IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'B', NEW DELHI

Before Sh. Kul Bharat, Judicial Member

Dr. B. R. R. Kumar, Accountant Member

ITA No. 819/Del/2020 : Asstt. Year : 2014-15

ACIT, Circle-36(1), New Delhi	Vs.	Sh. Himanshu Garg, C-1/16, Corner Building, Model Town-3, New Delhi-110009
(APPELLANT)		**(RESPONDENT)**
PAN No. AZTPG3600N		

CO No. 112/Del/2022 : Asstt. Year : 2014-15

Sh. Himanshu Garg, C-1/16, Corner Building, Model Town-3, New Delhi-110009	Vs.	ACIT, Circle-36(1), New Delhi
(APPELLANT)		(RESPONDENT)
PAN No. AZTPG3600N		

Assessee by : Sh. Niraj Jain, CA &
Sh. P. K. Mishra, CA
Revenue by : Sh. Vivek K. Upadhyay, Sr. DR

Date of Hearing: 11.03.2024		**Date of Pronouncement:30.05.2024**

ORDER

Per Dr. B. R. R. Kumar, Accountant Member:

The present appeal and the Cross Objection have been filed by the Revenue and the assessee against the order of ld. CIT(A)-36, New Delhi dated 16.12.2019.

2. Following grounds have been raised by the Revenue:

"1. Whether on the facts in the circumstances of the case and in law, the Ld. CIT(A) has erred in treating the transaction of sale of land [vide Deed No.72 at Pataudi] as 'capital gains

transaction' which was duly established and treated by the AO as 'adventure in the nature of trade'/business transaction and accordingly the consequent income as 'income from business'.

2. Whether on the facts in the circumstances of the case and in law, the Ld. CIT(A) has erred by allowing the assessee the claim of indexation both on cost of acquisition and improvement of land sold at Pataudi vide Deed No.72, against the transaction which was duly established and treated by the AO as 'adventure in the nature of trade'/business transaction.

3. Whether on the facts in the circumstances of the case and in law, the Ld. CIT(A) has erred by allowing full cost of improvement of land against the sale transaction for portion of the land which was allowed by the AO proportionately.

4. Whether on the facts in the circumstances of the case and in law, the Ld. CIT(A) has erred by allowing full cost of improvement of land alongwith indexation in the case of land sold at Pataudi vide deed No.987 despite the fact that the assessee has failed to substantiate the claim of cost of improvement during the assessment proceedings. The AD has categorically mentioned that the cheques regarding cost of improvement were issued by the assessee in October 2007 whereas the impugned property was purchased on 26.03.2008 and the said fact was not duly appreciated by the Ld. CIT(A).

5. Whether on the facts in the circumstances of the case and in law, the Ld. CIT(A) has erred in deleting the addition of Rs.47,53,116/- made on account of disallowance of 'cost of improvement and indexation without appreciating the fact that the assessee has failed to substantiate the said claim before the AO.

6. Whether on the facts in the circumstances of the case and in law, the Ld. CIT(A) has erred in deleting the addition of Rs.30,65,000/- without appreciating the fact that the said addition was made by the AO on account of disallowance of claim regarding 'cost of Improvement and indexation as the assessee has not submitted any documents/evidences or details of the expenses nor payments made in respect of such cost of improvement.

7. Whether on the facts in the circumstances of the case and in law, the Ld. CIT(A) has erred in deleting the addition of Rs.18,77,750/- and Rs.20,30,250/- without appreciating the fact that the said additions were made by the AO on account of disallowance of claim regarding 'cost of acquisition' of land at Pataudi and 'cost of improvement' and indexation when the AO has given a clear cut finding that authenticity of cost of improvement was not verifiable.

8. Whether on the facts in the circumstances of the case and in law, the Ld. CIT(A) has erred in deleting the addition of Rs.1,84,23,729/- made by the AO on account of disallowance of exemption claimed by the assessee u/s 54F of the IT Act, 1961 without appreciating the fact that the AO has established that the assessee is not satisfying the conditions laid down for claim of exemption under the said section."

3. In CO No. 112/Del/2022, following grounds have been raised by the assessee:

"1. That the Id. CIT(Appeals) has erred in not allowing the additional ground of appeal taken by the Respondent wherein he has made a fresh claim of exemption also allowable u/s 54B of the Act with reference to Long Term Capital Gains arising on sale of land vide deed no. 2618 amounting to Rs. 47,49,202/-.

2. That the Id. CIT(Appeals) has erred in not allowing the additional ground of appeal taken by the Respondent wherein he has made a fresh claim of exemption also allowable u/s 54B of the Act with reference to Long Term Capital Gains arising on sale of land vide deed no. 987 amounting to Rs. 4,24,182/-."

4. The assessee declared total income of Rs.92,71,320/- in the return of income filed on 30.11.2014 and the case was selected for limited scrutiny for examination of large deduction claimed u/s 54 of the Income Tax Act, 1961, large value sale consideration of property and cash deposits.

5. During the year, the assessee declared Long Term Capital Gains of Rs.66,23,908/- and Short Term Capital Gain of Rs.2,28,405/- and claimed exemption u/s 54F of Rs.1,84,23,729/-. The details of the capital gains are as under:

Long Term Capital Gains

1. Deed No. 72 – Rs.5,93,000/-
2. Deed No. 821 – (loss) Rs.2,59,000/-

3. Deed No. 987 – Rs.47,49,200/-
4. Taj Land – Rs.1,84,23,729/- & claimed exemption u/s54F
5. Other Land – Rs.15,40,600/-
Total LTCG Rs.66,23,000/- (excluding Section 54F)

Short Term Capital Gains
1. Patudi Nabab – 1 – Rs.5,58,475/-
2. Patudi Nabab – 2 – Rs.4,24,000/-
Total – Rs.9,82,000/-

6. The Assessing Officer examined each transaction and re-determined the capital gains.

1. Deed No. 72 – Rs.5,93,000/-

7. The details submitted by the assessee before the Assessing Officer pertaining to the transactions of deed no. 72 are as under:

Cost of acquisition –	Rs.13,46,820/-
Cost of improvement –	Rs.21,59,570/-
Sale consideration –	Rs.62,50,250/-
LTCG –	Rs.5,93,000

8. The Assessing Officer held that out of the total cost of improvement of Rs.21,59,570/-, the assessee has paid Rs.7,50,000/- by cheque and the remaining amount was paid by cash. The Assessing Officer issued notice u/s 133(6) to Sh. Kishan Pal, the alleged contractor for improvement of land, which was returned unserved. Later, a reply has been received

from the contractor that the work was done in the year 2010 whereas the assessee claimed that the work was undertaken in the year 2008. Further, the AO held that the assessee has sold only half portion of the land, hence he cannot claim the entire cost of improvement while computing the capital gains. The assessee sold only 30 marla of the total of 60 marla. After taking into consideration, the area of the land sold which is 50%, the AO re-computed the profits as under:

Cost of acquisition –Rs. 13,46,820 –	Rs.13,46,820
Cost of improvement – Rs.21,59,570 – to	Rs.24,26,606
(i.e. 50% of improvement of Rs.21,59,570)	
Sale consideration –	Rs.62,50,250
Profit on sale of land (LTCG) –	Rs.38,23,644

9. The Assessing Officer determined the profits as receipts from adventure in the nature of trade and refused to treat the receipts as capital gains. The reason for treating the transaction as adventure in nature of trade was that the assessee has spent Rs.20,00,000/- on the land measuring 16350 sft. which is more than Rs.100/- per sq. ft. in the year 2008 and that is nothing but adventure in nature of trade. The AO further held that a single transaction of purchase and sale may be outside the assessee's line of business and it can constitute an "adventure in the nature of trade".

10. Aggrieved, the assessee filed appeal before the ld. CIT(A).

11. The ld. CIT(A) deleted the addition holding that as regards the treatment to be given to the impugned transaction of sale of

plots carved out of Deed No. 72, only based on the principles settled by the Hon'ble Courts on the issue of treatment of a transaction as "adventure in nature of trade" Vs. "capital gain" arising out of investment and consequent sale.

12. The ld. CIT(A) relied on the judgment in the case of G. Venkataswami Naidu & Co. Vs. CIT 35 ITR 594 (SC) wherein it was held that,

"If a person invests money in land intending to hold it, enjoy its income for some time, and then sells it at a profit, it would be a clear case of capital accretion and not profit derived from an adventure in the nature of trade. Cases of realization of investments consisting of purchase and resale, though profitable, are clearly outside the domain of adventures in the nature of trade. In deciding the character of such transactions several factors are relevant, such as, e.g., whether the purchaser was a trader, and the purchase of the commodity and its resale were allied to his usual trade or business or incidental to it, the nature and quantity of the commodity purchased and resold; any act subsequent to the purchase to improve the quality of the commodity purchased and thereby make it more readily resaleable; any act prior to the purchase showing a design or purpose; the incidents associated with the purchase and resale: the similarity of the transaction to operations usually associated with trade or business; the repetition of the transaction; the element of pride of possession. A person may purchase a piece of art, hold it for some time and, if a profitable offer is received, sell it. During the time that the purchaser had its possession, he may be able to claim pride of possession and aesthetic satisfaction; and if such a claim is upheld, that would be a factor against the transaction being in the nature of trade. The presence of all these relevant factors may help the court to drawn an inference that a transaction is in the nature of trade, but it is not a matter of merely counting the number of facts and circumstances pro and con; what is important to consider is their distinctive character. In each case, it is the

total effect of all the relevant factors and circumstances that determines the character of the transaction."

