

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

TAX APPEAL NO. 483 of 2006

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR.JUSTICE KS JHAVERI

and

HONOURABLE MR.JUSTICE G.R.UDHWANI

1	Whether Reporters of Local Papers may be allowed to see the judgment ?	
2	To be referred to the Reporter or not ?	
3	Whether their Lordships wish to see the fair copy of the judgment ?	
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	

LEENA JUGALKISHOR SHAH....Appellant(s)

Versus

ASSTT.COMMISSIONER OF INCOME TAX....Opponent(s)

Appearance:

MR MANISH J SHAH, ADVOCATE & MR. J.P. SHAH, ADVOCATE, for the Appellant(s) No. 1

MR KM PARIKH, SENIOR STANDING COUNSEL for the Opponent(s) No. 1

CORAM: **HONOURABLE MR.JUSTICE KS JHAVERI**
and
HONOURABLE MR.JUSTICE G.R.UDHWANI

Date : 14/06/2016

ORAL JUDGMENT

(PER : HONOURABLE MR.JUSTICE KS JHAVERI)

The appellant has preferred this appeal under section 260A of the Income-tax Act, 1961 challenging the order of the Income-tax Appellate Tribunal ('the Tribunal') dated 10.11.2005 whereby the Tribunal dismissed the appeal filed by the appellant by confirming the orders of the Commissioner of Income-tax (Appeals) and the Assessing Officer. While admitting the matter, this court has framed the following question of law:

“Whether on the facts and in the circumstances of the case, the Tribunal was right in law in holding that section 54F benefit will not be available if the residential house is purchased or constructed by the assessee outside India?”

2. The facts of the case are that the assessee, a non-resident Indian, disposed of the property situated at Vadodara and purchased a residential house in U.S.A. i.e. outside India and investment made was out of mortgage loan from BBNT (USA) of dollar of 7,68,000 and out of personal savings of dollar 32,601. The sale proceeds of the plot sold in India was retained in India which was utilized for giving loan to Smt. Bharti K. Vyas. In view of above, the Assessing Officer observed that the sale proceeds of the plot of land has not

been utilized in acquiring the residential house in USA. Moreover, the residential house purchased/constructed in USA is not subject to tax in India within the meaning of section 54 of the Income-tax Act. The Assessing Officer, therefore, did not allow the claim of deduction and brought the amount to tax. Being aggrieved by the order of the Assessing Officer, the assessee carried the matter in appeal before the Commissioner of Income-tax (Appeals). The Commissioner of Income-tax (Appeals) observed that acquiring of new asset outside India by the assessee is beyond the purview of the Income-tax Act and as such section 54F will have no application to the assessee's case. He further observed that purchasing of house outside India will not satisfy the provisions of the Income-tax Act. In that view of the matter, he dismissed the appeal of the assessee.

3. The assessee being aggrieved by the order of the Commissioner of Income-tax (Appeals), carried the matter in further appeal before the Tribunal. The Tribunal after considering decisions, namely, (i) **Padmasundara Rao (Decd.) and others v. State of Tamil Nadu & others** [255 ITR 147 (SC)] , (ii) **Kishore B. Setalvad v. CWT** [256 ITR 637 (Guj.)], (iii) **Orissa State Warehousing Corpn. v. CIT** [237 ITR 589 (SC)] and (iv) **CIT v. Harijan Evam Nirbal Varg Avas Nigam** [226 ITR 696] and after hearing learned counsel for the parties, held that benefit under section 54F of the Income-tax Act was not allowable for a residential house purchased/constructed outside India. In that view of the matter the Tribunal dismissed the appeal of the appellant.

