

**IN THE INCOME TAX APPELLATE TRIBUNAL  
MUMBAI BENCHES "A", MUMBAI**

**BEFORE SHRI G.S. PANNU (AM) AND SHRI RAM LAL NEGI (JM)**

**ITA No. 3706/MUM/2012  
Assessment Year: 2007-2008**

Mr. Abhay Kumar S. Maskara, Gandhi Mansion, 2 <sup>nd</sup> Floor, Bomanji Master Road, Mumbai - 400002  PAN: AABPM6281G	<b>Vs.</b>	The Income Tax Officer-14(1)(1), 204, 2 <sup>nd</sup> Floor, Earnest House, Nariman Point, Mumbai - 400021
<b>(Appellant)</b>		<b>(Respondent)</b>

**&**

**ITA No. 3430/MUM/2012  
Assessment Year: 2007-2008**

The Income Tax Officer-14(1)(1), 204, 2 <sup>nd</sup> Floor, Earnest House, Nariman Point, Mumbai - 400021	<b>Vs.</b>	Mr. Abhay Kumar S. Maskara, Gandhi Mansion, 2 <sup>nd</sup> Floor, Bomanji Master Road, Mumbai - 400002  PAN: AABPM6281G
<b>(Appellant)</b>		<b>(Respondent)</b>

Revenue by : Shri Rajesh Kumar Yadav (DR)  
Assessee by : Shri Madhur Aggarwal (AR)

Date of Hearing: 16/03/2018  
Date of Pronouncement: 27/04/2018

**ORDER**

**PER RAM LAL NEGI, JM**

These are the cross appeals filed by the assessee and the revenue against the order dated 27/03/2012 passed by the Commissioner of Income Tax (Appeals)-28, Mumbai, pertaining to the assessment year 2007-2008,

whereby the Ld. CIT (A) has partly allowed the appeal filed by the assessee against assessment order passed u/s 143 (3) of the Income Tax Act, 1961 (for short 'the Act').

2. Brief facts of the case are that the assessee having sources of income from bank interest, article writing and dividend, filed its return of income for the assessment year under consideration declaring the total income of Rs. 86,203/-. The case was selected for scrutiny and in response to the notices u/s 143 (2) and 142 (1) the authorized representative (AR) appeared before the AO and filed the relevant details called for by the AO. It was noticed that in the P&L account, the assessee had credited Rs. 1,78,92,633/- as long term capital gain (LTCG) and short term capital gain (STGC) on sale of painting, interest income of Rs. 86,277.87, profession fees on articles writing Rs. 5,000/- and dividend income of Rs. 1,300/-. Against the said income, the assessee had claimed bank charges of Rs. 1515.90 and declared net profit of Rs. 20,633,285/. On being asked the AR contended that money receivable on sale of painting was not offered to tax because paintings were excluded from personal effects only in the year 2007 by finance Act 2007, w.e.f. 01.04.2008 and the assessee's case pertains to pre amendment period. The assessee was asked to file the details such as purchase and sale of each item claimed as personal effects, and further asked to explain as to why the painting was purchased in the capacity of NRI and taken in the capital account for the year ending 31.03.2007, why the advance tax was paid, why in the return of income exempt column was kept blank and why in P&L account it was shown LTCG/STCG and not in computation. The authorized representative (AR) submitted that the appellant/assessee started collecting art/paintings paintings in the year 1996/97. The assessee collected twelve paintings up to the year 1998-99. The assessee also reflected the same in the balance sheet under the head 'Art Collection'. In the year 1999-2000 the appellant left for U.S. Since, painting was his passion, he carried the paintings along with him to the

U.S. and displayed his collections of paintings. He continued to stay there and became Non Resident. He purchased four paintings in U.S in the year 2002-03, four paintings in the subsequent year and ten paintings in the year 2004-05. These paintings were purchased out of the salary from full time employment in the U.S. From 1999-2000 to 2004-05 the assessee was a non resident. The assessee had not sold even a single painting from 1996 to 2005. The assessee came back to India in the year 2005-06 and brought the entire collection. No duty was charged by the department of Customs treating the same as personal belongings of the assessee.

