

Taxation of Real Estate (Income-Tax issues)

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Agenda

- **Taxation of Joint Development Agreements**
 - Analysis of point of time of incidence of Capital Gains for Owners
 - Analysis of S.80-IB(10) issues for Developers
 - Joint Venture vs. Joint Development
- **S.50C – Full consideration in certain cases**
- **Recent amendments in Capital Gain Exemption Sections**
- **S.194-IA: TDS on Immoveable property transactions**
 - Overview & Issues / Controversies
- **S.195 – TDS in case of non-resident seller**
- **Business Trusts (REIT) – Finance Act 2014**

Joint Development Agreement (JDA)

Basics

- Taxation of JDA in the hands of Owner & Developer is a complex & relevant issue today
- JDA Basics:
 - Owner has X grounds of land with old house
 - Owner enters into a Joint Development Agreement (JDA), typically an unregistered agreement, on a % basis with Developer along with registered Power of Attorney (PoA)
 - This usually means **Owner will part with agreed portion of his LAND *in lieu* of which he gets built-up area corresponding to his share** from the Developer
 - Developer gets his agreed portion of land corresponding to which he can construct and sell built-up area along with UDS

JDA Basics (contd...)

- Owner along with the unregistered JDA typically registers a PoA in favour of Developer
- PoA given to Developer usually gives Developer the right to
 - Enter property and arrange demolition of existing structures
 - Alienate Developer's portion of UDS and collect receipts for the same
 - Create charge over his share of property (for obtaining financing)
 - Obtain necessary approvals from various authorities for the project

Taxable events in JDA (for Owner)

- Two points of taxation are possible –
 - **Capital Gains on Conveyance of UDS land to developer or his nominees** (third parties) in lieu of which owner gets share of built-up area
 - **Capital Gains on sale of owner's built-up area (say, flats)** to third party
 - Land and Building can be sold under Long-Term and Short-Term Capital Gains, assuming Owner's Land was bought much earlier (or) inherited etc.

Taxable events in JDA (for Developer)

- **It is in the nature of Business Income for Developer i.e., head of taxation is 'Profits and Gains of Business'**
- **The assets of the Developer are 'stock-in-trade'**
- **Overall, Developer's income is the sale proceeds he gets from buyers of his built-up area along with his UDS and Developer's expense is the construction cost of built-up area given to Owner**
- **Typically, Developer accounts income and expenses using Percentage Completion Method (PCM) and pays appropriate taxes every financial year over the course of the project**
- **Developers may, if eligible, claim deduction u/s 80-IB(10)**

KEY PROBLEM IN TAXATION OF JDA (For Owner)

| DEPARTMENT | ASSESSEE / OWNER |
|--|---|
| Dept. contends that taxation arises at the time of execution of JDA along with POA | Owner's contention is that CG arises only when built up area is in his/her possession |
| Execution of POA constitutes "part performance u/s 53A under TP Act" (or) can be construed to "enable enjoyment of property" by Developer - hence is Transfer u/s 2(47)(v) & 2(47)(vi) of IT Act | Execution of POA does not hand over possession : part performance under TP Act requires possession |
| POA allows Developer to enter property, alienate his share, obtain money by mortgaging etc. | Mere JDA and POA does not constitute transfer; permissive possession is not possession with respect to S.53A of TP Act and does not constitute 'Transfer' |

KEY PROBLEM IN TAXATION OF JDA (For Owner)

| DEPARTMENT | ASSESSEE/OWNER |
|--|--|
| Registration (Sale Deed) is not mandatory for transfer – possession is enough | No income has been realised – where is the question of CG! |
| Transfer of UDS to developer complete via POA - estimated cost of construction of owner's built up area to be taken as sale consideration for calculating owner's CG | Permissive possession i.e., to obtain approvals and enter property does not constitute possessory right envisaged as Transfer under IT Act |

