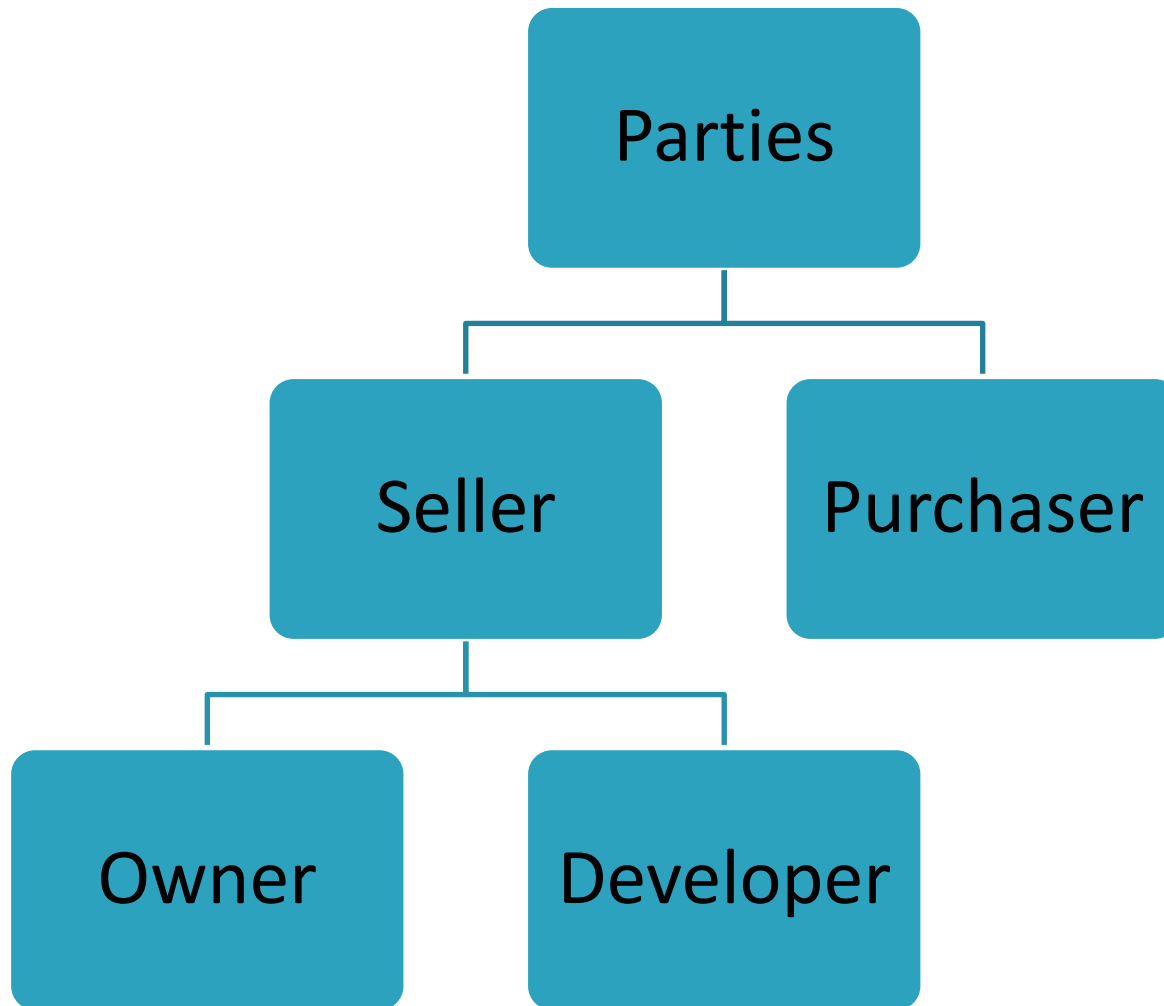


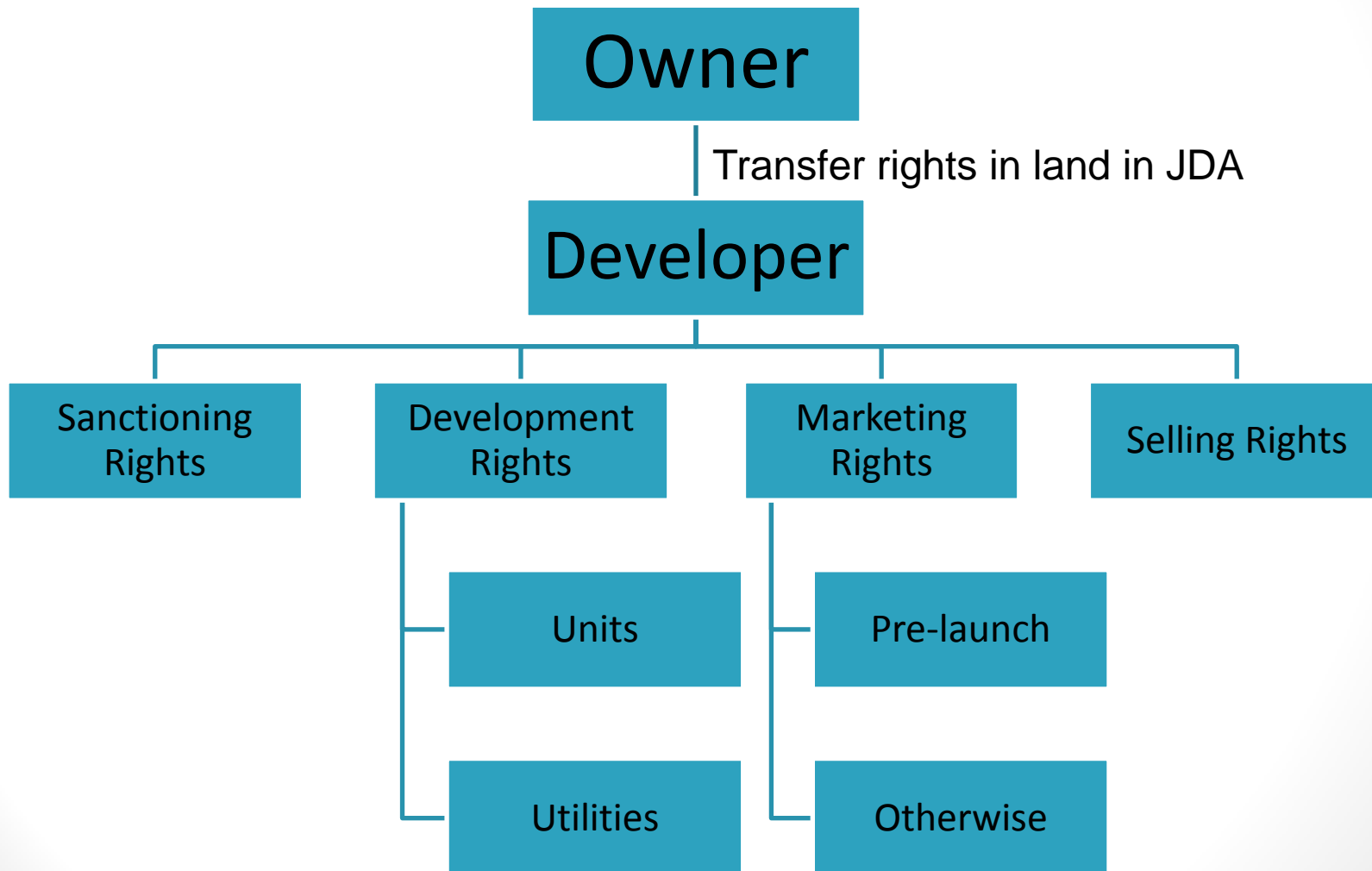
# Issues in Real Estate Transactions

- Rano Jain

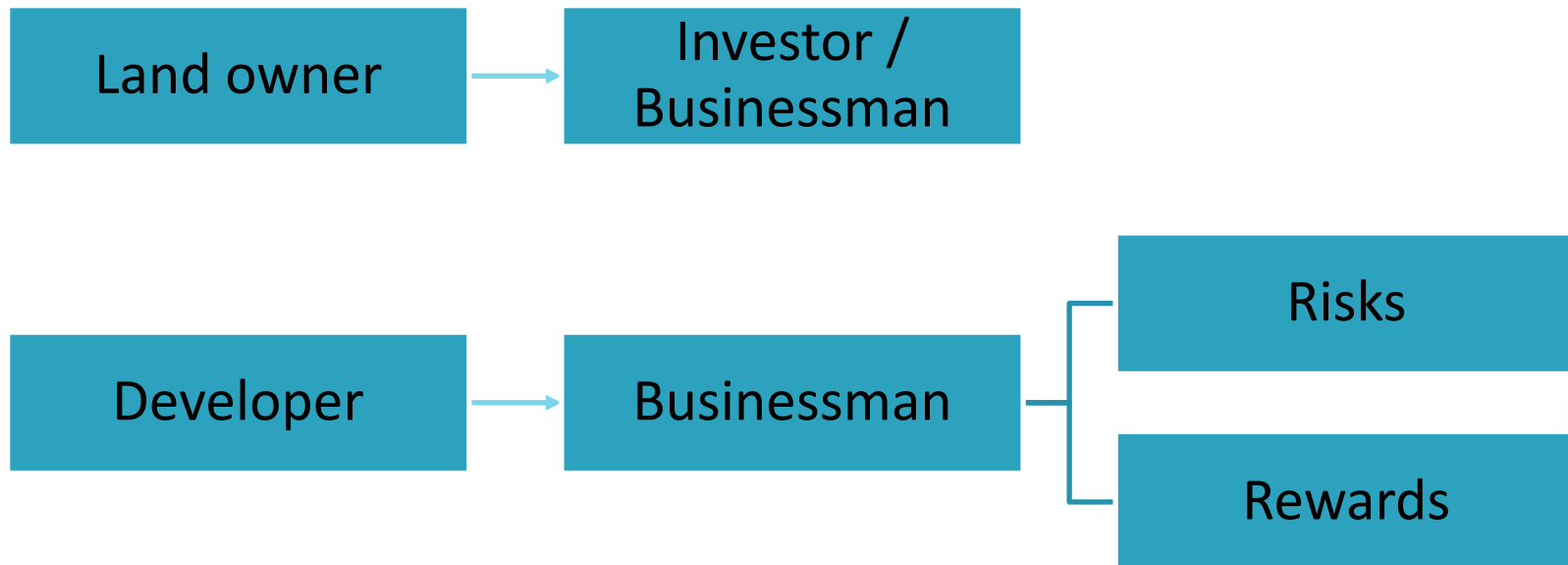
# Parties to Transaction



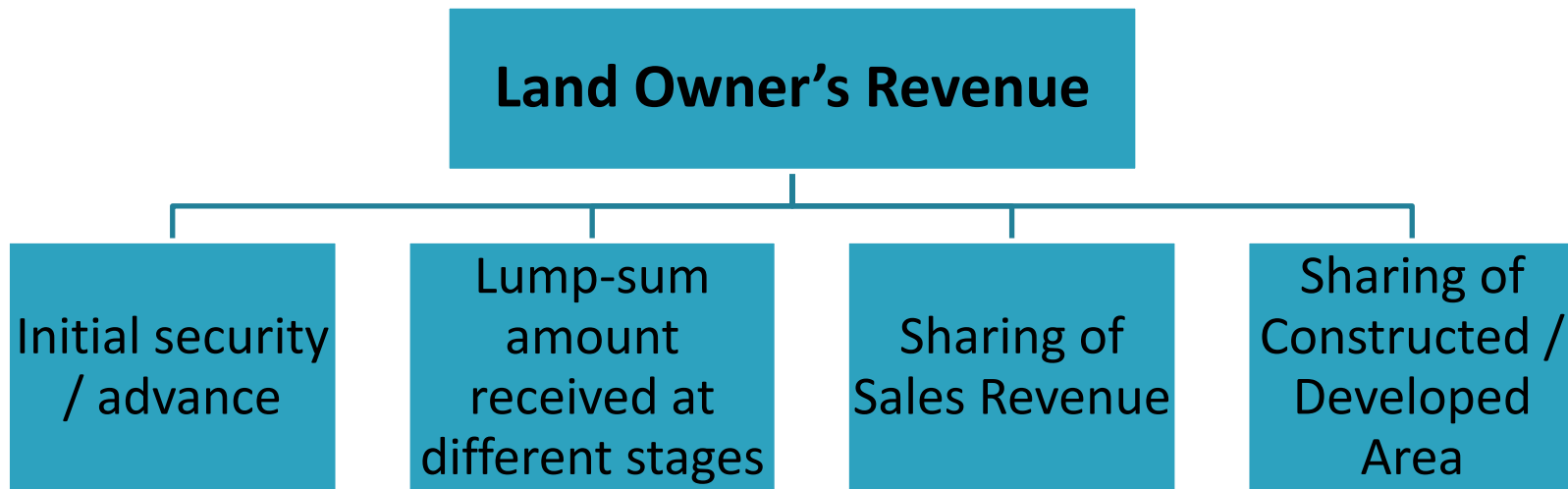
# Relation between Owner and Developer

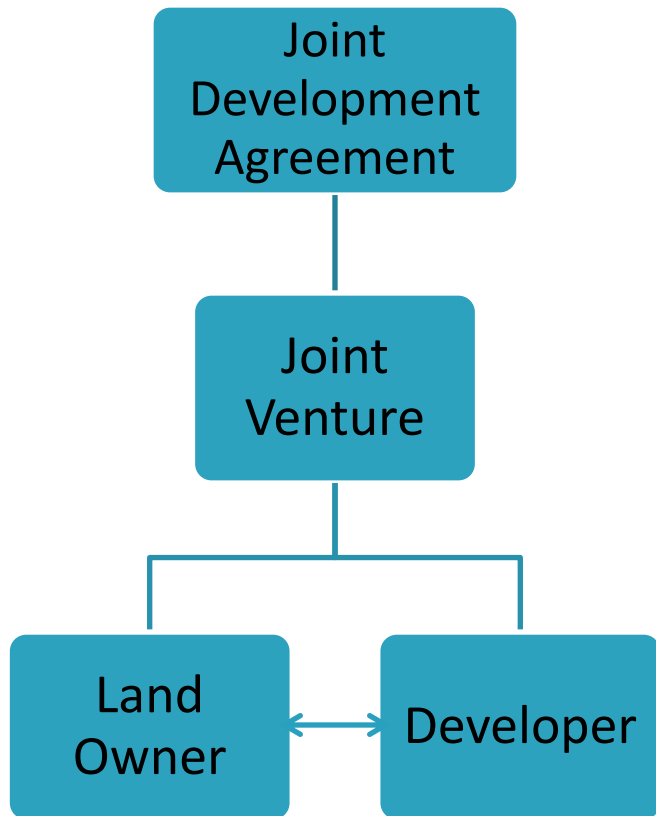


# Status of Parties



# Revenue Model of Owner





## Stages of the whole Joint Venture

Pre-launch

Booking

Developer / Buyer Agreement

Possession

Convergence

# Accounting / Taxation issues



- Multiple Years



- Complex JDA's



- Huge Costs / Risks

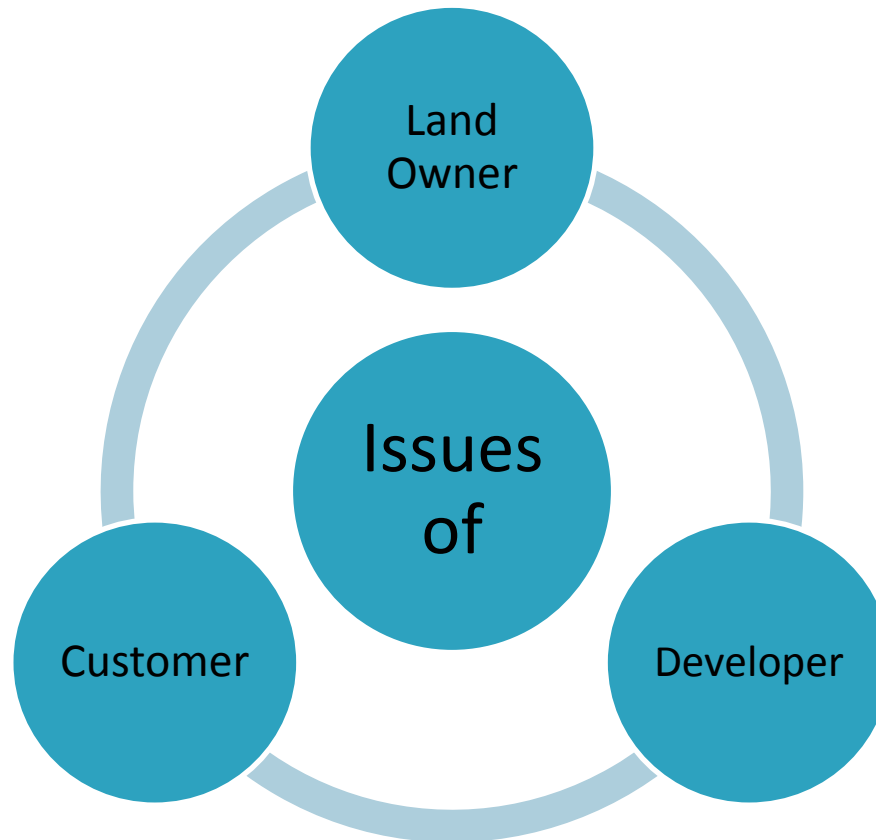


- Volatile Markets



- Difference in the parameters of Accounting and Income Tax Act

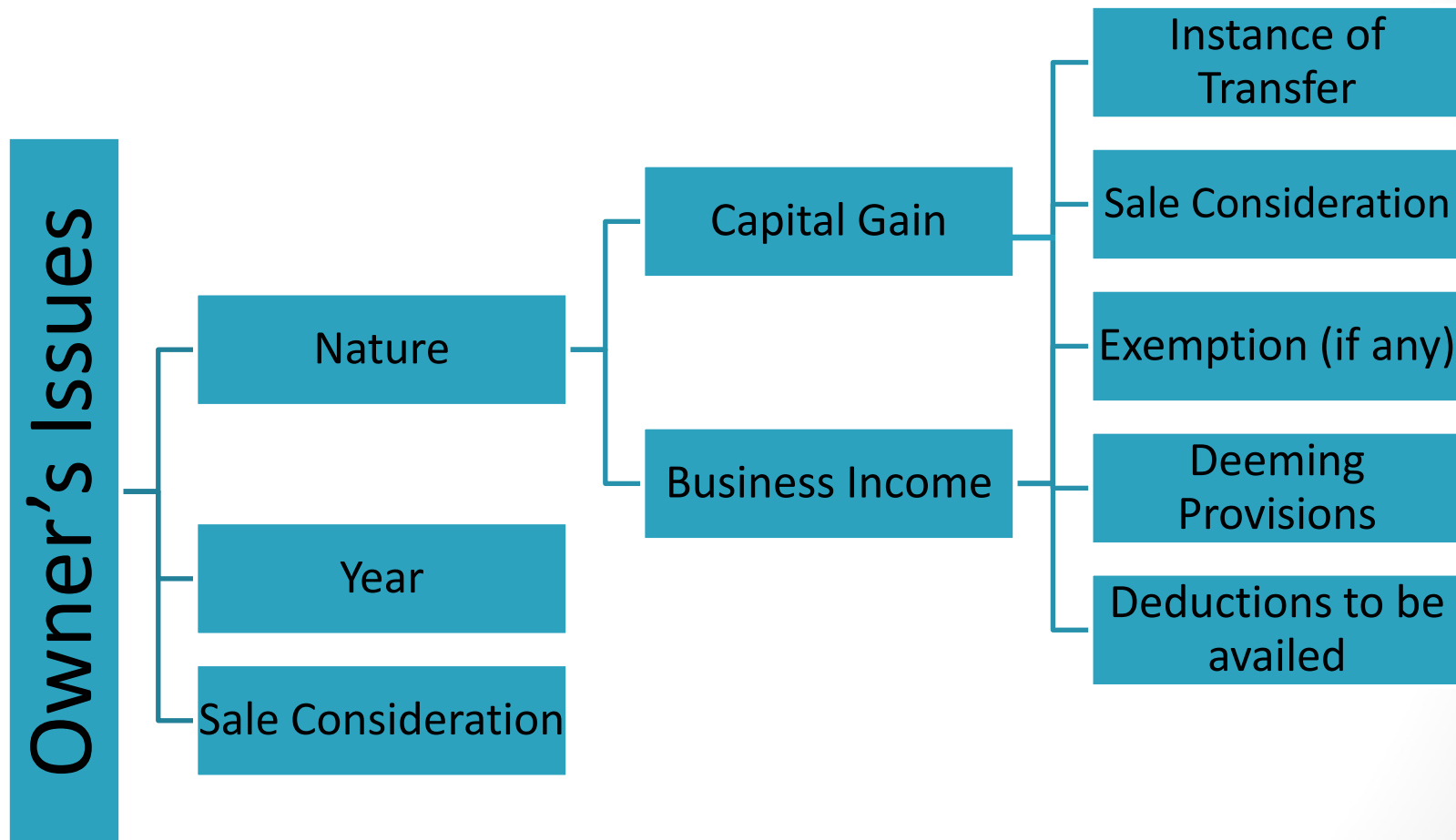
# Income tax Issues can be considered from the following point of views





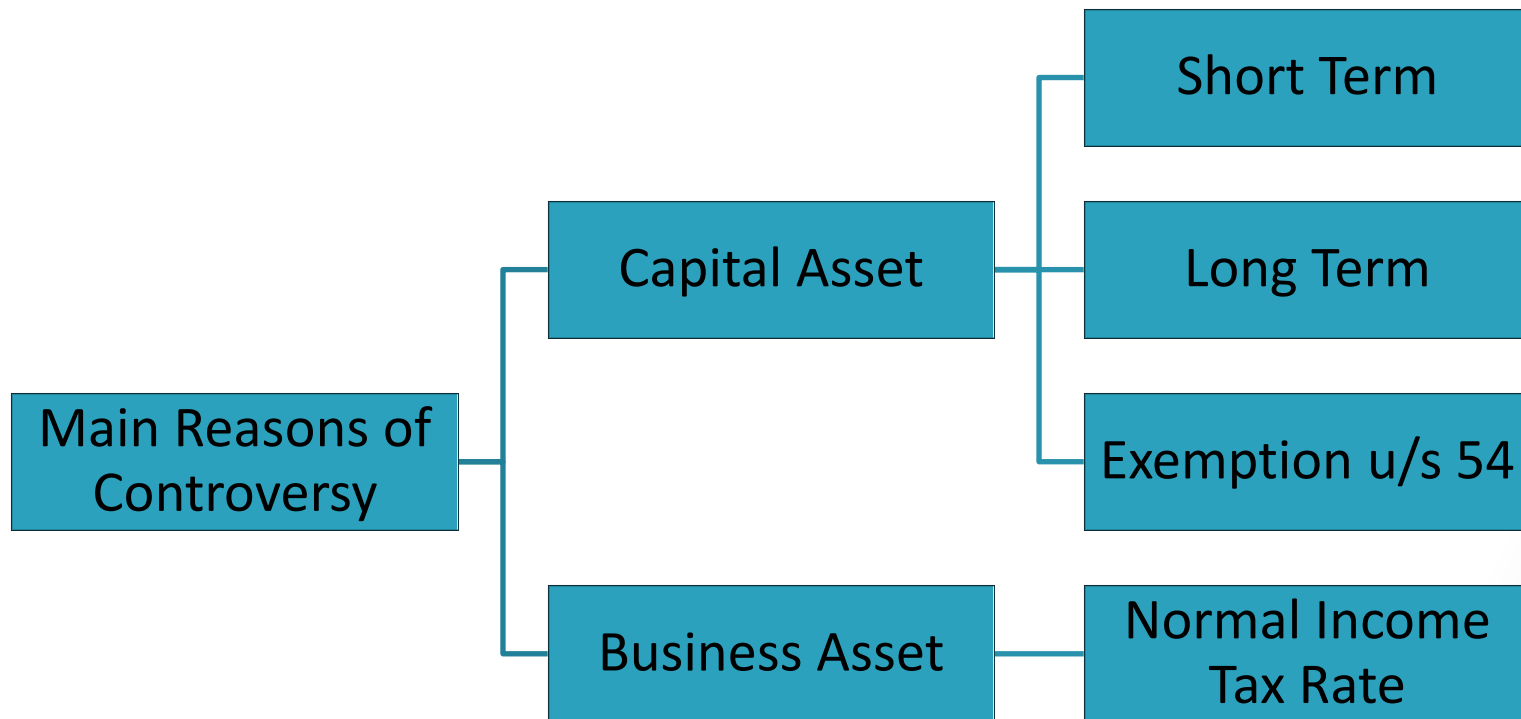
# Land Owner's Issues

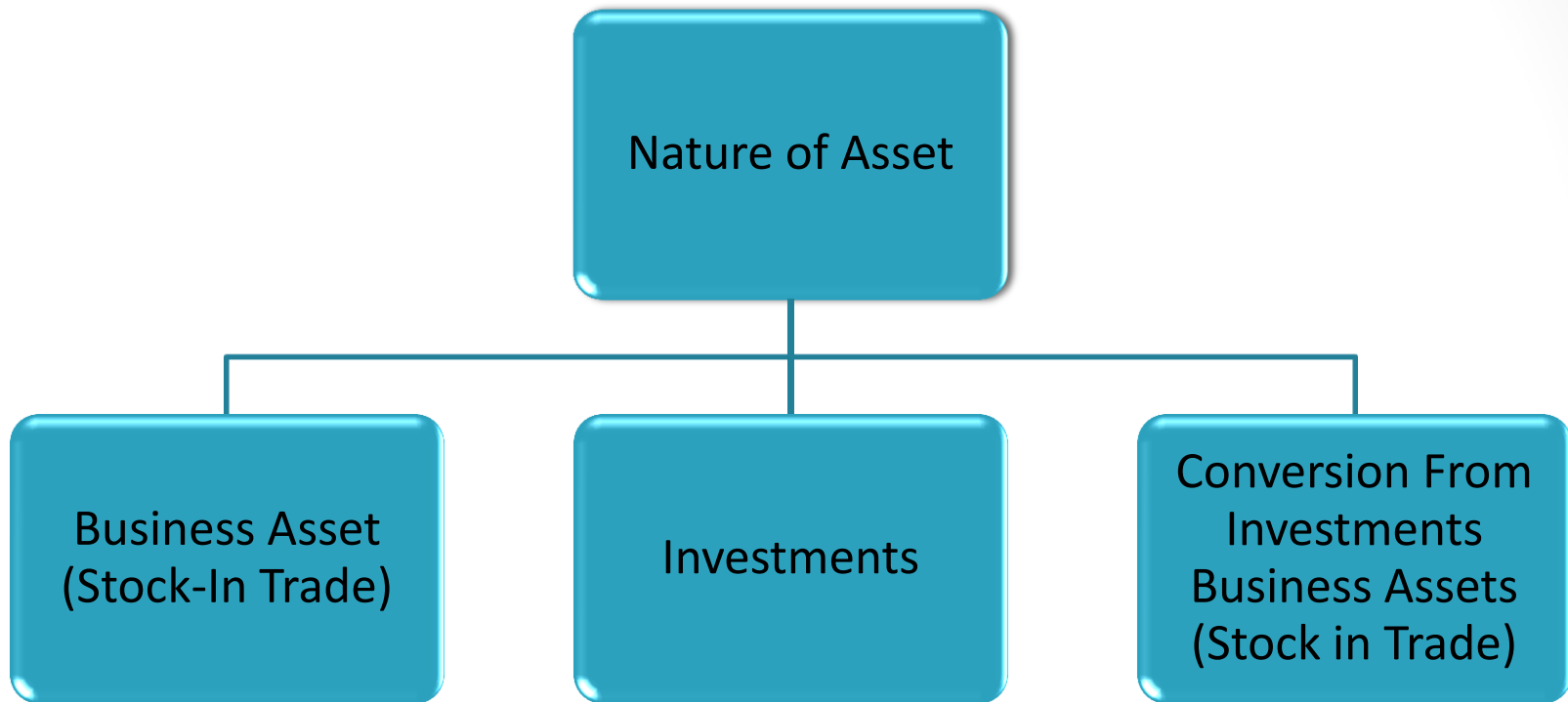
# Land Owner's Issues



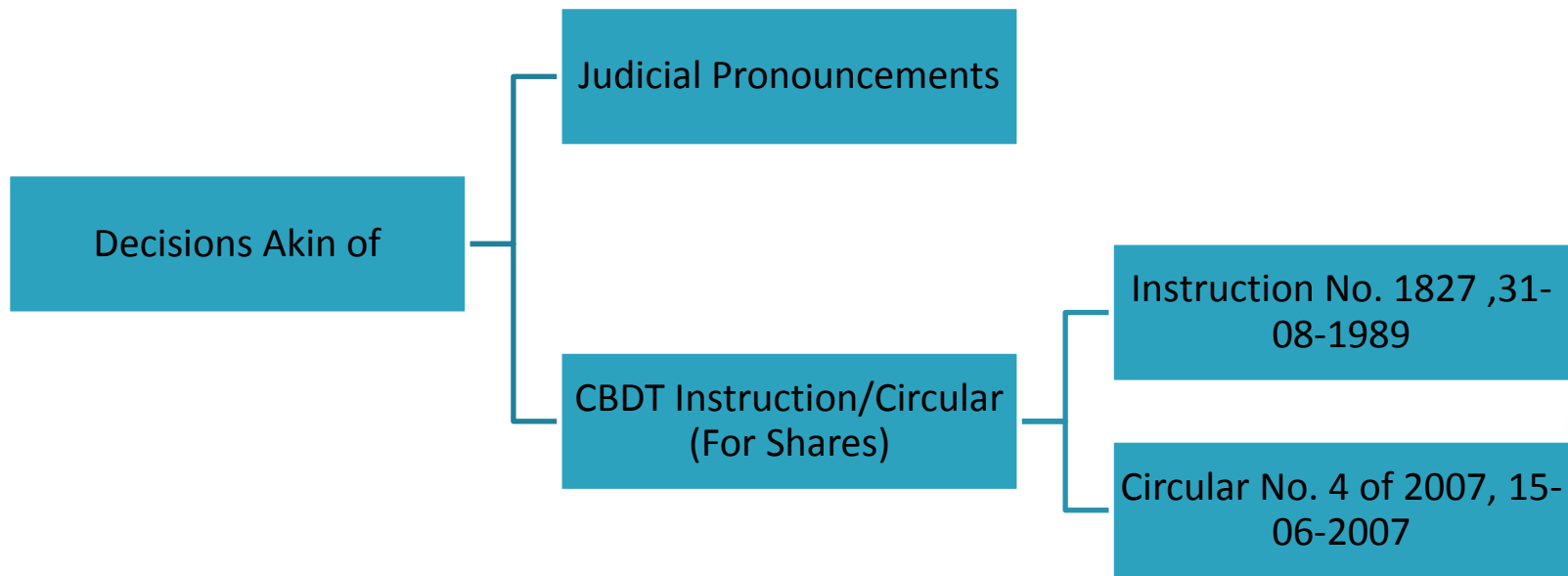
# Controversy on Nature of Asset

It is controversial as to whether a particular asset is a business asset or capital asset.

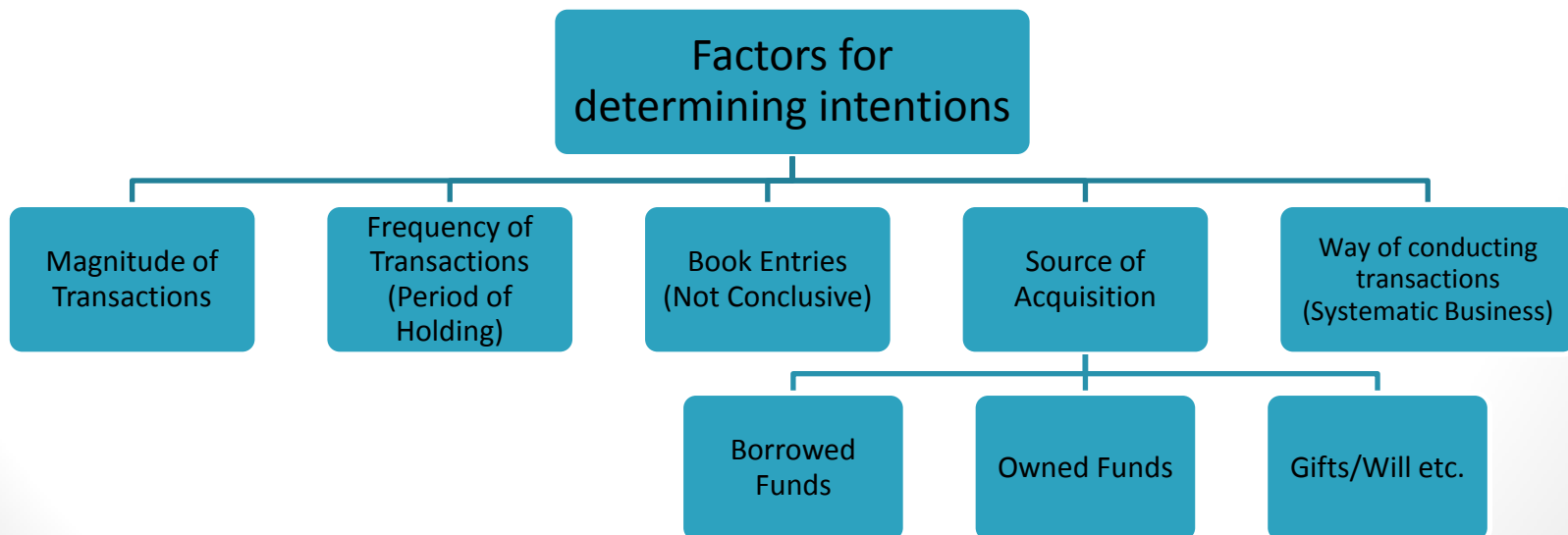
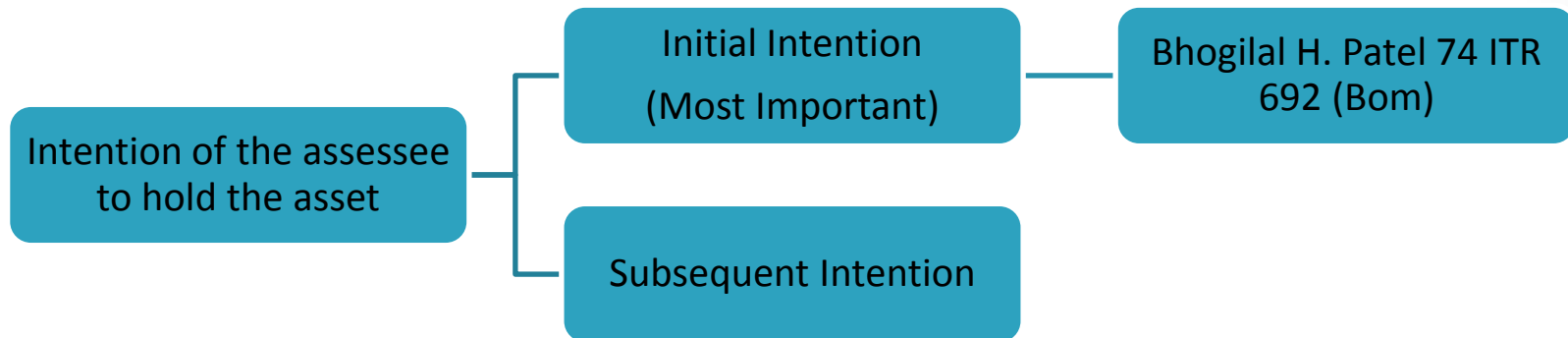




# Judicial view



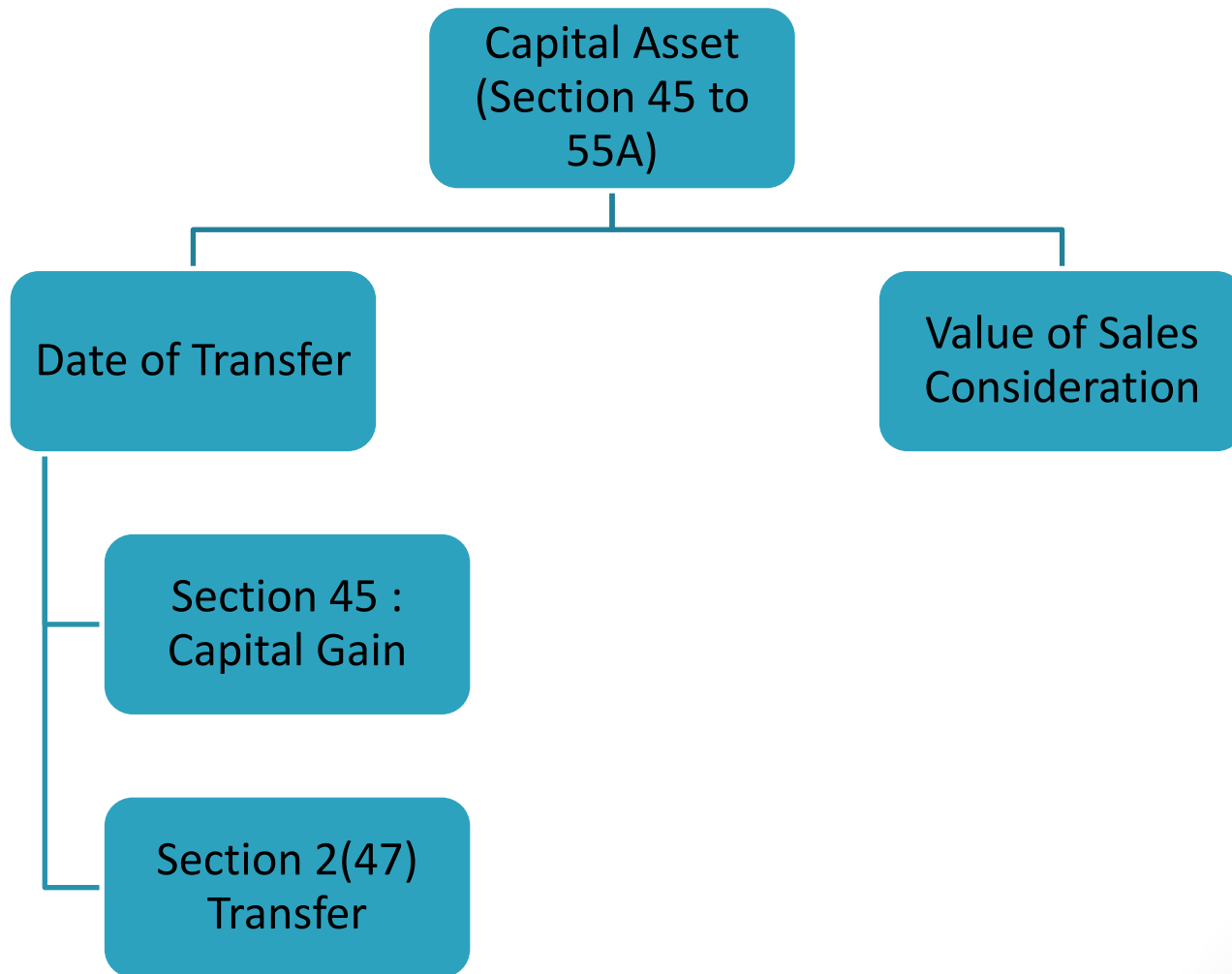
# Intention of the owner



# Sec 45(2)

(2) Notwithstanding anything contained in sub-section (1), the profits or gains arising from the transfer by way of conversion by the owner of a capital asset into, or its treatment by him as stock-in-trade of a business carried on by him shall be chargeable to income-tax as his income of the previous year in which such stock-in-trade is sold or otherwise transferred by him and, for the purposes of section 48, the fair market value of the asset on the date of such conversion or treatment shall be deemed to be the full value of the consideration received or accruing as a result of the transfer of the capital asset.

