TRANSFER OF RESIDENTIAL PROPERTY – CAPITAL GAINS AND EXEMPTIONS UNDER Ss.54 & 54F

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Note : The scope of this article is restricted to examining certain aspects of Long-Term Capital Gains which arise during transfer of residential property.

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1. Capital Gains

Capital gains being one of the sources of income are taxable under section 45 of the Income Tax Act, 1961. Capital gains were charged to tax for the first time by the Income Tax and Excess Profits Tax (Amendment Act), 1947, which inserted, *inter alia* , section 12 B in the 1922 Act. Subsequently the Finance Act of 1956 widened section 12 B to bring within 'capital gains' "any profits or gains arising from the sale, exchange, relinquishment or transfer of a capital asset.."

The charging section as it exists today states that the "profits or gains arising from the transfer of a capital asset made in the previous year are taxable under the head 'capital gains' and shall be deemed to be the income of the previous year in which the transfer took place."

The levy on capital gains will occur only if all the conditions mentioned in the section are satisfied:

a) Existence of a capital asset
b) Transfer of the said capital asset by the assesse
c) The transfer must place in the previous year

The two most important terms in section 45 are 'capital assets' and 'transfer'. *Capital Assets* are defined under section 2(14) as property of any kind (whether movable or immovable, whether tangible or intangible, whether fixed or circulating) held by an assessee, whether or not connected with his business or profession, but does not include certain specified assets mentioned therein. Capital assets can either be short term assets or long term assets depending on how long the Assessee holds the asset before its transfer. *Short-term capital asset*, defined under section 2(42A), is any capital asset held by the assessee for maximum 36 months before transfer. Long-term capital asset, defined under section 2(29A), is any capital asset which is not a short –term capital asset.

The term *transfer* has been defined in section 2 (47). It reads as follows:

> *"Transfer", in relation to a capital asset, includes,-*
> *(i)The sale, exchange or relinquishment of the asset; or*
>
> *(ii) The extinguishment of any rights therein; or*
>
> *(iii) The compulsory acquisition thereof under any law; or*
>
> *(iv) In a case where the asset is converted by the owner thereof into, or is treated by him as, stock- in- trade of a business carried on by him, such conversion or treatment;] [or]*
>
> *(v) Any transaction involving the allowing of the possession of any immovable property to be taken or retained in part performance of a contract of the nature referred to in section 53A of the Transfer of Property Act, 1882 1 (4 of 1882); or*

(vi) Any transaction (whether by way of becoming a member of, or acquiring shares in, a co- operative society, company or other association of persons or by way of any agreement or any arrangement or in any other manner whatsoever) which has the effect of transferring, or enabling the enjoyment of, any immovable property.

Explanation.- For the purposes of sub- clauses (v) and (vi)," immovable property" shall have the same meaning as in clause (d) of section 269UA.

2. Computation of Long-Term Capital Gains

Section 48 of the ITA, 1961 gives the method for computing Long-Term Capital Gains (LTCG). For the purposes of computing the capital gains, certain expenditures are allowed as deductions under section 48.

1. Expenditure incurred wholly and exclusively in connection with the transfer
2. Cost of acquisition of the asset and the cost of any improvement thereto.

Whether the cost incurred on evicting tenants can be allowed as a deduction while calculating capital gains is an issue which has been raised in several disputes. In the case of ***CIT v. Eagle Traders***[1] ***(Delhi HC)***, the assessee paid the tenants certain amount to vacate the premises. It was held that the expenditure was incurred wholly and exclusively in connection with the agreement of sale, which preceded the transfer and in fulfilment of a condition of sale. Hence the expenditure could be considered as a deduction under section 48 (1). A similar reasoning was followed in the following cases:

- ***Naozar Chenoy v. CIT.***[2]**(AP HC)**
- ***CIT v. Miss Piroja C. Patel*** [3] **(Bom HC)**
- ***CIT v. ShakuntalaKantilal***[4] **(Bom HC)**
- ***Hardiallia Chemicals Ltd. v. CIT***[5] **(Bom HC)**
- ***CIT v. Shakuntala Rajeshwar***[6] **(Del HC)**
- ***CIT v. A. Venkataraman***[7] **(Mad HC)**
- ***ITO v. G. Thangavel Gounder***[8] **(Mad HC)**

The Karnatake High Court in the case ***Mrs.June Perrett v. Income-tax Officer*** [9] has taken a view that, the cost of evicting tenants can be treated as cost of improvement.

[1] ITA 1287/2011
[2] [1998] 234 ITR 95 (AP)
[3] [2002] 122 Taxman 752 (Bom.)
[4] [1991] 190 ITR 56
[5] [1996] 218 ITR 598
[6] [1986] 160 ITR 840 (Del).
[7] [1982] 137 ITR 846 (Mad.)
[8] {1981] 12 TTJ 223 (Mad.)

This is a simple formulaic depiction of how LTCG is calculated:

LTCG = Full value of consideration received or receivable (-)

(i) Indexed cost of acquisition,
(ii) Indexed cost of improvement and
(iii) Any expenditure wholly and exclusively for transfer of asset

Cost of Acquisition	It is the cost or price for which the asset was acquired by the assessee
Cost of Improvement	It is any capital expenditure incurred on or after April 1, 1981 which results in: a) making any addition or improvement in the capital asset; and b) which increases the market value of the capital asset.
Any expenditure wholly andexclusively for transfer of asset	Any expenditure which is incurred to effect the transfer such as 1. Brokerage or commission paid to find a buyer 2. Cost of stamp 3. Registration fee borne by the seller 4. Travelling expenditure incurred in connection with the transfer 5. Litigation expenditure incurred in case of compulsory acquisition of asset.

Indexation: As value of money decreases and inflation is on the rise, a capital asset acquired by the assessee long back (36 months or more) at a low price would be sold at a phenomenally high price. In such circumstances, the assessee might end up paying very high amount of capital gains tax on the transfer. To offset the effect of inflation, we assume the indexed cost of acquisition and indexed cost of improvement for computing LTCG. Indexed cost of acquisition and indexed cost of improvement is computed according to the Cost Inflation Index (CII) for the concerned financial years.

(i) Indexed cost of acquisition = Cost of acquisition × CII for the year in which asset is Transferred

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CII of the year in which the asset was Acquired or on April1, 1981 (whichever is later)

(ii) Indexed cost of improvement =Cost of improvement × CII of the year when

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CII of the year in which the asset was Acquired or on April1, 1981 (whichever is later)

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[9](2008) 298 ITR 268(Kar),

Illustration:

Mr.X purchased an asset in December 1976 for Rs.50,000 which was transferred on 15-02-2012.He made improvements during FY 1991-1992 for Rs. 10,000. He sold it on
15-05-2012 for Rs.10, 00,000. What is the indexed cost of acquisition and of improvement of the asset?