“Transfer” under Income Tax Act, 1961

- The term ‘transfer’ amended by Finance Act, 1987 w.e.f. 01.04.1988 to bring in transactions that allow possession of property in part performance of contract as per section 53A of the Transfer of Property Act, 1882. Relevant **S. 2(47)(v)** of IT Act reads as under:
 - “*(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)*”
- Thus, Department’s view based on interpretation of S.2(47)(v) is that execution of JDA & PoA triggers S.2(47)(v)
- Another clause used to buttress Department’s claim is **S.2(47)(vi)**:
 - “*(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.*”

KEY PROBLEM IN TAXATION OF JDA (For Owner)

Case Laws holding CG at time of JDA/PoA

- In *Chaturbhuj Dwarkadas Kapadia Vs. CIT 260 ITR 491 (Bom)*, the Bombay High Court held that in the case of a development agreement, if the contract, read as a whole, indicates passing of or transferring of complete control over the property in favour of the developer, then the date of the contract would be relevant to decide the year of chargeability of capital gains and the substantial performance of the contract would be irrelevant
- The Court observed that it is precisely for this reason that the Legislature has introduced Sec 2(47)(v) read with Sec 45 which indicates Capital Gains is taxable in year in which such transactions are entered into EVEN IF the transfer of immovable property is not effective or complete under the general law.

KEY PROBLEM IN TAXATION OF JDA (For Owner)

Case Laws holding CG at time of JDA/PoA contd..

- The main points that emerge from the Mumbai High Court decision are:
 - Even though JDA may not amount to “transfer” in general law but the definition of ‘transfer’ under IT law and point of time of such ‘transfer’ is to be inferred in accordance with Sec 2(47)(v) of the IT Act
 - If Sec 2(47)(v) is applicable, the theory of substantial compliance becomes irrelevant and the date of actual possession becomes irrelevant
 - The JDA should read as a whole and test to decide the year of chargeability is year in which the JDA was entered into
- **Bottomline : The Court in this decision laid emphasis on the date of execution of the JDA**

KEY PROBLEM IN TAXATION OF JDA (For Owner)
Case Laws holding CG at time of JDA/PoA contd..

- Similar view followed that taxation ought to happen at time of execution of JDA and/or PoA:
 - Charanjit Singh Atwal vs. ITO [ITA No. 448/Chd/2011 dated 29.7.2013]
 - Vemanna Reddy (HUF) Vs ITO 114 TTJ (Bang) 246
 - Ms. Rubab M. Kazerani vs. JCIT (97 TTJ Third Member, Mumbai ITAT)
- Circular 495 dated 22.9.1987

KEY PROBLEM IN TAXATION OF JDA (For Owner)

Case Laws holding CG only on possession

- In several decisions it has been held that S.2(47)(v) does not apply until possession is handed over to owner
 - **CIT Vs Sadia Sheikh 87 CCH 59 Mumbai High Court dated 02.12.2013**
 - The Mumbai High Court held that the execution of the agreement could not amount to transfer u/s 53A of the Transfer of Property Act when the possession is not handed over by the assessee to the developer and the entire control over the property remains with the assessee
 - **Binjuseria Properties Pvt. Ltd. vs. ACIT (40 CCH 28 ITAT Hyderabad)**
 - **Fibars Infotech vs. CIT (2014-TIOL-51-ITAT-HYD)**

KEY PROBLEM IN TAXATION OF JDA (For Owner)
Case Laws holding CG only on possession (contd...)

- **DCIT vs. Asian Distributors Ltd. (70 TTJ Mumbai 88)**
- **Vijaya Productions (134 ITR 19 Third Member Chennai)** [wherein a JV as opposed to JDA was discussed]
- **CIT vs. K.Jeelani Basha (256 ITR 282 Madras HC)**
- Other decisions which can be interpreted to hold possession of property is point of incidence of CG and not execution of PoA
 - **CIT vs. P. Srinivasan (211 Taxman 479 Madras HC)**
 - **(Recent decision) CIT vs. C.Sugumaran (TCA No. 840 of 2014 dated 3rd November 2014)**

KEY PROBLEM IN TAXATION OF JDA (For Developer) – u/S.80IB(10)