13. In Jankiram Bahadur Ram vs. CIT 57 ITR 21 SC, it has been held that the mere fact that the owner of an immovable property takes steps to enhance its value before selling it does not amount to an adventure in the nature of trade.

14. In the case of CIT vs. Kasturi Estates Pvt. Ltd., 62 ITR 578 (Mad.), the assessee had even parceled the land into plots and incurred expenses for laying roads on filling up, corporation survey and other matters, yet the court held that these steps were no more than enabling the assessee to earn a better price rather than plunging into the waters of trade.

15. In CIT Vs. Hoick Larsen 160 ITR 67 (SC) it was held that the real question is not whether the transaction lacks the element of trading but to see whether the first step of the transaction was not taken as, or in the course of, a trading transaction. Applying the said principle it is to be seen in the facts of the Appellant's case that when the land was originally purchased there is nothing to show that this first step (of purchase of land) was taken in the course of a trading transaction.

16. In ACIT vs. Ashok Motilal Kataria, 308 ITR (AT) 298 Pune, it has been held that the assessee was not a dealer engaged in real estate business and the land was not held as a stock-in-trade. Merely because the assessee had the intention to make good profit on the basis of information that the land was to be

converted from agricultural zone or non-industrial zone to industrial zone, that by itself was not enough to assume that the assessee had purchased the land as an adventure in the nature of trade. Even, mere carving out the plots and selling them to different persons could not be assumed to be an adventure in the nature of trade, unless some more activities in the nature of business were carried out.

17. It is a matter of record that the assessee has held the entire piece of land for 5 long years and that fact in itself shows the Intention of the assessee to make investment in the said plot for capital appreciation. That the improvement made in the plot of land which was barren and uneven by resorting to land tilling, fencing etc, was only with a view to make the land saleable and further plotting of the said land was also part of the same exercise. Simply because the piece of land in this transaction has been bifurcated into 5 different parts to make it saleable after a long period of 5 years from the date of investment, per se cannot grant the character of the said pieces of land as "stock in trade" so as to give it a colour of business activity or adventure in the nature of trade. Applying the principles emerging from the above cases to the facts and circumstances instant case it is held that there is nothing to show that the first step of purchase of land was taken in the course of a trading transaction. The land was kept well over 5 years. What was realized on the sale of land was accretion to the capital. It is not a case where the appellant can be set to have plunged into the waters of trade.

18. Having gone through the undisputed facts on record that the assessee held the entire piece of land for more than 5 years cannot give it a colour of "adventure in the nature of trade". Applying the principles laid down by the various judgments, we hold that the assets sold is a capital asset and the profits earned be considered as capital gains. Order of the ld. CIT(A) on this issue is affirmed.

2. Deed No. 987 – Rs.47,49,200 and Cross Objection

19. As per the AO,

- Assessee purchased 4 Kanal for Rs.18,72,500/- on 28.09.2010
- Assessee purchased 15 Kanal 19 Marla for Rs.54,00,000/- on 26.03.2008
- Assessee sold 16 Kanal 11 Marla for Rs.2,06,88,000/-
- Assessee disclosed capital gains of Rs.47,49,201/-

20. The Assessing Officer found that the assessee has claimed cost of improvement of Rs.29,46,021/- on the improvement of land. The assessee produced a bill dated 01.07.2008 on the letter head of once Sh. Mahender Singh, Thekedar. The assessee claimed that an amount of Rs.16,80,000/- was paid in cheque and Rs.15,000/- was paid in cash. The AO held that on verification of the bank account, the payments made through cheque was in October 2007 not in 2008 that is even before the purchase of property on 26.03.2008. The AO held that the assessee cannot claim expenses on account of payment for improvement even before the date of purchase of land. Holding

thus, the AO disallowed the cost of improvement in computation of capital gains.

21. Further, the AO has also not allowed cost of improvement of Rs.30,65,000/- being the cost of improvement claimed while computing the Short Term Capital Gains on the sale consideration of Rs.53,71,682/- (page 13 - AO).

22. Before the ld. CIT(A), the assessee claimed exemption u/s 54B. The ld. CIT(A) did not allow the claim of exemption u/s 54B on the grounds that it was not filed along with the return. The factum of eligible claim cannot be denied to the assessee. Hence, the matter is referred to the file of the Assessing Officer to examine the date of purchase of the property as per the provisions of Section 54B and take a decision in accordance with the provisions of the Act. The appeal of the assessee on this ground and the CO of the assessee is allowed for statistical purpose.

3. Deed No. 986 – Rs.39,08,000

23. As per the AO,

- The assessee purchased land on 28.09.2010 for a total cost of Rs.34,14,500.
- Out of the total land acquired, the assessee sold 50% of the land.
- The assessee sold the property on Sept/13 & Aug/13
- The assessee claimed cost of improvement of Rs.20,30,250.

- The assessee produced a bill dated 10.01.2011 on the letter head of once Sh. Darshan Pal, Thekedar.
- The assessee claimed the entire amount has been paid in cash.

24. The Assessing Officer held that no evidence in respect of payment has been furnished, no identity proof of Sh. Darshan Pal was submitted, no address of Sh. Darshan Pal and contact number has been submitted in the reply given to the AO.

25. The ld. CIT(A) deleted the addition holding as under:

"7.2 With respect to the above Ground of Appeal which is in reference to disallowance of half of the cost of acquisition and further the entire cost of improvement, the submission of the Appellant is twofold. As regards the disallowance of Cost of Acquisition it has been submitted that while it is true that the assessee/Appellant did not sell the entire piece of land evidenced by deed, but the claim of entire cost of acquisition to be deducted from the sale consideration was made on the peculiar facts on hand. That the assessee had purchased the land which was irregular in shape and the prospective buyers were not ready to buy the entire piece in such shape. That it is through process of strenuous negotiations that the assessee was able to make a deal of three pieces which have been parted off in haphazard manner of land parcels on the total plot size leading to narrow and irregular vacant spaces abutting these plots. Thus the so called left over strips of land even while remaining to continue in assessee's possession is not saleable as it does not have any market. In support of this submission the Appellant has enclosed the map of land showing such strips, enclosed as Annexure- E. Further, a letter from Patwari of "Pataudi" dated 14.11.2014 (Annexure- F) in relation to the land has been also enclosed in which it is clearly mentioned that balance land has been left for using the path to different plots and is not usable by the assessee.

It has been submitted that it is in this context that the entire cost of acquisition of the land in Deed No. 986 was adjusted against the sales consideration. That viewed differently it is as good as an extinguishment of Appellant's saleable rights on the land and accounting wise it would be fair to apportion value of this unusable vacant land to each of the plot whereby the result shall be the same. Consequently it has been submitted that the assessee's claim for full cost of consideration be allowed.

7.3 As regards the disallowance of Cost of Improvement the substance of the Appellant's submission is that that a detailed labour bill dated 10/01/2011 of the contractor Sh. Darshan Pal had been filed and the scanned copy of which has been reproduced in the assessment order. That this has five different nature of work namely knocking down of old houses, clearing the ground, land filling, leveling and construction of boundary. That all these expenses were the natural corollary of the kind of plot that the assessee had purchased. Having allowed the compensation, the expenses incurred to clear the land and level it was clear case of attempt to improve the assets and hence and allowable expense. Similarly demarcating the plot by constructing a boundary to avoid any further encroachment was also to secure and improve the plot of land. It is incorrect to say that any information or evidence was not filed. The appellant did file copy of contract, copies of bills sand, earth bricks etc. The bill of the contractor was also filed before the A.O. The reality is that that most of these expenses were incurred on that part of land which got transacted. That is why these portions got sale worthy. Hence the need and factum of having incurred expenses stand duly supported by the circumstances and the assesse had discharged the initial onus.

That as regards the non service of notice u/s 133(6) it has been submitted that these are nomadic labour contractors who keep moving in the area and normally do not have permanent address. The events in question relate to the period 2010, which is quite back in time. Locating them in 2016-17 would be a stupendous task. Therefore in the circumstances non-service cannot be used against the appellant. Regarding the payment in cash it needs to be appreciated that these payments are disbursed over a

period of time of holding the property and not is onetime payment. The assesse is not running a business and hence not maintaining formal books of accounts in the context. Otherwise this has been met out of cash in hand. The assessee/ appellant has also placed on record his letter to Nagarpalika of Patuadi" (Annexure-G) in response of a notice (the same is enclosed), in support of his claim that assessee has incurred certain expenses for maintenance and development of land till the time of sale of land. That therefore the Appellant is clearly entitled for the entire payments made to the contractor, both by cheque as well as by cash, amounting to Rs. 20,30,250/-.