4. Learned counsel for the appellant Mr. Shah has

contended that the appellant had, after selling the plot of land, purchased a residential house in United States of America and fulfilled the conditions laid down in Section 54F of the Income-tax Act for claiming benefit under the said section and therefore, the appellant was not liable to pay any tax under the head 'capital gain'. He has further contended that the Tribunal committed an error in holding that residential house mentioned in section 54F of the Income-tax Act must be in India and not outside India. He has further submitted that nowhere in section 54F of the Income-tax Act prior to its amendment, it is stated that the residential house is required to be purchased or constructed in India and then only the appellant entitled to get benefit of the said section. In this regard he has relied on the Explanatory Notes to unamended sections 54 and 54F of the Income-tax Act which read as under: (Circular No. 01/2015 – Explanatory Notes to the provisions of the Finance (No. 2) Act, 2014)

“20. Capital gains exemption in case of investment in a residential house property -

20.1 The provisions contained in sub-section (1) of section 54 of the Income-tax Act, before its amendment by the Act, inter alia, provided that where capital gain arises from the transfer of a long-term capital asset, being buildings or lands appurtenant thereto, and being a residential house, and the assessee within a period of one year before or two years after the date of transfer, purchases or within a period of three years after the date of transfer constructs, a residential house, then, the amount of capital gains to the extent invested in the

new residential house is not chargeable to tax under section 45 of the Income-tax Act.

20.2 The provisions contained in sub-section (1) of section 54F of the Income-tax Act, before its amendment by the Act, inter alia, provided that where capital gains arises from transfer of a long term capital asset, not being a residential house, and the assessee within a period of one year before or two years after the date of transfer, purchases or within a period of three years after the date of transfer constructs, a residential house, then, the portion of capital gains in the ratio of cost of new asset to the net consideration received on transfer is not chargeable to tax.

20.3 Certain courts had interpreted that the exemption is also available if investment is made in more than one residential house. The benefit was intended for investment in one residential house within India. Accordingly, sub-section (1) of section 54 of the Income-tax Act has been amended to provide that the rollover relief under the said section is available if the investment is made in one residential house situated in India.

20.4 Similarly, sub-section (1) of section 54F of the Income-tax Act has been amended to provide that the exemption is available if the investment is made in one residential house situated in India.

20.5 Applicability – these amendments take effect from 1st April, 2015 and will accordingly apply in relation to assessment year 2015-16d and subsequent assessment years.”

The provisions of section 54F of the Income-tax Act as amended by the Finance (No. 2) Act, 2014 effective from 1.4.2015 read as under:

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

54F (1) – Subject to the provisions of sub-section (4), where, in the case of an assessee being an individual or a Hindu undivided family, the capital gain arises from the transfer of any long-term capital asset, not being a residential house (hereafter in this section referred to as the original asset), and the assessee has, within a period of one year before or two years after the date on which the transfer took place purchased or has within a period of three years after that date constructed, one residential house in India (hereafter in this section referred to as the new asset), the capital gain shall be dealt with in accordance with the following provisions of this section, that is to say -

- (a) if the cost of 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

(iii) purchases any residential house, other than the new asset within a period of three years after the date of transfer of the original asset;

(b) the income from such residential house, other than the one residential house owned on the date of transfer of the original asset, is chargeable under the head 'income from house property')

Explanation – For the purposes of this section - 'net consideration' in relation to the transfer of a capital asset, means the full value of the consideration received or accruing as a result of the transfer of the capital asset as reduced by any expenditure incurred wholly and exclusively in connection with such transfer.

(2) Where the assessee purchases, within the period of two years after the date of the transfer of the original asset, or constructs, within the period of three years after such date, any residential house, the income from which is chargeable under the head "income from house property", other than the new asset, the amount of capital gain arising from the transfer of the original asset not charged under

section 45 on the basis of the cost of such new asset as provided in clause (a), or, as the case may be, clause (b), of sub-section (1), shall be deemed to be income chargeable under the head 'Capital gains' relating to long-term capital assets of the previous year in which such residential house is purchased or constructed.

(3) Where the new asset is transferred within a period of three years from the date of its purchase or, as the case may be, its construction, the amount of capital gain arising from the transfer of original asset not charged under section 45 on the basis of the cost of such new asset as provided in clause (a) or, as the case may be, clause (b), of sub-section (1) shall be deemed to be income chargeable under the head 'Capital gains' relating to long term capital assets of the previous year in which such new asset is transferred.

