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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ ITA 66/2020

THE PR. COMMISSIONER OF INCOME TAX -3
..... Appellant

Through: Mr. Aseem Chawla, Sr. Standing Counsel with Ms. Pratishtha Choudhary and Mr. Aditya Gupta, Advs.

versus

LATE SH. FRANCIS WACZIARG ((THROUGH - LEGAL HEIR- MS. AUDE PRIYA DONATELLE WACZIARG)
..... Respondent

Through: Mr. Ved Jain and Mr. Nischay Kantoor, Advs.

CORAM:
HON'BLE MR. JUSTICE YASHWANT VARMA
HON'BLE MR. JUSTICE PURUSHAINDRA KUMAR KAURAV

O R D E R

% **13.03.2024**

PER: PURUSHAINDRA KUMAR KAURAV, J.

1. The instant appeal has been preferred by the Revenue under Section 260A of the Income Tax Act, 1961 [**"Act"**] against the order of the Income Tax Appellate Tribunal [**"ITAT"**] dated 29 July 2019 for the Assessment Year 2007-08.

2. The facts of the case would show that the respondent filed his Income Tax Return [**"ITR"**] on 12 October 2007, declaring his income to the tune of ₹73,06,002/-. The said ITR was processed in accordance with the provisions of Section 143(1) of the Act and a notice under Section 143(2) was duly issued to the respondent as soon as his case was picked up for scrutiny.

3. Thereafter, an assessment order was passed by the Assessing Officer [**"AO"**] under Section 143(3) read with Section 147 of the Act on 30 December 2011. The total income of the petitioner in the assessment order was determined to be ₹5,85,36,320/-, after making an addition on account of sale of paintings which was treated by the AO as profit under adventure in nature of trade.

4. Being aggrieved by the assessment order, the respondent, on 11 June 2012, filed an appeal before the Commissioner of Income Tax (Appeals) [**"CIT(A)"**], wherein, on the basis of the additional evidences made available under Rule 46A of the Income Tax Rules, 1962 [**"Rules"**], the addition made by the AO was deleted. While deciding the case in the favour of the respondent, the CIT(A) was of the opinion that some of the concerned paintings were received by the respondent in the form of gifts from his mother, whereas, others were purchased by the respondent himself in 1980s and thus, they fell into the category of personal effects.

5. The order passed by the CIT(A) was appealed before the ITAT, which rejected the appeal of the Revenue on the ground that the paintings were personal effects and consequently, excluded from capital assets under Section 2(14)(ii) of the Act.

6. Learned counsel appearing on behalf of the Revenue submits that the ITAT was not justified in concurring with the opinion of the CIT(A) as no opportunity of examination of additional evidence produced by the respondent was given to the AO under Rule 46A of the Rules. According to him, since the CIT(A) has erroneously admitted the additional evidences, therefore, there is no reasonable basis for deleting the addition made by the AO. He further submits that while being aware of the proposed amendment in the Finance Act,

2007, which came into force before 30 June 2007 but inserted with effect from 1 April 2008 and which had brought paintings into the definition of capital asset, the respondent disposed of the paintings before the said enactment in order to escape taxation on the sale transactions in question.

7. He further contends that had the additional evidences been produced before the AO, instead of the same being made available for the first time before the CIT(A), the AO would have been well equipped to take a holistic view in the changed circumstances of the case, if any.

8. Learned counsel appearing on behalf of the respondent, on the other hand vehemently opposes the submissions advanced by the learned counsel for the Revenue to contend that the additions cannot be made only on the basis of the conjectures and surmises and particularly, in the absence of any evidence to prove that the transactions in question were sham or pre-planned transactions.

9. He controverted the submissions canvassed by the respondent regarding the admissibility of additional evidence by the CIT(A) and submitted that sub-Rule 4 to Rule 46A of the Rules vests the authority in the CIT(A) to call for any additional evidence and admit the same for the adjudication of the case.

10. We have heard the learned counsel appearing on behalf of the parties and perused the record.

11. The limited issue which the Revenue proffers for our consideration is whether the CIT(A) was justified in accepting the additional material under Rule 46A of the Rules without extending an opportunity to the AO to rebut the said material.

12. Undisputedly, the sale transaction in question was carried out before the amendment of 2007 came into effect and which brought a change in the clause pertaining to personal effects by treating the paintings to be a capital asset. A bare glance at the order passed by the ITAT would indicate that the respondent is not involved in any trade or business of paintings, rather it was his hobby which led to the collection of the said paintings. It is further noted by the ITAT that the respondent keeps the paintings as part of his personal effects and thus, the concerned incidence of sale would fall within the meaning of the expression adventure in the nature of trade.

13. So far as the issue regarding arbitrary exercise of powers by the CIT(A) under Rule 46A of the Rules is concerned, a perusal of sub-Rule 4 to Rule 46A succinctly clarifies the position of law that the CIT(A) was inherently empowered to direct the respondent to produce documents to enable him to dispose of the appeal or for any other substantial cause. The relevant provision of the Rules is extracted as under:-

> **"46A. Production of additional evidence before the Deputy Commissioner (Appeals) and Commissioner (Appeals).** - (1) The appellant shall not be entitled to produce before the Deputy Commissioner (Appeals) or, as the case may be, the Commissioner (Appeals), any evidence, whether oral or documentary, other than the evidence produced by him during the course of proceedings before the Assessing Officer, except in the following circumstances, namely:-
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> (a) where the Assessing Officer has refused to admit evidence which ought to have been admitted ; or
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> (b) where the appellant was prevented by sufficient cause from producing the evidence which he was called upon to produce by the Assessing Officer ; or
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> (c) where the appellant was prevented by sufficient cause from producing before the Assessing Officer any evidence which is relevant to any ground of appeal ; or

(d) where the Assessing Officer has made the order appealed against without giving sufficient opportunity to the appellant to adduce evidence relevant to any ground of appeal.

