INCOME TAX APPELLATE TRIBUNAL

DELHI BENCH "G": NEW DELHI

BEFORE HON'BLE JUSTICE P.P. BHATT, PRESIDENT

AND

SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER

(Through Video Conferencing)

ITA No. 5767/Del/2015

(Assessment Year: 2007-08)

Shri Valmik Thapar, 19, Kautilya Marg, New Delhi	Vs.	ACIT, Circle-53(1), New Delhi
(Appellant)		(Respondent)

ITA No. 6346/Del/2014

(Assessment Year: 2010-11)

Shri Valmik Thapar, M/s. R. N. Khanna & Company, CA, 14-15F, Shivam House, Connaught Place, New Delhi PAN: AACPT7098K	Vs.	DCIT, Circle-32(1), New Delhi
(Appellant)		(Respondent)

ITA No. 6726/Del/2014

(Assessment Year: 2010-11)

ACIT, Circle-53(1), New Delhi	Vs.	Shri Valmik Thapar, 19, Kautilya Marg, New Delhi PAN: AACPT7098K
(Appellant)		(Respondent)

Assessee by :	Shri Salil Agarwal, Senior Advocate along with Shri Shailesh Gupta, Shri Mahur Agarwal, Advocates
Revenue by:	Shri H. K. Choudhary, CIT DR
Date of Hearing	11/06/2021 (Last hearing)
Date of pronouncement	11/06/2021.

O R D E R

PER PRASHANT MAHARISHI, A. M.

1. These are three appeals for two Assessment years pertaining to one assessee, Mr. Valmik Thapar, a resident, Individual [Assessee]. Assessee filed ITA number

5767/Del/2015 for assessment year 2007 – 08 and ITA number 6346/Del/2014 for A Y 2010-11. Ld AO filed ITA number 6726/Del/2014 for AY 2010-11. All these appeals are on common issue and therefore, those are heard together and disposed of by this common order.

Assessment Year 2010-11

2. ITA number 6346/Del/2014 is filed by the assessee against the order of the Commissioner of Income Tax (Appeals) XXVI , New Delhi dated 25th of September 2014 for assessment year 2010 – 11 raising following grounds of appeal:-

   i. on the facts and in the circumstances of the case, the appellate authority has erred in accepting the substituted fair market value of immovable property situated at 19, Kautilya Marg, New Delhi with ₹ 7,70,160/– as at 1 April 1981 instead of Rs 7,710,000/– based on the valuation report by an approved valuer and relied upon by the appellant.

   ii. On the facts and in the circumstances of the case, the appellate authority has erred in not allowing assessee's claim u/s 54 of the act for ₹ 37,913,760/– in respect of investment in residential flat in Mumbai.

3. In ITA number 6726/Del/2014, the learned Asst Commissioner of Income Tax, Circle – 53 (1), New Delhi [The Ld AO] is also aggrieved with the order of the Commissioner of income tax (Appeals) –XXVI, New Delhi [The LD CIT (A)] dated 25 September 2014 for assessment year 2010 – 11 on following counts raising grounds as under:-

   1) On the facts and circumstances of the case, the CIT (A) has erred in allowing the claim of Rs 1 crore u/s 54EC of The Income Tax Act, 1961.
   2) On the facts and circumstances of the case, the CIT (A) has erred in allowing claim of Rs 1 crore u/s 54EC of the income tax act, 1961, when the assessee has purchased both the capital gain bonds prior to the date of transfer of capital asset.
   3) On the facts and circumstances of the case the CIT (A) has erred in allowing claim of Rs 1 crore u/s 54EC of the income tax act, 1961 whereas the maximum limit allowable as per the act is ₹ 50 lakhs.

Additional Ground

4. On 7/01/2019, assessee moved an application for admission of additional ground challenging reopening of assessment u/s 147 of The Act as Under:-

> "That the impugned assessment so framed is bad in law and on facts, inasmuch as, the initiation of proceedings u/s 147 of the act and, further completion of assessment u/s 143 (3) read with Section 147 of the act was without satisfying the statutory preconditions (without any tangible material) as envisaged in aforesaid Section and was without jurisdiction and was liable to be quashed as such."

5. Relying heavily on the decision of the Honourable Supreme Court in case of National Thermal Power Co Ltd versus Commissioner of Income Tax [229 ITR 383], assessee submitted that assessee is challenging the reopening of the assessment proceedings, which is a jurisdictional ground, which can be raised at any time during the course of pendency of the appeal, the facts are on record, no further facts are required to be investigated and therefore the ground raised by the assessee, , should be admitted. It is further stated that in case of the decision of the honourable Supreme Court in Jute Corporation of India Ltd versus CIT 187 ITR 688, it is held that the appellate authority has the jurisdiction to permit the appellant to raise an additional ground, which could not have been raised at the stage when the return was filed or when the assessment order was made and the ground became available on account of a change of circumstances of law. In view of this, the application of the assessee submits that the instant assessment framed is without jurisdiction and hence is unsustainable in law and therefore this ground should be admitted.

6. The learned authorised representative vehemently supported the application made by the assessee for admission of the additional ground reiterating the same arguments as raised in the application itself.

7. The learned CIT DR vehemently opposed the admission of the additional ground of appeal stating that assessee should not have raised this ground of appeal at this stage when neither before the learned assessing officer or before the learned CIT – A, it has been raised. He further stated that it is not a legal ground and when there can be two views on a particular issue; such ground cannot be raised under the pretext of a legal ground. Therefore, according to him, it should not be admitted at all at this stage.

8. We have carefully considered the rival contention and perused the application of the assessee wherein now assessee has raised an additional ground of appeal

challenging the reopening of the assessment. We find that the present assessment order for assessment year 2010 – 11 has emanated from the reopening of the assessment made by the learned assessing officer. When, reopening is challenged, nothing else is required to be seen except the reasons recorded by the learned assessing officer, application of mind and prima Facie view. Further, when reopening of the assessment is challenged, it goes to the root of the matter. Once, if reopening is quashed, the merits are not at all required to be looked into. Thus, ground raised by the assessee is legal in nature, No fresh facts are required to be investigated. Prayer for the admission of the additional ground is also supported by the decision of the honourable Supreme Court in case of NTPC (supra) and Jute Corporation of India (supra). In view of this, we admit the additional ground raised by the assessee.

Facts

9. Briefly, the fact shows that assessee is an individual having income from business, capital gains and other sources. For assessment year 2010 – 11 assessee filed his return of income on 26/07/2010 declaring total income of Rs 29,102,041/–. Such return was processed u/s 143 (1) of The Income Tax Act [The Act] on 8 April 2011 at the same income. No assessment took place thereafter.

10. Assessee has inherited a property. Assessee has sold 50% of the property at 19, Kautilya Marg, New Delhi to Srimati Anjali Gujral, wife of Shri Naresh Gujral, as per collaboration agreement executed for developing the property on the said land by building a new structure in equal proportion for a consideration of Rs 142,000,000 i.e. sales consideration of Rs 12.50 crores and Cost of construction of Rs 1.70 Cr. Assessee handed over the possession of the said property to the builder consequent to the execution of this collaboration agreement. It followed by a registered sale deed on 25th of March 2010. Balance 50% of the property (front portion) is retained by the assessee for his residence. Thus, assessee received a sum of ₹ 12.50 crores under the collaboration agreement executed on 29th of April 2006 and sale deed was executed for the same on 25th of March 2010. The consideration received by the assessee on various dates is as Under:-

serial number	Date of payment	Amount of payment (in Rs)
1	11/4/2007	1,25,00,000

2	9/8/2007	4,00,00,000
3	1/12/2008	3,00,00,000
4	13/1/2009	2,25,00,000
5	9/11/2009	1,50,00,000
6	25/3/2010 (date of sale deed)	50,00,000

11. This property was acquired by the grandmother of the assessee Mrs. Koshalya Thapar on 27/5/1957. The above property was gifted on 25 January 1980 to her son Shri Romesh Thapar. Shri Romesh Thapar passed away on 22 August 1987 and the property was transferred in the name of the assessee as per revenue records, on 24th of May 1990. Assessee treated the cost of acquisition of assets being fair Market value as on 1 April 1981 and indexed cost of acquisition of ₹ 48,727,200 which based on the valuation report of the property as at 1/4/1981 at ₹ 7,710,000. Assessee further claimed indexation benefit with respect to the certain expenditure of ₹ 2,639,321 and of ₹ 211,260 of registration charges incurred in financial year 2006 – 07.

12. The assessee reduced there from investment in residential flat at Mumbai purchased in September 2007 out of the advance received amounting to Rs. 3,77,65,215/- . Assessee further made an investment in construction of a residential unit at 19 Kautilya Marg, New Delhi [As per agreement with the builder] and claimed deduction of Rs 1.70 Crore. He claimed deduction of purchase of these two properties u/s 54 of the act.

13. Further assessee made investment of Rs 50 Lakhs in Rural Electrification Corp capital gain bonds on 24th of February 2009, out of the advanced received in F Y 2008-09. He further invested Rs 50 Lakhs in National Highway Authorities bonds on 9 December 2009 in F y 2009-10. Thus, he claimed deduction u/s 54 EC of the Act of Rs 1 Crore being investments in bonds in two different financial years of Rs 50 lakhs each.

14. Therefore out of the sale consideration of ₹ 142,000,000 assessee claimed overall deduction of Rs 11,69,63,642 and shown net capital gain of ₹ 25,036,358/–. Thus long-term capital gain on RS 25,036,358/- was taxed at Rs 5,007,272/–.

Reassessment proceedings before AO

15. The case of the assessee was reopened by issue of notice u/s 148 of The Income Tax Act by the learned assessing officer on 1 March 2012. The learned assessing officer has recorded following reason for reopening of the assessment:-

"01/03/2012:- Return declaring an income of ₹ 29,102,041/– for assessment year 2010 – 11 in this case was filed on 26/7/2010. A perusal of computation of total income and with the return shows that during the year, the assessee has received an amount of ₹ 142,000,000/– from sale of 50% share in house number 19, Kautilya Marg, New Delhi. The assessee has declared long-term capital gain of ₹ 25,036,358/–. Out of sale proceeds, the assessee has made the following investments:-

a) investment in Rural Electrification Corporation capital gain bonds on 24/2/2009 out of the advanced received Rs 50 ,00,000/-

b) investment in NHAI bonds on 9/12/2009 out of advance ₹ 50,00,000/-

Section 54EC reads as under:-

(1) where the capital gain arises from transfer of a long-term capital asset and

(2) proviso to Section 54EC reads as Under:-

[Provided that the investment made on or after first day of April 2007 in the long-term specified assets by assessee during any financial year does not exceed Fifty lakh Rs.]

In this case, the assessee has claimed deduction u/s 54EC for Rs 1 crore. The assessee has invested in amount exceeding ₹ 50 lakhs in long-term capital assets out of sale proceeds; proviso to Section 54EC is clearly applicable in this case. Thus, the deduction u/s 54EC on LTCG amounting to ₹ 50 lakhs has been claimed in excess, which are required to be taxed. As assessee has made a wrong claim for deduction u/s 54 EC an income (LTCG) of ₹ 50 lakhs chargeable to income tax has escaped assessment.

Apart from the above, the assessee has also claimed deduction u/s 54 amounting to ₹ 37,765,215 and Rs. 1,70,00,000/- by making investment in two capital assets (new property), where as deduction u/s 54 is allowable for only one property. In view of this, the assessee has claimed excess deduction u/s 54, which is liable to be withdrawn and taxed.

In view of this, I have reason to believe that income as mentioned above has escaped assessment and accordingly proceedings u/s 147 of the income tax act, 1961 initiated. Notice u/s 148 of the income tax act, 1961 is being issued."

16. Reasons Recorded were attached with the notice u/s 148 of the act. Assessee submitted a letter dated 7 March 2012 stating that the return filed by the assessee on 26th of July 2010 may kindly be treated as return having been filed in compliance to notice u/s 148 of the act. The learned assessing officer noted from computation of the capital gain shown by the assessee. Further, the assessee on 11/10/2012 furnished the details of the whole transaction and the justification for claim of deduction u/s 54 and 54EC of the income tax act.