Indexed cost of acquisition

The asset was acquired in 1976. Hence, CII of FY 1981-1982 must be taken.
CII for FY 1981-82 is Rs.100
CII for FY 2011-2012 is Rs.785

Indexed cost of acquisition = $\mathbf{\dfrac{50{,}000 \times 785}{100}}$ **= Rs. 3,92,500**

Indexed cost of improvement

The improvements were made in the FY 1991-1992
CII for FY 2011-2012 is Rs.785
CII for FY1991-1992 is Rs. 199

Indexed cost of improvement = $\mathbf{\dfrac{50{,}000 \times 785}{199}}$ **= Rs.1, 97,236.181**

(i) Computation of cost of acquisition /cost of improvement in case of residential property acquired by gift or inheritance

The method of computation of cost of acquisition is different when the capital asset is acquired by an assessee through gift or inheritance. Section 49 (1) of the ITA enlist specific modes of acquisition for which the cost of acquisition is deemed to be the cost of acquisition of the previous owner. Acquisition through gift or inheritance is one of the modes specified under the said provision. For the various modes of acquisition mentioned in section 49(1), or some other modes specified in certain clauses under section 47, under Explanation 1 to S. 2(42A), the period for which the asset was held by the earlier owner or in the earlier form is also to be included as part of the holding period of the assessee for determining whether the capital asset is a long-term capital asset or a short-term capital asset. Under section 55 (2)(b)(ii), where a capital asset became the property of the assessee by any of the modes specified in S. 49(1), and the capital asset was acquired by the previous owner prior to 1st April 1981, the assessee is entitled to substitute the fair market value of the asset as on 1st April 1981 for the actual cost.

A combined reading of section 47 and 45 suggests that there is no capital gain chargeable to tax as a result of transfer of a capital asset under gift since the transaction involving a gift of capital asset as gift/inheritance are not regarded as transfer for the purpose of section 45. However, where such capital asset becoming the property of the assessee under gift is subsequently transferred as envisaged in section 45, the capital gain arising from such transfer is made chargeable to tax and having regard to the specific provisions contained in the statute, the date and cost of acquisition of the previous owner are adopted as a cost and date of acquisition of the assessee for the purpose of computation of income from such capital gains.

Illustration

On June 9, 1983, Mr. Xing bought a residential property for Rs. 2 Lakhs. On August 7, 1986, he spent Rs. 2 lakhs for adding another room to the residential property. Mr. Xing passed away on July 6, 1990 leaving the residential property to his son Mr Zee. The market value of the property at that time was Rs10 lakh. Mr. Zee sold this house on July 6, 2011, for a net consideration of Rs50 lakh. Let us calculate the cost of acquisition for Mr. Zee.

The property inherited by Mr. Zee is a long-term capital asset as the period of holding is to be calculated from the date of acquisition of property by Mr. Xing. The period of holding is certainly more than 36 months.

Department's view: Indexation is to be considered from the year in which the asset was first acquired by the assessee.

Calculation of Indexed cost of Acquisition

The market value of the residential property in FY 1990-91 when the asset first came into Mr. Zee's possession was Rs10 lakhs. This value is of no consequence.

His cost of acquisition, according to Sec 47(iii) is Rs2 lakhs (the amount is same as what was paid by his father in FY83-84).

The index for the year in which the son first held the asset is required to be taken for computation. The son came into possession of the house in FY 1990-91 and the index for that year is 182.

Therefore, the indexed cost of acquisition is (2,00,000 x 785/182) = Rs. 8,62,637.363

Assessee's view: Indexation is to be considered from the year in which the asset was first acquired by the previous owner.

Taking the same set of facts as given above, let us compute the indexed cost of acquisition for Mr. Zee as per the Assessee's view.

Calculation of Indexed cost of Acquisition

The market value of the residential property in FY 1990-91 when the asset first came into Mr. Zee's possession was Rs10 lakhs. This value is of no consequence.

His cost of acquisition, according to Sec 47(iii) is Rs2 lakhs (the amount is same as what was paid by his father in FY- 1983-84).

The index for the year in which father acquired the asset is required to be taken for computation by reading Ss.49 (1), 2(42A) together. The father acquired the property in June 1983. Hence, the index year should be taken as FY – 1983-84

Therefore, the indexed cost of acquisition is (2,00,000 x 785 /116) = Rs.13,53,448. 27

A controversial issue in calculating capital gains on transfer of property which has been previously acquired through gift or inheritance is, whether the indexation is to be considered from the year in which the asset was first acquired by the previous owner, or from the year in which the asset was first acquired by the assessee. There have been judicial pronouncements expressing conflicting views on this issue.

The following decisions are in favour of the assessee:

In the case of ***ACIT v. Sh. Gautam Navlakha***[10] **(ITAT Delhi),** it was held that in case an asset is transferred under gift/will the indexed cost of the acquisition is to be computed with reference to the year in which the previous owner first held the asset.

In the decision of ITAT Kolkata in ***Smt. Mina Deogun v. ITO***[11]*,* the assessee's father had acquired a property, in 1958. He expired in 1968, whereupon the assessee's mother became the owner of the property. The mother expired in September 1999, resulting in the assessee and her three sisters inheriting the property as co-owners. The property was sold during the previous year relevant to assessment year 2004-05.The assessee substituted the fair market value of the property as at 1st April 1981 for the cost of acquisition and claimed cost indexation from the financial year 1981-82. The AO allowed cost indexation only from the financial year 1999-2000.The Tribunal observed that if, for the purposes of determining the period of holding by the

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[10] ITA No. 2747/Del/2012

[11](2008)19 SOT 183 (Kol.),

assessee, the period for which the asset was held by the previous owner is included, thendifferent considerations could not be applied for the purpose of S. 48. It noted that the scheme of taxation with respect to inherited assets was that where an assessee sold an inherited capital asset, the capital gain was computed with reference to the period of holding and the cost of acquisition incurred by the previous owner, since inheritance or succession was not regarded as a transfer.

Other decisions which are in favour of the assessee are:

- ***CIT v. Laxmi Machine Works*[12] (SC)**
- ***DCIT v. Manjula J Shah*[13](ITAT Bombay)**
- ***Mrs.Pushpa Sofat v. ITO*[14] (ITAT Chandigarh)**
- ***Deputy CIT v. Smt. Meera Khera*[15] (ITAT Bombay)**

The primary object of cost indexation, as elaborated by the Explanatory Memorandum to the Finance Bill, 1992, is that where an asset has been held for a long period of time, 75% of the impact of inflation is to be neutralized while computing the capital gains. In cases of succession, etc., the intermediate transfers by gift, inheritance, partition of HUF, etc. are ignored, since these are transfers without any consideration. For all practical purposes, the ultimate owner is regarded as having held the asset from the date of its first acquisition for a consideration by an earlier owner, and his cost is also taken on the same basis. Under such circumstances, it could certainly not be the intention of the Legislature to deny the benefit of indexation for the period of holding by the previous owner. Taking of indexation from the date of receipt of gift, inheritance, is illogical, and against the very scheme of computation of capital gains. It would result in an absurd situation whereby the inflation neutralisation which was available to a previous owner is denied to a subsequent owner for no rhyme or reason, though the subsequent owner is regarded as having stepped into the shoes of the previous owner for all other practical purposes of computation of capital gains.

3. Capital Gains Arising on Transfer of Residential Property

I. Profit on sale of property used for residence – Section 54

Section 54 of the Income-tax Act, 1961 provides for exemption in respect of long-term capital gain arising from the transfer of a residential house by individuals and Hindu Undivided Families (HUF) on the satisfaction of the conditions specified therein. The section was introduced to curtail the rigours of tax liability under section 45 and to encourage investment in residential property.