(4) The amount of the net consideration which is not appropriated by the assessee towards the purchase of the new asset made within one year before the date on which the transfer of the original asset took place, or which is not utilised by him for the purchase or construction of the new asset before the date of furnishing the return of income under section 139, shall be deposited by him before furnishing such return (such deposit being made in any case not later than the due date applicable in the case of the assessee

(4) The amount of the net consideration which is not appropriated by the assessee towards the purchase

of the new asset made within one year before the date on which the transfer of the original asset took place, or which is not utilised by him for the purchase or construction of the new asset before the date of furnishing the return of income under [section 139](#), shall be deposited by him before furnishing such return [such deposit being made in any case not later than the due date applicable in the case of the assessee for furnishing the return of income under sub-section (1) of [section 139](#)] in an account in any such bank or institution as may be specified in, and utilised in accordance with, any scheme which the Central Government may, by notification in the Official Gazette, frame in this behalf and such return shall be accompanied by proof of such deposit; and, for the purposes of sub-section (1), the amount, if any, already utilised by the assessee for the purchase or construction of the new asset together with the amount so deposited shall be deemed to be the cost of the new asset:

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

(i) the amount by which—

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

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

shall be charged under [section 45](#) as income of the previous year in which the period of three years from the date of the transfer of the original asset expires; and

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

The learned counsel for the appellant has taken us through Section 11 of the Income-tax Act which is quoted hereinbelow:

"Income from property held for charitable or religious purposes.

11. (1) Subject to the provisions of [sections 60](#) to [63](#), the following income shall not be included in the total income of the previous year of the person in receipt of the income—

(a) income derived from property held under trust wholly for charitable or religious purposes, to the extent to which such income is applied to such purposes in India; and, where any such income is accumulated or set apart for application to such purposes in India, to the extent to which the income so accumulated or set apart is not in excess of fifteen

per cent of the income from such property;

b) income derived from property held under trust in part only for such purposes, the trust having been created before the commencement of this Act, to the extent to which such income is applied to such purposes in India; and, where any such income is finally set apart for application to such purposes in India, to the extent to which the income so set apart is not in excess of fifteen per cent of the income from such property;

(c) income derived from property held under trust—

(i) created on or after the 1st day of April, 1952, for a charitable purpose which tends to promote international welfare in which India is interested, to the extent to which such income is applied to such purposes outside India, and

(ii) for charitable or religious purposes, created before the 1st day of April, 1952, to the extent to which such income is applied to such purposes outside India:

Provided that the Board, by general or special order, has directed in either case that it shall not be included in the total income of the person in receipt of such income;

(d) income in the form of voluntary contributions made with a specific direction that they shall form part of the corpus of the trust or institution.

Explanation.— For the purposes of clauses (a) and (b),—

(1) in computing the fifteen per cent of the income which may be accumulated or set apart, any such voluntary contributions as are referred to in [section 12](#) shall be deemed to be part of the income;

(2) if, in the previous year, the income applied to charitable or religious purposes in India falls short of eighty-five per cent of the income derived during that year from property held under trust, or, as the case may be, held under trust in part, by any amount—

(i) for the reason that the whole or any part of the income has not been received during that year, or

(ii) for any other reason,

then—

(a) in the case referred to in sub-clause (i), so much of the income applied to such purposes in India during the previous year in which the income is received or during the previous year immediately following as does not exceed the said amount, and

(b) in the case referred to in sub-clause (ii), so much of the income applied to such purposes in India during the previous year immediately following the previous year in which the income was derived as does not exceed the said amount,

may, at the option of the person in receipt of the income (*such option to be exercised before the expiry of the time allowed under sub-section (1) of section 139 for furnishing the return of income, in such form and manner as may be prescribed*) be deemed to be income applied to such purposes

during the previous year in which the income was derived; and the income so deemed to have been applied shall not be taken into account in calculating the amount of income applied to such purposes, in the case referred to in sub-clause (i), during the previous year in which the income is received or during the previous year immediately following, as the case may be, and, in the case referred to in sub-clause (ii), during the previous year immediately following the previous year in which the income was derived.

