Cash Transactions in Immovable Properties Subjected to Penal Provisions

Existing Section 269SS provides that, subject to specified exceptions, a person shall not take or accept any loan or deposit from any other person otherwise than by the prescribed banking channels that is by an account payee cheque or account payee bank draft or by use of electronic clearing system through a bank account so that the aggregate of loan or deposit from one person together with aggregate of existing loans and deposits from such person is ₹20,000/- or more. In simplified terms, cash loan or deposit from same person of ₹20,000/- or more is not allowable for the purpose of Section 269SS. Contravention of the above provision attracts penalty under the provisions contained in Section 271D, which provides that the person shall be liable to pay by way of penalty a sum equal to amount taken or accepted in contravention of Section 269SS. The above provisions are not applicable inter alia in a case when the acceptor of the loan or depositor as well as the person giving the loan or deposit have agricultural income and neither has any income chargeable to income tax.
Now by the Finance Bill, 2015, it is proposed to expand this provision by adding the sums received in relation to transfer of immovable property whether as advance or otherwise and whether or not ultimately the contemplated transfer takes place or not. Read on to know more...

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The term used in the proposed amendment is "immovable property", which has not been defined for the purpose of the Income-tax Act. The meaning assigned to the term "immovable property" in Section 269UA(d) is restricted for the purpose of Chapert XX-C only while the provisions of Section

269SS and 269T are contained in Chapter XX-B. Whether recourse is taken to the said Section 269UA(d) or the to the General Clauses Act, 1897, Transfer of Property Act, 1882 or to the Registration Act, 1908, in any case, the term immovable property would certainly include land, building and may include rights in land or building.

It is pertinent to recollect and co-ordinate here that the Finance Act, 2013 introduced a provision in Section 43CA whereby for the limited purpose of date of stamp valuation, the agreement for transfer of land or building or both not held as capital asset involving only cash consideration is disregarded till the agreement is registered that is to say that when the consideration is paid only in cash instead of date of agreement, the date of registration thereof is taken for stamp valuation.

The implication of the proposed amendment would be that a transaction in immovable property otherwise than by prescribed banking channel will attract harsh penalty under Section 271D to the transferor of immovable property being the recipient of money.

Section 269SS is being substituted by a newly drafted section 269SS. After enactment, the proposed new Section would become operative w.e.f. 01-06-2015.

On the same lines, Section 269T is being amended to provide that no repayment of any advance received in relation to a transfer of immovable property would be made except by the said prescribed banking channels, if such advance together with other specified sums in the section in aggregate on the date of payment is ₹ 20,000/- or more. Whether the transfer takes place or not is irrelevant. The specified sum being repaid might have been received by cheque or cash or any other mode is not relevant here as for the purpose of Section 269T the mode of repayment is only the relevant subject. Contravention of this provision would invite penal provisions of Section 271E making the person making such repayment liable to pay, a sum equal to advance so repaid. This amendment will also take effect from 01-06-2015.

Although amendments in both the Sections are made with the same intent and with reference to same subject manner, but it is observed that the new words being inserted in Section 269SS and 269T are not the same. While 269SS introduces the key words "advance or otherwise" in relation to transfer whereas Section 269T introduces the words "advance by whatever name called". Therefore, for the purpose

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of Section 269T, the specified sum is restricted to repayment of advance only as distinguished from the proposed amendment to Section 269SS whereby receipts whether as advance or otherwise are being prohibited. If the sum being repaid is not in the nature of advance then the provisions of Section 269T will not be attracted. For example, a transaction in immovable property is executed and for some reasons the transaction is cancelled and money becomes repayable then whether the repayment is of the sum received earlier is of advance or not will be a question of fact and circumstances of the case.

