

Income Tax Appellate Tribunal - Mumbai

Mrs. Gulshanbanoo R. Mukhi vs Joint Commissioner Of Income Tax on 16 January, 2002

Equivalent citations: 2002 83 ITD 649 Mum, (2003) 78 TTJ Mum 768

Bench: R Tolani, S Mehrotra

ORDER R.P. Tolani, J.M.

1. This appeal filed by the assessee arise out of the order of the CIT(A) for asst. yr. 1996-97. Elaborate and argumentative grounds are raised, which, in effect raise the following grounds of appeal:

(1) Challenging reopening of assessment under Section 147/148 of the Act.

(2) The CIT(A) erred in upholding the Jt. CIT's order holding that the assessee is entitled for exemption under Section 54 of the Act in respect of one flat only and thereby riot considering exemption for the investment made in another flat in the same building while computing the capital gains chargeable to tax.

(3) The CIT(A) erred in passing an order of enhancement under Section 251(2) of the Act on the ground that the expenditure incurred by the assessee to bring the new flat in a habitable condition was not incredible in the cost of new flat and thereby disallowing the amount of Rs. 14,94,357.

(4) The CIT(A) erred in passing an order of enhancement under Section 251(2) of the Act rejecting the valuation report of a Government approved valuer for fair market value as on 1st April, 1981, of the fiat sold by the assessee. The registered valuer had worked out the fair market value at Rs. 1,22,12,644 and the C1T(A) has applied his own method by adopting the same to be at Rs.26,17,542.

2. Briefly stated the facts are that the assessee was owner of a flat at 7/B, Sunita, E.G. Kher Marg, Malabar Hill, Mumbai, The same was sold by the assessee for a consideration of Rs. 13,25,00,000 vide sale deed dt. 29th Nov., 1995.

The assessee filed return of income disclosing the capital gain thereon based on the following working :

Rs.

Rs.

Net consideration on sale of flat (details as per separate statement attached) 12,84,11,500 Less: (1) Valuation of flat as on 1-4-1981 (As per valuation report attached) 1,22,12,644 (2) Share money (3) Deposits with Comtrust Co-op. Housing Society Ltd.

1,22,16,895 Index cost 1,22,16,895X281/100 3,43,29,474 Less : Exempt under s. 54 investment in residential flat 9,40,82,026

1. Amount already paid (i) Up to 31-3- 1996 3,15,08,107

(ii) 1-4-1996 to 31-8-1996 30,32,551

2. Amount deposited with nationalised Bank (Xerox copy of proof enclosed) 2,87,00,500  
6,32,41,158 Taxable capital gain 3,08,40,868 The return of the assessee was accepted under Section 143(1)(a). Subsequently it was noticed that the amount deposited by the assessee under capital gain tax scheme i.e. Rs. 2,87,00,500, was utilised for the purchase of another flat, i.e. the assessee claimed exemption under Section 54 in respect of purchase of flat for a consideration of Rs. 3,15,07,107 vide purchase deed dt. 18th Dec., 1995, as also in respect of flat purchased for Rs. 2,87,00,500 on 14th Jan., 1997. The AO also noticed that an amount of Rs. 30,32,551 spent on the flat during the period 1st April, 1996, to 31st Aug., 1996, was also included in the claim of exemption under Section 54. According to the AO, the exemption under Section 54 was available only for one house. The assessee had made excess claim of deduction under Section 54, reasons to this effect were recorded and the AO reopened the assessment by issuing notice under Section 148. The assessee objected to reopening as being bad in law which was not accepted.

3. During the course of assessment the assessee was asked to explain the circumstances under which exemption under Section 54 was claimed in respect of two separate flats and other aspects to which the assessee replied as under :

"In the statement containing details of taxable long-term capital gain on sale of residential flat, exemption has been claimed in respect of investments in residential flats. In this respect, a query was raised as to whether the exemption claimed under Section 54 is in accordance with the provisions of the Act particularly when the investment relates to two residential flats in the same building. As explained hereinafter, the exemption claimed is in accordance with the provisions of the Act.

The relevant details as to the consideration received on sale of the old residential house and the utilisation of the capital gain arising on the said transfer of the residential house in purchase of new residential houses already contained in the above mentioned statement. At the outset, it may be pointed out that Section 54 of the Act is intended to give relief in respect of capital gain arising from the transfer of a residential house if the net-consideration is invested in the purchase or construction of the residential house. The opening words of Section 54 are as under:

"54(1) Subject to the provisions of Sub-section (2), where, in the case of an assessee being an individual or an HUF, the capital gain arises from the transfer of a long-term capital assets, being buildings or lands appurtenant thereto, and being a residential house, the income of which is chargeable under the "Income from house property" (hereinafter 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, xxxx."

The expression a 'residential house' used in Section 54 would mean in the context any residential houses and not one residential house. Unlike in the case of Section 23 or Section 53 or Section 54E of the IT Act there is no express restriction under Section 54 to the effect that assessee should purchase only one house so as to qualify for concession or exemption. Therefore, 'a' would mean 'any' and not necessarily 'one'. In other words, the expression 'a residential house' is descriptive of the nature of the property and has no reference to the numerical figure of the property. In this regard, a useful reference can be made to the decision of the Tribunal, Bombay Bench, in K.G. Vyas v. ITO (1986) 26 TTJ (Bom) 491 : (1986) 16 ITD 195 (Bom) wherein it is held that assessee is entitled to exemption in respect of total amount invested in four flats in a case where the assessee sold his residential flat and with sale proceeds purchased four flats in the same building, although two flats on first floor and one flat each on second and third floors, since all the four flats have been purchased by the assessee in the same building for the purpose of his own residence and were being used by him for the said purpose only. The Tribunal had clearly pointed out that a house may consist of more than one self-contained dwelling unit and, therefore, all the four flats in question was regarded as a house of the assessee and not as separate houses. In giving this decision, the Tribunal strongly relied upon the following judgments of the Courts.

(1) CIT v. Kodandas Chanchlomal (1985) 155 ITR 273 (Guj):

Wherein it is held that house property for the purpose of Section 54 has the same meaning as the concept of house property under Sections 22 to 27 of the Act and that it takes into account all residential units particulars in these days when multistoried flats are becoming the order of the day.

(2) Shivnarain Chowdhury v. CWT (1977) 108 ITR 104 (All):

Wherein it has been held that several self-contained dwelling units which are contiguous and situate in the same compound and within common boundaries and having unity of structure could be regarded as one house for the purpose of granting exemption under Section 5(1)(iv) of the WT Act.

The following text of clarification issued by the CBDT would further strengthen our stand outlined above as to the entitlement of exemption under Section 54 as claimed in the return. The clarification issued is as under:

'Assessee retained more than one house for the purpose of his own or parent's own residence and has used them for such residence from time to time whether capital gains arising on transfer of each of such houses should qualify for exemption.

Sec. 54 lays emphasis on the use of the property mainly for the purpose of assessee or his parents' own residence. If an assessee has retained more than one house for the purpose of his own or the parents' own residence, and has used them for such residence, and not for any other purpose the capital gains arising on transfer of each of such house would qualify for exemption under Section 54, provided the other conditions spelt out therein are fulfilled.

[Letter : No. 207 24/76~IT(A-II), dt. 25th March, 1977 [copy enclosed] Thus, it is submitted keeping in view the context, the object and purpose of Section 54 for giving relief in respect of investment in residential house, the exemption claimed under Section 54 in the return of income in respect of residential flats in the very same co-operative society is in accordance with the provisions of the Act for which sufficient justification is furnished hereinabove."

The AO, however, held that the provisions of Section 54 of the Act are very clear and the exemption is available only in respect of one residential house. If the intention of the legislature was to give the benefit of Section 54 to more than one house, the same would have been made clear by stating that exemption is available to residential house or houses and the word "a" would not have been used. As per the plain meaning of the words used in Section 54, "a residential house" means one residential house only. The AO distinguished the various case laws and the CBDT circular quoted above and accepted the indexed cost of acquisition as shown by the assessee. However, while allowing exemption under Section 54, the same was granted only in respect of flat No. 8D, Land's End purchased on 18th Dec., 1995. In effect, the exemption was denied in respect of claim of amounts paid from 1st April, 1995 to 31st Aug., 1996, totalling to Rs. 30,32,551 and amount deposited in the capital gain tax scheme which was used for purchase of another flat in the same building.

4. Aggrieved, the assessee preferred first appeal where the assessee objected to the validity of the reopening of assessment under Section 147. This ground of the assessee was dismissed and the validity of reopening of the assessment was upheld.

5. On merits, the CIT(A), in principle, accepted the action of the Assessing Officer in granting exemption under Section 54 in respect of the first flat, i.e. flat No. 8D, Land's End, and the rest of the disallowance as done by the AO was confirmed.

6. In addition to the above, the CIT(A) proposed to enhance the assessment on the following issues :

(1) While claiming deduction under Section 54, the assessee included repairs and renovation expenses to the tune of Rs. 17,26,908 in the cost of new asset i.e. Flat No. 8D, Land's End out of which the AO allowed an amount of Rs. 14,94,357 while working out capital gains. The same was enhanced.