- **Many developers claim Deduction u/s 80IB(10) of the IT Act, 1961**
- S.80IB(10) provides for 100% deduction in the case of an undertaking developing and building housing projects approved before the 31st day of March, 2008 by a local authority IF:
 - Such undertaking has commenced/commences development & construction of housing project \geq 1st day of October 1998
 - The project size should be minimum of **one acre**
 - Residential unit has maximum built-up area of **1000 sq.ft** (Delhi & Mumbai or within 25 kms. from municipal limits) and **1500 sq.ft** at any other place

KEY PROBLEM IN TAXATION OF JDA

(For Developer) - u/s 80-IB(10)

- The built up area of shops and commercial establishment does not exceed 3% of aggregate built up area or 5000 sq.ft, whichever is higher
- Not more than 1 residential unit is allotted to any person not being an individual
- Where one residential unit is allotted to an individual, no other residential unit is allotted to:
 - Individual, spouse, or minor children of such individual
 - HUF in which such individual is karta
 - Any other person representing that individual
- The assessee should not be a mere 'contractor' (should assume risks)

S.80-IB(10) issues

- No specific requirement that assessee who claims u/s 80-IB should OWN the land – can be *developer* and/or *builder*
 - **CIT vs. Radhe Developers 341 ITR 403 Guj. HC**
 - **CIT vs. Sanghvi & Doshi Enterprises (83 CCH 7 Madras HC)**
- 80-IB(10) is available on each “housing project”
 - **Arun Excello Foundation vs. CIT (108 TTJ 71 Mad.)**
 - **CBDT Circular F. No.205/3/2000/ITA II dated 4-5-2001**
“any project which has been approved by a local authority as a housing project”
 - **In Viswas Promoters P. Ltd. vs. ACIT (TCA No 1014 of 2009 etc. dated 2nd Nov. 2012) Madras HC** held that each distinct residential block can be a ‘housing project’

S. 80-IB(10) issues

- **Built-up area ceiling violation:**
 - Some Flats may violate 1500 sq.ft. requirement; **pro-rata deduction u/S.80-IB to be given** (*Bengal Ambuja Housing Development, ITA 458 of 2006 dated 5-1-2007*)
 - Open terrace cannot be subject matter of inclusion of built-up area (*CIT vs. Sanghvi & Doshi, Madras HC*)
- **Commercial usage area violation:**
 - If both commercial & residential units are built proportionate deduction to extent of compliance would be allowed (*CIT vs. Arun Excello Foundations (P) Ltd. TCA No. 1348 & 1349 of 2007 dated Oct. 18, 2012*)
 - Pre AY 05-06, approved project by local authority was eligible for deduction u/S 80IB(10) irrespective of extent of commercial usage (*CIT vs. Brahma Associates. 333 ITR 289 Mum. HC*)

S.80-IB(10) issues

- **Mere ‘contractor’ (not ‘developer’) ineligible for S.80-IB(10):**
 - *B.T.Patil & Sons Belgaum Construction Private Limited (126 TTJ Mumbai 577), CIT vs. Indwell Linings P. Ltd. 122 TTJ Chennai 137*
 - Depends on facts of each case; who has discretion of execution & undertakes risks?
 - Specific explanation inserted with retrospective effect from 1-4-2001 by Finance Act, 2009
- **Completion Certificate issues:**
 - Approval of project prior to 2005 did not require issuance of Completion Certificate (CIT vs. CHD Developers Ltd. 362 ITR 77 Delhi HC)
 - On facts of case, Completion Certificate had been given in Owners name and later Developer acquired adjacent plot and claimed deduction on entire property - Developer was eligible for S.80-IB(10) (88 CCH 152 Mumbai HC)

Joint Venture vs. Joint Development

- “Joint venture” happens when Owner treats his/her land as stock-in-trade in the Books of Account:
 - Business income to both Owner & Developer; share of profits in common business
 - Owner might have converted existing capital asset into stock-in-trade in which case **S.45(2) of IT Act** applies:
 - On date of conversion, assessed as deemed transfer with fair market value as on that date and levied as Capital Gains
 - From date of conversion till sale, business income in the hands of the Owner.
 - Note that Capital Gains though relating to earlier point of time of conversion, assessed only when asset is sold

