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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

INCOME TAX APPEAL NO.545 OF 2002

Humayun Suleman Merchant … Appellant

vs.

The Chief Commissioner of Income Tax … Respondents
Mumbai City, XVII, Mumbai and Anr.

.....

Mr. B. M Chatterji, Senior Advocate a/w. Ms.Shilpa Goel, Mr.Ranit Basu and Mr. G.S.Pikale i/b. M/s.S.V.Pikale & Co. for the Appellant.
Mr. A. R. Malhotra a/w. Mr. N. A. Kazi for the Respondents.

.....

CORAM : M.S.SANKLECHA &
A.K. MENON, JJ.

DATE : 18th AUGUST, 2016

ORAL JUDGMENT (Per M. S. Sanklecha,J.):-

1 This appeal under Section 260A of the Income Tax Act, 1961 (for short 'the Act') challenges the order dated 17th May, 2002 passed by the Income Tax Appellate Tribunal (for short 'the Tribunal'). The impugned order relates to Assessment Year 1996-97.

2 This appeal was admitted on 25th August, 2004 on the following substantial questions of law :

> *(a) Whether on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal was justified in applying the provisions of Section 54(F)(4) of the Income Tax Act, 1961?*

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> *(b) Whether on the facts and in the circumstances of the case, the Appellate Tribunal was right in holding that the Assessing Officer has rightly computed the deduction u/s. 54F of the Income Tax Act, 1961, restricting the investment in the new asset at Rs.35,00,000/- and thus restricting the exemption u/s. 54F of the Act proportionately to the amount invested?*

3 The undisputed facts leading to this appeal are as under: -

(a) On 29th April, 1995, the appellant sold a plot of land in Mumbai for a consideration of Rs.85,33,250/-.

(b) On 16th July, 1996, the appellant entered into an agreement to purchase a flat for a consideration of Rs.69,60,000/-.

(c) The appellant paid two installments of Rs.10,00,000/- each on 17th July, 1996 and 23rd October, 1996 to the developer / builder i.e. before the due date for filing of return of Income under Section 139(1) of the Act i.e. 31st October, 1996.

(d) On 1st November, 1996 the petitioner paid to the developer a further installment of Rs.15,00,000/- for purchase of flat pursuant to the agreement dated 16th July, 1996.

(e) On 4th November, 1996 the appellant filed his return of income for the Assessment year 1996-97. This was after the due date of filing the return of income.

(f) On 13th March, 2001, the Assessing Officer passed an Assessment Order under Section 143(3) read with Section 147 of the Act. The Assessment Order determined the net

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consideration at Rs.75.39 lakhs. Thereafter the Assessing Officer allowed a proportionate exemption of Rs.31.55 lakhs (out of Rs.35 lakhs paid till the filing of return) from Capital Gain Tax in terms of Section 54F of the Act. However, the balance consideration of Rs.43,84,334/- which was payable for purchase of the flat pursuant to the agreement dated 16th July, 1996 was brought to tax under the head 'Capital Gains'. This on account of appellant's failure to deposit the unutilized consideration for purchase of the flat in specified bank accounts in accordance with the scheme of Central Government as provided under Section 54F(4) of the Act.

(g) Being aggrieved, the appellant-assessee filed an appeal to the Commissioner of Income Tax (Appeals) (CIT(A)). By order dated19th October, 2001, the CIT(A) did record the fact that the appellant had obtained possession of the new flat on 27th January, 1997. However, the order of the Assessing Officer dated 13th March, 2001 was not disturbed.

(h) Being aggrieved the appellant carried the issue in further appeal to the Tribunal. By the impugned order, the Tribunal on an analysis of Section 54F(4) of the Act, came to the conclusion that the appellant had only utilized Rs.35,00,000/- of the net consideration received on sale of land towards purchase of a flat before the due date of filing the return of income. Further, the balance of the net consideration had not been deposited in the specified bank account as mandated by Section 54F(4) of the Act. Thus dismissing the appeal of the appellant-assessee.

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4 It is in the backdrop of the above facts that the two substantial questions of law arise for our consideration:

5 **Regarding Question No.1:-**

(a) No submissions were made specifically by the appellant in support of the question raised herein i.e. applicability of Section 54F(4) of the Act to the present controversy. In fact it is an agreed position between Counsel for the parties that Section 54F(4) of the Act applies to the present facts. The only issue for consideration is its appropriate interpretation.

(b) In view of the above agreed position, question no.1 is answered in the affirmative i.e. in favour of the respondent-revenue and against the appellant- assessee.

6 **Regarding Question No.2:**

(a) The facts leading to this question have been set out in Para 2 herein above. Therefore not repeated here.

(b) Mr.Chatterji, learned Senior Counsel in support of the appeal submits as under:-

(i) The issue arising herein is no longer *res-integra* as it stands covered by the decision of this Court in ***Commissioner of Income Tax Vs. Mrs.Hilla J.B.Wadia [1995]261 ITR 376*** read with Circulars dated 15th October, 1986 and 16th December, 1993 issued by the Central Board of Direct Taxes. So also the decision of Madhya Pradesh High Court in ***Smt. Shashi Varma Vs. Commissioner of Income Tax [1997] 224 ITR 106***. In any event, the decision of the

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Karnataka High Court in ***Commissioner of Income Tax Vs. K. Ramchandra Rao (2015) 277 CTR 0522*** also covers the issue;

(ii) Section 54F of the Act has been brought into the Act with the object of encouraging the housing sector. Therefore a liberal /beneficial interpretation/construction be given to Section 54F(4) of the Act. In support reliance is placed upon the decision of the Delhi High Court in ***Commissioner of Income Tax vs. Ravinder Kumar Arora [2012] 342 ITR 38;***

(iii) Section 54F(4) of the Act has deliberately used the word *"appropriation"* while extending its benefit. It is used in addition to be utilized with a view to extend the scope of its benefit. The word *"appropriation"* means setting apart. Therefore once an agreement to purchase the flat was executed on 16th July, 1996 and the consideration was set aside though not paid it would be considered to be appropriated (set apart) towards the purchase of the flat and the benefit of Section 54F would stand extended; and

(iv) In the alternative, it is submitted that on present facts, the requirements of Section 54F(4) of the Act are satisfied. This is so as the entire amount has been paid to the developer before the last date prescribed to file its return of income. Thus, the issue would stand concluded by the decision of the Gauhati High Court in case of ***Commissioner of Income Tax vs. Rajesh Kumar Jalan [2006] 286 ITR 274.***

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(c) As against the above Mr.Malhotra learned Counsel for the revenue in response submits as under :

(i) On plain interpretation of Section 54F(4) of the Act the petitioner has not utilized the entire net consideration taxable under the head Capital Gains for purchase of the flat. Nor had the appellant deposited the balance unutilized consideration in a specified bank account as notified in terms of Section 54F(4) of the Act. Therefore, the assessee is not entitled to the benefit of exemption from Capital Gains under Section 54F of the Act, to the extent the mandate of Section 54F(4) of the Act, is not satisfied;

(ii) The decision of this Court in Mrs.Hilla J.B.Wadia (Supra) as well as the Circulars dated 15th October, 1986 and 16th December, 1993 issued by the Central Board of Direct Taxes would have no application to the present facts. This in view of the fact that neither the decisions rendered nor the Circular were issued in the context of Section 54F(4) of the Act as it was not in the Act, at the relevant time;

(iii) The word appropriation towards purchase of the new flat used in Section 54F(4)of the Act only covers cases where the flat has already been purchased within one year before date on which capital gains arose on the transfer of the asset. In the present facts, there is no purchase of a flat prior to the sale of the capital asset but the purchase is post sale of the capital asset. This requires utilization and deposit in specified account to the extent not utilized; and

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(iv) The decision of Gauhati High Court in Rajesh Kumar Jalan (supra) would have no application in the present facts as admittedly the amounts have not been utilized or deposited in the specified bank account before the assessee filed his return of income on 4th November, 1996.

(d) For a proper appreciation of the rival submissions, it is necessary to reproduce the relevant portion of Section 54F of the Act which arises for our consideration :

> "54F(1)[*Subject to the provisions of sub-Section(4), where, in the case of an assessee being an individual or a Hindu undivided family] the capital gain arises from the transfer of any long-term capital asset, not being a residential house (hereafter in this Section referred to as the original asset), and the assessee has, within a period of one year before or [two years] after the date on which the transfer took place purchased or has within a period of three years after that date constructed, a residential house (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 the assessee owns on the date of the transfer of the original asset, or purchases, within the period of one year after such date, or constructs, within the period of three years after such date, any residential house, the income from which is chargeable under the head "Income*

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from house property", other than the new asset.

