

IN THE INCOME TAX APPELLATE TRIBUNAL “SMC” BENCH, MUMBAI

BEFORE SHRI A.K. GARODIA ,AM

आयकर अपील सं./I.T.A. No.7047/Mum/2014

(निर्धारण वर्ष / Assessment Year: 2007-08)

Capt. S.K. Khurana, 132-C, Mittal Court, Nariman Point, Mumbai-400 021.	बनाम/ Vs.	Income Tax Officer 12(3)(2), Aaykar Bhavan, Mumbai.
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. AADPK 8375K		
(अपीलार्थी /Appellant)	:	(प्रत्यर्थी / Respondent)

अपीलार्थी की ओर से / Appellant by	:	Shri B.S.Bist
प्रत्यर्थी की ओर से/Respondent by	:	Shri M. Subramaniam

सुनवाई की तारीख / Date of Hearing	:	30/11/2015
घोषणा की तारीख / Date of Pronouncement	:	04/12/2015

आदेश / ORDER

PER A. K. GARODIA, A. M:

This appeal by the assessee is directed against the order dated 16/09/2014 of Commissioner of Income Tax (Appeals)-23, Mumbai (Hereinafter called as the CIT(A)) for assessment year 2007-08.The assessee has raised following ground of appeal:

- 1. The learned Assessing Officer 12(3)(2), Mumbai erred in law and on facts in treating profits on sale of PAINTING as normal income to be taxed at normal rate.*

2. *For the Assessment Year 2007-2008 as per Sec.2(14) of Income Tax Act, 1961 Painting is not a capital assets and hence profit on sale not liable to tax at all.*
 3. *On the facts and circumstances of the case Assessing Officer view is not according to law.*
 4. *Because learned CIT(A) -23 erred in law and in facts confirming the view of learned Assessing Officer that sale of Painting is normal income whereas sale of Painting is not capital assets up to Year Ended 31/03/2007.*
1. It was submitted by the ld. AR of the assessee that the issue regarding chargeability of tax on short term capital gain arising on sale of painting is covered in favour of assessee by the judgment of Hon'ble Madras High Court rendered in the case of CIT Vs. Kuruvilla Abraham as reported in 88 DTR 291 (Madras). He also placed reliance on following judgments of Hon'ble Bombay High Court:-
- a) Indian Del. P. Ltd. vs. CIT, 349 ITR 330 (Bom)
 - b) Sanchit Software and Solutions P. Ltd. vs. CIT, 349 ITR 404 (Bom).
2. As against this, the ld. DR of the revenue supported the order of CIT(A).
3. I have considered the rival submissions. I find that in the present case, the assessee offered Short Term Capital Gain to tax totaling of Rs.5,59,611/- including an amount of Rs.2.75 lakhs being short term capital gain on account of sale of painting at tax rate of 10%. Admittedly, the short term capital gain being profit on sale of shares amounting to Rs.1,90,167/- and profit on sale of Mutual Fund Rs.94,444/- are liable to tax at the rate of 10% only. But in respect of gain on sale of painting of Rs. 2.75 lakhs, the AO initiated the present proceedings u/s 154 and in the same, it was held by the AO as per his order dated 03.01.2012 that the gain of Rs.2.75 lakhs on sale of painting

is chargeable to tax at normal rate and not at 10%. During these proceedings, it was submitted by the assessee before the AO also that as per section 2 (14), personal effects is not a capital asset and this section was amended by Finance Act 2007 w.e.f. 1.04.2008 as per which, Paintings were specifically excluded from the definition of Personal Effects which is not a capital asset as per section 2(14) but in the present case, the assessment year involved is AY 2007-08 i.e. before this amendment and therefore, gain arising to the assessee on sale of painting is not liable to tax at all. But the AO rejected this contention of the assessee by stating in his order passed by him u/s 154 that the assessee has brought the mistake to notice only when the notice to rectify to tax short term capital gain tax on sale of painting was sought. Hence, it is seen that this is not the case of AO that as per the provisions of section 2 (14) as were on the statute book during the relevant period i.e. before the amendment by the Finance Act 2007 with effect from A. Y. 2008 – 09, painting is a capital asset and it is not personal effects. The order of learned CIT(A) is this that the assessee did not raise any claim in the course of assessment proceeding that the painting in question is representing his personal effects held by him for personal use and it is not capital asset. Therefore, it is seen that as per impugned order of CIT(A) also, it is not a case made out that painting in question is not personal effect and therefore, it had to be accepted that painting in present case is personal effect. In that situation, the order of the AO u/s 154 to increase the rate of tax chargeable on such gain arising on sale of painting cannot be approved at normal rate. Since the assessee has himself offered the profit on sale of painting as liable to tax at the rate of 10% and no appeal was filed in original assessment proceedings and this claim is made in section 154 proceedings initiated by the A.O. to charge tax at normal rate as against 10% rate offered by the assessee, it cannot be held in the present proceedings that no tax is chargeable on this profit on sale of painting but action of AO of increasing the tax rate from 10% to normal rate also cannot be approved. In the facts of the present case when it is seen that the profit on sale of painting is actually not liable to capital gain tax because this

is not a capital of asset, it cannot be subjected to tax at normal rate of tax only because the assessee has wrongfully offered the same to tax at the rate of 10%. Hence, on this aspect, we hold that the rectification made by the AO u/s 154 to the effect that normal rate of tax should be applied in respect of short term capital gain on sale of painting is unjustified and therefore, I reverse the order of Id. CIT(A) on this issue and it is held that whatever tax is paid by the assessee on the profit on sale of painting be accepted without making any further addition in the tax liability of the assessee on this account. I want to make in clear that the returned income cannot be reduced in 154 proceedings initiated by the A.O.

In the result, the assessee's appeal is allowed in the terms indicated above.

Order pronounced in the open court on 4th December, 2015

Sd/-

(A.K. GARODIA)

लेखा सदस्य / Accountant Member

मुंबई Mumbai; दिनांक Dated : 04 .12.2015
Ps. Ashwini Gajakosh

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent
3. आयकर आयुक्त(अपील) / The CIT(A)
4. आयकर आयुक्त / CIT - concerned
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard File

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt. Registrar)

आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai