INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "A": NEW DELHI
BEFORE SHRI BHAVNESH SAINI, JUDICIAL MEMBER
AND
SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER

ITA No.4157/Del/2016
(Assessment Year: 2013-14)

Smt Bhawna Sharma, OC-3/801, Essel Towwers, MG Road, Gurgaon PAN: AKKPS1075M	Vs.	DCIT(Intl. Taxation), Circle-3(1)(2), New Delhi
(Appellant)		(Respondent)

Assessee by :	Shri Sandeep Kumar, CA
Revenue by:	Shri Arun Kumar Yadav, Sr. DR
Date of Hearing	02/07/2019
Date of pronouncement	23/09/2019

O R D E R

PER PRASHANT MAHARISHI, A. M.

1. This appeal is filed by the assessee Smt Bhawna Sharma against the order of the ld CIT(A)-43, New Delhi dated 06.06.2016 for the Assessment Year 2013-14, raising the following grounds of appeal:-

"1. Lower Authorities have erred in passing/ confirming orders which are based on hypothetical grounds, are bad in law, are against provision of Income Tax Act, is against decided Judgments and are against law of natural justice.

2. The lower authorities have grossly erred in confirming the treatment of capital gain as Short Term Capital Gain instead of Long Term capital gain which is against the ratio of various judgments of Honourable Courts, thus, bad in law and against course of natural justice.

3. The lower authorities have grossly erred in denying deduction u/s 54F of Income Tax Act to which the Appellant is duly eligible, ignoring the submissions made by the Appellant, facts and circumstances and also various judgments of Honourable Courts."

2. Brief facts of the case are that the assessee is an individual who filed her return of income on 25.07.2013 declaring Nil income. Assessee has claimed deduction of Rs. 6693638/- u/s 54 of the Income Tax Act, 1961. The assessee has sold plot of land on 28.03.2013 for a total consideration of Rs. 11850000/- and index cost of acquisition was Rs. 5156362/- . The ld AO

noted that the assessee became owner of the property on 27.12.2011 the date on which the conveyance deed was executed. The assessee claimed that the as the above plot was allotted to the assessee on 27/12/2002 the date of acquisition should be considered from that date. Thus, the only dispute on this issue is whether the property sold by the assessee is a long term capital asset or short term capital asset. The whole controversy is discussed by the ld AO at para 3.1 to 3.1.8 is as under:-

3.1 Date of acquisition and cost of the plot sold by the assessee.

3.1.1 As per the deed of conveyance of Plot no. 72, Sector-3, Gurgaon the transaction value is stated at Rs.1,18,04,040/- and the stamp duty thereon of Rs. 5,95,500/-. The first few paras of the deed of conveyance read as under:

> *"This deed conveyance made the 12th day of December 2011 between the Haryana Urban Development Authority acting through the Estate Officer (Hereinafter called the vendor of the One Part and Smt. Bhawna Sharma w/f Munish Sharma through CPA Sh. Anand Parkash Patni S/o Sh Laxmi Narain R/o 160, SFS Flats, Gulmohar Encalve, New Delhi-110049 (hereinafter called the transferee) of the Other Part.*
>
> *WHEREAS the land hereinafter described and intended to be hereby conveyed urns owned by the vendor in full proprietary rights:*
>
> *AND WHEREAS the vendor has sanctioned the scale of the said site to the transferee in pursuance of his application dt 20.10.2011 made under Sub regidation (i) of regulation 5 of Haryana Urban Development (Disposal of Land and Building) regulations 1978 (hereinafter referred to as the said mies/regulations): to be used as a site of Residential Purpose in the Urban area of Gurgaon*
>
> *AND WHEREAS the vendor has fixed the tentative price of the land at Rs. 11,84,040/- (Rupees Eleven Lac Eighty Four Thousand & Forty only).*
>
> *AND WHEREAS the vendor reserves the right to enhance the tentative price in the case of land sold by allotment by the amount of additional price determined in accordance with the said regulation.*
>
> *AND WHEREAS the transferee sold land by allotment has paid the tentative sale price and agrees to pay the additional Price in the manner hereinafter appearing.*
>
> *NOW, therefore, this deed witnesseth that for the purpose of carrying into affect the said sale and in consideration of the convenants of the transferee hereinafter contained and the said sum ofRs. 11,84,040/- (Rupees Eleven Lac Eighty Four Thousand & Forty only) by the transferee and the undertaking of the*

transferee to pay the additional price. If any, determined to be paid by the transferee, with in a period of Thirty days of the date of demand made in this behalf by the Estate Officer without interest or in such number of installments with interest as may be determined by the chief Administrator, the vendor hereby grants and conveys up to the transferee all the piece and parcel of Plot No. 12 measuring 220 Sq. Mtr /Yard, Sector-43, Urban Estate, Gurgaon (Haryana), and more particularly described in the plan filled in the Officer of Estate officer and signed by the Estate Officer aforesaid and dt.....the.....day of.....Hereinafter called the said site)."