(2) No evidence shall be admitted under sub-rule (1) unless the Deputy Commissioner (Appeals) or, as the case may be, the Commissioner (Appeals) records in writing the reasons for its admission.

(3) The Deputy Commissioner (Appeals) or, as the case may be, the Commissioner (Appeals) shall not take into account any evidence produced under sub-rule (1) unless the Assessing Officer has been allowed a reasonable opportunity-

(a) to examine the evidence or document or to cross-examine the witness produced by the appellant, or

(b) to produce any evidence or document or any witness in rebuttal of the additional evidence produced by the appellant.

(4) Nothing contained in this rule shall affect the power of the Deputy Commissioner (Appeals) or, as the case may be, the Commissioner (Appeals) to direct the production of any document, or the examination of any witness, to enable him to dispose of the appeal, or for any other substantial cause including the enhancement of the assessment or penalty (whether on his own motion or on the request of the Assessing Officer) under clause (a) of sub-section (1) of section 251 or the imposition of penalty under section 271."

14. Therefore, the contentions raised by the Revenue is unsustainable and do not merit any consideration.

15. Further, the ITAT has rightly relied upon the decision of this Court in the case of **Faiz Murtaza Ali v. CIT** [2013 SCC OnLine Del 717] to conclude that the sale transactions in question would not attract tax prior to 01.04.2008. The relevant paragraphs of the said decision are reproduced as under:-

"11. Keeping this in mind, we have to examine whether, in the facts of the present case, the articles in question could be regarded as personal effects. The only evidence that is forthcoming is the affidavit of the assessee where he has indicated that the said articles were for his personal use. He has also indicated that these articles were received by him from two streams, one, by way of inheritance from his father and uncle and the other, by way of a gift deed from his aunt. Whatever be the mode of acquisition of articles, the fact, as stated in his affidavit, is that these were in his personal use.

12. We may also refer to Himatlal C. Valia v. CIT (2001) 248 ITR 262 (Guj) where the Gujarat High Court, when confronted with the question as regards the frequency of use before any article could be regarded as a "personal effect", observed that it would be difficult to understand as to why there should be such rationing of personal effects of the assessee for the purpose of giving the benefit of the exclusion clause contained in section 2(14). In that case, the issue was with regard to 790 pieces of dinner sets. The Gujarat High Court held that if the assessee had more than one dinner set which were intended to be used by him and his family members, as and when dinner parties were arranged, there was nothing in the provisions of section 2(14) to enable courts to assign a restricted meaning to the words "personal effects" used in that provision. Therefore, the extent of use was held not to be a relevant factor.

13. The Supreme Court in CIT v. H. H. Maharani Usha Devi [1998] 231 ITR793 (SC) had also observed that the High Court had rightly held that the frequency of use of the property must necessarily depend on the nature of the property and that merely because from the nature of the property, it could be used on ceremonial occasions only, it did not follow that the property was not held by the assessee for personal use.

14. Looking at the totality of circumstances we are of the view that the assessee has been able to show that the articles in question were inherited and/or received by him by way of gift. Those articles were movable properties. They did not include any jewellery and they had been held for personal use by the assessee and they were subsequently sold by him to various buyers. The fact that these articles were held by him for personal use has been indicated in the affidavit filed by the assessee before the Assessing Officer. No material has been brought out by the Assessing Officer or the Revenue to indicate that the affidavit is false. Therefore, on the basis of evidence on record, the articles in question ought to have been held to be "personal effects" of the assessee.

15. With regard to the amendment to section 2(14), which has been brought about by the Finance Act, 2007, with effect from April 1, 2008, and which alters the clause pertaining to "personal effects" in the manner indicated below, we may say straightaway that the same would not apply as it has prospective operation with effect from April 1, 2008, whereas in the present case the assessment year is 2002-03. The amendment that has been brought about in section 2(14)(ii) is as follows:

> "(ii) personal effects, that is to say, movable property (including wearing apparel and furniture) held for personal use by the assessee or any member of his family dependent on him, but excludes—

(a) jewellery ;
(b) archaeological collections ;
(c) drawings ;
(d) paintings ;
(e) sculptures ; or
(f) any work of art.

Explanation.—For the purposes of this sub-clause, 'jewellery' includes—

(a) ornaments made of gold, silver, platinum or any other precious metal or any alloy containing one or more of such precious metals, whether or not containing any precious or semi-precious stone, and whether or not worked or sewn into any wearing apparel ;

(b) precious or semi-precious stones, whether or not set in any furniture, utensil or other article or worked or sewn into any wearing apparel ; "

It will be seen that with effect from April 1, 2008, even paintings, sculptures, works of art, archaeological collections and drawings, in addition to jewellery, have been excluded from the expression "personal effects". But that would be applicable from April 1, 2008, which is much after the assessment year 2002-03.

16. In view of the foregoing discussion, the question which has been framed for our consideration is answered in favour of the assessee and against the Revenue."

[Emphasis supplied]

16. In view of the aforesaid, we are of the considered opinion that the order of the ITAT does not suffer from any infirmity and since no substantial question of law arises, the instant appeal fails and is accordingly dismissed. Pending application(s), if any, are also disposed of.

YASHWANT VARMA, J.

PURUSHAINDRA KUMAR KAURAV, J.

MARCH 13, 2024/MJ