

**IN THE INCOME TAX APPELLATE TRIBUNAL
(DELHI BENCH: 'G': NEW DELHI)**

**BEFORE SMT. DIVA SINGH, JUDICIAL MEMBER
AND
SHRI ANADEE NATH MISSHRA, ACCOUNTANT MEMBER**

**ITA No:- 5977/Del/2016
(Assessment Year: 2012-13)**

Mr. Sunit Mathur, J-502, La Lagune, Sector-54, Gurgaon.	Vs.	DCIT, Circle 7(1), C.R. Building , New Delhi.
PAN No: AAKPM7426N		
APPELLANT		RESPONDENT

Assessee by : None
Revenue by : Shri Saras Kumar, Sr. DR

ORDER

Per Anadee Nath Misshra, AM

(A) This appeal has been filed by the assessee against the impugned appellate order dated 26.09.2016 passed by Learned Commissioner of Income Tax (Appeals)-37, New Delhi, [in short, "Ld.CIT(A)"] pertaining to Assessment Year 2012-13. The Assessee has raised following grounds of appeal:-

"1. The Learned CIT (Appeals) 37, New Delhi and the A.O. has erred in law and in facts in sustaining the disallowance of exemption of Rs. 66,57,730.00 from capital gains by applying wrong provisions of law as applicable in this regard which act of the authorities below are arbitrary and unjust.

2. *The Learned CIT (Appeals) 37, New Delhi has erred on facts and in law in rejecting the claim of the assessee for exemption from capital gains u/s 54(1) of the Income tax Act and upholding the disallowance of Rs. 66,57,730.00 which act of the CIT (Appeals) is arbitrary and unjust.*

3. *The Learned CIT (Appeals) 37, New Delhi has misread and misapplied the provisions of Section 54(1) read with Section 54(2) of the Income-tax Act, holding that provisions of Section 54(2) are applicable which act of the CIT (Appeals) is arbitrary and unjust."*

(B) Vide Assessment Order dated 16.03.2015 passed under Section 143(3) of the Income Tax Act, 1961 (in short "I.T. Act"). The relevant portion of the Assessment Order dated 16.03.2015 is reproduced as under:-

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Claim u/s 54 of the Act.

2. During the course of the proceedings, it has been observed that assessee has claimed deduction u/s 54 of Income Tax Act. The assessee sold a house property on 14.06.2011 i.e Flat No. 1402, Tower No. 1, Vipul Belmonte, Golf Course Road, Gurgaon, on 14.06.2011 at the cost of Rs. 4.0 Crores. The assessee was co-owner of the said property alongwith his wife and owns 50% with his wife Smt Romita Mathur. The assessee was entitled to 50% share of sold amount i.e 2.0 Crores. Capital gain is computed after indexation on the said property was Rs. 1,33,42,270/-, 50% of the said capital gain is Rs. 66,57,730/-.

Capital Gain is computed here as under:

Sale Consideration	:	Rs. 2,00,00,000/-	
Cost of Acquisition	:	Rs. 9365084 x $\frac{785}{551}$	= Rs. 1,33,42,270/-

50% of Share of Capital Gain	=	Rs. $\frac{1,33,42,270}{2}$	=	Rs. 66,57,730/-
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2.1 Further, the assessee has received an amount of Rs. 2.5 Crores as advance by cheque and it was cleared on 17.06.2011 as per the back account (Axis Bank A/c No. 049010100445672) statement submitted by the assessee. The balance amount of Rs. 1.25 Crores was credited in the account (Axis Bank A/c no. 049010100453752) of Smt Romit Mathur on 18.07.2011. As per submission of the assessee, the remaining amount was paid at the time of transfer of property.

