Chapter 9 Capital Gains and Securities Transaction Tax

Concept of taxation of capital gains

¶9-010 Basis of charge

Under s 2(24)(vi) of the Act, income is defined to include any capital gains chargeable under s 45 of the Act. Sections 45–55A of the Act deal with the provisions pertaining to capital gains. Under s 45, any profits or gains arising from the transfer of a capital asset shall be chargeable to income tax under the head 'Capital Gains'. Such income shall be deemed to be income of the previous year in which the transfer takes place, unless such capital gain is exempt under s 54, s 54B, s 54D, s 54EC, s 54F, s 54G, s 54GA or s 54GB of the Act.

Thus, the essential conditions for taxing capital gains are as follows:

- Existence of a capital asset
- Transfer of a capital asset during the previous year
- Profits or gains arising from this transfer
- Capital gains are not exempt under s 54, s 54B, s 54D, s 54EC, s 54F, s 54G, s 54GA or 54GB of the Act.

Law: *Sections 2(24)(vi), 45–55A, 54, 54B, 54D, 54EC, 54F, 54G, 54GA and 54GB of the Income-tax Act, 1961.*

The Calcutta High Court in *CIT v Bhupendra Singh Atwal* (1983) 140 ITR 928 (Cal) has held that capital gain is an artificial income and these provisions should be strictly construed. In case of doubt, the benefit should go to the taxpayer.

Capital assets and types of capital asset

¶9-020 What is a 'capital asset'?

The term 'capital asset' has been defined in s 2(14) of the Act to mean property of any kind held by an assessee, whether or not connected with business or profession. The following items are excluded from the scope of 'capital asset':

- stock-in-trade, consumable stores and raw materials, held for the purposes of the assessee's business or profession
- personal effects (including wearing apparel and furniture) held for personal use by the assessee or any dependent member of the assessee's family,

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excluding jewellery, archaeological collections, drawings, paintings, sculptures or any work of art
- agricultural land in India, not being land situated within specified limits of a municipality
- 6.5% Gold Bonds, 1977, 7% Gold Bonds, 1980, or National Defence Gold Bonds, 1980, issued by the Central Government[1]
- Special Bearer Bonds, 1991 issued by the Central Government
- Gold Deposit Bonds issued under the Gold Deposit Scheme, 1999 notified by the Central Government

Further, the term 'property' includes and is always deemed to have included any rights in or in relation to an Indian company, including rights of management or control or any other rights whatsoever.

The definition of 'capital asset' thus has a sweeping nature and covers property of any kind, barring the exceptions stated above. Property of any kind includes not only tangible assets but also intangible rights. It could be material in nature (eg land, buildings, etc.) or non-material (eg tenancy rights, leasehold rights, etc).

In the case of *CIT v Mediworld Publications (P) Ltd* (2011) 337 ITR 178 (Del), the Delhi High Court held that transfer of brand names, trademarks, copyright and goodwill for a consideration will clearly be a case of sale of a capital asset.

The Delhi Tribunal, in *Abhiram Seth v JCIT* [TS-586-ITAT-2011(Del)], held that even 'right to exercise an option' is a capital asset and transfer of such a right gives rise to capital gains in the hands of the transferor.

It has been held by the Madras HC in *M Nachiappan v CIT* (1998) 230 ITR 98 (Mad) that the property should be a capital asset in the hands of the assessee at the time of transfer. The status of the property at the time of acquisition is irrelevant for the purposes of charging capital gains.

Law: *Section 2(14) of the Income-tax Act, 1961.*

¶9-030 Exclusions from capital assets

The exclusions mentioned in ¶9-020 have been discussed briefly below.

Stock-in-trade, consumable stores and raw material

Typically, these comprise all those goods or commodities which are bought or sold in the course of business activity. Whether a particular asset is stock-in-trade or a capital asset, it will depend on the manner in which it is held and the facts of each case, rather than on the nature of the article.

In the case of *Elgi Finance Ltd v ACIT* (2009-TIOL-157-ITAT-Mad), the Chennai Tribunal held that the right to collect the receivables assigned to group companies is a capital asset and transfer of such capital asset will result in capital gains/loss and the loss incurred on such a transaction cannot be claimed as deduction from its business income. The Tribunal observed that while assigning the receivables

1 These instruments are only of academic interest, as they have now ceased to exist.

to the group companies, the funds obtained are by way of transfer of the right to collect the receivables as a whole and not by way of realisation of individual receivable accounts.