The conditions to be fulfilled for the operation of section 54 are:

(i) The assessee must be an individual or Hindu Undivided Family

[12] (2007) 290 ITR 667
[13](2010) 31 (II) ITCL 2
[14](2004) 81 ITD 1
[15](2004)2 SOT 902 (Mum.)

(ii) Capital asset must be a residential house property – buildings or lands appurtenant thereto. The income of which is chargeable under the head "income from house property". Such property may be self-occupied or let out.
(iii) There must be transfer of the residential property (original asset).
(iv) The residential property transferred must be a long-term capital asset.
(v) The capital gains arising from the transfer of the original asset must be invested in a residential house property (new asset).

Limitation period for investment in new asset

1. Where residential house property (new asset) is acquired/ purchased, it is one year before, or two years after the date of transfer of residential house property (original asset).
2. Where new asset is constructed, it is three years after the date of transfer of original asset.

(vi) Amount of exemption is the least of the following:

1. The amount of capital gain; or
2. The amount invested in purchasing or construction of the new asset.

(vii) Amount of exemption is the least of the following:

In case the assessee transfers the new asset before three years from the date of acquisition of the new asset, the deduction on capital gains allowed would be withdrawn.

Capital Gains Deposit Scheme

If the assessee is unable to make the acquisition purchase within the timeframe , he is required to deposit the monies in Capital Gains Deposit Scheme in any Bank specified by the Government and be utilized in accordance with any scheme specified by the Government.

If the amount of capital gains is partly utilized by the assessee for construction or purchase of the new residential property, together with the amount deposited shall be deemed to be the cost of the new asset.

In case the assessee does not use the amount either wholly or partly for either construction or purchase of new asset within the time period (two years for purchase or three years for construction), the amount not so utilized will be charged to under section 45 as the income of the previous year in which the period of three years from the date of the transfer of the original assert expires and the assessee is entitled to withdraw such amount in accordance with the scheme.

The amount not so utilised shall be charged under section 45 as the income of the previous year in which the period of three years from the date of the transfer of the original asset expires

II. Capital gain on transfer of certain capital assets in case of investment in residential house – Section 54F

The Income Tax Act, 1961 grants exemption of capital gains arising from the transfer of a long-term capital asset **other than a house property** under section 54F.

Conditions for applicability of this provision are:

1. The assessee is an individual or a Hindu Undivided Family (HUF).
2. The asset transferred is any long-term capital asset other than a residential house.
3. The assessee has purchased, within one year before the date of transfer or two years after the date of transfer or constructed within three years after the date of transfer (or from the date of receipt of compensation in the case of compulsory acquisition), a residential house.
4. The assessee should not own on the date of transfer of the original asset more than one residential house (other than the new house). He should also not purchase within a period of two years after such date or construct within a period of three years after such date any residential house whose income is taxable under the head " Income from House property"(other than the new house).
5. Amount of Deduction
    a. If the above conditions are satisfied, the capital gain will be treated in a concessional manner as under:

        (i)If the cost of the new house is greater than the net consideration in respect of the capital asset transferred then entire capital gain arising from the transfer will be exempt from tax.

        (ii) If the cost of the new house is less than the net consideration in respect of the capital asset transferred then exemption from capital gain will be granted proportionately on the basis of investment of net consideration either for purchase or construction of the residential house.

Circumstances when exemption granted u/s 54F may be withdrawn-

- If the individual sells or transfers the new house within three years of its purchase or construction; or
- If the individual purchases, within a period of two years of the transfer of original asset, or constructs within a period of three years of transfer of such asset, a residential house other than a new house.

Capital Gains Accounts Scheme

Where the amount of net consideration is not appropriated or utilised by the assessee for purchase or construction of the new residential house before the due date of furnishing of return of income, it shall be deposited by him on or before the due date of furnishing the return of income, in the Deposit Account in any branch (except rural branch) of a public sector bank in accordance with the Capital Gains Accounts Scheme, 1988.

The amount already utilised for the purchase or construction of the new house together with the amount so deposited shall be deemed to be the amount utilised for the purchase/construction of the new house u/s 54F.

If the amount deposited is not utilised fully for the purchase/construction of the new house within the stipulated period, the proportionate amount shall be treated as long-term capital gain of the previous year in which the period of three years from the date of transfer of the original asset expires. In such cases the assessee shall be entitled to withdraw such amount in accordance with the aforesaid scheme. The amount not so utilised shall be charged under section 45 as the income of the previous year in which the period of three years from the date of the transfer of the original asset expires.

III. Capital Losses to be computed after deductions under Ss. 54 & 54F

The exemption under section 54 and 54F must be calculated before capital losses are set off against the capital gains. Section 74 which deals with carry forward and set off of loss under the head “capital gains”, provides that when a long term capital loss iscarried forward, “it shall be set off against income if any, under the head “capital gains”assessable for that assessment year in respect of any other capital asset not being short-term capital asset”. In other words, thus, when a long term capital loss is carried forward,it can be set off only against such income as or assessable under the head capital gains ina subsequent year. A plain reading of these provisions would show that while Ss. 54& 54F comes into play in the process of computing capital gains which are assessableunder the head “capital gains” section 74(1) (b) comes into play only when the incomeassessable to tax under the head capital gains is computed.This view has been taken by the Tribunal in ***Tata Power Co Ltd v. ACIT***[16] where the issue involved exemption under section 54EC.

The eligibility of the assessee to claim benefit of deduction under section 54 and 54F has been the subject of dispute in many cases.

4. Incidence of Capital Gains under various scenarios

(i) Scenario 1: Whether exemption can be claimed under Ss.54 and 54F when capital gains derived from transfer of a single residential property is used for purchasing multiple residential properties.

Decisions in favour of the assessee

There has been a catena of decisions on this issue, the most recent ruling being the Delhi High Court’s ruling in ***CIT v. Gita Duggal***[17]and the Andhra Pradesh High Court’s decision in the case of ***CIT* v. *Syed Ali Adil***[18]. In GitalDuggal, the assessee invested capital gains in the **construction of two floors** and claimed

[16] I.T.A No.3382/ Mum/2010

[17] ITA 1237/2011

[18] T.T.A.No.410 of 2012.

exemption under section 54. The AO rejected the claim on the basis that the units on the said floors were independent & self-contained and not "*a residential house*" and granted exemption for only one unit. The High Court of Delhi held the assessee is entitled to exemption. In *Syed Ali's* case, the assessee in the above case invested the capital gains obtained from the transfer of his ancestral residential property, in acquiring two flats. **The two flats are located in the same apartment and they have adjacent kitchens and toilets have a common meeting point**. With reference to the new asset, section 54 uses the phrase "a residential property". The Department argued that the language used in the section contemplates a situation where a single residential property (new asset) is acquired from transfer of old asset and thence assess cannot invest the capital gains in two flats. The court ruled that the phrase "a residential property" includes more than one residential property and the assessee was allowed a deduction under section 54.

The High Court of Karnataka took a similar view in the case of ***CIT*** v.***Smt. K.G.Rukminiamma***[19]. It was held that the assessee could claim exemption under section 54F for **acquiring four flats under a Joint Development Agreement.** The Court took the view thatfour residential flats cannot be construed as four residential houses for the purpose of section 54 but it has to be construed only as "a residential house".

