IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH : B : NEW DELHI

BEFORE SHRI R.K. PANDA, ACCOUNTANT MEMBER
AND
SHRI KULDIP SINGH, JUDICIAL MEMBER

ITA No.4728/Del/2012
Assessment Year: 2007-08

DCIT, Circle-11(1), CR Building, New Delhi.	Vs	Francis Wacziarg, A-58, Nizamuddin East, New Delhi. PAN: AAEPW9332M
(Appellant)		(Respondent)

Assessee by	:	Shri Ved Jain, Advocate, S/Shri Rishabh Jain, Manoj Piyush & Hardik Arora, CAs
Revenue by	:	Ms Ashima Neb, Sr. DR
Date of Hearing	:	17.07.2019
Date of Pronouncement	:	29.07.2019

ORDER

PER R.K. PANDA, AM:

This appeal filed by the Revenue is directed against the order dated 11th June, 2012 of the CIT(A)-13, New Delhi, relating to assessment year 2007-08.

2. Facts of the case, in brief, are that the assessee is an individual and derives income from salary, business and other sources. He filed his return of income on 12th October, 2007 declaring the total income of Rs.73,06,002/-. The return was processed

u/s 143(1) of the Act. Subsequently, the Assessing Officer reopened the assessment u/s 147 by recording the following reasons:-

> "The assessee is director in M/s Fort Cochin Hospitality Services Pvt. Ltd. He is also a director and shareholder in several companies. He has been salary and business. During A Y 2007-08 he has shown income as income as under as income from
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> | *S No.* | *Head* | *Amount (Rs.)* |
> |---|---|---|
> | *1.* | *Salary* | *1242804/-* |
> | *2.* | *Business* | *3783454/-* |
> | *3.* | *IFOS* | *2839330/-* |
> | *4.* | *Total* | *7865588/-* |
>
> During the course of assessment proceeding for A Y 2007-08 in the case of M/s Fort Cochin Hospitality in the financial year 2006-07 relevant to A. Y. 2007-08. All the three paintings were sold at Rs. 4,00,00,000/-, Rs. 72,00,000/- and Rs. 40,30,320/-. The above transaction was confirmed by the assessee before the Assessing Officer under oath in his statement on 15.12.2009. The assessee has claimed to have purchased the first painting in 1988 for Rs. 30000/-. He has not been able to file any evidence for cost of acquisition. The other two paintings as per the assessee were acquired from his mother as a gift, who procured them in 1977-78 for around Rs. 2000-3000/- each. However, no evidence of mode of acquisition has been filed not any documentation of gift/ inheritance has been filed. (The assessee has also never shown these paintings as part of his personal balancesheet as part of his Wealth tax returns). The assessee has not offered for tax the income so generated on account of sale of these paintings. Since the same of these paintings is an isolated transaction it falls under the category of adventure in the nature of trade.
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> I have reason to believe that the aforesaid income chargeable to tax has escaped assessment for assessment year 2007-08"

3. He accordingly issued notice u/s 148 of the Act. The assessee, in response to the same filed a letter stating that the return filed on 12th October, 2007 may be treated as return filed in response to the notice u/s 148 of the IT Act. The Assessing Officer issued statutory notices u/s 143(2) and 143(1). During the course of assessment proceedings, he asked the assessee to file the details of payment realization at the hands of Mr. Francis Wacziarg, details of auction of painting and the details of

acquisition of painting and asked him to explain as to why the sale of painting be not considered as profit under adventure in nature of trade. It was explained by the assessee that the auction was held on 27th July, 2007 at Taj Mahal Hotel, New Delhi by Osians-Connoisseurs of Art Pvt Ltd. It was stated that the paintings which were kept by the assessee are personal effects and held by him for his personal use. It was submitted that paintings were excluded from the definition of personal effect for the purpose of defining the term 'Capital asset' u/s 2(14) of the Act only after the enactment of the Finance Act, 2007 w.e.f. 01.04.2008. The assessee further submitted that he was keeping the paintings as part of his personal effect which was his hobby and has not made any transaction of sale of painting before or after this transaction. It was further submitted that purchase of paintings during F.Y. 2006-07 by Fort Cochin has already been confirmed in the assessment proceedings for the same assessment year and no discrepancies were found. It was submitted that some of the paintings were gifted by his mother. It was accordingly argued that it cannot be considered as adventure in the nature of trade.

