

INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "D": NEW DELHI
BEFORE SHRI AMIT SHUKLA, JUDICIAL MEMBER
AND
SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER

ITA No. 2630/Del/2015
(Assessment Year: 2011-12)

Kapil Kumar Agarwal, C/o. IPSAA House ANM & Associates, J021A, Mayfiled Gardens, Sector-51, Gurgaon PAN: AACPA2412L (Appellant)	Vs.	DCIT, Circle-1(1), Gurgaon (Respondent)
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Assessee by :	Shri Piyush Kaushik, Adv
Revenue by:	Smt Sugandha Sharma, Sr. DR
Date of Hearing	07/03/2019
Date of pronouncement	30/04/2019

O R D E R

PER PRASHANT MAHARISHI, A. M.

1. This appeal is filed by the assessee, individual against the order of the Commissioner of Income Tax (Appeals) – 1, Gurgaon dated 20/2/2015 for assessment year 2011-12 raising solitary ground of appeal that on the facts and circumstances of the case and in the law, the CIT –(A) has grossly erred in confirming disallowance on account of deduction as claimed by the assessee under section 54F of INR 7985761/-.
2. The brief facts of the case shows that assessee is an individual who filed his return of income on 29.07.2011 declaring income of INR 1,43,82,590/-. In the return of income the assessee has shown capital gain on sale of shares and also claimed deduction u/s 54 F of the act. The assessee sold shares of the company on 13/07/2010 for a consideration of INR 8,000,000/- and claimed the indexed cost of purchase of these shares at INR 14239/- and therefore earned long-term capital gain of INR 7985761/-. Assessee has booked a flat/Apartment No. 3C in Belgravia, Tower No. 12 in Central Park-II, Sector 48, Gurgaon on 18/8/2016. The assessee over a period of time in

various installments paid Rs. 14245000/- for this flat. Therefore, the assessee claim the benefit under section 54F of the Act.

3. The learned Assessing Officer examined the claim of the assessee and found that according to the provisions of Section 54F the assessee has been given two time limits for “purchase’ and ‘construction’ of the ‘new asset’. In the present case the Assessing Officer noted that whether the new asset is purchased or constructed. On the basis of this assumption he examined various payment schedule submitted by the assessee before him. The learned AO came to conclusion that at the time of booking of the above apartment flat the construction of the flat had not started. It commenced in the year 2007 and completed in FY 2012-13. Therefore according to him this flat cannot be considered as a “new asset”. The learned assessing officer was of also of the view that assessee has not purchased the house in the present case but has made payment installment to the builder for construction of the property. He therefore stated that it is a case of a construction of a new house property. As the new asset is constructed in this case the time limit according to him of the date of sale of original asset till the expiry of 3 years thereafter applies. He therefore noted that the assessee has started investing in the new asset with effect from 18/8/2006 that is 3 years and 11 is months before the date of sale. He further noted that around 90% of the total investment in the new asset has been made before the date of sale of the original asset. He noted that assessee would have been eligible for deduction under Section 54F had the entire investment in the construction of the new asset had been made during 13/7/2010 to 12/7/2013. Therefore according to him in the sky case the condition is breached and therefore he denied that the eligible deduction under section 54F of the act to the assessee of Rs. 7985761/. Accordingly the income of the assessee was assessed at Rs. 22368350/- as per order u/s 143 (3) of the income tax Act dated 14/02/2014.
4. The assessee preferred an appeal before the learned CIT(A) who dismissed the appeal. Therefore, assessee has preferred this appeal before us.
5. The learned authorised representative has submitted a detailed written submission on the issue as under:-

“The assessee relies on the ensuing written submission which in the interest of justice be kindly considered in the disposal of the matter.

1) *Ground of Appeal.*

The assessee in essence challenges the decision of CIT(A) in confirming the disallowance of deduction / exemption u/s 54F of Rs. 79,85,761.

2) *Background Facts.*

The following background facts be noted:

- i. Assessee has sold shares of a company on 13/07/10 for a total consideration of Rs. 80,0,000 on which Long Term Capital Gain (LTCG) of Rs. 79,85,861 has arisen. On the said Long Term Capital Gain (LTCG) the assessee has claimed the benefit of exemption / deduction u/s 54F pursuant to an Apartment Buyer’s Agreement dated 20/03/07 entered with M/s Sweta Estates Pvt. Ltd. & other parties (‘Owners’) for purchase of a residential apartment being flat no. 3C in Belgravia Tower No. 12 in Central Park-II, sector 48, Gurgaon as per which the assessee was required to make a payment of Rs. 1,42,45,000 which in fact was paid by assessee on various dates in a phased manner outlined in page 3-4 of AO order being an undisputed position. Copy of said agreement is on record as submitted in Assessee’s PB.*
- ii. As admitted by AO in page 4 of its order, at the time of booking the construction of flat has not started which commenced in 2007 only. The last payment as per the payment schedule outlined in pages 3-4 of AO order was paid on 21/08/12.*
- iii. As per the aforesaid agreement the Owners have entered into a collaboration agreement with a company to develop the group housing colony including constructions, marketing and disposal of various apartments to be constructed therein.*

3) **View of the AO.**

In the course of assessment proceedings the AO required the assessee to show cause as to why not the transaction of acquiring property as per the Apartment Buyers Agreement be not regarded as a transaction of ‘construction’ of property rather than ‘purchase’ of property as claimed by the assessee. Being not satisfied with the submissions of assessee as reproduced in AO’s order the AO proceeded on the premise that the said acquisition of property is to be regarded as ‘construction’ of property and that in case of construction of property the entire investment is to be made within a period of three years from the transfer of asset subject to capital gains i.e. between 13/07/10 - 12/07/13 which since did not happened therefore the assessee is not eligible for relief u/s 54F. In other words it is the view of the AO that in case of construction of property the construction cannot precede the date of transfer of original asset giving rise to capital gains. The AO

relied upon two ITAT decisions noted at page 7 of AO order which are dealt extensively, infra.