S.50C - Full value of Consideration in certain cases

- Value for purpose of stamp duty (“Guideline Value”) considered to be the **full value of consideration** for CG computation purposes in cases where value paid as per Deed is less than Guideline Value
- Applicable in case of seller of “**capital asset**”
 - **Example: Land sold for Rs.40 lakhs via registered Sale Deed; guideline value of land in SRO is Rs.50 lakhs. Rs.50 lakhs will be the full value of consideration for Seller under IT Act u/S.50C**
- In case value is disputed, reference maybe made to DVO i.e., Valuation Officer during assessment proceedings
 - DVO reference can be made by Appellate Authority (such as CIT(A)) too – *[B.N.Properties Holdings P. Ltd. vs. ACIT 6 ITR Trib. 1 Chennai ITAT]*
- Earlier S.50C was not held to be applicable for ‘stock-in-trade’ [*Refer CIT vs. Kan Construction et al, Allahabad HC 70 DTR 169*]
 - Now, **Section 43CA** has been inserted in Finance Bill 2013 to specifically address this

Capital Gains Exemption

u/s 54, 54F, 54EC

| Long-term CG Exemption | S.54 | S.54B | S.54EC | S.54F |
|-------------------------------------|---|--|---|--|
| Who can claim exemption? | Individual/HUF | Individual/HUF | Any person | Individual/HUF |
| Eligible Assets Sold | A residential house property (minimum holding 3 yrs.) | Agriculture land which has been used by assessee or parents for agricultural purposes for last 12 yrs. | Any long-term capital assets (minimum holding 3 yrs.) | Any long term asset other than residential property provided that taxpayer on date of transfer of original asset does not own more than one residential house other than new asset |
| Assets to be acquired for exemption | Residential House Property | Another agricultural land (urban or rural) | Bond of NHAI or REC | Residential house property |

Capital Gains Exemption

u/s 54, 54F, 54EC

| Long-term CG Exemption | S.54 | S.54B | S.54EC | S.54F |
|--|---|---|---|---|
| Time limit for acquiring new assets | Purchase: 1yr. Back, , 2 yrs. Forward Construction: 3 yrs. Forward | 2 years forward | 6 months forward | Purchase: 1yr. Back, , 2 yrs. Forward Construction: 3 yrs. Forward |
| Exemption Amount | Investment in new asset or CG – whichever is lower | Investment in agricultural land or CG, whichever is lower | Investment in new capital asset or CG which is lower (max limit : Rs.50L in FY) | Investment in new assets / Net Sale Consideration * Capital Gains |
| Whether Capital Gains Deposit Scheme applicable? | Yes | Yes | NA | Yes |

Recent amendments to Capital Gains Sections

- **S.54 & S.54F :**
 - Allowed CG exemption on purchase...construction of “a residential house” i.e., anywhere (not just in India)
[Refer Vinay Mishra v. ACIT [2013] 141 ITD 301]
 - Finance Act 2014 w.e.f 1-4-2015 amended it to read “one residential house in India”
- **S.54 & S.54F:** This same amendment also has brought one more important change!
 - “*a residential house*” was liberally construed by various Courts to allow purchase of multiple flats as one unit and avail S.54 of Act. It is likely NO LONGER the case with use of phrase “*one residential house*”

Recent amendments to Capital Gains Sections (contd...)

- Four residential flats constituted 'a residential house' for purpose of S.54 - ***Dr. Smt. P.K. Vasanthi Rangarajan v. CIT [2012] 23 taxmann.com 299 Madras HC***
- The expression '*a residential house*' should be understood as building should be of residential nature and '*a*' doesn't indicate singular number - ***CIT v. Smt. K.G. Rukminiamma [2010] 196 Taxman 87(Kar. HC)***.
- Purchase of 2 flats adjacent to one another –exemption u/S 54 allowed (***CIT v. Syed Ali Adil 215 Taxman 283 AP***)
- Exemption u/S. 54 available when TWO flats combined to ONE residential unit. - ***CIT v. D. Ananda Basappa 180 Taxman 4 (Kar.)***.

