<u>आयकर अपीलीय अधिकरण, मुंबई न्यायपीठ, जे, मुंबई ।</u>

IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHES "J", MUMBAI

श्री जोगिन्दर सिंह, न्यायिक सदस्य **एवं**
श्री एन. के. प्रधान, लेखा सदस्य**,** के समक्ष

Before Shri Joginder Singh, Judicial Member, and
Shri N.K. Pradhan, Accountant Member

ITA NO. 6147/Mum/2016
Assessment Year: 2009-10

ACIT, Circle-16(1) Room no.439, Aayakar Bhawan, 101, M.K. Road Mumbai 400 020	**<u>बनाम</u>**/ Vs.	Shri Shrey Sharma Guleri Prime Channel Software Communications P. Ltd. 215, Kuber Complex New Link Road Andheri (West) Mumbai 400 053
(राजस्व /Revenue)		(निर्धारिती /Assessee)
P.A. No. AAAPG4566H		

राजस्व **की ओर से** / Revenue by	Shri Saurabh Rai
निर्धारिती **की ओर से /** Assessee by	Shri Dilip V. Lakhani

सुनवाई की तारीख **/ Date of Hearing :**	**20/03/2018**
आदेश की तारीख /**Date of Order:**	**22/03/2018**

आदेश / O R D E R

Per Joginder Singh (Judicial Member)

The Revenue is aggrieved by the impugned order dated 08.07.2016, of the First Appellate Authority. The first and second grounds raised by the assessee pertain to admission of additional evidence by the Ld. Commissioner of Income Tax (Appeal) in contravention of rule 46A of the Income Tax Rules, with respect to proof of basement being used a habitable unit in the form of photographs and electricity bills.

2. During the hearing, the ld. counsel for the assessee, Shri Dilip V. Lakhani, defended the impugned order by inviting our attention to the factual finding recorded by the First Appellate Authority. On the other hand, the learned D.R., Shri Saurabh Rai, defended the assessment order by contending that the First Appellate Authority did not provide opportunity to the Assessing Officer and admitted additional evidence in the form of

photographs and electricity bills, thus, it is violation of rule 46A of I.T. Rules.

2.1 We have considered the rival submissions and perused the material available on record. The facts in brief are that the assessee declared original return of income on 29.07.2009, amounting to Rs. 6,85,460, which was processed u/s 143(1) of the Income Tax Act, 1961 (hereinafter the Act). Subsequently, the case of the assessee was selected for scrutiny and assessment was framed on a total income at Rs. 15,36,660, under section 143(3) of the Act vide order dated 28.12.2011. During the proceedings, it was revealed that the assessee had sold the basement and realized capital gain of Rs. 1,24,08,721, which was invested in acquiring two house properties at *"Royal Accord III"*. The stand of the Assessing Officer was that the basement does not fall within the purview of *"Residential Flat*" as envisaged u/s 54 of the Act. Thus, the same not being in the nature of capital asset, the gain arising therefrom should be taxed. The case of the assessee was re-opened

with the issuance of notice u/s 148 of the Act which was responded by the assessee. The reasons recorded were provided to the assessee. The assessee was asked to furnish the reply. The assessee also furnished various judicial pronouncements. The Assessing Officer, on consideration of the submissions of the assessee concluded that as per the provisions of section 54F of the Act, the basement is not included in the residential house, therefore, the claimed deduction was disallowed. Before us, the learned D.R. has contended that additional evidence like photographs and electricity bills were considered by the Ld. Commissioner of Income Tax (Appeal) and, thus, it is violation of rule 46A of the Rules. We find that while framing the assessment u/s 143(3), if the Assessing Officer was apprehensive, nothing prevented him to examine the factual matrix and the assessee would have been asked to submit the details, if so required. Even it is noted from Para-10 of the assessment order that the assessee vide letter dated 26.02.2015 submitted all the details, documents and

then the order was passed u/s 143(3). Thus, we are satisfied that there is no violation as such as has been claimed by the Revenue, consequently, we find no infirmity in the order of the Ld. Commissioner of Income Tax (Appeal). Thus, this ground of the Revenue is dismissed.