3.1.2 The sale deed of the said Plot no. 72, Sector-3, Gurgaon dated 28.03.2013 in the third para states that "whereas the above said VENDOR is owner and in possession of Plot No. 72 measuring 220 sq. Mtrs. (263.12 Sq. Yds), situated in the residential colony known as Sector-43, Urban Esate, Gurgaon, Tehsil and Distt. Gurgaon (Haryana), by way of Sale Deed/Conveyance Deed Vasika No. 27259 dated 27/12/2011, registered in the office of Joint/Sub-Registrar, Gurgaon (Haryana) (hereinafet called the PROPERTY)" and further that " whereas the VENDOR has taken permission for transfer of the above said property in favour of VENDEE vide Memo No. Z0002/E0018/UE029/ TRAN1/ 0000000105 dated 21/03/2013 from the Estate Officer- II, Haryana Urban Development Authority, Gurgaon.

3.1.3 The above paras in the two deeds clearly established that the assessee became the owner of the Property on 27.12.2011 and could not become the owner uiitil and unless the additional price if any against the tentative price was paid by the assessee. This is further established by the fact that the assessee had to seek the permission for transfer of the above said property from HUDA before it could be transferred as the ownership still lay with HUDA.

3.1.4 HUDA was paid further amounts for the said plot after the deed of conveyance and before the sale of said plot by assessee. The total amount paid by assessee towards the acquisition of the plot was Rs. 41,77,715/-.

3.1.5 Confronted with the above, the assessee through its representative letter dated 29.01.2016 submitted that:

"the assessee became the owner of the property by making a payment ofRs. 3,15,700/-to Mr. Amar Nath Gupta on 17.12.2002 who was the allottee of the plot. Thereafter, HUDA has recorded the assessee as the allottee in place of the previous owner and raised installment demands on the assessee and issued the receipts in the name of the assessee. The conveyance deed was registered in the name of the assessee on 27.12.2011 after HUDA had received the tentative sale price of the plot subject to payment of enhancements as and when raised by it. The date of the ownership of the property may be taken to the date from which HUDA had transferred the allotment in the name of the assessee and not the conveyance deed. The conveyance deed is executed to convey free hold rights of the property to the

assessee but she became the owner by virtue of allotment being transferred in her name in 2002 and because payments were being done in her name since then. Like in the case ofDDA SFS Flat the ownership is counted from the date of allotment and not from the date of execution of conveyance deed. After the conveyance of the property in the name of the assessee the property coidd be transferred to anybody only by way of a sale deed which the assessee has entered into on 28.03.2013. It is not the case and it was not possible to transfer the property to new buyer by transferring the allotment which was the case by which she became the owner. It is, therefore, requested that the transfer of the asset may be treated as long term capital gain and benefit of indexation may be allowed to the assessee."

3.1.6 The submissions have been duly considered and are not found acceptable. Nowhere in the conveyance deed made on 12.12.2011, it is mentioned that the conveyance deed is executed to be conveyed "free hold rights" as claimed by the assessee. Further, the reliance on the Board Circular No. 471 [F. No. 207/27/85-IT(A-II)], dated 15-10-1986 is misplaced on the facts of the case of the assessee. As that was issued in relation to the construction of the house undertaken by fhe DDA on behalf of the assessee and assessee had no control over the completion of the construction of the house which was undertaken by the Authority. The circular was with respect to the application of the consideration on transfer of asset giving rise to capital gams and to allow the benefit of deduction u/s 54 or 54F of the Act, with respect to the construction of the house. In assessee's case HUDA had not undertaken the construction of the house on assessee's behalf and it was a case of sale of residential plot giving rise to capital gain and not application of sale proceeds of asset sold and hence is clearly distinguishable.