4) **View of CIT(A).**

The CIT(A) confirmed the view of AO. The CIT(A) relied upon two additional ITAT decisions as noted at page 12 of CIT(A) order which are dealt extensively in the ensuing paras.

5) **Assessee's submissions**

5.1 *It is respectfully submitted that the AO is fundamentally misplaced in observing that in case of construction of property the construction cannot precede the date of transfer of original asset giving rise to capital gains It is now judicially very well settled that there can be no denial of deduction I exemption u/s 54F for commencing construction of new house before the sale of original asset. This issue is now no longer a res integra in view of several authoritative pronouncements from High Courts particularly the Delhi High Court.*

In the ensuing decisions it has been held, interalia, that there can be no denial of exemption u/s 54F for commencing construction of new house before sale of original asset & that there is no requirement u/s 54F that the same money received from the sale of original asset should be used in the acquisition of new residential house:

i) *Decision of Delhi High Court in the case of CIT Vs Bharti Mishra (2014) 41 taxmann.com 50 (Del.): The precise issue involved in this case as noted by the High Court vide para 5 of its order is as under:*

"5. Thus, the only issue, which is raised and has to be examined, is whether the respondent-assessee can be denied benefit of Section 54F because construction of the house had commenced before the sale of the shares i.e.. on 17th September, 2008." The Delhi High Court in this case while considering the decisions of Allahabad & Karnataka High Court directly on the subject observed as follows vide para 6 &7:

6. *Commissioner (Appeals) and the tribunal have relied upon decisions of Allahabad High Court and Karnataka High Court in CIT v. H.K. Kapoor [1998] 234 ITR 753 (Alt.) and CIT v. J.R. Subramanya Bhat [1987] 165 ITR 571/[1986] 28 Taxman 578 (Kar). These two cases deal with interpretation of Section 54 of the Act. The said Section is pari materia to Section 54F. The only distinction being that Section 54 applies to investment in a new house where the original asset sold was/is residential property and provisions of Section 54F were/are applicable to all other assets, not being a residential house. In J.R. Suhramanya Bhat (supra). Karnataka High Court noticed language of Section 54 which stipulated that the assessee should within one year*

from the date of transfer purchase, or within a period of two years thereafter, construct a residential house to avail of concession under the said Section. The contention of the Revenue that construction of the new building had commenced earlier to the sale of the original asset, it was observed, cannot bar or prevent the assessee from taking benefit of Section 54 II was immaterial when the construction commenced, the sole and important consideration as per the Section was that the construction should be completed within the specified period. It was accordingly held as under:—

"So too was the next conclusion reached by the Tribunal. The date of the sale of the old building was February 9, 1977. The completion of the construction of the new building was in March, 1977, although the commencement of the construction started in 1976. It is immaterial, as the Tribunal, in our opinion, has rightly observed, about the date of commencement of the construction of the new building. Since the assessee has constructed the building within two years from the date of sale of the old building, he was entitled to relief under section 54 of the Act."

7. *The aforesaid judgment was pronounced on 9th June, 1986 and was followed by Allahabad High Court in hi.K. Kapoor (supra) and it has been held as under:—*

"the question for consideration is whether exemption on capital gains could be refused to the assessee simply on the ground that the construction of the Surya Nagai: Agra house, had begun before the sale of the Link house. Similar question came up for consideration before the Karnataka High Court in the case of CIT v. J. R. Subramanya Chat [1987] 165 ITR 571. In the case before the Karnataka High Court, the date of the sale of the old building was February 9, 1977. The completion of the construction of the new building was in March, 1977, although the commencement of construction stalled in 1976. On these facts, the Karnataka High Court held that it was immaterial that the construction of the new building was stalled before the sale of the old building. We fully agree with the view taken by the Karnataka High Court. The Appellate Tribunal was right in holding that capital gains arising from the sale of the Golf Link house to the extent it got invested in the construction of the Surya Nagar house, will be exempted under section 54 of the Act."

It is extremely important to submit that thereafter the Delhi High Court vide para 9 observed that the aforesaid ratio is being followed and accepted since 1986. The Delhi High Court observed that it will not be fair and in the interest of justice to interfere I alter the said interpretation and interpret beneficial provision differently after almost two decades

Finally it would be very important to outline the following as held by Delhi High Court vide paras 12 & 13 of its judgment:

“12. Section 54F(1) if read caiefully states that the assessee being an individual or Hindu Undivided Family, who had earned capital gains from transfer of any long-term capital not being a residential house could claim benefit under the said Section provided, any one of the following three conditions were satisfied: (i) the assessee had within a period of one year before the sale, purchased a residential house; (ii) within two years after the date of transfer of the original capital asset; purchased a residential house and (Hi) within a period of three years after the date of sale of the original asset, constructed a residential house.