(2) ....

(3) ....

(4) The amount of the net consideration which is not appropriated by the assessee towards the purchase of the new asset made within one year before the date on which the transfer of the original asset took place, or which is not utilized by him for the purchase or construction of the new asset before the date of furnishing the return of income under Section 139, shall be deposited by 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 utilized in accordance with, any scheme which the Central Government may, by notification in the Official Gazette, frame in this behalf and such return shall be accompanied by proof of such deposit; and for the purposes of sub-Section(1), the amount, if any, already utilized by the assessee for the purchase or construction of the new asset together with the amount so deposited shall be deemed to be the cost of the new asset :

Provided that if the amount deposited under this sub-Section is not utilized wholly or party for the purchase or construction of the new asset within the period specified in sub Section (1), then -

(i) the amount by which -

(a) the amount of capital gain arising from the transfer of the original asset not charged under Section 45 on the basis of the cost of the new asset as provided in clause (a) or, as the case may be, clause (b) of sub-Section (1), exceeds

(b) the amount that would not have been so charged had the amount actually utilized by the assessee for the purchase or construction of the new asset within the period specified in sub-Section(1) been the cost of the new asset,

shall be charged under Section 45 as income of the previous year in which the period of three years from the date of the transfer of the original asset expires; and

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

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(e) We shall first examine the scheme of Section 54F of the Act. Section 54F is part of Chapter IV of the Act which inter alia provides for computation of total Income and for that purpose, sets out the various heads of income. Part E of Chapter VI deals with the head of income viz. Capital Gains. It provides for Computation of Capital gains and also for exemption available there under. Section 54F of the Act introduced into the Act with effect from 1st April, 1983 by the Finance Act, 1982 provides exemption from Capital gain on transfer of any long term capital asset in case the same is invested in a residential house. However, the Section when introduced provided that any capital gain arising from transfer of long term capital asset would not be chargeable to capital gains tax, if the same were utilized for purchase of an housing accommodation within a year before or after the date on which the transfer of an capital asset took place or was used for construction of a residential house within a period of three years from the date of transfer of the Capital Asset.

(f) Thus, Section 54F of the Act as incorporated made available the benefit of exemption to purchase a house within one year (amended to two years) or construct a residential house within a period of 3 years from the date on which capital asset has been sold. However, while implementing Section 54F of the Act, it was noticed that at times assessments were completed prior to the expiry of above period of two / three years from the date of sale of the Capital Asset and the assessee had not utilized the amount within the prescribed

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period provided in Section 54F of the Act. This would lead to Assessment orders being rectified by appropriate orders,to determine the availability of benefit of exemption under Section 54F of the Act.

(g) This led to the introduction of sub-section (4) to Section 54F of the Act by the Finance Act, 1987 with effect from 1st April, 1988. Besides introducing sub-section (4) to Section 54F the Finance Act, 1978, also amended Sub Section (1) of Section 54F of the Act to make it subject to provision of sub-section (4) thereof.

(h) As we are concerned with Assessment Year 1996- 97, it is the amended provision which applies. Therefore, now Section 54F(1) of the Act which grants exemption from Capital gain tax where a flat is purchased either within one year prior to the sale of capital asset or within 2 years after the date of sale of the capital asset or where a residential house is constructed within 3 years from the date of sale of the capital asset, is now subject to the provisions of Section 54F(4) of the Act. Thus, where the consideration received on sale of capital asset is not appropriated (where purchase was earlier than sale)or utilized (where purchase is after the sale) then the same would be subject to the charge of capital gain tax, unless the un-utilized amounts are deposited in specified bank account as notified in terms of Section 54F(4) of the Act. The exemption would be available to the un-utilized amounts only if the mandate of

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sub-section(4) of Section 54F of the Act is complied with. Further the proviso to sub-section(4) of Section 54F of the Act, safe guards the Revenue where the assessee had not invested the amounts chargeable to Capital Gains within the time prescribed under sub-section(1)of Section 54F of the Act. This by providing that in such cases,Capital Gain under Section 45 of the Act would be charged on the un-utilized amount as Income of the previous year in which the period of three years from the date of transfer of the capital asset expires.