3. The next ground pertains to holding that the assessee was eligible for claiming deduction u/s 54 of the Act. The argument of the learned D.R. is that the basement in the house cannot be termed as a residential house within the provisions of section 54 of the Act. On the other hand, the ld. counsel for the assessee defended the conclusion drawn in the impugned order. It was pleaded that basement is part and parcel of the residential unit, therefore, it cannot be termed as a separate unit.

3.1 We have considered the rival submissions and perused the material available on record. We have already discussed the facts in the earlier para of this

order. The only issue which requires adjudication whether the basement is part and parcel of a residential unit. We find that when a sanction is approved by the Municipal Authorities / competent authorities, naturally such approval is granted with the basement and even today above certain limit stealth parking has been made mandatory, keeping in view the traffic problem in the bigger city like Delhi. Normally, the basement is used as a residential unit and if there is any violation there is a separate provision of taking action by the Municipal Authorities. Even if it is used as a residential unit by the domestic helps or used as a play ground like Table Tennis, it cannot loose its character as a residential unit. There is uncontroverted finding in Para-4.3 of the impugned order that there was evidence on record to show that the basement referred as *"A-2 / 30"* of Sufdarjang Enclave as a habitable unit. The assessee produced the photographs of the basement clearly revealing, independent entry gate, stair case, living room, bed room, dining, wash basin, toilet, kitchen and

mini-drawing room. If the Assessing Officer was apprehensive of some mala-fide nothing prevented to visit actual site / building and should have examined the factual matrix. The assessee also produced the evidences like property tax bill and electricity bills issued by BSES / Rajdhani Power Ltd. evidencing that the basement was merely used as a residential unit. Thus, such evidences cannot ignored.

3.2 Now, we shall analyze the provision of section 54 and section 54F of the Act. Section 54 is reproduced hereunder:-

> *"Profit on sale of property used for residence.*
> *54. (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.

Explanation.—[Omitted by the Finance Act, 1992, w.e.f. 1-4-1993.]"

3.3 Now, we shall reproduce hereunder section 54F of the Act also:-

"Capital gain on transfer of certain capital assets not to be charged in case of investment in residential house.

54F. (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 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 (hereafter 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,—

"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) ofsection 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.

Explanation.—[Omitted by the Finance Act, 1992, w.e.f. 1-4-1993.]"

3.4 A plain reading of the provision of section 54(1) of the Income-tax Act discloses that when an individual-assessee or Hindu undivided family-assessee sells a long term capital assets and within a specified period construct / acquire residential unit (new asset), the

capital gain arises from the original asset, shall be dealt with in accordance with the provisions of this section. Such assessee can invest capital gains for purchase of residential building/house to seek exemption of the capital gains tax. Section 13 of the General Clauses Act declares that whenever the singular is used for a word, it is permissible to include the plural. The contention of the Revenue is that the phrase "a" residential house would mean one residential house and it does not appear to the correct understanding. The expression "a" residential house should be understood in a sense that building should be of residential in nature and "a" should not be understood to indicate a singular number. The combined reading of sections 54(1) and 54F of the Income- tax Act discloses that, a non residential building can be sold, the capital gain of which can be invested in a residential building to seek exemption of capital gain tax. However, the proviso to section 54 of the Income-tax Act, lays down that if the assessee has already one residential building, he is not entitled to exemption of capital gains tax, when he invests the capital gain in purchase of additional residential building. The context in which the expression, a residential house" is used in Section 54 makes it clear that, it was not the intention of the legislation to convey the meaning that: it refers to a single residential

house, if, that was the intention, they would have used the word "one." As in the earlier part, the words used are buildings or lands which are plural in number and that: is referred to as "a residential house", the original asset. An asset newly acquired after the sale of the original asset also can be buildings or lands appurtenant thereto, which also should be "a residential house." Therefore the letter “a” in the context it is used should not be construed as meaning "singular." But, being an indefinite article, the said expression should be read in consonance with the other words “buildings” and “lands” and, therefore, the singular “a residential house” also permits use of plural by virtue of Section 13(2) of the General Clauses Act. – CIT V. D. Ananda Bassappa (2009) 223 (kar) 186: (2009) 20 DTR (Kar) 266 can be followed.