13. For the satisfaction of the third condition, it is not stipulated or indicated in the Section that the construction must begin after (he date of sale of the original/old asset. There is no condition or reason for ambiguity and confusion which requires moderation or reading the words of the said sub-section in a different manner. The apprehension of I he Revenue that the entire money collected or received on transfer of the original/capital asset would not be utilised in the construction of the new capital asset, i.e.. residential house, is ill-founded and misconceived'

Thus, in a very clear and precise manner it has been held by the Delhi High Court that that there can be no denial of deduction I exemption u/s 54F for commencing construction of new house before the sale of original asset. Also it has been clearly held by the Delhi High Court that apprehension of the Revenue that the entire money collected or received on transfer of the original/capital asset would not be utilised in the construction of the new capital asset, i.e., residential house, is ill-founded and misconceived”,

- ii) Decision of Karnataka High Court in the case of CIT Vs J.R.Subramanya Bhat 165 ITR 571 (Kar);*
- iii) Decision of Allahabad High Court in the case of CIT Vs H.K.Kapoor 234 ITR 753 (AM.);*
- iv) Decision of Madras High Court in the case of C.Aryama Sundaram Vs CIT (2018) 97 taxmann.com 74 (Madras). In this recent & very important decision dated 06/08/18 from Madras High Court it would be very important to outline the facts and issues involved as noted by the High Court vide para 4 & 5 of its order as under:*

“4. The appellant assessee sold a residential house property at No. 137, Sundar Nagar New Delhi on 15.1.2010 in favour of one Sint.Vanadana Manchanda, for a total consideration of Rs. 12,50.00. 000/- and the total long term capital gain that arose to the appellant assessee was Rs. 10.47,95,925/-. In the meanwhile, on 14.5.2007. the appellant assessee purchased the properly with superstructure thereon at No.138, JorBagh, New Delhi for a total consideration of Rs.15.96.46,446/-. After

demolishing the existing superstructure, the appellant assessee constructed a residential house at a cost of Rs. 18,73.85.491/-. Thus, the appellant assessee claimed entire long term capital gain as exempt from tax under Section 54 of the said Act.

5. The Assessing Officer held that only that part of the construction expenditure incurred after the sale of the original asset would be eligible for exemption under Section 54 of the said Act and based on records held that cost of construction incurred after the sale of the original asset was Rs. 1,14,81,067/-.”

The following final operative portions vide para 22 & 23 of this decision is very important to note as below

“22. It is axiomatic that Section 54(1) of the said Act does not contemplate that the same money received from the sale of a residential house should be used in the acquisition of new residential house. Had it been the intention of the Legislature that the very same money that had been received as consideration for transfer of a residential house should be used for acquisition of the new asset, Section 54(1) would not have allowed adjustment and/or exemption in respect of property purchased one year prior to the transfer, which gave rise to the capital gain or may be in the alternative have expressly made the exemption in case of prior purchase, subject to purchase from any advance that might have been received for the transfer of the residential house which resulted in the capital gain.

23..It is not a requisite of Section 54 that construction could not have commenced prior to the date of transfer of the asset resulting in capital gain. If the amount of capital gain is greater than the cost of the new house, the difference between the amount of capital gain and the cost of the new asset is to be charged under Section 45 as the income of the previous year. If the amount of capital gain is equal to or less than the cost of the new residential house including the land on which the residential house is constructed, the capital gain is not to be charged under Section 45 of the said Act. ”

Principles laid down in aforesaid decision has been followed in various ITAT decisions being the following:

- v) Decision of Co-ordinate Bench of ITAT in the case of DCIT Vs Dr. Chalasani Mallikarjuna Rao (2016) 75 taxmann.com 270;*
- vi) Decision of Co-ordinate Bench of ITAT in the case of ITO, Japiur Vs Smt. Saroj Devi Agarwal (2017) 87 taxmann.com 23;*
- vii) Decision of Co-ordinate Bench of ITAT in the case of Mustansir I Tehsildar Vs ITO, Mumbai (2017) 88 taxmann.com 275;*

viii) *Decision of Ahmedabad ITAT in the case of ACIT Vs Subhash Sevaram Bhavnani 23 taxmann.com 94.*

5.2 *Reliance is also placed on the following decisions wherein held that assessee having made substantial payments for acquisition / construction of new house, that the amounts paid till the due date of filing Return of income exceeding the amount of capital gain then exemption cannot be denied u/s 54F on the ground that complete construction could not be done or possession of new house not granted to assessee in view of the applicability of rule of liberal construction on interpretation of provisions of section 54F & in view of ground reality that construction by builders takes unusually longer time in the practical scenario:*

i) *Decision of Karnataka High Court in the case of Principal CIT Vs C.Gopalaswamy (2016) 384 ITR 307 (Kar.);*

ii) *Decision of Delhi High Court in the case of CIT Vs Kuldeep Singh (2014) 49 taxmann.com 167: It would be important to note the following from the operative portion of Delhi High Court decision vide paras 10 & 11 as under:-*

10..... It was observed that Section 54 of the Act says that assessee could have constructed the house and not, that the construction should have necessarily been completed. Noticing that it was not easy to construct a house within the lime limit of three years and under the Government schemes, construction takes years, When substantial investment was made in the construction and it should be deemed that sufficient steps had been taken and it satisfied requirement of Section 54.