(2) The fair market value as at 1st April, 1981, in respect of the flat sold in Sunita Building was determined by registered valuer at Rs. 1,22,12,644. The same was considered as seriously defective and modifications were effected. The CIT(A) undertook a lengthy exercise and rejected the fair market value adopted by the registered valuer and by this exercise came to a conclusion that the valuation should be as under:

(a) Land value Rs. 7,39,065

(b) Land development cost (as taken by the valuer) 2,09,000

(c) Cost of construction (as taken by the valuer) 9,61,000

(d) Additional cost for various factors as discussed above 9,42,172 Total 28,51,237 Less : Depreciation on super structure for 10 years calculated at 12.5 per cent of (c + d) 2,37,946 (Taking total durability of the building to be 80 years) 26,13,291 Applying the indexed cost valuation, CIT(A) taken the cost of the flat at Rs.

73,55,293 as against adoption of Rs. 3,43,20,474 by the AO,

7. Regarding the allowability of only one flat under Section 54(1) the CIT(A) accepted the conclusion of the AO that a residential house means one residential house. Relying on the Supreme Court judgment in the case of *Municipal Corporation of Greater Bombay v. Mafatlal Industries* AIR 1996 SC 190 it was held that the word used in the statute should be given their natural and popular meaning in the absence of specific definitions of a residential house, therefore, ordinarily means, structurally one residential unit as the common man understands it. Regarding *K.G. Vyas v. ITO* (supra) the CIT(A) held that accepting more than one residential unit as a residence is an exception dictated by compulsion of circumstances but not a rule to be followed universally. The assessee had referred to Section 13 of the General Clauses Act. The CIT(A) held that the provisions is to be seen with reference to the context. Therefore, every singular word will not include plural or vice versa as the same in the instant case will be repugnant to the subject. The assessee had represented to the Land's End Cooperative Housing Society that the present premises in occupation consisted of only two bed-rooms and was not sufficient to accommodate the family, therefore, a desire existed to acquire any additional premises preferably in the same block of building, if available. The assessee had stated of her family consisting of herself, husband, three married daughters and grandchildren. The CIT(A) was of the view that the daughters were married and were part of their husband's family and at the most, they may be making occasional visit to their parents. The CIT(A) further observed that the first flat purchased was sufficient for the requirement of the assessee's family is indicated by the fact that the second flat was acquired after a gap of one year. Besides, the assessee let out the flat at 8D, to M/s Toman Corporation of Japan w.e.f. 1st Aug., 1998, for a monthly compensation of Rs. 65,000 which conclusively proved that the assessee did not require both the flats for residential purposes. The assessee's another, argument was that the flats purchased need not be used for assessee's own residence for qualifying for exemption under Section 54 in terms of the amended provisions of Section 54 w.e.f. asst. yr. 1983-84. In fine, the CIT(A) held that the size of the assessee's family did not persuade him to adopt an elongated meaning of residential house to accommodate two flats on two different floors, consequently exemption under Section 54 in respect of first flat i.e. at 8D at Land's End only was given. Aggrieved, the assessee is before us.

8. The learned counsel for the assessee at the outset contended that the reopening of the assessment in the instant case is bad in law. The return of income was filed by the assessee on 30th Aug., 1996, and order under Section 143(1)(a) was made and no order under Section 143(3) was made. Since order under Section 143(1)(a) is not an assessment, a notice under Section 143(2) could have been issued. Having not done so, it can be presumed that the AO had dispensed with the assessment and the reopening of an assessment can be made only when there is an assessment. Since order under Section 143(1)(a) is not an assessment, the same cannot be reopened. Therefore, issue of notice under Section 148 was not proper.

9. The learned Departmental Representative relied on the order of the CIT(A) in this behalf upholding the reopening which, inter alia contains that the scheme of the Act suggest that the law intends to treat an assessment under Section 143(1)(a) as an alternative assessment. Consequently, a scrutiny assessment under Section 143(3) need not be done at all and issue of intimation would suffice and in totality of the scheme it can be held that intimation is nothing but an assessment. The learned Departmental Representative further contended that in terms of proviso to Section 143(2), a notice could not be issued after expiry of 12 months from the end of the month in which the return was furnished. The return was filed on 30th Aug., 1996, and by this provision, the issue of notice under Section 143(2) was barred by limitation on 31st Oct., 1997. Since at the time of issue of notice under Section 148 on 4th Feb., 1998, this time-limit has already expired and there was no choice left but to issue notice under Section 148. Under these circumstances, it can be held that the income chargeable to tax had escaped assessment by the time notice under Section 148 was issued. Reliance was placed on Allahabad High Court judgment in the case of Pradeepkumar Har Satan Lal v. AO (1998) 229 ITR 46 (All)

10. The learned counsel for the assessee, in the rejoinder, contended that Section 143(1)(a) is an intimation and not an order or assessment. Since there was no assessment in the case, provisions of Section 147 is not applicable in this case. Reliance was placed on 75 ITR 180 (sic), CIT v. S. Raman Chettiar (1965) 55 ITR 630 (SC).

