Sbw

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

INCOME TAX APPEAL NO.314 OF 2013

Rasiklal M. Parikh ..Appellant

Versus

Assistant Commissioner of
Income Tax-19(2), Mumbai ..Respondent

Mr. Sanjiv M. Shah for the Appellant.
Ms. Shehnaz Bharucha for the Respondent.

.....

CORAM: M. S. SANKLECHA &
A. K. MENON, JJ.
RESERVED ON : 13TH FEBRUARY, 2017
PRONOUNCED ON : 10TH MARCH, 2017

JUDGEMENT (PER A.K.MENON,J.)

1. This appeal under Section 260A of the Income Tax Act, 1961(the Act) assails the order dated 31st October, 2012 passed by the Income Tax Appellate Tribunal (Tribunal). The impugned order relates to Assessment Year 2006-07.

2. This appeal was admitted on 28th January, 2015 on the following substantial questions of law:-

"(A) Whether on the facts and in the circumstances of the case and in law, the Tribunal grossly erred in not, at the outset,

deciding the application for admission of additional evidence filed under Rule 29 of the Income Tax Appellate Tribunal Rules, 1963 read with the additional evidence paper book before proceeding to pass an order on the merits of the controversies involved in the appeal?

(B) Whether on the facts and in the circumstances of the case and in law, the Tribunal was right in approving the denial of exemption under Section 54F?

(C) Whether the Tribunal infringed the principles of natural justice in not providing an opportunity to the Appellant to rebut the detrimental conclusions inferred by the Tribunal based on the additional evidences adduced by the appellant and the Circular no.495 dated 22nd September, 1987?"

3. Vide order dated 28th January, 2015 the Court expedited the hearing of the appeal in view of the appellant being 86 years of age. Thereafter by consent of parties the appeal has been taken up for hearing on 18th November, 2016 by consent of parties. After the admission of the appeal the appellant took out Chamber Summons No.335 of 2015 proposing certain amendments. Initially the Chamber Summons was adjourned to the hearing of the appeal. However, since the appellant sought to rely upon the contents of the proposed amendment, we thought it fit to hear Chamber Summons in the first instance.

Accordingly vide order dated 12th January, 2017 we held that the amendment sought is impermissible and the Chamber Summons came to be dismissed. The appeal has since been taken up for hearing.

4. Mr. Shah, the learned counsel for the appellant submitted that the challenge is twofold. Firstly, he assails the failure of the Tribunal to pass an order upon the application to lead additional evidence under Rule 29 of the Income Tax (Appellate Tribunal) Rules, 1963 (ITAT Rules) and secondly on the merits of the matter for having denied an exemption sought under Section 54F of the Act. We will first deal with Mr. Shah's submission on the controversy in the impugned order relating to the application for leading additional evidence.

The First Question

5. We deal with Question "A" first. In respect of Assessment Year 2006-07 the assessee had filed an appeal before the Tribunal arising out of an Assessment Order dated 26th December 2008 passed under Section 143(3) of the Act which was upheld by order dated 7th July 2011 of the Commissioner of Income Tax (Appeals) [CIT(A)]. During the pendency of the appeal before the Tribunal, the appellant had on or about 9th July, 2012 filed an application seeking admission of additional evidence. In view of the impending hearing of the appeal on 8th October, 2012, the appellant contended that certain additional and material documents accompanying the application were sought to be introduced for the first time before the Tribunal that do not really, in the strict

sense, constitute "fresh evidences". It was submitted that the additional evidence be admitted since it is fundamental in order to meet the ends of justice.9

6. The Additional Evidence Paper Book (AEPB) consists of (i) Commencement Certificate dated 29th July, 2003 as amended on 7th September, 2010, (ii) Occupancy Certificate in respect of Wing "A" and Wing "B' dated 29th January, 2008 and 2nd June, 2010, (iii) A pamphlet issued by the developer in relation to the housing project (iv) copies of 4 letters addressed by the developers to the appellant and (v) a Sketch Plan of flat nos.901, 902 and 903. Mr. Shah submitted that on the scheduled date of hearing i.e. 8th October, 2012 the appeal was heard finally. The grievance of the appellant before the Tribunal was that the CIT(A) incorrectly denied exemption under Section 54F of the Act. Mr. Shah submitted that the appeal was then heard but came to be dismissed on 31st October, 2012 and a copy of the order was received on 10th November, 2012 whereupon it was noticed that while disposing of the appeal, the Tribunal omitted to pass any order on the application to take on record the additional evidence. The grievance of Mr. Shah is that the AEPB had been taken on record but the Tribunal failed to pass any orders on the application to permit the additional evidence to be considered. Instead the Tribunal used the documents filed and relied upon them to hold against the assessee. Exception has been taken to this approach adopted by the Tribunal. Mr. Shah then

submitted that there are different ways in which additional evidence may be considered viz under Rule 18 or 29 of the ITAT Rules and by using inherent provisions of Section 254 of the Income Tax Act, 1961. In the instant case the Tribunal by not indicating whether or not the application had been allowed committed a serious error which has caused grave prejudice to the appellant. Mr. Shah submitted that the Tribunal had erred in not passing an order on the assessee's application for admission of additional evidence.