Recent amendments to Capital Gains Sections (contd...)

- **S.54EC:** Originally, CG on long-term capital asset invested within 6 months in long-term specified asset shall not be brought to tax. Proviso had said investment made in long-term specified asset during any financial year shall not exceed 50 lakhs
 - Used to get exemption up to Rs.1 crore by splitting across two financial years (say, in March and April) . Refer ***Smt. Sriram Indubal v. ITO [2013] 32 taxmann.com 118 (Chennai)***
 - Now this ‘loophole’ has been fixed in Finance Act, 2014!
- **S.56(2) : Forfeiture of advance money received for capital asset** (say negotiation failed and no transfer of capital asset), such amount taxable as revenue receipt – “Income from Other Sources”
 - Overturns Supreme Court ruling in ***Travencore Rubber & Tea Co. Ltd. vs. CIT (243 ITR 158 SC)***

Some other interesting decisions on Capital Gains...

- **Caveat Emptor:** All decisions are based on facts & circumstances of the case!
- In ***Mrs. June Perett vs. ITO (298 ITR 268 Kar. HC)***, ***Miss Piroja C. Patel (242 ITR 582 Mumbai HC)***, ***Naozar Chenoy vs. CIT (243 ITR 95 AP HC)***, payments made for eviction of existing tenants can be treated as 'expenditure incurred in connection with transfer of property' and hence reduced during CG computation
- In ***CIT vs. Chennai Properties & Investments Ltd. (266 ITR 685)*** Madras HC held that earnings of company from letting out property were held to be Income from House Property
 - Though Objects of company to acquire/sell & lease properties

S. 194IA

TDS on Transfer of Immovable Property

- As per Finance Act, 2013, TDS is applicable on sale of immovable property wherein the sale consideration of the property exceeds or is equal to Rs 50,00,000 (Rupees Fifty Lakhs).
- Sec 194 IA of the Income Tax Act, 1961 states that for all transactions with effect from June 1, 2013, Tax @ 1% should be deducted by the purchaser of the property at the time of making payment of sale consideration.
- Applies only for **resident** transferor (for non-resident deduction u/s 195 still applies)

S.194IA (contd...)

- **Points to be remembered by the Purchaser of the Property:**
 - Deduct tax @ 1% from the sale consideration.
 - Collect PAN of Seller
 - PAN of seller & Purchaser to be mandatorily furnished in online Form
- **Points to be remembered by the Seller of the Property:**
 - Provide Seller PAN to Purchaser
 - Verify deposit of taxes deducted by the Purchaser in Form 26AS Annual Tax Statement.
- **Note: PAN of Seller mandatory – otherwise TDS @ 20% u/S. 206AA**
- TAN not required, only PAN required
- TDS to be paid online and Form 26QB generated – will be verified by Sub-Registrar
- TDS Certificate Form 16B to issued within 15 days from due date of deposit of TDS

S.194IA – Issues/controversies

- **Is limit of Rs.50 lakhs qua immovable property or qua owner?**
 - i.e. Multiple owners together own property in toto worth more than 50 lakhs.
 - Better to deduct (in proportion of ownership)
- **No NIL tax deduction certificate prescribed** such as in S.195(2), S.195(3) and S.197 in cases where no tax lies for payee
 - TDS Refund claim by Seller an extra hassle!
- **Owner by possession different than Owner as per land documents** – PAN mismatch for SRO

S.194IA – More Issues/controversies

- **Applicable for entire value (including construction agreement) or only UDS sale?**
 - What about applicability to JDA itself?
- **Financing institution (Bank) for property will not deduct; what should buyer do?**
 - Banks/Institutions will likely not undertake this administrative hassle
- **Will TDS be on S.50C value (OR) on actual value paid?**