2.2 The assessee purchased on 02.12.2011 a new Flat B-2, Parsvnath Exotica, Golf Course Road, Gurgaon Sh. Ashok Gupta at cost of Rs. 4.0 Crores on by taking loan of Rs. 4.0 Crores from Kotak Mahindara Bank. The assessee purchased the said house property in co ownership with his wife, therefore, the assessee was entitled to 50% share in the purchased flat with her wife Ms Romita Mathur. The exemption under section 54 of the act was claimed on account of purchase of residential flat through a sale deed dated 02.12.2011 at a cost of Rs. 4.0 Cr. For purchase of the said residential flat, the assessee had applied for a loan from Kotak Mahindra Bank. For the purpose of disbursing the cost of the said flat, the said bank issued a demand draft directly in favour of Sh Ashok Gupta A/c No. 55014875538 of Rs. 4,00,00,000/- and accordingly the entire said amount of housing loan was utilized for purchase of residential flat. The assessee has claimed exemption under section 54 of the Act in respect of the above referred long term capital gain (50% of Rs. 1,33,42,270/-) i.e Rs. 66,57,730/- treating the cost of the residential flat of Rs. 2.0 Cr. (50% of 4.0 Cr) which was more than the sale proceeds of the said property and hence capital gain was shown as NIL by the assessee.

3. The assessee was issued a show cause notice u/s 142(1) of Income Tax Act, 1961 which is reiterated here under:

In connection with income tax proceedings for AY 2012-13 you are requested to furnish the following information:

- 1. The assessee sold residential property i.e Flat No. 1402, Tower No. 1, Vipul Belmonte, golf Course Road, Gurgaon, on 14.06.2011 at Rs. 4.0 Cr (50% Share) and Long Term Capital Gain was computed of Rs. 66,57,730 (50% Share) after indexation. The Assessee purchased a new flat B-2, Parsvnath Exotica, Golf Course Road, Gurgaon at cost of Rs. 4.0 Cr (50% Share) on 02.12.2011 by taking loan of Rs. 4.0 Cr (50% Share) from Kotak Mahindra Bank. The assessee claimed exemption u/s 54 vide letter dated 19.12.2014 and the assessee also claimed expense incurred on borrowing loan of Rs. 4.0 Cr. (50% Share) from Kotak Mahindra Bank of Rs. 1.5 Lac.*
- 2. The assessee has received 2.5 Cr. (50% Share) on sale of its property said above as advance by cheque No. 244870 dated 15-06-2011 and the balance amount of Rs. 1.5 Cr (50% Share) has received at the time of transfer of sale/attorney document.*
- 3. The assessee purchased New flat B-2, Parsvnath Exotica, Golf Course Road, Gurgaon, on 02.12.2011 and paid Rs. 4.0 Cr (50% Share) by taking loan from above mentioned bank. The assessee is required to furnish the details of loan account and paid interest thereof.*

4. The Income Tax Act 1961, states u/s 54:
- (i) If the amount of the capital gain so purchased or constructed, the difference between the amount of the capital gain and the cost of the new asset shall be charged u/s 45.....
 - (ii) If the amount of the capital gain is equal to or less than the cost.....
5. Capital gain arising due to sale of residential property stated above is not invested in the new property which is purchased during the A. Y. 2012-13. The assessee borrowing loan of Rs. 4.0 Cr (50% share) from Kotak Mahindra Bank vide Demand Draft NO. 010623 dated 03.11.2011 and paid to the First party. Total entire value of the new flat is paid by loan only. On the other hand, the assessee claimed expense on interest paid against the borrowing loan. It is clear intension of the assessee to mislead the department. Show cause as to why the income arises on account of LTCG is not to be assumed as capital gain and added to the income of the assessee.
7. You are filed return after due date u/s 139(1) of IT Act, 1961 on 27.04.2013, show cause as to why the exemption claimed u/s 54 should not be disallowed and added to the income.
4. The assessee replied vide its letter dated 31.12.2014 which is reproduced herein below:
1. The assessee had sold the flat No. 1402, Tower no. 1, vipul Belmonte, Golfcourse Road, Gurgaon on 14.06.2011 at Rs. 4.0 Cr. (50% Share) and long Term Capital Gain was Computed Rs. 66,57,730/- after indexation and purchased a new Flat B-2, Parsvnath Exotica, Golf Course Road, Gurgaon for Rs. 4.0 Cr (50% share) on 02.12.2011 and consideration for the purchase of the new asset has been paid from home loan obtained by the assessee from Kotak Mahindra Bank New Delhi. A detailed reply with case-laws has already been submitted to you vide letter dated 24.12.2014.
 2. As regards the receipt of payment of Rs. 4.0 Cr. (Rs. 2.50 Cr.) on 15.06.2011 and balance Rs. 1.5 Cr. at the time of transfer of flat, there is no denial to this fact.
 3. As regards the purchase of new flat B-2, Parscnath Exotica, Golf Course Road, Gurgaon. On 02/12/2011 for Rs. 4.00 Cr. (50% Share) By takin loan from kotak Mahindra Bank. Details of Loan account and interest paid are enclosed herewith.
 4. As regards the provision of section 54 of the Income Tax Act, 1961, it is again submitted that nowhere does the section lay down the condition that the consideration of the sale of a residential flat is required to be utilized for the purchase/ construction of the new residential flat.
The section provides that the assessee has to purchase a house property for the purpose of residence within a period of one year before or two years after the date on which the transfer of her property took place or she should have constructed a house property within a period of three years after the date of transfer.
The section also provides for purchase of the new residential property even before the sale of the existing residential property. If this being the case, it is inferred that the section does not

