IN THE INCOME TAX APPELLATE TRIBUNAL

(DELHI BENCH 'SMC' : NEW DELHI)

BEFORE SHRI H.S. SIDHU, JUDICIAL MEMBER

ITA No. 1228/Del/2016
Assessment Year: 2011-12

SH. ADARSH KUMAR SWARUP, POST BAG NO. 221, RAMBAGH, JANSATH ROAD, MUZAFARNAGAR (UP)	Vs.	DCIT, CIRCLE-1 MUZAFARNAGAR
(PAN: AGIPS9620C) **(APPELLANT)**		**(RESPONDENT)**

Assessee by : Sh. M.P. Rastogi, Adv.
Revenue by : Ms. Bedobina Chaudhuri, Sr. DR

ORDER

The Assessee has filed this Appeal against the Order dated 18.12.2015 of the Ld. CIT(A), Muzaffarngar pertaining to assessment years 2011-12.

2. The following grounds raised have been raised by the assessee:-

> 1. That the CIT(A) has erred on facts and under the law in disallowing the deduction u/s. 54 of the Act on sale of land appurtenant to the residential house owned by the appellant and allowed by the AO and consequently the enhancement of income by Rs. 60,27,000/- is arbitrary, unjust and any rate very excessive.

2. That the CIT(A) as well as AO has erred on facts and under the law in adopting the fair market value of land sold at Rs. 300/- per sq. yards against Rs. 730/- per sq. yards determined by approved valuer.

3. That the Ld. CIT(A) and AO both has erred on fact and under the law in adopting the demand cost of the land, which was acquired by the appellant by way of inheritance from his mother Smt. Asha Swarup, being the market value as on 1.4.1981 instead of its value as on 31.3.1985 and consequently the cost of the land adopted at the rate of 300/- per sq.yards, instead of 730/- per sq. yards claimed by the appellant is arbitrary, unjust and any rate very inadequate.

4. That the assessee denies his liability to pay interest charged u/s.234A, 234B and 234C of the Act.

Your appellant craves leave to add, alter, amend or withdraw any of the grounds of appeal at the time of hearing.

3. The brief facts of the case are that the return of income was filed on 17.8.2011 declaring total income at Rs.15,36,830/-. The return was processed uls 143(1) of the IT Act and case was selected for scrutiny. Accordingly, notice u/s.143(2) of the I.T. Act, 1961 was issued on 6.8.2012 and notice u/s. 142(1) of the I.T. Act, 1961 was also issued on 21.6.2013 alongwith questionnaire. In compliance to

the statutory notices u/s. 143(2)/142(1) of the I.T. Act, 1961, the Assessee's AR attended the proceedings from time to time and filed the required details and documents. During the course of assessment proceedings it was noticed by the AO that during the year under consideration the assessee has sold a plot in two parts, the value as per circle rate of this property was Rs. 91,39,000/- including value of trees 16,000/-. No income in this regard has been shown by the assessee in the return of income. Therefore, vide order sheet entry dated 6.1.2014 the assessee was required to submit the computation of capital gain. In response to thereto the assessee vide his reply dated 10.1.2014 submitted the calculation of Long Term Capital Gain. Perusal of computation filed by the assessee reveals that the assessee has taken the cost of acquisition of plots sold as per valuation report prepared by Dr. Rajiv Jain, Govt. Approved Valuer in which the rate of land has been adopted @ 730/- per sq. yard in 1985.

As per section 49(1) of the Income Tax Act, 1961 cost of acquisition, in case of capital asset acquired by certain modes of acquisition including Will, shall be deemed to be the cost for which the previous owner of the property acquired it. Further, in explanation to the section 49(1) it is clearly mentioned that the cost of previous owner of the property means the cost of last previous owner of the capital asset who acquired it by a mode of acquisition

other than that referred to clause (i) to (iv) of this sub-section. Perusal of documents submitted by the assessee during the course of assessment proceeding it is noticed that the property in question was purchased by the assessee's grand mother Smt. Jyotsna Kumari Swarup before 1.4.1981 as no date of purchase is mentioned in her Will dated 15.1.1985. Hence, for the purpose of cost of acquisition the circle rate of the property as on 1.4.1981 is to be taken. The circle rates as on 1.4.1981 have been obtained from the office of the ADM(Finance), Muzaffamagar. According to which the circle rate of the property situated in Kambalwala Bagh was Rs. 300/- per sq. yard as on 1.4.1981. Vide order sheet entry dated 30.1.2014 the assessee was required to explain and, justify why the cost of acquisition of property may not be taken at the circle rate of 300/- per square yards as on 1.4.1981 in view of the provisions of section 49(1) of the Income Tax Act. 1961. In response to which the assessee vide his reply dated 31.1.2014 has submitted as under:-

> "The assessee would like to draw your kind attention to the fact that the land sold during the year was part of the portion of the property inherited by the assessee Shri Adarsh Kumar Swarup from his mother Smt. Asha Swarup after her death on 16 March 1994 through her will. As stipulated in section 49(1)(ii) reproduced above, the cost of acquisition of the property sold mean the cost for which the last previous owner had acquired

the property. In this case, the last previous owner was the assessee's mother Smt. Asha Swarup. She acquired the property from her mother-in-law Smt . Jyotsna Kumari Swarup through later's will after her death on 5 march, 1985. As such the cost of the property sold is to be taken as the fair market value of the property existing in March, 1985 and not as on 01.04.1981 and therefore it requested that the value derived in the valuation report be kindly accepted and not @ 300/- per sq. yd as mentioned by your honour."