3.1.7 This evident from the text of the said circular No. 471, dated 15-10-1986 which is as under:

"428. Capital gains from long-term capital asset - Investment in a flat under the self-financing scheme of the Delhi Development Authority - Whether to be treated as construction for the purposes of capital gains

1. Sections 54 and 54F provide that capital gains arising on transfer of a longterm capital asset shall not be charged to tax to the extent specified therein, inhere the amount of capital gain is invested in a residential house. In the case of purchase of a house, the benefit is available if the investment is made within a period of one year before or after the date on which the transfer took place and in case of construction of a house, the benefit is available if the investment is made within three years from the date of the transfer.

2. The Board had occasion to examine as to whether the acquisition of a flat by an allottee under the Self-Financing Scheme (SFS) of the D.D.A. amounts to purchase or is construction by the D.D.A. on behalf of the allottee. Under the

SFS of the D.D.A., the allotment letter is issued on payment of the first instalment of the cost of construction. The allotment is final unless it is cancelled or the allottee withdraws from the scheme. The allotment is cancelled only under exceptional circumstances. The allottee gets title to the property on the issuance of the allotment letter and the payment of instalments is only a follow-up action and taking the delivery of possession is only a formality. If there is a failure on the part of the D.D.A. to deliver the possession of the flat after completing the construction, the remedy for the allottee is to file a suit for recovery of possession.

3. The Board have been advised that under the above circumstances, the inference that can be drawn is that the, D.D.A. takes up the construction work on behalf of the allottee and that the transaction involved is not a sale. Under the scheme the tentative cost of construction is already determined and the D.D.A. facilitates the payment of the cost of construction in instalments subject to the condition that the allottee has to bear the increase, if any, in the cost of construction. Therefore, for the purpose of capital gains tax the cost of the new asset is the tentative cost of construction and the fact that the amount was allowed to be paid in instalments does not affect the legal position stated above. In view of these facts, it has been decided that cases of allotment of flats under the Self-Financing Scheme of the D.D.A. shall be treated as cases of construction for the purpose of capital gains."

3.1.8 Hence, the contention of the assessee to consider the transfer of a long term capital asset and allow indexation is not acceptable. The difference between the amount spent towards payment to the original allottee and by way of instalments to HUDA aggregating to Rs. 41,77,712/ - and the sale consideration of Rs. 1,18,50,000/-is brought to tax by making an addition of Rs. 76,72,288/- to the returned income of rupees NIL"

3. Thus, the ld AO treated the transfer of the capital asset as transfer of a short term capital asset. Consequently, the deduction u/s 54 was also denied. Assessee made an alternative claim of section 54 F of the act, that was also denied. Further, reasons for denial of deduction was because the new property has been purchased in the name of the assessee and Ms. Saroj Patni, mother of the assessee. The ld AO was of the view that property sold by the assessee was owned by the assessee whereas, the investment in the new residential house was also contributed to the extent of Rs. 17 lakhs by the mother of the assessee. Thus, the assessment order u/s 143(3) of the Act was passed on 03.02.2016 determining the total income of the assessee at Rs. 7672290/-. The assessee aggrieved with the order of the ld AO preferred an appeal before of the ld CIT(A).

4. The ld CIT(A) further held as under:-

"4. Findings/ Determination

I have examined the facts at hand and have duly heard the counsel. Ground nos. 1 and 4 are general. Ground nos. 2 and 3 are connected and are being disposed off in a consolidated manner. The dispute in this case is (i) Whether the property was a short-term capital asset or a long-term capital asset. ? (ii) Whether the appellant was eligible for benefit u/s 54F? (iii) Whether the appellant was eligible for benefit u/ s 54 ?

4.1 The AO notes at paras 2, 3 till 3.1.8 as follows:-

"2. The assessee had claimed a deduction of Rs. 66,93,638/- u/s 54 of the IT Act, in the return filed of a plot of land bearing no. 72 in Sector-43, Gurgaon which was sold, on 28.03.2013 for a. total consideration of Rs. 1,18,50,000/ after claiming the indexed cost of acquisition of Rs. 51,56,362/- on the actual payments of Rs. 41,77,712/ - for the acquisition of the said plot.