# Capital Asset





# Section 45 of Income Tax Act, 1961

- (1) Any profits or gains arising from the transfer of a capital asset effected in the previous year shall, save as otherwise provided in sections 54, 54B, 54D, 54E, 54EA, 54EB, 54F, 54G and 54H, be chargeable to income-tax under the head "Capital gains", and shall be deemed to be the income of the previous year in which the transfer took place.

\*\*\*\*\*

# Transfer 2(47)

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

... Continued

# Transfer 2(47)

Explanation 1. — For the purposes of sub-clauses (v) and (vi), "immovable property" shall have the same meaning as in clause (d) of section 269UA.]

Explanation 2. — For the removal of doubts, it is hereby clarified that "transfer" includes and shall be deemed to have always included disposing of or parting with an asset or any interest therein, or creating any interest in any asset in any manner whatsoever, directly or indirectly, absolutely or conditionally, voluntarily or involuntarily, by way of an agreement (whether entered into in India or outside India) or otherwise, notwithstanding that such transfer of rights has been characterised as being effected or dependent upon or flowing from the transfer of a share or shares of a company registered or incorporated outside India;]

# Section 2(47) - Transfer

'Transfer' for Section 2(47)  
is recognized as

Relinquishment

Extinguishment

Part performance

u/s 53A of Transfer  
of Property Act,  
1882

# Section 53A of the Transfer of Property Act, 1882

- Transfer of Property Act has been bodily transposed into clause (v) of Section 2(47) of the Act. In other words, the legal requirements of Section 53A of 1882 Act are required to be fulfilled so as to attract the provisions of Section 2(47)(v) of the Act.

## **Section 53A of the Transfer of Property Act, 1882 reads as follows:**

- “53A. *Part Performance* : Where any person contracts to transfer for consideration any immovable property by writing signed by him or on his behalf from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty, and the transferee has, in part performance of the contract, taken possession of the property or any part thereof, or the transferee, being already in possession, continues in possession in part performance of the contract and has done some act in furtherance of the contract, and the transferee has performed or is willing to perform his part of the contract, then, notwithstanding that the contract, though required to be registered, has not been registered, or, where there is an instrument of transfer, that the transfer has not been completed in the manner prescribed therefor by the law for the time being in force, the transferor or any person claiming under him shall be debarred from enforcing against the transferee and persons claiming under him any right in respect of the property of which the transferee has taken or continued in possession, other than a right expressly provided by the terms of the contract.

# Section 53A of the Transfer of Property Act, 1882

- Thus, a transfer in order to fall under the doctrine of part performance u/s 53A of the 1882 Act and thereby amenable to tax by virtue of Section 2(47)(v), read with Section 45 of the Act, should satisfy the following: [Cumulative Conditions to be satisfied for applicability of section 53A of TOPA, 1882]:
  - (a) there should be a written contract for consideration;
  - (b) from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty;
  - (c) the contract should be signed by the transferor;
  - (d) the contract should pertain to transfer of immovable property;
  - (e) the transferee should have taken possession of the property;
  - (f) the transferee has performed or is willing to perform his part of contract, and
  - (g) the contract should be registered as per the provisions of The Registration Act, 1908 (this condition has been introduced w.e.f. September 2001).

- i. Sec 53 A of TOPA,1882 was introduced by Finance Act, 1987 w.e.f 01.04.1988
- ii. In an amendment to Section 53A w.e.f 24.09.2001
  - i. deleted 'contract though required to be registered not registered.
  - ii. similar amendment in section 17(1A) of the Registration and

**C.S. Atwal vs Commissioner of Income-tax, Ludhiana [2015] 378 ITR 244 (Punjab & Haryana)**

Hon'ble P&H High Court held that section 53A of Transfer of Property Act, has been bodily transposed into section 2(47)(v) of the Act, and the effect of it would be that section 53A of Transfer of Property Act, shall be taken to be an integral part of section 2(47)(v) of the Act. In other words, the legal requirements of section 53A of Transfer of Property Act, are required to be fulfilled so as to attract the provisions of section 2(47)(v) of the Act.

The above mentioned case has been affirmed by the Hon'ble Apex Court in the judgement of **Commissioner of Income Tax vs Balbir Singh Maini, [2017] 398 ITR 531**

# Section 45(5A)

- **Following sub-section (5A) shall be inserted after sub-section (5) of section 45 by the Finance Act, 2017, w.e.f. 1-4-2018 :**
- *(5A) Notwithstanding anything contained in sub-section (1), where the capital gain arises to an assessee, being an individual or a Hindu undivided family, from the transfer of a capital asset, being land or building or both, under a specified agreement, the capital gains shall be chargeable to income-tax as income of the previous year in which the certificate of completion for the whole or part of the project is issued by the competent authority; and for the purposes of section 48, the stamp duty value, on the date of issue of the said certificate, of his share, being land or building or both in the project, as increased by the consideration received in cash, if any, shall be deemed to be the full value of the consideration received or accruing as a result of the transfer of the capital asset :*
- **Provided** *that the provisions of this sub-section shall not apply where the assessee transfers his share in the project on or before the date of issue of said certificate of completion, and the capital gains shall be deemed to be the income of the previous year in which such transfer takes place and the provisions of this Act, other than the provisions of this sub-section, shall apply for the purpose of determination of full value of consideration received or accruing as a result of such transfer.*