An issue therefore arises for banking and other finance companies as regards whether right in loans which are assigned can be regarded as 'stock-in-trade'.

Personal effects

The term 'Personal effects' has been defined in s 2(14)(ii) of the Act to mean moveable property (including wearing apparel and furniture, but excluding jewellery, archaeological collections, drawings, paintings, sculptures and any work of art). These are articles which have some personal connection with the assessee (articles of personal use, clothing, furniture, utensils, tableware, etc). The Calcutta HC, in *Smt. Shree Kumari Mundra v CIT* (1997) 228 ITR 548 (Cal), held the following:

> *"...some degree of connection between the assessee and the items is necessary. The assessee need not necessarily be able to wear the items on his or her person. Household items and utensils can also be personal effects although very expensive and decorative pieces might not be classified as such. A distinction is to be borne in mind as between personal effects and assets intended for use in business or profession. It is on an assessment of these and other attendant relevant factors that a decision has to be reached whether the items which were sold were personal effects within the meaning of section 2, clause (14) or not."*

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Agricultural land in India

Section 2(14)(iii) of the Act excludes agricultural land from the ambit of a capital asset. The Finance Act, 2013 has amended the definition of 'agricultural land'. A land parcel will be treated as an agricultural land if it is not situated in any of the following:[2]

- any area which is comprised within the jurisdiction of a municipality or a cantonment board and which has a population of not less than 10,000
- any area within the following distance, measured aerially

Distance from the local limits of a municipality or a cantonment board	Population
Up to 2 km	10,000 – 1,00,000
Up to 6 km	1,00,000 – 10,00,000
Up to 8 km	Above 10,00,000

What constitutes agricultural land has been the subject matter of consideration in a number of judicial decisions. The Supreme Court in *CWT v Officer-in-charge (Court of Wards)* (1976) 105 ITR 133 (SC) observed that what is really required to be shown is connection with an agricultural purpose and the user and not the mere possibility of land being used by some possible future owner or possessor for an agricultural purpose.

2 For the sake of brevity, the entire text of cl (iii) in s 2(14) is not reproduced.

Similarly, it was held by the Delhi High Court in *Shiv Shankar Lal v CIT* (1974) 94 ITR 433 (Del) that where a land has been put to agricultural purpose for a long period and the agricultural operations were temporarily suspended, the land does not cease to be an agricultural land. The Bombay High Court in *CIT v Smt. Debbie Alemao* (2011) 331 ITR 59 (Bom) held that even though agricultural operations on land does not result in generation of surplus, the land will still continue to be treated as agricultural land.

The Madras High Court in the case of *MS Srinivasa Naicker v ITO* (2007) 292 ITR 481 (Mad) held that where the land in question was under agriculture operation on the date of sale, it would not be treated as capital assets and it mattered very little how subsequent purchasers intended the land in question to be put to use.

Where the land in question was barren land surrounded by rocky mountains and not fit for agricultural operations and the sale of the land was not for agricultural purpose but for the purpose of construction of residential properties, the Hyderabad Tribunal, in the case of *Suresh Kumar D. Shah v DCIT* (2012) 49 SOT 341 (Hyd), held that the land in question will not qualify as agricultural land.

Law: *Section 2(14)(ii)–(iii) of the Income-tax Act, 1961.*

¶9-040 Short-term and long-term capital assets

Depending on the period of holding, the capital assets are classified in two categories: (i) short-term; and (ii) long-term.

Short-term capital assets

Capital gains arising from the transfer of a short-term capital asset will give rise to short-term capital gain. Section 2(42A) of the Act defines 'short-term capital asset' as a capital asset that has been held by an assessee as on the date of transfer, for a period of not more than 36 months immediately preceding the date of its transfer.

However, in the case of the following capital assets, if their holding period is *not more than 12 months*, they will be treated as short-term capital assets:

- shares held in a company; or
- any other security listed in a recognised stock exchange in India; or
- unit of the Unit Trust of India (established under the Unit Trust of India Act, 1963); or
- unit of a Mutual Fund specified in s 10(23D) of the Act; or
- zero coupon bonds.

In the case of *Bharti Gupta Ramola v CIT* (2012) 251 CTR 139 (Del), the Delhi High Court held that the date on which the asset is acquired and the date on which the asset is sold has not to be excluded in order to determine whether the asset is held for a period of more than 36/12 months. It was also held that in the absence of definition of the term 'month', the definition under the General Clauses Act, 1897 should be adopted. Thus, if shares are acquired on 2 January in a particular year and is transferred on 2 January next year, the gains arising on such transfer should be taxable as long term capital gains.