TDS on sale by Non-Resident

- TDS u/s 195 has to be withheld by the buyer on payment to non-resident seller:
 - Long-term capital gains tax (20% plus applicable cess) has to be withheld by buyer in full!
 - Buyer or Seller can approach the Department u/s 195(2) and 195(3) respectively to obtain Certificate of Withholding at lower rates (or even NIL rate of TDS) in cases where Non-resident is investing in another residential property in India etc.
 - Upto USD 1 Million per F.Y may be repatriated through authorized dealers with documentary evidence and certificate from CA

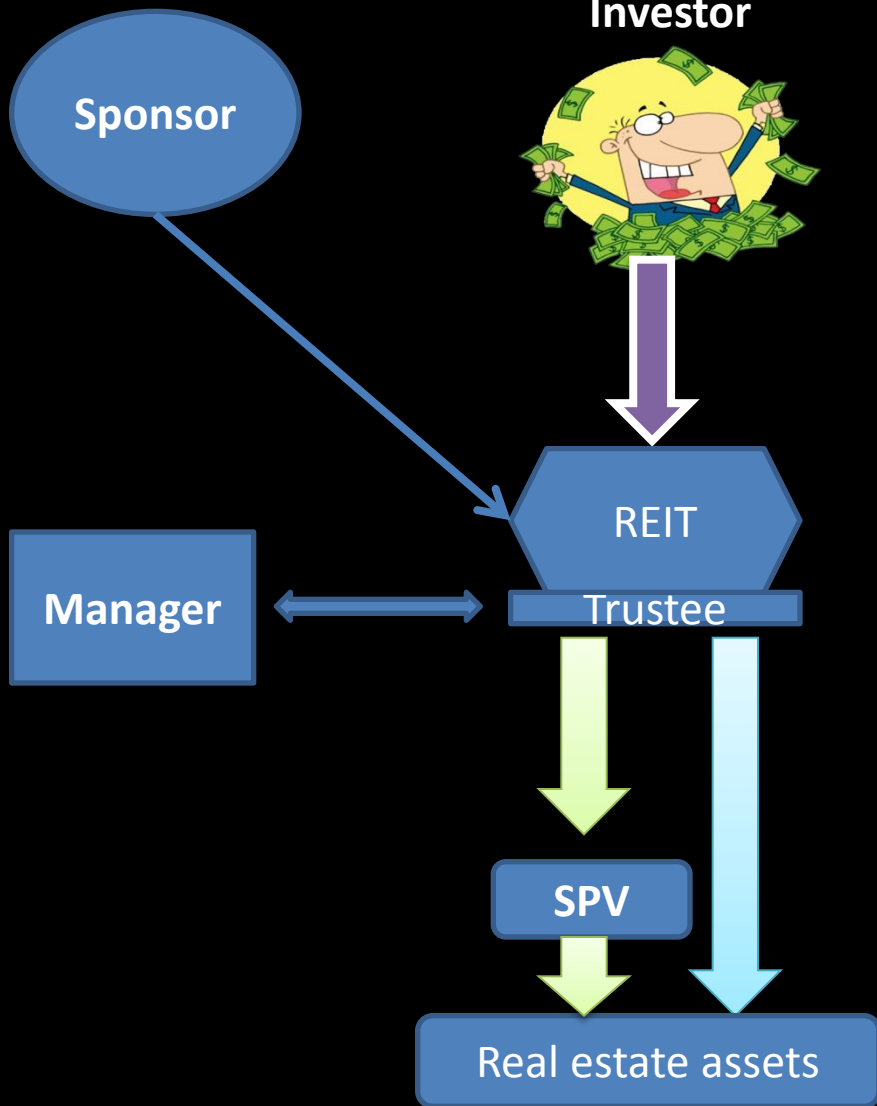
Budget 2014 : Business Trusts

- Aimed towards promoting investment in real estate and infrastructure in India via PPP model
- Clause 3 of Finance Bill proposes to insert new definition S.2(13A) to define “Business Trusts” to mean a trust registered as an Infrastructure Investment Trust (*Invits*) or Real Estate Investment trust (*REITs*), the units of which are required to be listed on a recognized stock exchange, in accordance with SEBI Act, 1992 and notified by Central Government in this behalf

