$~29

THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 20.02.2013

+ **ITA 613/2012**

FAIZ MURTAZA ALI ..... Appellant

versus

COMMISSIONER OF INCOME TAX ..... Respondent

Advocates who appeared in this case:

For the Petitioner : Dr Rakesh Gupta, Ms Rani Kiyala and Ms Ayushi Pareek, Advs.

For the Respondent : Mr Amol Sinha, sr. standing counsel with Mr Anshum Jain, Mr Rahul Kochar and Mr Deepak Anand, Advs.

CORAM:-
HON'BLE MR JUSTICE BADAR DURREZ AHMED
HON'BLE MR JUSTICE R.V.EASWAR

JUDGMENT

BADAR DURREZ AHMED, J (ORAL)

CM 18145/2012

Exemption is allowed subject to all just exceptions.

The application is disposed of.

ITA 613/2012

This appeal by the assessee is the second round of litigation before this Court insofar as the assessment year 2002-03 is concerned. The

appeal is directed against the order dated 31.05.2012 passed by the Income Tax Appellate Tribunal in ITA No.2117/Del./2007. The matter had been remitted to the Tribunal on a limited question. Earlier this Court had heard the appeal by the revenue in ITA No.929/2009. The questions which were proposed in that appeal were as under :-

> "(1) Whether ITAT was correct in law in deleting the addition of Rs.39,47,136/- made by the Assessing Officer treating the sale of alleged personal effects as "Income From Undisclosed Sources"
>
> (2) Whether ITAT was correct in law in holding that the evidence filed by the assessee was believable and therefore, onus was shifted to the Revenue to prove that the item sold were not personal effects of the assessee?
>
> (3) Whether item sold by the assessee were 'personal effects' so as to fall within the ambit of exclusionary clause of Section 2(14) of the Act, which defines 'capital asset'."

The facts need not be repeated and therefore the narration of facts given in the order dated 10.05.2011 would suffice for our purposes. The facts as narrated in the said order are as under :-

> "3. In the return filed by the assessee for the assessment year 2002-03 he declared income of Rs.31,71,656/-. The Assessing Officer noticed that in the bank account of the assessee there is a deposit aggregating to Rs.39.47 lakhs, which according to the assessee was the amount released by him from the sale of certain "personal effects". According to him, the sums released from the aforesaid sale were exempt under Section 2(14) of the Income Tax Act. The assessee had explained that he had received various household items,

paintings, carpets, collector items, furniture items, etc. owned by his grandfather, father, uncle and aunt. These movable properties were held for personal use by the assessee. The details as given by the assessee are as under:-

A. Carpets (silk on silk carpets) 35 items

B. Paintings 20 Pcs

C. Collector items which included antique watches, rings and decorative items 14 Pcs

D. House Hold Items which included crystal items 12 Pcs

E. Antique Furniture which includes table, chairs, centre table, chest, etc. 34 Pcs

4. The Assessing Officer was of the view that the aforesaid items could not be treated as personal effects and were in fact capital assets within the meaning of Section 2(14) of the Income Tax Act and therefore refused to grant any exemption on the sales proceeds thereof from tax and included this amount for the purpose of tax. Another reason given by the Assessing Officer was that the assessee had failed to establish the identity of the items sold individually to each buyer or that these items have market value of Rs.39.47 lakhs. According to him, since the assessee had not produced any documentary evidence in support of his claim he, was not able to establish the genuineness of his claim for exemption under Section 2(14) of the Act. This was the additional ground on which he returned the plea of exemption under Section 2(14) of the Act.

5. The assessee preferred appeal there against before the CIT(A). The CIT(A) held that the items sold were articles meant for personal use and were therefore personal effects.

The entire discussion of the CIT(A) on this aspect is in the following terms:- "Before deciding the Appeal I would like

to clarify that the assessee has sold certain furniture items including fixtures, household items, silk carpets, paintings, etc. which were assets of personal use of the assessee's father and parcel of the immovable properties the assessee has inherited. The assessee was using these assets along with the immovable properties where these assets were located. Hence, sale of these assets, in my opinion is sale of articles meant for personal use."

6. Thereafter, the CIT(A) took up the issue as to whether the assessee had been able to prove the genuineness of the sale as allowed by him and recorded the finding of fact that assessee had in fact been able to discharge the onus from sufficient material produced by him on record that he had in fact sold the aforesaid items and released the amount of Rs. 39.47 lakhs on sale thereof. In this manner he arrived at a finding that the sale proceeds were exempted under Section 2(14) of the Act and not exigible to tax. The ITAT has affirmed the order of the CIT(A) vide impugned judgment dated 17th October, 2008 thereby dismissing the appeal of the Revenue. However, the order of the ITAT is only on second aspect, namely, the genuineness of items sold and the money released. Since the order of the ITAT was silent on the first issue, namely, whether the items sold was personal effects entitled to exemption under Section 2(14) of the Act or not, the Revenue moved an application under Section 254(2) of the Act alleging that this aspect was not decided though it was raised. The Tribunal has dismissed this application vide order dated 17th July, 2009 stating that no ground was raised that some articles were personal effects or capital assets."