AO observed that the above contention of the assessee is not correct as the expression "previous owner of the property" pas been defined in the explanation of section 49(1) as discussed above. Therefore, the cost of acquisition of the assessee in respect to the property sold is taken at Rs. 300/- per sq. yd. to the computation of Long Term Capital Gain given by the assessee vide letter dated 10.1.2014 the assessee has claimed deduction u/s 54F of the Income Tax Act, 1961 for investment in house property. The perusal of Balance Sheet as on 31.3.2011, submitted by the assessee alongwith return of income, there are two house properties with the assessee apart from new property purchased during the year, which are as under:-

Delhi Kothi 5,55,504/-

Mussorie Flat 4,77,500/-

As per proviso of section 54F(1) nothing contained in this sub-section shall apply where the assessee owns more than one residential house, other than the new asset, on the date of transfer of the original asset. Therefore, 'the assessee is not entitled for deduction u/s 54F of the Income Tax Act, 1961 as the assessee already owned two residential houses. Vide order sheet entry dated 3.2.2014 the assessee was required to justify his claim of section 54F in spite of having two residential house at Delhi and flat at Mussoorie. In response of which the assessee vide his reply dated 14.2.2014 submitted that the investment of Rs. 60,70,000/- made in the purchase of house property would fall under section 54 as section 54F is not applicable to the facts of the case. After considering the reply of the assessee and the documents submitted the claim of the assessee u/s 54(1) is accepted and assessment was completed at 24,60,130/- being taxable Long Term Capital Gain vide AO's order dated 10.3.2014 passed u/s. 143(3) of the I.T. Act, 1961.

4. Against the Order of the Ld. AO, assessee appealed before the Ld. CIT(A), who vide impugned order dated 08.12.2015 has concluded that Long Term Capital Asset sold by the assessee is 'land appurtenant to the building'but is not a residential house and therefore, the assessee is not entitled for deduction u/s.54 of the Act for this transaction. Ld. CIT(A) further observed that therefore, the deduction claimed by the assessee during assessment proceedings and allowed by the AO at Rs. 60,27,000/- is disallowed and AO was

directed to recomputed income assessed of the assessee. Accordingly, the income assessed was enhanced by Rs. 60,27,000/- and dismissed the appeal of the assessee.

5. Aggrieved with the aforesaid order of the Ld. CIT(A), Assessee is in appeal before the Tribunal.

6. At the time of hearing, Ld. Counsel of the assessee has filed a Paper Book containing pages 1 to 61 having the copies of Sale Deed dated 25.6.2010 in favour of TCMC Developers Ltd., Muzaffarngar, evidencing that the land was part of House NO. 64, Agrasen Vihar for a sum of Rs. 45,60,000/-; copies of sale deed dated 25.6.2010 in favour of Ankit Garg, Muzaffarnagar evidencing that the land was part of House NO. 64, Agrasen Vihar for a sum of Rs. 45,60,000/-; Copy of Will of Smt.Jyotsna Kumari Swarup; Copy of Will of Smt. Asha Swarup; Copy of registered valuer Sh. Rajiv Jain report as on 1.4.1981 evidencing the market value of the land @Rs. 600/- per sq. yard; copy of registered valuer Sh. Rajiv Jain report as on 31.3.1985 evidencing the market value of the land @ Rs. 730/- per sq. yard and copy of house tax assessment and record of the Municipality, Muzaffarngar in respect of the house. Ld. Counsel of the assessee also filed the Brief Synopsis which read as under:-

> *"1. The appellant hails from a well known industrial family of small town Muzaffarnagar where the appellant's family had owned several industries like sugar, vanaspati, distillery, steel and others.*

2. The appellant's grandmother, Smt. Jyotsna Kumari Swarup wife of late Lala Gopal Raj Swarup, resident of Ram Bagh, Muzaffarnagar was having 50% share in the residential house (kothi) located in Ram Bagh along with the land appurtenant thereto and the same had been bequeathed by said Smt. Jyotsna Kumari Swarup in favour of her grandson Adarsh Kumar Swarup (the appellant) and Smt. Asha Swarup wife of Prabhat Kumar Swarup in equal share (Presently, the House No. 64, Agrasen Vihar, Jansath Road, Muzaffarnagar having Municipal No. 65, Kambalwala, Muzaffarnagar).