11. What has been stated in the judgment of the Madhya Pradesh High Court in 1997, in practical terms and in reality still holds good. This is a matter of common knowledge that flats or apartments being constructed by builders take time. The Government Housing Boards also take time and seldom adhere to the promised date.

iii) *Decision of Karnataka High Court in the case of CIT Vs Sambandam UdayKumar (2012) 345 ITR 389.*

In this regard it would be also important to quote once again the following from the operative portion of decision of Madras High Court in the case of C.Aryama Sundaram Vs CIT dated 06/08/18 (supra) as under:

23.....It is not a requisite of Section 54 that construction could not have commenced prior to the date of transfer of the asset resulting in capital gain. If the amount of capital gain is greater than the cost of the new house, the difference between the amount of capital gain and the cost of the new asset is to be charged under Section 45 as the income of the previous year. If the amount of capital gain is equal to or less than the cost of the new residential house, including the land on which the

residential house is constructed, the capital gain is not to be charged under Section 45 of the said Act. ”

5.3 *WITHOUT PREJUDICE TO OTHER ARGUMENTS IT IS ALSO SUBMITTED THAT DELHI HIGH COURT VIDE AFORESAID DECISION IN CASE OF KULDEEP SINGH CATEGORIZED THE ACQUISITION OF AN APARTMENT UNDER A BUILDER BUYERS AGREEMENT WHEREIN THE BUILDER GETS CONSTRUCTION DONE IN A PHASED MANNER AND THE PAYMENTS ARE LINKED TO CONSTRUCTION AS A CASE OF ‘PURCHASE’ AND NOT ‘CONSTRUCTION’. IDENTICAL ARE THE FACTS OF PRESENT CASE WHEREIN ASSESSEE IS MAKING CONSTRUCTION LINKED PAYMENT TO BUILDER AS PER THE PAYMENT SCHEDULE OUTLINED IN AO ORDER AND THE BUILDER GETS THE CONSTRUCTION DONE. UNDER THIS SCENARIO THE ASSESSEE WILL BE DEFINITELY ENTITLED FOR BENEFIT OF PAYMENT MADE WITHIN ONE YEAR PRIOR TO THE DATE OF SALE OF SHARES TILL THE DATE OF FILING ROI FOR AY 2011-12 I.E. STARTING FROM SERIAL NO. 5 OF THE PAYMENT SCHEDULE OUTLINED IN PAGES 3-4 of AO ORDER UPTILL SERIAL NO. 11 WHICH COMES TO RS. 88,78,091 BEING MORE THAN THE CAPITAL GAIN OF RS. 79,85,761 AND THEREFORE IN ANY CASE THE ASSESSEE WILL BE ENTITLED FOR COMPLETE DEDUCTION / EXEMPTION U/S 54F AS CLAIMED IN FACT ON THIS BASIS ONLY THE ASSESSEE HAS MADE CLAIM IN ROI AS NOTED BY AO VIDE PARA 3 OF ITS ORDER. IN FACT THE AO ALSO DOES NOT DISPUTE THAT IF THIS TRANSACTION IS CATEGORIZED AS THAT OF PURCHASE THEN THE ASSESSEE WILL GET THE COMPLETE BENEFIT U/S 54F AS CLAIMED. THUS THE CLAIM OF ASSESSEE GETS SQUARELY COVERED FROM THE DECISION IN CASE OF KULDEEP SINGH (SUPRA) WHEREIN THE IDENTICAL TRANSACTION OF ACQUISITION OF FLAT UNDER BUILDER / BUYER AGREEMENT WILL BE REGARDED A TRANSACTION OF ‘PURCHASE’.*

6) *Decisions relied upon by AO & CIT(A).*

6.1 *Decisions relied by AO. The AO has relied upon two ITAT decisions in the case of ACIT Vs Sunder Kumar Sujan Singh Dham & Kishore H. Galaiya Vs ITO. Both these ITAT decisions will not make any impact on assessee’s claim of exemption / deduction u/s 54F in the present case of assessee in view of the following reasons:*

i) *In these ITAT decisions it has been held for the purpose of extending the benefit to the assessee that purchase of an apartment from builder who gets it constructed in a phased manner can also be regarded as a case of construction in order to extend benefit to the assessee.*

ii) *Secondly it was not the subject matter of issue in these ITAT cases as to whether assessee can be denied benefit of Section 54F if construction commences prior to the transfer of original asset;*

iii) *Thirdly these ITAT decisions are prior to the decisions from Delhi High Court & Madras High as relied supra.*

6.2 **Decisions relied upon by CIT(A).** *The CIT(A) has additionally relied upon two ITAT decisions i.e. decision of Ahmedabad ITAT in the case of Smt. Ushaben Jayantilal Sodhan & decision of Hyderabad ITAT in the case of Smt. Nimgad Sncevi. Both these ITAT decisions will not make any impact on assessee's claim of exemption / deduction u/s 54F in the present case of assessee in view of the following clear reasons:*