2. Thereafter, this Court in the said order dated 10.05.2011 had noted that insofar as the question of genuineness of the sales by the assessee to various buyers for a sum of ₹39.47 lakhs was concerned, the Court was of the opinion that the finding arrived at in favour of the assessee was on the

basis of evidence produced by the assessee and was a pure finding of fact. Therefore, this Court, in the said appeal, which was disposed of by the order dated 10.05.2011 did not disturb the finding of the Tribunal that the sales were genuine.

3. The only question which needed to be considered, in terms of the order dated 10.05.2011, was whether the articles sold by the assessee to different buyers could be treated as 'personal effects' and, therefore, would be eligible for exemption under Section 2(14) of the Income Tax Act, 1961. This Court by virtue of the order dated 10.05.2011 directed as under: -

> "12. The question was only applicability of Section 2(14) in respect of these articles. No factual aspects were involved and it was a question to be decided on the basis of facts.
>
> 13. Under these circumstances we are of the opinion that the Tribunal should have gone into this issue and decided the same. For this reason alone we remit the case back to the ITAT for deciding this aspect of the matter. For this reason we are not deciding the proposed questions of law. Parties to appear before the Tribunal on 18th July, 2011."

Thereafter, the matter was taken up by the Tribunal and was disposed of by the impugned order dated 31.05.2012. In the impugned order we find that the Tribunal has exceeded the direction given by this Court. The impression that emerges from the narration of facts given by the Tribunal

is that the sales themselves were doubtful. The Tribunal, in our view, could not go behind the description of the articles as given in the confirmations furnished by the buyers because the genuineness of the sales had already been concluded by the Tribunal in the earlier round and was not disturbed by the High Court by virtue of the order dated 10.05.2011. The only issue for the Tribunal was to consider whether articles such as carpets, paintings, collector items, household items including crystal items, antique furniture could be considered to be personal effects or not in law.

4. In this back drop, the substantial question of law which arises for our consideration is:-

> "Whether the items sold by the assessee were 'personal effects' so as to fall within the ambit of the exclusionary clause of section 2(14) of the Income Tax Act, 1961, which defines 'capital asset'?"

5. We have heard the learned counsel for the parties at length. The position that emerges is that a substantial part of these articles had been received by the assessee through inheritance either from his father, who, in turn had inherited them from his father, or through inheritance from his uncle. There is also evidence of the fact that some of these articles had been gifted to the assessee by his aunt by virtue of a gift deed which is

also on record. We also note that the assessee had given an affidavit to the assessing officer which was to the following effect:-

"AFFIDAVIT

I, Faiz Murtaza Ali, S/o late Justice Murtaza Fazi Ali, R/o 112, Uday Park, New Delhi – 110049 do hereby solemnly affirm on oath as under :

1. That I have inherited immovable property from my Aunt, Late Mrs. Sayeeda Mehdi Imam vide her registered Will dated 9th Sept. 1999.
2. That I have been gifted various antique items, furniture, carpets, paintings, watches, decorative items etc. as personal effects by my aunt Smt. Sayeeda Mehdi Imam on 05.02.1999.
3. That I have inherited immovable properties from my father Late Justice Fazal Murtaza Ali and my uncle Late Mustafa Fazi Ali who died intestate.
4. That I have inherited various furniture items, carpets, paintings, decorative items for my personal use from my father and uncle.

Deponent

Verification

I, Faiz Murtaza Ali do hereby solemnly affirm on oath that whatever has been stated above is true and correct and nothing material has been concealed therefrom.

Deponent"

From the above it is clear that the assessee had stated on affidavit that the articles which were either received by him as gift from his aunt or inherited from his father and uncle were articles of his personal use.

6. The definition of capital asset given in Section 2(14) of the Income Tax Act, 1961 indicates that a capital asset means property of any kind held by an assessee, whether or not connected with the business or profession but does not include :-

> "(ii) 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.
>
> 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;"

Therefore, if the articles in question fall within the expression 'personal effects' they are not to be included as part of capital assets. Now, the expression 'personal effects' has been defined as 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. There are no jewellery items in the articles in question. Of

course, there are some articles which are furniture items. Then, there are carpets and paintings and certain other items such as watches and crystal items.

7. In ***HH Maharaja Rana Hemant Singhji Vs. CIT : (1976) 103 ITR 61 (SC)***, the Supreme Court was examining a somewhat similar definition of 'capital asset' under the 1922 Act wherein capital asset was defined in Section 2(4-A). The expression "personal effects" was defined as 'movable property (including wearing apparel, jewellery and furniture) held for personal use by the assessee or any member of his family dependent on him'. The Supreme Court considered the expression "personal use" and while doing so, observed that only those effects could legitimately be said to be personal which pertain to the assessee's person and an intimate connection between the effects and the person of the assessee must be shown to exist to render them to be regarded as personal effects. It is clear that the Supreme Court held that only those articles are to be included in the definition of 'personal effects' which are intimately and commonly used by the assessee.

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 Vs. 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.

10. The Supreme Court in ***CIT Vs. H H Maharani Usha Devi : (1998) 231 ITR 793 (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.

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.

The appeal is allowed. There shall be no order as to costs.

BADAR DURREZ AHMED, J

R.V.EASWAR, J

FEBRUARY 20, 2013
vld