3. The said Smt. Jyotsna Kumari Swarup expired on 31st March 1985 and in accordance with the will, after her death Smt. Asha Swarup and Adarsh Kumar Swarup had acquired the residential house and the land appurtenant thereto in equal share.

4. Later on, Smt. Asha Swarup also bequeathed her share in the residential house and land appurtenant thereto, which were inherited from Smt. Jyotsna Kumari Swarup in favour of the appellant vide her will dated 8th December 1993. Smt. Asha Swarup later on expired on 16th March 1994 and according to her will, the appellant Mr. Adarsh Kumar Swarup also acquired her share in the residential

house and land appurtenant thereto. At the time of death, Smt. Asha Swarup was having one-fourth share in the residential house and the land appurtenant thereto.

5. During the year under consideration, the appellant, out of the land appurtenant to the residential house, had sold 608 square metres land in two parts for a sum of Rs.91,39,000/- on 25th June 2010. In the assessment, the Assessing Officer has also allowed deduction for the investment made in a flat is] s 54 of the Income-tax Act, 1961 (the Act) for a sum of Rs.60,27,000/-, whereas for the balance amount the Assessing Officer worked out the capital gain at Rs.6,35,870/-.

6. During the course of assessment, the assessee had claimed that no tax on capital gain on sale of the land is chargeable to tax because the market value of the land on the date of acquisition of land by previous owner, i.e. Smt. Asha Swarup in terms of section 49 of the Act on 31 st March 1985 (being the date of death of Smt. Jyotsna Kumari Swarup) worked out by the registered valuer at Rs. 730/- per square yard and after indexation, nothing remains chargeable to tax.

7. However, the Assessing Officer was of the view that in view of the Explanation to Section 49(1) of the Act, the cost of acquisition has to be seen not in the hands of Mrs.

Asha Swarup but in the hands of Smt. Jyotsna Kumar Swarup because Asha Swarup had also acquired the said property by way of will and because Smt. Jyotsna Kumari Swarup was holding such property before 1st April 1981. Hence in view of section 55(2)(b)(ii) of the Act, the market value of the property has to be taken into consideration as on 1 st April 1981. Even for the purpose of the valuation as on 1 st April 1981, the assessee had worked out the said property by registered valuer Shri Rajiv Jain who worked out the value of the property @ Rs.600 / - per square yard.

8. The Assessing Officer, instead of the market value worked out by the registered valuer, adopted the market value of the property on the basis of circle rate @ Rs.300 / - per square yard as on 1 st April 1981 without further benefit of proper indexation as available to the assessee as per the second proviso to section 48 of the Act and Explanation (iii) read with section 2(42A) and Explanation 1(6) of the Act.

9. The appellant filed appeal before the CIT (Appeals) and objected the action of the Assessing Officer. The appellant stated that the market value of the property should have been taken as on 31 st March 1985 when the previous owner of the property Smt. Asha Swarup had acquired

and not on 1 st April 1981 and secondly stated that even otherwise the value of the property as on 1 st April 1981 had been adopted by the Assessing Officer on the basis of circle rate is wrong and it should have been taken as worked out by the registered valuer @ Rs.600 / - per square yard because the circle rates are fixed for a particula.r large area of the locality without taking into consideration the exact location of the property, whereas the value depends upon the location of the property also. Property near to the road fetches more value.

10. The Commissioner (Appeals) dismissed the contention of the appellant not only with regard to the date of adoption of market value as on 31 st March 1985 as contended by the appellant and has also rejected the market value of the property as worked out by the registered valuer and instead adopted the value as on 1 st April 1981 on the basis of circle rate as done by the Assessing Officer.

11. However, the CIT (Appeals) in the appeal proceedings alleged that the deduction as allowed by the Assessing Officer in respect of said property by registered valuer Shri Rajiv Jain who worked out the value of the property @ Rs.600 / - per square yard.

8. The Assessing Officer, instead of the market value worked out by the registered valuer, adopted the market value of the property on the basis of circle rate @ Rs.300 / - per square yard as on 1 st April 1981 without further benefit of proper indexation as available to the assessee as per the second proviso to section 48 of the Act and Explanation (iii) read with section 2(42A) and Explanation 1(6) of the Act.

9. The appellant filed appeal before the CIT (Appeals) and objected the action of the Assessing Officer. The appellant stated that the market value of the property should have been taken as on 31 st March 1985 when the previous owner of the property Smt. Asha Swarup had acquired and not on 1 st April 1981 and secondly stated that even otherwise the value of the property as on 1 st April 1981 had been adopted by the Assessing Officer on the basis of circle rate is wrong and it should have been taken as worked out by the registered valuer @ Rs.600/- per square yard because the circle rates are fixed for a particular large area of the locality without taking into consideration the exact location of the property, whereas the value depends upon the location of the property also. Property near to the road fetches more value.