(i) On the basis of the above broad analysis, we shall now examine the facts of the present case. The sale of capital asset took place on 29th April, 1995 for a consideration of Rs.85.33 lakhs. The agreement for purchase of construction of flat for consideration of Rs.69.90 lakhs was entered into by the appellant on 16th July, 1996. An amount of Rs.35 lakhs were utilized by the Appellant in purchase of flat before the return of income was filed on 4th November, 1996 under Section 139 of the Act. However, the mandate under sub Section (4) of Section 54F of the Act is that the amount not utilized towards the purchase of the flat has to be deposited before the due date of filing return of Income under Section 139(1) of the Act in the specified bank account. In this case admittedly the entire amount of capital gains on sale of asset which is not utilized has not been deposited in a specified bank account before due date of filing of return under Section 139(1) of the Act. Therefore where the amounts of capital gains is utilized before

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filing of the return of income in purchase / construction of a residential house, then the benefit of exemption under Section 54F of the Act is available. Before us it is an undisputed position that except Rs.35 lakhs, the balance of the amounts subject to capital gains tax has not been utilized before date of furnishing of return of income i.e. 4th November, 1996 under Section 139 of the Act. Therefore, on plain interpretation of Section 54F of the Act, it appears that the impugned order of the Tribunal cannot be faulted.

(j) However, the aforesaid view would be subject to the result of our examination of the submissions and case laws relied upon by Mr.Chatterji in support of the appeal to urge a view contrary to the plain meaning of Section 54F of the Act.

(k) Reliance placed by the Appellant upon the decision of this Court in Mrs.Hilla J. B. Wadia (supra) to contend that the issue stands concluded in favour of the appellant-assessee is not acceptable. This for the reason that the only issue for consideration before the Court in the above case was the interpretation of Section 54 of the Act. In the above case the assessee had sold her residential property and invested a substantial amount in a Society for construction of a residential flat in the building to be constructed. The assessee therein had paid substantial amounts to the society and also acquired domain over the flat within a period of 2 years from the date of the sale of her house. At that point of time i.e. for the Assessment Year 1973-74 there was no requirement of depositing any un-utilized amount in a specified bank

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account as now provided under Section 54(2) of the Act (similar to Section 54F(4) of the Act). Therefore the Court had no occasion to consider the provisions of Section 54(2) of the Act which is similar to Section 54F(4) of the Act, with which we are concerned.

(l) Mr.Chatterji, then placed reliance on the observation of this Court in Mrs. Hilla J. B. Wadia (supra) that the Circular issued by the Central Board of Direct Taxes dated 15th October, 1986 in relation to construction of a home by Delhi Development Authority should also be extended to cities like Mumbai, as there is no control over the time taken by the developer / builder to construct the house and give possession of the same to the assessee. The Central Board of Direct Taxes Circular dated 15th October, 1986 was issued only in the context of Section 54 and 54(F) of the Act to clarify that an investment in a flat under the self finance scheme of Delhi Development Authority would be treated as construction for the purpose of capital gain, where an allotment letter has been issued by the Authority and facility of payment in installment is provided for the purchase of flat. It did not even remotely concern itself with the provision of Section 54(2) and/or 54F(4) of the Act with which we are concerned. The Circular only extended the meaning of constructing a residential house within a period of three years from the sale of the capital asset. The subsequent Circular issued in 16thDecember, 1993 by the Central Board of Direct Taxes relied upon by the Appellant, only extended the

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meaning of "constructed within a period of three years" to allotment letters issued by the Co-operative Housing Society or other similar institution for the purpose of 54F of the Act. Therefore, it does not in any manner do away with and / or relax the statutory mandate of depositing the un-utilized amount in the specified bank account as required by sub section (4) of Section 54F of the Act. Therefore, neither the decision of this Court in Mrs.HillaJ. B.Wadia (supra) nor the Central Board of Direct Taxes Circulars dated 15th October, 1986 and 16thDecember, 1993 would govern the issue so as to conclude the issue in favour of the Appellant.

(m) The reliance upon the decision of the M. P. High Court in Smt. Shashi Varma (supra), also does not advance the case of the Appellant. We find that the facts in the above case are similar to the one in Mrs. Hilla J. B. Wadia (supra) and for the same reasons, will not govern the present dispute. In fact, the issue stood covered by the Circular dated 15th October, 1986 as the property purchased therein was of the Delhi Development Authority. Thus, the above decision has no application to the present facts.