10.1. We have heard the rival submissions and perused the material available on record. We find merit in the argument of the learned Departmental Representative that the issuance of notice under Section 143(2) as agitated by the assessee can be issued only within a period of 12 months from the end of the month in which the return was filed. In the instant case, by the time the escapement was noticed, the time limit so prescribed was elapsed. Therefore, in any case, the income to this respect had escaped assessment. Since intimation under Section 143(1)(a) was issued, there was no pending return as the rights of the assessee vis-a-vis return filed were settled by provisions of s. 143(1)(a). An order under s. 143(3) was not possible as the time-limit prescribed in this connection had already expired. Therefore, from the information available, there was no assessment of the amount involved in the reasons recorded by the AO. Provisions of Section 147 also does not debar any such situation as the words are--"if the AO has reason to believe.....assess or reassess such income....." Since by the lapse of time, the notice under Section 143(2) could not be issued and no dispute has been raised that there were no reasons suggesting escapement. Under these circumstances, the logical conclusion is that as far as the belief of the AO is concerned, the income had escaped assessment, which AO had power to assess or reassess. Consequently we uphold the order of the CIT(A) on this issue and hold that the reassessment is valid. This issue raised by the assessee by various grounds is dismissed.

11. Coming to the second issue, the learned counsel for the assessee contended that the assessee's family consisted of husband, wife and three married daughters and grandchildren. The assessee had sold her flat in Sunita Apartments and purchased one flat at 8D, 1st Floor, Land's End Building at Dongri Road, Mumbai. The assessee wrote a letter dt. 10th April, 1996, that the flat had only two bed rooms and was not sufficient for members of her family and, therefore, was desirous of acquiring additional premises preferably in the same block of the building. A request was, therefore,

made that if any member of the society is desirous of transferring the flat, the assessee was willing to make a bid. By the time of submitting the return, the assessee had bought this property and made additions thereto and the balance amount on which exemption from capital gain has been claimed was deposited in capital gain account scheme in the nationalised bank. From the amount deposited in Capital Gain Account Scheme (CGAS), the assessee subsequently after following the due prescribed procedure purchased another flat on 14th Jan., 1997, which is within two years from the date of sale, i.e. 27th Nov., 1995. The second flat was purchased by the assessee as it was found that the assessee's family was not able to accommodate properly in the first flat.

12. The learned counsel contended that the size of the family of the assessee required the purchase of second flat. The learned counsel then took us through Section 54(1) of the Act, which reads as under :

"54(1) Subject to the provisions of Sub-section (2), where, in the case of an assessee being an individual or an HUF, the capital gain arises from the transfer of a long-term capital asset, being buildings or land 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, a residential house, 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."

The learned counsel for the assessee contended that the provisions of Section 54 had undergone amendment w.e.f. asst. yr. 1983-84. Prior to this amendment, the flat purchased or constructed should be for the purposes of one's own residence and as per the amended provisions, the exemption was granted if the asset purchased was a residential house. Consequently there is a shift in legislative intention from the "new asset" being compulsorily used for the self-residence to any residential house.

13. The learned counsel further contended that as per the new provisions, the words used are "a residential house" which expression would mean in the context of Section 54 as "any residential

house" and not one residential house. Therefore, "a" would mean "any" and not necessarily "one". In other words, the expression "a residential house" is descriptive in nature of the property and there is no reference to the numerical figure of the property. The learned counsel contended that any residential house would include more than one unit of residential house. The dominant object is that the new asset so purchased should be residential house for the assessee. Therefore, the number of units is not very relevant to the issue. The assessee had acquired a flat on the 8th floor consisting of two bed rooms which was not sufficient for dwelling of her family. Therefore, necessity of the other flat was felt which was duly communicated to the co-operative housing society and on the 10th floor of the same building the assessee bought another flat for her family to be used as a residential house within the stipulated period. Both the flats combinedly fit into the wordings of s, 54 and they can be called any residential house.

14. The learned counsel contended that the matter has to be looked into from the realities of Bombay where availability of a flat of your choice is not certain and there are instances where one has to buy one small flat on a particular floor and the other on the other floor or in some cases buy one flat in one building and the other in the adjoining building. The learned counsel contended that this plea finds support from Section 5(1)(iv) of the WT Act, Section 33(1) of the ED Act, Section 23(3) of the IT Act, General Clauses Act, CBDT circular, dictionary meaning and legislative intention and the scheme. The learned counsel further contended that though the assessee has let out the flat on the 8th floor in August, 1998, still, the same does not alter the legal position as the assessee is complying with the substantive provisions of Section 54(1) of the Act. Reliance was placed on the decision of the Mumbai Bench of the Tribunal in the case of K.G. Vyas (supra) wherein number of flats were considered to be one house. Further reliance was placed on in the case of Col H.H. Sir Harinder Singh v. CIT (1972) 83 ITR 416 (SC) to the effect that in the singular, plural is included, and in the case of Shivnarain Chowdhury v. CWT (1977) 108 ITR 104 (All) which has been followed by the Kerala High Court in CWT v. Mrs. Najima Nisar (1992) 197 TTR 258 (Ker). The learned counsel further contended that the flats have a structural unity in the sense that one is on the 8th floor and the other on the 10th floor. The floors are connected by elevators, the building is same, and therefore, the approach is also connected. Therefore, looking at their structural unity point of view as also looking at the family requirement and Bombay realities, both the flats are nothing but a residential house which are eligible for deduction under Section 54(1).