require utilization of the sale proceeds for purchase of the new asset as the purchase in certain case precedes the sale.

In arriving at the above inference, the assessee is also guided by the following decisions of the various Courts:-

- a. *Ishar Singh Chawla v. CIT (2010) 130TTJ108 (Mum)* ✓
 - b. *Mrs. Prema P. Shah v. Income-tax Officers, Ward 2(4) (2006) 100 ITD 60 (Mum).*
 - c. *Ajit Vaswanit v. Cit (2001) 117 Taxman 123 (Del -Mag)*
 - d. *ITO v. K.C. Gopalan (1999) 107 taxman 591 (Ker).* ✓
5. As regards the claiming of exemption U/s 54 of the Income Tax Act, 1961, it is submitted that the same has already been replied to you vide our letter dated 24.12.2014. Copy of the same is again enclosed herewith. As regards the interest on home loan claimed, it is submitted that the same has been claimed for the interest paid on Home Loan taken from Reliance Capital Ltd. against flat sold during the year under consideration and for the period from 01.04.2011 up to sale of the flat.
6. (7) as regards the delay filing of return by the assessee, it is submitted that there is no connection between the delay filing of Income Tax Return and claiming of exemption u/s 54 of the Income Tax Act, 1961.

5. In view of the above, it is observed that the said flat which was purchased by the assessee is financed by the bank. Hence, the assessee is not entitled to exemption of section 54F. Reliance is placed on the Order of the Tribunal in the case of Smt. Pramila A. Parikh v. ITO [IT Appeal No. 2755 (Mum.) of 1997] the CIT(A) wherein the disallowance was conformed after having observed that sale proceeds of the shares have been utilized by the assessee for other purpose and the property was purchased from the loans borrowed from the bank. section 54F(1) should be read along with its sub-section (4) and not in isolation. If both the sections are read together only one inference can be drawn that the sale proceeds of the capital asset must be utilized/appropriated by the assessee towards the new assets within a specified period and if not appropriated before date of furnishing of return of income under section 139, it shall be deposited by him before furnishing such returns in an account of any such bank or institution as may be specified in and utilized in accordance with any scheme which the Central Government may by notification in the Official Gazette framed in this behalf. If the sale proceeds is appropriated for any other purpose, except to purchase the property and new assets are acquired out of the borrowings, the assessee would not be entitled for deduction under section 54F of the Act.

5.1 Under this section, there is no requirement of law that the funds if not utilized to make the investment in the specified schemes, the same should be deposited in certain account as is the condition in section 54F of the Act. He has also placed a reliance upon the order of the Tribunal in the case of Smt Pramila A. Parekh (supra) in which the property was constructed out of the borrowed funds and the sale proceeds of the capital asset was utilized for the repayment of the loan. In that case, the Tribunal has categorically held that since the

sale proceeds were not utilized for purchase the residential house and it was utilized to repay loans, the exemption under section 54F cannot be granted.