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11. However, the CIT (Appeals) in the appeal proceedings alleged that the deduction as allowed by the Assessing Officer in respect of investment of flat u/s 54 of the Act was wrong as he was of the view that u/s 54 of the Act the deduction is available only when the residential house is transferred and not the land appurtenant thereto and for this purpose he relied upon the judgment of Punjab & Haryana High Court in the case of Ashok Sayal vs. CIT in 209 Taxman 376 and the judgment of the Rajasthan High Court in the case of Rajesh Surana vs. CIT in 306 ITR 366 and then enhanced the income of the appellant by way of disallowing the deduction is] s 54 of the Act as allowed by the Assessing Officer on the investment of Rs.60,27,000/-

Assessee's Contention:

Ground No.1:

The CIT (Appeals) has disallowed the deduction is u/s 54 of the Act as allowed by the AO and claimed by the appellant on the ground that because the sale has been only of the land and not the residential house even if the land was appurtenant thereto and for this purpose had relied upon the judgment of Ashok Syal vs. CIT (P&H) in 209 Taxman 376 and Rajesh Surana vs. CIT (Raj) in 306 ITR 366. As per the appellant, the facts of both High Courts are different and no such issue was there.

In the case of Ashok Syal (supra), a residential plot was allotted to the said assessee by housing authorities on which a- room with mud was made without any basic amenities as required for a residential house. Even the electricity and toilet were not there. The said assessee claimed that on account of being a room constructed thereon, he sold the house and not the land and claimed exemption ix] s 54 of the Act. On such facts, Punjab & Haryana High Court held that first of all no room was there and secondly even if it is assumed that room was there, it was constructed with mud for a certain purpose without any basic amenities as is necessary in a house to be called a residential house. The Punjab & Haryana High Court held that instead of house, as claimed, it was only

land sold, hence no deduction is] s 54 of the Act is admissible.

In the case of Rajesh Surana (supra), the Hori'ble Rajasthan High Court was examining the issue ix] s 53 and not 54 of the Act. In the said case also, the said assessee had sold the plot of land with a garage and in those very facts the Rajasthan High Court held that in the absence of basic amenities it was not a house but plot of land only and then disallowed the exemption u/s 53 of the Act.

As far as the assessee's case is concerned, it is brought to your

kind notice that the said land, which was sold by the appellant, was forming part of the residential house No. 64, Agrasen Vihar (Ram Bagh) , Muzaffarnagar (having a Municipal No. 65, Bagh Kambalwala) and all the property was duly assessed to house-tax and was self- occupied by the occupants viz. the appellant and other family members. U/s 54 of the Act, the legislature has used the expression "being buildings or lands appurtenant thereto and being a residential house".

The Hon'ble Karnataka High Court had examined these expressions while construing the provision of section 54 of the Act in the case of Shri C.N. Anantharaman vs. ACIT in

ITA No. 1012/2008 vide its judgment dated 10th October 2014 - copy enclosed. The Hon'ble Karnataka High Court held that the deduction u/s 54 of the Act is also available even if the land, which was appurtenant to the residential house, is sold and it is not necessary that the whole of the residential house should be sold because the legislature has used the words "or" which is distinctive in nature.

In the instant case, it is not the case of AO and CIT (Appeals) that the land was not appurtenant to the residential house. The case of the CIT (Appeals) is that the appellant has sold only the land appurtenant to the house and not residential house which, according to the Karnataka High Court, is not a requirement under the law and exemption vi] s 54 of the Act is also available to the land which is appurtenant to the house. The front page of the sale deed itself shows that the land was part of residential house No. 64, Agrasen Vihar, Muzaffarnagar. Therefore, the exemption as claimed and allowed by the Assessing Officer should be upheld and the enhancement as made by the CIT (Appeals) deserves to be deleted.

Ground No.2:

As far as the application of rate as adopted by the Assessing Officer for the purpose of working out the

capital gain is concerned, the same is wrong inter-alia because:

(i) the market value should have been taken as was in the hands of previous owner Smt. Asha Swarup from whom the appellant had received the property because she is the previous owner as far as the assessee is concerned; and

(ii) because Smt. Asha Swarup had acquired the property as on 31 st March 1985, hence the market value of the property should have been taken into account as on 31st March 1985 as worked out by the registered valuer at Rs.730/ - per sq yard.