15. The learned Departmental Representative, on the other hand, argued that the language of Section 54 is plain and simple and leads to one-interpretation. The words in the section are to be given its ordinary grammatical meaning. The words used are--"a residential house". The plea of the learned counsel for the assessee that the Revenue is overemphasising the words "the residential house" is also not correct as the section itself refers to "a residential house" in Clause (i), i.e. (i) if the amount of the capital gain is greater than the cost of the residential house so purchased or constructed....". It was contended that the section refers not only to "a residential house" which in its plain and grammatical meaning means one residential house, the latter words, "the residential house" also signifies that what the legislature clearly intends and means by these words is contemplation of one residential house by way of purchase or construction. It was contended that when the statute is capable of drawing only one plain meaning, no rule of interpretation should be applied irrespective of the probable difficulties or absurdities. From the ordinary and grammatical

connotation also purchase of a residential house will mean one unit of residential house. In the instant case two different flats liable to taxes in two different categories situated in different floors bought from two different persons are nothing but two separate residential units. From statute point of view the exemption is entitled to "a residential house/the residential house" meaning thereby one residential house. Assuming that ordinary parlance and grammatical meaning is to be given, a residential house means a unit and more so in Mumbai a flat is a unit by itself.

16. Corning to the arguments of the assessee that the earlier flat was bigger in space and the assessee's family could not be accommodated in flat at 8D, Land's End Building, the learned Departmental Representative contended that the plea of the assessee is full of inconsistencies. First of all three married daughters do not constitute part of assessee's family. All of them are living abroad and are not resident in India. At the most, they come to visit their parents. Therefore, the plea of the assessee that the family is an extended family consisting of three married daughters and grandchildren is not substantiated by the assessee. The inconsistency in the stand of the assessee is further proved from the fact that the one flat has been given on rent after the second was purchased goes to show that the same was not required for the residential use of the assessee. Assuming the additional utility test is to be applied, the reasons given by the assessee herself contradict the conduct of the assessee. The whole exercise was to avail the benefit of capital gain and to let out the property on rent. The law should not be interpreted in such a manner so as to promote such planning.

17. The learned Departmental Representative further contended that "a" can be "any" but "any" cannot be "many". Besides, the statute has consciously used the words "a residential house" as well as "the residential house". The case law cited by the counsel for the assessee was sought to be distinguished on the fact that they were applicable to legislative positions as applicable prior to 1st April, 1983. Therefore, they are not applicable. Besides, it was contended that once the language of the new provisions is very clear, and capable of giving plain meaning, there is no purpose in going for external aids of construction and case laws which are based on earlier provisions by drawing similies therefrom. Apart from the inconsistencies in the stand of the assessee about the legitimate residential needs it was further contended that the flats being separate and distinct residential units were on separate floor and from additional utility point of view also, they cannot be considered as a house. Reliance was placed on CIT v. Gautam Sarabhai Trust (1988) 173 ITR 216 (Guj) and CIT v. Poddar Cement (P) Ltd. (1997) 226 ITR 625 (SC). In fine it was contended that the words used are not only "a residential house" but it is supplemented by the use of words "the residential house". So what is contemplated by Section 54(1) is purchase or construction of one residential house. Since the reading of the statute leads to only one meaning, there is no use of external aids of constructions or drawing analogies from case laws. The operation of the statute has to be given effect to. The Bombay realities and other factors may be inconveniences to the assessee but they cannot override the plain meaning of the statute.

17.1 The learned counsel for the assessee, on the other hand, contended that there is no dichotomy in the words "a residential house" and "the residential house" as sought to be canvassed by the learned Departmental Representative in Section 54(1)(i). It was further contended that once it is held that "a residential house" may involve more than one units, then the user of the residential

house is not necessary to be established. There can be various units in one structure which means one, The assessee's two units were a residential house. Therefore, the same is entitled to exemption.