7.4 I have carefully considered the facts of the case with reference to the Ground of Appeal No. 5. As regards the issue of restricting the cost of acquisition to an amount of Rs.15,36,525/- instead of full claim of cost of acquisition at Rs.34,14,500/-, the essence of the submission of the Appellant is that in the peculiar facts of the this case the entire cost of acquisition is required to be deducted from the sale consideration for the reason that part of the entire plot had to be bifurcated before sale as it was irregular in shape and was not saleable. In support thereof the appellant has also provided the copy of the site plan of the said plotting. That the non sold piece of land is for the purpose of providing right to way for going to other plots and therefore is permanently un-saleable and therefore the entire cost of acquisition has to be loaded on the sold land, so as to work out the Short Term Capital Gain arising of the said transaction. In support thereof the appellant has also provided the confirmation given by Halka Patwari, Pataudi to Tehsildar Pataudi on 14.11.2014, evidencing the present status of the left over unsold part of 33 Marla out of the total 60 Marla Plot in Deed no. 986. From the evidences filed on record it is seen that the claim of the Appellant is justified and in the facts of the case the entire cost of acquisition is required to be deduced from the cost of sale consideration. Accordingly the AO is directed to allow the cost of acquisition at Rs.34,14,500/- instead of the same claim having been restricted by the AO at Rs. 15,36,525/-.

As regards the disallowance of the cost of improvement of Rs.20,30,250/- is concerned that while the assessee had submitted the details of work of land filling, cleaning, demolition of old structure and plinth wall and brick walls through the Sh. Darshan Lal, the Contractor whose final bill is dated 10.01.2011, it is seen that the same has been summarily rejected by the AO without making any necessary inquiry from Darshan Pal whose office address has been provided at Mumtajpur, Teshsil Pataudi, District Gurgoan. That not much can be made of the non- service of the notice u/s 133(6) issue to Shri Darshan Pal, more so in face of the fact that a hand written reply in his name has been received through post in the office of the AO on 26.12.2016. The Appellant had filed copy of the contract copy of signed bill and earth brick bills evidencing construction of boundary to avoid any encroachment on the sold piece of land. In support of fencing/construction of brick wall the assesee has also provided copy of letter written to secretary, Municipality, Pataudi dated 10.10.2011. Thus taking into totality all these contemporaneous evidences as also the fact that it is the AO who had all the powers to enforce the attendance of Darshan Pal the Contractor, the addition made by the AO by disallowing the cost of improvement for Rs. 20,30,250/- is directed to be deleted and the Ground of Appeal No. 5 is allowed."

26. Having heard the arguments of both the parties. We find that the ld. CIT(A) has given relief observing,

- There was an old house which has to be demolished.
- Land has to be cleared, filled and levelled.
- Boundary was constructed.
- The fact that half of the land was sold has been accepted.
- The land was irregular in shape and the site plan of the plotting has been examined.

- From the examination of the above, the ld. CIT(A) held that the remaining land was unsaleable, hence the entire part of improvement has to be loaded on the said land.

27. Since, a categorical finding has been given by the ld. CIT(A) with regard to the shape, boundary, ground leveling work, the area of the plot sold and unsaleable land parcel. We find no reason to interfere with the order of the ld. CIT(A) in allowing the cost of improvement.

4. Taj Land – Rs.1,84,23,729/- & Exemption u/s 54F

28. For the sake of brevity and ready reference, the relevant portion of the Assessment Order is reproduced as under:

"10.2 The assessee during the relevant period has sold a property known as Taj Land for a consideration of Rs.3,23,88,500/- to Taj Real Estate Pvt. Ltd., Okhla, New Delhi on 27.06.2013. This property is situated in Farookh Nagar Tehsil, District Gurgaon (now Gurugram). The assessee had purchased different small lands in November 2007 from different persons (total 10 different deeds) which were sold during the relevant period under a single registry to Taj Real Estate Developer. The details of purchase of above land by the assessee is tabulated here under:

Description of the Property	Date of Sale	Area of sold property	Sales consideration	Remarks
Ten properties purchases totaling to 39 Kanal 7 Marla 7 Sarsai as undera: 4 Kanal at Khata No. 659/697 Farukhnagar Teh. Pataudi, Dist.				

Gurugram purchased for Rs. 8,00,000/- + Rs. 48,000/- Stamp duty on 23.07.2007. 6 Kanal 9 Marla at Khata No. 61/64 Farukhnagar Teh. Pataudi, Dist. Gurugram purchased for Rs.16,12,500/- + Rs. 97,000/- Stamp duty on 15.11.2007. 6 Kanal 9 Marla at Khata No. 61/64 Farukhnagar Teh. Pataudi, Dist. Gurugram purchased for Rs.16,12,500/- + Rs. 97,000/- Stamp duty on 15.11.2007. 4 Kanal 6 Marla at Khata No. 61/64 Farukhnagar Teh. Pataudi, Dist. Gurugram purchased for Rs.10,75,000/- + Rs. 64,500/- Stamp duty on 15.11.2007. 3 Kanal 18 Marla at Khata No. 59/61 Farukhnagar Teh. Pataudi, Dist. Gurugram purchased for Rs.9,62,500/- + Rs. 58,000/- Stamp duty on 15.11.2007. 7 Marla 7 Sarsai at Khata No. 62/65 Farukhnagar Teh. Pataudi, Dist. Gurugram purchased for Rs.1,00,000/- + Rs. 6,000/- Stamp duty on 15.11.2007. 4 Kanal 5 Marla at Khata No. 59/61 Farukhnagar Teh. Pataudi, Dist. Gurugram purchased for Rs.10,70,000/- + Rs. 64,200/- Stamp duty on 16.11.2007. 3 Marla at Khata No. 62/65 Farukhnagar Teh. Pataudi, Dist.	27.06.2013	39 Marla	32388500	

Gurugram purchased for Rs. 37,500/- + Rs. 2,250/- Stamp duty on 19.11.2007. 2 Marla at Khata No. 62/65 Farukhnagar Teh. Pataudi, Dist. Gurugram purchased for Rs. 90,000/- + Rs. 5,400/- Stamp duty on 16.11.2007. 6 Kanal 8 Marla at Khata No. 59/61 Farukhnagar Teh. Pataudi, Dist. Gurugram purchased for Rs.10,70,000/- + Rs. 64,200/- Stamp duty on 19.11.2007.				

10.3 The assessee has worked out the capital gains on the above sale as below:

Sales consideration:	Rs.3,23,88,500/-
Less: Cost of Acquisition-81,94,450*939/551=	Rs.1,39,64,771/-
Long term capital gain	Rs.1,84,23,729/-
Less: Exemption u/s 54F (-)	Rs.1,84,23,729/-

Analysis of Claim of exemption u/s 54F of the Act:

10.4 The assessee in support of his claim u/s 54F has furnished a copy of registered deed dated 11.7.2013 purchased by assessee jointly in the name of Smt. Meenu Gupta, Smt. Nirmal Garg and Shri Himanshu Garg (assessee). On perusal of this registry, it is observed that the purchased property is a land of 4 bigha, 8 biswa (appxt 1 Acre) comprising of a constructed area of 500 sq.ft. The total cost of above property paid by the co-owners was Rs.5,41,36,367/- (Five crore forty one lacs thirty six thousand and three hundred and sixty seven). The share of the assessee in the above property is 47.5/119

from the total land of 4 bigha 8 biswa (appx. 1 Acre) and constructed area.

10.5 On perusal of the documents of registry of the property it is observed that the claimed property was mainly a land of about one Acre size where a covered area of a size of 500 sq. ft. is also stated to be situated. Further, it is nowhere mentioned in the registry that said constructed building is a residential house. The registry mentions a covered area of 500 sq. ft. or a "Makan". It does not say a "Rihayshi Makan" or residential house. Thus, the claim of assessee u/s 54F was not evident from the documents provided in his support.

10.6 Meanwhile, the inspector of this office was directed to visit the said property to ascertain the correctness of the claim of the assessee. On his visit to the said property he found that a concrete-brick manufacturing unit is being run by one Shri Bharat Bhushan under the name of M/s Surabh Ferrocon. The photograph of the said premises was taken by the Inspector is reproduced overleaf:

10.7 In view of the above the assessee was show caused vide this office letter dated 21.11.2016 to prove his claim under Section 54F. The assessee vide reply dated 02.12.2016 submitted that the assessee had obtained a domestic connection of 1 KW after the purchase of the property which proves that the said building was a residential house. It was also asserted that the premise was purchased by assessee with a view to reside with his parents by using the entire land and the said building as residential house. The

assessee also relied upon the registered documents where it is mentioned that the said property comprises of an area of 500 sq. feet constructed building. As far as the approval of construction for residential house, it was mentioned that there was no need on the part of the assessee to obtain any approval of construction since he had bought an already constructed house. The assessee has also submitted a certificate from Town and Country Planning dated 01.12.2016 which says that the said land is a residential land. As per the letter plot in Khasra No. 257 - 258 sector 104, Gurgaon is shown as a part of residential land in the Master Plan of Gurugram. Further the assessee has also relied upon the Khasra issued by the Patwari where it is mentioned that a "Makan" is also situated in the khasra of agricultural land purchased by the assessee. With regards to the present situation of the property where an electricity connection of 45KV has been taken by the assessee in 2016 it has been stated that the present status of the property does not prove that when the property was purchased it was not a residential house.

10.8 The submission made by the assessee has been duly considered. It is not a matter of dispute that whether a constructed structure or 'Makan' was a part of the property purchased by the assessee. The registered sale deed as well as the khasra issued by the Patwari clearly mentions this fact. The issue under examination is as to whether the said 'Makan' was a Rihayashi Makan (Residentail House) or any other type of 'Makan'. Further, if at all this covered area was a residential house, is the assessee eligible to claim deduction under section 54F on the entire property being mainly a land of about one Acre size.

