IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH: 'SMC' NEW DELHI

BEFORE SHRI H. S. SIDHU, JUDICIAL MEMBER

I.T.A. No. 7629/Del/2019
Assessment Year: 2016-17

VINOD KUMAR SHARMA, 241, SECTOR-19, FARIDABAD HARYANA-121002 (PAN: AAAPS9524P) **(ASSESSEE)**	vs.	ITO, WARD 2(5), FARIDABAD HARYANA-121002 **(RESPONDENT)**

Assessee by: Sh. Akshay Abrol, Advocate
Revenue by: Sh. Pradeep Singh Gautam, Sr. DR.

ORDER

This appeal is filed by assessee against the Order dated 21.08.2019 passed by the Ld. CIT(A), Faridabad relating to Assessment Year 2016-17.

2. The brief facts of the case are that assessee filed his e-return on 28.07.2016. The case of the assessee was selected through CASS for limited scrutiny. In this case notice under section 143(2) of the Income Tax Act, 1961 (in short " Act") was issued requiring the assesee to submit information on or before 18.09.2017. In response thereto the assessee filed the reply on 16.09.2017 alongwith computation of taxable income, bank account statement, collaboration agreement and construction agreement. Notices u/s. 142(1) of the Act alongwith certain queries were issued online on 15.6.2018 requiring assessee to furnish information as

required on or before 25.06.2018. Another notice u/s. 142(1) of the Act was issued to the assessee on 19.7.2018 requiring him to furnish desired information on or before 26.07.2018. However, no reply was furnished. AO issued fresh notice to the assessee on 22.9.2018 requiring him to furnish information as required on or before 01.10.2018. In response thereto the assessee submitted remarks through his e-filing portal requesting for granting of extension for 60 days alongwith remark assessee furnished evidence of occupation certificate of building H.No. 241, Sector-19, Faridabad. Fresh Notice u/s. 142(1) of the Act dated 12.11.2018 requiring assessee to furnish information as required on or before 19.11.2018. In response thereto assessee again sought adjournment till end of November, 2018. Finally, a show cause notice alongwith notice u/s. 142(1) of the Act was issued to the assessee on 12.12.2018 requiring him to furnish reply to the show cause on or before 17.12.2018. In response no reply was furnished and therefore, the assessment proceedings were finalized on the basis of details filed by the assessee. AO observed that the assessee was found to have entered into a collaboration agreement with Sh. Krishan Lal (second party) on 04.10.2012 for dismantling of old building of Plot No. 241, Sector-19, Faridabad measuring 350 sq.yds. and construction of Ground Floor, First Floor and Second Floor. As per the collaboration agreement the assessee will keep the rights of ground floor and second floor with roof rights of first floor. The assessee in the computation declared the fair market value of the property at Rs. 1,25,10,000/-. After reducing the indexed cost of acquisition at Rs. 21,16,515/-, declared long term capital gain at

Rs. 1,03,93,485/-. The assessee then claimed exemption u/s. 54 of the Act at Rs. 1,24,50,000/- on long term capital gain. The claim of exemption u/s. 54 of the Act cannot be accepted fully as the assessee sold the rights of first floor to the builder, and kept ground and second floor to himself under collaboration agreement, therefore, long term capital gain on proportionate sale value of first floor which comes to Rs. 34,64,495/- (1/3rd of long term capital gain as calculated by assessee at Rs. 1,03,93,485/-), is the deemed long term capital gain on transfer of rights of first floor to the second party Sh. Krishan Lal and was to be taxed in the hands of the assessee. The assessee vide show cause letter dated 12.12.2018, has to furnish his reply as to why long term capital gain should not be charted on proportionate sale value of first floor which comes to Rs. 34,64,495/- (1/3rd of long term capital gain as calculated by you at Rs. 1,03,93,485/). The assessee has not furnished any reply to the show cause notice implying that he has nothing to say with regard to deemed long term capital gain on transfer of rights first floor of Rs. 34,64,495/-. Accordingly, an addition of Rs. 34,64,495/- was made to the income of the assessee on account of deemed long term capital gain and income of the assessee was assessed at Rs. 45,92,515/- u/s. 143(3) of the Act vide order dated 28.12.2018. Against the assessment order dated 28.12.2018, assessee appealed before the Ld. CIT(A), who vide his impugned order dated 21.8.2019 has dismissed the appeal of the assessee and enhanced the income u/s. 251(1) of the Act. Aggrieved with the impugned order dated 21.8.2019, assessee is in appeal before the Tribunal.