7. Mr. Shah submitted that the Tribunal ought to have first passed an order on the application allowing or rejecting it and give reasons for the decision. However, without indicating so, the Tribunal in paragraph 9 of the impugned order relied upon the additional documents filed and held against the assessee. It held that the commencement certificate filed revealed that the developers had no approval for construction of the 9th floor on which the appellant's premises was situate and it is only on 7th September, 2010 that the commencement certificate was validated for construction of the 9th floor. Mr. Shah submitted that the commencement certificate as amended and filed along with the AEPB was used by the Tribunal to deny relief to the appellant. Furthermore, the Tribunal also made reference in paragraph 10 of the order to the Sketch filed along with the AEPB by stating as follows:-

"By merely filing of the design in the form of an internal map,

would not suffice. It is only by physical verification, the contention of the assessee could be established that three flats are one residential unit having one common passage, one electricity meter and one municipal corporation number. These mandatory things could be established by the assessee as the flats are yet to be completed."

8. Thus the Tribunal had grossly erred in referring to two documents filed by the appellant in the AEPB, without passing an order permitting or rejecting the application. He submitted that the impugned order is therefore vitiated. In the course of his submissions, Mr. Shah relied upon the provisions of the 'ITAT Rules. He invited our attention to Rules 18 and 29 of ITAT Rules which are reproduced below for ease of reference:-

"18. (1) If the appellant or the respondent, as the case may be, proposes to refer or rely upon any document or statements or other papers on the file of or referred to in the assessment or appellate orders, he may submit a paper book in duplicate containing such papers duly indexed and paged at least a day before the date of hearing of the appeal along with proof of service of a copy of the same on the other side at least a week before :

Provided, however, the Bench may in an appropriate case condone the delay and admit the paper book.

(2) The Tribunal may suo motu direct the preparation of a paper book in triplicate by and at the cost of the appellant or the respondent containing copies of such statements, papers

and documents as it may consider necessary for the proper disposal of the appeal.

(3) The papers referred to in sub-rule (1) above must always be legibly written or type-written in double space or printed. If xerox copy of a document is filed, then the same should be legible. Each paper should be certified as a true copy by the party filing the same, or his authorised representative and indexed in such a manner as to give the brief description of the relevance of the document, with page numbers and the Authority before whom it was filed.

(4) The additional evidence, if any, shall not form part of the same paper book. If any party desires to file additional evidence, then the same shall be filed by way of a separate book containing such particulars as are referred to in sub-rule (3) accompanied by an application stating the reasons for filing such additional evidence.

(5) The parties shall not be entitled to submit any supplementary paper book, except with the leave of the Bench.

(6) Documents that are referred to and relied upon by the parties during the course of arguments shall alone be treated as part of the record of the Tribunal.

(7) Paper/paper books not conforming to the above rules are liable to be ignored.

29. Production of additional evidence before the Tribunal.

The parties to the appeal shall not be entitled to produce additional evidence either oral or documentary before the

Tribunal, but if the Tribunal requires any document to be produced or any witness to be examined or any affidavit to be filed to enable it to pass orders or for any other substantial cause, or, if the income-tax authorities have decided the case without giving sufficient opportunity to the assessee to adduce evidence either on points specified by them or not specified by them, the Tribunal, for reasons to be recorded, may allow such document to be produced or witness to be examined or affidavit to be filed or may allow such evidence to be adduced."

9. Mr. Shah submitted that whenever any party applies for production of additional evidence before the Tribunal, the Tribunal may allow such documents to be produced or any affidavit to be filed or reasons to be recorded and Rule 18(4) which provides that additional evidence not forming part of the paper book, was to be filed by way of separate paper book containing particulars accompanied by an application stating the reasons for filing such additional evidence. He submitted that the application made by the appellant on 9th July, 2012 constitutes an application contemplated in Rule 18(4). He submitted that upon such application being filed, the Tribunal was bound to consider the same in accordance with law and pass an order giving reasons for accepting or rejecting the same. However, in the instant case, the Tribunal adopted a different course, omitting to pass an order on the application yet using the contents of the some of the documents in order to arrive at its conclusions in the appeal. Reasons for allowing or rejecting the AEPB could have to be recorded in the final order but was not. The course adopted by the

Tribunal was perverse and therefore he submitted question "A" be answered in the affirmative.