10.9 It is the duty of the assessee to satisfy with the evidences to prove any claim made under section 54F of the Act. More so when at

present there is a permanent connection of 45 KW and a factory is being run from the said place. Merely having a domestic electricity connection does not prove that it was a residential house. The assessee was requested to furnish the evidences to prove that how a small area of 500 sq. ft. which was purchased jointly in the name of 3 co-owners could be eligible for deduction u/s 54F on a land of more than 90 times size for which the total investment of Rs. 5,41,36,367/- was made. The assessee has not been able to substantiate his claim in respect of the residential house.

10.10 Supreme Court in Associated Indem Mechanical Private Ltd. vs. West Bengal Small Scale Industrial Development Corporation Ltd. [2007 (3) SCC 607] explain the meaning of "residential" as follows:

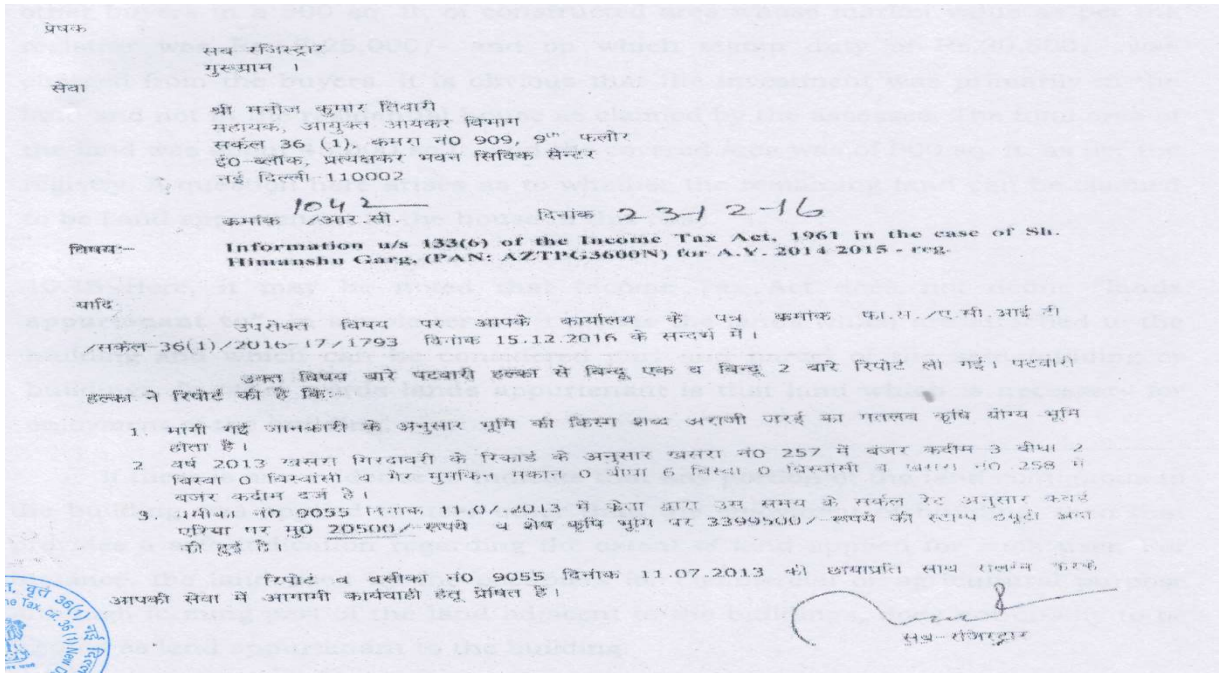
"A residence ordinarily means a place where one resides; the act or fact of abiding or dwelling in a place for some time; an act of making one's home in a place. "Residential" ordinarily means-used, serving or designed as a residence or for occupation by residents; relating to or connected with residence. Gardens or grounds or any furniture supplied or fittings or fixtures affixed in a building or seat in the room can by no stretch of imagination be called or said to be a residential building, but they are included in the definition of premises".

10.11 Further, in the case of Amit Gupta vs. DCIT Citation 2006 6 SOT 403 it was held that "The requirement of law is that the property should be a residential house. The expression residential house has not been defined in the Act. The popular meaning of the word is a place or building used for habitation of people. It is used in contradistinction to a place which is used for the purpose of business, office, shop, etc. It is capable of being used for the purpose of residence than the requirement of section is satisfied."

10.12 The assessee was expected to establish the said building to be called as residential house, by furnishing documents of following nature:

- The plan of the house and the approval for construction from the relevant authorities.
- Title deed.
- Tenancy agreement, if any.
- Photograph, if any. habitability of the building for the purpose of residence which may include kitchen, bathroom etc.

10.13 The assessee has however, not been able to furnish conclusive evidences in support of his claim. It was also observed on perusal of the registry deed that in the column of the type of land it was mentioned as "Araji Jarai" which means agriculture land. For ascertaining the nature of land a letter was issued to the Sub Registrar/Tehsildar of the area. He was also requested to intimate about the value of constructed area taken for stamp duty purpose. The reply received from the Tehsildar is reproduced under:



प्रेषक

सब रजिस्ट्रार
गुरुग्राम ।

सेवा

श्री मनोज कुमार तिवारी
सहायक, आयुक्त आयकर विभाग
सर्कल 36 (1), कमरा नं0 909, 9वाँ फ्लोर
ई0-ब्लॉक, प्रत्यक्षकर भवन सिविक सेन्टर
नई दिल्ली-110002

क्रमांक 1042 /आर.सी. दिनांक 23-12-16

विषय:— **Information u/s 133(6) of the Income Tax Act, 1961 in the case of Sh. Himanshu Garg. (PAN: AZTPG3600N) for A.Y. 2014-2015 - reg.**

यादि

उपरोक्त विषय पर आपके कार्यालय के पत्र क्रमांक फा.सं./ए.सी.आई.टी. /सर्कल-36(1)/2016-17/1793 दिनांक 15.12.2016 के सन्दर्भ में।

उक्त विषय बारे पटवारी हल्का से बिन्दू एक व बिन्दू 2 बारे रिपोर्ट ली गई। पटवारी हल्का ने रिपोर्ट दी है कि:-

1. मांगी गई जानकारी के अनुसार भूमि की किस्म शब्द अराजी जारई का तात्पर्य कृषि योग्य भूमि होता है।
2. वर्ष 2013 खसरा गिरदावरी के रिकार्ड के अनुसार खसरा नं0 257 में बंजर कदीम 3 बीघा 2 बिस्वा 0 बिस्वांसी व गैर मुमकिन मकान 0 बीघा 6 बिस्वा 0 बिस्वांसी व खसरा नं0 258 में बंजर कदीम दर्ज है।
3. जमीका नं0 9055 दिनांक 11.07.2013 में केरा द्वारा उस समय के सर्कल रेट अनुसार कलां एरिया पर मु0 20500/- रुपये व शेष कृषि भूमि पर 3399500/- रुपये की स्टाम्प ड्यूटी अदा की हुई है।

रिपोर्ट व जमीका नं0 9055 दिनांक 11.07.2013 की छायाप्रति साथ संलग्न करके आपकी सेवा में आगामी कार्यवाही हेतु प्रेषित है।

सब-रजिस्ट्रार

It may be seen from the above letter that the Sub Registrar has categorically stated that the meaning of the word "Araji Jarai" is an agriculture land. Further it stated that out of the total stamp duty only Rs.20,500/- was charged against the covered area and stamp duty of Rs.33,99,500/- was for the remaining agricultural land.

10.15 The inquiries conducted by this office, therefore, establishes that the claimed investment of Rs. 1.84 crore was not in the purchase of a residential house but was for the purchase of a land .It may be seen that the nature of the property purchased by the assessee is not a residential house but an urban agricultural land where some constructed area was existing when the assessee purchased it. This structure may have been used for any purpose but there is nothing on record to prove that it was a residential house. For claiming exemption of Rs. 1.84 crores u/s 54F the assessee has made investment jointly with two other buyers in a 500 sq. ft, of constructed area whose market value as per the registrar was Rs. 3,25,000/- and on which stamp duty of Rs.20,500/- was charged from the buyers. It is obvious that the investment was primarily in the land and not in the residential house as claimed by the assessee. The total area of the land was about 45,000 sq.ft. and the covered area was of 500 sq. ft. as per the registry. A question here arises as to whether the remaining land can be claimed to be Land appurtenant to the house in this case.

10.16 Here, it may be noted that Income Tax Act does not define “lands appurtenant to”. In simple terms, it means the lands which are attached to the building and which can be considered part and parcel of the said building or buildings. In other words lands appurtenant is that land which is necessary for enjoyment of the building.

If there is any evidence to indicate that any portion of the land contiguous to the building was applied to user other than the enjoyment of building, then that provides a safe indication regarding the extent of land applied for such user. For instance, the land used by the occupiers for commercial or agricultural purpose although forming part of the land adjacent to the buildings, does not qualify to be treated as land appurtenant to the building.