The Explanatory Memorandum states that the amendments are proposed in order to curb generation of black money by way of dealings in cash in immovable property transactions. However, the writer submits that in reality the cash portion of the transaction is not accounted at all and therefore to that extent the proposed amendment will not have the desired effect. Further, under the existing provisions contained in Sections 50C and 43CA read with Section 56(2), the transactions in land or buildings or part thereof are taxed at stamp valuation or stated consideration, whichever is higher. Therefore, in a transaction where the stated consideration is lower than the stamp valuation, the difference is already getting taxed and to an extent while Section 50C or Section 43CA invite taxation, the proposed provision attracts penalty.

The proposed amendments will certainly deter the transactions from being back dated by use of cash consideration. Hitherto, for the purchase of immovable property as an asset, any quantum of cash could be paid and repayment of advance for immovable property could be paid in cash without attracting any penal provisions under the income tax law. Now, for cash consideration or repayment in cash the penal provisions will get attracted. At the same time, cash consideration or repayment per se will not affect the validity of the transactions or will not affect the date of the transfer under the property laws concerning transfer or will not affect even the date of transfer under the provisions of the income tax law more particularly with reference to provisions contained in clauses (v) and (vi) of sub Section (47) of Section 2 of the Act.

The exact effects as well as limitations of the proposed amendment read with existing provisions may be visualised as follows:

i. Harsh penal provisions for taking or accepting specified sum or for repayment thereof;
ii. Transaction would continue to be valid under the laws concerning properties as well as under the contract law;
iii. The transaction would continue to be valid under the income tax law;
iv. The date of transfer will remain unaffected by the proposed amendment as well as by the existing provisions of Section 43CA;
v. The taxation of income out of such cash transaction except for the limited purpose of date of stamp valuation as provided in Section 43CA would also continue to be as before.

Real Estate Investment Trusts (REITs): Some Limitations Addressed :

The draft schemes of Real Estate Investment Trusts and Infrastructure Investment Trusts were announced by the Securities and Exchange Board of India more than a year back. However, it was known that unless the required pass through status for taxation is granted under the tax laws, the schemes cannot take off. To address the income tax issues, the Finance (No.2) Act, 2014 had amended the Act to introduce a special taxation regime in respect of the such schemes referred as `Business Trusts' in the Act. However, the said provisions were falling short of complete pass through and rightful expectations. The proposed amendments in this Finance Bill would address some of the limitations. The limitations which remain to be addressed are also discussed later in this article which should form a part of the post budget memorandum.

Section 269T is being amended to provide that no repayment of any advance received in relation to a transfer of immovable property would be made except by the said prescribed banking channels, if such advance together with other specified sums in the section in aggregate on the date of payment is ₹ 20,000/- or more.

The existing definition of Business Trust in Section 2(13A) is now being substituted to mean a trust registered as an Infrastructure Investment Trust under the Securities and Exchange Board of India (Infrastructure Investment Trusts) Regulations, 2014 or a Real Estate Investment Trust under the Securities and Exchange Board of India (Real Estate Investment Trusts) Regulations, 2014 in either case made under the Securities and Exchange Board of India Act, 1992, and the units of which are required to be listed on recognised stock exchange in accordance with the aforesaid Regulations.

Under the existing provisions, the listed units of a business trust, when traded on a recognised stock exchange, are subjected to securities transaction tax and the resultant gains are granted special tax treatment, that is to say, if the gains are long term, the same are exempt u/s. 10(38) and if gains are short term, the same are taxable at concessional rate of 15% u/s. 111A. However, this special tax treatment under Section 10(38) and 111A is not available to the sponsors when they transfer units acquired earlier in exchange of shares of the special purpose vehicle (SPV).

One of the ways by which a business trust may indirectly hold income generating assets is through SPV. Taxation of capital gains arising to the sponsor at the time of exchange of shares in SPV, with units of the business trust, is deferred as such exchange is treated as not transfer under Section 47(xvii). Further, by virtue of Section 49 (2AC), the cost of the shares to the sponsor becomes the cost of these units that the sponsor receives and by virtue of Section 2(42A) Explanation 1 clause (hc), the holding period of shares is included in computing the holding period of such units.