17. During reassessment proceedings, assessee submitted that the assessee entered into a collaboration agreement on 29th of April 2006 in financial year 2006 – 07, pertaining to assessment year 2007 – 08. Assessee entered into a collaboration agreement on 29 April 2006, which became effective from 11 April 2007 with the receipt of part consideration from the builder and handing over the property for redevelopment to him. The builder was to develop the property at her own cost and also pay the assessee a sum of Rs 12.5 crores in consideration of which the assessee was to transfer/sale the agreed half portion of the newly constructed property to her nominees along with the proportionate undivided and earmarked portion entitled to the land underneath the develop property. The assessee also stated that the capital gain has arise in assessment year 2008 – 09 for reason explained, thus the capital gain tax is not chargeable in assessment year 2008 – 09. The reason being that that according to the provisions of Section 45 (2) of The Income Tax Act, 1961 in accordance to which the capital gain from conversion of a capital asset to stock in trade arises in the year of conversion and capital gain tax becomes payable in the year in which the converted assets is transferred/sold. Assessee further explained several clauses of the collaboration agreement. Assessee also dealt with the provisions of Section 53A of The Transfer of Property Act 1882 and submitted that collaboration agreement executed on 29th of April 2006 for construction of built-up space was not a document of part performance in accordance with provisions of Section 53A of The Transfer of Property Act. Assessee further submitted that though capital gain accrued in assessment year 2008 – 09, would be chargeable only in the year when the actual sale deed is executed i.e.

assessment year 2010 – 11. Assessee submitted a revised computation of total income for assessment year 2010 – 11 , whereby the indexed cost for assessment year 2008 – 09 has been adopted and the loss under Business head is claimed for set of against the recomputed capital gains.

18. The learned assessing officer considered the explanation of the assessee after considering the revised computation of total income submitted before him, holding that assessee has reduced the taxable long-term capital gain to ₹ 6,095,701/– whereas in the original computation assessee himself has disclosed the amount of capital gain of ₹ 25,036,358. He rejected the contention of the assessee that assessee has actually converted the investment into stock in trade for the reason that this fact should have been disclosed by the assessee in the return filed for assessment year 2007 – 08, and also the long-term capital gain arising on this conversion should have been shown in the return filed u/s 139 (1) of the act. He further stated that in the revised computation submitted by the assessee there are other issue of indexed cost of acquisition as well as the claim of deduction u/s 54 and Section 54EC of the Act. He also rejected the contention of the assessee that the capital gain should have been taxed in assessment year 2007 – 08. AO further stated that assessee himself is not sure in which year he would like to offer the taxability of the capital gain arising on the sale of the above property. However as the assessee has stated revised computation , for taxability of the above sum for assessment year 2007 – 08, he initiated the proceedings u/s 147 of the act for assessment year 2007 – 08 on protective basis considering that the transaction has arisen in financial year 2006 – 07 as the year in which the capital gain has actually resulted.

19. Ld AO noted that though the assessee has entered into collaboration agreement on 29th of April 2006 however, the assessee has claimed benefit of indexation of cost of acquisition for the sum spent in financial year 2006 – 07.

20. Ld AO examined valuation of property as at 1-4-1981 valued at ₹ 7,710,000 . Ld AO on examination of the valuation report noted that valuer has prepared this report based upon the facts and information provided by the assessee and as is found during the inspection at site. According to the AO, the learned valuer should have applied CPWD basic plinth area rate for construction and should be adjusted for various specification. With respect to value of land, of plot area of 1547 yd² (1293.47] which has been valued by the valuer at ₹ 11,127. 75 per square meter to ₹ 1,43,499.81 considering 10% per year increase in land rate, compared it with the

property situated in Vasant Vihar and then stated that Kautilya Marg is a far better place than Vasant Vihar as Raj path is very close to the said premises and embassy area are also nearby located. Therefore, he adopted the valuation of the above property as per the local market rates [LDO] where the land rates are varying from Rs 10,000 per square yard to Rs. 15,000 per square yards. Accordingly, the Authorised valuer valued the land as at 1/4/1981 at Rs 143,499.81. So far as the construction cost is concerned, Authorised Valuer took average plinth area rate at ₹ 80 per square feet on total cost of construction was determined at ₹ 1,026,880. Accordingly, the total cost of land and cost of construction was considered at RS 1,54,20,379.81 for the whole property.

21. The learned assessing officer noted that there is a big flaw in the above valuation made by the learned valuer for the reason that Vasant Vihar rate, which has been compared by the assessee, is approximately 15 km away from the impugned property. He further noted that as on 1/4/1981 the LDO rates were applicable in Delhi, therefore, according to him the prevailing rates of the value of land, as on 01/04/1981, in the area where the property in question is situated, was ₹ 2000 per square meter. He supported it with the copy of the notification along with the chart of the rates prevailing in that area. It was also provided to the assessee. Assessee submitted that that such rate was applicable only up to 31st of March 1981 and not thereafter. Therefore, the assessee supported valuation report of the registered valuer. LD AO rejected all the contentions of the assessee and adopted the market value of the land as on 1/4/1981 taking rate of ₹ 2000 per square meter of 1293.478 m² of land at ₹ 2,586,956 which was indexed to RS 1,63,49,561/–. For value of the construction, the learned assessing officer was of the view that the registered valuer has adopted the rate of ₹ 80 per square feet and such rate has been added after including the extra cost of superior work etc. He noted that the assessee has entered into collaboration agreement in April 2006, and construction of new property was completed by the end of March 2010, whereas the registered valuer has valued the property as on 19/7/2010, on which date the said construction was not in existence, since the same was demolished in 2006 – 07 for construction of new property, therefore, registered valuer has not even seen the old property on the date of valuation, which was not in existence then. He therefore took the construction cost at ₹ 770,162/- and determined the total indexed construction cost of ₹ 4,867,423/-. Therefore, according to learned AO, the total indexed cost of land and construction

was only ₹ 2,46,88,211/- out of which 50% has been sold. Therefore he determined the capital gain at Rs 117,311,789/– on sale consideration of ₹ 142,000,000 deducting there from indexed cost of acquisition of ₹ 24,688,211/-.

22. With respect to the deduction u/s 54 of The Income Tax Act for the property purchased at Mumbai for which the assessee has claimed deduction of RS 37,816,419/–, he noted that assessee has included the cost of household items such as 'a conditioner, refrigerator, television set and painting etc. In the cost of acquisition of the new property therefore after excluding cost of such items, he held that assessee has made an investment in the new property at ₹ 37,604,010/- instead of Rs 37,816,419/–. With respect to the construction cost of the property at 19 Kautilya Marg, New Delhi, he noted that the assessee has sold the capital asset in question on 25th of March 2010, whereas the investment in Mumbai flat was made in September 2007. Further, the deduction u/s 54 of the income tax act is available for investment in purchase of construction of only one property whereas the assessee has claimed with respect to two properties i.e. one at Mumbai and one at New Delhi. He also noted that the property at Mumbai was purchased on 6/9/2007, prior to the period of one year from the date of transfer of capital asset on 25th of March 2010, and further the assessee was also asked to justify the deduction of ₹ 1,70,00,000/- claimed on construction of new residential house though the construction was commenced in April 2006 and completed prior to the date of transfer of capital asset. The learned AO held that assessee has purchased a ready built flat in September 2007 whereas the capital asset in question is transferred on 25th of March 2010 therefore the assessee has purchased the above property even prior to 1 year before, and he does not allow deduction u/s 54 (1) of the income tax act on Mumbai property.

23. With respect to the claim of deduction of Rs 1,70,00,000/- of construction cost of Kautilya Marg Property Delhi, he proposed to allow the claim of the assessee.

24. With respect to the claim of purchase / construction of house property for deduction u/s 54 of the income tax act, assessee submitted that the property purchased in Mumbai in September 2007 and investment in construction of residential unit at 19 Kautilya Marg New Delhi both the properties were residential properties acquired out of capital gain accruing on sale of the residential property and therefore the claim of the assessee should be allowed for both the properties. The learned assessing officer held that the claim of the assessee u/s 54 of the act can be allowed only for 'a' residential house property and further the two properties are not adjacent to each

other and are not a single dwelling unit, as one flat is situated at Mumbai and the another said residential house constructed by the assessee is situated in Delhi. He relied on the decision of the honourable Bombay High Court in 185 ITR 499 wherein it has been held that the exemptions allowable only against one of the house property. Therefore he rejected the claim of the exemption u/s 54 of the income tax act in respect of second property [flat at Mumbai], however he allowed deduction u/s 54 with respect to the property constructed at 19 Kautilya Marg for Rs 1,70,00,000/- .

25. With respect to the claim of deduction u/s 54EC of the act, the learned assessing officer noted that assessee has made investment of ₹ 50 lakhs each on 24th of February 2009 and on 9 December 2009, which were made out of the advance consideration received under the collaboration agreement. The assessee relied on CBDT circular number 359 dated 10 May 1983 and decision of the honourable Bombay High Court in 384 ITR 325 and the decision of the coordinate bench reported in 41 ITD 368. The learned AO after noting the provisions of Section 54EC held that assessee has not invested the amount of ₹ 50 lakhs each in Rural Electrification Corp bonds and National Highway authority of India Bonds within the stipulated period of six months after the date of such transfer of the capital asset, as the transfer deed of the capital asset was made on 25th of March 2010 whereas the copies of the allotment advice of bonds were on 21 February 2009 and 31st of December 2009 respectively. As according to the learned assessing officer, the assessee should have invested the amount after 25th of March 2010 since the assessee has purchased the capital Gain bonds prior to the date of the transfer of the capital asset, the claim made by the assessee u/s 54EC of the income tax is incorrect, and therefore he rejected.

26. Thus the learned assessing officer computed the capital gain on sale of house property by granting only the deduction of Rs 1,70,00,000/- being the construction cost of the house property at Kautilya Marg and reduced it from the long-term capital gain arrived earlier of ₹ 117,311,789/- and thereby determined total taxable long-term capital gain of ₹ 100,311,789/–. Accordingly assessment order u/s 147 read with Section 143 (3) of The Income Tax Act was passed on 26th of March 2013 determining the total income of the assessee at ₹ 104,499,240/–.

Appeal before CIT (A)

27. Assessee preferred an appeal before the learned CIT – A. He passed an order on 25th of September 2014. With respect to the value of the property as on 1 April 1981, he held that appellant has failed to controvert the finding of the learned assessing officer by producing any comparable sale instances in 1981 in the nearby vicinity of the appellant's property under reference on leasehold land. Therefore, he upheld the action of the learned assessing officer holding that the fair market value of the property as on 1 April 1981 would be ₹ 7,70,160 against the claim of the assessee of ₹ 7,710,000. With respect to the claim of the deduction u/s 54 of The Income Tax Act with respect to the flat at Mumbai and the cost of construction of residential house property at Delhi, the learned CIT – A held that amendment to Section 54 of the act with effect from 1/4/2015 contending that appellant case is covered by this amendment and appellant's claim is justified with respect to both the properties, he held that the amendment is clarificatory in nature and does not help the case of the appellant. Therefore, he upheld disallowance of deduction of ₹ 37,193,760 u/s 54 of the act for Mumbai flat.

28. With respect to deduction u/s 54EC of the act, he held that spirit of Section 54EC would get defeated in case the interpretation as mentioned in the CBDT circular number 359 applicable for the Section 54D is not imported here for the Section 54EC as both the sections read similarly on this score. He noted that the assessee has demonstrated that investment of ₹ 50 lakhs each in REC capital gain bonds and National Highway authority capital gain bonds on 24/2/2009 and 9/12/2009 respectively have been made out of advance receipts. Therefore, he held that learned assessing officer is not justified in disallowing the claim of deduction of Rs 1 crore u/s 54EC. Therefore, he deleted the above disallowance.

Issue in Appeal

29. Therefore, AO is in appeal against the deletion of disallowance u/s 54EC and assessee is in appeal for reinstatement of the fair market value as on 1/4/1981 of the capital asset transferred and deduction u/s 54 of the act with respect to Mumbai flat. Over and above, assessee has also challenged the reopening of the assessment u/s 147 of the act by way of an additional ground of appeal, which is already admitted.