3.3 There could also be another angle. Section 54/54F uses the expression "a residential house". The expression used is "a residential unit". The intention of the legislature is very clear and it speaks about “a residential unit”. If the two units are conjoint together and to make it habitable (situated on the same floor) it will satisfy the provision and exemption u/s 54F will be available to the assessee. However, in the present appeal before us it is an admitted

fact that the basement is part and parcel of the same building, therefore, we cannot do any violence to the section and the provision has to be read as it is. We are aware that there is nothing in the section which requires that the residential house should be built in a particular manner. A person may construct a house according to his plans and requirements. Most of the houses are constructed according to the needs and requirements and even compulsions. For instance, a person may construct a residential house in such a manner that he may use the ground floor for his own residence and let out the first floor having an independent entry so that his income is augmented. One may build a house consisting of four bedrooms (all in the same or different floors) in such a manner that an independent residential unit consisting of two or three bedrooms may be carved out with an independent entrance so that it can be let out or even the other family members can be adjusted and they can remain mutually supportive. It is neither expressly nor by necessary implication prohibited. Hon'ble Jurisdictional High Court in K.C. Kaushik vs. Income Tax Officer 185 ITR 499 (Bom) held as under:

> *"1. The petitioner is in the service of the Bank of Baroda. He purchased a flat in Suvarnadeep Co-operative Housing Society Limited (for short "Surnadeep"), Santacruz, Bombay, on March 21, 1973, for a sum of Rs. 49,140 for the purpose of his residence. He was residing in that flat On October 24, 1979, he sold the flat for Rs. 1,25,000 and on same the date*

purchased another flat in Jai Priyadarshini Co-operative Housing Society Limited at Khar. Bombay (for short "Priyadarshini"), for a sum of Rs. 1,11,000. He resided in the Khar flat from October 24, 1979, to July 25, 1980. On July 26, 1980, he sold the Khar flat also for a sum of Rs. 1,20,000 and purchased another flat on the date in Kalpana Co-operative Housing Society Limited (for short "Kalpana"). Santacruz, Bombay, for Rs. 1,20,000. Thereafter, he started residing in this flat. However, he vacated the flat on May 16, 1981, on being transferred to Baroda. From May 27, 1981, to July 1, 1983, the flat in Kalpana was let out to the Bank of Baroda, his employers.

2. For the assessment year 1980-81, the petitioner claimed that the surplus of Rs. 75,860 arising on the sale of his flat in Suvarnadeep on October 24, 1979, was not taxable as he had invested more than the said amount in the purchase of a flat in Kalpana on July 26, 1980, for residence. The Income-tax Officer partly accepted the claim and held that the surplus was invested in the purchase of a flat in Priyadarshini, Khar on October 24, 1979, and not in the purchase of a flat in Kalpana, Santacruz, on July 26, 1980, as claimed. The petitioner filed a revision petition under section 264 of the Income-tax Act, 1961, which was rejected by the Commissioner of Income-tax, vide order dated February 5, 1985. It is pertinent to mention that two issues, viz., (i) whether the petitioner had a choice to choose the property against which the capital gains which had arisen on the transfer of a capital asset are to be adjusted; and (ii) whether the property purchased but not actually used for residence for three years fulfils the requirement of section 54(1) of the Income-tax Act, 1961, were raised before the Commissioner. While accepting the contention that the petitioner had a choice and could claim relief under section 54 against the purchase of the flat on July 26, 1980, even though he had purchased a flat on October 24, 1979, in the meantime, the Commissioner held that that flat having not been occupied by the petitioner for his residence for three years, he was not entitled to relief under section 54 against the purchase of that flat.