In the case of ***CIT* v. *Ananda Basappa***[20]another decision of Karnataka High Court, it was held that the expression "a residential house" should not be understood to indicate a singular number. The assessee having purchased two residential flats is entitled to claim deduction under section 54, more so as these **flats are situated side by side and the builder has effected modification of the flats to make it as one unit.***CIT* v *Syed Ali Adil*[21] followed this decision.

In the case of ***I.T.O.* v *P.C.Rama Krishna*[22](ITAT Mad)** the assessee acquired **two flats, one on the ground floor and the other on the third floor of the same building**. It was decided that the assessee can claim the benefits under section 54 as the two flats were located in the same building.*CIT* v *Syed Ali Adil* relied on this decision.

Deduction was allowed on capital gains where the assessee purchased **three flats in the same building** in the case of ***Prem Prakash Bhutani* v. *ACIT*[23] (ITAT Del)** It was held that the residential house has to be a building, and that there is nothing in section 54 which required the building to be constructed in a specific manner.

In the case of ***Jt. CIT* v.*S.K.Jasani*** [reported in BCAJ, August, 2005], **two flats purchased by assessee on different floors were converted into a residential unit by providing internal staircase**. It was held that in view of the fact that proceeds of transfer were invested within time in the purchase of two

[19]2011) 239 CTR (Kar) 435
[20](2009) 223 CTR (Kar) 186
[21] Supra n.19
[22](2007)107 TTJ (Chennai) 351
[23]110 TTJ (Del) 440 (2007).

flats, exemption under section 54 was allowable. Thus, two flats were held to come within the scope of the expression "a residential house".

In ***Vyas (K.G.)* v *ITO***[24]**(ITAT Bom)** Deductions under section 54 were allowed where the assessee had purchased **four flats in same building but on different floors**. *CIT* v. *Syed Ali Adil*[25]followed this decision

Decisions in favour of the Department

Special Bench in the case of ***I.T.O.*v. *Suseela M. Jhaveri***[26]**(ITAT Bom)**, was held that exemption under Sections 54 and 54F of the Act would be allowable in respect of one residential house if the **assessee has purchased more than one residential house and the houses are in different locations.** The choice would be with assessee to avail the exemption in respect of either of the houses provided the other conditions are fulfilled. However, the assessee would be entitled to exemption in more than one unit if the **two adjacent or continuous units converted into one residential house and the units have common passage/stair case, common kitchen and the two units are intended to be used as single house for the residential of the family.**

Where the assessee purchased **seven houses in a row** through seven separate seven separate purchase agreements, the exemption under section 54 cannot be claimed. This was the decision in the case of ***Krishnagopal Nagpal* v. *DCIT***[27]**(ITAT Pune)**. The reasoning was that, each house was capable of being used as one house independently of other row houses. Hence deduction can be granted for purchase of one residential house only.

In the decision in ***Shiv Narain Chaudhari vs. CWT***[28]**(Allahabad HC) several self-occupied dwelling units which were contiguous and situated in the same compound and within the common boundary having unity of structure** should be regarded as one residential house. The decision has been relied upon in the *I.T.O.* v.*Suseela M. Jhaveri*.[29]

In the following decisions **the exemption was allowed only for investment in one flat.**

- ***Gulshanbanoo R. Mukhi v. JCIT***[30]**(ITAT Bom)**
- ***K.C. Kaushik v ITO***[31]**(Bom HC)**

Whether exemption can be claimed under Ss.54 and 54F when new assets are situated in two different locations.

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[24] 16 ITD 195 (Bom.)(1986)
[25] Supra. N. 19
[26] (2007) 109 TTJ Mum 299
[27] (2004) 82 TTJ (Pune) 481
[28] *(1977) 108 ITR 104*
[29] Supra n.27.
[30] 83 ITD 649 (ITAT- Mum) (2002)
[31] 185 ITR *499 (Bom.)(1990)*

In the case of ***Pawan Arya*****v. *CIT***[32]**(P&H HC)**, the court took the view that when the assessee has made investment in two houses, the exemption under section 54 is available in respect of one house only. In this case the **two houses were situated in different locations**. The court relied on the opinion expressed in the decision in ***I.T.O.* v. *Suseela M. Jhaveri***[33]regarding purchase of residential properties in different locations.

There have been two decisions favouring the assessee where residential properties were purchased in two different locations.

In ***Ratanlal Murarka*** v. ***Jt. CIT***[34]**(ITAT Bom)** , assessee had **purchased one house at Pune and one at Thane** by investing within specified time the relevant proceeds arising out of transfer of his house and it was held that exemption under section 54 was allowable in respect of investment in acquiring both the houses. The expression "a residential house" in section 54(1) was held to include two houses.

Similarly, in ***P.S. Mogre v. CIT***[35]**(ITAT Bom)** the house that had been sold was approximately 1,500 square feet in area and out of relevant proceeds, **two flats were purchased of the area of about 750 square feet and 630 square feet in different localities** within stipulated time as assessee was unable to acquire one big flat of about 1,500 square feet and the Mumbai Bench of the Tribunal allowed the exemption following the decision in *RatanlalMurarka* v. *Jt. CIT.*[36]

Conclusion - The above decisions suggest that the phrase ‘a residential property’ should be interpreted in a liberal sense to include residential units/flats in the same building. However, acquisition of multiple properties in different locations might not entitle the assessee to claim the benefits under Ss.54 & 54F.

(ii) Scenario 2: Whether exemption can be claimed under Ss.54 and 54F when capital gains from transfer of multiple properties are invested in a single residential property.

In the case of ***DCIT v. RanjitVithaldas***[37], it was held that if other conditions as regards time limit etc. are fulfilled, **exemption under section 54 is allowable** where capital gains arising from sale of two residential houses are invested in a single residential house.

The only restriction for claiming exemption under Ss.54 and 54F is that the capital gain arising from the sale of one residential house must be invested in one residential house and not in two residential houses.

[32](2011) 237 CTR (P&H) 210
[33]ITA No. 4485/Mum/1999, reported in BCAJ, 2003
[34]ITA No. 4748/Mum/2001
[35]ITA No. 27/Mum/2000
[36]Supra. N. 35
[37](2012) 79 DTR 377

Sale proceeds from multiple properties invested in multiple properties

In the case of ***Shri Humayun S. Rangila v. ITO***[38] **(ITAT Bom)**, the assessee sold two flats and on the sale proceeds purchased two new flats. It was held that the exemptions will be available to any number of residential houses so long as other conditions under section 54are fulfilled. **Exemption would be available to sale of any number of residential properties as long as there are corresponding investments**. The aggregate capital gain cannot be calculated. **Deduction must be calculated on each set of sale and investment** in the combination most beneficial to the assessee.

In the case of ***Rajesh Keshav Pillai*** **v. ITO**[39]**(ITAT Bom)**, the assessee **sold two flats and capital gain from the sale of two flats was invested in two flats**. It was held that where more than one house was sold and purchased, the exemption can be claimed only on one to one basis and **each set of sale and purchase have to be treated separately**. The Court in ***DCIT v Ranjit Vithaldas***[40]followed this decision.

Conclusion : It is apparent from the reasoning used in the above cases that the benefit under Ss. 54 & 54F can be claimed as long as every transfer of residential property has a corresponding investment in another residential property. Hence, more than one residential property can be transferred but there must be an equal number of investments.