(n) Mr.Chatterji, learned Senior Counsel appearing for the appellant assessee then contended on the basis of the two Circulars dated 15th October, 1986 and 16th December, 1993 of the Central Board of Direct Taxes that once an allotment letter has been issued to the assessee, then it follows that the title of the constructed house has passed on to the assessee. Therefore the payment made subsequent to allotment letter in

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installments would not in any manner affect the assessee having satisfied Section 54F(1) of the Act. This submission ignores the fact that Sub Section (1) of Section 54F has been made subject to Sub Section (4) of the Act. The requirement under Section 54F(4) of the Act is the deposit of the unutilized amount in the specified bank account till it is utilized. This requirement has not been done away with in either of the above two Circulars dated 15th October, 1986 and 16th December, 1993 relied upon by theAppellant-Assessee.

(o) Mr.Chatterji, learned Senior Counsel next submitted that in any case the issue now stands concluded in favour of the Appellant by the decision of the Karnataka High Court in K. Ramchandra Rao (supra) wherein an identical question came up for consideration and it was held that even where the assessee had not deposited the un-utilized Capital Gain in an account which was duly notified by the Central Government in terms of Section 54F(4) of the Act, the benefit of Section 54F(1) of the Act would still be available. The Court held that if the intention was not to retain the capital gains but was to invest it in construction of property within the period stipulated in Sub Section (1) of Section 54(F) of the Act then Section 54F(4) of the Act is not at all attracted. We are with respect unable to accept the reasoning adopted by Karnataka High Court in K. Ramchandra Rao (supra). The mandate of Section 54F(4) of the Act is clear that amount which has not been utilized in construction and/or purchase of property before filing the return of income, must necessarily be deposited in an account duly notified by the

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Central Government, so as to be exempted.

(p) Further, Section 54F(4) of the Act specifically provides that the amounts which have not been invested either in purchase / construction of house have to be deposited in the specified accounts before the due date of filing of return of income under Section 139(1) of the Act. The aforesaid aspect it appears was not noticed by the Karnataka High Court. In any case, the entire basis of the decision of the Karnataka High Court in K. Ramchandra Rao (supra) is the intent of the parties. In interpreting a fiscal statute one must have regard to the strict letter of law and intent can never override the plain and unambiguous letter of the law. It is true that normally while construing an all India Statute like the Income Tax Act, we would not easily depart from a view taken by another High Court on an issue arising for our consideration. This on consideration of certainty and consistency in law. However, the view of the other High Courts are not binding upon us unlike a decision of the Apex Court or of Larger or a Co-ordinate Bench of this Court. Thus if on an examination of the decisions of the other High Court we are unable to accept the same, we are not bound to follow/accept the interpretation of the other High Courts leading to a particular conclusion. In this case we find that the decision of the Karnataka High Court in K.Ramchandra Rao (supra) was rendered sub-silentio i.e. no argument was made with regard to the requirement of deposit in notified bank account in terms of Section 54F(4) of the Act before the due date as provided in Section 139(1) of the Act. As observed

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in Salmond's Jurisprudence 12th Edition :

> *"The rule that a precedent sub silentio is not authoritative goes back at least to 1661(m) when Counsel said : 'An hundred precedents sub-silentio are not material'; and Twisden J agreed : 'precedents sub-silentio and without argument are of no moment'. This rule has ever since been followed."*

(q) In fact this Court in ***Commissioner of Income Tax vs. Thana Electricity Supply Ltd. 206 ITR 727*** has observed that a decision of one High Court is not binding as a precedent on another High Court unlike a decision of the Apex Court. In support, reliance was placed in the above order upon the decision of the Apex court in ***Valliamma Champaka Pillai vs. Sivathanu Pillai AIR 1137 1979 (SC) 1937*** to hold that it is well settled that decision of one High Court is not a binding precedent upon another High Court and at best can only have persuasive value. However, at the cost of repetition we must emphasize that the decision of another High court rendered in the context of an all India Act would have persuasive value and normally to maintain uniformity and certainty we would adopt the view ofthe other High Court. However, with the greatest respect, we find that the decision of Karnataka High Court in K.Ramchandra Rao (supra) has been rendered sub-silentio. Therefore, we cannot place any reliance upon it to conclude the issue on the basis of that decision.