Clause (i) of Explanation 1 to s 2(42A) of the Act clarifies how the period of holding is to be computed in certain specific circumstances:

- In the case of a share held in a company in liquidation, the period subsequent to liquidation of the company should be excluded.
- In the case of a capital asset, which became property of an assessee in circumstances mentioned in s 49(1)[3] of the Act (refer to table 9.4 under deemed value of cost of acquisition within ¶9-130) of the Act, the period during which the asset was held by the previous owner should be included.
- Where the capital asset is shares in a company, which became property of the assessee in consideration of a transfer referred to in s 47(vii) of the Act, under a scheme of amalgamation, the period of holding of shares in the amalgamating company shall also be included in computing the period of holding of the asset.
- Where the capital asset is the right to subscribe to any financial asset, which is renounced in favour of any other person, the holding period shall be calculated from the date of the offer of such right by the company making such an offer.
- Where the capital asset is shares in a company, which became property of the assessee in consideration of a demerger, the period of holding of shares in the demerged company shall also be included in computing the period of holding of the asset.
- In the case of rights or bonus shares, the period of holding is to be calculated from the date of allotment of shares.
- Where the capital asset is shares or trading rights or clearing rights of a recognised stock exchange in India, acquired by a person pursuant to demutualisation or corporatisation of exchange, the period of membership in such exchange prior to demutualisation or corporatisation shall be included in computing the period of holding.
- In the case of a capital asset being any specified security[4] or sweat equity shares allotted or transferred, by the employer free of cost or at a concessional rate, the period of holding shall be calculated from the date of allotment or transfer of such specified security or sweat equity shares.

It was held in the case of *ACIT v Dr Dhurjati Gupta* (2010) 33 DTR 287 (Hyd) (Trib) that for determining the period of holding the asset, it is the date of grant of the stock option in favour of the assessee that is material and not the date on which the option was exercised and stock options were converted into shares. Capital Gains arising out of sale of shares acquired through employee stock option plans (ESOPs) have to be assessed as long-term capital gains with the consequential benefit of indexation and exemption under s 54 of the Act. However, a different view is taken in the case of *Pramod H Lele v ACIT* (2011) 47 SOT 363 (Mum),wherein the

3 Section 49(1) situation would include a property received under a gift or will, on succession, or on distribution of assets on liquidation of a company, etc.

4 'Specified security' means the securities defined in cl (h) of the Securities Contracts (Regulation) Act, 1956 and includes employee's stock option.

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Chapter 15 General Anti-avoidance Rule

¶15-010 General overview

The General Anti-avoidance Rule (GAAR) is a concept which generally empowers the revenue authorities in a country to deny the tax benefits of transactions or arrangements which do not have any commercial substance or consideration other than achieving a tax benefit.

The Direct Taxes Code Bill, 2009 (DTC 2009) proposed, for the first time, the introduction of GAAR into the Income-tax law of India. The Discussion paper to the DTC 2009 stated the following need for the introduction of GAAR:

> "24.1 Tax avoidance, like tax evasion, seriously undermines the achievements of the public finance objective of collecting revenues in an efficient, equitable and effective manner. Sectors that provide a greater opportunity for tax avoidance tend to cause distortions in the allocation of resources. Since the better-off sections are more endowed to resort to such practices, tax avoidance also leads to cross-subsidisation of the rich. Therefore, there is a strong general presumption in the literature on tax policy that all tax avoidance, like tax evasion, is economically undesirable and inequitable. On considerations of economic efficiency and fiscal justice, a taxpayer should not be allowed to use legal constructions or transactions to violate horizontal equity.
>
> 24.2 In the past, the response to tax avoidance has been the introduction of legislative amendments to deal with specific instances of tax avoidance. Since the liberalisation of the Indian economy, increasingly sophisticated forms of tax avoidance are being adopted by taxpayers and their advisors. The problem has been further compounded by tax avoidance arrangements spanning across tax jurisdictions. This has led to severe erosion of the tax base. Further, appellate authorities and Courts have been placing a heavy onus on revenue when dealing with matters of tax avoidance even though the relevant facts are in the exclusive knowledge of the taxpayer and he or she chooses not to reveal them.
>
> 24.3 In view of the above, it is necessary and desirable to introduce a general anti-avoidance rule which will serve as a deterrent against such practices. This is also consistent with the international trend."