(iii) Scenario 3:Whether deduction can be allowed under Ss.54 and 54F when capital gains are invested in re-modelling or addition of floors to an existing property.

According to the decision of the Madras High Court in ***CIT v. V.Pradeep Kumar***[41] the construction must be a real one. It should not be a symbolic construction. The assessee in this case had undertaken an **extension work in the old building in the ground floor and first floor**. The Court observed that there was no residential house and it was only an extension of the old building. Therefore it was held that a mere extension of the existing building would not give benefit to the assessee as contemplated under section 54.

<u>Decisions in favour of the assessee</u>

The assessee in ***CIT* v. *Narasimhan***[42]***(*Mad HC)** demolished the first floor of the house owned by him, and **constructed a new first floor** and claimed exemption under section 54. It was decided in favour of the assessee. It was held that the construction of first floor could be regarded as construction of a unit of a house property.

[38]ITA No.1239/M/2010 Mumbai
[39]7Taxmann 11 (Mum) (2010)
[40]Supra. N. 38.
[41][2006] 153 taxman 138 (mad.)
[42](1990) 81 CTR (Mad) 141

In the case of ***CIT* v.*A. R. Mathavan Pillai*[43]*(* Ker HC)** , the court held that the interpretation of the word 'construction' used in section 54 cannot be restricted only to new construction but it can be used to denote **constructions which are in the nature of remodelling**

In the case of ***ACIT* v. *Vidya Prakash Talwar*[44]*(*Delhi HC)** the assessee started **construction of first floor and *barasati* of an already existing property,** subsequent to the transfer of the original asset. It was held that the first floor and the *barsati* constituted a separate 'independent residential unit'. According to the Delhi High Court, the meaning of 'residential house property' in section 54 has the same meaning as in Ss.22-27 and includes 'independent house units'.

In ***B.B. Sarkar*v. *CIT*[45]** the question before **Calcutta High Court** was whether exemption under section 54 can be claimed on the **construction of an additional floor in the new asset purchased**. The Court allowed the assessee's claim.

Conclusion: The main purpose of the statute is to give relief for the acquisition of a new residential house and hence in that context, it does not really matter whether the new residential house is partly constructed or partly purchased.

(iv) Scenario 4: Whetherdeduction can be allowed under Ss.54 and 54F when capital gains are invested in residential property outside India.

There is no stipulation in Section 54 that the residential premises must be purchased in India itself. If it is purchased outside India, but for residential purposes, it would satisfy the condition of Section 54 and the claim of the assessee cannot be rejected.

In the case of ***Mr. Vinay Mishra v. ACIT*[46](ITAT Bangalore)** , **t**he assessee sold certain shares which resulted in LTCG and invested the entire capital gains in the **acquisition of a house property in United States of America** and claimed exemption under section 54F of the Act. The tribunal allowed exemption under section 54F.

Similarly, in the case of ***Mrs. Prema Shah v. ITO*[47](ITAT Bom)**, where the assessee had **purchased residential property in the United Kingdom**, it was held that if an individual sells any long term capital asset to reinvest the sale proceeds on a new house property purchased or constructed outside India, he can still enjoy the benefits of exemption Ss. 54 & 54F.

However, in another case ***Leena J Shah v. Asstt. CIT*[48] (ITAT Ahemdabad**), the Tribunal took a contrary view and disallowed the exemption

[43]1996 219 ITR 696 Ker
[44]1981 132 ITR 661
[45][1981] 132 ITR 150
[46][2012] 20 ITR (Trib) 129 (Bang)
[47](2006) 100 ITD 60 (Mum)
[48](2006) 6 SOT 721 (Ahd)

Conclusion: The reasoning is that, if all other conditions laid down in the section are satisfied, the exemption cannot be disallowed merely because the property acquired is in a foreign country, since there is no stipulation in Section 54 that the residential premises must be purchased in India itself.

(v) Scenario 5 :To claim exemption under Ss.54 &54F, whether investment in new asset or deposit in CGDS should be out of the actual sale consideration .

Both the provisions permit exemptions to be claimed irrespective of whether an assessee borrows the required funds or uses the consideration, as long as he satisfies the condition relating to investment in specified assets, he should be entitled to the exemption. The object of the provisions is that the funds should be channelized into certain sectors. Hence, investment can happen through funds from any source. An important judicial pronouncement in this regard is the decision of Supreme Court in the case of ***CIT*** v. ***T.N. Aravinda Reddy***[49]. In this case, the assessee sold his old house resulting incapital gains.

The Supreme Court held that the **word "purchase" must be given its common meaning of buying for a price by payment in any form, there being no stress on the manner or source by which the new asset was acquired**. This case has been relied upon by various subsequent decisions where source of funds is the subject matter of dispute.

In the case of ***ITO v. Dinesh Choudhary (HUF)***[50]***)*** **(ITAT Bom) ,** the question arose as to whether the deduction under section 54 is allowable where the assessee has used borrowed funds for construction of the new asset. The case was decided in the favour of the assessee.

Similarly in ***J.V.Krishna Rao v. DCIT***[51]***(*****AP HC*****)***, it was held that the capital gains earned by the assessee can be utilized for other purposes, and as long as the assessee fulfils the condition of investment of the equivalent amount in the asset qualifying for relief under section 54F, by securing the money spent out of capital gains from other sources available to it by borrowal or otherwise, it is eligible for relief under section 54F in respect of the entire amount of capital gains realized.

Other decisions in favour of the assessee:

- ***ACIT v. Dr. P.S. Pasricha***[52] ***(*****Bom HC)**
- ***Bombay Housing Corporation v. Asst. CIT***[53]***(*****Bom HC)**
- ***ITO v. K.C. Gopalan***[54]***(*****Ker HC)**
- ***Muneer Khan v. ITO***[55] **(ITAT Hyd)**

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49 (1979) 12 CTR (SC) 423
50 (2013)TIOL 493 ITAT Mum
51 [2012] 24 taxmann.com104
52 (2008) 20 SOT 468 (Mumbai)
53 [2002] 81 ITD 545 (Bom)
54 [1999] 107 Taxman 591 (Ker)
55 41 SOT (2011) 504

- ***Sita Jain v. Asstt. CIT***[56] **(ITAT Delhi)**
- ***Mrs. Prema P. Shah v. ITO*** [57] **(ITAT Bom)**

Decisions in favour of the department

In *CIT* ***v. V. R. Desai***[58]**(Ker HC)**, it was held that the assessee was not entitled to exemption under section 54F because the assessee neither deposited the sale proceeds for construction of the building in the bank in terms of s/s. (4) before the date of filing return, nor was the sale proceeds utilised for construction in terms of section 54F (3) of the Act.

Similar views are expressed in the following decisions:

- ***Milan SharadRuparelv.Asstt. CIT*** [59] **(ITAT Bom)**
- ***Smt. V. Kumuda v.DCIT***[60] **(ITAT Hyd)**
- ***Pramila A. Parekh* v. *ITO***[61] **(ITAT Bom)**

Conclusion: Transfer includes exchange for the purpose of Capital gains. If an assessee were to exchange hi residential property or other asset for shares, where he does not receive any monies, he could still avail of the benefit of section 54 &54F if he were to purchase or construct the new asset within the required time frame.The requirement of the law is that the assessee should purchase a residential house within the specified period and source of funds is quite irrelevant.