10. In support of his contentions in respect of question (A), Mr. Shah, learned counsel for the appellants referred to the following judgments :

(i) Commissioner of Income Tax v/s. Asian Techs Ltd. 233 ITR 715 (Ker);

(ii) Commissioner of Income Tax v/s. Travancore Titanium Products Ltd. 203 ITR 685;

(iii) R.S.S. Shanmugam Pillai & Sons vs. Commissioner of Income Tax, Madras 95 ITR 109 (Mad.);

(iv) Maruti Udyog Ltd. vs. Income Tax Appellate Tribunal and Others 244 ITR 303 (Del.)

(v) Zenith Ltd. v/s. Deputy Commissioner of Income Tax and Another 271 ITR 135;

(vi) Parkkot Maritima Agencies Pvt. Ltd. v/s. Commissioner of Income Tax in Tax Appeal No.37 of 2016 decided on 15th November, 2016;

(vii) Assam Hindu Mission Upper Nawprem v/s. Smt. Elaboris Tron AIR 1999 Gauhati 39;

(viii) Smt. Suhasinibai Goenka v/s. Commissioner of Income Tax 216 ITR 518;

(ix) Commissioner of Income Tax v/s. Kum. Satya Setia 143 ITR 486;

(x) Hukumchand Mills Ltd. Vs. Commissioner of Income Tax, Central, Bombay 63 ITR 232 (SC);

(xi) Arjan Singh Vs. Kartar Singh and Others AIR (38) 1951 SC 193

(xii) M.M. Quasim vs. Manohar Lal Sharma and Others AIR 1981 SC 1113

(xiii) Gopal Chandra Chaudhury v/s. LIC of India AIR 1985 Orissa 120;

11. We do not see how the facts before the Kerala High Court in *Asian Techs* (supra) help the appellant. In the above case, the Tribunal in exercise of its powers under Rule 29 of the Income Tax (Appellate Tribunal) Rules directed the parties to file details showing description of the articles manufactured and the amounts received by the assessee. The same was filed on behalf of the assessee. on the directions of the Tribunal. In that case the judicial member of the Tribunal had based the entire reasoning relating to the factual position on the basis of the above material tendered for the first time before the Tribunal and that although the order of the Tribunal had used the word "we" indicating reasoning on behalf of both members, the accountant member was unable to agree with the conclusions. On a reference the third member agreed with the view of the Judicial Member. It is in that context that the judgment has to be read. In that case the Tribunal had called upon the assessee to furnish the additional material but had not admitted them as additional evidence and yet

the judicial member relied upon the same in the order. This course adopted by the Tribunal was disapproved by the High Court terming it as grossly unfair and illegal and therefore suffering from judicial infirmity and ad-hocism. It is not a case where the appellant before the Tribunal had sought leading of additional evidence documentary or oral. In the present case, the appellant-assessee had himself filed the AEPB well before the date of hearing and the Revenue had notice of the application. The appellant-assessee therefore was fully aware of the additional material he sought to rely upon. As against this, in the case in *Asian Techs* (supra) the Tribunal had called for certain information on its own then there was no notice to the Revenue as to whether the additional material had been admitted as additional evidence or even the basis of the same having admitted. The Court held that it is important in regard to the material that the party to the appeal viz. the Assessee and the Revenue should have notice and knowledge of the same. Such are not the facts in the instant case.

12. As far as *Travancore Titanium Products Ltd.* (supra) is concerned, we note that the Court found that the Tribunal relied upon the documents which were tendered for the first time and that the grounds of appeal before the Commissioner were also not part of the paper book and the Tribunal had considered a working sheet that had been prepared and which was not a part of the documents tendered before the Tribunal as additional evidence in Rule

29 and no reasons were stated by the Tribunal for accepting these additional documents. There was nothing on record to show whether these documents were produced before the Assessing Officer or before the first appellate authority. The plea put forward by the assessee before the Tribunal was new one based on fresh documents filed for the first time before the Tribunal. It was in this context that the High Court held that the process followed by the Tribunal to consider the documents was not in accordance with law and observed as follows:-

"No reason has been stated for receiving those documents at that stage."

13. The Court observed that it was competent for the Tribunal to admit additional evidence in accordance with law but for reasons to be stated since the parties would have fair and proper notice of the same thus causing the Court to observe that ad-hocism cannot be countenanced in law. In our view, Asian Techs (supra) and Travancore Titanium Products Ltd. (supra) offer no assistance to the appellant's cause.