3. The assessee arrived in India for permanent stay on 23.12.2004. The sale of paintings to different buyers during the financial year relevant to the assessment year under consideration is not disputed except in one case in which confirmation was not filed. The AR further explained that tax was paid keeping in view that there may be some taxable income. No income was claimed as exempt but it was claimed as non taxable. The costs of paintings are shown in balance sheet as assets and after sale the difference is shown as gain. The assessee further submitted the details of purchases of paintings and source of income. The AO after hearing the assessee in the light of the documents on record inter alia made addition of Rs. 1,96,63,977/- on account of net profit earned on sale of paintings and credited in capital account under the head 'business income'.

4. The assessee challenged the assessment proceedings before the CIT(A). Since, the AO had treated the amount received from one of the buyers as unexplained credit in the absence of confirmation from the said buyer, the assessee submitted confirmation from the said buyer. The said evidence was forwarded to AO for verification. The AO after verification accepted the genuineness of the credit. Accordingly, the CIT(A) directed the AO to give necessary relief in this regard. However, held that the paintings in question do not come within the meaning of personal effects but fall under the head

capital asset and the assessee has earned capital gain from sale of the paintings in question through various methods including public auction, through galleries and through personal contacts. Against the said findings of the Ld. CIT(A) the assessee is in appeal before this Tribunal.

5. The assessee has raised the following effective grounds of appeal against the impugned order passed by the Ld. CIT (A):-

1. *“The learned Commissioner of Income Tax (Appeals) erred in holding the income earned on sale of painting was chargeable under the head Capital Gains and was not exempt because the painting were not personal effects and thereby covered by the term “capital asset” u/s 2(14) of the Income Tax Act, 1961.*
2. *The learned Commissioner of Income Tax (Appeals) overlooked the fact that the amendment bringing “paintings” into the ambit of definition of “Capital Asset” u/s 2(14) came in force w.e.f. 1.4.2008 & in the A.Y. 07/08 appellant had no liability to pay tax on gains arising on sale of paintings.*
3. *The learned Commissioner of Income Tax (Appeals) overlooked the evidence provided by appellant such as port trust receipt showing paintings as household goods and other evidence.*
4. *The Assessing Officer be directed to exclude from the total income, income derived on sale of paintings being personal effects.”*

6. The Ld. counsel for the assessee submitted that the Ld. CIT (A) has erred in holding the income from sale of painting is chargeable under the head capital gains holding that paintings do not fall under the category personal effects. The Ld. counsel further submitted that the Ld. CIT (A) has ignored the fact that the paintings were brought within the ambit of the definition of capital assets u/s 2 (14) of the Act, by the Finance Act, 2007 applicable w.e.f. 01.04.2008 and since the assessee’s case pertains

to the assessment year 2007-08, he was not required to pay any tax on gains arising on sale of paintings. The Ld. counsel further pointed out the Ld. CIT (A) has overlooked the evidence provided by the appellant such as port trust receipt showing paintings as household goods and other evidence and the statutory provisions. Accordingly, the Ld. CIT (A) has wrongly held that the gains arising on the sale of the paintings are capital gains of the assessee. To substantiate the contention his contentions, the Ld. counsel relied on the following decisions:

1. Faiz Murtaza Ali Vs CIT (Taxmann. Com 232 Delhi HC)
2. CIT Vs Kuruvilla Abraham (33Taxmann. Com 450 Madras HC)
3. ACIT Vs MS. Dilnavaz S. Variava (87ITD 113-Mumbai ITAT)
4. Kurush N. Jungalwala Vs ITO (ITA No. 2398/Mum/2008 dt. 8.12.2003)
5. ACIT Vs Suresh Sethi (ITA No. 763/Kol/2012 dt. 15.3.2013)
6. Renu Roy Vs ITO (ITA Nos. 491-496/Kol/2012 dt. 28.5.2015)
7. Suvapasanna Bhattacharya Vs. ACIT (ITA No. 1303/KOI/2010 dt. 6.11.2015)

7. On the other hand, the Ld. Departmental Representative (DR) relying on the findings of the AO submitted that the AO has rightly held that money earned on sale of paintings as per the statement filed by the assessee except paintings sold to Mr. Harish Chawla for Rs. 31,00,000/- is taxable as business income as against the assessee's claim as exempt income on the ground of personal effect which is an afterthought. Hence, the CIT (A) has wrongly held that the income received by the assessee from sale of the paintings comes within the meaning of capital gain. So far as the paintings sold to Mr. Harish Chawla is concerned, the AO has rightly treated the amount as unexplained cash credit u/s 68 of the Act. The Ld. DR relied on the judgment of the Hon'ble Supreme Court passed in the case of HH Maharaja Rana Hemant Singh Ji Vs. CIT 103 ITR 61 and the judgment of Hon'ble Madras High court in R.