- i) *In the case of Smt. Ushaben Jayantilal Sodhan before Ahmedabad ITAT exemption was denied u/s 54F on the ground that the entire construction including possession had materialized prior to the sale of property subject to capital gains. This is not at all the fact situation in the present case. In the present case of assessee the construction as is evident from the payment scheduled is happening in a phased manner and is continuing uptill 21/08/12. The AO himself admits on the facts of present case that construction was not completed until sale of shares subject to capital gains. In fact the very same Bench of ITAT i.e. Ahmedabad ITAT vide its another decision in the case of ACIT Vs Subhash Sevaram Bhavnani 23 taxmann.com 94 categorically distinguished the above view taken in the case of Smt. Ushaben Jayantilal Sodhan on the ground that benefit of section 54F cannot be denied where the construction got completed after the sale of asset subject to capital gains.*
- ii) *Secondly the aforesaid decision is from ITAT rendered prior to the decision of Kuldeep Singh from Delhi High Court which is being heavily relied upon;*
- iii) *The other ITAT Hyderabad decision in case of Smt. Nimgad Sridevi is of 2005 and will explicitly stand superseded by various subsequent High Courts decisions heavily relied upon.*

Thus, in view of the foregoing facts and circumstances and the legal position it is respectfully submitted that looked from any angle the assessee will be entitled to the benefit of exemption / deduction u/s 54F of Rs. 79,85,761 as claimed and the lower authorities have seriously erred in denying the benefit of same."

6. The learned departmental representative vehemently supported the order of the lower authorities.
7. The brief facts of the case shows that assessee derived a long-term capital gain on sale of shares of Rs. 7985861/-. The assessee has claimed deduction under Section 54F stating that it has purchased an apartment by buyers agreement dated 20/3/2007 entered into with M/s Sweta estate private limited for purchase of residential apartment being flat number 3C

in Belgravia Tower No. 12 in Central Park – II, Sector 48, Gurgaon as per which the assessee was required to make a payment of Rs. 14245000/- which was paid by the assessee on various dates as mentioned in the assessment order at page number 3 and 4. Admittedly, at the time of booking of the flat the construction did not commence. He was of the view that claim of the assessee that above transaction is a 'purchase' of a new asset is incorrect and according to him the transaction of acquiring property as per the apartment buyers agreement is a transaction of 'construction' of property and therefore he disallowed the claim. The learned CIT(A) also supported the view of the learned AO by 2 different decisions of the coordinate bench. Therefore following 2 questions arise before us:-

- i. whether the acquisition of an apartment under a builders buyers agreement wherein the builder gets construction done in a phased manner and the payments are linked to construction are a case of purchase of a new asset or construction of new asset
 - ii. whether the construction of new asset even if commenced before the date of sale of the original asset, the assessee is eligible for deduction of the amount of investment made in the property.
8. The 1st question has been answered by the honourable Delhi High Court in case of CIT vs Kuldeep Singh in [2014] 49 taxmann.com 167 (Delhi)/[2014] 226 Taxman 133 (Delhi)/[2014] 270 CTR 561 (Delhi) wherein the honourable High Court has held as under:-

“8. The word 'purchase' can be given both restrictive and wider meaning. A restrictive meaning would mean transactions by which legal title is finally transferred, like execution of the sale deed or any other document of title. 'Purchase' can also refer to payment of consideration or part consideration along with transfer of possession under Section 53A of the Transfer of Property Act, 1882. Supreme Court way back in 1979 in CIT v. T.N. Aravinda Reddy [1979] 120 ITR 46/2 Taxman 541, however, gave it a wider meaning and it was held that the payment made for execution of release deed by the brother thereby joint ownership became separate ownership for price paid would be covered by the word 'purchase'. It was observed that the word 'purchase' used in Section 54 of the Act should be interpreted pragmatically in a practical manner and legalism shall not be allowed to play and create confusion or linguistic distortion. The argument that 'purchase' primarily meant acquisition for money paid and not adjustment, was rejected observing that it need not be restricted to

conveyance of land for a price consisting wholly or partly of money's worth. The word 'purchase', it was observed was of a plural semantic shades and would include buying for a price or equivalent of price by payment of kind or adjustment of old debt or other monetary considerations. It was observed that if you sell a house and make profit, pay Caesar (State) but if you buy a house or build another and thereby satisfy the conditions of Section 54, you were exempt. The purpose was plain; the symmetry was simple; the language was plain.

9. In view of this it is apparent that acquisition of an apartment under a builders buyers agreement wherein the builder gets construction done in a phased manner and the payments are linked to construction is a case of purchase and not construction of new asset.
10. With respect to the 2nd question whether the construction of the house property if commenced before the date of the sale of the original asset whether the assessee is entitled to deduction u/s 54F of the income tax act or not. The Hon'ble Delhi High Court in case of CIT vs Bharti Mishra (2014) 41 Taxmann.com 50 (Delhi)/[2014] 222 Taxman 2 (Delhi)/[2014] 265 CTR 374 (Delhi) has examined the issue that whether assessee can be denied benefit of section 54F because construction of the house had commenced before the sale of the shares. Identical is the issue before us that the assessee sold the shares as in assessment year 2011 – 12 and the assessee started making investment in the new asset with effect from 18/08/2006. For this reason the learned assessing officer denied the benefit of section 54F of the act. The Hon'ble Delhi High Court in Bharti Mishra (supra) has held as under:-

“5. Thus, the only issue, which is raised and has to be examined, is whether the respondent-assessee can be denied benefit of Section 54F because construction of the house had commenced before the sale of the shares i.e., on 17th September, 2008.