Without prejudice to above, even if it is presumed that it is the cost in the hands of Smt. Jyotsna Kumari Swarup has to be taken into account because Smt. Asha Swarup had acquired the property by way

of a will from Smt. Jyotsna Kumari Swarup. Even then the market value of the property as on 1 st April 1981 was more than as adopted by the Assessing Officer. The Assessing Officer has adopted the market value of the property as that was notified by the Stamp Authorities for the purpose of levy of stamp duty by circle rates. The Stamp Authorities, while fixing the circle rates, did not take into account various advantages and disadvantages

and the location of the property, but they fixed the circle rate on a fixed rate for whole of the locality. The Hon 'ble Jurisdictional Allahabad High Court in the case of Dinesh Kumar Mittal vs. ITO in 193 ITR 770 held that there is no rule of law to the effect that the value determined for the purpose of stamp duty is the market value of the property. The market value of the property may be more or may be less.

Therefore, in such circumstances, when a registered valuer has worked out the market value of the property as on 1 st April 1981 at Rs.600 / - per square yard after taking into account the location of the land, the same should be adopted by the Assessing Officer.

Additional Ground of Appeal:

While computing the capital gain on sale of property, the Assessing Officer had adopted the deemed cost as market value of the property as on 1 st April 1981 because he was of the view that late Smt. Asha Swarup, from whom the appellant had received the property by way of will had inherited the property from late Smt. Jyotsna Kumar Swarup and accordingly the cost of acquisition of the property shall be deemed to be the cost for which the previous owner of the property acquired it. As per the Explanation to section 49(1) of the Act, the previous

owner of the property means the last previous owner of the property who acquired it by a mode of acquisition other than that referred in clause (iii) of section 49(1) of the IT Act. Hence accordingly the cost in the hands of Smt. Jyotsna Kumar Swarup shall be deemed to be the cost of the property. As Smt. Jyotsna Kumar Swarup was holding the property prior to 1 st April 1981, hence in view of the provision of section 55(2)(b) of the Act the fair market value of the asset as on 1 st day of April 1981 would be the deemed cost of acquisition.

The computation of capital gains has been prescribed u/s 48 of the IT Act and it states that capital gains shall be computed by deducting from the full value of the consideration received as a result of the transfer of a capital asset, cost of the acquisition of asset and the cost of any improvement thereto.

The second proviso to section 48 of the IT Act further states that if the long term gains arises from the transfer of a long term capital asset, then the cost of acquisition means the indexed cost of acquisition. The indexed cost of acquisition has been defined in Explanation (iii) and it states that the indexed cost of acquisition means "an amount which bears to the cost of acquisition the same proportion as cost inflation index for the year in which the

asset is transferred, bears to the cost inflation index for the first year in which the asset was held by the assessee or for the year beginning on the first day of April 1981, whichever is later".

The long term capital asset and short term capital asset has been defined in section 2(29A) and 2(42A) of the IT Act respectively. The short-term capital asset means a capital asset held by an assessee for

not more than 36 months immediately preceding the date of its transfer. Explanation 1(b) to section 42A of the IT Act further states that in determining the period for which any capital asset is held by the assessee, in the case of a capital asset which becomes the property of the assessee in the circumstances mentioned in sub-section (1) of section 49, there shall be included for which an asset was held by the previous owner referred to in the said section.

In the instant case, the previous owner has been considered by the Assessing Officer Smt. Jyotsna Kumar Swarup in view of the Explanation to Section 49 and not Smt. Asha Swarup. Hence the necessary collolary arises that the period of holding has to be computed from 1 st April 1981 being the base year for which the cost has been deemed and accordingly the indexed cost of the

> *property should be worked out after taking into account the date of deemed cost of acquisition, i.e. 1 st April 1981 onwards for the purpose of computation of capital gains.*
>
> *In the instant case, the Assessing Officer, for the purpose of indexation, has adopted the date as 31st March 1985 and not 1st April 1981. Hence the Assessing Officer be directed to work out the indexed cost, thereby taking into account the date of acquisition as 1st April 1981."*

7. On the contrary, Ld. DR relied upon the orders of the authorities below and stated that Ld. CIT(A) has passed a well reasoned order which does not need any interference, hence, he requested that the appeal filed by the Assessee may be dismissed.

8. We have heard both the parties and perused the records, especially the impugned order passed by the Ld. CIT(A), Paper Book and Brief Synopsis. We find that in this case return of income was filed on 17.8.2011 declaring total income at Rs.15,36,830/-. The return was processed uls 143(1) of the IT Act and case was selected for scrutiny. Accordingly, notice u/s.143(2) of the I.T. Act, 1961 was issued on 6.8.2012 and notice u/s. 142(1) of the I.T. Act, 1961 was also issued on 21.6.2013 alongwith questionnaire. In compliance to the statutory notices u/s. 143(2)/142(1) of the I.T. Act, 1961, the Assessee's AR attended the proceedings from time to time and filed the required details and documents. During the course of assessment