Further, if any material pointing to the attempted user of the land for purposes other than the effective and proper enjoyment of the house would also 'afford a safe guide to determine the extent of surplus land not qualifying to be treated as land appurtenant to the building.

10.17 In the present case, there is not an iota of doubt to hold that the constructed area and the land are not one unit or inseparable unit. Out of the total area of the land of about 45,000 sq. ft. only 500 sq. ft. is the area of constructed portion with no evidence of use as a residential house. The assessee has not been able to produce any evidence in his support on this point. Therefore, the land of about 45,000 sq. ft cannot be stated to be a land appurtenant to the house as claimed by the assessee.

10.18 My views find support from the case law cited in 351 ITR 123 (2013) HIGH COURT OF KERALA Smt. Asha George vs. ITO where the honorable court on the similar issue concluded as under:

"12. Section 54F is intended to encourage construction of or acquisition of residential house with the aid of the proceeds from the transfer of any long term capital asset, which is not a residential house. The provision contemplates computing the cost of the residential building, but the value of the plot on which the farm house stands and the land appurtenant could also be considered. The tribunal has categorically found that the appellant

has not produced material to show that the entire area of 1.92 acres should be considered as land appurtenant to it. It is in such circumstances, the tribunal made an estimation and directed that the value of the plot on which the farm house is located and the land appurtenant be fixed as Rs. 2 lakhs. We are unable to accept the contention of the appellant that the value of the entire land must be considered in arriving at the value of the residential building."

10.19 In view of the above the claim of assessee that the amount of capital gain was invested in purchase of a residential house is not proved on the basis that, the facts gathered during the course of assessment and the documents placed on record.

10.20 Without prejudice to the above, even if the constructed area of 500 sq. ft. is treated to be a residential house, the claim of the assessee will be restricted to the value of the house and his share in the said house. As per the sub-registrar its value was appxt. Rs. 3.50 lacs (stamp duty of Rs.20,500/- charged @ 6% of the market rate of the property) and the share of assessee in that house comes to Only Rs.1.75 lacs. Thus out of the total claim of Rs. 1.84 crores, if the assessee is eligible at all u/s 54F, he will get a deduction of only Rs. 1.75 lacs.

10.21 However, in this case the facts clearly establishes that the claim of assessee u/s 54 F is not as per the conditions laid down in the Act. The Hon'ble Supreme Court in the land mark judgment of Sumati Dayal vs. Commissioner of Income tax observed as overleaf:

"It is no doubt true that in all cases in which a receipt is sought to be taxed as income, the burden lies on the Department to prove that it is within the taxing provision and if a receipt is in the nature of income, the burden of proving that it is not taxable because it falls within exemption provided by the Act lies upon the assessee."

10.22 The Hon'ble Supreme Court in the case of Commissioner of Income-Tax, West vs. Durga Prasad More 82 ITR 540 observed the often quoted following relevant observation:

"It is true that an apparent must be considered real until it is shown that there are reasons to believe that the apparent is not the real. In a. case of the present kind a party who relies on a recital in a deed has to establish the truth of those recitals otherwise it will be very easy to make self-serving statements in documents either executed or taken by a party and rely on those recitals. If all that an asses see who wants to evade tax is to have some recitals made in a document either executed by him or executed in his favour then the door will be left wide open to evade tax. A little probing was sufficient in the present case to show that the apparent was not the real. The taxing authorities were not required to put on blinkers while looking at the documents produced before them. They were entitled to look into the surrounding circumstances to find out the reality of the recitals made in those documents."

10.23 In view of the facts and circumstances of the case and on the basis of inquiry conducted the only irresistible conclusion which can be drawn is that the claim of assessee u/s 54 F is not as per the conditions laid down in the Act. Therefore, an addition of Rs. 1,84,23,729/- is being made to the total income of the assessee on account of disallowance of exemption u/s 54F of the Income Tax Act, 1961."

29. Aggrieved, the assessee filed appeal before the ld. CIT(A).

30. The ld. CIT(A) deleted the addition holding that the assessee has purchased a house "Makan", hence the exemption u/s 54F is to be allowed.

31. For the sake of ready reference, the arguments taken up by the assessee before the ld. CIT(A) and the decision of the ld. CIT(A) is reproduced below:

"8. In Ground No.6 the Appellant has contended that the AO has erred in refusing to give the benefit of section 54F to the assessee, with respect to investment made in a residential house out of proceeds of land sold at Taj Real Estate Pvt. Ltd., on the ground of having not proven his claim and consequently made an addition of Rs. 1,84,23,729/-.

It has been submitted that through oversight this ground could not be filed originally and that the said ground may kindly be therefore admitted.

In the interest of justice, the said Ground of Appeal No. 6 is hereby admitted.

8.1 From the assessment order it is seen that in support the claim of 54F the assessee has furnished copy of registered sale deed dated 11.07.2013 of the property purchased by the assessee jointly in the name of Smt. Menu Gupta, Smt. Nirmal Garg and Shri Himanshu Garg (the assessee). The AO notes the purchased property is a land of 4 Bigha 8 Biswa (approximately 1 acre) comprising of a constructed area of 500 square feet. The total cost of above property paid by the co-owners was Rs.5,41,36,367/- and the share of the assessee in the said property is 47.5/119 from the total of 4 Bigha 8 Biswa and the constructed area. That the registry mentions a covered area of 50 sq. Ft. or a makaan but does not say a "or residential house". That thus the claim of assessee u/s 54F is not evident from the documents provided by the assessee. In para 10.7 of the Assessment Order the AO has noted that the assessee filed a

reply dated 02.12.2016 submitting that he has obtained a domestic connection of 1 K.W. after the purchase of the property which proves that the building was a residential house. The assessee also relied on the registered documents where it is mentioned that the said property comprises of an area of 500 sq. ft constructed building. The assessee also submitted a certificate from Town and Country Planning dated 01.12.2016 which says that the said land is a residential land in the Master Plan of Gurugram. The assessee also relied on the Khasra issued by the Patwari where it is mentioned that a "Makaan" is situated in Khasra of agricultural land.

In para 10.8 of the assessment order the AO notes that it is not in dispute whether z constructed structure or Makaan was part of the property purchased by the assessee. The issue under examination is whether the Makaan was a residential house or any other type of Makaan also if at all this covered area was a residential house is the assesee eligible to clain deduction under section 54F on the entire property being mainly a land of about 1 acre size.

The AO requested the assessee to furnish the evidence to prove that how a small area of 500 sq. ft. which was purchased jointly in name of 3 co- owner could be eligible for deduction u/ 54F on a land of more than 90 times size for which the total investment of Rs. 5,41,36,367/- was made. The AO has referred to the Supreme Court decision in Indem Mechanical Pvt. Ltd. to explain the meaning of residence. In para 10.15 the AO has therefore concluded that from the inquiries conducted it is established that investment of Rs. 1.84 crores was not in purchase of a residential house but was for purpose of land where some constructed area was existing when the assessee purchased it. That this structure may have been used for any purpose but there is nothing on record to prove that it was a

residential house. That thus it is obvious that the investment was primarily in land and not in residential house as claimed by the assessee.

In para 10.17 the AO is further of the view that out of the total area of the land of about 45,000 sq. ft. only 500 sq. ft. is the area of constructed portion with no evidence of use a residential house and that therefore the land about 45,000 sq. ft. cannot be stated to be land appurtenant to the house as claimed by the assessee. That considering the fact that the market value of the constructed area of 500 sq. ft. was Rs. 3,25,000/- with the stamp duty of Rs. 20,500/- in all, therefore out of the total claim of Rs. 1.84 crores the assessee is eligible of a deduction u/ s 54F only to the extent of Rs. 1.75 lakhs, if at all . That however in paral0.23 an addition of Rs. 1,84,23,729/- has been made by the AO by denying the claim of exemption u/s 54F.

8.2 Vide reply submitted during the appellate proceeding the assessee / appellant has inter-alia submitted in substance that the purchase deed or the registry, does state that there is 500 sq. ft. makan (Enclosed as Annexure- H). Further the assessee has submitted a certificate from town and country planning to the effect that the area where the land is located is residential in nature. Also the khasra of the patwari certifies to the existence of a "Makaan" on the land. All this goes to prove that there does exist a structure on the land which is habitable.

That relying on the decision of ITAT, Jaipur in the case of Shyam Sunder Mukhija, 1999 38 ITD 122 JP , the appellant further submitted that the expression " Residential house " used in section 54F has not been defined in the Act. The popular meaning of word house is a place or building used for habitation of man. Consequently

residential house is a dwelling place which is used by people to reside or dwell, as against a house which is used for office or warehouse or shop. So contra-distinction to a residential house is a building used for commercial or business purposes. In that light ITAT, Jaipur held that even a farm house is also a residential house. Trying to put it differently, it is the purpose for which the house is used and not the size or location which is material to characterize it for the purpose of sec 54F.

As regards the visit of the Income Tax Inspector on which the A.O. has relied so much, the appellant submitted that the same does not prove anything adverse. Notwithstanding that, the existence of a house in question has not been disputed even in his report, to the extent referred to in the assessment order. The attempt of the A.O in computing partial allowable deduction, as an alternative, goes to prove his acceptance about existence of a residential house, on the lines mandated by sec 54F. It is further submitted that existence of a shed along with the residential unit involving casting of pavers cannot be fatal, as these are temporary structures, erected post purchase of the house and the land appurtenant to it. Its existence does not change the basic character of the residential house. The section does not put bar on the manner of utilization of land and the land appurtenant once it has been purchased. Post purchase of the mandated residential house, developments like enhancing the electricity connection to 45 kw in 2016 does not obliterate the existence of residential property at the time of transaction and thereafter.