18. We have heard the rival submissions and perused the material available on record. The provisions of Section 54(1) are reproduced above. Our first endeavour is to ascertain whether the provisions are capable of giving meaning by a plain reading. In Section 54(1)(i), the words used in connection with purchasing or constructing are "a residential house". In Section 54(1)(ii), the words used are "if the amount of the capital gain is greater than the cost of the residential house so purchased or constructed....". If we take up the plea of the learned counsel for the assessee, the Revenue is emphasising that "a residential house" means "a residential house" thereby one residential house. We find that it is not the emphasis of the Revenue but it is the wordings of the provision itself. We are dealing with a situation where the legislature wants to confer some benefit to the assessee under certain conditions. If we take the ordinary and grammatical connotations, then "a residential house" means a dwelling unit. In Bombay one flat will mean one residential house. The assessee's requirements may be many. But what we are concerned is with the plain reading of the provisions of the Act. The decisive factor is not the perception of the assessee but the clear intent of the law, Pitted against each other, the intent of law has to prevail. According to under Sections 54(1), 54(1)(i) and 54(1)(ii) uses the words "a residential house" and "the residential house" for the same thing. Similarly, "the residential house" is purported to be referred to as "the new asset" for rest of the provisions. It has to be presumed that legislature is oblivious of the selection of words. If the legislature had an intention to exempt more than one unit it could have been done by simple words like "residential house or houses", "the new asset/assets". Similarly in Clauses (i) and (ii), the cost of acquisition of new asset is directed to be taken as Nil if the new asset is sold within three years of its purchase. If the legislature intended more than one residential units, here also it could have used the words "if there are more than one units the cost of acquisition in respect of new asset should be the date on which it is acquired". The whole scheme of Sections 54(1)(i) and (ii) spells out that what the legislature means unambiguously is one residential house. The Hon'ble Supreme Court in CIT v. Vegetable Products Ltd. (1973) 88 ITR 192 (SC) has held that if the language of the statute is plain, the fact that the consequences of giving effect to it may lead to some absurd result is not a factor to be taken into account in interpreting a provision. It is for the legislature to step in and remove the disparity. Further, the Supreme Court in CED v. Alladi Kuppaswamy (1977) 108 ITR 439 (SC) has opined "it is true that a physical statute should be construed strictly so as to be given every benefit of doubt to the subject. But where the phraseology of a particular section of the statute takes within its sweep the transaction which is taxable, it is not for the Court to strain and stress the language of the section so as to enable the taxpayer to escape the tax". Weighing on the scale of these observations of the Hon'ble Supreme Court, we are of the view that the provisions in question do not create any ambiguity and the language is plain. We appreciate that the plain interpretation may result in some inconvenience, for that matter looking at Bombay realities some absurdities, but the same cannot prevail over the plain meaning of the statute. The question of giving benefit of doubt to the subject also arise when there is some ambiguity, but where the provisions, as we have already described, are plain and unambiguous, we find ourselves helpless to interpret the section in such a way with a view to avoid the contemplated hardships. The case laws cited by the learned counsel for the assessee pertain to interpretations of provisions prior to 1st April, 1983. They could have been helpful have we found some difficulty with the meaning of the provisions. Since the meaning of the

provisions is plain, simple and unambiguous, these external aids of interpretation and drawing analogies from case laws do not benefit the cause of the assessee. The Revenue has demonstrated that in assessee's case, the so-called family requirements also do not exist in the sense that three daughters were married and living abroad. They occasionally visit their parents and are nonresidents. Consequently, the size of the family as being projected, cannot be considered on the common parlance connotations. Besides, the residential need of the assessee could not be established for the second flat as the same was let out. In any case, this issue does not have much bearing as we held that the provisions in question are clear and they mean purchase or construction of one residential house. Under these circumstances we uphold the order of the lower authorities on this issue. This issue arising out of several grounds is dismissed.

19. The third issue raised is as under:

"Without prejudice to ground I above Ground III

1. The CIT(A) erred in passing an order of enhancement under Section 251(2) of the Act on the alleged ground that expenditure incurred by the appellant to bring the new flat to a habitable condition was not includible in the cost of the new flat, thereby disallowing an amount of Rs. 14,94,357 which was earlier allowed by the Jt. CIT out of the total expenditure of Rs. 17,26,908.

2. He further erred in making certain incorrect, immaterial and/or irrelevant observations, in particular the following :

(i) the expenditure for the kind of minor defects pointed out by the architect certainly could be a minor amount and not as much as Rs. 17,26,908. The appellant obviously has undertaken substantial renovation to achieve a luxury status.

(ii) the term "cost of the new asset" should necessarily refer to purchase consideration and not subsequent expenditure unrelated to purchase transaction itself.

He failed to appreciate and ought to have held that:

(i) the expenditure on repairs was incurred only to bring the new flat to a habitable condition and fit for occupation by the appellant and her family.

(ii) the term "cost" is not synonymous with the "price" that is paid for the acquisition of an asset, as is laid down by various Courts. It is well-settled law that any expenses incurred to bring an asset into existence and to put it in a working condition are to be included in determining its cost.

(iii) hence, the expenses incurred by the appellant to bring the new flat to a habitable state were includible in its cost, and as such qualify for exemption under Section 54.

