

आयकर अपीलिय अधिकरण, अहमदाबाद न्यायपीठ, अहमदाबाद ।
**IN THE INCOME TAX APPELLATE TRIBUNAL
"B" BENCH, AHMEDABAD**

**BEFORE SHRI RAJPAL YADAV, JUDICIAL MEMBER
AND
SHRI AMARJIT SINGH, ACCOUNTANT MEMBER**

**ITA.No.918 and 919/Ahd/2014
निर्धारण वर्ष/Asstt.Year : 2009-2010**

Late Shri Atulkumar Mansukhlal Shah L/Rs. of Smt. Atulkumar Shah C/o. Ketan H. Shah, Advocate 903, Sapphire Complex C.G.Road, Navrangpura Ahmedabad. PAN : ATKPS 9712 Q	Vs	ITO, Ward-7(2) Ahmedabad
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अपीलार्थी/ (Appellant)		प्रत्यर्थी/ (Respondent)
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Assessee by :	Shri Ketan H. Shah, AR
Revenue by :	Shri Mudit Nagpal, Sr.DR

सुनवाई की तारीख/Date of Hearing : 16/11/2017
घोषणा की तारीख /Date of Pronouncement: 16/11/2017

आदेश/O R D E R (ORAL)

PER RAJPAL YADAV, JUDICIAL MEMBER

Present two appeals are directed at the instance of assessee against separate orders of even dated i.e. 20.2.2014 passed by Id.CIT(A)-XIV, Ahmedabad for the Asstt.Year 2009-10.

2. ITA No.919/Ahd/2014 emerges out of proceedings under section 143(3) of the Income Tax Act, 1961, whereas in ITA No.918/Ahd/2014

assessee is impugning levy of penalty imposed under section 271(1)(c) of the Act.

3. First we take quantum appeal i.e. ITA No.919/Ahd/2014.

4. The Id.counsel for the assessee, at the very outset, submitted that he has raised additional ground of appeal, wherein it has been pleaded that late Shri Atulkumar Mansukhlal Shah expired on 4.7.2011 and this fact was brought to the notice of AO vide letter dated 23.12.2011. In spite of that the AO has passed the assessment order in the name of a deceased person, therefore, the assessment order deserves to be declared null and void.

5. Considering the very nature of plea raised in the additional ground of appeal, more so, being a legal plea, we admit this ground of appeal, and proceed to dispose of the appeal on merit.

6. Brief facts of the case are that the assessee has filed its return of income on 29.5.2009 showing total income at Rs.1,41,830/-. The case of the assessee was selected for scrutiny assessment and notice under section 143(2) was issued on 30.8.2010 which was duly served upon the assessee. In order to set assessment proceedings in motion, the Id.AO has issued notice under section 142(1) of the Act. On scrutiny of the details it came to the notice of AO that cash of Rs.11,79,000/- was deposited in Punjab National Bank, Satellite Branch, Ahmedabad. Similarly, a sum of Rs.25,95,000/- was deposited with HDFC Bank, Mithakhali Branch, Ahmedabad. The Id.counsel for the assessee while impugning the orders of Revenue authorities took us through section 159 of the Income Tax Act, 1961 and pointed out that as per sub-section (2) of section 159 notice upon legal heirs ought to have been issued by the AO, which the AO has failed to do so, and therefore, the assessment order

is a nullity and deserves to be quashed. In order to buttress his contention, he relied upon decisions of the Hon'ble Madhya Pradesh High in the case of CIT Vs. Dalumal Shyamulal, 276 ITR 62. He further drew our attention towards the order of the ITAT, Ahmedabad Bench in the case of ITO Vs. Akhter Nooruddinahmed Saiyed reported in 40 CCH 0271 (Ahd)(Trib.). He placed on record copies of both these decisions.