6. Commissioner (Appeals) and the tribunal have relied upon decisions of Allahabad High Court and Karnataka High Court in CIT v. H.K. Kapoor [1998] 234 ITR 753 (All.) and CIT v. J.R. Subramanya Bhat [1987] 165 ITR 571/[1986] 28 Taxman 578 (Kar). These two cases deal with interpretation of Section 54 of the Act. The said Section is pari materia to Section 54F. The only distinction being that Section 54 applies to investment in a new house where the original asset sold was/is residential property and provisions of Section 54F were/are applicable to all other assets, not being a residential house.

In J.R. Subramanya Bhat (supra), Karnataka High Court noticed language of Section 54 which stipulated that the assessee should within one year from the date of transfer purchase, or within a period of two years thereafter, construct a residential house to avail of concession under the said Section. The contention of the Revenue that construction of the new building had commenced earlier to the sale of the original asset, it was observed, cannot bar or prevent the assessee from taking benefit of Section 54. It was immaterial when the construction commenced, the sole and important consideration as per the Section was that the construction should be completed within the specified period. It was accordingly held as under:—

"So too was the next conclusion reached by the Tribunal. The date of the sale of the old building was February 9, 1977. The completion of the construction of the new building was in March, 1977, although the commencement of the construction started in 1976. It is immaterial, as the Tribunal, in our opinion, has rightly observed, about the date of commencement of the construction of the new building. Since the assessee has constructed the building within two years from the date of sale of the old building, he was entitled to relief under section 54 of the Act."

7. *The aforesaid judgment was pronounced on 9th June, 1986 and was followed by Allahabad High Court in H.K. Kapoor (supra) and it has been held as under:—*

"The question for consideration is whether exemption on capital gains could be refused to the assessee simply on the ground that the construction of the Surya Nagar, Agra house, had begun before the sale of the Link house. Similar question came up for consideration before the Karnataka High Court in the case of CIT v. J. R. Subramanya Bhat [1987] 165 ITR 571. In the case before the Karnataka High Court, the date of the sale of the old building was February 9, 1977. The completion of the construction of the new building was in March, 1977, although the commencement of construction started in 1976. On these facts, the Karnataka High Court held that it was immaterial that the construction of the new building was started before the sale of the old building. We fully agree with the view taken by the Karnataka High Court. The Appellate Tribunal was right in holding that capital gains arising from the sale of the Golf Link house to the extent it got invested in the construction of the Surya Nagar house, will be exempted under section 54 of the Act."

8. *Commissioner (Appeals) in his order while accepting the plea of the assessee has referred to several judgments of the Tribunal thereafter in which the aforesaid reasoning and interpretation of Section 54/54F has been followed. Reference has been made to the judgment of Madras High Court in CIT v. Sardarmal Kothari, [2008] 302 ITR 286 in which it has been held as under:—*

"3. There is no dispute about the fact that the assesseees have invested the entire net consideration of sale of capital asset in the land itself and subsequently the assesseees have invested large sums of money in the construction of the house. The cost of investment in land and the cost of expenditure towards the construction of the houses is not in dispute. The one and only ground on which the Assessing Officer has non-suited the assesseees for the claim of exemption was that the houses have not been completed. There remains some more construction to be made.

4. The requirement of the provision is that the assessee, within a period of three years after the date of transfer, has to construct a residential house in order to become eligible for exemption. In the cases on hand, it is not in dispute that the assesseees have purchased the lands by investing the capital gain and they have also constructed residential houses. In order to establish the same, the assesseees submitted before the Commissioner of Income-tax(Appeals) several material evidence, viz., invitation card printed for the house-warming ceremony to be held on July 12, 2003. The assesseees have also produced the completion certificates from the municipal authority on January 30, 2004. On the basis of the above documents, the Commissioner of Income-tax(Appeals) concluded that the requirement of the statutory provision has been complied with by the assesseees and that was reconfirmed by the Tribunal in the orders impugned."

9. The aforesaid ratio is being followed and accepted since 1986. It will not be fair and in the interest of justice to interfere/alter the said interpretation and interpret beneficial provision differently after almost two decades.

10. The Supreme Court recently in Civil Appeal No. 11003/2013, *Arasmeta Captive Power Co. (P.) Ltd. v. Lafarge India (P.) Ltd.*, decided on 12th December, 2013 has observed as under:

'2. In *Government of Andhra Pradesh and others v. A.P Jaiswal and others*, a three-judge bench has observed thus:

"Consistency is the cornerstone of the administration of justice. It is consistency which creates confidence in the system and this consistency can never be achieved without respect to the rule of finality. It is with a view to achieve consistency in judicial pronouncements, the Courts have evolved the rule of precedents, principle of stare decisis, etc. These rules and principle are based on public policy..."