(1A) For the purposes of sub-section (1),—

(a) where a capital asset, being property held under trust wholly for charitable or religious purposes, is transferred and the whole or any part of the net consideration is utilised for acquiring another capital asset to be so held, then, the capital gain arising from the transfer shall be deemed to have been applied to charitable or religious purposes to the extent specified hereunder, namely:—

(i) where the whole of the net consideration is utilised in acquiring the new capital asset, the whole of such capital gain;

(ii) where only a part of the net consideration is utilised for acquiring the new capital asset, so much of such capital gain as is equal to the amount, if any, by which the amount so utilised exceeds the cost of the transferred asset;

(b) where a capital asset, being property held

under trust in part only for such purposes, is transferred and the whole or any part of the net consideration is utilised for acquiring another capital asset to be so held, then, the appropriate fraction of the capital gain arising from the transfer shall be deemed to have been applied to charitable or religious purposes to the extent specified hereunder, namely:—

- (i) where the whole of the net consideration is utilised in acquiring the new capital asset, the whole of the appropriate fraction of such capital gain;
- (ii) in any other case, so much of the appropriate fraction of the capital gain as is equal to the amount, if any, by which the appropriate fraction of the amount utilised for acquiring the new asset exceeds the appropriate fraction of the cost of the transferred asset.

Explanation.—In this sub-section,—

- (i) "appropriate fraction" means the fraction which represents the extent to which the income derived from the capital asset transferred was immediately before such transfer applicable to charitable or religious purposes;
- (ii) "cost of the transferred asset" means the aggregate of the cost of acquisition (as ascertained for the purposes of [sections 48](#) and [49](#)) of the capital asset which is the subject of the transfer and the cost of any improvement thereto within the meaning assigned to that expression in sub-clause (b) of

clause (1) of [section 55](#);

(iii) "net consideration" 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.

(1B) Where any income in respect of which an option is exercised under clause (2) of the *Explanation* to sub-section (1) is not applied to charitable or religious purposes in India during the period referred to in sub-clause (a) or, as the case may be, sub-clause (b), of the said clause, then, such income shall be deemed to be the income of the person in receipt thereof—

(a) in the case referred to in sub-clause (i) of the said clause, of the previous year immediately following the previous year in which the income was received; or

(b) in the case referred to in sub-clause (ii) of the said clause, of the previous year immediately following the previous year in which the income was derived.

(2) Where eighty-five per cent of the income referred to in clause (a) or clause (b) of sub-section (1) read with the *Explanation* to that sub-section is not applied, or is not deemed to have been applied, to charitable or religious purposes in India during the previous year but is accumulated or set apart, either in whole or in part, for application to such purposes in

India, such income so accumulated or set apart shall not be included in the total income of the previous year of the person in receipt of the income, provided the following conditions are complied with, namely:—

- [(a) such person furnishes a statement in the prescribed form and in the prescribed³ manner to the Assessing Officer, stating the purpose for which the income is being accumulated or set apart and the period for which the income is to be accumulated or set apart, which shall in no case exceed five years;*
- (b) the money so accumulated or set apart is invested or deposited in the forms or modes specified in sub-section (5);*
- (c) the statement referred to in clause (a) is furnished on or before the due date specified under sub-section (1) of [section 139](#) for furnishing the return of income for the previous year:*

Provided *that in computing the period of five years referred to in clause (a), the period during which the income could not be applied for the purpose for which it is so accumulated or set apart, due to an order or injunction of any court, shall be excluded.]*

Explanation.—Any amount credited or paid, out of income referred to in clause (a) or clause (b) of sub-section (1), read with the *Explanation* to that sub-section, which is not applied, but is accumulated or set apart, to any trust or institution registered under [section 12AA](#) or to any fund or institution or trust or any university or other educational institution or any

hospital or other medical institution referred to in sub-clause (iv) or sub-clause (v) or sub-clause (vi) or sub-clause (via) of clause (23C) of [section 10](#), shall not be treated as application of income for charitable or religious purposes, either during the period of accumulation or thereafter.

(3) Any income referred to in sub-section (2) which—

(a) is applied to purposes other than charitable or religious purposes as aforesaid or ceases to be accumulated or set apart for application thereto, or

(b) ceases to remain invested or deposited in any of the forms or modes specified in sub-section (5), or

(c) is not utilised for the purpose for which it is so accumulated or set apart during the period referred to in clause (a) of that sub-section or in the year immediately following the expiry thereof,

(d) is credited or paid to any trust or institution registered under [section 12AA](#) or to any fund or institution or trust or any university or other educational institution or any hospital or other medical institution referred to in sub-clause (iv) or sub-clause (v) or sub-clause (vi) or sub-clause (via) of clause (23C) of [section 10](#),

shall be deemed to be the income of such person of the previous year in which it is so applied or ceases to be so accumulated or set apart or ceases to remain so invested or deposited or credited or paid or, as the case may be, of the previous year immediately

following the expiry of the period aforesaid.