Arguments of Assessee on Reopening of assessment

30. The learned authorised representative contesting ground of the reopening of the appeal submitted that reopening has been made for the reason that assessee has claimed deduction u/s 54EC for Rs 1 crore as assessee has invested in amount

exceeding ₹ 50 lakhs whereas according to the proviso the claim is allowable to the extent of ₹ 50 lakhs only. second reason is that the assessee has claimed deduction u/s 54 of the income tax act by making investment in two residential houses assets (new property) where as deduction u/s 54 is allowable only for 'one' property. Against reopening his arguments are :-

i. He submitted that deduction u/s 54EC of the act is squarely covered in favour of the assessee by the decision of Honourable Madras High Court in CIT versus C Jaichander 370 ITR 579, wherein it has been held that Where assessee invested a sum of Rs. 50 lakhs each in two different financial years, within a period of six months from date of transfer of capital asset, he was eligible for deduction under section 54EC. He submitted that for this reason, the claim of the assessee is correct, supported by the decision and therefore non-application of mind by the learned assessing officer. With respect to the claim of deduction u/s 54EC, he further relied upon circular number 3/2008, which provided that the deduction u/s 54EC shall not exceed 50 lakhs in a financial year. He submitted that when the assessee has invested ₹ 50 lakhs in two financial years, the circular does not prohibit the deduction. He further stated that the circular are binding on the revenue authorities. He further relied on the decision of the coordinate bench [2013] 33 taxmann.com 611 (Panaji - Trib.) Income-tax Officer, Ward - 2, Margas, Goa v. Ms. Rania Faleiro wherein after considering the above circular the deduction is allowed to the assessee. He further stated that misreading of the Section by the learned assessing officer cannot be the reason to believe for reopening of the assessment.

ii. With respect to the second reason, Id AR stated that assessee has claimed deduction of Rs 3 77,60,218 with respect to the flat in Mumbai and further deduction of Rs 1,70,00,000 with respect to the deduction of construction cost of property in Delhi. He submitted that the learned assessing officer has stated that it is allowable only for one property whereas such restriction has come with effect from 1/4/2015. He stated that assessing officer has given a deduction of ₹ 1.70 crores, however; he has not given a deduction of purchase of Mumbai Flat. He referred to the amendment with effect from 1/4/2015 stating that "a

residential house" has now been amended as "one residential house". He therefore stated that prior to 1/4/2015, the assessee is eligible for deduction u/s 54 of the income tax act. He submitted that the issue is also covered in favour of the assessee by the decision of Honorable Karnataka High court Commissioner of Income-tax *v.* D. Ananda Basappa* [2009] 180 Taxman 4 (Karnataka)/[2009] 309 ITR 329 (Kar) [2009] 180 Taxman 4 (Karnataka**)** and G.Chinnadurai *v.* Income-tax Officer, Income-tax Department Non-Corporate Ward 13(2), Chenn 74 taxmann.com 227 (Madras). He submitted that facts of the case before us are identical. He therefore submitted that reason which is not in consonance of the decision it cannot be a reason for reopening of the assessment. He further referred to the decision of the honourable Delhi High Court in CIT versus Geeta Duggal 357 ITR 358 against which special leave petition filed by the revenue has also been dismissed by the honourable Supreme Court in 52 taxman.com 246.

iii. He further submitted that unless there is a tangible material even in that case where there is no assessment made by the learned assessing officer u/s 143 (3) of the income tax act, reopening is invalid. He submitted that in this present case there is no tangible material. To show this he referred to the reasons recorded by the learned assessing officer and stated that there is no reference by the learned AO on any of the tangible material. He therefore submitted that looking at the reasons recorded by the learned assessing officer there is no tangible material available with the learned assessing officer or there is no live link with the formation of the belief that income of the assessee has escaped assessment. He submitted that for that reason also the reopening of the assessment is invalid.

Arguments of Id DR on Reopening

31. The learned departmental representative submitted that the original return filed by the assessee was not at all assessed but was merely processed and therefore there is no assessment. He further referred that date of recording of the reason is 01 March 2012 and therefore the proviso, which has been referred by the learned authorised representative u/s 54EC of the act, did not exist as on that date for the year. He

further submitted that does not apply in the impugned assessment year, which is applicable from 1 April 2015. He further submitted that when there is no assessment made u/s 143 (3) of the act and when the return is merely processed, there is no requirement of any tangible material in that particular case. He further stated that even in the decision of the honourable Supreme Court of India in case of Kelvinator of India the assessment was passed u/s 143 (3) of the act where the honourable Supreme Court has held for requirement of tangible material. It is not at all relevant when the returns are merely processed u/s 143 (1) of the act. He further referred to the additional ground raised by the assessee and stated that in the grounds of appeal the assessee has only stated that statutory precondition of having any tangible material has not been referred in the reasons of reopening. He submitted that therefore the claim of the assessee that reopening of the assessment is invalid should fail on this count only.

32. He further referred to the various decisions cited by the learned authorised representative and stated that all the decisions cited by the learned authorised representative are after recording of the reasons and at the time of recording of the reasons there were no decisions available in favour of the assessee and therefore there were no two opinions.

33. He therefore submitted that there is no fault in the reopened assessment. He therefore stated that the reopening of the assessment made by the learned assessing officer is proper. He specifically referred to the decision of the honourable Bombay High Court in case of Indian Hume Pipe Co. Ltd.[2011] 16 taxmann.com 190 (Bom.). He further relied upon the decision of the honourable Delhi High Court in case of Raj Woolen Industries[2012] 20 taxmann.com 267 (Delhi) therefore according to him there is a valid reopening of the assessment for the purpose of claim of deduction u/s 54EC of the income tax act by the assessee.

34. With respect to the second reason recorded for deduction of acquisition of more than one residential house property, he submitted that, as on first of March 2012 on the date of reopening what was the law is required to be seen. As on that date, it was only “a house property” allowed for acquisition to claim deduction u/s 54 of the income tax act. He submitted that all the decisions are rendered subsequent to the date of reopening of the assessment so at the time of reopening of the assessment no such

judgment was available. He further referred to the decision of the honourable Punjab and Haryana High Court in case of Pawan Arya Vs CIT [2011]11 taxmann.com 312(Punjab & Haryana)which has been referred by the learned CIT – A. He further submitted that in that particular decision the decision of the honourable Karnataka High Court relied upon by the learned authorised representative has also been considered. In view of this, he submitted that the reopening of the assessment made by the learned assessing officer could not be found fault with.

35. Learned authorised representative reiterated the original submission made by him with respect to the availability of deduction u/s 54EC of the act and for the purpose of deduction Under Section 54 of the income tax act, he relied on the decision of the honourable madras High Court.

Queries by the Bench

36. Coordinate bench then raised the query to the learned authorised representative that honourable Supreme Court in case of Asst Commissioner of income tax versus Rajesh Jhaveri stockbrokers private limited (2007) 291 ITR 500 (SC) has held whether the reopening of the assessment is required to be upheld in view of the fact that the assessing officer must have reason to believe that income/profits or gains are chargeable to income tax have escaped assessment. It was further pointed out that that was also the case where the original return filed by the learned assessing officer was not assessed u/s 143 (3) of the act.

37. The learned authorised representative submitted that the issue before the bench is not covered by the decision of the honourable Supreme Court as in that case it was held that only the principle relating to the change of opinion is not applicable where there is no assessment u/s 143 (3) of the income tax act was not made. He therefore submitted that even otherwise assessee is not claiming that there is a change of opinion. However, assessee is strongly claiming that there is No “reason to believe” for reopening of the assessment in absence of tangible material. He further referred to the various decision of the honourable Delhi High Court to support his case on this issue of reopening.

Arguments of assessee on Merits of Addition/disallowance

38. Coming back to the merits of the case the learned authorised representative referred to the ground number [1] of the appeal and stated that the issue is squarely covered in favour of the assessee by the decision of the coordinate bench in ITA number 2041/del/2016 for assessment year 2011 – 12 in case of Ved Kumari Subhash

Chander dated 26th of August 2019 wherein also the dispute of taking the fair market value has once 1/4/1981 which was based on the valuation report obtained by the assessee from registered valuer was challenged by the learned assessing officer with respect to the average rate of land adopted by the assessee. He further referred to para number five of that decision wherein the coordinate bench has held that the valuation made by the registered valuer of the income tax department would certainly take precedence over a value, which the assessing officer might adopt on his own without referring to the departmental valuation Officer. He therefore submitted that in the present case there is no reference made by the learned assessing officer to the departmental valuation Officer and has disputed the land price adopted by the registered valuer on his own whims and fancies. He therefore submitted that the issue is covered by this coordinate bench decision in favour of the assessee on the issue of adoption of the fair market value for computation of the cost of acquisition of the capital asset transferred as on 1 April 1981.

39. With respect to the ground number two of investment into house property eligible for deduction u/s 54 of the income tax act. He relied on the decision of the honourable Karnataka High Court in case of around in Arun K Thaigrajan versus Commissioner of income tax 427 ITR 190 wherein it has been held that for the purpose of allowing benefit of deduction u/s 54 (1) the expression residential house includes within its ambit numbers as well and it cannot be construed as one residential house only. He therefore submitted that issue is squarely covered in favour of the assessee.

Arguments of Revenue on Merits of Addition/ Disallowances

40. The learned departmental representative vehemently supported the order of the learned assessing officer and the learned CIT – A and stated that for rejecting the report of the learned authorised valuer, both the lower authorities have given their own reason that the land is not situated in the immediate vicinity of the impugned land involved in this appeal. He further stated that there are rates prescribed by the local body that are the fair market value as on 1 April 1981.

41. With respect to the ground number [2] of the appeal, he submitted that under the provisions of Section 54 (1) of the act the assessee is only entitled to the deduction of one residential house property whereas the assessee has claimed deduction on more than one house property, which is not admissible. He further submitted that assessee has not purchased one residential unit, which is combined in any manner. He submitted that assessee has purchased one flat in Mumbai and constructed another

property in Delhi how that can be considered as a one residential unit. He submitted that none these decisions cited by the learned authorised representative deals with this issue that a property situated into distant cities can be allowed as a deduction u/s 54 of the income tax act.

Rejoinder by Assessee

42. In the rejoinder, the learned authorised representative with respect to the adoption of land rate submitted that land rates have been adopted by the learned assessing officer on the whims and fancies and is not supported by any material. He further referred to the several judicial precedents that the learned assessing officer should have referred the matter to the learned departmental valuation officer and he is not the person who can step into the shoes of the valuer. On the second issue that whether assessee is entitled for deduction u/s 54 of more than one house, he submitted that issue squarely covered in favour of the assessee.

Analysis, Reasons and Decision

43. We have carefully considered the rival contentions and perused the orders of the lower authorities. We have also considered the various judicial precedents cited before us by both the parties. There are three issues involved in this appeal which are required to be adjudicated:-

i. whether the reopening of the assessment has been made by the learned assessing officer is in accordance with the law
ii. Whether fair market value of the property sold during the year as on, 1/4/1981 is required to be taken as per the report of the registered valuer produced by the assessee before the assessing officer or the value adopted by the learned assessing officer is required to be taken.
iii. Whether the assessee entitled for deduction u/s 54 of the income tax act for two different house property i.e. first properties being a flat purchased by the assessee at Mumbai and second house property constructed by the assessee as per the collaboration agreement at New Delhi.
iv. Whether the assessee is entitled to deduction u/s 54EC of the act of RS 1 crore, he has invested ₹ 50 lakhs each into different financial years but within the time allowed.

Decision and analysis on reopening of assessment

44. Coming to the first issue whether the reopening of the assessment is made by the learned assessing officer in accordance with the law or not, the reasons recorded by the learned assessing officer has already been reproduced above at the time of recording the facts of the present case. The learned assessing officer has recorded the reasons on 1 March 2012 stating that (1) assessee has made investment in REC capital gain bonds on 24th of February 2009 of ₹ 50 lakhs and further investment on 9/12/2009 of ₹ 50 lakhs in national highway authority of India Bonds. According to him, the assessee is eligible for deduction only with respect to an investment of ₹ 50 lakhs made in the financial year 2008 – 09 and thereby there is an escapement of income to the extent of ₹ 50 lakhs. (2) The assessee has claimed deduction u/s 54 of the income tax act of a flat purchased at Mumbai for ₹ 37,765,215/– and incurred a cost of construction of another house property at New Delhi of Rs 1.70 Crores. The assessee should have been allowed deduction only with respect to one property, therefore the assessee has claimed excess deduction u/s 54 of the act, and therefore there is an escapement of income to that extent.

