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When stamp duty is treated as sale price

Should buyers, sellers pay tax on difference between the sale price and stamp duty?

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Under income tax laws, if land or building is sold at a price of less than the stamp duty valuation of such land or building, the seller is taxed on a notional basis on the capital gain by taking the stamp duty valuation as the sale price, instead of the actual agreement

value. Not only that, the purchaser is also taxed on the same difference between stamp duty valuation and agreement value as his income from other sources.

Very often, when a person has booked a flat in a building under construction, he may wish to dispose of the flat before the construction is complete, either because the construction has been delayed, or because he may have identified a better flat somewhere else, or because he may even otherwise need the funds. Given the difficulty in finding ready buyers for real estate, particularly for property under construction, often, he is keen to sell the flat, maybe even at cost or below cost, and very often below the stamp duty valuation, as he needs the liquidity immediately. In such cases, are the purchaser and the seller liable to pay tax on the difference between the actual price and **stamp duty** valuation?

If one looks at the provisions of the law, it refers to immovable property, being land and building or both. Tribunals have held in various decisions that this term “land and building or both” is a more restrictive term than “immovable property”. It, therefore, does not cover rights in immovable property, which right is not ownership of land or building. In the case of a property under construction, the purchaser does not own the flat which is under construction—neither the land nor the construction. He merely has a right to get ownership of the flat at a future date, when construction is complete.

Tribunals have, therefore, held in a couple of cases that in such a situation, the seller cannot be taxed on artificially deemed income, as he is not selling land or building, but just a right to sell land or building.

What about the purchaser? In case of the purchaser, he is paying a certain price to the person who had originally booked the flat, and certain amount of instalments to the builder, which are pending as per the original payment schedule. Therefore, the total purchase price that he is paying would consist of both these elements. However, in his case, he is ultimately taking possession of the flat on completion of construction and is, therefore, receiving land and building. The deeming fiction would, therefore, apply to him.

This deeming fiction would, however, apply in the year of receipt of the flat, and not in the year of agreement. The year of receipt of the flat would be the year of transfer of the flat in his name.

Further, there is a provision that where an agreement is entered into for purchase of the flat prior to the date of registration of the transfer, and payments are made under such agreement by account payee cheque, bank draft or electronic bank transfer on or before the date of agreement, then the stamp duty valuation of the property on the date of

agreement can be taken, instead of the stamp duty valuation on the date of receipt of the flat. Since the new purchaser would be definitely making a payment to the original purchaser when he enters into an agreement with him, he can take stamp duty valuation on the date of that agreement assigning the purchase of the flat to him. The new purchaser cannot, however, take the stamp duty valuation on the date of the original agreement for purchase between the original purchaser and the builder, since he was not a party to that agreement.

Therefore, a bargain **purchase of a flat** from a desperate seller may also come with an additional cost in the form of tax payable by the purchaser on such differential value on the purchase. The purchaser needs to factor this in, while taking the decision to purchase the property.

Interestingly, the provisions for deduction of tax at source on purchase of an immovable property also use the term “land and building or both”. Is tax deductible at source at 1% when the new purchaser is acquiring the right to purchase the flat from the original purchaser? The obligation under the relevant provision, is of a transferee responsible for paying to a resident transferor, for transfer of an immovable property (defined as land, other than agricultural land, or any building or part of a building). In this case, there is no transfer of an immovable property by the transferor, the original purchaser, though the transferee is acquiring such an immovable property. Therefore, strictly speaking, there is no requirement to deduct tax at source.

However, as in all cases of tax deduction at source, it is advisable to take a conservative view, rather than invite possible litigation on the issue. It may, therefore, be preferable for the new purchaser to deduct tax at source from the payments to the original purchaser. Of course, on payment of instalments to the builder, there is no doubt that tax is deductible at source.

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