3. However, on examining the purchase deed vide which pilot no. 72 was acquired by the assessee, the sale deed vide wich the said plot no. 72 was transferred, by the assessee, the evidence of payments made to acquired, the said, plot and related documents the following points arose for discussion and determina tio n:

3.1.2 The sale deed, of the said. Plot No. 72, Sector-3, Gurgaon dated. 28.03.2013 in the third para states tht "whereas the above .scud. VENDOR is owner and in possession of Plot No. 72 measuring 220 sq. mtrs. (263.12 sq. yds.) situated in the residential colony known as Sector-43, Urban Estate, Gurgaon, Tehsil and Distt. Gurgaon (Haryana), by way of Sale Deed./ Conveyance Deed Va.si.ka. No. 27259 dated 27.12.2011, registered in the office of joint/ sub-registrar, Gurgaon (Haryana) (hereinafter called the PROPERTY)" and further that "whereas the VENDOR has taken permission for transfer of the above said property in favour of VENDEE vide Memo No. Z0002/E0018/UE029/TRAN1/00000000105 dated 31.03.2013 from the Estate Officer-11, Haryana Urban Development Authority, Gurgaon.

3.1.3 The above paras in the two deeds clearly established that the assessee became the owner of the Property on 27.12.2011 and could not become the o wner until and unless the additional price if a ny against the ten tative price was paid by the assessee. This is further established by the fact that the assessee had. to seek the permission for transfer of the above said. prope3rty from HUDA before it could be transferred as the ownership sttHdgy with HUDA.

3.1.4 HUDA was paid further amounts for the said plot'after the deed of conveyance and before the sale of said plot by assessee.

The toted amount paid by assessee towards the acquisition of the plot was Rs. 41, 77, 715/-..

……
……

3.1.8 Hence, the contention of the assessee to consider the transfer of a long term capital asset and allow indexation is not acceptable. The difference between the amount spend towards payment, to the original allottee and. by way of installments to HUDA aggregating to Rs. 41,77,712/- and the sale consideration of Rs 1,18,50,000/- is brought to tax by making an addition of Rs. 76, 72,288/ - to the returned income of rupees NIL."

4.2 The AO further notes from paras 3.3.4 till para 5 as follows:-

" 3.3.4 Facts of the case

The property has been registered as per the conveyance deed, in the name of Ms. Bhawna Sharma (the assessee) only. The payments towards the installments have been made to HUDA from the accounts of the parents also. Only an amount of Rs. 24,78,500/- has been paid from the account no 32661641151 which as per the statemen t of account stood, in. the name of Mr, Mu.ni.sh Sharma. husband, of the assessee to which the name of the assessee Mrs. Bhawna Sharma has been added "hand written". It cannot be said with certainty whether the funds in the account belonged to the assessee as her name is added manually to the name of account holder Mr. Munish Sharma. The total consideration claimed to have been paid to HUDA is of Rs. 41,77, 712/-. Under the circumstances, the assessee can be the owner of the property as a donnee i.e. through gift but then section 64 of the Act, will come into play not taken up here for the sake of brevity.

3.3.5 The above facts have to be considered in light of the provisions of Section 54F. (l)fSubject 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 22residential 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 pain 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) own 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) W/frere the assessee purchases, within the period of 30[two yearsJ 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 pro vided 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 gams" 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 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 schem.e32wh.ich 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 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 u/s 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 constuctin of the new asset within the period specified in sub-section (1) been the cost of the new asset, shall be charged, u/s 45 as income of the previous year in which the period of three years from the date of the transfer of the original asse~ expires; arid

(ii) The assessee shall be entitled to withdraw the unutilized amount in accordance with, the scheme aforesaid

.....

5. Hence, the total income of the assessee is assessed u/s 143(3) at Rs. 76, 72,290/- after rounding off of Rs. 76. 72.287/7"^-. - 28SA of the IT Act, 1961, Interest u/s 234A/234B/234C/234D is charged as applicable. Necessary forms are issued in the context. Penalty proceedings u/s 271(l)(c) are being initiated separately for concealment and filing of inaccurate particulars of income

4.3 The appellant had sold an asset being residential plot of 220 sq. mts. Bearing plot no 72 at sector 43, Gurgaon for a consideration of Rs. 1,18,50,000/- vide sale deed dated 28.03.2013. Thus, the date of sale of asset is established as 28.03.2013.]