proceedings it was noticed by the AO that during the year under consideration the assessee has sold a plot in two parts, the value as per circle rate of this property was Rs. 91,39,000/- including value of trees 16,000/-. No income in this regard has been shown by the assessee in the return of income. Therefore, vide order sheet entry dated 6.1.2014 the assessee was required to submit the computation of capital gain. In response to thereto the assessee vide his reply dated 10.1.2014 submitted the calculation of Long Term Capital Gain. Perusal of computation filed by the assessee reveals that the assessee has taken the cost of acquisition of plots sold as per valuation report prepared by Dr. Rajiv Jain, Govt. Approved Valuer in which the rate of land has been adopted @ 730/- per sq. yard in 1985. As per section 49(1) of the Income Tax Act, 1961 cost of acquisition, in case of capital asset acquired by certain modes of acquisition including Will, shall be deemed to be the cost for which the previous owner of the property acquired it. Further, in explanation to the section 49(1) it is clearly mentioned that the cost of previous owner of the property means the cost of last previous owner of the capital asset who acquired it by a mode of acquisition

other than that referred to clause (i) to (iv) of this sub-section. Perusal of documents submitted by the assessee during the course of assessment proceeding it is noticed that the property in question was purchased by the assessee's grand mother Smt. Jyotsna Kumari Swarup before 1.4.1981 as no date of purchase is mentioned in her

Will dated 15.1.1985. Hence, for the purpose of cost of acquisition the circle rate of the property as on 1.4.1981 is to be taken. The circle rates as on 1.4.1981 have been obtained from the office of the ADM(Finance), Muzaffamagar. According to which the circle rate of the property situated in Kambalwala Bagh was Rs. 300/- per sq. yard as on 1.4.1981. Vide order sheet entry dated 30.1.2014 the assessee was required to explain and, justify why the cost of acquisition of property may not be taken at the circle rate of 300/- per square yards as on 1.4.1981 in view of the provisions of section 49(1) of the Income Tax Act. 1961. In response to which the assessee vide his reply dated 31.1.2014 which was considered by the AO observed that the above contention of the assessee is not correct as the expression "previous owner of the property" pas been defined in the explanation of section 49(1) as discussed above. Therefore, the cost of acquisition of the assessee in respect to the property sold is taken at Rs. 300/- per sq. yd. to the computation of Long Term Capital Gain given by the assessee vide letter dated 10.1.2014 the assessee has claimed deduction u/s 54F of the Income Tax Act, 1961 for investment in house property. The perusal of Balance Sheet as on 31.3.2011, submitted by the assessee alongwith return of income, there are two house properties with the assessee apart from new property purchased during the year, which are as under:-

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assessee. Accordingly, the income assessed was enhanced by Rs. 60,27,000/- and dismissed the appeal of the assessee.

8.1 I further note that the assessee hails from a well known industrial family of small town Muzaffarnagar where the assessee's family had owned several industries like sugar, vanaspati, distillery, steel and others. The assessee's grandmother, Smt. Jyotsna Kumari Swarup wife of late Lala Gopal Raj Swarup, resident of Ram Bagh, Muzaffarnagar was having 50% share in the residential house (kothi) located in Ram Bagh along with the land appurtenant thereto and the same had been bequeathed by said Smt. Jyotsna Kumari Swarup in favour of her grandson Adarsh Kumar Swarup (the appellant) and Smt. Asha Swarup wife of Prabhat Kumar Swarup in equal share (Presently, the House No. 64, Agrasen Vihar, Jansath Road, Muzaffarnagar having Municipal No. 65, Kambalwala, Muzaffarnagar).

The said Smt. Jyotsna Kumari Swarup expired on 31st March 1985 and in accordance with the will, after her death Smt. Asha Swarup and Adarsh Kumar Swarup had acquired the residential house and the land appurtenant thereto in equal share. Later on, Smt. Asha Swarup also bequeathed her share in the residential house and land appurtenant thereto, which were inherited from Smt. Jyotsna Kumari Swarup in favour of the appellant vide her will dated 8th December 1993. Smt. Asha Swarup later on expired on 16th March 1994 and according to her will, the appellant Mr. Adarsh Kumar Swarup also acquired her share in the residential house and land appurtenant

thereto. At the time of death, Smt. Asha Swarup was having one-fourth share in the residential house and the land appurtenant thereto. During the year under consideration, the assessee, out of the land appurtenant to the residential house, had sold 608 square metres land in two parts for a sum of Rs.91,39,000/- on 25th June 2010. In the assessment, the Assessing Officer has also allowed deduction for the investment made in a flat is u/s 54 of the Income-tax Act, 1961 (the Act) for a sum of Rs.60,27,000/-, whereas for the balance amount the Assessing Officer worked out the capital gain at Rs.6,35,870/-. During the course of assessment, the assessee had claimed that no tax on capital gain on sale of the land is chargeable to tax because the market value of the land on the date of acquisition of land by previous owner, i.e. Smt. Asha Swarup in terms of section 49 of the Act on 31 st March 1985 (being the date of death of Smt. Jyotsna Kumari Swarup) worked out by the registered valuer at Rs. 730/- per square yard and after indexation, nothing remains chargeable to tax. However, the Assessing Officer was of the view that in view of the Explanation to Section 49(1) of the Act, the cost of acquisition has to be seen not in the hands of Mrs. Asha Swarup but in the hands of Smt. Jyotsna Kumar Swarup because Asha Swarup had also acquired the said property by way of will and because Smt. Jyotsna Kumari Swarup was holding such property before 1st April 1981. Hence in view of section 55(2)(b)(ii) of the Act, the market value of the property has to be taken into consideration as on 1 st