That the assertion that the land on which the house is situated has been stated as agriculture is also not factually correct. All that the letter of Sub Registrar says is it is ARJAI JARAI i.e. capable of

agriculture operations. In any case it is not all material to the issue. The section is neutral as to what kind of land the residential house should be situated on and in whether it is located in urban or rural area.. The land is ARJAI JARAI or agricultural is in itself a bland statement in this specific context. Even inspector's report does not refer about any agricultural operations taking place in the appurtenant land. Moreover the concerned Patwari's Khasra, relied upon by assessee in the assessment proceedings does once again certify the existence of the house.

As far as the issue of size of appurtenant land is concerned, again the Act is neutral on this. Buying a particular residential house is decision of an assessee, influenced by so many factors and circumstances. Some people want to stay in gated communities of flats while others want a lot of greenery around its living areas. The benefit of the section cannot be denied simply because the assessee decided to go for a house with a large open green space.

That "land appurtenant" to the house is not a criteria for grant of deduction under section 54 F and even a farm house with all in appurtenant land can be called a residential house (refer case of "Shyam Sunder Mukhija Vs. ITO, supra) neither the Act nor the tenets of natural justice require assessing officer to sit on judgment about the appropriate area of appurtenant to the land. Hence in this alternative agreement he has gone to extreme by restricting appurtenant land as "Zero" which is clearly irrational and cannot test any the stand of reasoning. Finally having thrown up an alternative manner of computation of income without implementing it in final computation, makes such alternative suggestion ab initio void, because tire basic purpose of assessment is to correctly assess the income as per assessing officer's satisfaction and appreciation.

The appellant further stated that it was submitting the following documents in support of his claim, which documents were never called for by the AO and which are as follows:

> **The plan of the house and the approval for construction from the relevant authorities.** It is submitted that house was already constructed at the time of purchase and duly mentioned in title deed submitted by assesse during assessment proceedings. Further, Assessee on his part has not taken any approval for construction from any authorities.
>
> **Title Deed:** Title deed of the house was duly submitted at the time of assessment proceedings. However same is encloses again as Annexure-H.
>
> **Tenancy agreement:** It is never a condition for claiming 54 F that house should be on rent, however assesse let out the property for residential purpose in next year that is FY 2014-15(A copy of such agreement has been enclosed as Annexure-I).

Further, it is during the assessment proceedings only that the assessee came to know that tenant has started certain warehouse activities on let out property without permission of assesse. He has issued a legal notice to the tenant for using residential property for commercial use through his advocate. A copy of Notice has been enclosed as Annexure-J. However we reiterate that this does not go to hit on claim u/s 54 F being not a contemporaneous event.

4.) Photographs of Makan: Photographs of Makan showing habitability like kitchen, room etc. of house are enclosed as Annexure-K.

5.) The habitability of the building for the purpose of residence which may include kitchen bathroom etc.:

It is stated that habitability of the building stands prove through the photograph and rent agreement mentioned above.

Further it is stated that a domestic electricity connection bill of property was also submitted at the time of assessment, which certifies that property was meant for residential use not commercial (Such bill is again enclosed as Annexure-L.)

That hence in view of detailed submission on each and every point raised by A.O., the Assessee would object to any disallowance of its claim for section 54F, whether fully or partially because both as per facts and law the assessee is well entitled for the entire deduction, as submitted in the preceding paragraphs.

8.31 have carefully considered the facts of the case with reference to the Ground of Appeal No. 6. The issue in question is quite narrow, simple and no more res-integra i.e. whether the claim of deduction u/s 54F in case of purchase of a residential house within the period stipulated in the said section is allowable on only that part of the residence which is constructed through brick and mortar or that whether the claim of deduction u/s 54F would also encompass the landed area in which this residence is situated and which in the facts of the case is a residential user plot and capable of further extension and also made more livable with all natural facilities, garden etc. It is not the case as if the AO is not satisfied to grant the claim of exemption u/s 54F per se as he has himself agreed in para 10.20 of the assessment order to grant deduction u/s 54 only to extent of Rs. 1.75 lakhs out of the total value of the residence of 500 sq. ft. in

which there are other co-owners and total value of which is Rs. 3.5 lakhs.

The issue as brought out above is squarely covered by Circular No. 667 dated 18.10.1993 issued by the Central Board of Direct Taxes on the question as to whether the exemption u/s 54F would also include the cost of purchase of a plot, provided that the acquisition of plot and the construction thereon are completed within the period specified in this section.

For ready reference para no. 2 of the said Circular No. 667 is reproduced herein below:-

"The Board has examined the issue whether, in cases where the residential house is constructed with the specified period, the cost of such residential house can be taken to include the cost of the plot also. The Board are of the view that the cost of the land is an integral part of the cost of the residential house, whether purchased or built. Accordingly, if the amount of capital gain for the purposes of section 54, and the net consideration for the purposes of section 54F, is appropriated towards purchase of a plot and also towards construction of a residential house thereon, the aggregate cost should be considered for determining the quantum of deduction under section 54/54F, provided that the acquisition of plot and also the construction thereon, are completed within the period specified in these sections."

The issue has also been settled through various judicial decisions wherein it is held that the word residential house used in section 54F of Income Tax Act cannot be restricted only to the constructed area but would also include the land on which said residential house is built/constructed, which are as under:-

I. Additional Commissioner of Income Tax Range -I Dehradun vs. Shri Narendra M Uniyal (ITA No. 1624/Del/2009).

"10. It is crystal clear from the plain reading of Section 54 & 54F that exemption is allowable in respectg of amount invested in the construction of a residential house. There is no any rider u/s 54F that no deduction would be allowed in respect of investment of capital gains made on acquisition of land appurtenant to the building or on the investment on land on which building is being constructed. When the land is purchased and building is constructed thereon, it is not necessary that such construction should be on the entire plot of land, meaning thereby a part of the land which is appurtenant to the building and on which no construction is made, there is no denial of exemption on such investment. Therefore, the contention of the learned DR that there is a distinction with respect to investment in appurtenant land as per Section 54 and 54F is not tenable at all…….

The comments of the AO to the effect that exemption u/s 54F is eligible only for construction of house is not tenable insofar as even cost of land forming part of the residential unit on which no construction is done is also eligible for exemption u/s 54F. Thus, the cost of vacant land appurtenant to and forming part of the residential unit is to be considered for claim of exemption u/s 54F even if no construction has been done on the appurtenant land."

II. ACIT, Circle - 2 Ajmer vs. Shri Om Prakash Goyal (ITA No. Jaipur/2011).

"8. The assessee claimed exemption under section 54F stating that the amount in question has been invested for purchase of land for constructing the house. However, AO did not accept the contention of the assessee on two grounds i.e. firstly, the land in question purchased through an agreement and the agreement has not been registered; secondly, it was opined by AO that the plot in question is an agricultural land and on purchase of agricultural land, deduction under section 54F cannot be allowed. However, the Id. CIT (A) considered the fact that there is no bar to purchase agricultural land on which house was to be constructed. The

fact is that subject to provisions of sub-section (4) of section 54F, 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, found that assessee has purchased a plot of land and has constructed a house on the same, then taking into consideration the case of Narendra Mohan Uniyal, 34 SOT 152 (Del.) and taking into consideration the decision of Hon'ble Rajasthan High Court in case of Vishnu Trading & Investment Co. (128 TAXMAN 777) and also the decision in case of Shyam Sunder Makhija (38 ITD 125 - Jaipur) found that assessee is eligible for exemption under section 54F……..Since all the details are placed on record from which it is established that assessee purchased a plot of land and then constructed the house on it. The house constructed on agricultural land or on other land does not matter, but the fact that house should be constructed and from the report it is very much clear that a residential house was constructed as this fact has been mentioned by valuer in para 14 of his valuation report. In view of these facts and circumstances, we hold that Id. CIT (A) was justified in allowing the claim of the house. Accordingly, we confirm the order of Id. CIT (A)."

III. Deputy Commissioner of Income Tax vs. Kalyanaraman Nataraja (82 taxmann.com 93 - Chennai - Trib.), dated 01.05.2017.

"6. It is crystal clear from the plain reading of section 54F that exemption is allowable in respect of amount invested in the construction of a residential house. There is no any rider under section 54F that no deduction would he allowed in respect of investment of capital gains made on acquisition of land appurtenant to the building or on the investment on land on which building is being constructed. When the land is purchased and building is constructed thereon, it is not necessary tint such construction should be on the entire plot of land, meaning thereby a part

of the land which is appurtenant to the building and on which no construction is made, there is no denial of exemption on such investment. Therefore, the contention of the revenue that there is a distinction with respect to investment in appurtenant land as per sections 54 and 54F is not tenable at all…….

The provisions of section 54F clearly provide for exemption if the net consideration received as a result of transfer of any capital asset, other than a residential house, is invested in the purchase or construction of a residential house. The new residential house is not debarred from having a land appurtenant to any size……."