Budget 2014 : Business Trusts

- Income-investment model of REITs and Invits:
 - Trust would raise capital by way of issue of units (to be listed on recognized stock exchange) and can also raise debts directly from both resident & non-resident investors
 - Income bearing assets would be held by the trust by acquiring controlling or other specific interest in an Indian company (SPV) from the Sponsor
- Business Trust (Chapter XII-FA) shall file Return of Income (S.139(4E)) and furnish Income & Expenditure Statement to its unit holders (S.115UA(4))
- In case of ECBs by the trust, the TDS will be 5% for such period as provide in S. 194LC.
- These provisions supply the taxation regime for the **Draft Regulations, 2013 (put up for public comments till October 2013) issued by SEBI** on REITs and Invits.

Business Trusts



- **SPV:** All entities that REIT has majority interest will qualify as SPV. Explanation to S.10(23FC) “an Indian company in which the business trust holds controlling interest and any specific percentage of shareholding or interest, as may be required by the regulations under which such trust is granted registration”
- **Investors:** Unit holders of the REIT
- **Trustees:** Holds property on behalf of the investor
- **Sponsor (Transferor):** Required to hold minimum 15% (25% for first 3 years) of total outstanding units of REIT at all times to show “skin-in-the game”
- **Distribution:** 90% of net distributable income after tax of REIT is required to be distributed to unit holders after 15 days of declaration

Budget 2014 : Business Trusts

| Taxable Event | For REIT/Invit | For Unit Holders (Investors) | For Sponsor (Transferor) | For SPV |
|--|-----------------------------------|---|--------------------------|----------------------------|
| Capital Gain on sale of units of business trust | N/A | Subject to STT and given tax treatment similar to equity shares of company (S.10(38)) | | N/A |
| Dividend income from SPV on shares held by Business Trust | Dividend received exempt from tax | Dividend component distributed by Business Trust exempt from tax | | DDT will be payable by SPV |
| Other income (S.115UA(2)) | Taxable at maximum marginal rate | Any distributed income from Business Trust (other than interest income) will be exempt from tax (S.10(23FD)) | | N/A |

Budget 2014 : Business Trusts

| Taxable Event | For REIT/Invit | For Unit Holders (Investors) | For Sponsor (Transferor) | For SPV |
|--|----------------|------------------------------|--|------------|
| <p>Capital gains on exchange of shares of SPV for units of business trust</p> | <p>N/A</p> | <p>N/A</p> | <ul style="list-style-type: none"> • No capital gains at time of exchange (S.47(xvii)) • CG taxable at time of sale of units received in exchange of shares even if transaction of sale of units carried out on a recognized stock exchange • Cost of shares exchanged will be cost of units (S.49(2AC)) • Period of holding of shares will be included for period of holding of units | <p>N/A</p> |

Budget 2014 : Business Trusts

| Taxable Event | For REIT/Invit | For Unit Holders (Investors) | For Sponsor (Transferor) | For SPV |
|--|---|--|--------------------------|---|
| Interest income from SPV on money lent by Business Trust (S.10(23FC)) | <ul style="list-style-type: none"> • Interest received exempt in hands of Business Trust • SPV not required to withhold tax (S.194A(3)(xi)) • Business Trust to withhold at time of distribution of its income (S.194LBA) <ul style="list-style-type: none"> - 5% in case of non-resident unit holders - 10% in case of resident unit holders | Interest component distributed taxable in hands of unit holders: <ul style="list-style-type: none"> - 5% in case of non-resident unit holders - At normal income-tax rates for resident unit holders | | Deduction will be available to SPV as per normal provisions of IT Act |

Thanks!

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Acknowledgments:

Mr.Dhiraj Raman & Ms. Bhavya Rangarajan, Advocates