7. On the other hand, the Id.DR pointed out that a perusal of sub-clause (a) of Sub-section (2) and sub-section (3) of Section 159 would contemplates that if any proceedings taken against the assessee, who expired during the pendency of the proceedings, then the proceedings may be continued against legal representatives in the same capacity as if the assessee was alive, and the order could not be declared as nullity. At the most, it can be treated as a procedure illegality which can be cured by issuance of notice to the L/Rs.

8. We have duly considered rival contentions and gone through the record carefully. Section 159 of the Income Tax has a direct bearing on the controversy in hand, therefore, it is imperative upon us to take note of this section. It reads as under:

“159. (1) Where a person dies, his legal representative shall be liable to pay any sum which the deceased would have been liable to pay if he had not died, in the like manner and to the same extent as the deceased.

(2) For the purpose of making an assessment (including an assessment, reassessment or recomputation under section 147) of the income of the deceased and for the purpose of levying any sum in the hands of the legal representative in accordance with the provisions of sub-section (1),—

(a) any proceeding taken against the deceased before his death shall be deemed to have been taken against the legal representative and

- may be continued against the legal representative from the stage at which it stood on the date of the death of the deceased;*
- (b) any proceeding which could have been taken against the deceased if he had survived, may be taken against the legal representative; and*
- (c) all the provisions of this Act shall apply accordingly.*

(3) The legal representative of the deceased shall, for the purposes of this Act, be deemed to be an assessee.

.....”

9. A perusal of this section would indicate that any proceedings taken against an assessee before his death shall be deemed to have taken against the legal representatives which may be continued against the L/Rs. from the stage at which it stood on the date of the death of the assessee. A perusal of the record would indicate that a notice under section 143(2) was issued on 30.8.2010 when Shri Atulkumar M. Shah was alive. An opportunity to the assessee was given to make submission in support of his return, as required under section 143(2). This assessment proceedings was set in motion by the AO when the assessee was alive. Fact of death of the assessee was brought to the notice of the AO at the very fag end i.e. vide letter dated 23.12.2011. The AO has, though taken cognizance of this letter, but failed to issue notice to the L/Rs. so that they can put their defence before him. As far as two case laws cited by the ld.counsel for the assessee before us is concerned, in the case of CIT Vs. Dalumal Shyamulal (supra) it reveals that the assessee died on 11.7.1991 and assessment order was passed on 24.2.1993. The time gap would suggest that notice under section 143(2) appears to have been served upon the assessee after his death. Similarly a gap of more than two years is available in the case of Akhter Noorudinahmed Saiyed (supra). Considering these two factors, assessment must have been declared null and void in those

cases. Facts are quite distinguishable with the facts of the present case. Therefore, in our opinion, there is no illegality committed by the AO. He only committed an irregularity and it is settled position that wherever any irregularity crept in the proceedings, the proceedings itself cannot be declared void, rather irregularity deserves to be rectified. Considering these aspects, we allow appeal of the assessee for statistical purpose. We set aside both the impugned orders and restore all issues to the file of the AO for adjudication afresh. The Id.AO shall re-determine income of the assessee on merit after considering plea of the assessee whether loss suffered by the assessee in share trading deserves to be set off against ultimate assessed income. The Id.AO shall issue notice to the legal representatives by providing reasonable opportunity of hearing, and thereafter pass assessment order.

10. So far as levy of penalty under section 271(1)(c) of the Act is concerned, we are of the view that since very genesis for imposition of penalty have been set aside to the file of the AO for re-adjudication, therefore, this appeal challenging imposition of penalty is also set aside to the file of the AO. However, it will be in discretion of the AO to initiate or not initiate penalty after passing the assessment order.

11. In the result, both appeals of the assessee are allowed for statistical purpose.

Order pronounced in the Court on 16th November, 2017 at Ahmedabad.

Sd/-
(AMARJIT SINGH)
ACCOUNTANT MEMBER
Ahmedabad; Dated 16/11/2017

Sd/-
(RAJPAL YADAV)
JUDICIAL MEMBER