3. For the assessment year 1981-82, following his order for earlier assessment year, the Income-tax Officer held that the Khar purchased by the petitioner on October 24, 1979, was sold on July 26, 1980, i.e., within a year. Therefore, the surplus was chargeable as short-term capital gains. For this very reason, he also held that to the extent the petitioner had availed of relief under section 54 against the purchase of this flat on October 24, 1979, the cost of the flat was required to be reduced. Accordingly, he computed the short-term capital gains for the year at Rs. 82,860. The petitioner's appeal thereagainst failed. According to the Commissioner of Income-tax (Appeals), the petitioner had no option or choice. Relief under section 54 was or could be available only against the purchase of the first property for residence after the sale of the residential house capital gains arising on the transfer of which were sought to be adjusted.

4. The petition was admitted on August 30, 1985, when interim relief in terms of prayer (g) was also granted. It is proposed to dispose of the preliminary objection first. It was contended by Dr. Balasubramanian, for the Revenue, that the Income-tax Act provides a complete machinery for the assessment of tax, imposition of penalty for granting relief in respect of any improper order passed by the income-tax authorities. A person aggrieved by an order of the Income-tax Officer had thus adequate remedies available to him by way of appeal to the Commissioner (Appeals) and the Tribunal. Jurisdiction of this court under article 226 of the Constitution is an extraordinary jurisdiction. The petitioner can invoke this jurisdiction only when there is no alternative and effective remedy. It is not established that the petitioner had in this case no alternative and/or effective remedy. Fairly admitting that the order passed by the Commissioner under section 264 of the Income-tax Act in revision was not appealable, Dr. Balsubramanian stated that it was due to a conscious provision made by the Legislature in this behalf. The petitioner had chosen not to go in appeal and to avail of a remedy which was available. In any event, that fact by itself would not entitle the petitioner to invoke the writ jurisdiction of this court as a matter of course. The contentions were repelled by Shri Sonde, learned counsel for the petitioner. It was pointed out that though extraordinary, the jurisdiction under article 226 was discretionary. When the petition has already been entertained, it may not be proper or legal for the same court to consider the question of entertaining it once again at the time of final hearing.

5. In my judgment, the petition having already been entertained and the jurisdiction being, though extraordinary, discretionary, I will prefer to dispose of the petition on merits. This was also the view taken by this court (Goa Bench) in Writ Petition No. 174/B/1981 decided on August 2, 1984.

6. In order to appreciate the rival contentions on merits of the petition, it is desirable to refer to the provisions of section 54 of the Income-tax Act as they were in force during the relevant period. Section 54 is reproduced hereunder :

"54. Profit on sale of property used for residence. - Where a capital gain arises from the transfer of a capital asset to which the provisions of section 53 are not applicable, being buildings or lands appurtenant thereto the income of which is chargeable under the head 'Income from house property', which in the two years immediately preceding the date on which the transfer took place, was being used by the assessee or a parent of his mainly for the purposes of his own or the parent's own residence, and the assessee has within a period of one year before or after that date purchased, or has within a period of two years after that date constructed, a house property for the purposes of his own residence, 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 greater than the cost of 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 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."

7. Evidently, relief is not available under the section in respect of capital gains arising on the transfer of any and every capital asset. Relief is available only if the capital asset is such that its income is chargeable under the head "income from house property" and which in the two years immediately preceding the transfer was being used by the assessee or a parent of his for the purpose of his own or the parent's own residence. There is no dispute that this condition is satisfied in the present case as the flat in Suvarnadeep was used by the petitioner from 1973 to 1979 for his own residence and income from it, if any, would have been chargeable under the head "income from house property". The second condition for availing of the relief is that the assessee must within a period of one year before or after the date of transfer of such a capital asset, purchased or within a period of two years after that date, construct a house property for his own residence. In this case, both the house properties, i.e., the flat in Priyadarshini and the flat in Kalpana, were purchased by the petitioner within one year of the date of the sale of the flat in Suvarnadeep and both the flats were purchased for the purpose of residence. In the absence of any provision to the contrary, in my judgment. The petitioner is entitled to avail of the relief in respect of the capital gain arising on the sale of his flat in 1979 against the flat purchased in that year as also against the flat purchased on July 26, 1980. It has, of course, to be adjusted against one of the flats only. The petitioner has chosen to seek that relief against the purchase of the flat on July 26, 1980, and, as held by the Commissioner in his order under section 264 of the Income-tax Act for the assessment year 1980-81, I am inclined to hold that it is for the petitioner to claim relief under this section against the purchase of any one of the flats provided that the other conditions mentioned in the section are satisfied. There being no dispute that the flat purchased by the petitioner in Kalpana on July 26, 1980, satisfies the conditions laid down in section 54, i.e., it was purchased within one year of the sale of the Suvarnadeep flat and for the purpose of his own residence, the petitioner is entitled to seek adjustment of capital gains against the purchase of this flat.