(vi) Scenario 6:Whether the procurement of plot within the time limit prescribed be sufficient to claim benefits under Ss. 54 and 54F?

Investment in purchase of plot for construction of house would not entitle an assessee to claim exemption under Ss. 54 & 54F unless the construction is completed within the specified timelimit.

The ***Purchase of plot, followed by construction*** Circular: No. 667, dated 18-10-1993 reads as follows:

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*

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[56]ITA Nos. 4754, 4755 & 5036/Del/10 dated 20.5.2011
[57][2006] 100 ITD 60
[58] (2011) 37 (I) ITCL 29 (Ker)
[59](2009) 20 DTR (Mumbai)(Trib) 289,
[60]135 ITD 116
[61]Unreported decision in ITA No. 2755/Mum/1997]

Whilst it is has been clarified that the cost of plot should be used for computing deduction, it is also evident from the words used in the circular that mere purchase of plot for construction within the time specified would not qualify investment for exemption under Ss.54 or 54F.

Decisions in favour of the department

In the case of ***Smt.Rita Gaur v. Dy. CIT***[62]**(ITAT Lucknow)**it was held that , for claiming deduction under section 54F, mere purchase of residential plot is not sufficient, assessee has to construct (or purchase) a house within specified period.The mere purchase of residential plot is not sufficient compliance of provisions of Section 54F. What was expected from the assessee was to prove on record that the assessee had purchased or constructed a house within the period specified in Section 54F.

A Similar view has been taken in the case of ***Addl. CIT* v. *Narendra Mohan Uniyal***[63]**(ITAT Del)**

However, in the recent decision of ITAT Hyderabad in ***Mrs. Pushpa Devi Tirbrewala v. ITO***[64]**(ITAT Hyd)**, it was held that, the only condition imposed under sub-section (1) and (2)of Section 54 are- (a) the assessee should within a period of two years from the date of transfer, purchase a residential house or within a period of three years from the date of transfer, construct a residential house. Hence, investment in purchase of plot forconstruction of house would entitle an assessee to claim exemption under Ss.54 or 54F. The decision laid emphasis on the **Board's circular No.667 dated 18.10.1993**.

Conclusion: The mere purchase of residential plot is not sufficient compliance of provisions of Section 54/54F. What was expected from the assessee is to prove on record that the assessee had purchased or constructed a house within the period specified in Section 54/54F.

(vii) Scenario 7 :Whether exemptions u/s. 54F can be claimed even if construction is not completed within 3 years but when substantial payment been made.

An individual desirous of constructing a new property generally approaches Co-operative Societies, Government's Self-Financing Schemes or third party builders/developers. In such cases, despite having paid the full amount of consideration or a substantial amount thereof, sometimes, the completion of construction or transfer of ownership in case of purchase of the residential property can be delayed due to some reason. Therefore there the individual/assessee runs the risk of losing the exemption under section 54 or section 54F for delay in completion of construction, for no fault of his. To address these situations, the following circulars were brought out.

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[62](2004) 90 ITD 24 (Luck.)
[63]ITANo.1624 /Del/2009,
[64]ITA No.1763/Hyd/11

Board Cir. No. 471 dtd. 15.10.1986 (162 ITR (St) 41) has clarified that cases of allotment of flats under the self-financing scheme of the Delhi Development Authority (DDA) should be treated as cases of 'construction' for the purposes of Ss. 54 and 54F.**The Board Cir. No. 672 dtd. 16.12.1993 (205 ITR (St) 47)** has clarified that allotment of flats/houses by co-op. societies and other institutions, whose schemes of allotment and construction are similar to those of DDA (as mentioned in para 2 of aforesaid Cir. No. 471), would be treated as 'construction' for the purposes of Ss. 54 and 54F.There are decisions in favour of the assessee where exemptions have been granted although the construction was not completed within the time period specified under the provisions of the ITA.

In the case of ***Kishore H. Galaiya v. ITO***[65] ***(ITAT Bom)*** , It was held in favour of the assessee and this position has been clarified by the CBDT in Circular No. 472 dated 16-12-1993 in which it made clear that the earlier Circular No. 471 dated 15-10-1986 (in which it was stated that acquisition of flat through allotment by DDA has to be treated as construction of flat) would apply to co-operative societies and other institutions

Other decisions in favour of the assessee :

- ***ACIT v. Smt. Sunder KaurSujan Singh Gadh***[66] **(ITAT Bom)**
- ***CIT v. R.L. Sood***[67] **(Del HC)**
- ***Smt.Shashi Varma. v. CIT*** [68] **(MP HC)**
- ***Mrs. Seetha Subramanian. v. ACIT***[69] **(ITAT Mad)**

Conclusion: In the modern days, it is not easy to construct a house within the time limit of two years and under the Government schemes, construction takes years and years. Therefore, confining to two years' period for construction and handing over possession thereof is impossible and unworkable under section 54 of the Act. **If substantial investment is made in the construction of house, then it should be deemed that sufficient steps have been taken and this satisfies the requirements of section 54.**

(viii) Scenario 8:Whether the deduction under Ss.54 & 54 can be claimed if the property is purchased by the assessee in name of persons other than the assessee.

Delhi High Court case ***CIT v. Shri Kamal Wahal***[70] the assessee claimed deduction under Section 54F on the ground that the sale proceeds were invested in the acquisition of a vacant plot and the purchase of a residential house inthe name of his wife. It was held that, for the purposes of Section 54F, **the new residential house need not be purchased by the assessee in his own name nor is it necessary that it should be purchased exclusively in**

[65][2012] 24 taxmann.com 11 (Mumbai - Trib.)
[66](2005) 2SOT206,
[67](2000) 245 ITR 727 (Del.)
[68][1997] 224 ITR 106
[69](1996) 59 ITD 94
[70] ITA4/2013 Del HC (January 2013)

his name. The Court observed that the assessee had notpurchased the new house in the name of a stranger or somebodywho is unconnected with him and that he has purchased it only in the name of his wife.

Other decisions in favour of the assessee

- ***ACIT v. Suresh Verma***[71] **(ITAT Del)**
- ***CIT v. Ravinder Kumar Arora***[72] **(Del HC)**
- ***Shri N. Ram Kumar vs. ACIT*** [73] **(ITAT Hyd)**
- ***CIT vs. Gurnam Singh***[74] **(P&H HC)**
- ***CIT v V. Natarajan***[75] **(Mad HC)**
- ***Mir Gulam Ali Khan vs.*** *CIT*[76]***(*** **AP HC)**

Decisions in favour of the Department

In the case of ***Jai Narayan v. ITO***[77]**(P&H HC)** ***,*** the reinvestment out of the sale proceeds of the assessee's property was made in the name of the assessee's son and grandson.Wherever the Legislature intended it to be so, it had specifically provided under the provision. It was held that the term "assessee" is qualified by the expression "purchased any other land for being used for agricultural purposes", which necessarily means that **the new asset which is purchased has to be in the name of the assessee himself for seeking exemption under section 54B of the Act**. The exemption under section 54B was not allowed.

