), the following sub-clause shall be substituted with effect from the 1st day of April, 2014, namely:—

(b) Any immovable property,—

(i) Without consideration, the stamp duty value of which exceeds fifty thousand rupees, the stamp duty value of such property;

(ii) for a consideration which is less than the stamp duty value of the property by an amount exceeding fifty thousand rupees, the stamp duty value of such property as exceeds such consideration:

Provided that where the date of the agreement fixing the amount of consideration for the transfer of immovable property and the date of registration are not the same, the stamp duty value on the date of the agreement may be taken for the purposes of this sub-clause:

Provided further that the said proviso shall apply only in a case where the amount of consideration referred to therein, or a part thereof, has been paid by any mode other than cash on or before the date of the agreement for the transfer of such immovable property;

(II) in clause (viib), in the Explanation, in clause (b), for the word and figure "Explanation 1", the word "Explanation" shall be substituted.

Memorandum explaining the provisions in the Finance Bill 2013

Taxability of immovable property received for inadequate consideration

The existing provision of sub-clause (b) of clause (vii) of sub-section(2) of section 56 of the Income Tax Act, inter alia, provide that where any immovable property is received by an Individual or HUF without consideration, the stamp duty value of which exceeds Rs.50,000/-, the
The stamp duty value of such property would be charged to tax in the hands of the Individual or HUF as income from other sources.

The existing provision does not cover a situation where the immovable property has been received by an Individual or HUF for inadequate consideration. It is proposed to amend the provisions of clause (vii) of sub-section (2) of section 56 so as to provide that where any immovable property is received for a consideration which is less than the stamp duty value of the property by an amount exceeding Rs.50,000/-, the stamp duty value of such property as exceeds such consideration, shall be chargeable to tax in the hands of the individual or HUF as income from other sources.

Considering the fact that there may be a time gap between the date of agreement and the date of registration, it is proposed to provide that where the date of the agreement fixing the amount of consideration for the transfer of the immovable property and the date of registration are not the same, the stamp duty value may be taken as on the date of the agreement, instead of that on the date of registration. This exception shall, however, apply only in a case where the amount of consideration, or a part thereof, has been paid by any mode other than cash on or before the date of the agreement fixing the amount of consideration for the transfer of such immovable property.

This amendment will take effect from 1st April, 2014 and will, accordingly, apply in relation to the assessment year 2014-15 and subsequent assessment years.

**Objective of the amendment**

The Finance Act 2013 substituted Section 56(2)(vii)(b) of the Income Tax Act to include a case of transfer of any immovable property for a consideration which is less than the stamp duty value of the property by an amount exceeding Rs. 50,000/-. Prior to the said amendment the transferor was assessed to the extent of the entire stamp duty valuation as his income where the property was transferred without consideration. **As these provisions were being overcome by the assesseees by attributing some consideration to the transfer instead of ‘nil’ consideration, this amendment has now sought to plug the loophole.**
In order to avoid double taxation on the same income the provisions of Section 49(4) were inserted w.e.f. 1st October 2009, to provide that the value adopted as consideration for the purpose of Section 56(2)(vii) or (viia) would be reckoned as the cost of acquisition of such property in the hands of the transferee when the said property is transferred subsequently.

**Issues with regard to Section 56(2)(vii)(b) of the Income Tax Act**

1. **Whether 56(2)(vii)(b) can apply if the transfer of Immovable Property is pursuant to a court monitored auction or a Debts Recovery Tribunal process or sale by a statutory authority to recover statutory dues?**

   It is to be noted that the provisions of Section 56(2)(vii)(b) provides only for the stamp duty value to be reckoned as consideration, in case it is higher than the actual consideration. It is to be noted that proviso to Section 56(2) (vii)(b) of the Income Tax Act also has a similar provision as in the case of 50C wherein in the case where the assessee disputes the value adopted by the stamp valuation authority on the ground that it is higher than the fair market value of the property, he can make a claim before the assessing officer, who may then refer the said valuation to the valuation officer as defined under 2(r) of the Wealth Tax Act, 1957.

   The above proviso is an enabling provision to mitigate the genuine hardship of the assessee in cases as referred above but it is to be noted that the reference to the valuation officer by the assessing officer is a discretionary power given to the assessing officer. It is to be debated whether the word “may” used in Section 50C (2) should be read as “shall”

2. **Step up cost available to the transferee.**

   In the case of a transfer of a Capital Asset under section 50C or an Asset held as Stock-in-trade under section 43CA to a person for a consideration which is less than that adopted by the stamp valuation authority, the owner of the Capital Asset or the Stock-in-trade as the case may be would be taxed under section 50C or section 43CA as the case may be and the
purchaser (transferee) would be taxed under section 56(2)(vii)(b) of the Income Tax Act. In both cases tax would be levied on the difference between the value adopted for the purpose of stamp duty and the actual consideration.

Section 49(4) of the Income Tax Act provides that in the transferee who has been taxed for the difference in consideration between the stamp duty value and the actual consideration under the head “Income from other sources” under the provisions of Section 56(2)(vii)(b) of the Act, will be able to adopt the deemed consideration as above as his cost to compute income from Capital Gains when the said asset is sold.

Conclusion

The provisions of the above mentioned sections have been recently introduced into the Income Tax Act. As the provisions are still in the nascent stage, the law relating to the said provisions including its applicability or otherwise to various transactions relating to the transfer of immovable property is yet to be tested and with the passage of time, there is bound to be litigation on the subject in the days to come.

This article has attempted to understand the provisions of the Sections through various issues which could confront the Real Estate industry and transactions in immovable property in general.

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