8. However, clause (i) provides that if the new asset for the purchase of which the assessee sought relief of capital gains under section 54 is sold

within a period of three years of its purchase or construction, the cost of the new asset will be required to be reduced to the extent of relief availed of on account of capital gains earned but adjusted. It is for this reason that it has become important to consider whether the new asset, i.e., the flat in Kalpana purchased by the petitioner on July 26, 1980, which was admittedly let out by the petitioner to his employer, Bank of Baroda, on and from May 27, 1982, on his transfer to Baroda can be said to be a factor that would bring the petitioner within the mischief of clause (i). In the context, it is desirable to refer to the Gujarat High Court decision in the case, CIT v. Tikyomal Jasanmal [1971]82 ITR 95. The facts in that case were that out of the total constructed portion of the house admeasuring 1,389 sq. ft., the assessee had let out an area of 734 sq. ft., i.e., more than half, immediately on completion of the construction. It was held that the new house was not constructed by the assessee for the purpose of his own residence. The court, however, observed that it was not the case of the assessee that the house was originally constructed by him for the purpose of his own residence but by reason of subsequent events or supervening circumstances, it became impossible or impracticable for him to occupy a part of the house for the purpose of his own residence and was let out to tenants for that reason. Such indeed could not be the case of the assessee since no period of time elapsed between the completion of construction of the ground floor and the letting out of a major portion of it to tenant. In the second decision in the case of CIT v. Natu Hansraj [1976]105 ITR 43, the Gujarat High Court held that no single factor including whether or not the property newly acquired by the assessee was wholly or substantially acquired by him for the purpose of his own residence after purchase or construction, as the case may be, would be determinative of the matter. Even if the new property was not substantially put to use for his own residential purposes by the assessee within a reasonable time and if the failure to do so was without any fault on his part, that is, by reason of some unforeseen subsequent events or supervening circumstances, it might still be possible to hold in a given case, provided other circumstances point in that direction, that the real relief, intention or motive entertained by the assessee at or about the time of purchase or construction as regards the use of the newly acquired house property was to occupy it himself.

9. From the above two decisions of the Gujarat High Court, it can fairly be inferred that the petitioner in the present case had purchased the new flat in Kalpana on July 26, 1990, for his own residence. He resided in that flat until his transfer to Baroda. His transfer to Baroda is an unforeseen and subsequent event and, therefore, there is no warrant for construing the relevant expression in the manner suggested by the Revenue to hold that the flat was not purchased by the petitioner for the purpose of his residence just because it had to be let out to the Bank of Baroda in the circumstances mentioned above.

10. Dr. Balasubramanian had stated that the scheme of section 54 was that the relief in respect of capital gains arising on the transfer of a capital asset was available against the purchase of the first house

property for the assessee's residence following sale. The assessee had no choice in this regard as held by the Commissioner of Income-tax (Appeals). He also argued that the fact that the petitioner had to vacate and let out the flat on his transfer to Baroda was not germane to the issue. The fact is that the flat was not occupied by the petitioner for a period of three years.

11. In my view, the manner in which the provision in this regard has been construed by the Gujarat High Court in its aforesaid two decisions is reasonable and requires to be accepted. The expression "for the purpose of his own residence", in my judgment, means and refers to a situation where a new capital asset. i.e., the house property, is purchased by the assessee with the intention to use the same as his own residence. If, for some reason over which he has no control or something unforeseen happens as a result of which he has to reside at a place other than the place where such a new capital asset is situate, it could not be held that the new capital asset was not purchased for the purposes of his own residence. In the above view of the matter, both the conditions are satisfied in this case. Accordingly, the petition succeeds. Rule is made absolute in terms of prayer clauses (b) and (d). No order as to costs."