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(r) It was next contented by Mr.Chatterji, that liberal / beneficial construction should be given to the provision of Section 54F of the Act as its object was to encourage the housing sector which would result in the benefit being extended to the appellant assessee. In support, reliance was placed upon the decision of Delhi High Court in Ravindra Kumar Arora (supra). We find that observation of the Delhi High Court in Ravindra Kumar Arora (supra) that Section 54F of the Act should be liberally construed was in the context of the benefit being denied as the name of the wife was added to purchase made by the assessee of a new flat. This denial was even though all the requirements of Section 54F of the Act stood satisfied. Therefore the observation of the Delhi High Court would have no application to the present facts.

(s) It is a settled position in law that no occasion to give a beneficial construction to a statute can arise when there is no ambiguity in the provision of law which is subject to interpretation. Thus in the face of the clear words of the Statute the intent of parties and/or beneficial construction is irrelevant. In fact, the Apex court in ***Sales Tax Commissioner vs. Modi Sugar Mills [1961] 12 STC 182*** reiterated the well settled principle of interpretation in the following words:

> *"In interpreting a taxing statute, equitable considerations are entirely out of place. Nor can taxing statute be interpreted on any presumption or assumptions....It must interpret a taxing statute in the light of what is clearly expressed ..."*

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Recently, the Supreme Court in ***Mathuram Agrawal vs. State of Madhya Pradesh [1999] 8 SCC 667*** has observed as under :-

> *"The intention of the Legislature in a taxation statute is to be gathered from the language of the provisions particularly where the language is plain and unambiguous. In a taxing Act it is not possible to assume any intention or governing purpose of the statute more than what is stated in the plain language. It is not the economic results sought to be obtained by making the provision which is relevant in interpreting a fiscal statute. Equally impermissible is an interpretation which does not follow from the plain, unambiguous language of the statute. Words cannot be added to or substituted so as to give a meaning to the statute which will serve the spirit and intention of the Legislature....." (emphasis supplied)*

Similarly this Court in ***Thana Electricity (Supra)*** had observed as under :

> *"If the provision of a taxing statute can be reasonably interpreted in two ways, that interpretation which is favourable to the assessee has got to be accepted. This is a well-accepted view of law. It is the satisfaction of the court interpreting the law that the language of the taxing statute is ambiguous or reasonably capable of more meanings than one, which is material. If the court does not think so, the fact that two different views have been advanced by the parties and argued forcefully or that one such view which is favourable to the assessee has been accepted by some Tribunal or High Court, by itself will not be sufficient to attract the principle of beneficial interpretation"*

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In the present facts the provision of Section 54F(4) of the Act are very clear. There is no ambiguity. Thus, there is no occasion to apply liberal / beneficial construction while interpreting the Section as contended by the Appellant.

(t) It was next contended by Mr. Chatterji, learned Senior Counsel for the appellant that the word *"appropriation"* used in Section 54F(4) of the Act would also apply in the present case where the capital asset has been sold and sale proceeds are earmarked to be invested in construction of house. A plain reading of Section 54F(4) of the Act militates against it. As pointed out by Mr.Malhotra, learned Counsel appearing for the revenue, Section 54F(4) of the Act deals with two classes of cases, one where purchase of new residential house is within a period of one year before the date on which capital asset is sold by assessee and second class of cases where the amount subjected to capital gains are utilized for purchase/ constructing a flat, post the sale of the capital asset. In the present facts we are concerned with the second class i.e. purchase post the sale of the capital asset.

(u) The parliament has used the word *"appropriated"* in the first class of cases i.e. where property has already been purchased prior to the sale of capital asset and the amount received on sale of capital asset is appropriated towards consideration which has been paid for purchase of the flat. In this case we are concerned with the purchase / construction of residential housing, after the sale of capital asset. This requires the

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amount -which is to be subjected to capital gain has to be utilized before the date of filing of return of Income under Section 139 of the Act by the assessee. Section 54F(4) of the Act itself clearly states that the amount not utilized in purchase / construction of flat / house should be deposited in the specified Bank notified by the Government. Thus the plain language employed in Section 54F(4) of the Act makes a clear distinction between cases of appropriation (purchase prior to sale of capital asset) and utilization (purchase/construction after the sale of capital asset). Therefore the word "*appropriated*" would have no application in cases of purchase / construction of a house after the sale of capital asset with which we are concerned.