14. The Madras High Court in *R.S.S. Shanmugam Pillai & Sons* (supra) the Tribunal observed that a letter sought to be relied upon cannot be received at the appellate stage since its genuineness has not been tested at the stage of the assessment. However, despite this the Tribunal had taken the very document into consideration to decide the appeal against the party. This led the Court to

observe *"In this case the Tribunal adopted a somewhat curious procedure. Having held the letters cannot be admitted and acted upon at the stages of the appeal it chose to go through them and take a prima facie view that they are against the assessee ….."* In the present facts, there is no order passed stating the additional evidence cannot be produced/accepted. In the present facts, the evidence was produced by the Assessee and admittedly relied upon by the appellant before us. Thereafter it takes the same into consideration while disposing of the appeal. Although Mr. Shah had contended that this is a case from which appellant could draw support, we find it to the contrary.

15. The Delhi Court decision in *Maruti Udyog Ltd.* (supra) the Tribunal had admitted additional grounds in the appeal filed by the Revenue but instead of recording whether additional grounds were allowed, observed that the reasons could be incorporated in the order to be passed in appeal. The issue was not in respect of production of additional documents but on the issue of raising additional grounds before the Tribunal, therefore has no application to the present facts.

16. *Assam Hindu Mission Upper Nawprem* (supra) has no relevance to the instant facts. In *Smt. Suhasinibai Goenka* (supra) the Court had occasion to consider Rule 29 of the ITAT Rules and observed that the Tribunal had sufficient cause for receiving additional documents filed for fair and just

disposal of the case and that the Tribunal should have allowed the assessee to file additional document on record and should have given an opportunity to the Revenue to place the material in support thereof. In *Kum. Satya Setia* (supra) the Madhya Pradesh High Court had made reference while interpreting Rule 29 of the ITAT Rules, this Rule is in pari materia with Order 41 Rule 27 of the CPC and reiterated that it is within the discretion of the appellate authority to allow production of additional evidence and the Tribunal had jurisdiction in the interests of justice to allow production of a crucial document. Mr. Shah had submitted that the word "allow" found in Rule 29 of the ITAT Rules indicated that the application would have to be made by the parties seeking to bring additional evidence and the Tribunal could allow such application. We do not find any merit in this submission inasmuch as it is only if the Tribunal so requires it may allow additional evidence to be brought on record.

17. In *Zenith Ltd.* (supra) this Court observed an order passed by the Tribunal declining to add additional grounds is procedural in nature and cannot be said to affect the rights of the parties since such an order can always be challenged in the appeal that may be preferred against the final order. We have therefore considered the final order which effectively deals with the merits of the Appellants' case and also takes into consideration the additional document which admittedly the Appellants relied upon at the hearing. In a recent judgment of this Court in *Parkkot Maritima Agencies Pvt. Ltd.*

(supra) a Division Bench of this Court had allowed the assessee to place additional material before the Assessing Officer instead of Tribunal. However, we notice that this order came to be passed on request made on behalf of the Revenue by its counsel who did not oppose the request seeking the leading of additional evidence.

18. In the case of *Hukumchand Mills Ltd.* (supra) the Supreme Court considered the power of the Tribunal under Section 33(4) of the Indian Income Tax Act, 1922 and the Appellate Tribunal Rules, 1946 wherein it was observed that provisions of Section 33(4) were in pari materia with Section 254 of the Income Tax Act, 1961. In *Arjan Singh* (supra) the Supreme Court observed that the discretion of the Appellate Court under Order 41 Rule 27 to admit and receive additional evidence is not an arbitrary one but is a judicial one. Referring to *M.M. Quasim* (supra) Mr. Shah made reference to quotation therein to the passage from *Patterson Vs. Alabama (1934) 295 US 600* at Page 607 which reads as follows : *"We have frequently held that in the exercise of our appellate jurisdiction we have power not only to correct error in the judgment under review but to make such disposition of the case as justice requires. And in determining what justice does require, the Court is bound to consider any change, either in fact or in, law, which has supervened since the judgment was entered."*

We do not find the above pronouncements advancing the case of the

Appellant given the fact situation in the present case since according to us the Tribunal had taken note of the Appellants submissions based on the AEPB.

19. Mr. Shah had relied upon the observations of the Supreme Court in *M. Laxmi & Co.* (supra) quoted in *Gopal Chandra Chaudhury* (supra) to the effect that the Court took notice of subsequent events due to altered circumstances to shorten the litigation. In the instant case, the subsequent events namely the issuance of the amended commencement certificate could not be brought to the attention of the Assessing Officer or the Commissioner of Income Tax (Appeals) and therefore it was necessary to take notice of the changed circumstances for doing complete justice to the assessee and the Court ought not to shut its eyes to such developments. We are unable to find merit in his submissions since we do not see how this would make any material difference to the Appellants since he had not complied with the mandatory conditions of Section 54.