4.4 The computation of total income by the appellant as in the return of income is follows:-

"Income from Capital Gain (Chapter IV E)

Long Term Capital Gain

Plot No. 72 Sec 43 Gurgaon 28.03.2013 11850000

Sales Consideration

Less . indexed cost

Purchase cost 633187

*FY 2002-03 332200/44 7*852*		
Installments'	*272355*	
*FY 2003-04 148005/43*852*		
Installments	*262709*	
*FY 2004-05 148005/ 480*852*		
Installments	*253723*	
*FY 2005-06 148005/ 497/*852*		
Installment	*737143*	
*FY2005-06 430000/497*852*		
Installments	*327419*	
*FY2011-12 301671/785*852*		
installments	*2669826*	
*FY2012-13 2669826/852*852*	*5156362*	
	6693638	
	6693638	
		6693638
Investment in House property u/s 54 Rs. 6700000/-		
Gross Total Income		*0*
Total income		*0*
Found off u/s 288A		*0*

Adjusted total income (ATI) is not more than

Rs. 20 lakh hence AMT not applicable"

4.5 In the sale deed dated 28.03.2013, on page 2, at para 3 it is noted "Where as the above said VENDOR is owner and in possession of Plot No, 72 measuring 22Q sq. Mtrs. (263.12 sq. yds.), situated in the residential colony known as Sector-43, Urban Estate, Gurgaon, Tehsil and Distt. Gurgaon (Haryana), by way of sale deed/ conveyance deel Vasika No. 27259 dated 27.12.2011, registered in the office of joint/ sub-registrar, Gurgaon (Haryana) (hereinafter called the PROPERTY)"

Thus, the appellant got possession of the property bearing plot no, 72 at Sector 43, Gurgaon vide sale deed/ conveyance deed Vasika no 27259, on 27.12.2011. Thus, the date of acquisition of the asset in question is established as 27.12.2011.

4.6 The property in question bearing plot no. 72, Sector 4.3, Gurgaon was allotted by HUDA as per reallotment letter no. 8871 dated 27.12.2002 to the appellant. The appellant is trying to read date of allotment as date of possession. This is not the case. As per the accompanying Form C of HUDA dated 31.05.2002, at paras 4,5,6 and 7 it has been elaborated as follows:-

"4. In case you refuse to accept this allotment you, shall communicate your refusal by a registered letter within 30 days from the date of issue of this allotment letter, failing which this allotment shall stand cancelled and the earnest money deposited by you shall he forfeited, to authority and. you shall have no claim for damages.

5. In case you accept this allotment please send you acceptance by registered post alongwith an amount of Rs. 177606.00 within 30 days from the date of issue of this allotment letter, which together with an amount of Rs. 118404.oo by you alongwith your application form an earnest, money, will constitute 25 per cent, of the total tentative price.

6. The balance amount i.e. Rs. 888030.00 of the above tentative price of the plot can be paid in lump sum of allotment letter or in six annual installments. The first installment will fall due after the exprity of one year of the dale of issue of this letter. Each installment would be recoverable together with interest on the balance price at 15% interest of the remaining amount. The interest shall however, accrue from the date of offer of possession.

7. The possession of the site will be offered to you on completion of the development works in the era, where the site is situated."

Thus, possession was not synonymous with allotment or reallotment. Date of possession is vital for working out the namre of asset whether long-term or short-term. In case of the appellant, the asset, came In possession only on 27.12.2011. This asset was sold on 28,03.2013. Thus, the asset in question remained with the appellant for less than 3 years and qualifies to be termed as Short-Term Capital Asset.

*4,7 It is relevant to reproduce paras 3.1,2, 3,1.3 and 3.1.4 of the AO which read as follows:- **

"3.1.2 The sale deed of the said Plot No. 72, Sector-3, Gurgaon dated 28.03.2013 in the third para states tht "whereas the above said VENDOR is owner and in possession of Plot. No. 72 measuring 220 sq. mtrs. (263.12 sq. yds.) situated, in the residential colony known as Sector-43, Urban Estate, Gurgaon, Tehsil and Distt. Gurgaon (Haryana), by way of Sale Deed/ Conveyance Deed Vasika No. 27259 dated. 27.12.2011, registered, in the office of joint/ sub registrar, Gurgaon (Haryana) (hereinafter called the PROPERTY)" and. further that "whereas the VENDOR has taken permission for transfer of the above said property in favour of VENDEE vide Memo No. Z0002/E0018/ UE029/ TRAN1/00000000105 dated 31.03.2013 from, the Estate Officer-II, Haryana, Urban Development. Authority, Gurgaon.

3.1.3 The above paras in the two deeds clearly established that the assessee became the owner of the Property on 27.12.2011 and could not become the owner until and unless the additional price if any against the tentative price was paid by the assessee. This is further established by the fact that the assessee had to seek the permission for transfer of the above said prope3rty from HUDA' before it could, be transferred, as the ownership still lay with HUDA.