8.4 Thus considering the established facts and circumstances of the case, the facts of the case, submissions of the assessee as well as the supporting documents like the plan of the house which was already constructed at the time of purchase and duly mentioned in the title Deed, the photographs of the house showing habitability like kitchen, room etc. and the fact that domestic electricity bill which confirms that the impugned property was a residential property, and keeping in view the above said Circular no. 667 of the CBDT as well as the principles laid down in the various decisions referred above, I have no doubt in my mind that exemption u/s 54F is applicable to the Appellant on the entire amount of Rs. 1,84,23,729/- as claimed by him in the return of income and that it cannot be restricted only to the value of the constructed portion of the house which proportionately belongs to the Appellant. So far as the issue of some commercial activity / storage/ warehouse being run from the said premises by the tenant to whom the residential house was given on lease by the assessee for its use as residential premises is concerned, it is held that the said user by the tenant of the premises which is in violation to the lease agreement does not have any bearing on the fact that the exemption is granted under section 54F for purchase of residential house including the land thereto and any

subsequent violation by the lessee of the said residential premise at a later date cannot be determinative of the disallowance of the claim of exemption u/s 54F by the assessee. In a result the Ground of Appeal no. 6 is allowed."

32. Aggrieved, the Revenue filed appeal before the Tribunal. Before us, the ld. Sr. DR argued that the ld. CIT(A) has ignored all the gathered evidences and also under played the evidences of brick manufacturing unit existing over the land. The submissions of the Sr. DR in writing are as under:

Facts	How CIT(A) dealt	Argument
The AO has denied exemption 54F extent on claimed u/s except to the of Rs 1.75 lacs cogent reasons & evidences including for reason that a brick manufacturing was unit found on said property and images of same also inserted in order. Further many other anomalies have been pointed out including the fact that on a land of around 1 acre so called structure building was on 500 sq ft only and said structure cannot be called as residential one. (refer pages 19 to 26 of AO's order)	CIT(A) has ignored all the gathered evidences and the order of AO is relied upon also underplayed of evidence of having brick manufacturing unit over there. The reasons/alleged evidences/case laws relied upon are simply untenable.	With all force and conviction, the order of AO is relied upon. The evidences in any form as mentioned by CIT(A) were not produced before the AO and also he has not been allowed to examine the same.

33. Against the arguments of the Revenue, the ld. AR argued supporting the decision of the ld. CIT(A). The submissions of the ld. AR in writing are as under:

Stand of AO	Decision of CIT(A)	Comments in support of revenue	Assessee's Comments
The AO has denied exemption claimed u/s 54F except to the extent of Rs.1.75 lacs on cogent reasons & evidences including for reason that a brick manufacturing unit was found on said property and images of untenable. same also inserted in order. Further, many other anomalies have been pointed out including the fact that on a land of around 1 acre, SO called structure building was on 500 sq fit only and said structure cannot be called as residential one.	CIT(A) has ignored all the gathered evidences and also underplayed of evidence of having brick manufacturing unit over there. The reasons / alleged evidences /case laws relied upon are simply untenable.	With all force and conviction, the order of AO is relied upon. The evidences in any form as mentioned by CIT(A) were not produced before the AO and also he has not been allowed to examine the same.	Ground No. 8 The assessee relies on the findings of the Id. CIT(A) in para 8.2, 8.3 and 8.4 of the appellate order. In this connection, a reference may kindly be made to pg. 24 of the assessment order wherein the Id. AO has given a finding that total area of the land was 45000 sq. ft. and the covered area was 500 sq. ft as per the registry. It is not understood as to how the Id. Senior DR is alleging that the evidences were not produced before the Id. AO. Further, there is a mention of domestic electricity connection of 1KW at pg. 21 of the assessment order. Further on at the

(refer pages 19 to 26 of AO's Order)			same pg. of the assessment order, a certificate from Town and Country Planning dated 01.12.2016 has been noticed by the AO mentioning that the said land was residential. The Id. AO in para 10.8 has stated that it is not a matter of dispute that whether the constructed structure or 'Makan' was a part of the property purchased by the assessee and according to him the issue is whether it was a residential house and in that case he has agreed that the assessee is eligible for claim u/s 54 on the entire property. Out here it may be mentioned that on a residential land there cannot be any structure or 'Makan' that could be other than residential.

34. Heard the arguments of both the parties and perused the material available on record.

35. We find that the entire deal consists of 10 properties purchased on 23.07.2007 to 19.11.2007 at Farukhnagar. The cost of acquisition shown by the assessee was Rs.81,94,450/- and the indexed cost of acquisition worked out by taking indexation at 939/551 was Rs.1,39,64,771/-. The sale consideration being Rs.3,23,88,500/-, the Long Term Capital gains worked out was Rs.1,84,23,729/-. The assessee subsequently claimed the Long Term Capital Gains as exempt u/s 54F owing to purchase of new residential property within the allowed time. The cost of acquisition and the cost of sale are not in dispute. The Long Term capital gains determined is also not in dispute. The only dispute before us is whether the Long Term Capital Gains have been rightly utilized for purchase of residential house as per the provisions of Section 54F.

36. The entire registry for acquisition of new property pertains to purchase of land of 4 Bigha and 8 Biswa, comprising a total constructed area of 500 sq. mts. for Rs. 5,41,36,367/-. The registry deed dated 11.07.2013 of the property reveals that the property was mainly a land of about 1 acre with a covered area of 500 sq.ft. The page 68 of the paper book which is the first page of the purchase deed mentions the description of the property as "kism jamin/jaydad" – "araji jarai" i.e. detail of the property – agricultural land. The "Rakba" – 4 bigha 8 biswa i.e. area - 4 bigha 8 biswa, "Covered area" – "500 varg foot i.e. covered area 500 sq. ft.". The Assessing Officer has also sent the Inspector to visit the property and he found a concrete brick manufacturing unit under the name M/s Surabh Ferrocon. The photographs have been enclosed in the Assessment Order

clearly proving that a brick manufacturing unit is being run from the premises.

37. Before the Assessing Officer, the assessee submitted that it should be considered as a residential property eligible for deduction u/s 54F owing to,

- A 1 KW electricity connection which shows it is a domestic connection, hence a residential house,
- Intention of the assessee to reside with his parents using the entire land and the said covered area as residential house.
- It was submitted that there was no need to obtain any approval of construction as there is already a constructed house.
- The assessee submitted certificate from town and country planning dated 01.12.2016 showing it as residential land in the master plan.
- The assessee has also relied on the Khasra issued by Patwari where it has mentioned that a "Makan" is also situated.

38. The ld. CIT(A) held that a residential house has not been defined in Section 54F of the Income Tax Act, 1961 and hence, the size or the location is not material to characterize the purpose of Section 54F. The ld. CIT(A) also held that the agricultural land as mentioned in the purchase deed means "land cultivable". The ld. CIT(A) held that "arajai jarai" is bland statement in the specific contest and there was no proof that

agricultural operations are taking place in the appurtenant land. The decision of the ld. CIT(A) treating the "agricultural land" as "land cultivable" and trying to bring the newly purchased asset out of the purview of the "agricultural land" is without any basis when the stamp duty authorities and the revenue authorities have duly considered it as agricultural land.

39. The Departmental Representative argued that the ld. CIT(A) has totally ignored the evidence of having brick manufacturing unit over the land.

40. The ld. Counsel has also argued that the domestic connection of the electricity of 1 KW, the town planning certificate indicating the land as residential, patwari certificate of existence of "Makan" should make the assessee eligible for exemption u/s 54F.

41. The provisions of Section 54F are 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 32a[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—

(a) the assessee,—

(i) owns more than one residential house, other than the new asset, on the date of transfer of the original asset; or

(ii) purchases any residential house, other than the new asset, within a period of one year after the date of transfer of the original asset; or

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

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

Explanation.—For the purposes of this section,—

[***]

[***] "net consideration", in relation to the transfer of a capital asset, means the full value of the consideration received or accruing as a result of the transfer of the capital asset as reduced by any expenditure incurred wholly and exclusively in connection with such transfer.

(2) Where the assessee purchases, within the period of [two years] after the date of the transfer of the original asset, or constructs, within the period of three years after such date, any residential house, the income

from which is chargeable under the head "Income from house property", other than the new asset, the amount of capital gain arising from the transfer of the original asset not charged under section 45 on the basis of the cost of such new asset as provided in clause (a), or, as the case may be, clause (b), of sub-section (1), shall be deemed to be income chargeable under the head "Capital gains" relating to long-term capital assets of the previous year in which such residential house is purchased or constructed.

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

[(4) The amount of the net consideration which is not appropriated by the assessee towards the purchase of the new asset made within one year before the date on which the transfer of the original asset took place, or which is not 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 utilised in accordance with, any scheme38 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."