20. No doubt ordinarily in an application seeking admission of additional evidence one would expect an order to be passed on the application. This would be the appropriate course of action so that parties are able to understand whether the application was allowed or not. In this case the appellant produced the additional evidence and admittedly after making submissions in support of it being allowed to be produced, also made submissions on merits. The petitioner/appellant did not call upon the Tribunal

to pass an on order on his application to produce additional evidence contained in the AEPB before making his submissions on merits and therefore proceeded upon the understanding that the application has been allowed. The Tribunal has taken into consideration the submissions of counsel for the appellants based on the documents forming part of AEPB. There is no doubt in our mind that the Tribunal had permitted the appellants to make submissions on the basis of these documents. If that were not to be case, there may have been something to be said in favour of the appellants, however, in the present case the appellants were aware that the attention of the Tribunal had been invited to the documents in question and the Tribunal had in fact considered contents of the documents on merits and as to how it would affect the appellants' case. Having done so, in our view no injustice has been caused to the appellants. Had the Tribunal declined to consider the documents in our view it would have been appropriate that some reasons will have to be given by them for depriving the parties the benefit of the submissions to be made on the basis of such additional documents. This, in our view is necessary since the rules itself provide for the right to seek reliance upon additional documents. We have no doubt that in the present case the Tribunal did not commit any error in the facts and circumstances of the present case in not having passed the order on the application for leading additional evidence contained in AEPB before proceeding to pass the order on merits of the controversy in the appeal.

We, therefore, answer question (A) in the negative, that is, in favour of the Revenue and against the appellants.

The Second Question

21. According to Mr. Shah the second question deserves to be answered in negative and in favour of the appellant – assessee. He submitted that while dealing with second question one has to consider three aspects. Firstly, the applicability of Section 54F(1) juxtaposed with Section 54F(4); Secondly, non-completion of construction of the building in which the appellant – assessee had agreed to purchase flats and Thirdly, contiguity of three flats which the appellant – assessee had agreed to purchase. Mr. Shah referred to the impugned order and submitted that relevant portions of the impugned order are to be found in paragraph 8 to 11 thereof. He submitted that the assessee surrendered tenancy on 13th September, 2005 and received net consideration of Rs.1.66 crores. The assessee had invested a sum of Rs.1.33 crores towards construction cost of the new flats before the due date for filing the return under Section 139(4) of the Act. He submitted that even before the due date of filing the return under Section 139(1), a sum of Rs.55 lakhs had been paid over but the benefit was denied to him.

22. Mr. Shah drew our attention to the provisions of Section 54F and submitted that Section 54F(4) provides that the net amount of consideration

which is not appropriated by the assessee towards the purchase of the new asset within one year or which is not utilized 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 the assessee in a separate account before furnishing the return of income under sub-section (1) of Section 139. This provision according to Mr. Shah is to be read as a proviso to Section 54F(1) and read as such, the appellant – assessee would be entitled to benefit under section 54 F. He submitted that filing of a return has no relevance since Section 54F (4) in its present form would be read as extension to Section 139(1).

23. Mr. Shah relied upon the following decisions in support of his submissions on the second question.

i) *Commissioner of Income Tax vs. Rajesh Kumar Jalan (2006) 286 ITR 274;*

ii) *Commissioner of Income Tax vs. Punjab Financial Corporation 254 ITR 492;*

iii) *Commissioner of Income Tax vs. Kullu Valley Transport Co. P. Ltd. 77 ITR 518;*

iv) *Humayun Suleman Merchant vs. The Chief Commissioner of Income Tax, Mumbai in Income Tax Appeal No.545 of 2002 decided on 18th August, 2016;*

v) *K. P. Varghese vs. Income Tax Officer, Ernakulam and Anr. 131 ITR 596 (SC);*

vi) *CBDT and Others vs. Aditya V. Birla 170 ITR 137;*

vii) *Commissioner of Income Tax vs. J.H. Gotla 156 ITR 323;*

viii) *Commissioner of Income Tax vs. Mrs.Hilla J.B. Wadia (1995) 261 ITR 376;*

ix) *Commissioner of Income Tax vs. R. L. Sood 2000 245 ITR 727;*

x) *Munibyrappa vs. Commissioner of Income Tax 265 ITR 560;*

24. Mr. Shah submitted that important dates such as the date of approval of the amended plan 8th March, 2002 was not taken into account by the Tribunal. Although this date would have made a difference to the case. Mr. Shah then made reference to the observations of the Tribunal in paragraphs 9 and 10 of the impugned order wherein the Tribunal had come to certain conclusions apropos the assessee's entitlement to claim exemption under Section 54F of the Act arriving at a decision but had failed to record whether these documents had been admitted in evidence. According to him, had the Tribunal decided the issue of admissibility by passing a reasoned order, the appellant could have been able to clear any doubts with the Tribunal.