(3A) Notwithstanding anything contained in sub-section (3), where due to circumstances beyond the control of the person in receipt of the income, any income invested or deposited in accordance with the provisions of clause (b) of sub-section (2) cannot be applied for the purpose for which it was accumulated or set apart, the Assessing Officer may, on an application made to him in this behalf, allow such person to apply such income for such other charitable or religious purpose in India as is specified in the application by such person and as is in conformity with the objects of the trust; and thereupon the provisions of sub-section (3) shall apply as if the purpose specified by such person in the application under this sub-section were a purpose specified in the notice given to the Assessing Officer under clause (a) of sub-section (2):

Provided that the Assessing Officer shall not allow application of such income by way of payment or credit made for the purposes referred to in clause (d) of sub-section (3) of [section 11](#):

Provided further that in case the trust or institution, which has invested or deposited its income in accordance with the provisions of clause (b) of sub-section (2), is dissolved, the Assessing Officer may allow application of such income for the purposes referred to in clause (d) of sub-section (3) in the year in which such trust or institution was dissolved.

(4) For the purposes of this section "property held

under trust" includes a business undertaking so held, and where a claim is made that the income of any such undertaking shall not be included in the total income of the persons in receipt thereof, the Assessing Officer shall have power to determine the income of such undertaking in accordance with the provisions of this Act relating to assessment; and where any income so determined is in excess of the income as shown in the accounts of the undertaking, such excess shall be deemed to be applied to purposes other than charitable or religious purposes.

(4A) Sub-section (1) or sub-section (2) or sub-section (3) or sub-section (3A) shall not apply in relation to any income of a trust or an institution, being profits and gains of business, unless the business is incidental to the attainment of the objectives of the trust or, as the case may be, institution, and separate books of account are maintained by such trust or institution in respect of such business.

(5) The forms and modes of investing or depositing the money referred to in clause (b) of sub-section (2) shall be the following, namely :—

(i) investment in savings certificates as defined in clause (c) of section 2 of the Government Savings Certificates Act, 1959 (46 of 1959), and any other securities or certificates issued by the Central Government under the Small Savings Schemes of that Government;

(ii) deposit in any account with the Post Office

Savings Bank;

(iii) deposit in any account with a scheduled bank or a co-operative society engaged in carrying on the business of banking (including a co-operative land mortgage bank or a co-operative land development bank).

Explanation.—In this clause, "scheduled bank" means the State Bank of India constituted under the State Bank of India Act, 1955 (23 of 1955), a subsidiary bank as defined in the State Bank of India (Subsidiary Banks) Act, 1959 (38 of 1959), a corresponding new bank constituted under section 3 of the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1970 (5 of 1970), or under section 3 of the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1980 (40 of 1980), or any other bank being a bank included in the Second Schedule to the Reserve Bank of India Act, 1934 (2 of 1934);

(iv) investment in units of the Unit Trust of India established under the Unit Trust of India Act, 1963 (52 of 1963);

(v) investment in any security for money created and issued by the Central Government or a State Government;

(vi) investment in debentures issued by, or on behalf of, any company or corporation both the principal whereof and the interest whereon are fully and unconditionally guaranteed by the Central Government or by a State Government;

(vii) investment or deposit in any public sector company:

Provided that where an investment or deposit in any public sector company has been made and such public sector company ceases to be a public sector company,—

(A) such investment made in the shares of such company shall be deemed to be an investment made under this clause for a period of three years from the date on which such public sector company ceases to be a public sector company;

(B) such other investment or deposit shall be deemed to be an investment or deposit made under this clause for the period up to the date on which such investment or deposit becomes repayable by such company;

(viii) deposits with or investment in any bonds issued by a financial corporation which is engaged in providing long-term finance for industrial development in India and which is eligible for deduction under clause (viii) of sub-section (1) of [section 36](#);

(ix) deposits with or investment in any bonds issued by a public company formed and registered in India with the main object of carrying on the business of providing long-term finance for construction or purchase of houses in India for residential purposes and which is eligible for deduction under clause (viii) of sub-section (1) of [section 36](#);

(ixa) deposits with or investment in any bonds issued by a public company formed and registered in India with the main object of carrying on the business of providing long-term finance for urban infrastructure in India.