Although, the Direct Taxes Code has not come into effect yet, the Finance Act, 2012 had introduced a new chapter in the Act, ie, 'Chapter X-A' titled 'General Anti-Avoidance Rule', comprising 8 sections from s 95 to s 102 of the Act. Furthermore, the Finance Act, 2012 had also inserted s 144BA of the Act, prescribing the procedures to be followed by the tax authorities for invoking the provisions of GAAR. The Finance Act, 2013 has stipulated that the provisions pertaining to GAAR

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will be applicable for financial year (FY) 2015-16 and the subsequent years and has also made certain amendments in the GAAR provisions.

GAAR under the Act

¶15-020 Introduction

The Finance Act, 2012 had incorporated anti-avoidance provisions in the form of GAAR. The Memorandum to the Finance Bill, 2012 put forward the following points in order to advocate the need for the introduction of GAAR.

- Judicial decisions have been varied with regard to the question of substance over form in the implementation of taxation laws.
- In an environment of moderate tax rates, it is necessary that the correct tax base is subjected to tax in the face of aggressive tax planning and the use of opaque low tax jurisdictions for residence as well as for sourcing capital.
- Most of the countries have codified the doctrine of 'substance over form' in the form of GAAR.

The relevant extracts of the Memorandum to the Finance Bill, 2012 explaining the introduction of GAAR, are as follows:

> 'The question of substance over form has consistently arisen in the implementation of taxation laws. In the Indian context, judicial decisions have varied. While some Courts in certain circumstances had held that legal form of transactions can be dispensed with and the real substance of transaction can be considered while applying taxation laws, others have held that the form is to be given sanctity. The existence of anti-avoidance principles is based on various judicial pronouncements. There are some specific anti-avoidance provisions but general anti-avoidance has been dealt with only through judicial decisions in specific cases.
>
> In an environment of moderate rates of tax, it is necessary that the correct tax base be subject to tax in the face of aggressive tax planning and use of opaque low tax jurisdictions for residence as well as for sourcing capital. Most countries have codified the 'substance over form' doctrine in the form of General Anti Avoidance Rule (GAAR).
>
> In the above background and keeping in view the aggressive tax planning with the use of sophisticated structures, there is a need for statutory provisions so as to codify the doctrine of 'substance over form' where the real intention of the parties and effect of transactions and purpose of an arrangement is taken into account to determine tax consequences, irrespective of the legal structure that has been superimposed to camouflage the real intent and purpose. Internationally, several countries have introduced, and are administering statutory General Anti Avoidance Provisions. It is, therefore, important that Indian taxation law also incorporate statutory General Anti Avoidance Provisions to deal with aggressive tax planning. The basic criticism of statutory GAAR which is raised worldwide is that it provides a wide discretion and authority to the tax administration which at times is prone to be misused. This vital aspect, therefore, needs to be kept in mind while formulating any GAAR regime'.

¶15-030 Broad provisions of GAAR

The GAAR provisions introduced in the Finance Act, 2012 provided powers to authorities to invalidate any arrangement for tax purposes, if the main purpose or one of the main purposes of entering into transaction was to obtain a tax benefit. Apart from the 'tax benefit' test, the arrangement also has to test positive any one of the four specified additional tests under the provisions of s 96 of the Act.

The provisions incorporated in the Act provided a basic framework or structure for the application of GAAR and the consequences thereof. However, detailed guidelines and rules were required to provide the necessary clarifications for the implementation of GAAR provisions. Accordingly, to provide greater clarity and certainty in matters relating to GAAR, a committee was constituted to give recommendations for formulating the rules and guidelines for the implementation of GAAR provisions and to suggest safeguards so that these provisions are not applied indiscriminately.[1]

Accordingly, the Prime Minister of India constituted an Expert committee on GAAR under the chairmanship of Dr Parthasarathi Shome to undertake stakeholder consultations and finalise GAAR guidelines to bring more clarity about them.

The Expert Committee came out with its report on 30 September 2012. Based on this, the government on 14 January 2013 announced certain decisions which were as follows:

- GAAR to apply only where the main purpose of an arrangement is to obtain tax benefit
- GAAR to be restricted to tax consequence of that part only which is impermissible and not to whole arrangement
- Consideration of factors such as time period, tax payments, etc to be considered as relevant but not sufficient
- GAAR not to apply to Financial Institutional Investors that choose not to take any benefit under an agreement under s 90 or s 90A of the Act. Furthermore, GAAR to also not apply to non-resident investors in FIIs.