3.1.4 HUDA was paid, further amounts for the said plot, after the deed, of conveyance and. before the sale of said plot by assessee. The total amount paid by assessee towards the acquisition of the plot was Rs. 41,77,715/-"

4.8 Provisions of Section 54(1) read as follows: -

"54.[(1)] [Subject to the provisions of sub-section (2). where, in the case of an assesseeb being an individual or a Hindu undivided family], the capital gain arises from the transfer of a long-term capital asset, being buildings or Slands appurtenant thereto, and being a residential housed, 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 9jone year before or two years after the date on which the transfer took place purchased 10], or has within a period of three years after that date 11 [constructed, one residential house in India], lOthen], 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 12[is greater than the cost of 13 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 propose 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

4.9 Provisions of Section 54F(1) read as .follows:-

" 54F. (l)[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"29. 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. ”

4.10 To know what is a Short-Term Capital Asset and what is a long-term capital asset, recourse is held to provisions of Section 2(29A), Section 2(29B), Section 2{42A), and Section 2(4233). These read as follows:-

“ Section 2(29A)

“long term capital asset" means a capital asset which is not a short-term capital asset.

Section 2(2 9B)

“long term capital gain” means capital gain arising from the transfer of a long term capital asset

Section 2(42A)

Short-term capital asset means a. capital, asset held, by an assessee for not more than thirty-six months immediately preceding the date of its transfer.

Section 2S42B}

"short term capital gain" means capital gain arising from the transfer of a short term capital asset"

4.11 Since it is noted that the asset in question is a short-term capital asset, the gam arising there from was Short-Term Capital Gam. As such, 1 uphold the action of the Assessing Officer. Since the asset, in question is a Short-Term Capital Asset, benefit of provisions of Section 54 and Section 54F (which prescribe benefit only for a Long-Term Capital Asset) is not available to the assessee appellant.

4.12 In light of the above, the appellant fails in appeal."

5. Contesting the findings of lower authorities and defending the ground of appeals the ld AR submitted a written note as under:-

DETAIL OF ASSET IN QUESTION:- PLOT NO. 72, Sector-43, Gurgaon Date of Allotment to original Owner by HUDA :- 31.05.2002 Date of Re-Allotment to Assessee by HUDA :- 27.12.2002 Date of Conveyance deed by HUDA in favour of Assessee:-27.12.2011

Date of Sale by Assessee:- 28.03.2013

Total Holding Period from date of Allotment:- More than 10 Years

Assessee gets his title over the capital asset on the date of allotment of letter in respect of plot or flat etc. Therefore, the subsequent action of registration of sale agreement is merely an assignment of rights in the property of the assessee with Act of registration under the Stamp Duty Act. This view is fortified by the decisions of the Tribunal/Hon hie High Courts in following cases

a. Praveen Gupta vs ACIT (137 TTJ 307) (ITAT Delhi)

b. CIT vs Laxmi Devi Ratani (2005) 198 CTR(MP) 336

c. CIT vs Tata Services ltd. 122 ITR 594

d. CIT vs Vijay Flexible Containers 186 ITR 693 (Bom.)

e. CIT vs Mormasji Man Charji Vaid 168 CTR(Guj.)(FB) 565

f. Arundhati Balkrishna vs CIT (1982) 29 CTR (Guj.) 85

g.Shri Vembu Vaidyanathan, Mumbai ITA NO.5749/Mum/2013

h. DCIT Vs Deepak Shashi Bhusan Roy (ITAT Mumbai)

i. CIT Vs K Ramakrishanan 48 taxmann.com 55 (Delhi), 225 Taxman 123, 363 ITR 59

j. Ms. Madhu Kaul v. CIT [2014] 363 ITR 54/225 Taxman 86 Punjab and Haryana High Court.

k.Anita D Kanjani vs. ACIT (ITAT Mumbai) I.T.A. No.2291 /Mum/2015

1. CIT v. S R Jeyashankar (2015) 373 ITR 120 9Mad HC)

m. CIT v. A Suresh Rao (2014) 223 Taxmann 228 (Kar HC) n.Vinod Kumar Jain v. CIT (2012) 344 ITR 501 (P&H_HC) o.CIT v. Jitendra Mohan (2007) 165 Taxman 524 (Del HC) p. CIT v. Panchand Gandhi