5.2 It is not necessary that the same sale proceeds of the capital assets should be used to purchase the residential house. But, the equivalent funds should be available with the assessee to purchase the residential house. The sale proceeds were admittedly appropriated by the assessee for different purposes and the assessee did not have any funds to purchase the property. The property was purchased out of the borrowed funds. In these circumstances, it is not proper to say that the assessee is entitled for exemption under section 54F of the Act. Section 54F as under:

"54F. Profit on sale of property used for Residence.--(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 a long-term capital asset, not being a residential house (hereafter in this section referred to as the 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
 - (ii) 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,-

"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) Net consideration"

(3) Where the new asset"

(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 utilized 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."

6. From a bare reading of section 54F it is observed that sub-section (1) should be read along with sub-section (4). It cannot be read in isolation because the benefit of section 54 is to be allowed only subject to the provisions of sub-section (4) of the said section. This section allows the benefit of exemption to the individual or a HUF in which case the capital gain arises from transfer of any long-term capital asset not being a residential house and assessee has within a period of one year before or two years after the date on which the

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transfer took place purchased or has within a period of 3 years after that date construct a residential house, the capital gain shall be dealt with in accordance with provisions laid down in this section. Subsection (4) further states that the amount of 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 transfer of the original asset took place or which is not utilized by him for purchase or construction of the new asset before the date of the filing of the return of income under section 139, shall be deposited by him before furnishing such return in an account in any Bank or Institution as may be specified by the Central Government. If both these sub-sections are read in a conjunction only one inference is drawn that to avail the benefit of section 54F, the assessee is required either to purchase a residential house out of the sale proceeds of long-term capital asset within a period of one year before or two years after the date on which transfer took place or as within a period of 3 years after that date, construct a residential house. In that case, the capital gain shall be computed as per clauses (a) and (b) of sub-section (1).

9. The assessee purchased on 02.12.2011 a new Flat B-2, Parsvnath Exotica, Golf Course Road, Gurgaon Sh. Ashok Gupta at cost of Rs. 4.0 Crores on by taking loan of Rs. 4.0 Crores from Kotak Mahindra Bank. The assessee purchased the said house property in co ownership with his wife, therefore, the assessee was entitled to 50% share in the purchased flat with her wife Ms Romita Mathur. The exemption under section 54 of the act was claimed on account of purchase of residential flat through a sale deed dated 02.12.2011 at a cost of Rs. 4.0 Cr. For purchase of the said residential flat, the assessee had applied for a loan from Kotak Mahindra Bank. For the purpose of disbursing the cost of the said flat, the said bank issued a demand draft directly in favour of Sh Ashok Gupta A/c No. 55014875538 of Rs. 4,00,00,000/- and accordingly the entire said amount of housing loan was utilized for purchase of residential flat. The assessee has claimed exemption under section 54 of the Act in respect of the above referred long term capital gain (50% of Rs. 1,33,42,270/-) i.e Rs. 66,57,730/- treating the cost of the residential flat of Rs. 2.0 Cr. (50% of 4.0 Cr) which was more than the sale proceeds of the said property and hence capital gain was shown as NIL by the assessee.

10. In view of the facts, the deduction claimed u/s 54 of Income tax Act, 1961 amounting to Rs. 66,57,730/- is not to be allowable. Hence, the amount in question is added back to the income of the assessee under the head Capital Gains. I am satisfied that the assessee has furnished inaccurate particulars of its income. Penalty proceedings u/s 271(1)(c) of the Income Tax Act, 1961 are, therefore initiated separately. "

(C) The Assessee filed appeal before the Ld. CIT(A). Vide impugned appellate order dated 26.09.2016, Ld. CIT(A) dismissed assessee's appeal. The relevant portion of the order dated 26.09.2016 of the Ld. CIT(A) is reproduced as under:

5. The facts of the case are that as set out in the assessment order categorically state that the assessee lodged a claim under sec 54F & AO observed that the assessee sold a house property on 14.06.2011 i.e Flat No. 1402, Tower No.1, Vipul Belmonte, Golf Course Road, Gurgaon, on 14.06.2011 at the cost of Rs. 4.0 Crores. The assessee was co-owner of the said property along with his wife and owns 50% with his wife i.e Smt Romita Mathur. The assessee was entitled to 50% share of sold amount i.e 2.0 Crores and appellant computed his capital gains after indexation on the said property which was Rs. 1,33,42,270/-, 50% of the said capital gain is Rs. 66,57,730/-.