Explanation.—For the purposes of this clause,—

(a) "long-term finance" means any loan or advance where the terms under which moneys are loaned or advanced provide for repayment along with interest thereof during a period of not less than five years;

(b) "public company" shall have the meaning assigned to it in section 3 of the Companies Act, 1956 (1 of 1956);

(c) "urban infrastructure" means a project for providing potable water supply, sanitation and sewerage, drainage, solid waste management, roads, bridges and flyovers or urban transport;

(x) investment in immovable property.

Explanation.—"Immovable property" does not include any machinery or plant (other than machinery or plant installed in a building for the convenient occupation of the building) even though attached to, or permanently fastened to, anything attached to the earth;

(xi) deposits with the Industrial Development Bank of India established under the Industrial Development Bank of India Act, 1964 (18 of 1964);

(xii) any other form or mode of investment or deposit as may be prescribed.⁴

(6) In this section where any income is required to be applied or accumulated or set apart for application, then, for such purposes the income shall be determined without any deduction or allowance by way of depreciation or otherwise in respect of any asset, acquisition of which has been claimed as an application of income under this section in the same or any other previous year.

(7) Where a trust or an institution has been granted registration under clause (b) of sub-section (1) of section 12AA or has obtained registration at any time under section 12A [as it stood before its amendment by the Finance (No. 2) Act, 1996 (33 of 1996)] and the said registration is in force for any previous year, then, nothing contained in section 10 [other than clause (1) and clause (23C) thereof] shall operate to exclude any income derived from the property held under trust from the total income of the person in receipt thereof for that previous year."

WEB COPY

5. The learned advocate for the appellant has further contended that if we look at the provisions of the Income-tax Act, wherever the Legislature intended to restrict the transaction of the assessee, they have specifically used the words "in India". He further contended that the Legislature was very clear that the restriction was for the investment in residential house and if the assessee fulfills the conditions laid

down in section 54F of the Income-tax Act, exemption should not be denied to the assessee. He further contended that if the taxing provision is ambiguous then the court has to adopt the interpretation which favours the assessee. In support of this contention, the learned counsel for the appellant has relied on two decisions of the Apex Court, namely, **Commissioner of Income-tax, West Bengal-I v. Vegetable Products Ltd.**, reported in (1973) 88 ITR 192 (SC) and **Smt. Tarulata Shyam and others v. Commissioner of Income-tax, West Bengal**, reported in (1977) 108 ITR 345 (SC). The Apex Court in the case of **Commissioner of Income-tax, West Bengal-I v. Vegetable Products Ltd.** (supra) has held as follows:

“Held, accordingly, that in calculating the penalty leviable under section 271(1)(a)(i) of the Income-tax Act, 1961, for failure to file the return of income (for the assessment year 1960-61) within the time without reasonable cause, the amount paid by the assessee under provisional assessment under section 23B of the Indian Income-tax Act, 1922, had to be deducted from the amount of tax determined under section 23(2) of that Act, in order to determine the amount of tax on which the computation of the penalty was to be based.

If the court finds that the language of a taxing provision is ambiguous or capable of more meanings than one, then the court has to adopt that interpretation which favours the assessee, more particularly so where the provision to the imposition of a penalty.”

In the case of **Smt. Tarulata Shyam and others v.**

Commissioner of Income-tax, West Bengal (supra), the Apex Court has held as under:

“The language of sections 2(6A)(e) and 12(1B) is clear and unambiguous. There is no scope for importing into the statute words which are not there. Such importation would be not to construe, but to amend, the statute. Even if there be a casus omissus the defect can be remedied only by legislation and not by judicial interpretation.”