(2005) 279 ITR52 (Guj HC) q. CIT v. Anila ben Upendra Shah (2003) 262 ITR 657 (Guj) r. Lahar Singh Siroya v. ACIT (2016) 138 DTR 331 (Kar-HC) s.Vijay Hamilapurkar v. DCIT ITA No.6048/M/2013 t. ACIT v. Vandana Rana Roy ITA No.6173/M12011 u. Meena Hemnani vs ITO ITA No.5998/M/2010 v. Sneha Bimal Parekh v. CIT ITA No.5489/M/2015 w. Sumatichand Tolamal Gouti v.DCIT ITA No.2009/M/2013 15. x. Sanjeev Lall vs CIT Hon. SC 365ITR 389

y. CIT vs Ram Gopal Hon. Delhi High Court ITA 70/2015 09/02/2015

z. Snehabimal vs PCIT MumbaiITA 5489/M/2015

aa. Seeta Prabhu vs ITO Mumbai ITA 1020/M/2015

bb. ACIT vs Shri Keyar Hemant Shah TA No. 671 Mumbai/ 2017 dated 02.04.2019

cc. Circular: No. 471, dated 15-10-1986 162 ITR(St)41

dd.Circular : No. 672, dated 16-12-1993 205 ITR(St) 47

CBDT Circular No.672 and 471 dated 16/12/1993 and 15/10/1986 respectively clarifying that "the allottee gets title to the property on the issuance of allotment letter and the payment of installments is only a follow up action and taking the delivery of possession is only a formality."

As per Principal Commissioner of Income Tax v Vembu Vaidyanathan (ITA No. 1459 of 2016) dated 22/1/2019 Bombay High Court's stated that in reference to CBDT Circular No. 471 it is observed that such allotment is final unless it is cancelled or the allottee withdraws from the scheme and such allotment would be cancelled only under exceptional circumstances. It further noted that payment of instalment was only a follow-up action and taking delivery is only a formality.

The issue involved in the present appeal has also been examined recently by Hon'ble Punjab & Haryana High Court in the case of Vi nod Kumar Jain v CIT Ludhiana having identical facts and relying on circular 471 held that

> *"The allottee received title to the property on the issuance of an allotment letter and payment of installments were only consequential action upon which the delivery of possession followed"*

Admissibility of Section 54 F

1- Article 265 of the Constitution of India reads that "No tax shall be levied or collected except by the authority of law." In terms of the Article 265 of the Constitution, tax can be levied only if it is authorized by law. The taxing authority cannot collect or retain tax that is not authorized. Any retention of tax collected, which is not otherwise payable, would be illegal and unconstitutional.

2. The Supreme Court of India in CIT v. Shelly Products and another 261 ITR 367 held that if the assessee has by mistake or inadvertence or on account of ignorance, included in his income any amount which is exempted from payment of income-tax or is not income within the contemplation of law, the assessee may bring the same to the notice of the assessing officer, which if satisfied, may grant the assessee necessary relief and refund the tax paid in excess, if any.

3- In CIT v. Bharat General Reinsurance Co. Ltd. 81 ITR 303 (Del), this court held that merely because the assessee wrongly included the income in its return for a particular year, it cannot conferjurisdiction on the department to tax that income in that year even though legally such income did not pertain to that year.

4. The Bombay High Court in Balmukund Acharya vs DCIT, CIT and UOI 310 ITR 310 held that Tax can be collected only as provided under the Act. If any assessee, under a mistake, misconception or on not being properly instructed is over assessed, the authorities under the Act are required to assist him and ensure that only legitimate taxes due are collected.

5. The Bombay High Court in Nirmala L. Mehta v. A. Balasubramaniam, C.I.T. (2004) 269 ITR 1 held that there cannot be any estoppel against the statute. Article 265 of the Constitution of India in unmistakable terms provides that no tax shall be levied or collected except by authority of law. Acquiescence cannot take away from a party the relief that he is entitled to where the tax is levied or collected without authority of law.

6. Circular No. 14(XL-35) of 1955, dated 11.4.1955, issued by the Central Board of Direct Taxes and relied upon by the Petitioner reads as under:

"Officers of the department must not take advantage of ignorance of an assessee as to his rights. It is one of their duties to assist a tax payer in every reasonable way, particularly in the matter of claiming and securing reliefs and in this regard the officers should take the initiative in guiding a tax payer where proceedings or other particulars before them indicatethat some refund or relief is due to him. This attitude would, in the long run, benefit the department, for it would inspire confidence in him that he may be sure of getting a square deal from the department. Although, therefore, the responsibility for claiming refunds and reliefs rests with the assesses on whom it is imposed by law, officers should –

(a) draw their attention to any refunds or reliefs to which they appear to be clearly entitled but which they have omitted to claim for some reason or other;

(b) freely advise them when approached by them as to their rights and liabilities and as to the procedure to be adopted for claiming refunds and reliefs".