4. However, the Assessing Officer was not satisfied with the explanation given by the assessee and brought to tax the amount of Rs.5,12,30,320/- being the sale value of the paintings by observing at para 9 of the order as under:-

> "9. In other words, paintings have been included as capital asset, which is w.e.f. 01.04.2008. The Finance Act 2007 came into force before 30.06.2007, however this amendment bringing painting into definition of capital asset was inserted w.e.f 01.04.2008 i.e. after a gap of one year. The assessee suddenly resorted to a colourable device to dispose of the painting before 01.04.2008 so as to escape the taxation on this transaction. As the proposed device was to be

applied only on paper and for that purpose, no other person would have become ready to accept it, hence the assessee tried to fabricate this deal with the company i.e. Fort Cochin Hospitality Services Pvt. Ltd. ,in which he is one of the director. All transactions were made on papers and no actual delivery of paintings etc. was ever carried out since the above purchase company, in which the assessee is one of the director, had not paid the sale consideration amount to the assessee even at the end of the financial year in which the transaction took place. Without prejudice to the above the entire exercise was carried out to evade taxes, which is not permissible in view of the Supreme Court's decision in the case of McDowell and Company Limited v. Commercial Tax Officer, [1985] 154 ITR 148 (SC).otherwise also, if assessee that this painting is so valuable , he should have shown this in his balance sheet, just like other items generally shown like agricultural land etc. In view of above facts, the profit derived on account of sale of painting is being treated as profit under adventure in nature of trade. The profit is worked out, as under:

Sale value	Rs. 5,12,30,320/-
(Less)Cost of Purchase	Rs. NIL
PROFIT	Rs. 5,12,30,320/-"

5. In appeal, the ld.CIT(A) relying on various decisions deleted the addition so made by the Assessing Officer by observing as under:-

"5.3 Decision

I have considered the observation of the Assessing Officer, submission of the appellant and confirmation fled by Sh. Arun Puri and Rekha Puri. Ghulam Mohhammad Sheikh and Sh. Uday Jain Director, Dhoomimal Art Gallery, Connaught Circus. New Delhi. It is seen that appellant had sold three paintings during the financial year ended 31s1 March 2007 for Rs. 5,12,30,320/- to M/s Fort Cochin Hospitality Services Pvt. Ltd., wherein appellant is also Director of the said company. The sale of these three paintings has been treated as isolated transaction and, therefore, the transaction was treated as adventure in the nature of trade and profit from sale of painting was taxed in the hands of the appellant. It is claimed by the appellant that he is not a trader and not dealing in paintings. The paintings were part of personal effects and were not kept by him as stock in trade. It is further submitted by the appellant that paintings were not capital assets in terms of definition of capital assets u/s 2(14) of the IT Act relevant for assessment year under consideration i.e. A.Y. 2007-08. The appellant has submitted that one painting was purchased by the appellant out of his drawings and not shown separately. The amount paid was very meager and same was not shown in the books of accounts. The two other paintings were received by the appellant from her mother late Mrs. Donna Wacziarg as gift. In support of his