45. In the present case, the assessee has filed his return of income for assessment year 2010 – 11 on 26th of July 2010. The notice u/s 148 of the act was issued on 1st March 2012 along with the reasons recorded. In the present case there is no assessment made u/s 143 (3) of the act. Therefore even in the cases where no assessment order is passed, and return is processed by intimation u/s 143 (1) of the act, , the only condition that is required to be satisfied is for issue of reopening notice is "reason to believe" that income chargeable to tax has escaped assessment. Therefore, it is required to be seen that whether there is reason to believe with the assessing officer for reopening of the present assessment by issue of notice u/s 147 of the income tax act or not. Such is also the mandate of the decision of the honourable Supreme Court in case of Asst Commissioner of income tax versus Rajesh Jhaveri stockbrokers private limited (2007) 291 ITR 500 (SC) and Deputy Commissioner Of Income Tax Versus Zuari EState Development And Investment Company Ltd (2015) 373 ITR 661 (SC). It can also not be a case that the assessing officer can reopen the assessment for whatever reason is preposterous. Further merely because no assessment is made u/s 143 (3) of the act in case of an assessee it does not give the assessing officer carte blanche to issue reopening notice. Therefore in the cases, where the return is only processed but no assessment is

made u/s 143 (3) of the act only test that is to be seen is whether the assessing officer has reason to believe that income has escaped the assessment order not.

46. According to the provisions of Section 147 of the income tax act, if the assessing officer has reason to believe that any income chargeable to tax has escaped assessment for any assessment year he may assess or reassess such income and also any other income chargeable to tax which is escaped assessment which comes to his notice subsequently. The provision of explanation – 2 provides certain circumstances, which are deemed cases, wherein, chargeable to tax has escaped assessment. Clause (b) of that explanation clearly provides that where the return of income has been furnished by the assessee but no assessment has been made and it is noticed by the assessing officer that assessee has understated the income or has claimed excessive loss, deduction, allowance on relief in the return, it shall be considered as deemed escapement.

47. On the first issue of reopening of the assessment that when the assessee has invested in capital gain bonds on 24th of February 2009 of ₹ 50 lakhs and further investment of ₹ 50 lakhs on 9 December 2009, whether the claim of the assessee has resulted into any escapement of income or the learned AO has any reason to believe that income of the assessee has escaped assessment. The learned assessing officer has noted that assessee has claimed deduction Under Section 54EC for Rs. 1 crore whereas according to the proviso the deduction is only available to the extent of ₹ 50 lakhs. Thus, the assessing officer had reason to believe that assessee has claimed excess deduction of ₹ 50 lakhs u/s 54EC of the act. Admittedly, in this case assessee has made investment of ₹ 50 lakhs each in two different financial years and claimed deduction of Rs. 1 crore. When the learned assessing officer has recorded his reason to believe that assessee has claimed excess deduction of ₹ 50 lakhs on 1 March 2012, naturally, there are no decisions available of High Court which provides that assessee can claim deduction of sum deposited in excess of ₹ 50 lakhs u/s 54EC of the act. At the time of recording of the reasons, to reopen an assessment, the learned assessing officer is required to form only prima Facie opinion about escapement of income. It is required to be understood that he is not making an assessment but taking a first baby step for making the assessment by forming a reasonable belief that whether the claim of the assessee should be tested in reassessment proceedings are not. It may happen that at the time of forming of reassessment, based on the explanation and judicial precedence available he may

take a view that there is no escaped income, which is to be assessed. That is at assessment stage and not the stage of reopening of assessment. In view of this on this score, we do not find any infirmity in the action of the learned assessing officer that reason escapement of income by claiming deduction of Rs. 1 crore u/s 54EC of the act.

48. Similarly the second reasons recorded is with respect to whether the assessee is eligible for deduction u/s 54 of the income tax act with respect to "a house property" meaning thereby only one house property or more than one house property purchased by the assessee within the required time frame. On looking at the computation of total income filed by the assessee at page number two of the paper book it is apparent that assessee has claimed deduction of ₹ 37,765,215/– by making an investment in residential flat at Mumbai in September 2007 out of the advance received. Assessee has also claimed another deduction of investment in construction of residential unit at 19 Kautilya Marg New Delhi of Rs. 170 lakhs, which is part of the sale consideration as per collaboration agreement. Therefore, in the computation of the total income the assessee has claimed deduction with respect to 2 properties claimed as a residential property located in two different cities , where the income tax act provided for 'a residential house" property. Thus, on the basis of the computation of the total income furnished by the assessee, the learned assessing officer is of prima facie of the view that assessee has claimed deduction u/s 54 of the act with respect to 2 properties situated at two different places, which is not permissible. Thus on this issue too, we find that ld AO did not err in reopening of assessment.

49. Now we come to the argument of the learned authorised representative that in absence of any tangible material, the reopening cannot be made by the learned assessing officer. Admittedly in this case the assessment was not made but the return was processed u/s 143 (1) of the act. Therefore, the question that the learned authorised representative is posing before us is whether in case of no assessment or merely processing of the return u/s 143 (1) of the act, the learned assessing officer should have a tangible material necessarily to reopen the case of the assessee. Identical issue has been dealt with the honourable Delhi High Court in Indu Lata Rangwala V DCIT [2017]80 taxmann.com 102(Delhi)/ [2016] 384 ITR 337 (Delhi)/ [2016] 286 CTR 474 (Delhi). The honourable High Court after considering all the judicial precedents available on the issue held as Under:-

"Legislative background of Section 143

20. At the outset it requires to be noticed that Section 143 of the Act has frequently undergone changes. Though the said provision has been amended several times, what is relevant as far as the present case is concerned, is Section 143 (1) (a) as it stood immediately prior to the amendment with effect from 1st June 1999 by the Finance Act, 1999. It read thus:

"143 (1) (a) Where a return has been made under Section 139, or in response to a notice under sub-Section (1) of Section 142 –

(*i*) if any tax or interest is found due on the basis of such return, after adjustment of any tax deducted at source, any advance tax paid and any amount paid otherwise by way of tax or interest, then, without prejudice to the provisions of sub-Section (2), an intimation shall be sent to the Assessee specifying the sum so payable, and such intimation shall be deemed to be a notice of demand issued under Section 156 and all the provisions of this Act shall apply accordingly; and

(*ii*) if any refund is due on the basis of such return, it shall be granted to the Assessee:

Provided that in computing the tax or interest payable by, or refundable to, the Assessee, the following adjustments shall be made in the income or loss declared in the return, namely-

(*i*) any arithmetical errors in the return, accounts or documents accompanying it shall be rectified;

(*ii*) any loss carried forward, deduction, allowance or relief, which, on the basis of the information available in such return, accounts or documents, is *prima facie* admissible but which is not claimed in the return, shall

be allowed;

(*iii*) any loss carried forward, deduction, allowance or relief claimed in the return, which, on the basis of the information available in such return, accounts or documents, is *prima facie* in admissible, shall be disallowed:

Provided further that an intimation shall be sent to the Assessee whether or not any adjustment has been made under the first proviso and notwithstanding that no tax or interest is due from him:

Provided also that an intimation under this clause shall not be sent after the expiry of two years from the end of the assessment year in which the income was first assessable."

21. What is evident is the requirement of the AO having to send an intimation to the Assessee specifying if any tax or interest found is due on the basis of the return filed after adjustment of any tax deducted at source ('TDS'), any advance tax paid or any amount paid otherwise by way of tax or interest. Further, the first proviso to Section 143 (1) (a) permitted the Department to make adjustments on account of any arithmetical errors, any loss carried forward, deduction, etc. in the income or loss declared in the return. While the AO could pick up the return under this provision, he had no authority to make adjustments or adjudicate upon any issue arising from the return. The second point to be noted is that, notwithstanding the fact that an intimation to the Assessee which was deemed to be a notice of demand under Section 156 of the Act, the AO could proceed to issue notice under Section 143 of the Act. Thirdly, the sending of an intimation under Section 143 (1) (a) of the Act was mandatory. The legislature was careful not to use the word 'assessment' in the proviso to Section 143 (1) (a) of the Act. In other words, a distinction was made between making of an assessment by the AO after affording the Assessee an opportunity to explain the queries that arose from the returns whereas for the purpose of intimation under Section 143 (1) of the Act there was no question of any hearing to be given to the Assessee.

22. With effect from 1st June 1999 the changed Section 143 reads as under:

"143. Assessment - (1) Where a return has been made under Section 139, or in response to a notice under sub-Section (1) of Section 142 -

(*i*) if any tax or interest is found due on the basis of such return, after adjustment of any tax deducted at source, any advance tax paid, any tax paid on self-assessment and any amount paid otherwise by way of tax or interest, then, without prejudice to the provisions of sub-Section (2), an intimation shall be sent to the Assessee specifying the sum so payable, and such intimation shall be deemed to be a notice of demand issued under Section 156 and all the provisions of this Act shall apply accordingly; and (ii) if any refund is due on the basis of such return, it shall be granted to the Assessee and an intimation to this effect shall be sent to the Assessee:

Provided that except as otherwise provided in this sub-section, the acknowledgment of the return shall be deemed to be an intimation under this sub-section where either no sum if payable by the Assessee or no refund is due to him:

Provided further that no intimation under this sub-section shall be sent after the expiry of two years from the end of the assessment year in which the income was first assessable."

23. Here again the word used is 'intimation'. The first proviso states that the acknowledgment of the return 'shall be deemed to be an intimation' where either no sum is payable by the Assessee or no refund is due to him. The provision underwent changes as far as the outer limit of two years from the end of the assessment year in which the intimation is to be sent.

The Rajesh Jhaveri decision

24.1 The entire legislative history of Section 143 (1) of the Act was discussed by the Supreme Court in *Rajesh Jhaveri Stock Brokers (P.) Ltd.* (*supra*). The facts of that case were that the Assessee filed its return of income for the AY 2001-02 on 30th October 2001, declaring total loss of Rs. 2,70,85,105. The said return was processed under Section 143 (1) of the Act accepting the loss returned by the

Assessee. After the revenue audit raised an objection relating to showing of a debt of Rs. 1,285.72 lakhs as bad debts, the AO reopened the assessment on the ground that he had reason to believe that income assessable to tax had escaped assessment within the meaning of Section 147 of the Act.

24.2 In response to the notice, the Assessee filed its return of income on 31st May 2004 declaring the loss in the original income. The Assessee raised a protest on various grounds relating to jurisdiction and the merits of reopening the assessment. When the reopening was challenged by the Assessee by way of writ petition, the High Court of Gujarat relied on its decision in *Adani Export* v. *Dy. CIT*[1999] 240 ITR 224 (Guj.) and allowed the writ petition.

24.3 An appeal was filed before the Supreme Court in which the Revenue pointed out that the decision in *Adani Export* (*supra*) had no application since the return in that case had been final after an adjustment under Section 143 (3) of the Act whereas in the case before the Supreme Court the return had been accepted by processing it under Section 143 (1) of the Act. It is above in the background that the Supreme Court discussed the entire legislative history of Section 143 (1) of the Act. The Supreme Court explained the difference in the two expressions 'intimation' and 'assessment order' as under:

"It is to be noted that the expressions 'intimation' and 'assessment order' have been used at different places. The contextual difference between the two expressions has to be understood in the context the expressions are used. Assessment is used as meaning sometimes 'the computation of income', sometimes 'the determination of the amount of tax payable' and sometimes 'the whole procedure laid down in the Act for imposing liability upon the tax payer'. In the scheme of things, as noted above, the intimation under Section 143 (1) (a) cannot be treated to be an order of assessment. The distinction is also well brought out by the statutory provisions as they stood at different points of time. Under Section 143 (1) (a) as it stood prior to 1st April 1989, the Assessing Officer had to pass an assessment order if he decided to accept the return, but under the amended provision, the requirement of passing of an assessment order has been dispensed with the instead an intimation is required to be sent. Various circulars sent by the Central Board of Direct Taxes spell out the intent of the Legislature, i.e., to minimize the Departmental work to scrutinize each and every return and to concentrate on selective scrutiny of returns.

These aspects were highlighted by one of us (D.K. Jain, J.) in *Apogee International Limited v. Union of India* *(1996) 220 ITR 248 (Del)*. It may be noted above that under the first proviso to the newly substituted section 143 (1), with effect from 1st June 1999, except as provided in the provision itself, the acknowledgment of the return shall be deemed to be an intimation under Section 143 (1) where (a) either no sum is payable by the Assessee, or (b) no refund is due to him. It is significant that the acknowledgement is not done by any Assessing Officer, but mostly by ministerial staff. Can it be said that any 'assessment' is done by them? The reply is an emphatic 'no'. The intimation under Section 143 (1) (a) was deemed to be a notice of demand under Section 156, for the apparent purpose of making machinery provisions relating to recovery of tax applicable by such application only recovery indicated to be payable in the intimation became permissible. And nothing more can be inferred from the deeming provision. Therefore, there being no assessment under Section 143 (1) (a), the question of change of opinion, as contended, does not arise."