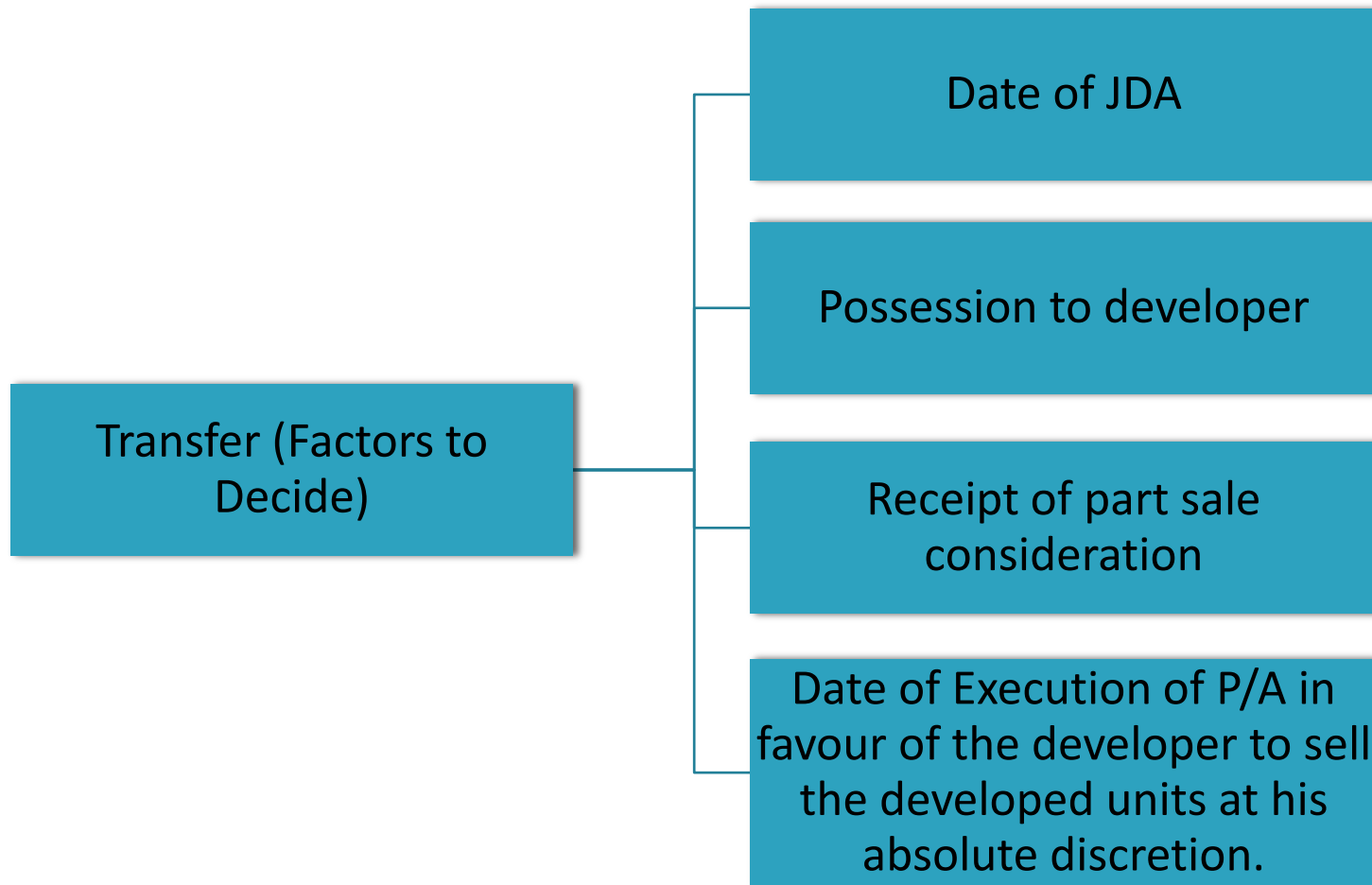
... Continued



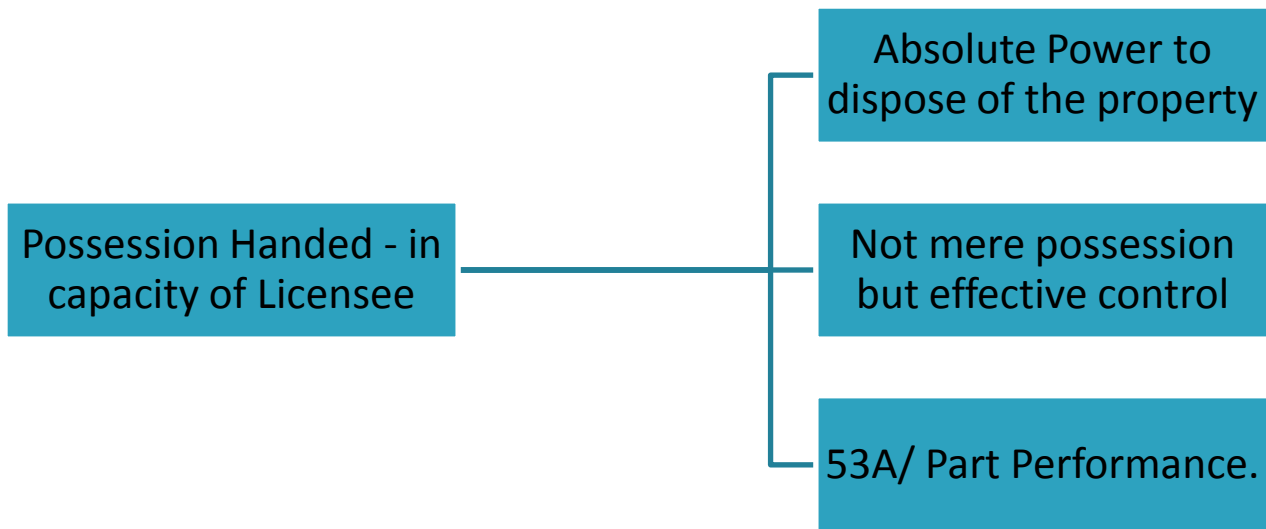
# Section 45(5A)

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

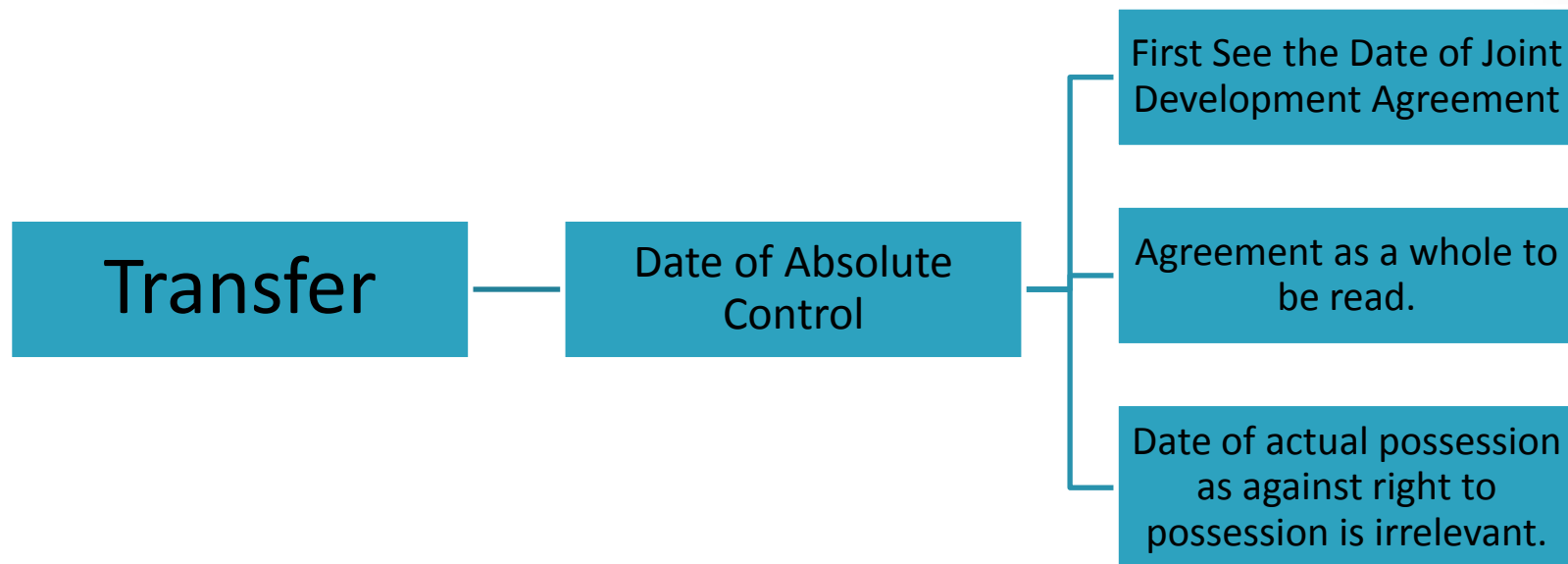
# Aspects of 'Date of Transfer'



# Aspects of 'Date of Transfer'



# Aspects of 'Date of Transfer'



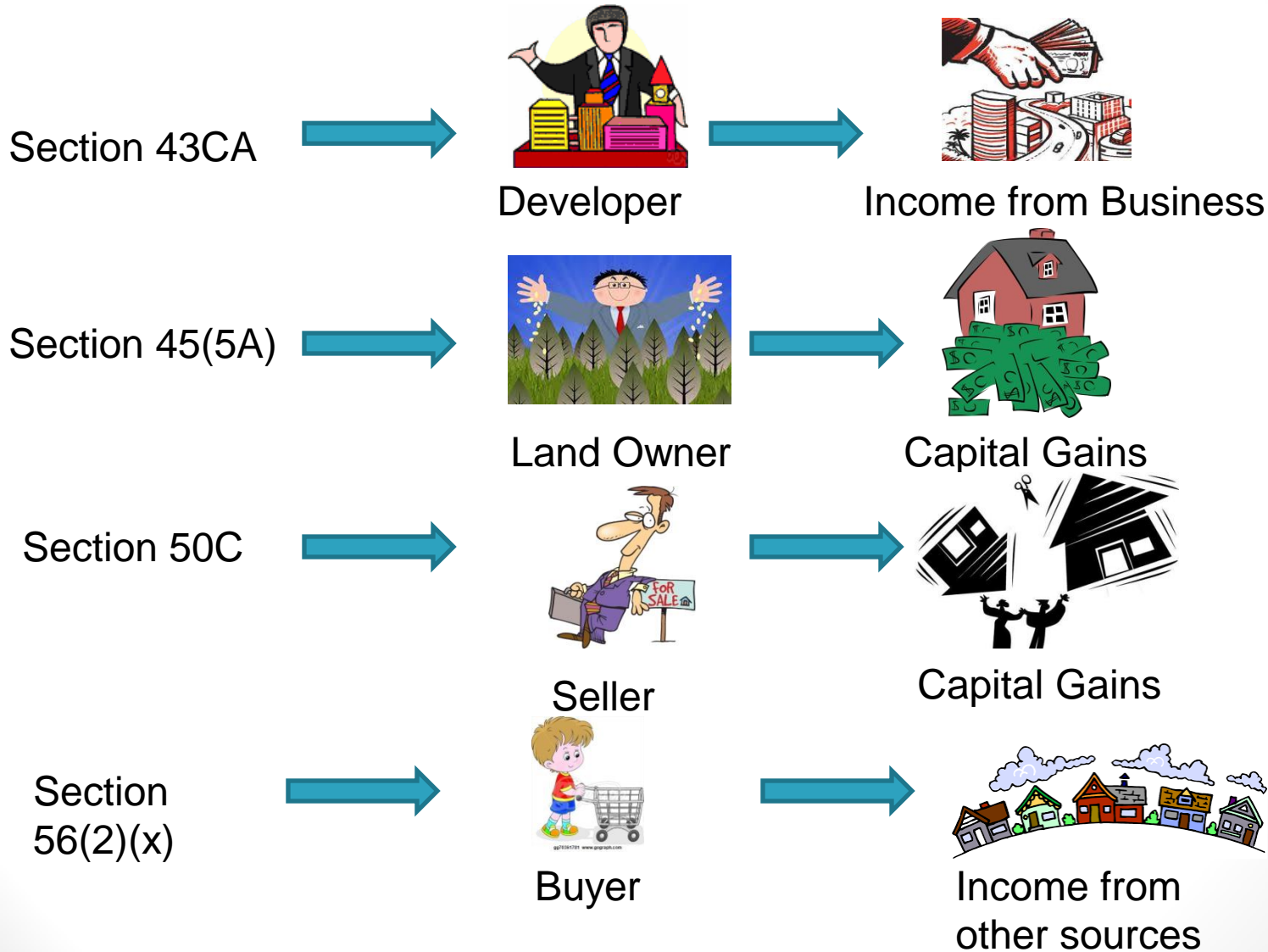
## **Chaturbhuj Dwarkadas Kapadia Vs CIT (2003) 260 ITR 491 (Bom)**

High Court observed that 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 contract would be relevant to decide the year of chargeability.

...continued

# Computation of Capital Gain

# Stamp Valuation Sacrosanct



# Computation of Capital Gain

## Illustration 1:

Mr X owned a residential house. Mr Y, a builder, approaches Mr X proposing construction of four floors along with parking area, of which, one floor is to be kept with Mr Y. The total cost of construction is Rs 1 Crores. Further, Mr Y also pays Rs. 50 Lakh to Mr X in cash. Mr X had purchased this house for Rs 3 Crore  
What will be the capital Gain in the hands of the owner (Mr. X)? Whether owner can claim deduction under section 54?

## Solution:

Consideration received = Value of  $3/4^{\text{th}}$  Constructed Area + Rs. 50,00,000  
= 75,00,000 + 50,00,000  
= Rs. 1,25,00,000 ... (A)

Cost of acquisition = Cost of  $1/4^{\text{th}}$  Land Area  
=  $1/4 \times 3,00,00,000$   
= Rs. 75,00,000

Capital gain (A-B) = Rs. 50,00,000 ... (B)

Exemption can be claimed under section 54 to the extent of Rs. 50,00,000.