contention, the appellant has filed affidavit of his brother Robert Wacziarg wherein he has stated that the paintings of Sh. Bikas Bhattacharjee (Title of painting ceremony) and painting of Sh. Ghulam Mohhamad Sheikh (Title of painting Speechless City) were gifted by his late mother Donna Wacziarg to the appellant during her visit to India in year 1977. The appellant has also submitted that painting of Artist V. S.Goitonde was purchased by the appellant in late eighties. In support of the above contention the appellant has filed confirmation of Sh. Arun Puri and Rekha Puri of India Today Group wherein they have stated that they know Sh. Francis Wacziarg tor more than three decades and have visited his home on several occasions. It is certified by Sh. Arun Puri and Rekha Puri that they have borrowed the painting of Sh.V .S. Goitonde from Sh. Francis Wacziarg for India Today Art Gallery inaugural show, which was held in 1995. The appellant also filed confirmation of Sh. Ghulam Mohhamad Sheikh wherein he has stated that the painting Speechless City was sold by him to Mrs. Donna Wacziarg for Rs. 4,000/- in 1977. The appellant has filed confirmation of Sh. Uday Ravi Jain Director of Dhoomimal Art Gallery wherein he has stated that the painting of Sh. Bikas Bhattacharjee (Ceremony) was purchased by Mrs. Donna Wacziarg in late 1970's and was part of the show at Dhoomimal Gallery. The above stated facts and confirmations filed by the appellant prove that these paintings were purchased by the appellant's mother Late Smt. Donna Wacziarg in late 1970's and the other painting of V.S. Goitonde was purchased by the appellant in late 1980's and the same were part of personal effects of the appellant. These paintings were owned by the appellant for his own enjoyment and pleasure for decades and these were part of personal effects, therefore, the same cannot be treated as capital assets for the year under consideration. The amendment brought by Finance Act 2007 w.e.f 01.04.2008 whereby definition of capital asset in section 2(14) sub clause (ii) is amended and paintings are included in the definition. This definition will apply for and from A.Y. 2008-09 and not the A.Y. 2007-08. As per the definition of personal effect prior to amendment such as article of personal or domestic use, clothing, furniture and show forth which were not include money or securities for money or in the actual context it cannot be extended by Passbook or provision notes. The very fact that furniture is also included in personal effect would show that the articles need not have an intimate connection with the person. All that is required is that the article should be meant for personal use of the person in ordinary course. In view of the above, the sale of paintings which were received by the appellant as gift fromhis mother and one was purchased by the appellant in late 1980's were personal effects of the appellant and same does not fall in the mischief of section 2(14)(ii) of the IT Act for the assessment year 2007-08, therefore, the addition made by the Assessing Officer, treating the sale of paintings as adventure in the nature of trade is deleted and this ground of appeal of the appellant is allowed."

5.1 In support of his above decision he placed reliance on the following judgments:-

(i) Borendra Nath Mookerjee v. Income-tax Officer (2011) 12 taxmann.com 441 (Kol); and

(ii) ACIT vs. Mrs. Dilnavaz S. Variava (2003) 87 ITD 113 (Mum.)

6. Aggrieved with such order of the CIT(A), the Revenue is in appeal before the Tribunal by raising the following grounds:-

> "1. On the facts and circumstances of the case and in law, the ld. CIT(A) has erred in deleting addition of Rs.5,12,30,320/- made by the A.O. being treated as profit under adventure in nature of trade, ignoring the facts that the assessee has not furnished any documentary evidence and proof of payment during the course of assessment proceedings.
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> 2. The appellant craves leave to add, alter or amend any ground of appeal raised above at the time of hearing.

7. The ld. DR strongly challenged the order of the CIT(A). She submitted that the ld.CIT(A) has not adjudicated the issue of adventure in nature of trade and has accepted additional evidences without confronting the same to the Assessing Officer. Therefore, the order of the CIT(A) is not proper. She accordingly submitted that she has no objection if the matter is restored to the file of the CIT(A) with a direction to give an opportunity to the Assessing Officer to rebut the additional evidences filed by the assessee before the CIT(A) and by obtaining the remand report from the Assessing Officer.

8. The ld. counsel for the assessee, on the other hand, strongly supported the order of the CIT(A). So far as the argument of the ld. DR that the ld.CIT(A) has accepted the additional evidences without giving an opportunity to the Assessing Officer or

confronting the same to the Assessing Officer is concerned, he submitted that the Revenue has not taken any such ground in the grounds of appeal so filed. The ld. counsel for the assessee drew the attention of the Bench to the provisions of Rule 46A which reads as under:-

> **"46A.** (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
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> (*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.
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> (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.
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> (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—
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> (*a*) to examine the evidence or document or to cross-examine the witness produced by the appellant, or
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> (*b*) to produce any evidence or document or any witness in rebuttal of the additional evidence produced by the appellant.
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> (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.]"

9. Referring to sub-rule (4) of Rule 46A, the ld. counsel for the assessee submitted that the assessee, on the basis of the direction of the CIT(A) to produce certain documents to enable him to dispose of the appeal has filed all these details and, therefore, the Revenue cannot challenge the power of the CIT(A) in accepting the additional evidences.