Through the Finance Act, 2013 the government has incorporated the amendments with some modifications.

¶15-040 Applicability of GAAR

Section 95 of the Act provided for applicability of GAAR which begins with a non-obstante clause. It provides that an arrangement entered into by a taxpayer may be declared to be an impermissible avoidance arrangement (IAA) notwithstanding anything contained in the Act. The tax consequence arising from an IAA may be determined according to the provisions of GAAR.

Furthermore, it has been provided that the provisions of GAAR may be applied to any step in, or a part of, the arrangement as they are applicable to the arrangement.

1 The Finance Minister's remarks at the beginning of discussion on the Finance Bill, 2012 in Lok Sabha.

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Therefore, GAAR provisions may apply to the components of an arrangement or to an arrangement in its entirety.

Also, in the Expert Committee report, it was recommended that where only a part of the arrangement is an IAA, GAAR provisions will be restricted to the tax consequences of the part which is impermissible and not to the whole arrangement. The recommendation made by the Expert Committee though was accepted, by the government. However, no amendment to that effect is included in the Finance Act, 2013.

It may also be noted that the GAAR provisions will be applicable to all taxpayers irrespective of their residential or legal status (ie resident or non-resident, corporate entity or non-corporate entity). However, in the Expert Committee report, it was recommended that GAAR provisions should not apply to FIIs that choose not to take any benefit under an agreement under s 90 or s 90A of the Act and also to non-resident investors in FIIs. The Finance Act, 2013 is silent on incorporating such recommendation in the Act.

Law: *Section 95 of the Income-tax Act, 1961.*

¶15-050 Impermissible avoidance arrangement (IAA)

Meaning

Under the GAAR provisions, any arrangement may be declared as an IAA and invalidated if it fails to pass the following two tests:

a. **Main test**: The main purpose of entering into a transaction (as included in the Finance Act, 2013) is to obtain a tax benefit. Furthermore, an arrangement shall be presumed an IAA, unless it is proved to the contrary by the assessee, if it has been entered into or carried out for the main purpose of obtaining a tax benefit if the main purpose of a step in, or part of the arrangement is to obtain a tax benefit, notwithstanding that the main purpose is not to obtain a tax benefit.

b. **Specified additional tests:** In addition to the main test being fulfilled i.e the main purpose of the arrangement is to obtain a tax benefit one of the following additional tests needs to be fulfilled:.

- It creates rights, or obligations, which would not ordinarily be created between persons dealing at arm's length.
- It results, directly or indirectly, in the misuse, or abuse, of the provisions of the Act.
- It lacks commercial substance or is deemed to lack commercial substance under s 97 of the Act in whole or in part.
- It is entered into, or carried out, by means, or in a manner, which would not normally be employed for bona fide purposes.

The original draft of the Finance Bill, 2012 stipulated a specific presumption that an arrangement will be presumed to be executed for obtaining a tax benefit if the former results in a tax benefit, unless the taxpayer is able to prove otherwise. However, during the enactment, the provision containing the specific presumption

was deleted and the onus to prove that the arrangement is executed for obtaining a tax benefit was cast on the tax officer. This change was brought from the original draft on the basis of the recommendations of the Standing Committee of the Parliament constituted to review the Direct Taxes Code, 2010.

Subsequently, the Finance Act, 2013 has once again shifted the onus of proving that a particular transaction is not an IAA from the revenue authorities to the taxpayer.

Law: *Section 96 of the Income-tax Act, 1961.*

Main test: Scope

The term 'arrangement' has been defined as any step in, or a part or whole of, any transaction, operation, scheme, agreement or understanding, whether enforceable or not, and includes the alienation of any property in such transaction, operation, scheme, agreement or understanding. Therefore, the term 'arrangement' covers any transaction, whether legally enforceable or not.

The expression 'main purpose' is subjective in nature. The term has not been defined in the Act. The dictionary meaning of the word 'main' is 'more than anything else, or the most'[2] and is capable of being interpreted in a number of ways. Furthermore, the definition of 'tax benefit' is wide and includes even deferral of tax to a later year as well as tax treaty benefits. The expression 'tax benefit' means any of the following:

- Reduction, avoidance or deferral of tax or other amount payable under the Act
- Increase in a refund of tax or other amount under the Act
- Reduction, avoidance or deferral of tax or other amount that would be payable under the Act, as a result of a tax treaty
- Increase in a refund of tax or other amount under the Act as a result of a tax treaty
- Reduction in total income
- Increase in loss.