# Computation of Capital Gain

## Illustration 2:

Total Land Area with owner is 1000 Acre

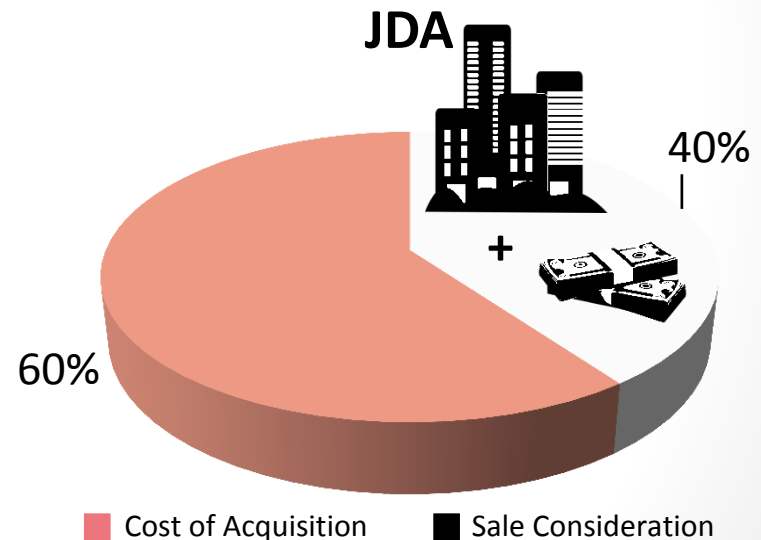
A JDA is entered into between Land Owner and Developer on April 1, 2011 with consideration under JDA being 40% of Built-up Area and Rs. 1 Crore.

Now,

Consideration in owner hand

Cost of construction of 400 Acre Built-up Area (not value of land) + Rs. 1 Crore

**Cost of Acquisition = Cost of 600 Acres\***



\* Fair Market value as on April 1, 2001 or the actual cost incurred after 01.04.2001



# Summary

- The first thing to understand here is that the owner of the property sells the **land right** of the property to the builder.
- In lieu of the land right, the builder **agrees to reconstruct the property** for the owner and give back a portion of the property to the owner and purchase the other portion from owner.
- Therefore, in effect the land right sold by the owner is only of the portion that the builder undertakes to purchase from the owner for a consideration.
- That **land right that is sold by the owner is a capital asset** under the Income Tax Act'1961 and which attracts capital gain on sale.
- For the portion that the owner purchases after reconstruction, he pays the builder for the cost of construction of such portion alongwith a mark-up that the builder may keep.
- Sale consideration is the consideration that the builder pays to the owner for transfer of builders' portion of the property.
- The amount which the owner pays to the builder for the owner's portion after construction is construction of a new house eligible for exemption u/s 54 and 54F.

## **Here there are some important points to be noted:**

- In order to claim exemption u/s 54 or 54F, the construction of the owner's portion should be completed only after the sale of the right of the builders' portion. This construction should be completed within 3 years from the date of sale of the builders' portion.
- If the owner of the property sells his portion of the property that he acquired after the collaboration agreement within three years of acquisition, then the exemption taken by the owner in respect of the construction of property will be withdrawn in the year of sale of his portion and the income will be treated as short term capital gain in the year of sale.

# Issues related to Developer

# AS 7 & AS 9

## (Brief Background)

- AS 7 was introduced in 1983 for Contractor and Real Estate Developer [w.e.f. 01-04-1998 from Company's Act]
  - Both Percentage Completion Method [PCM] and Completed Contract Method [CCM] were allowed
- Revised AS 7 introduced in 2002 effective w.e.f. 01-04-2003
  - Applicable only to contractors
  - PCM was made mandatory
- Also AS 9 (Revenue recognition) was introduced in 1985 keeping Real Estate Developers in mind .
  - Revenue is recognised when significant risks and rewards of ownership are transferred [CCM]
  - For service of Real Estate Developers both CCM and PCM can be used.

# AS 7 & AS 9

## (Brief Background)

- Guidance Note on recognition of Revenue by Real Estate Developers
  - It gave more importance to PCM.
- Revised Guidance note on Accounting for Real Estate Transaction was issued in Feb 2012
  - Covers all form of transactions in real estate
  - Applicable to Developers and land owners
  - Not for investment (fixed assets)
  - Contractors not covered (AS 7)
  - w.e.f. 01-04-2012 all real estate projects commencing

# Key proposition of Revised Guidance Note

- Construction contract – AS 7
  - Similar to delivery of goods – AS 9
- Economic Substance
  - All significant risks and rewards of ownership are transferred by the seller to the buyer.
  - No significant uncertainty exists regarding collection of revenue.
- Percentage Completion Method was explained.
  - Degree of completion = 
$$\frac{\text{Total cost incurred}}{\text{Total Estimated cost for the Project}}$$

# Income Computation and Disclosure Standards

- ICDS (w.e.f. 01.04.2016 AY 2017-18)
  - Section 145
  - Applied on Business Income and Income From Other sources
  - ICDS III relates to Construction (AS-7)
  - ICDS IV- Revenue Recognition (AS-9)

# Difference Between AS 7 and ICDS III

BASIS	ICDS III	AS-7
<b>Retention Money *</b>	Contract revenue comprise of initial amount of revenue agreed including retentions.	Retentions are not specifically mentioned in Contract Revenue as per AS 2
<b>Borrowing costs*</b>	ICDS III specifically consider borrowing cost as apart of contract cost.	AS 7 does not specifically mention borrowing costs as a part of contract cost. But AS 7 considers borrowing cost as a part of cost that are allocated to contract activity in general and can be allocated to the contract cost.
<b>Contract Costs</b>	If such costs are not realizable then the same may be allowed under provisions of the Act.	Contract costs which relate to future activity shall be recognized as an asset when it is probable that such costs are recoverable.

\* Refer Delhi High Court Judgement W.P.(C) 5595/2017



BASIS	ICDS III	AS-7
<b>Early stage of a contract</b>	ICDS III clearly defines early stage of a contract shall not extend 25% of the stage of completion.	AS 7 does not clearly define the early stage of a contract.
<b>Anticipated loss</b>	Does not permit recognition of anticipated losses.	All expected losses shall be recognized fully and not in proportion to percentage of completion.
<b>Reversal of revenue</b>	Provides for write-off in line with the provisions of Sec.36(1)(vii) Sec.36(1)(vii) bad debts written off.	Provides for reversal of revenue on account of uncertainty arising on reliability of contract revenue which was already recognized as income.

BASIS	ICDS III	AS-7
<b>Attributing contract cost</b>	The condition for attributing contract cost that such expenses should be capable of being measured reliably is removed.	For attributing contract costs to a construction contract, one condition is that such expenses should be capable of being measured reliably.
<b>Interest, dividend and capital gain</b>	Preconstruction income in the nature of interest, dividend and capital gain shall not be reduced from the cost of construction. They shall be treated and taxed as income.	AS 7 states that incidental income that is not included in contract revenue shall be reduced from contract costs, but it does not specifically mention about interest, dividend and capital gain.

# Delhi High Court Judgement

- Delhi High Court in *The Chamber of Tax Consultants & Anr. V. Union of India & Others* has struck down the following clauses from ICDS III and ICDS IV, being ultravires .
  - Treatment of retention money as mentioned in ICDS III [Para 10(a)].
  - Treatment of borrowing cost mentioned in ICDS III [Para 12].
  - PCM or CCM being recognised method of accounting as held by various judicial pronouncements, ICDS IV, permitting only one of the methods i.e. PCM.[Para 6]

# Percentage of Completion Method

## Pre Requisites of Percentage Completion Method

- a. Except during early stages of contracts when outcome of the contract cannot be estimated reliably
- b. At least 25% stage of project is completed.
- c. At least 25% of the saleable project area is secured by contracts or agreements with buyers.
- d. For this purpose only those agreements in respect of which at least 10% of the contract revenue is received and further there can be reasonable expectation that the future payments will be made by the buyer.

Illustrate - If there are 10 Agreements of sale and 10 % of gross amount is realised in case of 8 agreements, revenue can be recognised with respect to these 8 agreements

# Miscellaneous Definitions

# Section 50C

(1) Where the consideration received or accruing as a result of the transfer by an assessee of 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 (hereafter in this section referred to as the "stamp valuation authority") for the purpose of payment of stamp duty in respect of such transfer, the value so adopted or assessed or assessable shall, for the purposes of section 48, be deemed to be the full value of the consideration received or accruing as a result of such transfer :

*[Provided that where the date of the agreement fixing the amount of consideration and the date of registration for the transfer of the capital asset are not the same, the value adopted or assessed or assessable by the stamp valuation authority on the date of agreement may be taken for the purposes of computing full value of consideration for such transfer:*

*Provided further that the first proviso shall apply only in a case where the amount of consideration, or a part thereof, has been received by way of an account payee cheque or account payee bank draft or by use of electronic clearing system through a bank account, on or before the date of the agreement for transfer.]*

(2) Without prejudice to the provisions of sub-section (1), where—

(a) the assessee claims before any Assessing Officer that the value adopted or assessed or assessable by the stamp valuation authority under sub-section (1) exceeds the fair market value of the property as on the date of transfer;

(b) the value so adopted or assessed or assessable by the stamp valuation authority under sub-section (1) has not been disputed in any appeal or revision or no reference has been made before any other authority, court or the High Court,

the Assessing Officer may refer the valuation of the capital asset to a Valuation Officer and where any such reference is made, the provisions of sub-sections (2), (3), (4), (5) and (6) of section 16A, clause (i) of sub-section (1) and sub-sections (6) and (7) of section 23A, sub-section (5) of section 24, section 34AA, section 35 and section 37 of the Wealth-tax Act, 1957 (27 of 1957), shall, with necessary modifications, apply in relation to such reference as they apply in relation to a reference made by the Assessing Officer under sub-section (1) of section 16A of that Act.

*Explanation 1.*—For the purposes of this section, "Valuation Officer" shall have the same meaning as in clause (r) of section 2 of the Wealthtax Act, 1957 (27 of 1957).

*Explanation 2.*—For the purposes of this section, the expression "assessable" means the price which the stamp valuation authority would have, notwithstanding anything to the contrary contained in any other law for the time being in force, adopted or assessed, if it were referred to such authority for the purposes of the payment of stamp duty.