Capital Gain is computed here as under:

Sale Consideration Rs. 2,00,00,000/-

Cost of Acquisition Rs. $9365084 \times \frac{785}{551}$ = Rs. 1,33,42,270/-

50% of Share of Capital Gain = $\frac{Rs. 1,33,42,270}{2}$ = Rs. 66,57,730/-

5.1 The sale proceeds were received by Sh. Sunit Mathur of an amount of Rs. 2.5 Crores as advance by cheque (chq no 244870 dt 15/6/2011 of HSBC) from the purchaser) and it was cleared on 17.06.2011 as per the bank account (Axis Bank A/c No. 049010100445672) statement submitted by the assessee. The balance amount of Rs. 1.25 Crores was credited in the account (Axis Bank A/c no. 049010100453752) of the assessee on 18.07.2011. As per submission of the assessee, the remaining amount was paid at the time of transfer of property.

5.3 The assessee purchased on 02.12.2011 a new Flat B-2, Parsvnath Exotica, Golf Course Road, Gurgaon from Sh. Ashok Gupta at cost of Rs. 4.0 Crores on by taking loan of Rs. 4.0 Crores from Kotak Mahindara Bank. The assessee purchased the said house property in co ownership with his wife, therefore, the assessee was entitled to 50% share in the purchased flat with his wife Smt Romita Mathur . The exemption under section 54 of the act was claimed on account of purchase of residential flat through a sale deed dated 02.12.2011 at a cost of Rs. 4.0 Cr. For purchase of the said residential flat, the assessee had applied for a loan from Kotak Mahindra Bank. **For the purpose of disbursing the cost of the said flat, the said bank issued a demand draft directly in favour of Sh Ashok Gupta. A/c No. 55014875538 of Rs. 4,00,00,000/- and accordingly the entire said amount of housing loan was utilized for purchase of residential flat.** The assessee has claimed exemption under section 54 of the Act in respect of the above referred long term capital gain (50% of Rs. 1,33,42,270/-) i.e Rs. 66,57,730/- treating the cost of the residential flat of Rs. 2.0 Cr. (50% of 4.0 Cr) which was more than the sale proceeds of the said property and hence capital gain was shown as NIL by the assessee.

5.4 The assessee was issued a show cause notice u/s 142(1) of Income Tax Act, 1961 by the AO which is reiterated (in part) here under:

"In connection with income tax proceedings for AY 2012-13 you are requested to furnish the following information....."

4. The Income Tax Act 1961, states u/s 54:

(i) **If the amount of the capital gain so purchased or constructed, the difference between the amount of the capital gain and the cost of the new asset shall be charged u/s 45.....**

(ii) **If the amount of the capital gain is equal to or less than the cost.....**

5. Capital gain arising due to sale of residential property stated above is not invested in the new property which is purchased during the A. Y. 2012-13. The assessee borrowing loan of Rs. 4.0 Cr (50% share) from Kotak Mahindra Bank vide Demand Draft NO. 010623 dated 03.11.2011 and paid to the First party. Total entire value of the new flat is paid by loan only. On the other hand, the assessee claimed expense on interest paid against the borrowing loan. It is clear intension of the assessee to mislead the department. Show cause as to why the income arises on account of LTCG is not to be assumed as capital gain and added to the income of the assessee."

5.5 The appellant had nowhere deposited the amount of capital gain received from the said transaction of sale of house property (on 15/6/2011 & 17/6/2011 of Rs 4 Crores – his share being Rs 2 crores) in any of the methodology as envisaged under sec54(2) of the Act as the provisions of sec54(1) categorically state in the opening phrase itself that provisions of sec54(1) are **"Subject to the provisions of sub-section (2)" as stated herein**

"(1) Subject to the provisions of sub-section (2), where, in the case of an assessee being an individual or a Hindu undivided family the capital gain arises from the transfer of a long-term capital asset being buildings or lands appurtenant thereto, and being a residential house, the income of which is chargeable under the head "Income from house property" (hereafter in this section referred to as the 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, one residential house in India then, instead of the capital gain being charged to income-tax as income of the previous year in which the transfer took place, it shall be dealt with in accordance with the following provisions of this section, that is to say,—

(i) **if the amount of the capital gain is greater than the cost of the residential house so purchased or constructed (hereafter in this section referred to as the new asset), the difference between the amount of the capital gain and the cost of the new asset shall be charged under section 45 as the income of the previous year ; and for the purpose of**

computing in respect of the new asset any capital gain arising from its transfer within a period of three years of its purchase or construction, as the case may be, the cost shall be nil ; or

(ii) if the amount of the capital gain is equal to or less than the cost of the new asset, the capital gain shall not be charged under section 45 ; and for the purpose of computing in respect of the new asset any capital gain arising from its transfer within a period of three years of its purchase or construction, as the case may be, the cost shall be reduced by the amount of the capital gain.

(2) The amount of the capital gain 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 not so utilised shall be charged under section 45 as the 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 such amount in accordance with the scheme aforesaid.

5.6. The claim of the appellant before the AO was that in any case since a new residential house (at Parsvanth Exotica) has been purchased by it after sale of a house property (of Vipul Belmonte) , albeit from a loan taken (as has happened via kotak bank which has directly credited the said amount of cost of purchase to account of vendor) , the appellant pressed for claim under sec54 of the Act . The AO however was unappreciative of the claim of the appellant holding that the appellant has nowhere utilized the sale proceeds(capital gains) of the sale transaction arising from sale of its property to fund the new acquisition of new residential property Parsva Exotica and hence section 54 is not allowable.

5.7 This office has also observed that the appellant has nowhere deposited the capital gains arising from the sale transaction of June 2011 in manner envisaged under sec54(2) since provisions of sec54(1) are" subject to provisions of sec54(2)

5.8 The said provision sec54(2) stipulate that **"(2) The amount of the capital gain 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 :**

5.9 Since the funding of the new residential unit was via Kotak bank loan (and was not a direct utilization of sale proceeds for purchase of new asset from

proceeds of original asset sale) , it had thus become imperative for appellant to invest the amount of capital gain which has not been appropriated by assessee towards purchase of the new asset within 1 yr before the date on which transfer of original asset took place or which is not utilized in purchase / construction of new asset before date of furnishing of ROI in deposits in accordance with scheme of the Act as per sec54(2) in any scheme as notified by Central Govt. *This apparently has not been done . Since the stipulated provisions of section 54(2) have not been met by the appellant , there exists no reason to allow the appellants claim under section 54(1) as said "section 54(1) claim "subject to provisions of section 54(2) "*.

5.9.1 Further there is no proof of deposit of any sum in scheme as per sec54(2) of the Act too, along with the return of income filed by appellant assessee as per the scheme of the Act . This too further nullifies the claim of appellant assessee under sec54 .

5.10 The AO case is further supported by decision of 330ITR 309 (Del) in the case of 2011] 330 ITR 309 (Del) IN CASE OF VIPIN MALIK (HUF) vs COMMISSIONER OF INCOME-TAX which states that –"3. As per the claim made before the authorities below, the claim was with respect to "purchase" of a flat. This is important because section 54F contains two eventualities claiming for the benefit, one, is the purchase of the residential house and the second is construction of a residential house.4. Before us, the learned senior counsel Mr. S. Ganesh, on behalf of the assessee, has strongly urged that the authorities below misdirected themselves in requiring that the purchase of the property must be paid after the selling of the agricultural property inasmuch as the very language of section 54F contains an eventuality of purchase of the residential house even before one year of the sale of the agricultural land.5. The proposition as canvassed by the counsel for the appellant is not in question and surely the section itself says that the purchase of the new residential house can be made either before one year of the sale of the agricultural land or after two years of the sale of the agricultural land. However, in the present case, on facts, the proposition as urged does not apply.6. The following facts have emerged as per the orders of the Assessing Officer, Commissioner of Income-tax (Appeals) and Income-tax Appellate Tribunal :(i) The agricultural land was sold in September, 1995.(ii) Allotment of the flat in the co-operative society was made in terms of the allotment letter dated October 27, 1998, though the same was in pursuance of the draw of lots on September 20, 1998.(iii) Out of the total amount paid to the co-operative society of Rs.6,41,014 till July 28, 1995. The following sums were already paid from 1988 to March 31, 1995 as under :.....Thus, most of the payment was already made before one year of the sale of the agricultural land in September, 1995.(iv) The amount invested for the purpose of purchasing the flat was not the entire amount of the capital gain of Rs. 9,67,412 but only an amount of Rs. 6,41,014 till July 28, 1995.(v) The balance amount of the capital gain was not deposited in the specified account in terms of sub-section (4) of section 54F and also, consequently, no proof of such deposit was filed along with the return....."