9.1 So far as the merit of the case is concerned, he submitted that the assessee is a French national settled in India. Referring to the assessment order passed u/s 143(3) in the case of M/s Fort Cochin Hospitality Services Pvt. Ltd. for the assessment year 2007-08, he submitted that purchase of such paintings has been accepted there and no addition has been made in the assessment of Fort Cochi Hospitality Services Pvt. Ltd., on the basis of which the case of the assessee was reopened. Referring to the decision of the Hon'ble Delhi High Court in the case of *Fair Murtaza Ali v. CIT (2014) 360 ITR 200*, he submitted that the Hon'ble High Court has held that the amendment to section 2(14) brought by the Finance Act, 2007 w.e.f. 01.04.2008 is prospective in nature which alters the clause pertaining to personal effect. Therefore, for the period prior to 01.04.2008 the paintings had been considered to be personal effect. He submitted that three paintings were sold by the assessee to Fort Cochin Hospitality Services Pvt. Ltd. on 30th March, 2007 for a consideration of Rs.5,12,30,320/-. One of the paintings was

purchased by him from his drawings from Mr. Gaitonde and the other two were purchased by his mother late Mrs. Donna Wacziarg and gifted to him. To support the gift from his mother, the assessee had filed the affidavit of his brother Mr. Robert Wacziarg wherein it has been stated that paintings of Shri Bikas Bhattacharya and paintings of Shri Ghulam Mohammad Sheikh were gifted by his late mother Donna Wacziarg to the assessee. He submitted that the assessee is neither dealing in paintings nor is a trader and was getting his paintings as part of his personal effects and were not meant for sale. Since selling of paintings is not the business of the assessee, therefore, it is not an adventure in nature of trade. He submitted that the paintings were personal effects and consequently excluded as one of capital asset u/s 2(14)(ii) of the Act and not taxable prior to 01.04.2008 as the amendment brought by the Finance Act, 2007 is applicable w.e.f. 01.04.2008. He submitted that the Assessing Officer has misunderstood the fact that the paintings were brought within the ambit of definition of capital asset u/s 2(14) of the Act by the Finance Act, 2007 applicable w.e.f. 01.04.2008. He accordingly submitted that since the assessee's case pertains to assessment year 2007-08, therefore, the assessee was not required to pay any tax on gains arising on sale of paintings. The ld. counsel for the assessee relied on the following decisions:-

(i) ACIT vs. Dilnavaz S. Variava 2003 (87) ITD 113 (ITAT Mumbai);

(ii) CIT vs. Faiz Murtaza Ali (2014) 360 ITR 200 (Del);

(iii) CIT vs. Kuruvilla Abraham (2013) 356 ITR 519 (Mad);

(iv) CIT vs. Borendra Nath Mookerjee, ITA No.1623/K/2010;

(v) CIT vs. Borendra Nath Mookerjee GA No.198 of 2012 (Calcutta HC);

(vi) Abhay Kumar S. Maskara vs. ITO, ITA No.3706/Mum/2012;

(vii) Kurush N. Jungalwala vs. ITO, ITA No.2398/Mum/2008;

(viii) Renu Roy vs. ITO, ITA Nos.491-496/Kol/2012;

(ix) ACIT vs. Suresh Sethi, ITA No.763/Kol/2012; and

(x) Guffic Chem (P) Ltd. vs. CIT (2011) 332 ITR 602 (SC).

10. He accordingly submitted that since the ld.CIT(A) has passed the order deleting the addition which is in consonance with the judicial precedents, therefore, the same should be upheld and the grounds raised by the Revenue should be dismissed.

11. We have considered the rival arguments made by both the sides and perused the orders of the Assessing Officer and CIT(A) and perused the paper book filed on behalf of the assessee. We have also considered the various decisions cited before us. We find the assessee during the impugned assessment year has sold three paintings at an aggregate amount of Rs.5,12,30,320/-. The Assessing Officer brought to tax the above amount treating the same as adventure in nature of trade. We find the ld.CIT(A) deleted the addition so made by the Assessing Officer the reasons of which has been reproduced in the preceding paragraphs. It is the submission of the ld. DR that the ld.CIT(A) has accepted the additional evidences from the assessee without giving any opportunity to the Assessing Officer nor these evidences were confronted to the Assessing Officer. Therefore, the order of the CIT(A) should be set aside. Further, the ld.CIT(A) has not addressed the issue relating to adventure in nature of trade