24.4 The Supreme Court in *Rajesh Jhaveri Stock Brokers (P.) Ltd.* (*supra*) then discussed Sections 147 and 148 of the Act. It observed that Section 147 of the Act substituted with effect from 1st April 1989 empowered the AO to assess or reassess income chargeable to tax if the AO has reason to believe that income for any AY has escaped assessment. To confer the jurisdiction under Section 147 (a), the two conditions have to be fully satisfied: (i) the AO must have reason to believe that income, profits or gains chargeable to income tax have escaped assessment and (ii) if the reopening of assessment was after four years from the end of the relevant assessment year, the AO must also have reason to believe that such escapement had occurred by reason of either omission or failure on the part of the Assessee to disclose fully or truly all material facts necessary for his assessment of that year.

24.5 It was concluded by the Supreme Court in *Rajesh Jhaveri Stock Brokers (P.) Ltd.* (*supra*) that even where no steps were taken under Section 143 (3) of the Act in relation to the assessment, the AO was not powerless to initiate reassessment proceedings even when an intimation under Section 143 (1) of the Act had been issued. The Supreme Court concluded that the High Court had wrongly applied *Adani's* case (*supra*) which had no application in view of the conceptual difference between Section 143 (1) and Section 143 (3) of the Act.

24.6 The ratio of the decision in *Rajesh Jhaveri Stock Brokers (P.) Ltd.* (*supra*) is that the sending of an intimation by the AO to an Assessee in terms of Section 143 (1) of the Act is not treated to be an 'assessment' made by the AO. After 1st April 1989 there was no need for AO to pass an assessment order if he had decided to accept the return and this was in line with the legislative intent of minimizing the departmental work of scrutinizing each and every return and instead concentrate on selective scrutiny of returns. Importantly it was pointed out that "there being no assessment under Section 143 (1) (a), the question of change of opinion, as contended, does not arise."

25. It appears that the above distinction drawn between the object of provision of Section 143 (1) and Section 143 (3) of the Act was overlooked in some of the decisions of the High Courts, including this Court.

Decision in Orient Craft Ltd.

26.1 In *Orient Craft Ltd.* (*supra*), the question that arose for consideration was whether the reopening of the assessment made by the AO under Section 147 of the Act of an assessment for the AY 2002-03 was valid and whether the intimation under Section 143 (1) sent to the Assessee by the AO in respect of such return was an 'assessment'?

26.2 It was urged on behalf of the Assessee that the requirement of the AO having to form 'reasons to believe' that income chargeable to tax has escaped assessment for the AY in question, was a *sine qua non* even where the return was merely processed under Section 143 (1) of the Act.

The Court noted that

"it is true that no assessment order is passed when the return is merely processed under Section 143 (1) and an intimation to that effect is sent to the Assessee. However, it has been recognized by the Supreme Court itself in *Assistant CIT v. Rajesh Jhaveri Stock Brokers (P) Limited* (*supra*), a decision that was relied upon by the Revenue, that even where proceedings under Section 147 are sought to be taken with reference to an intimation framed under Section 143 (1), the ingredients of Section 147 have to be fulfilled, the ingredient is that there should exist „reason to believe" that income chargeable to tax has escaped assessment. This judgment, contrary to what the Revenue would have us believe, does not give a carte blanche

to the Assessing Officer to disturb the finality of the intimation under Section 143 (1) at his *whims and caprice*; he must have reason to believe within the meaning of the Section."

26.3 The Court in *Orient Craft Ltd.* (*supra*) then discussed extensively the meaning and content of the expression 'reasons to believe' under Section 147 of the Act. The Court relied upon the earlier decisions of the Supreme Court in *A.N. Lakshman Shenoy* v. *ITO* [1958] 34 ITR 275 (SC), *S. Narayanappa* v. *CIT*(1967) 63 ITR 219 (SC), *Sheo Nath Singh* v. *Appellate Asstt. CIT*[1971] 82 ITR 147 (SC), *ITO* v. *Lakhmani Mewal Das*[1976] 103 ITR 437 (SC). The Court has also discussed the decision of the Supreme Court in *CIT* v. *Kelvinator of India Ltd.* (*supra*). It must be noted at this stage that the *Kelvinator of India Ltd.* (*supra*) was a case one where the initial return was picked up for scrutiny and an assessment order passed under Section 143 (3) of the Act.

26.4 The conclusion in *Orient Craft Ltd.* (*supra*) was that the requirement of the AO having 'reasons to believe' that income has escaped assessment equally applied to an intimation under Section 143 (1) of the Act. In that context, the Court proceeded to hold that:

"Section 147 makes no distinction between an order passed under Section 143 (3) and the intimation issued under Section 143 (1). Therefore, it is not permissible to adopt different standards while interpreting the word 'reason to believe' vis-a-vis Section 143 (1) and Section 143 (3)."

26.5 The Court in *Orient Craft Ltd.* (*supra*) proceeded to hold as under:

"We are unable to appreciate what permits the Revenue to assume that somehow the same rigorous standards which are applicable in the interpretation of the expression when it is applied to the reopening of an assessment earlier made under Section 143 (3) cannot apply where only an intimation was issued earlier under Section 143 (1). It would in effect place an Assessee in whose case the return was processed under Section 143 (1) in a more vulnerable position than an Assessee in whose case there was a full-fledged scrutiny assessment made under Section 143 (3). Whether the return is put to scrutiny or is accepted without demur is not a matter which is within the control of Assessee; he has no choice in the matter. The other consequence, which is somewhat graver, would be that the entire rigorous

procedure involved in reopening an assessment and the burden of providing valid reasons to believe could be circumvented by first accepted the return under Section 143 (1) and thereafter issue notices to reopen the assessment. An interpretation which makes a distinction between the meaning and content of the expression 'reason to believe' in cases where assessments were framed earlier under Section 143 (3) and cases where mere intimations were issued earlier under Section 143 (1) may well lead to such an unintended mischief. It would be discriminatory too. An interpretation that leads to absurd results or mischief is to be eschewed."

26.6 The Court in *Orient Craft Ltd.* (*supra*) then proceeded to also explain *Rajesh Jhaveri Stock Brokers (P.) Ltd.* (*supra*) and point out that the difference between an 'assessment' and an 'intimation' did not mean that the strict requirements of Section 147 could be compromised. It was pointed out in *Orient Craft Ltd.* (*supra*) that in *Rajesh Jhaveri Stock Brokers (P.) Ltd.* (*supra*) the Court reiterated that "so long as the ingredients of Section 147 are fulfilled an intimation issued under Section 143 (1) can be subjected to proceedings for reopening." The Court in *Orient Craft Ltd.* (*supra*) then reiterated that

"It is nobody's case that an 'intimation' cannot be subjected to Section 147 proceedings; all that is contended by the Assessee, and quite rightly, is that if the Revenue ants to invoke Section 147 it should play by the rules of that Section and cannot bog down. In other words, the expression 'reason to believe' cannot have two different standards or sets of meaning, one applicable where the assessment was earlier made under Section 143 (3) and another applicable where an intimation was earlier issued under Section 143 (1). It follows that it is open to the Assessee to contend that notwithstanding that the argument of „change of opinion" is not available to him, it would still be open to him to contest the reopening on the ground that there was either no reason to believe or that the alleged reason to believe is not relevant for the formation of the belief that income chargeable to tax has escaped assessment. In doing so, it is further open to the Assessee to challenge the reasons recorded under Section 148 (2) on the ground that they do not meet the standards set in the various judicial pronouncements."

26.7 The above lengthy discussion of the decision in *Orient Craft Ltd.* (*supra*) becomes necessary since it was a case where reopening of the assessment was stated to be done pursuant to the initial return being processed under Section 143

(1) of the Act and an intimation sent to the Assessee in acceptance of such return. Secondly, this was a decision where the earlier decision in *Rajesh Jhaveri Stock Brokers (P.) Ltd.* (*supra*) was discussed at length and it was concluded that even for the purpose of reopening the assessment where the initial return had been accepted by sending an intimation to the Assessee under Section 143 (1) of the Act, the AO would, for the purposes of reopening the assessment under Section 147/148 of the Act still have to record reasons to believe that the income chargeable to tax has escaped assessment. Thirdly, the Court in *Orient Craft Ltd.* (*supra*) also discussed the entire case law as per the reason to believe including the decision in *Kelvinator of India Ltd.* (*supra*).

Other decisions of this Court

27. In *Mohan Gupta (HUF)* (*supra*) the return for the AY 2005-06 filed by the Assessee was processed under Section 143 (1) of the Act. On 26th March 2012 the Revenue issued a notice under Section 148 of the Act for reopening the assessment. The reason to believe as recorded by the AO was that the income on purchase and sale of shares ought to have been treated as business income rather than Short Term Capital Gain ('STCG') as claimed by the Assessee in the return filed by it. The AO was of the view that the earlier intimation under Section 143 (1) did not involve the application of mind by the AO and the new information had resulted from the scrutiny assessment for AY 2007-08. The Court relied on its decision in *Orient Craft Ltd.* (*supra*) and held that the record does not show "any tangible material that created the reason to believe that income had escaped assessment. Rather, the reassessment proceedings amount to a review or change of opinion carried out in the earlier AY 2005-06, which amounts to an abuse of power and is impermissible." It was further noted that even the order of the AO for the AY 2007-08, converting the STCG into business income, has been reversed by the CIT (A) and that order had been affirmed by the ITAT.

28. In *Indo Arab Air Services* (*supra*), the return filed was processed under Section 143(1) of the Act. Subsequently, on the basis of the information received from the Enforcement Directorate that in the books of the Assessee there were huge cash deposits, notice was issued by the AO to the Assessee under Section 148 of the Act. The Court relied on the decision in *Orient Craft Ltd.* (*supra*) and held that while the AO had in the reasons for reopening the assessment set out the information

received from the ED, he had failed to examine if that information provided the vital link to form the 'reason to believe' that income of the Assessee had escaped assessment for the AY in question. The AO had not stated that "he examined the returns filed by the Assessee for the said AY and detected that the said cash deposits were not reflected in the returns." Again the Court proceeded on the basis that there had to be some tangible material on the basis of which the AO could form a *prima facie* reason to believe that the income had escaped assessment.

29. The same approach was adopted in the decision in CIT v. Atul Kumar Swami [2014] 362 ITR 693/52 taxmann.com 47 (Delhi) where again the initial return was accepted by sending to the Assessee an intimation under Section 143 (1) of the Act. This was for the AY 1999- 2000. On 9th January 2002 the return was sought to be reopened under Section 147 of the Act but the reasons for so doing did not refer to any tangible material which the AO had come across subsequent to the filing of the return. The Court this time relied on the decision in *Kelvinator of India* (*supra*) and held that a valid reopening of the assessment has to be based only on tangible material to justify the conclusion that there was escapement of income. There was no discussion of the decision in *Orient Craft Ltd.* (*supra*) which in turn discussed the decision in *Rajesh Jhaveri Stock Brokers (P.) Ltd.* (*supra*).

30. In *Tupperware India (P.) Ltd.* (*supra*) the return of income was processed under Section 143 (1) of the Act at the returned amount. The return was for the AY 2003-04. It was sought to be urged that the AO had reasons to believe that the amount had escaped assessment after having examined the audit report and consequently notice was issued on 21st October 2005. The Court came to the conclusion that since the report of the statutory Auditor had already been enclosed with the return filed, "there was no material that the AO came across so as to have 'reasons to believe that the income had escaped assessment." The Court relied on the decision in *Orient Craft Ltd.* (*supra*)and answered the question on the validity of the reopening of the assessment in favour of the Assessee.

31. In each of the above decisions, the Court proceeded on the basis that there had to be some new tangible material to justify forming 'reasons to believe' that the income had escaped assessment. During the course of the arguments in *Tupperware India (P.) Ltd.* (*supra*) [decision dated 10th August 2015] the Court's attention was not drawn to the decision rendered by the Supreme Court four months

earlier on 17th April 2015 in Zuari *Estate Development & Investment Co. Ltd.* (*supra*).

The decision in Zuari Estate Development

32.1 The Supreme Court in *Zuari Estate Development & Investment Co. Ltd.* (*supra*) was dealing with an appeal by the Revenue against the decision of the Bombay High Court in *Zuari Estate Development & Investment Co. (P.) Ltd.* v. *J.R. Kanekar, Dy. CIT*[2004] 271 ITR 269/139 Taxman 209.

32.2 The facts in brief were that the Assessee filed its return for the AY 1991-92 which was accepted under Section 143 (1) of the Act. Subsequently, the AO came to learn that there was a sale agreement dated 19th June 1984 entered into between the Assessee and Bank of Maharashtra to sell a building on the condition that the sale would be completed only after the five years but before expiration of sixth year at the option of the purchaser, the purchaser could rescind the sale for a certain consideration.