8. The facts above clearly show that the amount which was available to be taxed as capital gain was not utilized for the purchase of the flat either one year before the sale of the agricultural land or two years after the sale of the agricultural land inasmuch as most of the amount had already been paid to the co-operative society before one year of the sale of the agricultural land. *The assessee also cannot be said to have constructed a residential house within 3 years of the sale of the agricultural land as the amount received from sale of the agricultural land was not utilised for the purchase of the flat. The assessee, therefore, cannot be said to have purchased a residential house within the meaning of section 54F either one year before the sale of the agricultural land or within two years after the sale of the agricultural land.* If we look at the ownership from the point of view of an allotment letter as draw of lots, then the allotment letter or the draw of lots is only in September/October, 1998, i.e., after two years of the sale of the agricultural land. We may note that, and as already stated above, before the Income-tax Appellate Tribunal, the assessee took up a stand of his having constructed the flat within three years of the sale of the agricultural land relying upon a circular of the Central Board of Direct Taxes which gave benefit of section 54F to an allottee of a DDA flat. The Scheme of the DDA which was approved by the Central Board of Direct Taxes was on the basis that the allotment letter is issued and when payment of the first instalment of the cost of construction is made then such allotment is final unless it is cancelled or the allottee withdraws from the scheme. The allottee under the DDA scheme of self-financing gets title on the issuance of the allotment letter. The said circular of the Central Board of Direct Taxes was, therefore, held inapplicable to the case of the appellant rightly by the Income-tax Appellate Tribunal

9. Independent of the above discussion, an aspect which overrides the above issue, is that, the agricultural land which was sold was of Vipin Malik HUF and the flat purchased in the co-operative society was not in the name of the HUF.

10. Clearly, therefore, there was no question of applicability of section 54F in the aforesaid facts and circumstances. 11. In view of the detailed finding of facts arrived at by the three authorities concurrently below, no substantial question of law arises and the appeal is, therefore, dismissed. (emphasis supplied)

5.11 The appellants case is therefore not in conformity with the provisions of sec 54(2) rw sec54(1) of the Act read with jurisdictional HC decision in 330ITR 309(Del) and proposition flowing therefrom (though laid in context of sec54F) . **The appeal of the assessee is thus dismissed on ground of allowability of claim under sec54** . The decision cited by appellant are distinguishable on facts and ITAT decision of Ajit Vaswanit Vs DCIT dt 15/2/2001 is not applicable as in that case the proceeds of Capital gain not utilized for purchase were deposited in the scheme as per sec54(2) which is lacking in the instant case since sec54(1) is subject to sec54(2) . . The other case of Ker HC of ITO Vs Gopalan is also distinguishable as the interplay of sec54(2) vis a vis sec54(1) was never ever considered , more so of a case where the assessee has not complied with provisions of sec54(2) scheme deposit aspect which is the crucial factor in instant case. The other decisions also donot find acceptance due to factual dichotomy and are distinguishable.

5.12 What the appellant has done is to try to present a narrow ambit of controversy which viewed with jurisdictional HC of 330ITR 309(Del) must fail on grounds of sec54 claim and the order of the Assessing officer is thus upheld . Held accordingly. The other aspect of the matter and rather germane aspect is whether sec54 (1) can be interpreted in a manner to render sec54(2) otiose. If the compliance of sec54(2) is not done , then sec54(1) by reverse corollary is automatically nullified . The scheme of the legislature cannot be interpreted in such a manner so as to render one subsection defunct as is being sought to be done by appellant.

5.13 Another aspect is whether the capital gain yielded to the assessee on date of said sale transaction continues to retain the character of capital gains , irrespective of the fact that appellant took a loan from kotak Mahindra bank to purchase a new asset and hence since the said capital gains (from sale of original asset) had not been invested as per scheme of sec54(2), hence too the claim of appellant as per sec54(1) must fail . **In other words, the decisions cited by the appellant nowhere states that the capital gains yielded to appellant is not to be invested in manner envisaged under sec54(2) .**

6. The other interlinked GOA ground of appeal no 2 raised by appellant as regards the aspect of AO having erroneously considered the section 54F , in my humble opinion is an incorrect understanding of the appellant of the entire tenor of the order and in view of findings rendered herein are above are also dismissed. Further the appellant has failed to appreciate that assessing officer in its show cause notice had itself stated that claim under sec54 was to be disallowed which was exactly stated so at para 3, page 3 (clause 7 of It recapitulated by assessing officer in its order) and finally again on para 10, page 7 of assessment order. The dissection of varied cases relating to 54F has been misread by appellant to make out an imaginary case with no premise and is unacceptable and as such dismissed at threshold .

— — — — — Sunit Mathur — — — — — "

(D) This present appeal has been filed by the assessee against the aforesaid impugned appellate order dated 26.09.2016 of the Ld. CIT(A). At the time of hearing, Revenue was represented by Shri Saras Kumar, the learned Senior Departmental Representative ("Ld. Sr. DR", for short). However, none was present from the assessee's side. In the absence of any representation from assessee's side, at the time of hearing before us, we heard the Ld. Sr. DR; who relied upon the order dated 16.03.2015 of the Assessing Officer and the aforesaid impugned appellate order dated 26.09.2016 of the Ld. CIT(A). After perusal of the materials on record, including the order of the AO and the aforesaid impugned order dated 26.09.2016 of the Ld. CIT(A), we find that the Ld. CIT(A) has passed speaking order on merits. Relevant portion of the impugned order of the Ld. CIT(A) has already been reproduced in foregoing paragraph **(C)** of this order. We find that the Ld. CIT(A) has given detailed reasons for his decision on merits in the aforesaid impugned appellate order dated 26.09.2016 of Ld. CIT(A). During appellate proceedings in Income Tax Appellate Tribunal ("ITAT", for short) no material has been brought for our consideration to persuade us to take a view different from the view taken by the Ld. CIT(A) in the impugned order on merit. After hearing the Ld. Sr. DR and after perusal of materials on record, and further, in view of the foregoing discussion, we decline to interfere with the aforesaid impugned appellate order dated 26.09.2016 of Ld. CIT(A), and accordingly, this appeal is dismissed.

(E) Before we part; **we explicitly clarify that the assessee will be at liberty to approach ITAT for restoration of the appeal in accordance with Proviso to Rule 24 of Income Tax (Appellate Tribunal), Rules, 1963. If the assessee**

does approach ITAT for restoration of the appeals in ITAT, the matter will be considered in accordance with law having regard to the facts and circumstances.

(F) In the result, appeal filed by Assessee is dismissed.

Order is pronounced in Open Court on 06/03/2020.

Sd/-

**(DIVA SINGH)
JUDICIAL MEMBER**

Sd/-

**(ANADEE NATH MISSHRA)
ACCOUNTANT MEMBER**

Dated: 06/03/2020
Pooja/-

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT NEW DELHI

Date of dictation	
Date on which the typed draft is placed before the dictating Member	
Date on which the typed draft is placed before the Other Member	
Date on which the approved draft comes to the Sr. PS/PS	
Date on which the fair order is placed before the Dictating Member for pronouncement	
Date on which the fair order comes back to the Sr. PS/PS	
Date on which the final order is uploaded on the website of ITAT	
Date on which the file goes to the Bench Clerk	
Date on which the file goes to the Head Clerk	
The date on which the file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the Order	