3. We have commenced our opinion with the aforesaid exposition of law as arguments have been canvassed by Mr. Ranjit Kumar, learned senior counsel for the appellants, with innovative intellectual animation of how a three- Judge Bench in *Chloro Controls India (P.) Ltd. v. Seven Trent Water Purification Inc.* [2013] 1 SCC 641 has inappositely and incorrectly understood the principles stated in the major part of the decision rendered by a larger bench in *SBP &*

Company v. Patel Engineering Ltd [2005] 8 SCC 618 and, in resistance, Mr. Harish Salve and Dr. A.M. Singhvi, learned senior counsel for the respondent, while defending the view expressed later by the three- Judge Bench, have laid immense emphasis on consistency and certainty of law that garner public confidence, especially in the field of arbitration, regard being had to the globalization of economy and stability of the jurisprudential concepts and pragmatic process of arbitration that sparkles the soul of commercial progress. We make it clear that we are not writing the grammar of arbitration but indubitably we intend, and we shall, in course of our delineation, endeavour to clear the maze, so that certainty remains "A Definite" and finality is 'Final'.

The aforesaid observations are equally, if not more important and relevant to tax matters.

11. *Even otherwise, we find that Section 54F(4) is misread and misunderstood by the Revenue. Section 54-F reads as under:—*

"54F. Capital gain on transfer of certain capital assets not to be charged in case of investment in residential house— (1) Subject to the provisions of sub-section (4), where in the case of an assessee being an individual or a Hindu undivided family, the capital gain arises from the transfer of any long-term capital asset, not being a residential house (hereafter in this section referred to as the assets not original asset), and the assessee has, within a period of one year before or two years after the date on which the transfer took place purchased, or has within a period of three years after that date constructed, a residential house (hereinafter in this section referred to as the new asset), the capital gain shall be dealt with in accordance with the following provisions of this section, that is to say, —

- (a) if the cost of the new asset is not less than the net consideration in respect of the original asset, the whole of such capital gain shall not be charged under Section 45;*
- (b) if the cost of the new asset is less than the net consideration in respect of the original asset, so much of the capital gain as bears to the whole of the capital gain the same proportion as the cost of the new asset bears to the net consideration, shall not be charged under Section 45:*

Provided that nothing contained in this sub-section shall apply where—

- (a) *the assessee,—*
- (i) *owns more than one residential house, other than the new asset, on the date of transfer of the original asset; or*
 - (ii) *purchases any residential house, other than the new asset, within a period of one year after the date of transfer of the original asset; or*
 - (iii) *constructs any residential house, other than the new asset, within a period of three years after the date of transfer of the original asset; and*
- (b) *the income from such residential house, other than the one residential house owned on the date of transfer of the original asset, is chargeable under the head „Income from house property.]*

Explanation. - For the purposes of this section,—

- (i) *[Omitted]*
- (ii) *"net consideration", in relation to the transfer of a capital asset, means the full value of the consideration received or accruing as a result of the transfer of the capital asset as reduced by any expenditure incurred wholly and exclusively in connection with such transfer.*

(2) Where the assessee purchases, within the period of two years after the date of the transfer of the original asset, or constructs, within the period of three years after such date, any residential house, the income from which is chargeable under the head "Income from house property", other than the new asset, the amount of capital gain arising from the transfer of the original asset not charged under Section 45 on the basis of the cost of such new asset as provided in clause (a), or, as the case may be, clause (b), of sub-section (1), shall be deemed to be income chargeable under the head "Capital gains" relating to long-

term capital assets of the previous year in which such residential house is purchased or constructed.

(3) Where the new asset is transferred within a period of three years from the date of its purchase or, as the case may be, its construction, the amount of capital gain arising from the transfer of the original asset not charged under Section 45 on the basis of the cost of such new asset as provided in clause (a) or, as the case may be, clause (b), of sub-section (1) shall be deemed to be income chargeable under the head "Capital gains" relating to long-term capital assets of the previous year in which such new asset is transferred.

(4) The amount of the net consideration which is not appropriated by the assessee towards the purchase of the new asset made within one year before the date on which the transfer of the original asset took place, or which is not utilised by him for the purchase or construction of the new asset before the date of furnishing the return of income under Section 139, shall be deposited by him before furnishing such return such deposit being made in any case not later than the due date applicable in the case of the assessee for furnishing the return of income under sub-section (1) of Section 139 in an account in any such bank or institution as may be specified in, and utilised in accordance with, any scheme which the Central Government may, by notification in the Official Gazette, frame in this behalf and such return shall be accompanied by proof of such deposit; and, for the purposes of sub-section (1), the amount, if any, already utilised by the assessee for the purchase or construction of the new asset together with the amount so deposited shall be deemed to be the cost of the new asset:

Provided that if the amount deposited under this sub-section is not utilised wholly or partly for the purchase or construction of the new asset within the period specified in sub-section (1), then,—

(i) the amount by which —

(a) the amount of capital gain arising from the transfer of the original asset not charged under Section 45 on the basis of the cost of the new asset as provided in clause (a) or, as the case may be, clause (b) of sub-section (1),

exceeds,

(b) the amount that would not have been so charged had the amount actually utilised by the assessee for the purchase or construction of the new

asset within the period specified in sub-section (1) been the cost of the new asset,

shall be charged under Section 45 as income of the previous year in which the period of three years from the date of the transfer of the original asset expires; and