4. The appellant, therefore, prays that Rs. 17,26,908 incurred by the appellant on repairs to the new flat, be included in the cost of the new flat, and allowed as a deduction under Section 54 while

computing capital gains chargeable to tax."

20. Briefly stated the facts are that after purchasing the flat No. 8D, the assessee claimed to have incurred repairs and renovation expenditure to the tune of Rs. 17,26,908 and included the same in the cost of the new asset. Out of this amount, the AO allowed Rs. 14,94,357. The CIT(A) was of the view that the said amount was not allowable. Consequently notice under Section 251(2) proposing enhancement was issued, pointing out to the assessee that in terms of Section 48(ii), cost of improvement is allowable as a deduction while computing the cost of the original asset sold but there is no such provision allowing subsequent renovations/repairs as part of the cost of new asset. The assessee replied that the flat No. 8D at the time of purchase was not in a habitable condition. The expenditure was incurred to make the same habitable. The same were essential and not luxury expenditure. The word used in Section 54 are "cost of the new residential house". Architects certificate was produced to show that the flat was in a state of general disrepair and inhabitable. The CIT(A) observed that the kind of defects which were pointed out were minor and do not require such heavy expenditure. Huge expenditure was incurred on marbles and other luxury items. No details were furnished in respect of many items and only name of the party and the amount paid was mentioned. The CIT(A) was of the view that the assessee had undertaken substantial renovation to achieve a luxury status. Reference was made to assessee's letter dt. 24th Jan., 2000, addressed to the AO stating that the nature of repairs were such as to make the flat comfortable enough and to be fit for occupation keeping in view the social status and the type of flat stayed earlier. The flat was built 30 years ago. Much attention was not paid in its upkeep and maintenance. The CIT(A) however, was of the view that cost of the "new asset" should necessarily refer to purchase consideration or cost of construction and not subsequent expenditure unrelated to purchase itself. Legislature have provided for cost of improvement in respect of original asset under Section 48(ii), but have not provided it for the new asset. The same could not be an unintended omission. Looking at the time-limit prescribed, the CIT(A) was of the view that looking at the plain language, further renovation, repairs after purchase could not be included in the cost of the new asset. If that was to be allowed, the AO had to read more words into the provision than what actually existed. The assessment was accordingly enhanced by excluding the above amount out of the cost of the new asset as worked out by the assessee.

21. The learned counsel for the assessee contended that the report of the architect placed at paper book p. 35 goes to show that the flat was in a general state of disrepair and was uninhabitable and the same required extensive repairs to make the same to be fit for habitation. The CIT(A) has enhanced the assessment on two counts--(1) that the repairs made out are luxury items; and (2) the plain meaning of the section says that there cannot be further expenditure after the purchase of the residential house is effect. The learned counsel for the assessee took us through various items to reinforce the claim that none of these items were luxury items as the CIT(A) has failed to distinguish as to what he means by luxury. The flat was to be habitated by a family which was already living in a decent flat. Looking at the requirements, the repairs and renovation carried out is not a luxury expenditure. The CIT(A) finding on this issue was assailed.

22. Coming to the meaning of Section 54(1)(i) vis-a-vis the cost of purchase of the new asset, the learned counsel contended that the words used are "cost of new asset" in contradistinction to price

of new asset, the legislature has used the words consciously. The finding of the CIT(A) is to the effect that once the price of residential house is paid, there cannot be further addition to this figure which is not the plain meaning of the words "cost of new asset" which will include not only the purchase price, legal expenses in this behalf, but also the necessary expenditure carried out to make it a habitable residential house and therefore, the word "cost" is used. The CIT(A) has wrongly interpreted the time frame. The legislature has given the time for direct expenditure up to the date of filing of the return and beyond that to invest the capital gain in a bank account under the Capital Gain Deposit Scheme. Consequently, the word "cost" being inclusive of necessary repairs is further strengthened by this time frame provided by the legislature to the assessee to go for a proper residential house. Consequently, the repair subsequently carried out by the assessee to make the house habitable are within the purview of the words "cost of new asset" and ought to be allowed while working out deduction/exemption under Section 54(1). The action of the CIT(A) in enhancing the assessment was assailed.

23. The learned Departmental Representative, on the other hand, contended that the expenditure in question are improvement expenses and are incurred after effecting the purchase. Section 54(1)(ii) refers to "cost" only which in common parlance means price of the house. Wherever the legislature have intended to increase the ambit of word "cost", necessary words are used as rightly observed by the CIT(A) in connection with Section 48(iii) with reference to cost and improvement. In the existing provisions, there cannot be further addition after the purchase is completed.