32.3 The transaction could not be completed even after 30th September 1993. The Assessee's accounts for the AY 1991 had disclosed the amount of Rs. 84,47,112 received from the Bank by the Assessee way back on 20th June 1984 as a 'current liability' under the heading 'Advance against deferred sale of building'. During the course of the assessment for AY 1994-95, the AO posed a query as to why the capital gains arising out of the sale of the premises should not be taxed in the AY 1991-92. On this basis notice was issued on 4th December 1996 under Section 143 read with Section 147 of the Act seeking to reopen the assessment for AY 1991-92.

32.4 The Bombay High Court allowed the writ petition challenging the reopening of the assessment and held that there was no transfer of any property in terms of Section 2 (47) of the Act. It was further held that "there was no material for the Assessing Officer to have reason to believe that the agreement to sell had been entered into in the assessment year 1990-91".

32.5 In the appeal by the Revenue, the Supreme Court reversed the decision of the Bombay High Court by relying on the decision in *Rajesh Jhaveri Stock Brokers (P.) Ltd.* (*supra*). The Supreme Court found that the contention of the Revenue to the effect that there was no question of 'change of opinion' since the original return was

accepted under Section 143 (1) of the Act, was not even addressed by the High Court.

32.6 To be fair to the Bombay High Court, the decision in *Rajesh Jhaveri Stock Brokers (P.) Ltd.* (*supra*) was delivered more than four years after its decision and therefore, there was no occasion for the Bombay High Court to have followed that ruling. However, the Supreme Court while setting aside the judgment of the Bombay High Court took note of the fact that in the meanwhile the AO had completed the assessment holding that the transaction amounted to a sale. This was affirmed by the CIT (A) but reversed by the ITAT relying on the decision of the High Court. Since the said decision of the High Court was being set aside, the Supreme Court also set aside the subsequent order dated 29th January 2004 of the ITAT and remitted the matter to the ITAT to decide the appeal on merits.

Decisions post Zuari Estate Development

33. The true purport of the decision in Supreme Court in *Zuari Estate Development and Investment Co. Ltd.* (*supra*) came for consideration before the Bombay High Court in Writ Petition No. 3027 of 2015 (*Khubchandani Healthparks (P.) Ltd.* (*supra*) By an interim order dated 10th February 2016, the Bombay High Court noted that the Supreme Court in *Zuari Estate Development & Investment Co. Ltd.* (*supra*) had not dealt with the issue of "reason to believe that income chargeable to tax has escaped assessment on the part of the Assessing Officer in cases where regular assessment was completed by Intimation under Section 143 (1) of the Act". Therefore the court observed as under:

"it would not be wise for us to infer that the Supreme Court in *Zuari Estate Development and Investment Co. Ltd.* (*supra*) has held that the condition precedent for the issue of reopening notice namely, reason to believe that income chargeable to tax has escaped assessment, has no application where the assessment has been completed by intimation under Section 143 (1) of the Act. The law on this point has been expressly laid down by the Apex Court in the case of *Rajesh Jhaveri Stock Brokers P. Ltd.* (*supra*) and the same would continue to apply and be binding upon us. Thus, even in cases where no assessment order is passed and assessment is completed by Intimation under Section 143 (1) of the Act, the *sine qua non* to issue a reopening notice is reason to believe that income chargeable to tax has escaped assessment. In the above view, it is open for the Petitioner to

challenge a notice issued under Section 148 of the Act as being without jurisdiction for absence of reason to believe even in case where the assessment has been completed earlier by intimation under Section 143 (1) of the Act."

34. Recently in *Olwin Tiles (India) (P.) Ltd.* v. *Dy. CIT*[2016] 66 taxmann.com 8/237 Taxman 342 (Guj.), the Gujarat High Court dealt with the case where the initial return was processed under Section 143 (1) of the Act, and later notice was issued under Section 148 of the Act seeking to reopen the assessment of the Assessee for the said AY 2011- 12. The Court took note of the decision *Rajesh Jhaveri Stock Brokers (P.) Ltd.* (*supra*) and negatived the plea of the Assessee that "the Assessing Officer, when recording his reason to believe that income chargeable to tax has escaped assessment, could not have relied on the original assessment records and he must have some material outside or extraneous to the records to enable him to form such a belief. Being a case which was originally accepted under Section 143 (1) of the Act without scrutiny, the only requirement to be fulfilled for issuing notice for reopening was that the Assessing Officer must have reason to believe that income chargeable to tax had escaped assessment." The Court however did not refer to the decision of the Supreme Court in *Zuari Estate Development & Investment Co. Ltd.* (*supra*).

Summary of the legal position

35.1 The upshot of the above discussion is that where the return initially filed is processed under Section 143 (1) of the Act, and an intimation is sent to an Assessee, it is not an 'assessment' in the strict sense of the term for the purposes of Section 147 of the Act. In other words, in such event, there is no occasion for the AO to form an opinion after examining the documents enclosed with the return whether in the form of balance sheet, audited accounts, tax audit report etc.

35.2 The first proviso to Section 147 of the Act applies only (i) where the initial assessment is under Section 143 (3) of the Act and (ii) where such reopening is sought to be done after the expiry of four years from the end of the relevant assessment year. In other words, the requirement in the first proviso to Section 147 of there having to be a failure on the part of the Assessee "to disclose fully and truly all material facts" does not at all apply where the initial return has been processed under Section 143 (1) of the Act.

35.3 As explained in *Rajesh Jhaveri Stock Brokers (P.) Ltd.* (*supra*) "an intimation issued under Section 143 (1) can be subjected to proceedings for reopening", "so long as the ingredients of Section 147 are fulfilled".

35.4 Explanation 2 (b) below Section 147 states that for the purposes of Section 147, where a return of income has been furnished by the Assessee but no assessment has been made and it is noticed by the AO that the Assessee has understated the income and claimed excessive loss, deduction, allowance and relief in the return then that "shall also be deemed to be a case where the income chargeable to tax has escaped assessment".

35.5 As explained by the Supreme Court in *Rajesh Jhaveri Stock Brokers (P.) Ltd.* (*supra*) and reiterated by it in *Zuari Estate Development & Investment Co. Ltd.* (*supra*) an intimation under Section 143 (1) (a) cannot be treated to be an order of assessment. There being no assessment under Section 143 (1) (a), the question of change of opinion does not arise.

35.6 Whereas in a case where the initial assessment order is under Section 143 (3), and it is sought to be reopened within four years from the expiry of the relevant assessment year, the AO has to base his 'reasons to believe' that income has escaped assessment on some fresh tangible material that provides the nexus or link to the formation of such belief. In a case where the initial return is processed under Section 143 (1) of the Act and an intimation is sent to the Assessee, the reopening of such assessment no doubt requires the AO to form reasons to believe that income has escaped assessment, but such reasons do not require any fresh tangible material .

35.7 In other words, where reopening is sought of an assessment in a situation where the initial return is processed under Section 143 (1) of the Act, the AO can form reasons to believe that income has escaped assessment by examining the very return and/or the documents accompanying the return. It is not necessary in such a case for the AO to come across some fresh tangible material to form 'reasons to believe' that income has escaped assessment.

35.8 In the assessment proceedings pursuant to such reopening, it will be open to the Assessee to contest the reopening on the ground that there was either no

reason to believe or that the alleged reason to believe is not relevant for the formation of the belief that income chargeable to tax has escaped assessment.

35.9 The decisions of this Court and other Courts to the extent inconsistent with the above decisions of the Supreme Court cannot be said to reflect the correct legal position."

50. Therefore respectfully following the decision of the honourable jurisdictional High Court , we reject the argument of the learned authorised representative that even in the case where there is no assessment made by the AO or the return is processed merely u/s 143 (1) of the income tax act, there is a requirement of having any tangible material with the assessing officer to reopen the case of the assessee. We hold that in such cases, there is no requirement of tangible material for reopening of assessment. In view of this, we do not find any infirmity in the reasons recorded by the learned assessing officer for reopening of the assessment.

51. In view of this, the additional ground raised by the assessee against the reopening of the assessment is dismissed.

Decision and analysis on Cost of acquisition as at 1-4-1981

52. We now come to the second question Whether fair market value of the property sold during the year as on, 1/4/1981 is required to be taken as per the report of the registered valuer produced by the assessee before the assessing officer or the value adopted by the learned assessing officer is required to be taken. The facts even at the cost of reiteration and repetition, shows that assessee has claimed indexed cost of acquisition at ₹ 48,727,200 by adopting the rate of property as on 1/4/1981 at ₹ 7,710,000 based on the report of government approved valuer who has valued the entire property for a sum of Rs. 1,54,20,000 the assessee has sold half share of this property and therefore the above valuation has been taken. However, the learned assessing officer questioned the valuation report with respect to fair market value of the land. The land rate has been adopted by the registered valuer at ₹ 11,127.75 per square meter. To arrive at this value the learned valuer has stated that in vasant Vihar area the auction price in 1985 was approximately ₹ 8000 per square meter. He also considered increase at 10% per year increase in the land rate in 1985 and therefore approximately in 1981 the land rate adopted as ₹ 6015 per square meter.

The another factor that has been mentioned is that Kautilya Marg is far better than in Vasant Vihar as Rajpath is very close to the said premises and therefore he adopted the land rate at 11,127.75 per square meter as on 1/4/1981. Ld AO rejected the valuation by the authorised valuer for the reason that the base taken by the registered valuer is admittedly an auction rate of Vasant Vihar plot in 1985, which is after four years of the base year i.e. 1981. He was also of the view that the value of the property cannot be estimated based on Pin code numbers. He also took view that rate applied by the learned valuer has not been proved by any documentary evidence. He also held that there is no similarity between the properties sold as well as the comparable property rates taken of vasant Vihar property. He took that the notified rate of the land by LDO as on 31/3/1981 of ₹ 600 per square yard and with effect from 1/4/1981; the same was ₹ 2000 per square meter. Therefore, he considered the land rate at ₹ 2000 per square meter against ₹ 11,127.75 per square meter adopted by the valuer. On careful consideration of the various arguments raised by both the parties, we fully agree with the contention raised by the learned authorised representative that valuation is a technical matter and learned assessing officer cannot value a property and the land rates. Admittedly, in this case the learned assessing officer has adopted LDO rates where assessee objected against those rates. The learned authorised representative specifically referred to the decision of the coordinate bench in case of Ved Kumari Subhash Chander versus income tax officer in ITA number 2041/del/2016 wherein on identical issue is decided as Under:-

> "5.0 We have heard the rival submissions and have also perused the material available on record. It is the contention of the assessee that the lower authorities have erred in overriding the report of the registered valuer without supporting evidence and, therefore, the same is bad in law. It is also the contention of the assessee that the Assessing Officer should have referred the matter to the DVO if he was not in agreement with the valuation as computed by the registered valuer and that in absence of any evidence on record, the report of the registered valuer should have been accepted with regard to fair market value as on 1.4.1981 for the purpose of computing the capital gains. It is seen that the Assessing Officer while rejecting the registered valuer's estimate at ₹ 5800/- per sq mtr has noted that the average rate at which the sales deeds were being executed was ₹ 1160/- per sq mtr. However, it is our considered opinion that valuation done by the empanelled

registered valuer of the Income Tax Department would certainly take precedence over a value, which the Assessing Officer might adopt on his own without referring to the DVO. The fact of the matter remains that the Assessing Officer, during the course of assessment proceedings, did not refer to the DVO even though he chose not to accept the rate adopted by the registered valuer. Therefore, in our considered opinion, the Assessing Officer exceeded the powers entrusted to him in this regard by undertaking to compute the fair market value on his own without being supported by the expert knowledge of the DVO. The law is fairly settled in this regard and coordinate benches of the Tribunal have time and again held that where the assessee had submitted valuation report of a registered valuer and the matter was not referred by the Assessing Officer to the DVO, the Assessing Officer is bound to accept the report of the registered valuer regarding the market value of the land as claimed by the assessee. We take support from the order of ITAT Chandigarh Bench in the case of Barjidner Singh Bhatti vs. ITO in ITA No. 1101/CHD/2014 wherein vide order dated 15.7.2015, the Bench had ruled in favour of the assessee by holding that if the Assessing Officer was not satisfied with the report of the registered valuer, he should have made a reference to the DVO and in absence of such a reference, the Assessing Officer should not have made his own calculation for the purpose of computation of capital gains. Reliance is also placed on the order of the ITAT, Lucknow Bench in the case of Adarsh Kumar Agrawal vs. ACIT in ITA No. 66/LKW/2014 wherein vide order dated 23.03.2014, it was held that where the assessee had submitted the valuation report of the registered valuer and the matter was not referred by the Assessing Officer to the DVO, the Assessing Officer has to accept the report of the registered valuer regarding the fair market value of the land as claimed by the assessee. ITAT Cochin Bench in the case of Mrs. Susamma Paulose Vs JCIT reported in 79 TTJ 573 (Coch.) on identical facts held as under:

".....A registered valuer is competent to value properties as per the provisions of the IT Act and Rules made there under. The AO is not justified in brushing aside the report of the registered valuer without pointing out any specific reason for that. The AD did not have any materials with him to rebut the valuation worked out by the registered valuer. The AD was rejecting the report of the registered valuer with a stroke of pen as if the law does not recognise the valuation made by a registered valuer. The method followed by the AO is quite unlawful and arbitrary.