Law: *Sections 102(1) and 102(11) of the Income-tax Act, 1961.*

These provisions combined together could bring each and every transaction which results in a lower tax liability for the taxpayer than some other possible arrangement, as a subject matter for scrutiny under the GAAR.

For example, the write-off of a bad debt, as compared with making a provision for the bad debt, carries a lower tax liability for the taxpayer. This could be scrutinised using the GAAR provisions.

Also, in order to determine whether a tax benefit exists or not,:

2 Concise Oxford Dictionary (Tenth Edition).

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s 294 of the Act provides that if in any assessment year (AY), the Finance Act charging income-tax is not enacted by 1 April of that year, the existing Finance Act or the provisions proposed in the Finance Bill, whichever is more favourable to the assessee, shall have effect until the Bill is enacted.

Law: *Sections 4(1) and 294 of the Income-tax Act, 1961.*

¶27-040 Power to make rules or pass orders

Section 295 of the Act authorises the CBDT to frame or make rules for the whole or part of India to carry out the purposes of the Act. The powers of the CBDT are subject to control of the Central Government. Hence any rule made or notification issued in this respect is required to be laid before Parliament for ratification. If both Houses agree that modifications are required in the rule or notification or that the rule or notification should not be made, that rule or notification shall have effect in such modified form or not have effect altogether. This shall be without prejudice to the validity of anything previously done under that rule or notification.

Rules framed by the Central Government are considered subordinated legislation. Rules have a statutory force and form a part of the respective provision under the Act. However, rules cannot travel beyond the provisions of the section under which they are made. In other words, rules cannot affect, control or derogate from the provisions of the Act. Any violation of the provisions of the respective section of the Act will render the rules void.

The Central Government has powers to give retrospective effect to the rules. However, such retrospective effect cannot be given if the rules prejudicially affect the interest of the assessee, unless this interest is permitted either expressly or by necessary implication.

Sub-section (2) outlines some of the matters where the CBDT may frame rules. The CBDT may frame rules even in respect of matters not specified where such rule has been framed for carrying out the purposes of Act.

Section 298 provides the Central Government with the power to pass by general or special orders, necessary or expedient for the purpose of removing any difficulty in giving effect to the provisions of the Act.

Law: *Sections 295 and 298 of the Income-tax Act, 1961.*

¶27-050 Repeals and savings

Section 297 of the Act provides for a mechanism in respect of proceedings which have continued under the Income-tax Act, 1922 (which was repealed by the Act). It provides for savings in respect of certain proceedings relating to assessment, return of income filed after the commencement of the Act, proceedings to assess escaped income, undistributed income of closely held companies, penalty proceedings in respect of AYs prior to the enactment of this Act, refund and interest thereon, recovery proceedings, etc. Furthermore, s 6 of the General Clauses Act, 1897 can also be resorted to in the case of a provision in the Act.

Law: *Section 297 of the Income-tax Act, 1961.*

Chapter 28 Wealth-tax Act

Introduction

¶28-010 The scope of the Wealth-tax Act

Wealth tax is an annual tax on the net wealth of a person. This tax is levied on the value of certain categories of assets as reduced by the corresponding liabilities. The Wealth-tax Act, 1957 (referred henceforth as WT Act) falls within Entry 86 of List I of the Seventh Schedule to the Constitution of India. The WT Act applies to the whole of India. The meaning of 'India' in the WT Act is analogous to that defined in s 2(25A) of the Income-tax Act, 1961 (the Act).[1]

Law: *Section 2(25A) of the Income-tax Act, 1961.*

Basic concepts underlying wealth tax

¶28-020 Persons liable to tax

Unlike the Income-tax Act, the WT Act does not define the term 'persons'. However, s 3 WT Act levies tax on the following:

- Individuals
- Hindu Undivided Family (HUFs)
- Companies[2]

Thus, effectively, assets owned by the other categories of persons are not subject to wealth tax. Section 45 of the WT Act provides that wealth tax shall not be levied on the following:

- Any company registered under s 25[3] of the Companies Act, 1956
- Any co-operative society[4]
- Any social club
- Any political party[5]

1 Refer to Chapter 1: 'Applicability of the Income-tax Act', ¶1-030, for the definition of 'India'.
2 For the meaning of 'company', refer to s 2(17) of the Income-tax Act.
3 A company formed with an intention to apply its profits, if any, for the promotion of commerce, art, science, religion, charity and any other useful object and to prohibit the payment of dividend to its members
4 A co-operative society means a co-operative society registered under the Co-operative Societies Act, 1912 (2 of 1912), or under any other law for the time being in force in any state for the registration of co-operative societies.
5 As defined in Explanation to s 13A of the Income-tax Act, 1961

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- A mutual fund[6]
- The Reserve Bank of India (RBI) incorporated under the Reserve Bank of India Act, 1934[7]

However, it is important to take note of the decisions[8] wherein persons other ın human beings are categorised as 'individuals' and made liable to wealth tax.

Wealth tax is payable on the assets belonging to the assessee. The Supreme ɔurt [*CWT v Bishwanath Chatterjee* (1976) 103 ITR 536 (SC); *Late Nawab Sir Mir ːman Ali Khan v CWT* (1986) 162 ITR 888 (SC)] held that the liability to wealth tax ːses out of ownership of the asset and not otherwise. Mere possession or joint ssession, unaccompanied by the right to or ownership of the property, will not ing the property within the definition of 'net wealth' for it would not then be an set 'belonging' to the assessee. The Special Bench of the Tribunal in the case of *ɔltas Ltd v ACWT* (2007) 301 ITR (AT) 217 (Mum) (SB) held that where the sessee (owner) has let out its property under a lease term of less than 12 years or on leave-and-licence basis, then for the purpose of wealth tax, the assessee will be nsidered the legal owner of the property and not the lessee.

Law: *Sections 3 and 45 of the Wealth-tax Act, 1957.*

ɪ28-030 Valuation date

Wealth tax is payable on the net wealth on the 'valuation date'. Section 2(q) of e WT Act defines the 'valuation date' as the last day of the financial year (FY). ıus, for the year ended 31 March 2011, the valuation date is 31 March 2011.

The asset should be available with the assessee as on the relevant valuation date r it to be chargeable to wealth tax [*CWT v JK Jute Mills Co. Ltd* (1979) 120 ITR ɔ0 (All); *CWT v JK Cotton Spinning and Weaving Mills Co. Ltd* (1979) 118 ITR ɜ3 (All)]. The fact that at the time of assessment the asset is not owned by the sessee would not absolve that assessee from wealth-tax liability.

Law: *Section 2(q) of the Wealth-tax Act, 1957*

28-040 Basic exemption and the rate of tax

Wealth tax is payable at 1 per cent on net wealth. Wealth tax is chargeable only the value of net wealth exceeds INR 3 million (amended by the Finance (No. 2) ct, 2009 and applicable with effect from AY 2010-11).

28-050 Meaning of net wealth

Net wealth is defined in s 2(m) of the WT Act to mean the aggregate value of all ːsets, wherever located, belonging to the assessee on the valuation date (including ːsets required to be included in the net wealth as on that date) and the net of the

As specified under s 10(23D) of the Income- tax Act.
Inserted with effect from 1 April 1957.
Assam Financial Corporation v CWT (1974) 94 ITR 404 (Gau); *Kerala Financial Corporation v WTO* (2001) 82 ITR 477 (Ker) (FB); and *CWT v BC Gupta & Sons Ltd* (1990) 182 ITR 240 (Gau).

aggregate value of all the debts owed by the assessee on the valuation date and incurred in relation to the said assets.

Law: *Section* 2(m) of the WT Act.

Concept of assets, deemed assets and exempt assets

¶28-060 Assets liable to wealth tax

Not all the assets owned by a person are subject to wealth tax. Wealth tax is levied only on certain categories of assets. The types of assets on which wealth tax is chargeable have substantially reduced over a period of time. Assets that are to be included in computing the net wealth of an assessee are provided in s 2(ea) of the WT Act, as explained in the table below:

Table 28.1: Assets included for computing wealth tax[9]

Section	Particulars of assets included	Exclusions
2(ea)(i)	Any building or land appurtenant, thereto used for the following: a. Residential or commercial purposes b. Maintaining a guest house or otherwise c. A farm house situated within 25 kilometres from local limits of any municipality, whether known as municipality, municipal corporation a cantonment board or by any other name	• A house meant exclusively for residential purposes and which is allotted by a company to an employee or an officer or a director, who is in whole-time employment, having a gross annual salary of less than 1 million • Any house for residential or commercial purposes which forms a part of a stock-in-trade • Any house which the assessee may occupy for the purposes of a business or profession[10] Since the words used here are 'may occupy', the continuous occupation and usage of a house for business purposes may not be necessary be eligible for the exclusion. If a house is kept ready for business purpose, it may be entitled for the exclusion. The Mumbai Tribunal [in the case of *Tracstar Investment (P) Ltd v DCWT* (2005) 1 SOT 115 (Mum)]