April 1981. Even for the purpose of the valuation as on 1 st April 1981, the assessee had worked out the said property by registered valuer Shri Rajiv Jain who worked out the value of the property @ Rs.600 / - per square yard. The Assessing Officer, instead of the market value worked out by the registered valuer, adopted the market value of the property on the basis of circle rate @ Rs.300 / - per square yard as on 1 st April 1981 without further benefit of proper indexation as available to the assessee as per the second proviso to section 48 of the Act and Explanation (iii) read with section 2(42A) and Explanation 1(6) of the Act. The assessee filed appeal before the CIT (Appeals) and objected the action of the Assessing Officer. The assessee stated that the market value of the property should have been taken as on 31 st March 1985 when the previous owner of the property Smt. Asha Swarup had acquired and not on 1 st April 1981 and secondly stated that even otherwise the value of the property as on 1st April 1981 had been adopted by the Assessing Officer on the basis of circle rate is wrong and it should have been taken as worked out by the registered valuer @ Rs.600 / - per square yard because the circle rates are fixed for a particular large area of the locality without taking into consideration the exact location of the property, whereas the value depends upon the location of the property also. Property near to the road fetches more value. The Commissioner (Appeals) dismissed the contention of the appellant not only with regard to the date of adoption of market value as on 31 st March

1985 as contended by the assessee and has also rejected the market value of the property as worked out by the registered valuer and instead adopted the value as on 1 st April 1981 on the basis of circle rate as done by the Assessing Officer. However, the CIT (Appeals) in the appeal proceedings alleged that the deduction as allowed by the Assessing Officer in respect of said property by registered valuer Shri Rajiv Jain who worked out the value of the property @ Rs.600 / - per square yard. The Assessing Officer, instead of the market value worked out by the registered valuer, adopted the market value of the property on the basis of circle rate @ Rs.300/- per square yard as on 1st April 1981 without further benefit of proper indexation as available to the assessee as per the second proviso to section 48 of the Act and Explanation (iii) read with section 2(42A) and Explanation 1(6) of the Act. The assessee filed appeal before the CIT (Appeals) and objected the action of the Assessing Officer. The assessee stated that the market value of the property should have been taken as on 31 st March 1985 when the previous owner of the property Smt. Asha Swarup had acquired and not on 1 st April 1981 and secondly stated that even otherwise the value of the property as on 1 st April 1981 had been adopted by the Assessing Officer on the basis of circle rate is wrong and it should have been taken as worked out by the registered valuer @ Rs.600/- per square yard because the circle rates are fixed for a particular large area of the locality without taking into consideration the exact location of the property, whereas the value

depends upon the location of the property also. Property near to the road fetches more value. The Commissioner (Appeals) dismissed the contention of the assessee not only with regard to the date of adoption of market value as on 31 st March 1985 as contended by the appellant and has also rejected the market value of the property as worked out by the registered valuer and instead adopted the value as on 1 st April 1981 on the basis of circle rate as done by the Assessing Officer. However, the Ld. CIT(Appeals) in the appeal proceedings alleged that the deduction as allowed by the Assessing Officer in respect of investment of flat u/s 54 of the Act was wrong as he was of the view that u/s 54 of the Act the deduction is available only when the residential house is transferred and not the land appurtenant thereto and for this purpose we rely upon the judgment of Punjab & Haryana High Court in the case of Ashok Sayal vs. CIT in 209 Taxman 376 and the judgment of the Rajasthan High Court in the case of Rajesh Surana vs. CIT in 306 ITR 366 and then enhanced the income of the assessee by way of disallowing the deduction is u/s 54 of the Act as allowed by the Assessing Officer on the investment of Rs.60,27,000/-. The CIT (Appeals) has disallowed the deduction u/s 54 of the Act as allowed by the AO and claimed by the assessee on the ground that because the sale has been only of the land and not the residential house even if the land was appurtenant thereto and for this purpose had relied upon the judgment of Ashok Syal vs. CIT (P&H) in 209 Taxman 376 and Rajesh Surana vs. CIT (Raj) in 306 ITR

366. As per the assessee, the facts of both High Courts are different and no such issue was there.

8.2 I also find that in the case of Ashok Syal (supra), a residential plot was allotted to the said assessee by housing authorities on which a- room with mud was made without any basic amenities as required for a residential house. Even the electricity and toilet were not there. The said assessee claimed that on account of being a room constructed thereon, he sold the house and not the land and claimed exemption u/s 54 of the Act. On such facts, Punjab & Haryana High Court held that first of all no room was there and secondly even if it is assumed that room was there, it was constructed with mud for a certain purpose without any basic amenities as is necessary in a house to be called a residential house. The Punjab & Haryana High Court held that instead of house, as claimed, it was only land sold, hence no deduction u/s 54 of the Act is admissible.