The report of a registered valuer is a valid piece of evidence in deciding matters of valuation. Such report can be modified or questioned or rebutted by the AO only in the light of reliable materials available with him. In the present case, the AO himself has not referred the matter to valuation. In the facts and circumstances of the case, the AO as well as the CIT(A) have erred in coming to their conclusions regarding the valuation of the property as on 1st April, 1981. Fair market value of the land as on 1st April, 1981, estimated by a registered valuer being based on sound factual basis and the phenomenal development in that area could not be rejected by the AO without assigning any specific reasons."

5.1 Similarly, in the case of Pyare Mohan Mathur HUF Vs ITO (in ITA No. 471/Agra/2009 vide order dated 21/04/2011) the Agra Bench of the ITAT has held that in view of the provision of section 55A once the assessee has submitted the necessary evidence by way of the valuation report made by the registered valuer, the onus gets shifted on the AO to contradict the report of the registered valuer. The registered valuation officer is a technical expert and the opinion of an expert cannot be thrown out without bringing any material to the contrary on record. In case the AO was not agreeable with the report of the registered valuer, he was duty bound to refer the matter to the DVO for determining the fair market value of the land as on which he failed to do so. The tribunal held that the revenue has not discharged the onus but merely rejected the fair market value taken by the assessee. It set aside the order of the CIT (A) and directed the AO to recompute the capital gain after taking the fair market value of the land as on 1/4/1981, as claimed by the assessee. Fair market value of the land as on 1/4/1981 estimated by the registered valuer being based on sound factual basis and the phenomenal development in that area could not be rejected by the AO without assigning any specific reasons.

5.2 In the case of CWT Vs Raghunath Singh Thakur (304 ITR 268 HP) the Hon'ble High Court of Himachal Pradesh held that if the Assessing Officer does not agree with the report regarding the valuer relied upon by the assessee, rejection of such valuer's report without making reference to the valuation, order is invalid and the report of the registered valuer shall be accepted.

5.4 The Hon'ble Bombay High Court in the case of C.I.T. vs. Raman Kumar Suri reported in (2013) 255 CTR 107 had held that the valuation done by the

registered valuer is with regard to a specific property and the same takes into account its various advantages and disadvantages, all of which would influence the valuation of property. The Hon'ble Bombay High Court went on to hold that the valuation done by an empanelled registered valuer of the Income Tax Department would certainly take precedence over other indicators.

5.5 Therefore, respectfully following the aforesaid juridical precedents, we have no option but to accept the assessee's contention that the Assessing Officer was not right in discarding the report of the registered valuer without having made a reference to the DVO and, therefore, the rate adopted by the Assessing Officer for the purpose of computation of fair market value cannot be upheld. Accordingly, we set aside the order of the Ld. CIT (A) and direct the Assessing Officer to re-compute the fair market value of the land as on 1.4.1981 by taking into account the rate as adopted by the registered valuer."

53. On careful perusal of the above decision we find that in para number 5.5 it has been specifically mentioned that it [ITAT] did not have any other option but to accept the assessee's contention that the assessing officer was not right in discarding the report of the registered valuer without having made a reference to the departmental valuation Officer and thus the rate adopted by the assessing officer for the purpose of computation of the fair market value cannot be upheld. The coordinate bench has set aside the issue back to the file of the learned lower authorities directing the assessing officer to re-compute the fair market value of the land as on 1/4/1981 by taking into account the rate as adopted by the registered valuer. However, there is a stark difference between the facts before the coordinate bench as well as the facts before us. In the case before that bench, the valuation report by the registered valuer was also having the comparable sale instances. Further, in that particular case, the higher value as on 1/4/1981 was also supported by the fact that even at the time of sale, also, the property was sold at much higher rates than circle rates and the valuation as on 1/4/1981 was higher than the market rates. However, before us the learned assessing officer has given a specific instance about land rates prevailing as on 1/4/1981 which is far less then valuation rates adopted by the registered valuer and further there is no corroboration of the same with the rates at the time of sale. Further base of valuation of sale instances after four years were taken. The basis

for land rates was taken on pin code Numbers. However, in principle we agree that assessing officer is not a valuation officer and departmental valuation officer is officer who is technically competent to value a property. Here in this case the valuation report of authorised valuer also does not inspire any confidence. In view of this, the decision relied upon by the learned authorised representative vehemently, we also set-aside this issue back to the file of the learned assessing officer but with a direction to refer the matter to the departmental valuation Officer for determining fair market value of the property as on 1/4/1981 and thereafter the assessing officer, based on that report, compute the fair market value of the property for indexation purposes accordingly. Assessee must be afforded an opportunity of hearing and assessee may support valuation by further evidences. In view of this Ground no 1 of the appeal is allowed with above directions.

Decision and analysis of Deduction u/s 54 of the Act for more than one residential House

54. Now we come to the second ground of appeal . Claim of the assessee is that it has purchased one house in form a flat at Mumbai and another house at New Delhi. Both are residential houses. Section 54 talks about ' a Residential house', which does not mean that only one house, is allowed as deduction. Assessee's contentions are supported by the decisions of various high court and draw strength from the amendment made in that act. Recently Honourable Karnataka High court has dealt with this issues in **Arun K. Thiagarajan Vs Commissioner of Income-tax (Appeals)-II [2020] 117 taxmann.com 270 (Karnataka) following the decisions of** *CIT* v. *K.G. Rukminiamma* [2011] 331 ITR 211 (Kar.), *Tilokchand and Sons* v. *ITO* [2019] 413 ITR 189 (Mad.) and *CIT* v. *Gita Duggal* [2013] 357 ITR 153 (Delhi) and has held that :-

> **"10.** We have considered the submissions made on both the sides and have perused the record. In order to appreciate the rival submissions made at the bar, we deem it appropriate to reproduce Section 54(1) of the Act, which read, prior to its amendment by Finance (No.2) Act, 2014, as under:
>
> 54(1) Subject to the provisions of sub-Section (2), where, in the case of an assessee being an individual or a Hindu undivided family, the capital gain arises from the transfer of a long-term capital asset, being buildings or lands appurtenant thereto, and being a residential house, the income of which is

chargeable under the head "Income from house property" (hereafter in this section referred to as the original asset), and the assessee has within a period of one year before or two years after the date on which the transfer took place purchased or has within a period of three years after that date constructed, a residential house, then, instead of the capital gain being charged to income-tax as income of the Previous year in which the transfer took place, it shall be dealt with in accordance with the following provisions of this section.

11. From close scrutiny of the aforesaid provision, it is axiomatic that property sold is referred to as original asset and the original asset is prescribed as buildings and lands appurtenant thereto and being a residential house. The expression 'a residential house' therefore, includes building or lands appurtenant thereto. It cannot be construed as one residential house.

12. A Bench of this court in case of *Smt. KG Rukminiamma* (*supra*) dealt with the meaning of expression 'a residential house' used in Section 54(1) of the Act while taking into account Section 13(2) of the General Clauses Act, 1897 held that unless there is anything repugnant in the subject or context, the words in singular shall include the plural and vice versa. It was further held that context in which the expression 'a residential house' is used in Section 54 makes it evident that it is not the intention of the legislature to convey the meaning that it refers to a single residential house. It was also held that an asset newly acquired after sale of original asset can also be buildings or lands appurtenant thereto, which also should be residential house, therefore, the letter 'a' in the context it is used should not be construed as meaning singular, but the expression should be read in consonance with other words *viz.*, buildings and lands. Accordingly, the contention raised by the revenue was rejected. Similar view was taken by a bench of this court in *Khoobchand M. Makhijasupra*, *B. Srinivassupra* and in the case of *Smt. Jyothi K Mehtasupra*. The Madras High Court while dealing with Section 54 of the Act as it stood prior to amendment by Finance Act No. 2/2014 in the case of *Tilokchand & Sons supra* took the similar view and held that the word 'a' would normally mean one but in some circumstances it may include within its ambit and scope some plural numbers also. The Delhi High Court also took the similar view in case of *Gita Duggal supra*.

13. It is well settled in law that an Amending Act may be purely clarificatory in nature intended to clear a meaning of a provision of the principal Act, which was already implicit. [See: Decision of The Supreme Court In *CIT* v. *Ram Kishan Das* [2019] 103 taxmann.com 414/263 Taxman 657/413 ITR 337. In view of aforesaid enunciation of law by different High Courts including this court and with a view to give definite meaning to the expression 'a residential house', the provisions of Section 54(1) were amended with an object to restrict the plurality to mean singularity by substituting the word 'a residential house' with the word 'one residential house'. The aforesaid amendment came into force with effect from 1-4-2015. The relevant extracts of Explanatory note to provisions of Finance (No. 2) Act, 2014 reads as under:

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

20.5 Applicability:- These amendments take effect from 1st April, 2015 and will accordingly apply in relation to Assessment year 2015-16 and subsequent Assessment years.

Thus it is axiomatic that the aforesaid amendment was specifically applied only prospectively with effect from Assessment year 2015-16.

14. The subsequent amendment of Section 54(1) also fortifies the fact that the legislature felt the need of amending the provisions of the Act with a view to give a definite meaning to the expression 'a residential house', which was interpreted as plural by various courts by taking into account the context in which the aforesaid expression was used. The subsequent amendment of the Act also fortifies the view taken by this court as well as Madras High Court and Delhi High Court. It is trite law that the principle underlying the decision would be binding as precedent in a case. In Halsbury Laws of England, Volume 22, Para 1682, Page 796, the relevant extract reads as under:

The enunciation of the reasons or principle on which a question before a court has been decided is alone binding as a precedent. This underlying principle is often termed the ratio decided, that is to say, the general reasons given for the decision or the general grounds on which it is based, detached or abstracted from the specific peculiarities of the particular case which gives rise to the decision.

[Also see: *'State of Haryana* v. *Ranbir @ Rana*', [2006] 5 SCC 167 & '*Girnar Traders* v. *State of Maharashtra*', [2007] 7 SCC 555].

15. This Court as well as Madras and Delhi High Court have interpreted the expression 'a residential house' and have held that the aforesaid expression includes plural. The ratio of the decisions rendered by coordinate bench of this court are binding on us and we respectively agree with the view taken by this court while interpreting the expression 'a residential house'. Therefore, the contention of the revenue that the assessee is not entitled to benefit of exemption under Section 54(1) of the Act in the facts of the case does not deserve acceptance.

In view of preceding analysis, the substantial question of law framed by this court is answered in favor of the assessee and against the revenue. In the result, the order passed by the assessing officer and Commissioner of Income-tax (Appeals) and the Income-tax Appellate Tribunal insofar as it deprives the assessee of the benefit of exemption under section 54(1) of the Act are hereby quashed and the assessee is held entitled to benefit of exemption under section 54(1) of the Act. In the result, the appeal is allowed."

55. Therefore , respectfully following the decision of Honourable Delhi and Other High courts , we hold that assessee is entitled for deduction u/s 54 of the act of more than one residential house property and lower authorities were not correct in denying the deduction of flat purchased in Mumbai. Thus, Ground no. 2 of the appeal of assessee is allowed.

56. In view of this ITA number 6346/Del/2014 filed by the assessee for assessment year 2010 – 11 is partly allowed.

57. Now coming to the appeal of the learned assessing officer in ITA number 6346/del/2014 for assessment year 2010 – 11 filed by the assessee wherein the only

issue is with respect to deduction claimed by the assessee u/s 54EC of the income tax act of Rs 1 crore by investing ₹ 50 lakhs in financial year 2008 – 09 and further investing ₹ 50 lakhs in financial year 2009 – 2010.