9 Only those assets of the assessee are chargeable to wealth tax and which squarely fall within the ambit of s 2(ea), not otherwise. The Punjab and Haryana High Court reaffirmed the view in the case of *Commissioner of Wealth Tax v Parminder Singh* (2010) 192 Taxman 69 (P&H), and held that where land of the assessee was acquired and stood vested in the state, the mere speculative right to receive compensation cannot be treated as an asset.

10 The Mumbai ITAT, in the case of *Furgo Survey India (P) Ltd. v Assistant Commissioner of Wealth-tax*, WT Appeal No. 67 to 69/Mum/2011, held that when an assesee is not in the business of letting out properties, letting out a part of a business premises is not exempt under s 2(ea)(i)(3) or 2(ea)(i)(5) of the Wealth-tax Act.

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Section	Particulars of assets included	Exclusions
		affirmed this position and held that a place used for conducting business meetings was sufficient to treat the property as a business asset. • Any residential property that has been let out for a minimum period of 300 days in the previous year • Any property in the nature of commercial establishments or complexes. The Pune Tribunal, in the case of *Satvinder Singh v DCWT* (2007) 112 TTJ 489 (Pune), held that any property in the nature of commercial establishments or complexes used for business or profession would be exempt from wealth tax under s 2(ea)(i)(5). The Tribunal also held that since the words 'any property' include all or some of them or one of them, the benefit of exemption under s 2(ea)(i)(5) cannot be denied only on the basis that the assessee had more than one commercial establishments or complexes at different places. The Pune Tribunal in the case of *Nutan Warehousing Co. Pvt. Ltd v DCIT* [2010] 326 ITR 94 (Bom), held that a warehouse does not come either under the term 'business establishment' or within the definition of commercial complex. Therefore, a warehouse can be held subject to tax for the purpose of the WT Act. The Chennai Tribunal, in the case of *Vyline Glass Works Ltd. v ACWT* (2012) 51 SOT 169 (Chen), held that where the nature and character of the properties exploited by the company to carry out its business remained the same, even after the properties were let out, such assets will remain as properties in the nature of commercial establishments occupied for the purpose of carrying out business. The emphasis is on the nature of the asset and, not who is carrying out the business. Even though the assessee is receiving

Section	Particulars of assets included	Exclusions
		rent, the property remains a commercial asset and does not attract levy of wealth tax.
2(ea)(ii)	Motor cars	• If used in the business of running them on hire • If treated as stock-in-trade Under the Madras High Court decision in the case of *Southern Roadways Ltd v CWT* (2001) 251 ITR 213 (Mad), the term 'motor car' covers all motor vehicles other than heavy vehicles.
2(ea)(iii)	Jewellery[11], bullion, furniture, utensils or any other article made wholly or partly of gold, silver, platinum or any other precious metal or any alloy, containing one or more of such precious metals	• If used by the assessee as stock-in-trade • Gold deposit bonds issued under the Gold Deposit Scheme, 1999 notified by the Central Government.
2(ea)(iv)	Yachts, boats and aircrafts	If used for the following commercial purposes: • It was held by the Rajasthan HC in the case of *Amalgamated Electricity Co Ltd v State of Rajasthan* (1983) 154 AIR (Raj), that if an asset is used for doing a business, the object being profit-making, the asset is said to be used for commercial purposes. It is nowhere laid down that, in order to satisfy the requirements of commercial purposes, aircraft need to be used as an air-taxi. One can use it for one's own business and to meet the exigencies of the business. • The Tribunal in the case of *DCWT v Jindal Iron & Steel Company Ltd* [WTA No. 161/M/2006, order dated 6 March 2007], held that the term

11 Under Explanation 1(a) to s 2(ea), the term 'jewellery' includes (i) ornaments made of gold, silver, platinum or any other precious metal or any alloy containing one or more of such precious metals, whether or not containing any precious or semi-precious stones, and whether or not worked or sewn into any wearing apparel (ii) precious or semi-precious stones, whether or not set in any furniture, utensils or other article or worked or sewn into any wearing apparel.

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