6. The learned counsel for the appellant has contended that after the amendment in sections 54 and 54F of the Act by the Finance (No. 2) Act which is made prospectively, now it has been restricted that the investment should be made in a residential house in India. In that view of the matter, earlier when there is no such restriction in the taxing provision and it is clear and unambiguous, there is no scope for importing into the statute words which are not there. Even when the language of taxing provision is ambiguous or capable of more meanings, the interpretation which favours the assessee should be adopted. In that view of the matter, he has contended that authorities below have wrongly held that the assessee is not entitled to the benefit under section 54F of the Income-tax Act as she has purchased the house outside India and the orders passed by the authorities below are required to be set aside.

7. Learned counsel Mr. Parikh for the respondent has taken us through the amendment Act of 1982 wherein Section 54 has been brought in which is reproduced below (138 ITR 23):

“19.1 Under section 54 of the Income-tax Act,

capital gains arising on the transfer of a house property which in the two years immediately preceding the date of its transfer was used by the assessee or a parent of his for self-residence is exempted from income-tax if the assessee, within a period of one year before or after that date, purchases or within a period of two years after the date of such transfer constructs a house property for the purpose of his own residence. The exemption of capital gain is restricted to the amount of such capital gain utilised for the purchase or construction of the new house property. Where the amount of capital gain is greater than the cost of the house property so purchased or constructed, the balance amount of the capital gains is charged to tax. If, however, the amount of capital gain is equal to or less than the cost of the house property purchased or constructed, the capital gain is completely exempted from income-tax. If such house property purchased or constructed is transferred within a period of three years of its purchase or construction the capital gain on the property so transferred is calculated by reducing the cost of its acquisition by the amount of the capital gain exempted from income-tax.

19.2 The conditions of self-occupation of the property by the assessee or his parent before its transfer and purchase or construction of the new property to be used for the residence of the assessee for the purposes of exemption of capital gains created hardship for assesseees. This was usually due

to the fact of employment or business of the assessee at a place different from the place where such property was situated.

19.3 The Finance Act has made the following modification in section 54 of the Income-tax Act, namely:

(I) the conditions of residence by the assessee or his parent in the property which was transferred, as also residence by the assessee in the new property purchased or constructed by him have been removed.

(ii) The period for construction of a new property has been raised from two years to three years since assessee sometimes experience difficulty in complying with the existing time limit of two years for the construction of a house property;

(iii) It is clarified that this exemption will be allowed only in the case of individual assessee.

(iv) It has been provided that this exemption will apply only in relation to long term capital gains, that is gains arising from the transfer of a house property which has been held by the assessee for a period exceeding 36 months.

19.4 This provision will take effect from 1st April, 1983, and will accordingly apply in relation to the assessment year 1983-84 and subsequent years.

(xiv) Exemption from tax on capital gains in certain cases on investment of the consideration in residential house – section 54F

20.1 Under the existing provisions of the Income-tax Act, any profits and gains arising from the transfer of a long term capital asset are charged to tax on a concessional basis. For this purpose, a capital asset which is held by an assessee for a period of more than 36 months is treated as a “long term” capital asset.

20.2 With a view to encouraging house construction, the Finance Act, 1982, has inserted a new section 54F to provide that where any capital gain arises from the transfer of any long term capital asset, other than a residential house, and the assessee purchases within one year before or after the date on which the transfer took place or constructs within a period of three years after the date of transfer, a residential house the capital gain arising from the transfer will be treated in a concessional manner as under:

(i) If the cost of the house that has been purchased or constructed is not less than the net consideration in respect of the capital asset transferred, the entire capital gain arising from the transfer will be exempt from tax.

(ii) If the cost of the newly acquired house is less than the net consideration in respect of the capital asset transferred, the exemption from long-term capital gain will be granted proportionately on the basis of investment of net consideration either for purchase or construction of the residential house. This concession will not be available in a case where

the assessee owns on the date of the transfer of the original asset any residential house, or purchases within the period of one year after such date, or constructs, within the period of three years after such date, any other residential house. Where the assessee purchases or constructs any other residential house within the period aforesaid, the exemption under the proposed provision, if allowed, shall stand forfeited and the amount of capital gain arising from the transfer of the original asset, which was not charged to tax, shall be allowed to be the income chargeable under the head "Capital gain" relating to long-term capital assets of the previous year in which such residential house is so purchased or constructed. "Net consideration" in respect of 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 after deduction of any expenditure incurred wholly and exclusively in connection with the transfer.