Decision and Analysis on deduction u/s 54EC

58. We have carefully considered the rival contention and find that the issue is squarely covered honourable madras High Court in case of Commissioner of income tax, Channing versus C Jaichander 370 ITR 579 (Madras) on the identical facts and circumstances where the assessee has made investment of ₹ 50 lakhs each into different financial year but within six months of the date of transfer of the capital asset and honourable High Court held as Under:-

> **"5.** The key issue that arises for consideration is whether the first proviso to Section 54EC(1) of the Act would restrict the benefit of investment of capital gains in bonds to that financial year during which the property was sold or it applies to any financial year during the six months period.
>
> **6.** For better understanding of the issue, it would be apposite to refer to Section 54EC(1) of the Act, which reads as under:
>
> "Section 54EC. *Capital gain not to be charged on investment in certain bonds*.— (1) Where the capital gain arises from the transfer of a long-term capital asset (the capital asset so transferred being hereafter in this section referred to as the original asset) and the assessee has, at any time within a period of six months after the date of such transfer, invested the whole or any part of capital gains in the long-term specified asset, the capital gain shall be dealt with in accordance with the following provisions of this section, that is to say,-
>
> (*a*) if the cost of the long-term specified asset is not less than the capital gain arising from the transfer of the original asset, the whole of such capital gain shall not be charged under section 45 ;
>
> (*b*) if the cost of the long-term specified

asset is less than the capital gain arising from the transfer of the original asset, so much of the capital gain as bears to the whole of the capital gain the same proportion as the cost of acquisition of the long-term specified asset bears to the whole of the capital gain, shall not be charged under section 45.

Provided that the investment made on or after the 1st day of April, 2007 in the long-term specified asset by an assessee during any financial year does not exceed fifty lakh rupees."

7. On a plain reading of the above said provision, we are of the view that Section 54EC(1) of the Act restricts the time limit for the period of investment after the property has been sold to six months. There is no cap on the investment to be made in bonds. The first proviso to Section 54EC(1) of the Act specifies the quantum of investment and it states that the investment so made on or after 1.4.2007 in the long-term specified asset by an assessee during any financial year does not exceed fifty lakh rupees. In other words, as per the mandate of Section 54EC(1) of the Act, the time limit for investment is six months and the benefit that flows from the first proviso is that if the assessee makes the investment of Rs.50,00,000/- in any financial year, it would have the benefit of Section 54EC(1) of the Act.

8. The legislature noticing the ambiguity in the above said provision, by Finance (No.2) Act, 2014, with effect from 1.4.2015, inserted after the existing proviso to sub-section (1) of Section 54EC of the Act, a second proviso, which reads as under:

"Provided further that the investment made by an assessee in the long-term specified asset, from capital gains arising from transfer of one or more original assets, during the financial year in which the original asset or assets are transferred and in the subsequent financial year does not exceed fifty lakh rupees."

9. At this juncture, for better clarity, it would be appropriate to refer to the Notes on Clauses - Finance Bill 2014 and the Memorandum explaining the provisions in the Finance (No.2) Bill, 2014, which read as under:

"Notes on Clauses - Finance Bill 2014:

Clause 23 of the Bill seeks to amend section 54EC of the Income-tax Act relating to capital gain not to be charged on investment in certain bonds. The existing provisions contained in sub-section (1) of section 54EC provide that where capital gain arises from the transfer of a long-term capital asset and the assessee has within a period of six months invested the whole or part of capital gains in the long-term specified asset, the proportionate capital gains so invested in the long-term specified asset out of total capital gain shall not be charged to tax. The proviso to the said sub-section provides that the investment made in the long-term specified asset during any financial year shall not exceed fifty lakh rupees.

It is proposed to insert a proviso below first proviso in said sub-section (1) so as to provide that the investment made by an assessee in the long-term specified asset, from capital gains arising from transfer of one or more original assets, during the financial year in which the original asset or assets are transferred and in the subsequent financial year does not exceed fifty lakh rupees.

This amendment will take effect from 1st April, 2015 and will, accordingly, apply in relation to assessment year 2015-16 and subsequent years.

Memorandum: Explaining the provisions in the Finance (No.2) Bill, 2014:

Capital gains exemption on investment in Specified Bonds.

The existing provisions contained in sub-section (1) of section 54EC of the Act provide that where capital gain arises from the transfer of a long-term capital asset and the assessee has, at any time within a period of six months, invested the whole or any part of capital gains in the long-term specified asset, out of the whole of the capital gain, shall not be charged to tax. The proviso to the said sub-section provides that the investment made in the long-term specified asset during any financial year shall not exceed fifty lakh rupees.

However, the wordings of the proviso have created an ambiguity. As a result the capital gains arising during the year after the month of September were invested in the specified asset in such a manner so as to split the investment in two years i.e., one within the year and second in the next year but before the expiry of six months. This resulted in the claim for relief of one crore rupees as against the intended limit for relief of fifty lakhs rupees.

Accordingly, it is proposed to insert a proviso in sub-section (1) so as to provide that the investment made by an assessee in the long-term specified asset, out of capital gains arising from transfer of one or more original asset, during the financial year in which the original asset or assets are transferred and in the subsequent financial year does not exceed fifty lakh rupees.

This amendment will take effect from 1st April, 2015 and will, accordingly, apply in relation to assessment year 2015-16 and subsequent assessment years."

10. The legislature has chosen to remove the ambiguity in the proviso to Section 54EC(1) of the Act by inserting a second proviso with effect from 1.4.2015. The memorandum explaining the provisions in the Finance (No.2) Bill, 2014 also states that the same will be applicable from 1.4.2015 in relation to assessment year 2015-16 and the subsequent years. The intention of the legislature probably appears to be that this amendment should be for the assessment year 2015-2016 to avoid unwanted litigations of the previous years. Even otherwise, we do not wish to read anything more into the first proviso to Section 54EC(1) of the Act, as it stood in relation to the assessees.

11. In any event, from a reading of Section 54EC(1) and the first proviso, it is clear that the time limit for investment is six months from the date of transfer and even if such investment falls under two financial years, the benefit claimed by the assessee cannot be denied. It would have made a difference, if the restriction on the investment in bonds to Rs.50,00,000/- is incorporated in Section 54EC(1) of the Act itself. However, the ambiguity has been removed by the legislature with effect from 1.4.2015 in relation to the assessment year 2015-16 and the subsequent years.

For the foregoing reasons, we find no infirmity in the orders passed by the Tribunal warranting interference by this Court. The substantial questions of law are answered against the Revenue and these appeals are dismissed. No costs."

59. Therefore, on issue of deduction u/s 54 EC of the income tax act we find that issue is squarely covered in favour of the assessee by the above decision.

60. Even otherwise the tax effect involved in the appeal of the ld AO is below Rs 50,00,000/- , therefore also it is not maintainable.

61. In view of this appeal of the learned assessing officer in ITA No 6726/ Del/2014 for AY 2010-11 is dismissed.

62. In view of this appeal of the assessee for assessment year 2010 – 11 is partly allowed and appeal of the learned assessing officer for the same assessment year is dismissed.

Assessment year 2007-08

63. ITA. Number 5767/Del/2015 for assessment year 2007 – 08 filed by the assessee is against the order of The Learned Commissioner Of Income Tax (Appeals) – 18, New Delhi dated 3 September 2015 wherein assessment was made by The Asst Commissioner Of Income Tax, Circle – 53 (1), New Delhi u/s 147 read with Section 148 of the act on 2nd of March 2015 determining the total income of the assessee at ₹ 155,760,013/– and assessee preferred appeal against that order which was dismissed. Therefore, assessee is in appeal before us.

64. In this appeal assessee has raised following grounds of appeal:-

1) that the learned Commissioner of income tax (appeals) has grossly erred both in law and on facts in sustaining an order of assessment u/s 143 (3) – 147 of the act at an income of ₹ 155,760,010/– as against the returned income of ₹ 34,034,040/–
2) that the learned Commissioner of income tax (appeals) has further erred both in law and on facts in sustaining the initiation of proceedings u/s 147 of the act and, further completion of assessment u/s 143 (3) – 147 of the act without satisfying the statutory preconditions envisaged therein.

2.1) That the learned Commissioner of income tax (appeals) has failed to appreciate the fact that reopening of assessment within the meaning of Section 147 of the act by the learned assessing officer was based on mere subjective opinion and is based on complete misreading of the provisions of the statute and thus, is only unsustainable in law and the same should have been quashed, as such.

3) That the learned Commissioner of income tax (appeals) has erred in law and on facts in sustaining an addition of a sum of ₹ 121,725,973/– Under the head capital gain on account of sale of property act 19, Kautilya Marg, Delhi and that too on protective basis against which, addition was already made by the learned assessing officer in assessment year 2000 – 11 and as such, the additions of sustained by the learned CIT (A) is misconceived in law and should be deleted, as such.

3.1) That the learned Commissioner of income tax (appeals) while sustaining the instant assessment has proceeded on only irrelevant and extraneous considerations, by Sri disregarding the submission/material/evidence furnished by the assessee, appellant in shape of detailed replies an information and as such, the additions of sustained, is wholly untenable on facts and also in law.

3.2) That the learned Commissioner of income tax (appeals) has further erred in law and on facts by ignoring the fact that there could be no double taxation of the said someone's on substantive basis in assessment year 2010 – 11 i.e. the year in which the sale deed was registered and sale of impugned property concluded and again on protective basis in impugned assessment year 2007 – 08 that is in the year when no sum was received by the assessee/appellant and no right in the property authorization were transferred in assessment year 2007 – 08 and thus, the said addition is in disregard of the judgment of the effects court in case of Laxmipati Singhania

versus CIT reported in 73 ITR 291 and therefore, unsustainable.

3.3) That in doing so, the learned Commissioner of income tax (appeals) has gone wrong in not allowing the benefit of indexation of correct cost of acquisition and improvement and also for exemptions claimed with respect to investments made out of the sale proceeds in assessment year 2010 – 11 and as such, the addition so made is misconceived and misplaced in law and should be deleted.

3.4) That the learned Commissioner of income tax (appeals) has further grossly erred in relying on the judgments totally in applicable to the facts of the case of the appellant company.

4) That the learned Commissioner of income tax (appeals) has grossly erred in sustaining the assessment without providing to the assessee, and proper and meaningful opportunity of being heard, thereby violating the principles of natural justice and thus such an order vitiated both on facts and in law.

65. The only reason for making the assessment in the present case is that addition has been made with respect to the capital gain of ₹ 121,725,973/– which was made in the hands of the assessee for assessment year 2010 – 11 was also argued by the assessee as it pertains to assessment year 2007 – 08. Therefore, the learned assessing officer has made the addition in the hands of the assessee for assessment year 2007 – 08 on protective basis.

66. While arguing the appeal of the assessee for assessment year 2010 – 11, none of the parties have stated that the above impugned transfer of capital assets took place in assessment year 2007 – 08, even otherwise both the parties agreed that the transaction is pertaining to assessment year 2010 – 11 and same should be taxed in that year only.

67. In view of this, as the impugned transaction is already taxed in the hands of the assessee for assessment year 2010 – 11, offered by the assessee also in that year, this appeal of the assessee for assessment year 2007 – 08 deserves to be allowed for this reason only.

68. In view of this ITA number 5767/del/2015 filed by the assessee for assessment year 2007 – 08 is allowed.

69. Accordingly, all the three appeals are disposed of by this common order as indicated above.

Order pronounced in the open court on 11/06/2021.

Sd/-	Sd/-
(JUSTICE P.P. BHATT)	(PRASHANT MAHARISHI)
PRESIDENT	ACCOUNTANT MEMBER

Dated: 11/06/2021

A K Keot

Copy forwarded to

1. Applicant
2. Respondent
3. CIT
4. CIT (A)
5. DR:ITAT

ASSISTANT REGISTRAR

ITAT, New Delhi

	Date of dictation	11.06.2021
	Date on which the typed draft is placed before the dictating member	11.06.2021
	Date on which the typed draft is placed before the other member	11.06.2021
	Date on which the approved draft comes to the Sr. PS/ PS	11.06.2021
	Date on which the fair order is placed before the dictating member for pronouncement	11.06.2021
	Date on which the fair order comes back to the Sr. PS/ PS	11.06.2021
	Date on which the final order is uploaded on the website of ITAT	11.06.2021
	date on which the file goes to the Bench Clerk	11.06.2021
	Date on which the file goes to the Head Clerk	
	The date on which the file goes to the Assistant Registrar for signature on the order	
	Date of dispatch of the order	