which was the basis of addition by the Assessing Officer. It is also her submission that the assessee has not furnished any documentary evidence and proof of payment during the course of assessment proceedings. It is the submission of the ld. counsel for the assessee that in view of sub-rule (4) of Rule 46A, the ld.CIT(A) can direct the assessee to produce documents to enable him to dispose of the appeal or for any other substantial cause which, in the instant case, he has exercised and, therefore, the Revenue cannot challenge the same. Further, no ground has been taken by the Revenue on this issue. It is also his submission that in view of the various decisions relied by him in the paper book case law compilation, the issue stands fully covered in favour of the assessee. According to the ld. counsel for the assessee since the amendment brought in by the Finance Act, 2007 w.e.f. 01.04.2008 which alters the clause pertaining to 'personal effect' would not apply retrospectively, and since the assessment year involved is assessment year 2007-08, therefore, the addition so deleted by the CIT(A) is in accordance with the law.

12. We find merit in the above argument of the ld. counsel for the assessee. As reproduced in the preceding paragraph, as per the sub-rule (4) of Rule 46A, the ld.CIT(A) has inherent power to call for any additional document or evidence to enable him to dispose of the appeal or for any other substantial cause. Further, the Revenue has not taken any such ground of violation of Rule 46A of the IT Rules. We, therefore, do not find any force in the argument of the ld. DR regarding the acceptance of additional evidence by the CIT(A) during the course of appeal proceedings without

confronting the same to the Assessing Officer. Now, coming to the issue of adventure in nature of trade, from the various submissions given by the assessee during the course of assessment proceedings as well as appeal proceedings, we find it is the hobby of the assessee to collect paintings and he is not dealing in paintings and is not a trader. He is keeping the painting as part of his personal effects, therefore, the incidence of sale cannot be construed to be adventure in nature of trade. We find an identical issue had come up before the Mumbai Bench of the Tribunal in the case of ACIT vs. Dilnavaz S. Variava (supra). The Tribunal, after considering the various submissions has upheld the order of the CIT(A) by observing as under:-

> "6. The expression "adventure or concern in the nature of trade, commerce or manufacture" occurring in the definition of "business" in section 2(13) of the Income-tax Act, 1961 (hereinafter called the Act) has itself not been defined in the Act. It is therefore not easy to discern the circumstances which will make a transaction an adventure in the nature of trade. It is not possible to evolve any single test or formula which can be applied in determining whether a transaction is an adventure in the nature of trade or not. The answer to the question must necessarily depend in each case on the total impression and effect of all the relevant factors and circumstances proved therein and which determine the character of the transaction. Where the purchase is made solely with an intention to resell at a profit and the purchaser has no intention of holding the property for himself, the transaction made constitute an adventure in the nature of trade. The singleness or isolation of a transaction cannot be a test. The nature and quantity of the subject-matter of the transaction at times indicates the purpose for which the transaction was entered into. Where a particular transaction is not in the ordinary course or line of business of the assessee, but is an isolated or single instance of a transaction, the onus to prove that the transaction is an adventure in the nature of trade is on the Department. This onus cannot be discharged by merely rejecting the assessee's explanation apropos the transaction. The mere earning of the surplus is not tantamount to embarking upon an adventure in the nature of trade.
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> 7. In the present case, we find that the assessee is a Management Consultant. She was stated to be a connoisseur of art. She purchased the paintings because of her aesthetic tastes. It gave her tremendous pleasure and pride of possession. She is owning other paintings also. Neither in the preceding

years nor in the subsequent years assessee did ever make any sale of her paintings collection. It is abundantly clear from the details that selling of paintings was not the business of the assessee. The paintings were acquired by the assessee for her own collection. She kept those paintings for more than 25 years. Therefore, the incidence of sale cannot be construed to be adventure in the nature of trade. We have perused the reasoning adduced in the impugned order. We are inclined to agree with the same on this count.

8. The next question is whether paintings could be construed to be articles of personal effects. As per the prescription of section 2(14)(ii) of the Act, personal effects, that is to say, movable property (including wearing apparel and furniture, but excluding jewellery) held for personal use by the assessee or any member of his family dependent on him. The meaning of "persona! effect" is not exhaustively defined in the Act. It only refers that movable property held for personal use by the assessee or any member of his family dependent on him can be construed as personal effect. Movable property includes wearing apparel and furniture, but excluding jewellery.

9. In the case of G.S. Poddar v. CWT (1965) 57 ITR 207 (Bom.), two gold caskets, a gold tray and two gold glasses were presented to the assessee. He kept these articles in the glass show-case for display in his drawing room. He claimed exemption in respect of these articles under section 5(1)(viii) of the Wealth-tax Act, 1957. Hon'ble High Court has held that merely because the gold caskets were kept in the show-case did not make them part of the furniture and the rest of the articles could not be considered to be the household utensils. It was further held that the use as a decoration in the drawing room, which is only calculated to get a pride of possession is not contemplated by the exemption. This decision was rendered in the context of Wealth-tax Act.

10. In the present case we find that the assessee is a connoisseur of art. The object of art is not only the pride possession but it also satiates the aesthetic quench for the art of the connoisseur. It gives joy to the possessor which is different from the pride of possession. The expression 'personal effect' as per the Black's Law Dictionary means articles associated with person, as property having more or less intimate relation to person of possessor. In Re Collins' Will Trusts v. Hewetson (1971) 1 W.L.R. 37, valuable stamp collection was held to be personal effect. In the case of Lippincott's Estate 173 Pa. 368, 34 Atl. 58, furniture and pictures were held to be articles of personal effects. The Apex Court in the case of H.H. Maharaja Rana Hemant Singhji v. CIT (1976) 103 ITR 61 has said that an intimate connection between the effects and the person of the assessee must be shown to exist to render them 'personal effects' within the meaning of that expression used in clause (ii) of the exceptions in section 2(4A) of the Indian Income-tax Act, 1922. The Legislature intended only those articles to be included within the expression 'personal effects' which were intimately and commonly used by the assessee.

11. The paintings were used to decor the house. Assessee loved paintings. A good painting transmits good vibe across. The element of personal attachment with the object did exist in the facts of the case. Therefore, in our opinion, paintings could be construed to be the personal effects, as such not exigible to tax. Accordingly we uphold the impugned order.

12. In the result, appeal of the revenue stands dismissed."

13. We find the Hon'ble Delhi High Court in the case of *Faiz Murtaza Ali Vs. CIT reported in 360 ITR 200* has observed as under:-

"8. Keeping this in mind, we have to examine whether, in 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.

9. We may also refer to *Himatlal C. Valia* v. CIT [2001] 248 ITR 262 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.

10. The Supreme Court in *CIT* v. *H H Maharani Usha Devi* [1998] 231 ITR 793 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.

11. 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 moveable 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.

12. With regard to the amendment to section 2(14), which has been brought about by the Finance Act, 2007 w.e.f. 1.4.2008 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 01.04.2008, 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 01.04.2008 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 01.04.2008, which is much after the assessment year 2002-03.

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."

14. We find the Hon'ble Madras High Court in the case of *CIT vs. Kuruvilla Abraham reported in 356 ITR 519,* has held as under:-

"11. As per the amended provision, the paintings were excluded from the purview of personal effects as contemplated under Section 2(14)(ii). Thus, in effect the paintings are brought under the definition of capital asset by virtue of the amended Act 2007 with effect from 1.4.2008. The first appellate authority elaborately considered this aspect by discussing the objects and reasons of the Finance Act 2007 in bringing the paintings within the purview of definition of capital asset. Thus, he observed that the jewellery was the only asset which is not in the nature of personal effects liable to be treated as capital asset upto the assessment year 2007-2008 and the paintings etc., would fall within the meaning of capital assets to attract capital gains tax, only from the assessment year 2008-2009. Consequently, the first appellate authority held that the paintings of the appellant sold during the assessment year 2005-2006 cannot be brought under the definition of capital asset and accordingly, he allowed the appeal filed by the assessee.

12. The Tribunal also found that the paintings can be considered as capital asset only with effect from 1.4.2008 by virtue of the Finance Act 2007 and the relevant assessment year being 2005-2006, the paintings were not excluded under the definition of Section 2(14) as the personal effects. Therefore, the Tribunal rejected the appeal filed by the Revenue.

13. We find that the order of the Tribunal confirming the order of the first appellate authority does not warrant any interference in view of the following reasons:-

(i) The relevant assessment year is 2005 -2006 and during such assessment year, the definition of capital asset found under Section 2(14) does not specifically exclude paintings from the purview of personal effects.

(ii) the paintings were excluded from the purview of personal effects and consequently included as one of the capital asset under Section 2(14) only in pursuant to the amendment made under the Finance Act 2007 that too with effect from 1.4.2008.