In case the sponsor holding the shares of the SPV decides to exit through the Initial Public Offer (IPO) route, then the special tax treatment on capital gains arising on transfer of shares is available. However, such special tax treatment is not available to the sponsor at the time it offloads units of business trust acquired in exchange of its shareholding in the SPV through the Initial offer at the time of listing of business trust on stock exchange. Thus, tax on such gains is levied at the time of transfer of units by the sponsor and the special tax treatment is presently not available and the transfer is not subjected to STT.

Now, it is proposed to do away with this dichotomy and provide parity between the sponsor held units and the units held by other unit holders. It is therefore proposed that the sponsor would get the same special tax treatment on offloading of units under an Initial offer on listing of units as it would have been available had he offloaded the underlying shareholding through an IPO and such transaction would also be subjected to STT. To achieve the purpose, Section 10(38) and Section 111A are proposed to be amended so as to omit the second *proviso* to Section 10(38) and second *proviso* to Section 111A and the Finance Act, 2004 with reference to STT is also being amended. Thus, benefit of Section 10(38) and Section 111A would be available to all the unit holders at parity.

Another issue being addressed by the Finance Bill, 2015 is in respect of the rental income earned directly by the REIT. In the present scheme of investments by REIT, the predominant income of the REIT would be rental income. For the rental income, the REIT may invest in the property through SPV or may invest directly in the property. If the investment is made through SPV, then the REIT will get income from the SPV in the form of dividend or interest. Dividend income from the SPV gets exemption u/s. 10(34) while the interest income is exempt in the hands of business trust u/s. 1010(23FC). However, if the REIT earns rental income from the property directly held by it, there is no exemption provision for such rental income in the hands of REIT. Now, to remedy such discrimination, it is proposed to introduce clause (23FCA) in Section 10 to provide that any income of such a business trust, by way of renting or leasing or letting out any real estate asset owned directly by such business trust shall be exempt. Consequential amendment is being made in Section 194I to provide that the payer of such rental income to the business trust will not be required to deduct tax at source from 01-06-2015.

The rental income would ultimately reach to the unit holders. Such rental income along with other incomes of the REIT would be received by unit holders in the form of dividend. However, in view of the specific provisions contained in Section 115UA such income would retain its character as rental income and would be taxed accordingly in the hands of the unit holders. Provisions of Section 10(23FD) are being amended to make such rental income taxable in the hands of the unit holders. REIT would therefore effect TDS u/s. 194LBA on such rental income while paying it to the unit holders with effect from 01-06-2015.

The existing definition of Business Trust in Section 2(13A) is now being substituted to mean a trust registered as an Infrastructure Investment Trust under the Securities and Exchange Board of India (Infrastructure Investment Trusts) Regulations, 2014 or a Real Estate Investment Trust under the Securities and Exchange Board of India (Real Estate Investment Trusts) Regulations, 2014 in either case made under the Securities and Exchange Board of India Act, 1992, and the units of which are required to be listed on recognised stock exchange in accordance with the aforesaid Regulations.

The proposed amendments would certainly make the scheme of REIT viable but it is submitted that for the scheme to really become attractive, there is a need to provide tax holiday for initial years on transfer of completed projects by the sponsor to the SPV. Presently, a completed project may not be held by SPV. Under the existing provisions, transfer of such project by the sponsor to the SPV would attract tax under the normal provisions in addition to heavy burden of stamp duty under the relevant State laws and registration charges. Stamp duty being a State subject, it would be left to the States to attract REITs and REIT projects by providing necessary incentives. Further, in advanced countries the renting is attractive for the reason *inter alia* that rent laws fully recognise property rights of the owners. In our country, a lot needs to be done in this context in terms of laws as well as in terms of implementation thereof. Further, in advanced countries, it is attractive to hire a property than buy it due to comparative interest and rental rates. In India also such comparatives make hiring attractive. But in India, buying a property is still a preferred option compared to hiring, for the reason that due to shortage of supply *vis-a-vis* the demand, the appreciation rates in property prices are quite high. ■