Ramanathan Chettiar vs. Commissioner of Income Tax [1985] 20 Taxman 52(Mad).

8. We have heard the rival submissions and also perused the material on record. The only grievance of the assessee is that the Ld. CIT (A) has wrongly held the income from sale of paintings in question is taxable under the head capital gains. The contention of the assessee is that the money received from the sale of paintings is neither the capital gain nor the business income, therefore not taxable under any of the heads being 'personal effects' held for personal use by the assessee or any member of his family which was not within the ambit of the definition of capital assets during the relevant period. The paintings were excluded from the definition of 'personal effects' by the Financial Act 2007 applicable w.e.f. 01.04.2008. Prior to its substitution sub-clause (ii) as substituted by the Finance Act, 1972 w.e.f. 01.04.1973 the wordings of the sub-clause were as under:-

*'(ii) Personal effects, that is to say, moveable property (including wearing apparel and furniture but excluding jewellery) held for personal use by the assessee or any member of his family dependant on him.*

*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 way wearing apparel'*  
*For the meaning of the expressions "held", "personal effects" and "personal use".*

9. The aforesaid sub-clause (ii) has been substituted by the Finance Act 2007, applicable w.e.f. 01.04.2008, which reads as under:-

*“(ii) Personal effects, that is to say, moveable property (including wearing apparel and furniture but excluding jewellery) held for personal use by the assessee or any member of his family dependant on him, but excludes-*

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

*Explanation-.....”*

10. By the said amendment the legislature has brought the paintings and some other articles within the ambit of the capital asset. The said amendment was therefore made applicable w.e.f. 01.04.2008, i.e. from the assessment year 2008-09 and since the paintings in question were sold by the assessee in the financial year 2006-07, the same cannot be treated as capital assets, therefore the income from sale of the paintings cannot be treated as capital gain. In the case of *Faiz Murtaza Ali Vs CIT(supra)* the Hon’ble Delhi High Court has held that the amendment to section 2(14) of the Act by the Finance Act, 2007 w.e.f 01.04.2008 which alters the clause pertaining to ‘personal effects’ would not apply retrospectively. In *CIT Vs Kuruvilla Abraham (supra)* the Hon’ble Madras High Court has upheld the findings of the ITAT that the paintings can be considered as capital asset only with effect from 01.04.2008 by virtue of the finance Act 2007. The observations of the Hon’ble High court are reproduced hereunder:-

*“14. Hence, we find no merits in the appeal as we are in full agreement with the findings recorded by both the appellate authorities. Consequently, the tax case appeal is dismissed and the question of law is answered that the paintings are excluded within the meaning of personal effects and included within the scope of capital asset only*

*with effect from the assessment year 2008-09 onwards and not in respect of the earlier periods. No costs.”*

11. Hence, in view of the findings of the High Courts in the cases referred/discussed in the foregoing paras, the paintings in question during the year relevant to the assessment year under consideration were outside the definition of capital assets, therefore the sale proceeds of the said paintings do not fall under the category of capital gain to tax under the head income from capital gains. The cases referred by the Ld. DR are distinguishable on facts, hence not applicable to the present case. It is pertinent to mention here that the revenue has itself challenged the impugned order on the ground that the Ld. CIT(A) has wrongly treated the paintings in question as capital asset. In other words, the revenue has admitted that paintings in question were ‘personal effects’ during the year relevant to the assessment year and the same were excluded from ‘personal effects’ w.e.f. 01.04.2008. Hence, find merit in the arguments of the Ld. counsel for the assessee that the Ld. CIT(A) has wrongly held that the income earned on sale of paintings are chargeable to tax under the head ‘capital Gains’ as the amendment bringing paintings within the ambit of the definition of capital asset u/s 2(14) of the Act came into force with effect from the assessment year 2008-09 and the assessee’s case pertains to the assessment year 2007-08.