A similar view was taken in the following decisions

- ***ITO v. Prakash Timaji Dhanjode***[78]***(*** **ITAT Hyd)**
- ***Prakash vs. ITO &Ors***[79] **(Bom HC)**

Conclusion: The object of granting exemption under section 54 of the Act is that a person who sells a residential house for the purpose of purchasing another convenient house must be given exemption so far as capital gains are concerned. As long as the sale of the house and purchase of another house are part of the same scheme, the lapse of sometime between the sale and purchase makes no difference. The word "assessee" must be given a wide and liberal interpretation so as to include his legal heirs also. There is no warrant for giving too strict an interpretation to the word "assessee" as that would frustrate the object of granting the exemption

(ix) Scenario 9:Whether deduction can be allowed under both Ss.54 and 54EC on the same residential property.

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[71](2012) 135 ITD 102 (Delhi) (Trib)
[72] (2012) 342 ITR 38 (Del.),
[73] ITA No.1901/HYD/2011,
[74](2010) 327 ITR 278,
[75](2006) 287 ITR 271 (Mad),
[76](1987) 165 ITR 228 (AP),
[77](2008) 306 ITR 335 (P &H)
[78]ITAT Nagpur 81 TTJ 694 (2001)
[79](2008) 220 CTR (Bom) 249

The assessee is entitled to claim deductions under both the sections. The recent decision in the case of ***ACIT v. Deepak S. Bheda***[80]***(* ITAT Bom),**has been held in favour of the assessee. In the said case, the AO denied the benefit claimed by the assessee under section 54 EC towards the investment made in REC bonds for a sum of Rs. 50 lakh out of total long-term capital gain of Rs. 3.40 crores. It was held that as far as the claim of exemption under section 54F and under section 54 EC, there is no such restriction in the statute that the assessee cannot claim the exemption under both sections, if the conditions provided under the respective sections are complied with and the same does not result in availing double exemption on the same amount.

Conclusion: There can be no bar on the entitlement of the assessee to claim deductions under both the sections if the conditions under the respective sections are complied with.

5. Occurrence of Capital Gains Levy in Joint Development Arrangements

With respect to chargeability and computation of capital gains under section 45, the interpretation of the word *transfer*, as defined in section 2(47) of the ITA 1961, has been highly contentious in many situations. One such situation is that which concerns the tax liability of land owners under Joint Development Agreements (JDA). JDAs have emerged as the most preferred way of developing properties whereby the Owner of the immovable property and the Developer/Builder agree to share the financial risks and profits of such ventures.

A basic JDA involves the owner agreeing to contribute a piece of land/building to be developed by the Developer/Builder into flats or residential units. In the agreement, the Builder offers to allot certain number of flats to the Owner as consideration for the land. A JDA is almost always accompanied by a General Power of Attorney (GPA) executed by the land owner in favour of the Developer/Builder, enabling him to procure the required permits and licenses to commence construction.

A single JDA attracts a number of tax implications for both the land owner as well as the developer/builder.

From the Land owner's point of view, some of the income tax issues that might arise are:

I. Whether a capital gain levy arises on the said JDA transaction?
II. If a capital gain levy is chargeable, when does the income accrue?
III. How cost of acquisition is determined when property is developed in pursuance of a JDA and subsequently sold to third party purchasers?

Let us examine each issue separately.

[80] 2012 (7) TMI 431

I. Whether a capital gain levy arises on JDA transaction?

Prior to April 1988, in the absence of a registered conveyance deed, the Owner of an immovable property could hand over possession to the Builder/Developer without having to pay tax on the capital gains derived out of such transactions. In effect the Owner/Assessee entered into agreements with Developers conferring privileges of ownership without executing conveyance deeds resulting in substantial loss of revenue to the Department.To set right this lacunae in law, S. 2(47) (v) was introduced in the Income Tax Act, 1961.The sub section widens the ambit of the word transfer and it covers "any transaction involving the allowing of, the possession of,anyimmovable property (as defined) to be taken or retained in part performance of a contract of the nature referred to in section 53A of the Transfer of Property Act."In general law , if strictly construed there would be no 'transfer' if there is no sale or agreement to sell but by virtue of section 53A, transactions in the nature of JDA have been brought within the ambit of section 2(47)(v). To qualify as a 'transfer' within the meaning contained in section 2(47)(v) the transaction must satisfy all the conditions enumerated in section 53A of the Transfer of Property Act,1882. The conditions are:

i. There should be contract for consideration;
ii. It should be in writing;
iii. It should be signed by the transferor;
iv. It should pertain to the transfer of immovable property;
v. The transferee should have taken possession of property;
vi. Lastly, transferee should be ready and willing to perform his part of the contract.

The terms of the JDA must be read along with section 53A in order to determine whether the transaction results in 'transfer' of capital asset.

The decision of Bombay High Court in ***Chaturbhuj Dwarkadas Kapadia* v. *CIT***[81]examines the scope of Section 2(47)(v). It has been pointed out that, arrangements conferring privileges of ownership even without transfer of title fall under section 2(47) (v) thereby attracting capital gains levy.

Contrary view was taken by the Madras High Court in ***CIT v. G.Saroja***[82] Unless thereisawrittenagreement,section53Aof Transfer of Property Act will not come into operation and where revenue was unable to prove that assessee had put developer in possession of property by receiving consideration partly or in full and fact remained that there was no sale agreement between assessee and builder and also assessee had not received sale consideration, it could not be held there was transfer of property as contemplated under section 2(47)(v).

Delhi Bench of ITAT in ***Satyawati Verma v CIT,***[83] held that where buyer could not acquire any right of ownership, use or possession in corpus of property or

[81] (2003) 180 CTR Bom 107
[82]301ITR124 (Mad.)[2008],
[83](2010) 124 ITD 467

income arising there from due to unauthorized occupants, provisions of section 2(47)(v), would not be attracted.

II. When does the capital gain accrue in a Joint Development arrangement?

The peculiar aspect of JDAs is that, no two JDAs are similar. Therefore, the tax liability of the Owner vis-à-vis the Developer depends largely on clauses incorporated in the agreement. Hence it is prudent to draft Joint Development Agreements in a manner where the terms clearly spell out the time, manner and to whom possession or title to the land shall be transferred by the owner. There can be many kinds of JDAs.

Let us look at the following scenarios

1. Where the owner transfers possessory rights along with the right to develop the land to developer at the time of execution of the Joint Development Agreement. In such circumstance, the income from such transfer accrues to the assessee on the date on which the JDA is executed.

2. The Owner gives theDeveloper a mere a right to develop a piece of land. When the construction of flats is complete, developer pays to the owner balance amount or is handed over possession of certain flats towards settlement of consideration. It is only after the completion of construction, owner transfer all rights, title and interest in the land in favour of the developer. The Developer then has the right to sell his share in the land and built-up area to third party purchasers. Transfer happens when the construction is completed

3. Where the owner does not transfer the rights to the land to the developer at all. The developer is granted mere right to construct or develop the land. Once the construction is complete, the owner transfers the proportionate right, title and interest in the land to the end consumer along with the flat. In this case, the gains would accrue to the owner when he transfers the flat to third party.

There are many other situations possible and the effect of capital gains levy would be determined by the Joint Development Arrangement. There have been a plethora of case laws on the above issue encompassing diverse view points on when the transfer is said to have taken place in a JDA arrangement. It has to be borne in mind that these decisions are based on interpretation of the term of the JDA and hence there is no straitjacket formula for determining when the capital gain accrues.