25. Mr. Shah submitted that the expression '*shall*' appearing in Section 54F(4) is not mandatory but only directory. To this effect, he relied upon the

decision of Punjab and Haryana High Court in ***Commissioner of Income Tax vs. Punjab Financial Corporation 254 ITR 6*** and submitted that the question as to whether a statute is mandatory or directory depends upon the intent of the Legislature and not upon the language in which the intent is clothed. He further submitted that in Section 54F the words '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), is indicative of its directory nature and it is not mandatory to deposit such sum before the specified date and non-deposit would not be fatal to the appellant – assessee's claim for exemption.

26. According to Mr.Shah the interpretation placed on Section 54F by the impugned order results in absurdity since the appellant - assessee had paid entire consideration demonstrating his intention to purchase new premises. Having paid the entire consideration he was not required to deposit monies in any specified account. On account of construction of premises/building being incomplete, the assessee was deprived of benefit of Section 54. Such technical interpretation ought not to be placed on the section. He, therefore, submitted that the second question is liable to be answered in the affirmative. He submitted that making the investment is the critical requirement for Section 54. In the present case the Appellant had remitted the entire price

before the due date yet the impugned order while dealing with the assessee's case had observed in paragraph 9 that the contention of assessee having invested a sum of Rs.1.33 crores towards construction of flat before due date of filing return under Section 139(4) cannot be accepted because sub-section (4) of Section 54F clearly mentions that the amount of net consideration which is not appropriated by the assessee towards construction of new premises before the date of furnishing return under Section 139 'shall' be deposited by him before furnishing the 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).

27. Mr. Shah submitted that this interpretation was incorrect and based on improper appreciation of provisions. Merely because the Tribunal had queried the assessee as to stage of construction and to which the assessee responded that the construction was in progress, the Tribunal had proceeded to hold that construction had not been completed even after a lapse of seven years and declined to accept assessee's contention that three residential flats which were adjacent to each other were contiguous and therefore to be treated as one unit.

28. Mr. Shah further submitted that the provisions similar to Section 54F

to be found in Section 22 of the 1922 Act were in pari materia with Section 139. Section 24(2) is pari materia to Section 72 and Section 22(2a) of 1922 Act was in pari materia to Section 80 which dealt with withdrawal of losses and considering this aspect, the Supreme Court in ***Commissioner of Income Tax vs. Kullu Valley Transport Co. P. Ltd. 77 ITR 518*** held that Section 24(2) confers benefit of losses being set off and carried forward and there is no provision in Section 22 of that Act for determining losses for the purpose of Section 24(2). Section 22(2A) simply says that in order to get the benefit of Section 24(2) the assessee must submit his loss return within the time specified under Section 22(1). Thus, a return so submitted is a valid return. It further held that if two views are possible, the view one which is favourable to the assessee must be accepted. In that case the appellant assessee had two points to urge, firstly, that the delay in submission of the return be condoned and return should have been treated as having made under Section 22(3) which Mr. Shah submitted is similar to Section 139(4). In such case there would have been valid return under Section 22(2A). He submitted that Section 22(2A) was in pari materia to Section 80. Furthermore, Mr. Shah pointed out that Section 24(2) which was in pari materia to section 22, providing for carrying forward of business loss, contained a specific provision whereunder, if the assessee sustains a loss of profit or gain in any year being a previous year, in any business, profession or

vocation, the loss cannot be partly or wholly set off or the whole loss, (where the assessee had no other head of income) could be carried forward to the following year demonstrating a beneficial interpretation.

29. Mr.Shah submitted that provisions of Section 54 should have been interpreted in manner beneficial to the assessee. The Court held that there is no requirement when the question is submitted to the opinion of the High Court it found that it consisted two, (i) whether the loss returned by the assessee was determined by the Income Tax Officer for the relevant assessment year and (ii) whether those losses could be carried forward after being set off under Section 24(2) of the Act. The Court relied that Section 22(3) is merely a proviso to Section 22(1) and thus, a return submitted at any time before the assessment is made is a valid return. Relying upon the said observation Mr. Shah submitted that in the present case also the date of filing the return is of no relevance and Section 139(4) should be read as extension of Section 139(1) and to that effect he submitted that the date of filing return is of no relevance provided other conditions had been satisfied, namely, that of investing amount received from the sale of old property. He, therefore, submitted that second question is liable to be answered in the affirmative.