(v) Lastly and in the alternative, it is submitted by Mr.Chatterji, that as the entire amount has been paid to the developer/builder before the last date to file the return of Income under Section 139 of the Act, the exemption is available to the appellant under section 54F(4) of the Act. In support, the decision of Gauhati High Court in Rajesh Kumar Jalan (Supra) is relied upon. The Gauhati High Court in the above case was concerned with the interpretation of Section 54 of the Act. It construed the provision of sub Section (2) of Section 54 of the Act which is identically worded to sub section (4) of Section 54F of the Act The Court in the aforesaid decision held that the requirement of depositing before the date of furnishing of return of Income under Section 139 of the Act has not to be restricted only to the date specified in Section 139(1) of the Act

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but would include all sub section of Section 139 including sub section (4) of the Act. On the above basis it concluded that if the amount is utilized before the last date of filing of the return under Section 139 of the Act then the provision of Section 54(2) of the Act would not hit the assessee before it. It is not very clear in the above case whether the amounts were utilized before the assessee filed its return of income or not.

(w) However, the factual situation arising in the present case is different. The return of income is admittedly filed on 4th November, 1996. In terms of Section 54F(4) of the Act as interpreted by the Gauhati High Court in Rajesh Kumar Jalan (supra) the amounts subject to capital gain on sale of the capital asset for purpose of exemption, has to be utilized before the date of filing of return of income. In this case 4th November, 1996 is the date of filing the return of Income. It is not disputed that on 4th November, 1996 when the return of income was filed, the entire amount which was subject to capital gain tax had not been utilized for the purpose of construction of new house nor were the unutilized amounts deposited in the notified Bank Accounts in terms of Section 54F(4) of the Act before filing the return of income. It is also to be noted that in line with the interpretation of Gauhati High Court on Section 54F(4) of the Act, the Assessing Officer had taken into account all amounts utilized for construction of a house before filing the return of income on 4th November, 1996 for extending the benefit of exemption under Section 54F of the Act. Therefore, in the present facts, the decision of the Gauhati High Court in Rajesh

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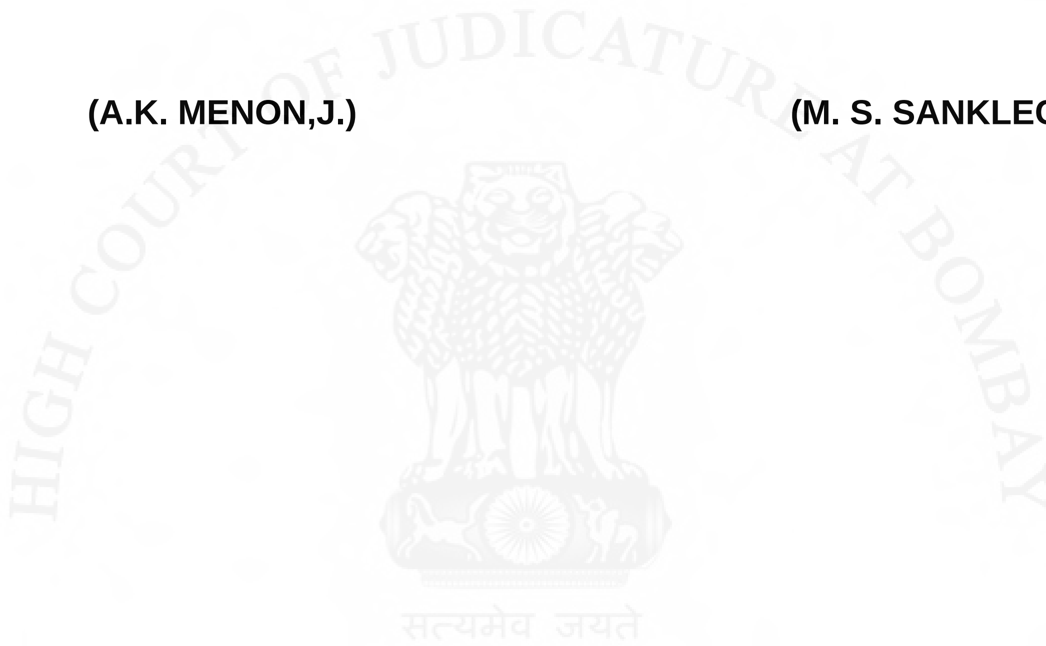
Kumar Jalan (supra) would not apply so as to hold that the appellant had complied with the Section 54F(4) of the Act.

(x) In the above view question no. 2 is also answered in the affirmative i.e. in favour of the revenue and against the appellant assessee.

7 In the above view, the **Appeal is dismissed.** No order as to costs.

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



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