(i). Date of execution of the JDA

In ***CIT v. Ashok Kapur HUF***[84] ***(* Del HC)**, it was held that the transfer took place when assessee entered into development agreement. It was observed that the clauses in the agreement had all the elements of 'transfer' under section 53A of the TPA.

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[84] (2007)213 CTR 241

The landmark decision of the Bombay High Court in ***Chaturbhuj Dwarkadas Kapadia* v.*CIT*[85],** referred to earlier, takes the view that the date on which the Joint development Agreement is executed becomes the date on which the transfer takes place and that capital gains to be calculated accordingly. Section 54 & 54F will be available to the assessee if he constructs /purchases residential property within the required period from the date of execution of the JDA.

Besides the JDA, several other agreements are executed by the parties during the course of the development project. An issue came up before ITAT Hyderabad in the case of ***Smt. Prathima Reddy v. ITO*[86]**as to whether the transfer took place on the date of execution of the supplementary agreement, which demarcated the flats to be allotted. The date of execution of the supplementary agreement was taken to be the date of transfer of the capital asset.

However in the case of ***Vijaya Productions (P.)Ltd.v. ACIT*[87]**, ITAT Chennai has taken a contrary view. The assessee in this case had entered into a JDA with another company whereby the assessee company contributes a certain portion of land for the purpose of development and will be entitled to 50% of the built-up area. The other company is to contribute a certain amount towards the project for which it shall be allotted 50% equity shares in the assessee company. The question was whether the execution of the JDA amounted to transfer by the assessee within the meaning of section 2(47). It was held that mere execution of the development agreement, does not denote that a transfer has taken place and that it is only at that point of time when the parties satisfy the stipulations under the agreement that the question of transfer under section 2(47) would arise.

Section 54 & 54F will be available to the assessee if he constructs /purchases residential property within the required period from the date of execution of the Joint Development Agreement and the supplementary agreement.

(ii). Date of handing over Possession of Vacant Land

'Possession'as contemplated in section 2(47) (v) need not necessarily be sole and exclusive possession, so long as the transferee is enabled to exercise general control over the property and to make use of it for the intended purpose. The ruling in ***ACIT v. A. Rama Reddy* [88](ITAT Hyd)** has followed the above reasoning to hold that when an owner enters into an agreement for development of the property and certain rights are assigned to the developer who in turn has made the substantial payment and taken steps to construction of flats, then the transaction is held to be a transfer under section 2(47)(v).

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[85] Supra n. 81.

[86] ITA No. 1393/Hyd/2010

[87] ITA No. 1093/Mad/2010

[88] (2012) 52 SOT 521 (Hyd.)(Trib.)

In ***Dr.Usha Mohandas v. ITO***[89]**(ITAT Hyd)** it was held that the date of entering into the agreement and handing over absolute possession was also linked to the full and final settlement of the consideration as per the agreement.

The decision of the Madras High Court in ***R. Kalanidhi v ITO***[90]reiterated that when the possession was handed over and total consideration was also agreed upon by parties and vendee was allowed to enjoy and entertain property for purpose for which it was taken over,then the transaction had fulfilled conditions required under section 53A, of Transfer of Property Act, 1982, and therefore, it was covered under definition of 'Transfer' under section 2 (47)(v).

Similar view was taken in the following decisions

- ***Vemana Reddy v ITO***[91]***(*** **ITAT Bangalore)**
- ***Ajay Kumar Shah Jagati v. CIT***[92]***(*** **SC)**
- ***ACIT v. Mrs. GeetadeviPasari***[93]**(ITAT Bom)**
- ***CIT v JeelaniBasha***[94] **(Mad HC)**

Section 54 & 54F will be available to the assessee if he constructs /purchases residential property within the required period once the possession, even a **part of the property** is handed over to the transferee

(iii). Date of Execution of General Power of Attorney (GPA)

In ***Shri Suresh Kumar D. Shah v. DCIT***[95] **(ITAT Hyd)**, it was held that in a Joint Development Agreement, if the Developer has performed or is willing to perform his part of the contract, then the transaction would qualify as a 'transfer' under section 2(47)(v) of the Income-tax Act, 1961.

Similar view held in the following decisions:

- **In *re Jasbir Singh Sarkaria***[96]**(AAR)**
- ***Sushma Rani Bansalv.CIT***[97]***(*** **ITAT Del)**

Section 54 &54F will be available to the assessee if he constructs /purchases residential property within the required period from date of execution of the GPA.

(iv) Date of handing over possession of constructed flats to the Owner of the property

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[89]ITA No. 595/Hyd/2010 dated 12.11.2010
[90](2010) 122 ITD 388 (Chennai)
[91] (2008) 114 TTJ Bang 246
[92] (2008) 215 CTR (SC) 396
[93](2006) 104 TTJ 375 (Mum)
[94](2002) 174 CTR Mad 394
[95] ITA no. 420, 421, 422, 423, 425 & 426/HYd/2011
[96][2007]164 TAXMAN 108
[97](2007) 615 Taxman 145.(Del).

Mumbai Bench of ITAT in ***Dy.CIT v. Asian Distributors***[98] it was held that if the land owners remain as mere sellers of land, in the MOU the clauses must be carefully drafted to mean that the possession/ ownership will get transferred only on last payment/handing over of the completed apartments

Section 54 & 54F will be available to the assessee if he gets possession of the constructed property within the required period from the date of sale of the land.

III. How is cost of acquisition determined when property is developed in pursuance of a JDA and subsequently sold to third party purchasers?

The percentage of land given to the Builder/Developer, for development, is treated as consideration for obtaining built-up area in the same property. Hence, value of land becomes the cost of acquisition.

In the case of ***Prabhandam Prakash v. ITO***[99]**(ITAT Hyd)**, the assessee owned a piece of land with a residential property constructed on it. He entered into an agreement with a promoter/developer as per which the promoter was to **demolish** the existing structure and build a new residential- cum-non-residential complex. It was held that the cost of acquisition of the property transferred to the developer would be the **actual cost of land acquired plus the cost of building or the structure constructed on the land by the owner.**

In the case of***Smt. Vasavi Pratap Chand* v.*D.C.I.T***[100], the Delhi Tribunal ruled that what was transferred under the collaboration agreement by the assessee to the builder was only 44% of the land owned by them in consideration of 56% of the built up area and not the entire land. The sale consideration of 44% land was in kind and, therefore, it amounted to investment in the construction of built up area.

Conclusion: If cost of improvement cannot be ascertained, the principle laid down in B.C.Srinivasa Shetty would apply, and the consideration received on account of sale of TDRs and FSI may not be considered as ‘capital gains’ and therefore exemption cannot be availed under Ss.54 and 54F.

6. Conclusion

The exemptions available under Sections 54 and 54F are substantial, the assessee, therefore, must ensure that the conditions prescribed in Ss. 54 & 54F are met with to avoid losing the exemption and endless legal battle with the Department. The assessee must procure the completion certificate, deposit the amount of capital gains in the CGDS, where necessary, and substantial investment must be made in the construction of house before filing of returns, to claim the benefits under Ss. 54 & 54F of the ITA, 1961.

[98](2001)70 TTJ 88
[99]2008 22 SOT 58
[100]2004 89 ITD 73 Delhi