(iii) The above said amendment was not made with any retrospective effect. On the other hand, as could be seen from the memorandum explaining the provisions of the Finance Bill 2007 as also the notes and clauses of the Finance Bill 2007, as extracted by the Commissioner of Income Tax (Appeals) in his order, it is very clear that the amendment was intended to take effect from 1st April 2008 and will accordingly apply in relation to the assessment year 2008-09 and for subsequent years.

(iv) When the amendment itself was brought in with prospective effect, the same cannot be applied retrospectively. Moreover, it being a taxing liability, the same cannot be applied retrospectively as held by the Apex Court in the decision reported in (2011) 232 ITR 602 (SC) (Guffic Chem P. Ltd., Vs. Commissioner of

Income Tax). Therefore, the first appellate authority as well as the Tribunal have rightly deleted the addition made by the Assessing Officer.

(v) In order to attract the capital gains, it should first fall within the definition of capital asset as contemplated under Section 2(14). However, the capital asset, as defined, does not include the personal effects which in turn excluded the paintings etc., after the amendment was brought in. To put it simply, the paintings are excluded from the purview of personal effects and included within the scope of capital asset only with effect from 1.4.2008. Therefore, the capital gains tax on the paintings are liable only with effect from 1.4.2008 in respect of the assessment year 2008-2009 onwards and not in respect of earlier assessment years. The relevant assessment year in this case being 2005-2006, both the authorities below viz., the Commissioner of Income Tax (Appeals) as well as the Tribunal have rightly found in favour of the assessee in this regard.

(vi) In so far as the contention of the Revenue with regard to the period of holding of such personal effects is concerned, we have perused the order of the Assessing Officer and there is absolutely no finding to that effect as contended by the learned counsel for the Revenue. Therefore, a contention which was not raised and considered before the lower authorities, cannot be permitted to be raised first time before this court.

(vii) No doubt, the Assessing Officer relied on the decision of the Apex Court reported in (1976) 103 ITR 61 (SC) (H.H.Maharaja Rana Hemant Singhji Vs. Commissioner of Income Tax) in support of his conclusion to hold that the paintings are not personal effects of the assessee. The facts of the said case show that the assessee therein was held liable to tax on the capital gains derived by the sale of sovereigns, silver bars and rupee coins, under Section 12B of the Indian Income Tax Act 1922, read with Section 2(4A). Considering those facts and circumstances, the Apex Court held that the silver bars or bullion could by no stretch of imagination be deemed to be "effects" meant for personal use. The said decision of the Apex Court was rendered by taking into consideration of the relevant provisions under the Income Tax Act 1922, read with Section 2(4A). On the other hand, the present case involving the assessment year 2005-2006 deals with Section 2(14) of the Income Tax Act, 1961, which was amended under the Finance Act 2007, as discussed supra. Therefore, when Section 2(14) of the 1961 Act had only excluded jewellery from the purview of personal effects before amendment and further excluded the paintings and others after the amendment, it would only show that the facts and circumstances of that case before the Apex Court are totally different and distinguishable, apart from the fact that the same was rendered prior to the 1961 Act. Therefore, the Assessing Officer was not right in relying on the said decision of the Apex Court.

14. Hence, we find no merits in the appeal as we are in full agreement with the finding rendered 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 2008-2009 onwards and not in respect of the earlier periods. No costs.

15. The various other decisions relied on by the ld. counsel for the assessee also support his case to the proposition that paintings were personal effects and consequently excluded as one of capital asset u/s 2(14)(ii) of the Act and does not attract tax prior to 01.04.2008. In view of the above discussion and in view of the detailed reasoning given by the CIT(A), we uphold his order in deleting the addition of Rs.5,12,30,320/- made by the Assessing Officer treating the same as adventure in the nature of trade. The grounds raised by the Revenue are accordingly dismissed.

16. In the result, the appeal filed by the Revenue is dismissed.

The decision was pronounced in the open court on 29.07.2019.

Sd/-	Sd/-
(KULDIP SINGH) JUDICIAL MEMBER	(R.K. PANDA) ACCOUNTANT MEMFBER

Dated: 29th July, 2019

dk

Copy forwarded to

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

Asstt. Registrar, ITAT, New Delhi