24. We have heard the rival submissions and perused the material available on record. The words used about the amount spent on purchase of new asset are "cost thereto" and not "price thereto". The cost includes purchase as well. Consequently, we are of the view that the word used signifies that the amount of purchase will include other necessary expenditure in this behalf to make a residential house habitable and taken together will be the cost of the new asset. We have perused the items of the report of the architect. The residential house was in a state of general disrepair and was uninhabitable. Consequently, the necessary repairs carried out to make the same habitable will constitute part of the cost of new house. We hold that the CIT(A) was not justified in enhancing the assessment by excluding the amount of Rs. 14,94,359 while working out deduction under Section 54. The enhancement is hereby deleted.

25. The fourth issue taken is as under:

"Without prejudice to ground I above Ground IV

1. The CIT(A) erred in passing an order of enhancement under Section 251(2) of the Act wherein he has rejected the valuation report of a Government approved Valuer for the fair market value ("the F.M.V.") as on 1st April, 1981, of the flat sold by the appellant of Rs. 1,22,12,644.

2. He further erred in not referring the matter to the Departmental Valuation Officer and instead calculating the F.M.V. of the property as on 1st April, 1981, by his own methods of valuation at Rs. 26,17,542 as against Rs. 1,22,12,644 as per the valuation report of the Government approved valuer."

26. Coming to ground No. 4, the controversy in this behalf is that for the purposes of working out capital gains the indexed cost of acquisition is determined by adopting fair market value (FMV) as on 1st April, 1981, and thereafter the same is adjusted by inflation index. The assessee submitted a valuation report from an approved valuer determining the same at Rs. 1,22,12,644 and worked out the capital gains accordingly by suitably adding the inflation index. The AO accepted the same. The CIT(A), however, was of the view that the valuation report submitted by the assessee contains serious deficiencies/defects in the form of--

- (i) The land value has been wrongly calculated.
- (ii) Depreciation has not been allowed while determining fair market value.
- (iii) A fallacious method of multiplying factors has been adopted.

The CIT(A) has given elaborate observations on these points and held that the same should be adopted as on 1st April, 1981, at Rs. 26,17,542.

27. The learned counsel for the assessee contended that the valuation report submitted by the assessee adopts land and building method for valuation in view of the six characteristic points of Sunita Building which is supposed to be one of the best buildings. The CIT(A) has summarily denied that such strong points existed in the said Sunita Building. The learned counsel further contended that the report submitted by the assessee was from a Government approved valuer, who had given a technical report. The CIT(A) is not a technical person. The comparative instances given are of a flat which was occupied by tenant and was to be sold at a considerably lesser amount because of the presence of a tenant. The assessee sold the flat with a vacant possession. These two instances cannot be compared. The learned CIT(A) instead of himself touching the technical aspect should have referred the same to the Departmental Valuation Officer in this behalf. A reference was made to Section 55A. Reliance was placed in the case of Raj Paul Oswal v. CWT (1988) 171 ITR 489 (P&H) to the effect that the word used "may" in the provisions means "shall". The valuation report of the assessee was described and it was contended that the same being realistic and based on technical data, should have been relied on.

28. The learned Departmental Representative, on the other hand, contended that the valuation report submitted by the assessee is a self-serving document. Besides, it is not a final say about the FMV of any property. It was only a piece of evidence in the form of advice. Reliance was placed in the case of Hotel Amar v. CIT (1993) 200 ITR 785 (On). It was contended that the depreciation of property was not properly considered. Multiplying factors adopted by the assessee's valuer were not correct and purely theoretical. The assessee's registered valuer has given only one sale instances and ignored to take into consideration the sale of flat in the same building, i.e. "Sunita". Various other discrepancies in the assessee's valuation report was pointed out. It was contended that the CIT(A) has given correct effects to the valuation report submitted by the assessee. It was not mandatory for the CIT(A) to refer the matter to the DVO. The CIT(A) by his plenary powers is empowered to interfere with a piece of evidence in the form of an expert advice and give the same correctional treatment.

29. We have heard the rival submissions and perused the material available on record. The controversy is based on the report of an approved registered valuer which is contended to be defective by the Department. The Department also has similar type of expert team as a counterpart in the form of Departmental Valuation Officers. The clash is between technical aspects like the effect on depreciation, multiplying factors, etc. In the given set of facts, the dispute revolves around intricate problems of localities where the price varies not only from one building to other but in the same building depending upon various factors like the floor, access, nature of building, etc. Besides, the issue address itself in diverse ways regarding valuation of land and building method, sale instances, comparison method, etc. We are of the view that this issue can be decided in conformity with the principle of natural justice if the matter is referred to the Departmental Valuation Officer. We accordingly deem it fit to set aside the issue and restore it back to the file of the CIT(A) with a direction to refer the matter to the DVO and then take an appropriate view in accordance with the provisions of law. This ground of the assessee is allowed for statistical purpose.

30. In the result, appeal of the assessee is partly allowed.