8.3 I further note that in the case of Rajesh Surana (supra), the Hori'ble Rajasthan High Court was examining the issue u/s 53 and not 54 of the Act. In the said case also, the said assessee had sold the plot of land with a garage and in those very facts the Rajasthan High Court held that in the absence of basic amenities it was not a house but plot of land only and then disallowed the exemption u/s 53 of the Act.

8.5 As regards asseessee's s case is concerned, it is brought to our notice that the said land, which was sold by the assessee, was

forming part of the residential house No. 64, Agrasen Vihar (Ram Bagh) , Muzaffarnagar (having a Municipal No. 65, Bagh Kambalwala) and all the property was duly assessed to house-tax and was self-occupied by the occupants viz. the assessee and other family members. U/s 54 of the Act, the legislature has used the expression "being buildings or lands appurtenant thereto and being a residential house".

8.6 I further find that the Hon'ble Karnataka High Court had examined these expressions while construing the provision of section 54 of the Act in the case of Shri C.N. Anantharaman vs. ACIT in ITA No. 1012/2008 vide its judgment dated 10th October 2014 has held that the deduction u/s 54 of the Act is also available even if the land, which was appurtenant to the residential house, is sold and it is not necessary that the whole of the residential house should be sold because the legislature has used the words "or" which is distinctive in nature.

8.7 In the instant case, it is not the case of AO and CIT (Appeals) that the land was not appurtenant to the residential house. The case of the CIT (Appeals) is that the assessee has sold only the land appurtenant to the house and not residential house which, according to the Karnataka High Court, is not a requirement under the law and exemption u/s 54 of the Act is also available to the land which is appurtenant to the house. The front page of the sale deed itself shows

that the land was part of residential house No. 64, Agrasen Vihar, Muzaffarnagar. Therefore, the exemption as claimed and allowed by the Assessing Officer should be upheld and the enhancement as made by the CIT (Appeals) is not sustainable in the eyes of law, hence, the same is deleted.

9. With regard to ground no. 2 is concerned, relating to application of rate as adopted by the Assessing Officer for the purpose of working out the capital gain, the same is wrong inter-alia because:

> (i) the market value should have been taken as was in the hands of previous owner Smt. Asha Swarup from whom the appellant had received the property because she is the previous owner as far as the assessee is concerned; and
>
> (ii) because Smt. Asha Swarup had acquired the property as on 31 st March 1985, hence the market value of the property should have been taken into account as on 31st March 1985 as worked out by the registered valuer at Rs.730/ - per sq yard.
>
> Without prejudice to above, even if it is presumed that it is the cost in the hands of Smt. Jyotsna Kumari Swarup has to be taken into account because Smt. Asha Swarup had acquired the property by way of a will from Smt. Jyotsna Kumari Swarup. Even then the market value of the property as on 1 st April 1981 was more than as

adopted by the Assessing Officer. The Assessing Officer has adopted the market value of the property as that was notified by the Stamp Authorities for the purpose of levy of stamp duty by circle rates. The Stamp Authorities, while fixing the circle rates, did not take into account various advantages and disadvantages and the location of the property, but they fixed the circle rate on a fixed rate for whole of the locality. In this behalf, I draw support from the judgement of the Hon'ble Jurisdictional Allahabad High Court in the case of Dinesh Kumar Mittal vs. ITO in 193 ITR 770 wherein it has been held that there is no rule of law to the effect that the value determined for the purpose of stamp duty is the market value of the property. The market value of the property may be more or may be less. Therefore, in such circumstances, when a registered valuer has worked out the market value of the property as on 1 st April 1981 at Rs.600 / - per square yard after taking into account the location of the land, the same should be adopted by the Assessing Officer. We hold and direct accordingly and allow the ground no. 2 raised by the assessee.

10. In the background of the aforesaid discussions and respectfully following the precedents, as aforesaid, we allow the appeal of the assessee.

11. In the result, the appeal of the Assessee is allowed in the aforesaid manner.

Order pronounced in the Open Court on 28/03/2017.

SD/-

[H.S. SIDHU]
JUDICIAL MEMBER

Date 28/03/2017

"SRBHATNAGAR"

<u>Copy forwarded to: -</u>

1. Appellant -
2. Respondent -
3. CIT
4. CIT (A)
5. DR, ITAT

TRUE COPY By Order,

Assistant Registrar,
ITAT, Delhi Benches