(ii) *the assessee shall be entitled to withdraw the unutilised amount in accordance with the scheme aforesaid."*

12. *Section 54F(1) if read carefully states that the assessee being an individual or Hindu Undivided Family, who had earned capital gains from transfer of any long-term capital not being a residential house could claim benefit under the said Section provided, any one of the following three conditions were satisfied; (i) the assessee had within a period of one year before the sale, purchased a residential house; (ii) within two years after the date of transfer of the original capital asset, purchased a residential house and (iii) within a period of three years after the date of sale of the original asset, constructed a residential house.*

13. *For the satisfaction of the third condition, it is not stipulated or indicated in the Section that the construction must begin after the date of sale of the original/old asset. There is no condition or reason for ambiguity and confusion which requires moderation or reading the words of the said sub-section in a different manner. The apprehension of the Revenue that the entire money collected or received on transfer of the original/capital asset would not be utilised in the construction of the new capital asset, i.e., residential house, is ill-founded and misconceived. The requirement of sub-section (4) is that if consideration was not appropriated towards the purchase of the new asset one year before date of transfer of the original asset or it was not utilised for purchase or construction of the new asset before the date of filing of return under Section 139 of the Act, the balance amount shall be deposited in an authorized bank account under a scheme notified by the Central Government. Further, only the amount which was utilised in construction or purchase of the new asset within the specified time frame stand exempt and not the entire consideration received.*

14. *Section 54F is a beneficial provision and is applicable to an assessee when the old capital asset is replaced by a new capital asset in form of a residential house. Once an assessee falls within the ambit of a beneficial provision, then the said provision should be*

liberally interpreted. The Supreme Court in CCE v. Favourite Industries, [2012] 7 SCC 153 has succinctly observed:—

'21. Furthermore, this Court in Associated Cement Companies Ltd. v. State of Bihar [(2004) 7 SCC 642], while explaining the nature of the exemption notification and also the manner in which it should be interpreted has held: (SCC p. 648, para 12)

"12. Literally 'exemption' is freedom from liability, tax or duty. Fiscally it may assume varying shapes, specially, in a growing economy. In fact, an exemption provision is like an exception and on normal principle of construction or interpretation of statutes it is construed strictly either because of legislative intention or on economic justification of inequitable burden of progressive approach of fiscal provisions intended to augment State revenue. But once exception or exemption becomes applicable no rule or principle requires it to be construed strictly. Truly speaking, liberal and strict construction of an exemption provision is to be invoked at different stages of interpreting it. When the question is whether a subject falls in the notification or in the exemption clause then it being in the nature of exception is to be construed strictly and against the subject but once ambiguity or doubt about applicability is lifted and the subject falls in the notification then full play should be given to it and it calls for a wider and liberal construction. (See Union of India v. Wood Papers Ltd. [(1990) 4 SCC 256 : 1990 SCC (Tax) 422] and Mangalore Chemicals and Fertilisers Ltd. v. Dy. CCT [1992 Supp (1) SCC 21] to which reference has been made earlier.)"

22. In G.P. Ceramics (P.) Ltd. v. Dy. Commissioner, Trade Tax (2009) 2 SCC 90], this Court has held: (SCC pp. 101-02, para 29)

29. It is now a well-established principle of law that whereas eligibility criteria laid down in an exemption notification are required to be construed strictly, once it is found that the applicant satisfies the same, the exemption notification should be construed liberally. [See CTT v. DSM Group of Industries[(2005) 1 SCC 657] (SCC para 26); TISCO Ltd. v. State of Jharkhand [(2005) 4 SCC 272] (SCC paras 42-45); State Level Committee v. Morgardshammar India Ltd. [(1996) 1 SCC 108] ; Novopan India Ltd. v. CCE & Customs [1994 Supp (3) SCC 606] ; A.P. Steel Re-Rolling Mill Ltd. v. State of Kerala [(2007) 2 SCC 725] and Reiz Electrocontrols (P.) Ltd. v. CCE. [(2006) 6 SCC 213]

***15.** In view of the aforesaid position, we do not find any merit in the present appeal and the same is dismissed."*

11. As the impugned issue is squarely covered in favour of the assessee by the above decision of the honourable High Court, we hold that assessee has purchased a house property i.e. a new asset and is entitled to exemption u/s 54F of the act despite the fact that construction activities of the purchase of the new house has started before the date of sale of the original

asset which resulted into capital gain chargeable to tax in the hands of the assessee. Accordingly we reverse the order of the lower authorities and direct the assessing officer to grant deduction under section 54F of Rs. 7985761/- to the assessee.

12. Accordingly, appeal of the assessee is allowed.

Order pronounced in the open court on 30/04/2019.

-Sd/-
(AMIT SHUKLA)
JUDICIAL MEMBER

-Sd/-
(PRASHANT MAHARISHI)
ACCOUNTANT MEMBER

Dated: 30/04/2019

Copy forwarded to

1. Applicant
2. Respondent
3. CIT
4. CIT (A)
5. DR:ITAT

ASSISTANT REGISTRAR
ITAT, New Delhi