3. At the time of hearing, Ld. Counsel for the assessee stated that assessee constructed his old house of the entire building consisting of ground floor, first floor and second floor through a Builder vide Collaboration Agreement 27.09.2012 in lieu of parting with first floor of the above property. He submitted that assessee did not get any amount from the builder Sh. Krishan Lal and the amount of long term capital gains was calculated on the basis of fair market value of the property at the time of Collaboration Agreement. The assessee claimed deduction u/s. 54 of the Act since the entire consideration for the first floor of the property was reinvested in the construction of the ground floor, second floor of the above mentioned property in dispute. He further submitted that the AO vide his order dated 28.12.2018 considered the 1/3rd of presumed cost of construction as capital gains and added the same in the income of the assessee without appreciating the fact that on the basis of collaboration agreement, the builder has incurred all the costs for the construction of the property. He further submitted that assessee has not parted with any part of the residential property except the first floor of the house property in lieu of construction of the entire property by the builder. But the AO has wrongly mentioned that the assessee has sold the second floor of the property. Finally, he submitted that the assessee in lieu of the sale consideration of the first floor of the property, got the ground floor and the second floor of the property constructed from the builder which is only one unit and as such the assessee is entitled to exemption of capital gains in full and not proportionately as mentioned in the assessment order. He further submitted that the similar issue

has already been adjudicated and decided by the Hon'ble Delhi High Court in the case of Commissioner of Income Tax vs. Geeta Duggal in ITA No. 1237/2011 vide judgment dated 21.02.2013. He draw our attention towards the relevant portion of the aforesaid judgement and requested that by respectfully following the said ratio the addition in dispute may be deleted by allowing the appeal of the assessee.

4. On the contrary, Ld. DR relied upon the orders passed by the revenue authorities and stated that the revenue authority has rightly rejected the claim of the assessee, keeping in view of the provision of the law. Therefore, the appeal filed by the assessee may be dismissed.

5. I have heard both the parties and perused the records, especially the orders of the revenue authorities alongwith the written submissions filed by the assessee as well as the provisions of section 54 of the I.T. Act and the case laws relied by the assessee's AR and Ld. CIT(A) in the impugned order. I am of the considered view that exactly similar issue has already been adjudicated and decided in favour of the assessee by the Hon'ble Delhi High Court in the case of Commissioner of Income Tax vs. Geeta Duggal in ITA No. 1237/2011 vide judgment dated 21.02.2013. The held portion of the aforesaid judgment is reproduced as under:-

> *"18. There could also be another angle. Section 54/54F uses the expression ''a residential house". The expression used is not ''a residential unit", This is a new concept introduced by the assessing officer into the section. Section 54/54F requires the*

assessee to acquire a "residential house" and so long as the assessee acquires a building, which may be constructed, for the sake of convenience, in such a manner as to consist of several units which can, if the need arises, be conveniently and independently used as an independent residence, the requirement of the Section should be taken to have been satisfied. There is nothing in these sections which require the residential house to be constructed in a particular manner. The only requirement is that it should be for the residential use and not for commercial use. If there is nothing in the section which requires that the residential house should be built in a particular manner, it seems to us that the income tax authorities cannot insist upon that requirement. A person may construct a house according to his plans and requirements. Most of the houses are constructed according to the needs and requirements and even compulsions. For instance, a person may construct a residential house in such a manner that he may use the ground floor for his own residence and let out the first floor having an independent entry so a his income is augmented. It is quite common to find such arrangements, particularly post-retirement. One may build a house consisting of four bedrooms (all in the same or different floors) in such a manner that an

independent residential unit consisting of two or three bedrooms may be carved out with an independent entrance so that it can be let out. He may even arrange for his children and family to stay there, so that they are nearby, an arrangement which can be mutually supportive. He may construct his residence in such a manner that in case of a future need he may be able to dispose of a part thereof as an independent house. There may be several such considerations for a person while constructing a residential house. We are therefore, unable to see how or why the physical structuring of the new residential house, whether it is lateral or vertical, should come in the way of considering the building as a residential house. We do not think that the fact that the residential house consists of several independent units can be permitted to act as an impediment to the allowance of the deduction under Section 54/54F. It is neither expressly nor by necessary implication prohibited."

5.1 After going through the aforesaid judgement of the Hon'ble Delhi High Court in the case of CIT vs. Gita Duggal (Supra) and the orders of the revenue authorities on the issue in dispute, I am of the view that the issue in dispute is squarely covered in favour of the assessee by the aforesaid decision of the Hon'ble Delhi High Court in the case of CIT vs. Gita Duggal. Therefore, respectfully following the aforesaid judgment of

the Hon'ble High Court of Delhi, I delete the addition in dispute and allow the appeal of the assessee.

6. In the result, the appeal filed by the assessee stands allowed.

Order pronounced on 06/12/2019.

Sd/-

[H.S. SIDHU]
JUDICIAL MEMBER

Date 06/12/2019
"SRB"
Copy forwarded to: -

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

TRUE COPY

By Order,

Assistant Registrar, ITAT, Delhi Benches