3.4 We find that Hon'ble Punjab & Haryana High Court in the case of Pawan Arya vs. CIT [2011] 11 taxman.com 312 (P&H) wherein it was held as under:

"1. This appeal has been preferred by the assessee under Section 260-A of the Income Tax Act, 1961 (for short, the Act) against the order of the Income Tax Appellate Tribunal, New Delhi dated 17.12.2009 in I.T.A. No.2416/Del/2008 for the assessment year 2005-06 proposing to raise following substantial questions of law:-

(i) Whether in facts and circumstances of the case, the action of the authorities below in rejecting the claim of the assessee when all the conditions under section 54 of the Act have been fulfilled is legally sustainable in the eyes of law?

(ii) Whether in facts and circumstances of the case, the action of the authorities below in rejecting the claim of the assessee without their being any material evidence to rebut the claim of the assessee/appellant is legally sustainable in the eyes of law?

(iii) Whether in facts and circumstances of the case, the action of the authorities below in ignoring the ratio of the decision in the case of D. Anand Basapa v/s ITO (2004) 91 ITD 53 (Bang.) wherein the exemption u/s 54 of the Act was granted on the acquisition of two houses out of the proceeds of one residential house is legally sustainable in the eyes of law?

(iv) Whether in facts and circumstances of the case, the action of the authorities below, impugned orders Annexure A-1 and A-5 are legally sustainable in the eyes of law?

2. The assessee claimed exemption on capital gains on sale of flat on the ground of

acquisition of two houses. The Assessing Officer set off the capital gain against one of the houses but held the claim not to be admissible against second house. However, the CIT(A) upheld the claim of the assessee relying upon decision of Bangalore Bench of the Tribunal in D. Anand Basapa Vs. ITO (2004) 91 ITD 53. The said view has been reversed by the Tribunal as follows:-

â€œ6. We have carefully considered the rival submissions in the light of the material placed before us. The facts in the present case are clear. The assessee is claiming exemption in respect of two independent residential houses situated at different locations; one is in Dilshad Colony, Delhi and the other is in Faridabad. The assessee in the Special Bench case had also purchased two residential houses against sale consideration of residential flat at â€˜Gulistanâ€™ situated at Bhulabai Desai Road, Mumbai. One residential property was at Varun Apartments at Varsova and the other property was at Erlyn Apartments, Bandra and it was held by the Special bench in the aforementioned case i.e. ITO Vs. Ms. Sushila M. Jhaveri (supra) that the assessee is entitled to get exemption only in respect of one house of her choice. Therefore, the decision of Special Bench is fully applicable to the present case and the assessee can avail exemption u/s 54 in respect of one residential house only. The factual aspect has not been disputed by ld. AR. The only dispute before us is legal proposition that whether the assessee is entitled to get exemption in respect of two independent residential houses purchased out of sale consideration of another residential house. Therefore, the issue is decided in favour of the department and it is held that the assessee is entitled to get exemption u/s 54 in respect of one property only and no question has been raised by ld. AR regarding the choice of the property or the factual aspect of the matter.

7. So it relates to the decision relied upon by ld. AR of Hon'ble Karnataka High Court in the case of CIT Vs. D. Anand Basapa, it may be mentioned that the said case cannot be applied to the case of the assessee on the ground that in that case the two houses purchased by the assessee were not independent properties and a factual finding has been recorded that the two apartments which were claimed to be exempted against sale consideration were situated side by side and it was also stated by the builder in that case that he has effected modification of the flats to make it as one unit by opening the door in between two apartments. On these facts, the Hon'ble' High Court has observed that the fact that at the time when Inspector inspected the premises, the flats were occupied by two different tenants is not the ground to hold that apartment is not one residential unit. The fact that the assessee could have purchased both the flats in one single sale deed or could be narrated the purchase of two premises as one unit in the sale deed is not the ground to hold that the assessee had no intention to purchase two flats as one unit. From these observations of Hon'ble High Court, it is clear that while rendering the decision they have kept in mind that the purchase of two flats in the same building which were united for living of the assessee by making necessary modifications made the residential unit as one and, thus, that case could not be applied to the facts of the case of the assessee.....â€□

3. We have heard learned counsel for the appellant.

4. As regards claim for exemption against acquisition of two houses under Section 54 of the Act, the same is not admissible in plain language of statute. In the judgment of Karnataka High Court in CIT v. D. Ananda Basappa [2009] 309 ITR 329 (Kar), referred to in the impugned order, exemption against purchase of two flats was allowed having regard to the finding that both the flats could be treated to be one house as both had been combined to make one residential unit. The said judgment, thus, proceeds on a different fact situation.

5. Learned counsel for the appellant wanted to raise certain other points which have neither been pleaded in the memo of appeal nor raised before the Tribunal. The same could not be allowed merely on the basis of oral submissions.

6. No substantial question of law arises.

7. The appeal is dismissed."

3.5 The Hon'ble High Court was approached, against the order of the Tribunal, wherein the decision in the case of D. Anand Basapa vs. ITO was also considered. The case decided by Hon'ble High Court is identical to the facts before us wherein the assessee claimed exemption in respect of two independent residential houses situated at different locations. In the case of CIT vs. D. Anand Basapa there were two houses were purchases by the assessee and was not independent properties and the builders made effected modifications in the flat and made it one unit by opening the door in between two apartments in that situation a particular decision was taken. However, in the appeal before us the alleged basement is very much part and parcel of the same residential building, therefore, the ratio laid down by the Hon'ble Punjab & Haryana High Court squarely applicable to the case of the assessee. The ratio laid down in the case of ITO vs. Mrs. Sushila M. Jhaveri 107 ITD 327 (Mum) (SB) (2007) where the houses were located at different places, the Mumbai Bench of the Tribunal held that exemption u/s 54F was available in respect of one house of the choice of the assessee. Identical ratio was laid down in ACIT vs. Sudhakar Ram [2011] 16 taxmann.com 175 (Mum) and as mentioned earlier by Hon'ble Jurisdictional High Court in K.C Kaushik Vs. ITO (supra). The ratio laid down by

Hon'ble Karnataka High Court in Abdul Gaffar vs. ITO [2006] 285 ITR 203 (Karnataka) supports our views. The assessee has relied upon the decision of ITAT, Mumbai Bench in the case of Nilesh Pravin Vora and Yatin Pravin Vora(supra) but in the said case, the tax-payer being father sold his property and reinvested sale proceeds in two residential flats in same locality i.e. Vile Parle (East) , Mumbai albeit in two different societies to settle his two sons. Similarly, in the decision rendered by Hon'ble Madras High Court in the case of Smt V R Karpagam(supra), the new residential flats which were allotted under a development agreement wherein she was to receive 43.75% of the built up area which was translated into 5 flats , were all located in the same building. Thus, both these decisions relied upon by the assessee were decided keeping in view peculiar facts of those two cases which are clearly distinguishable as in the instant case the basement is part and parcel of the same building / residential house. Considering the totality of facts and the judicial pronouncements discussed hereinabove, we are of the view that the assessee is entitled for exemption u/s 54 / 54F of the Act, therefore, we find no infirmity in the order of the ld. First Appellate Authority, therefore, it is affirmed.

Finally, the appeal of the Revenue is dismissed.

This Order was pronounced in the open court in the presence of learned representatives from both sides at the conclusion of the hearing on 20th March, 2018.

Sd/-	***Sd/-***
(N.K. Pradhan)	(Joginder Singh)
लेखा सदस्य / ACCOUNTANT MEMBER	**न्यायिक सदस्य** / JUDICIAL MEMBER

मुंबई Mumbai; दिनांक Dated : **22/03/2018**

Pradeep J. Chowdhury, Sr. PS

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Assessee
2. प्रत्यर्थी / The Revenue
3. आयकर आयुक्त,(अपील) / The CIT, Mumbai.
4. आयकर आयुक्त / CIT(A)- , Mumbai
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई **/ ITAT, Mumbai**