12. In the light of the aforesaid discussion, we are of the considered view that the issue involved in this case is squarely covered by the judgments of the Hon’ble High Courts discuss above. We therefore, set aside the impugned order passed by the Ld. CIT(A) and allow the sole ground of appeal of the assessee.

**ITA No. 3430/MUM/2012 (Assessment Year: 2007-2008)**

The revenue has raised the following effective grounds of appeal against the impugned order passed by the Ld. CIT (A):-

1. *“The Ld. CIT (A) erred in law by treating the addition made by A.O as a capital gain instead of business income, ignoring the fact that the amendments were made by Finance Act 2007 in section 2 (14)(ii) w.e.f. 1.4.2008 wherein the painting has been excluded from the definition of “personal effect” holding as a capital asset, whereas, as legal corollary of the above amendment, painting remains to be held as “personal effect” in the year of computation, resulting into not as capital asset and the gain, therefore, on the sale of such painting does not come within the purview of capital gain.*
2. *The Ld. CIT (A) erred in law as well as on the fact to treat the addition made by the A.O. as a capital gain in place of business income ignoring the fact that the assessee involved in systematic activities of purchase and sale of paintings in the year under consideration which is to be treated as a business income only.”*

2. The revenue has challenged the impugned order on the ground that the Ld. CIT(A) has wrongly held the income from sale of paintings in question is taxable under the head ‘capital gains, and not under the head ‘Income from Business’. Before us, the Ld. departmental representative (DR) relying on the assessment order submitted that the assessee had shown the purchase of paintings as investments in the Balance Sheet up to AY 2005-06. However, in the AY 2006-07 the same was shown as personal assets/collection. Hence, the AO has rightly held that the assessee’s intention clearly shows that the investments were made for doing business in paintings through Gallery Maskara Pvt. Ltd. in which the assessee was a director. The assessee’s plea that the during the relevant period paintings was not excluded from the ambit of personal effect, therefore the proceeds of the sale of paintings were not taxable, is not plausible as huge purchases of paintings and sales thereof cannot be held as personal effect.

3. On the other hand, the Ld. counsel for the assessee submitted that the appellant/assessee started collecting art/paintings in the year 1996/97. The assessee collected twelve paintings up to the year 1998-99. The assessee also reflected the same in the balance sheet under the head 'Art Collection'. In the year 1999-2000 the appellant left for U.S. Since, painting his passion, he carried the paintings along with him to the U.S. and displayed his collections of paintings. He continued to stay there and became Non Resident. He purchased four paintings in U.S in the year 2002-03, four paintings in the subsequent year and ten paintings in the year 2004-05. These paintings were purchased out of the salary from full time employment in the U.S. From 1999-2000 to 2004-05 the assessee was a non resident. The assessee had not sold even a single painting from 1996 to 2005. The assessee came back to India in the year 2005-06 and brought the entire collection. The customs department did not charge any duty treating the same as personal belongings of the assessee. The assessee sold one painting in the AY 2005-06. One painting was sold in the AY 2006-07 and claimed the income as capital gain, however, the claim was withdrawn subsequently being a personal effect. In the assessment year 2006-07, one painting was sold back to the party from whom it was purchased as the painting was subjected to certain restoration work before it was sold to the assessee and this fact was not disclosed at the time of sale. In the assessment year 2007-08, the paintings were sold by the assessee for personal reasons and thereafter no painting was sold for next two years. Therefore, it can be inferred from the conduct of the assessee that the assessee was not in business of dealing in paintings. Hence, it is amply clear that the assessee neither purchased nor sold any painting with a view to earn profit.

4. We have heard the rival submissions and perused the material on record. The only grievance of the revenue is that the Ld. CIT (A) has wrongly held the addition made by AO as capital gain instead of business income. The assessee