20.3 If the assessee transfers the newly acquired residential house within three years of its purchase or construction, then the amount of capital gain arising from the transfer of the original asset which was not charged to tax shall be deemed to be the income of the year in which the new asset is transferred and such income shall be charged to tax under the head 'Capital gain' relating to long-term capital assets.

20.4 This provision will become effective from 1st April, 1983, and will accordingly apply in relation to the assessment year 1983-84 and subsequent years."

8. The learned counsel for the respondent has further contended that the purpose of introduction of section 54 of the Income-tax Act is to give certain benefits to the assessee from capital gain tax arising from transfer of long-term capital asset provided the assessee invests the net consideration in residential houses in India. He has submitted that long-term capital asset and short-term capital asset have been defined in sections 2(29A) and 2(42A) of the Income-tax Act which read as under:

“2(29A) - ‘Long-term capital asset’ means a capital asset which is not a short-term capital asset.

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”

8.1 The learned counsel for the respondent has contended that the said provisions are benevolent provisions and for the benefits of the assessee who fulfills the conditions as prescribed in the provisions of the Income-tax Act. In the present case, the assessee has not fulfilled the conditions as laid down in section 54F of the Income-tax Act as she had utilized the sale proceeds in acquiring a residential house in United States of America. As per the terms of the said section, the assessee should have utilized the sale proceeds for purchasing the residential house in India. In that view of the matter, the assessee is not entitled to benefit under section 54F of the Income-tax Act and the Tribunal has, rightly, dismissed the appeal of the assessee. He, therefore,

contended that this court should not interfere with the findings recorded by the Tribunal and the appeal of the appellant is required to be dismissed.

9. We have heard learned counsel for the parties. We have perused the order of the Tribunal. There is no finding recorded by the authorities below that the appellant-assessee has not invested the sale proceeds in a residential house. It is also not in dispute that the appellant has not purchased the residential house in United States of America. In fact, she has purchased a residential house in U.S.A. out of the capital gain on sale of the plot in India and thus she has fulfilled the conditions stipulated in section 54F of the Income-tax Act. She has invested the capital gains in a residential house within the stipulated time. There was no condition in section 54F of the Income-tax Act at the relevant time that the capital gain arising out of transfer of capital asset should be invested in a residential house situated in India. The language of section 54F of the Income-tax Act before its amendment was that the assessee should invest capital gain in a residential house. It is only after the amendment to section 54F of the Income-tax Act by the Finance (No. 2) Act, 2014, which came into effect with effect from 1.4.2015 that the assessee should invest the sale proceeds arising out of sale of capital asset in a residential house situated in India within the stipulated period. Thus on a plain reading of section 54F of the Income-tax Act before its amendment by the Finance (No. 2) Act leaves no room for any doubt that the assessee should restrict her investment within India or outside India. The only condition was that the assessee should invest in a residential house. The Tribunal has wrongly

interpreted section 54F of the Income-tax Act by holding that the assessee should purchase the residential house situated in India. Prior to amendment to section 54F of the Act, the only condition stipulated was investment in a residential house. When the section 54F of the Income-tax Act was clear and unambiguous, there is no scope for importing into the statute the words which are not there. Such importation would be not to construe but to amend the statute. If there is any defect in the Act, it can be remedied only by the legislation and not by judicial interpretation.

10. In the present case the assessee has purchased the residential house in U.S.A. out of the sale proceeds of the plot in India and thus she has fulfilled the conditions of section 54F of the Income-tax Act before its amendment by the Finance (No. 2) Act. Moreover, when the language of a taxing provision is ambiguous or capable of more meanings than one, then the court has to adopt the interpretation which favours the assessee. Section 54F of the Act before its amendment was clear that the assessee should investment in a residential house. The language of section is clear and unambiguous. Therefore, we cannot import into the statute the words 'in India' as interpreted by the authorities. Thus, taking into consideration the above facts, we are of the opinion that benefit of section 54F before its amendment can be extended to a residential house purchased outside India. In that view of the matter, the appeal is allowed. The order of the Tribunal is set aside. We answer the question in favour of the assessee and against the revenue.

(K.S.JHAVERI, J.)

(G.R.UDHWANI, J.)

PKN