(3) Subject to the provisions contained in sub-section (2), where the value ascertained under sub-section (2) exceeds the value adopted or assessed or assessable by the stamp valuation authority referred to in sub-section (1), the value so adopted or assessed or assessable by such authority shall be taken as the full value of the consideration received or accruing as a result of the transfer.

...Continued

# Section 50D

Where the consideration received or accruing as a result of the transfer of a capital asset by an assessee is not ascertainable or cannot be determined, then, for the purpose of computing income chargeable to tax as capital gains, the fair market value of the said asset on the date of transfer shall be deemed to be the full value of the consideration received or accruing as a result of such transfer.



# Section 194IA

(1) 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, 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 a cheque or draft or by any other mode, whichever is earlier, deduct an amount equal to one per cent of such sum as income-tax thereon.

(2) No deduction under sub-section (1) shall be made where the consideration for the transfer of an immovable property is less than fifty lakh rupees.

(3) The provisions of section 203A shall not apply to a person required to deduct tax in accordance with the provisions of this section.

Explanation.—For the purposes of this section,—

(a) "agricultural land" means agricultural land in India, not being a land situate in any area referred to in items (a) and (b) of sub-clause (iii) of clause (14) of section 2;

(b) "immovable property" means any land (other than agricultural land) or any building or part of a building.

# Section 40A(3)

## Section 40A(3)

(3) Where the assessee incurs any expenditure in respect of which a payment or aggregate of payments made to a person in a day, otherwise than by an account payee cheque drawn on a bank or account payee bank draft, [exceeds twenty thousand rupees,] no deduction shall be allowed in respect of such expenditure.

**Question :** Whether 40A(3) is applicable on cash purchase of land ?

# Section 23(5)

## **Section 23(5)**

(5) Where the property consisting of any building or land appurtenant thereto is held as stock-in-trade and the property or any part of the property is not let during the whole or any part of the previous year, the annual value of such property or part of the property, for the period up to one year from the end of the financial year in which the certificate of completion of construction of the property is obtained from the competent authority, shall be taken to be nil.

# Section 2(42A)

## **Section 2(42A)**

"short-term capital asset" means a capital asset held by an assessee for not more than [thirty-six] months immediately preceding the date of its transfer

### **Third Proviso**

[Provided also that in the case of a share of a company (not being a share listed in a recognized stock exchange in India), [or an immovable property, being land or building or both,] the provisions of this clause shall have effect as if for the words "thirty-six months", the words "twenty-four months" had been substituted.]

# Important Case Laws

Rayala Corporation (P.) Ltd. vs Assistant Commissioner of Income-tax,  
[2016] 72 taxmann.com 149 (SC)

## FACTS

- The assessee-company was in the business of renting its properties and was receiving rent as its business income. The assessee-company claimed that the said income should be taxed under the head 'Profits and gains of business or profession' and not under the head 'Income from house property'.
- In the instant appeal before the High Court, the revenue argued that leasing and letting out of shops and properties was not the main business of the assessee-company as per Memorandum of Association and, therefore, the income earned by the assessee-company should be treated as income earned from house property.

## HELD

- The revenue submitted that the rent should be the main source of income or the purpose for which the company is incorporated should be to earn income from rent, so as to make the rental income to be the income taxable under the head 'Profits and Gains of business or profession'. It is an admitted fact in the instant case that the assessee-company has only one business and that is of leasing its property and earning rent therefrom. Thus, even on the factual aspect, there is no substance in what has been submitted by the revenue.
- The judgment relied upon by the assessee squarely covers the facts of the case involved in the appeals. The business of the company is to lease its property and to earn rent and, therefore, the income so earned should be treated as its business income.
- The High Court was not correct while deciding that the income of the assessee should be treated as income from house property.
- Thus, the income of the assessee shall be subject to tax under the head 'Profits and gains of business or profession'.

# Important Case Laws

Chennai Properties & Investments Ltd. vs Commissioner of Income-tax,  
Central -III, Tamil Nadu, [2015] 56 taxmann.com 456 (SC)

## FACTS

- The assessee-company was incorporated with main objective, as stated in the Memorandum of Association, to acquire the properties in the city and to let out those properties. The assessee had rented out such properties and the rental income received therefrom was shown as income from business.
- The Assessing Officer took a view that the rental income received by assessee was to be taxed as income from house property.
- The Commissioner (Appeals) as well as the Tribunal accepted assessee's claim holding that amount in question was to be taxed as business income.
- The High Court, however, restored order passed by the Assessing Officer.

## HELD

- The Memorandum of Association of the assessee-company mentions that main object of the company is to acquire and hold the properties and to let out those properties as well as make advances upon the security of lands and buildings or other properties or any interest therein. It may further be noted that in the return that was filed, entire income which accrued and was assessed in the said return was from letting out of these properties. It is so recorded and accepted by the assessing officer himself in his order.
- In aforesaid circumstances, it is concluded that letting of the properties is in fact is the business of the assessee. The assessee therefore, rightly disclosed the income under the head income from business. It cannot be treated as 'income from the house property'. Accordingly, instant appeal is allowed and order of the High Court is set aside.

# Important Case Laws

Raj Dadarkar & Associates vs Assistant Commissioner of Income-tax,  
[2017] 81 taxmann.com 193 (SC)

## HELD

- It is not in dispute that having regard to the terms and conditions on which the leasehold rights were taken by the assessee in auction, constructed the market area thereupon and gave the same to various persons on sub-licensing basis, the assessee would be treated as deemed owner of the premises in terms of section 27(iiiib). [Para 10]
- The high court pointed out the circumstances under which the market department of MHAD had auctioned the market area wherein the assessee was the successful tenderor; the BMC permitted sub-letting of the shops and stalls in stilt portion; the appellant was permitted to carry out additions and alterations which it did; the manner in which the appellant after making necessary constructions sub-licensed to various types of traders etc, on that basis, the high court concluded that reading of various clauses harmoniously as per which the rights were given to the assessee in the said property, pointed out towards the assessee acquiring rights in or in respect of the building or part thereof, which rights were clearly traceable to section 269ua(f). [Para 11]
- AS pointed out above, the aforesaid conclusion is not even disputed by the assessee. The submission was, even if the assessee is deemed owner of the premises in question, since the letting out the place and earning rents therefrom was the main business activity of the assessee, then the income generated from sub-licensing the market area should be treated as income from business and not income from the house property. The assessee's submission was that the dominant test has to be applied and once it is found that dominant intention behind the activity was that of a business, the rental income would be business income. [Para 12]

# Important Case Law

## Raj Dadarkar & Associates vs Assistant Commissioner of Income-tax, [2017] 81 taxmann.com 193 (SC) [Continued]

### HELD

- Before dealing with the respective contentions, one may state, in a summary form, scheme of the act about the computation of the total income. Section 4 is the charging section as per which the total income of an assessee, subject to statutory exemptions, is chargeable to tax. Section 14 enumerates five heads of income for the purpose of charge of tax and computation of total income. These are: salaries, income from house property, profits and gains of business or profession, capital gains and income from other sources.
- A particular income, therefore, has to be classified in one of the aforesaid heads. It is on that basis rules for computing income and permissible deductions which are contained in different provisions of the act for each of the aforesaid heads, are to be applied. For example, provisions for computing the income from house property are contained in sections 22 to 27 and profits and gains of business or professions are to be computed as per the provisions contained in sections 28 to 44DB. It is also to be borne in mind that only one tax is levied on the sum total of the income classified and chargeable under the various heads. It is not a collection of distinct taxes levied separately on each head of the income. [Para 13]
- There may be instances where a particular income may appear to fall in more than one head. These kind of cases of overlapping have frequently arisen under the two heads with which one is concerned in the instant case as well, namely, income from the house property on the one hand and profit and gains from business on the other hand. On the facts of the particular case, income has to be either treated as income from the house property or as the business income. Tests which are to be applied for determining the real nature of income are laid down in judicial decisions, on the interpretation of the provisions of these two heads. Wherever there is an income from leasing out of premises and collecting rent, normally such an income is to be treated as income from house property, in case provisions of section 22 are satisfied with primary ingredient that the assessee is the owner of the said building or lands appurtenant thereto.
- Section 22 makes 'annual value' of such a property as income chargeable to tax under this head. How annual value is to be determined is provided in section 23. 'Owner of the house property' is defined in section 27 which includes certain situations where a person not actually the owner shall be treated as deemed owner of a building or part thereof. In the present case, the assessee is held to be 'deemed owner' of the property in question by virtue of section 27(iii). On the other hand, under certain circumstances, where the income may have been derived from letting out of the premises, it can still be treated as business income if letting out of the premises itself is the business of the assessee. [Para 14]



# Important Case Law

Raj Dadarkar & Associates vs Assistant Commissioner of Income-tax,  
[2017] 81 taxmann.com 193 (SC) [Continued]

## HELD

- The object clause which is contained in the partnership firm is to take the premises on rent and to sub-let. In the present case, reading of the object clause would bring out two discernible facts, which are as follows:
  - (A) the assessee which is a partnership firm is to take the premises on rent and to sub-let those premises. Thus, the business activity is of taking the premises on rent and sub-letting them.  
In the instant case, by legal fiction contained in section 27(iib), the assessee is treated as 'deemed owner'.
  - (B) the aforesaid clause also mentions that partnership firm may take any other business as may be mutually agreed upon by the partners. [Para 16]
- In the instant case, therefore, it is to be seen as to whether the activity in question was in the nature of business by which it could be said that income received by the appellant was to be treated as income from the business. Apart from relying upon the aforesaid clause in the partnership deed to show its objective the assessee has not produced or referred to any other material. [Para 17]
- The tribunal being the last forum insofar as factual determination is concerned, these findings have attained finality. In any case, as mentioned above, the assessee did not argue on this aspect and did not make any efforts to show as to how the aforesaid findings were perverse. It was for the assessee to produce sufficient material on record to show that its entire income or substantial income was from letting out of the property which was the principal business activity of the appellant. No such effort was made. [Para 18]
- For the aforesaid reasons, the instant appeal lacks merit and is, accordingly, dismissed. [Para 21]

**Thank You!**