42. Having gone through the entire facts, we find that the domestic electric connection cannot give any credence or criteria to prove that the assessee has purchased a residential house as per the provisions of Section 54F. The Dakshin Haryana Bijli Vitran Nigam Ltd. has different types of tariff categories namely domestic supply, non-domestic supply, industrial & steel furnace power supply, public water work supply, bulk supply etc. The domestic supply is applicable to consumers for lights, fans, domestic pumping sets, lifts, fire hydrants and house hold appliances in the premises such as single private house/flat, group housing, hostel, working women hostels, anganwadi training centre, places of worships and

village chopal. It also notifies that private dwelling in which space is occasionally used for the conduct of business by a person residing therein shall also be served under this tariff. Further, it also notifies that where a portion of the dwelling is used regularly for the conduct of a business, the consumption in that portion shall be separately metered and billed under the appropriate Non-Domestic tariff or Industrial power supply tariff. If separate meters are not provided, the entire supply will be classified under Non-Domestic supply or industrial power supply tariff as applicable. Thus, in this case it cannot be said that since domestic supply has been given, it assumes the character of a residential house for the purpose of application of Section 54F. If the same simile is used it becomes akin to the argument that all the illegal colonies/houses which have been provided with domestic collection, should be considered as legal as there is a legal domestic electricity supply. Thus, we are not inclined to accept the rationale of the ld. CIT(A) that since there was a domestic electricity connection, the residential house has been said to be purchased. Similarly, the ratio of the size & location of the house will come into fore only once the factum of purchase of house has been proved. We are well aware that the size & location of the residential house do not matter as long as the capital gains are invested in purchase of the residential house. What is being examined in this case is whether any residential house has been purchased by the assessee or not? The master plan of Gurgaon as relied by the ld. CIT(A)/ canvassed by the ld. AR is not a correct way of determining the purchase of residential house. The master plan

of any urban area is the future perspective planning urban land scheme. The Gurgaon master plan 2012, master plan 2020, master plan 2025, master plan 2031 are the perspective development plan of the urban area. Hence, notification of the land as residential land do not give any credence to the factum of purchase of residential house when all the evidences are proving contrary. The ld. CIT(A) has also misinterpreted the "arjai jarai", the agricultural land as capable of agricultural operations. The ld. CIT(A) deleted the addition on the wrong pretest that no agriculture operations have been taken place in the land and since agricultural operations have not taken place, the ld. CIT(A) tacitly held that the residential land. The ld. CIT(A) relied on the case of Addl. CIT Vs. Narendera Mohan Uniyal in ITA No. 1624/Del/2009 and DCIT Vs. Kalyan Raman Natraja (88 Taxman 93). In this case, the issue was whether the house should be on the entire plot of land or not. The Co-ordinate Bench of ITAT held that the exemption need not be denied on the grounds that the entire plot has not been utilized for the construction of house. Hence, the facts of the case differ from the facts of the case before us. The ld. CIT(A) further relied on the case of ACIT Vs. O.P. Goyal. In that case, the Co-ordinate Bench of Jiapur held that since the residential house was constructed as the fact has been mentioned, the valuer in his valuation report, the Tribunal allowed the exemption u/s 54F which is not the case before us. We have also referred to Circular No. 667 of CBDT which clarifies *that Sections 54 and 54F provide for a deduction in cases where an assessee has, within a period of one year before or two years after the date on which the*

transfer of a capital asset takes place, purchased, or has within a period of three years after that date constructed, a residential house. The quantum of deduction is itself dependent upon the cost of such new asset. It has been represented to the Board that the cost of construction of the residential house should be taken to include the cost of the plot as, in a situation of purchase of any house property, the consideration paid generally includes the consideration for the plot also.

2. The Board has examined the issue whether, in cases where the residential house is constructed within the specified period, the cost of such residential house can be taken to include the cost of the plot also. The Board are of the view that the cost of the land is an integral part of the cost of the residential house, whether purchased or built. Accordingly, if the amount of capital gain for the purposes of section 54, and the net consideration for the purposes of section 54F, is appropriated towards purchase of a plot and also towards construction of a residential house thereon, the aggregate cost should be considered for determining the quantum of deduction under section 54/54F, provided that the acquisition of plot and also the construction thereon, are completed within the period specified in these sections.

43. Thus, even the CBDT Circular held that deduction u/s 54F can be given on the combined cost of construction of the residential land and cost of plot. The cost of plot is an integral part of the purchase of the house. No two calms about that. In the case before us, the master plan of Gurgaon is only a perspective plan, the Patwari's certificate and the electricity connection cannot prove either purchase or construction of house. The registration document of the land clearly proves that

the land is of 4 bigha 8 biswa and is an agricultural land as per the registration document. The registration fee is also paid as per Circle rate of agricultural land. The covered area of 500 varg foot (sq. ft.) do not mention it as a residential house in the registration document. There is no evidence or certificate of conversion of land use (CLU) from agricultural land to residential land. There is no dispute that the land purchased is an agricultural land and the registry has also been paid on the rate equal to registration of agricultural land. The land has been purchased in Bigha and Biswa not in square yards. The residential land is generally sold in square meter or square yards but not in Bigha or Biswa. The Assessing Officer has also separately enquired from the sub-Registrar who has replied in affirmative that the land is agricultural land and he has given reference of Khasra Girdhawari further proves it to be an agricultural land. The sub-Registrar has also clarified that the stamp duty of Rs.33,99,500/- was charged for registration for agricultural land and Rs.20,500 was charged for against the covered area. There was no mention of a residential house in the documents. Further, the enquiries conducted by the revenue authorities have clearly proved with photographic evidences that the area has been used for concrete brick manufacturing unit run by one Sh. Bharat Bhushan under the name of M/s Surabh Ferrocon. We have also gone through the lease deed submitted along with the paper book which shows that the land has been given on rent of "some of the building and open parking area" when there was no such building existing as per records. Further, at point no. 7, it mentions that the premises

should be used only for residential purpose of its staff whereas there was no dwelling unit available at the said premises. Further, the enquiries and the photographs clearly proves that the said land was used for manufacturing of concrete, bricks (page 20 of AO). Hence, no credence can be given to the rent agreement or the subsequent notices.

44. In this case, the basic documents of either existence of a house or construction of a house are lacking. The land purchased was agricultural land, stamp duty paid was on agricultural land.

45. We have also examined the judicial pronouncements on this issue. We are in agreement with the judgment of Hon'ble Supreme Court in Associated Indem Mechanical Private Ltd. vs. West Bengal Small Scale Industrial Development Corporation Ltd. [2007 (3) SCC 607] relied upon by the Assessing Officer which explained the meaning of "residential". The Hon'ble Apex Court held that,

"A residence ordinarily means a place where one resides; the act or fact of abiding or dwelling in a place for some time; an act of making one's home in a place. "Residential" ordinarily means-used, serving or designed as a residence or for occupation by residents; relating to or connected with residence. Gardens or grounds or any furniture supplied or fittings or fixtures affixed in a building or seat in the room can by no stretch of imagination be called or said to be a residential building, but they are included in the definition of premises".

46. In the case of Amit Gupta vs. DCIT (supra), it was held that, *"the requirement of law is that the property should be a residential*

house. The expression residential house has not been defined in the Act. The popular meaning of the word is a place or building used for habitation of people. It is used in contradiction to a place which is used for the purpose of business, office, shop, etc. It is capable of being used for the purpose of residence than the requirement of section is satisfied."

47. The Hon'ble HIGH COURT OF KERALA in the case of Smt. Asha George vs. ITO 351 ITR 123 (2013) on the similar issue concluded as under:

"12. Section 54F is intended to encourage construction of or acquisition of residential house with the aid of the proceeds from the transfer of any long term capital asset, which is not a residential house. The provision contemplates computing the cost of the residential building, but the value of the plot on which the farm house stands and the land appurtenant could also be considered. The tribunal has categorically found that the appellant has not produced material to show that the entire area of 1.92 acres should be considered as land appurtenant to it. It is in such circumstances, the tribunal made an estimation and directed that the value of the plot on which the farm house is located and the land appurtenant be fixed as Rs. 2 lakhs. We are unable to accept the contention of the appellant that the value of the entire land must be considered in arriving at the value of the residential building."

48. Section 54F demands reinvestment of the capital gains in new residential property to qualify for exemption. The provision was brought in to encourage individuals to reinvest their gains into new housing thereby fostering home ownership, stable investment growth and to augment the growth of other industries like Iron & Steel, Cement providing employment, engaging labour and ultimately industrial & economic growth of the country. Before parting, we want to clarify that we are of

firm opinion that the size of the residential house is not a criteria for claiming of exemption u/s 54F. The very fact that whether there existed any residential house and whether the assessee constructed any house subsequent to purchase of the land has not been proved in this case. At the same time, it has also been proved by the Revenue that there is no such residential dwelling or the residential house which entitle to assessee for exemption u/s 54F. Thus, based on the evidences collected, collated, examined, verified and investigated by the revenue authorities, the covered area which is shed of 500 mtr. on the agricultural land cannot be considered as a residential house. Hence, keeping in view, the entire facts and peculiarities of the instant case and judicial pronouncements, we hold that the claim of the assessee for exemption u/s 54F has been rightly denied by the Assessing Officer.

49. In the result, the appeal of the Revenue is partly allowed and the Cross Objection of the assessee is allowed.
Order Pronounced in the Open Court on 30/05/2024.

Sd/-	Sd/-
(Kul Bharat)	**(Dr. B. R. R. Kumar)**
Judicial Member	**Accountant Member**

Dated: 30/05/2024

Subodh Kumar, Sr. PS

Copy forwarded to:

1.Appellant
2.Respondent
3.CIT
4.CIT(Appeals)
5.DR: ITAT

ASSISTANT REGISTRAR