sold paintings worth Rs. 2,05,42,224/- during the year relevant to the assessment year under consideration. The only question to be decided in the light of the contention of the parties is that whether the sale of paintings in question by the assessee amounts to business so as to bring the income from sale of the paintings to tax under the head business income or the income so earned was not at all taxable. In order to ascertain whether the purchases and sales of the paintings in question by the assessee amounts to business activity or the same was simply sale of personal effects by the assessee, it is necessary to know real intention behind the transaction, mode and manner of purchases and sale of paintings. As contended by the assessee, the appellant started collecting arts/paintings since 1996-97. The appellant purchased paintings for the first time in the assessment year 1996-97. In the year, 1999-2000, the appellant left for US since paintings were his passion and he was so connected with the paintings he carried the same along with him to the United States. The appellant stayed in United States and became a non-resident. He purchased four paintings in the year 2002-03 and four paintings in the subsequent years and ten paintings in the year 2004-05. The appellant remained posted as Marketing Manager in Microsoft, he did not sell any painting during the aforesaid period. In the year 2005-06, the assessee came back to India and also brought the paintings/collections. No custom duty was levied on the said collection being the personal belongings of the assessee. So far as the sale of his paintings is concerned, the assessee sold one painting in the assessment year 2005-06. This painting was made by the assessee himself and the same was treated by the assessee as professional income. In the assessment year 2006-07 the assessee sold one painting and in its return of income offered the price of painting as capital gain, however, the same was withdrawn claiming personal effects after filing revised return. So the conduct of the assessee during the A.Y. 2005-06 and 2006-07 does not suggest that the assessee had sold the paintings as a businessman. So far as the sale of

paintings in the A.Y. 2007-08 is concerned, the AO treated the sale proceeds as income from the business, whereas the Ld. CIT (A) has held the proceeds as capital gain. Since, the paintings were excluded from the list of personal effects by the Finance Act, 2007 w.e.f. 01.04.2008 as discussed in the assessee's case aforesaid, the proceeds cannot be termed as capital gain. On the other hand, the AO has held that the income earned from sale of the paintings is business income. It is evident from the record that the assessee did not sell any painting after the financial year 2006-07 till assessment year 2010-11. As pointed out by the Ld. CIT (A), the details of last decade starting from financial year 1996-97 to F.Y. 2006-07 show five painting were purchased during F.Y. 1996-97 and F.Y. 1997-98 while two paintings were purchased during the F.Y. 1998-99. Then for the next three years there was no purchased of any painting but from F.Y. 2002-03, the assessee started purchasing paintings. During the F.Y. 2002-03 the assessee purchased four paintings. Similarly four paintings were purchased in the F.Y. 2003-04 In the F.Y. 2004-05 he purchased 10 paintings in the F.Y. 2005-06 the assessee purchased 21 paintings and in the F.Y. 2006-07 the assessee purchased four paintings. Out of the 55 paintings available with him he sold 31 paintings during the year relevant to the assessment year under consideration. So, from the aforesaid facts, the Ld.CIT (A) has held that the assessee was not in the business of dealing in paintings. Regarding the observations of the AO that the sale of paintings can be treated as adventure in the nature of business the Ld. CIT (A) has held that the assessee is an art lover and not interested in parting with the paintings which he had acquired over the years. Further, the assessee had not shown as stock in trade in his books of accounts but had shown as art collection. The Ld. CIT (A) has further held that the assessee is not in the business of dealing in painting. The sale of paintings by the assessee on account of personal reasons would not constitute his dealings as adventure in the nature of trade. The assessee had shown the profit arising from the paintings as long term capital gain and short term capital gain

in the P&L account does not make the assessee liable for tax under the head income from capital gain. Since, we do not find merit in the contention of the Ld. DR, we agree with the findings of the Ld. CIT (A) that the sale of paintings by the assessee would not amount to adventure in the nature of trade or the assessee was in the business of purchase/sale of the paintings. Hence, we hold that the since the paintings were personal effects during the relevant period and the assessee sold the for personal reasons, the income earned from the sale of paintings during the financial year relevant to the assessment year under consideration, does not fall under the head 'Income from Business'. We therefore, dismiss this ground of appeal of the revenue and direct the AO to exclude the income derived on sale of the paintings in question from the total income of the assessee.

In the result, appeal filed by the revenue is dismissed and the appeal filed assessee is allowed.

Order pronounced in the open court on 27<sup>th</sup> April, 2018.

*Sd/-*  
(G.S. PANNU)  
ACCOUNTANT MEMBER  
मुंबई Mumbai; दिनांक Dated: 27/04/2018

*Sd/-*  
(RAM LAL NEGI)  
JUDICIAL MEMBER

*Alindra PS*

**आदेश 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
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai

6. गार्ड फाईल / Guard file.

सत्यापित प्रति //True Copy//

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt. Registrar)  
आयकर अपीलीय अधिकरण, मुंबई / **ITAT, Mumbai**