30. When his attention was drawn to the fact that this Court had in case of

Humayun Merchant (supra) had delivered a judgment dated 18th August, 2016 which would cover the issue, Mr. Shah submitted that the said decision could be differentiated. He further submitted that the decision in ***Humayun Merchant*** (supra) was *per incuriam* inasmuch as it had not appreciated the judgment of the Guwahati High Court in ***Commissioner of Income Tax vs. Rajesh Kumar Jalan (2006) 286 ITR 271*** which has been referred to on behalf of the assessee. He then proceeded to attempt differentiation, referring to the facts of the case of *Humayun Merchant* (supra). He submitted that relevant dates in that case were 29th April, 1995 but the appellant sold plot of land for consideration. The petitioner paid two installments of Rs.10 lakhs each in July 1996 and October 1996 before the due date of filing the return under Section 139(1) of the Act, the due date being 31st October, 1996. On 1st November, 1996 a further installment was paid to the developer and the applicant filed his return of income on 4th November, 1996 which was after the due date of filing the return of income. Apropos Mr. Shah's submission that the decision in *Humayun Merchant* (supra) was *per incuriam* having failed to notice that the decision in the Supreme Court in case of *Rajesh Kumar Jalan* (supra) we are unable to agree.

31. In our view the submission of Mr. Shah that the expression 'shall'

appearing in Section 54F(4) is not mandatory but only directory has no merit inasmuch as not only Section 54F(4) used the word 'shall' be deposited it is followed by the bracketed portion which reads :

> *"(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 view of this clarification Mr.Shah's submitted that the word 'shall' is not mandatory but only directory cannot be sustained and reliance placed on *K.P. Varghese* (supra) that in interpreting Section 54 we must eschew literalness in interpretation of the section and arrive at an interpretation which is not absurd, is of no avail.

32. In *Aditya V. Birla* (supra) the court observed that an exemption provision must be interpreted as the situation demands and not in a technical sense. We do not see how this decision assists Mr. Shah. As far as possible a beneficial provision should be liberally but not if to the extent that renders the intent of the provision redundant. The restrictions on the time within which the conditions of Section 54 have to be complied with are reasonable. If we were to take a different view it would result in dilution of the statutory provision and promote misuse.

33. In *J.H. Gotla* (supra) the Court observed that interpretation of a taxing Statute would submit to equitable construction where strict literal construction leads to an unjust result. We do not find that the Appellant has faced an unfair result or that the interpretation of the provisions was improper. In *Mrs.Hilla J.B. Wadia* (supra) the assessee had satisfied the material test of having domain over the flat and having made an investment therein. In that behalf we hasten to add that the scheme of Delhi Development Authority clearly provided for an allotment letter to be issued on the first installment being paid and that the allotment letter is final unless it is cancelled or the allottee withdraws from the scheme. It further observed that under the scheme, the allottee would get title to the property on the issuance of the allotment letter and that the payment of installment is only a follow up action and taking delivery of possession is only a formality.

34. In the fact situation at hand we are afraid the assessee can derive no benefit from the provisions of circular No.672 dated 16th December, 1993 inasmuch as the scheme contemplated in paragraph 2 of circular No.471 is not available to the appellant. The appellant has to obtain the allotment letter from the developer under the provision of Maharashtra Ownership of Flats Act, 1963 (MOFA) and not from the co-operative society. The allotment letter issued by the developer does not confer title until the agreement for sale under

the provisions of the MOFA is registered. In the present case, however, it is not in dispute that the agreement for sale was entered into only on 24th November, 2008 beyond the period of three years from the date of surrender of tenancy which was 13th September, 2005. Moreover, the developer had no approval for construction of the 9th floor of Wing 'C', wherein the assessee had booked three flats and such approval was received by the builders only on 7th September, 2010. Thus, according to us there is no question of assessee establishing the title over the property which was not been approved for construction at the material time.

35. In *R. L. Sood* (supra) it was held that a substantial amount being paid, the assessee acquired substantial domain over new premises and merely because the builder failed to hand over possession of the flat within the period of one year, the assessee cannot be denied the benefit of the benevolent provisions of Section 54. We observed in that case, an agreement of purchase had been entered into within one year of sale of old residential home. On facts, therefore, it clearly can be differentiated. Moreover, the assessee in that case had the benefit of board circular no.471 which clarifies that under the allotment letter issued by DDA under the self-financing scheme, the allottee gets title to property which is not so in the case at hand. We are of the view that the issue pertaining to incomplete construction and that of contiguity of

flats need not be gone at this stage since on very first issue, we are not satisfied with the eligibility of the appellant assessee to claim exemption under Section 54F. Such being the position, in our view it is not necessary to consider the aspect of non-completion of construction and flat being reportedly contiguous since these are aspects in any case did not arise in the assessment year under consideration. We must not lose sight of the fact that we are presently concerned with assessment year 2006-07 in which year these issues did not arise.

36. We have also considered the submission of Mr. Shah based on the case of *Munibyrappa* (supra) that the case laws relied upon by the appellant before the Tribunal was not considered and the Tribunal had brushed aside case laws in a single sentence. We noted that grievance of the assessee is based on the observations of Tribunal in paragraph 11 that they have not relied on the decisions cited. Every decision cited may not be relevant. We find that the decisions cited were relating to contiguous units being treated as one residential unit. We have already observed that we are not required to go into this aspect in order to answer the question, since on first principles, we find that the assessee had not complied with Section 54F. In our view it is not necessary to consider this aspect of challenge and hence reference to said decision is of no avail to the assessee. The other cases enlisted by us in this judgment have no

bearing on the facts of the case of the Appellant herein.

37. In the course of the submissions in support of the Appellants' case over exemption under section 54F Mr. Shah has strenuously argued and tried to draw a parallel between the provisions of Section 24(2) of the 1922 Act and Section 72 contending they are in pari materia. Likewise Sections 22 and 22(2A) were in pari materia with Sections 139 and 80 respectively of the 1961 Act. However, in our view this does not come to assistance of Mr. Shah inasmuch as the language of Section 54 will not admit of such an interpretation. We have already taken a view that the consequences of the amount of capital gains or difference between amount spent for purchase of house and the total amount of capital gains not being deposited in the specified account in the case of *Humayun Suleman Merchant* (supra). We find no reason to take a different view in the facts and circumstances of the present case. Accordingly, for all the reasons set out above question (B) is answered in the affirmative in favour of the Revenue and against the Assessee.

The Third Question

38. As far as the third question is concerned, as to whether the Tribunal infringed the principles of natural justice in not providing an opportunity to rebut the conclusion of the Tribunal based on circular no.495, Mr. Shah submitted that the assessee had no opportunity to deal with contents of the

circular referred to by the Tribunal in its order. He relied upon circular dated 28th September, 1987 which dealt with scheme for 100% deduction in cases of long term capital gain fell to new scheme of deposit of capital gain under Section 54B, 54D and 54F and submitted that the Tribunal ought not to have relied upon said circular to decide the issue against the assessee. In support of his submission on question (C) Mr.Shah placed reliance on the observations of House of Lords in *Breen Vs. Amalgamated Engineering Union (1971) 1 All England Reports 1148* to buttress arguments that providing reasons was a basic rule of natural justice and one of the fundamentals of good administration. Relying upon this observation Mr. Shah submitted that although the impugned order dealt with documents the same were held against the appellant without providing the appellant an opportunity to meet any doubt that the Tribunal may have had.

39. We do not find that the Tribunal has based its decision on the effect of circular No.495 on the other hand only reference to the said circular is to be found in paragraph 9 of the impugned order which read as follows :

> *".... ..... This view is also supported by the departmental Circular No.495 dt. 22.9.1987 by which the Board has clarified that the amount has to be deposited before the due date of filing of the return under Section 139(1) of the Act. The assessee fails on this count also."*

40. We find that the Tribunal has referred to the said circular in passing the order only by way of clarification that the amount has to be deposited in specified account was required to be deposited before due date of return under Section 139(1). Since it is the case of the Appellants that the deposit has not been so made, the question of the assessee being affected, by the said circular does not arise.

41. We enquired of Mr. Shah as to whether the appellant's application for leading additional evidence was heard separately before the main appeal was taken up for hearing to which he replied that the application for additional evidence was heard along with the main appeal and that all arguments on the main appeal on behalf of the parties had been concluded on 8th October, 2012. To a specific query as to whether he canvassed the appellant's case based in the AEPB, he fairly stated reference was made to the additional documents but submitted that if a reasoned order is passed allowing or disallowing the AEPB the appellant could have been better placed while making the submissions before the Tribunal. Mr. Shah fairly conceded that all arguments on the appeal has been advanced before the Tribunal on the same date and that there was no occasion for separately considering the application for leading additional evidence.

42. Thus, it becomes evident that the appellant had argued his appeal entirely. Therefore we believe that if the appeal had been decided in favour of the appellant the appellant, he probably may not have considered the procedure followed by the Tribunal as ad-hocism. The Revenue could have possibly objected to the course followed by the Tribunal. In the circumstances we do not find that the Tribunal infringed upon the principles of natural justice in not providing an opportunity to the Appellants to rebut the conclusions described as detrimental. In any event this Court is not in a position to verify whether in fact the contents of the circular were put to the assessee or whether the assessee had dealt with the submissions before the Tribunal. These are matters within knowledge of the Tribunal and if a diligent assessee would have approached the Tribunal for rectification, if he felt there was justification. However, that not having been done, we do not find that the Tribunal can be faulted in present set of facts. We, therefore, answer question (C) in the negative in favour of the Revenue and against the Assessee.

43. The Appeal is disposed of accordingly. No order as to costs.

(A. K. MENON, J.) (M. S. SANKLECHA, J.)