7. A reading of the circular shows that a duty is cast upon the assessing officer to assist and aid the assessee in the matter of taxation. They are obliged to advise the assessee and guide them and not to take advantage of any error or mistake committed by the assessee or of their ignorance. The function of the Assessing Officer is to administer the statute with solicitude for public exchequer with an inbuilt idea of fairness to taxpayers."

6. The ld DR vehemently supported the order of the ld AO and ld CIT(A).

7. We have carefully considered the rival contentions and also perused the orders of the lower authorities. The first issue that needs to be decided is whether the asset sold by the assessee is a 'long term capital asset' or 'short term capital asset'. The brief controversy between the assessee and the

revenue is that the revenue says that date of conveyance deed by Haryana Development Authority in favour of the assessee made on 27.12.2011 shall be considered as the date of acquisition of asset and such asset is sold on 28.03.2013 , the impugned asset is held for less than 36 months, it is a short term capital assets. The assessee says that the assessee was transferred allotment letter from original allottee of land by HUDA on 31.05.2002 and therefore, from the date of allotment itself the assessee held the property for more than 36 months, hence the long term capital asset. Now the above issue is clearly covered in favour of the assessee by the decision of the Hon'ble Bombay High Court in ITA No. 1459/2016 dated 22.01.2019 which says by considering Circular No. 471 dated 15.10.1986 that date of acquisition of the asset shall be considered when the letter of allotment was issued. No doubt the impugned asset in that decision was a residential asset whereas, in the present case it is plot of land. However, merely because there is a change in the nature of immovable property, the principles of determining date of acquisition cannot change. In view of this we direct the ld AO to consider the date of allotment on 31.05.2002 as the date of acquisition of the impugned asset. Thus what is transferred by the assessee is a long term capital assets and not a short term capital assets. In view of this, the impugned profit or gain on sale of the above asset shall be considered as long-term capital gain. Thus, findings of lower authorities are reversed. Accordingly, ground No. 1 and 2 of the appeal are allowed.

8. Ground No. 3 of the appeal is against the denial of deduction u/s 54F of the Act. The ld AO was requested vide letter dated 29.01.2016 during the course of assessment proceedings to allow the alternative claim u/s 54F of the Act. The alternative claim of the assessee was also rejected on the merits. The only reason for rejection was that the property has been registered in the name of the assessee only, however, the payment towards the installments have been made to HUDA from the accounts of the parents of the assessee. The ld AO noted that the total consideration paid to HUDA of Rs. 4177715/- out of which only Rs. 2478500/- has been paid by the assessee therefore, the assessee has not invested the full net sale consideration for acquisition of the new asset. The second reason the ld AO noted that the new property has been purchased in the name of the assessee and mother of the assessee

whereas, the property sold was only in the name of the assessee. Thus, the mother of the assessee has also contributed to the capital asset. Hence, the ld AO held that claim of deduction u/s 54F is not allowable. The ld CIT(A) has clearly held that as the impugned asset sold is a short term capital asset there is no benefit of provision of section 54 and 54F is available to the assessee. However, as we have already held that impugned asset is a long term capital asset and the capital gain earned by the assessee is a long term capital gain and therefore, now the assessee after all other conditions are satisfied is eligible for claim of deduction u/s 54/54F of the Act. Therefore, we set aside ground No. 3 of the appeal to the file of the ld CIT(A) with a direction to decide about the claim of the assessee. Accordingly, ground No. 3 of the appeal is restored back to the file of the ld CIT(A). Needless to say that assessee may raise the contention about the allowability of exemption u/s 54F before him and after giving him an opportunity of hearing the issue may be decided. Accordingly, ground No. 3 of the appeal is allowed with above direction.

9. In the result appeal of the assessee is allowed for statistical purposes.

Order pronounced in the open court on 23/09/2019.

-Sd/-	-Sd/-
(BHAVNESH SAINI)	(PRASHANT MAHARISHI)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Dated: 23/09/2019
A K Keot

Copy forwarded to

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

ASSISTANT REGISTRAR
ITAT, New Delhi