

आयकर अपीलीय अधिकरण, अहमदाबाद न्यायपीठ - अहमदाबाद ।

IN THE INCOME TAX APPELLATE TRIBUNAL
AHMEDABAD – BENCH ‘SMC’

BEFORE SHRI RAJPAL YADAV, JUDICIAL MEMBER

आयकर अपील सं./ ITA No. 90/Ahd/2017

निर्धारण वर्ष/Assessment Year: 2008-09

Shri Ishwarbhai Maganbhai Desai L/h. Of Late Shri Maganbhai Nagjibhai Desai, 31, Niran Park House Opp: Sun-N-Step Club Sola Road, Thaltej Ahmedabad 380 051. PAN : AFCPD 0018 C	Vs	ITO, Ward-3 Patan.
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अपीलार्थी/ (Appellant)		प्रत्यर्थी/ (Respondent)
Assessee by :		Shri T.P. Hemani, AR
Revenue by :		Shri Prasson Kabra, Sr.DR

सुनवाई की तारीख/Date of Hearing : 15/04/2018

घोषणा की तारीख /Date of Pronouncement : 23/04/2018

ORDER

Assessee is in appeal before the Tribunal against order of Id.CIT(A), Gandhinagar, Ahmedabad dated 18.11.2016 passed for the Asstt.Year 2008-09.

2. Grounds of appeal taken by the assessee are not in consonance with the Rule 8 of the Income Tax (Appellate Tribunal) Rules, 1963 - they are descriptive and argumentative in nature.

3. In ground nos.1 and 2, the assessee has pleaded that the Id.CIT(A) has erred in confirming assessment order passed under section 144 r.w.s. 147 of the Income Tax. The assessment order is not sustainable in the eyes of law, because notice under section 148 was never served upon legal heirs of

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Maganbhai Nagjibhai Desai. It was in the name of the deceased person and the assessment order was also passed in the name of the deceased person. Thus, according to the assessee, the assessment order is not sustainable in the eyes of law.

4. Brief facts of the case are that the AO has got information that the assessee has deposited a sum of Rs.10.45 lakhs in cash in saving bank account during the financial year 2007-08. The AO wrote a letter dated 13.3.2015 to the assessee requesting him to explain source of cash deposits in the bank account. According to the AO, this letter was not replied with, hence assessment was reopened and notice under section 148 dated 25.3.2015 was issued, which according to the AO was served on the assessee on 26.3.2015. Thereafter, the Id.AO has issued notices under section 142(1) on 18.5.2015, 4.6.2015, 8.7.2015 and 17.8.2015. He passed *ex parte* assessment according to his best judgment under section 144 r.w.s. 147. He recorded a finding that a sum of Rs.31.18 lakhs were deposited in the Dena Bank on various dates. He made addition of Rs.31.18 lakhs with aid of section 68 on account of unexplained cash credit in the hands of Shri Maganbhai Nagjibhai Desai. Appeal to the Id.CIT(A) did not bring any relief to the assessee. The case of the assessee is that Shri Maganbhai Nagjibhai Desai was passed away on 26.12.2008. When process-server came to the alleged residence of Maganbhai Nagjibhai Desai, then this fact was informed to the process-server that Maganbhai Nagjibhai Desai has passed away. Thus, the AO has the knowledge of death of Shri Maganbhai Nagjibhai Desai, and inspite of that he did not try to locate legal heirs and issue notice to the legal heirs. The Id.counsel for the assessee contended that notice under section 148 was served upon the deceased person. Assessment order has been passed on the deceased is not sustainable. In support that contentions, he relied upon the following orders of the ITAT:

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- i) Hashmukh K. Barot, IT(SS)A.No.441/Ahd/2011;
- ii) ITO Vs. Sikander Lal Jain, 45 SOT 113 (Agra)(TM);
- iii) Mrs.Jerbanoo N. Wadia Vs. ACIT, 36 ITD 185 (Bom)

5. On the other hand, the Id.DR contended that recently Hon'ble Delhi High Court considered this issue in the case of Sky Light Hospitality LLP Vs. ACIT rendered in Writ Petition No.(C) 10870/2017. Hon'ble Delhi High Court has held that section 292B would take care of such type of lapse in the notice. Hence, on the basis of non-mentioning of name of L/hrs. in the assessment order, it would not be declared as void. He further contended that this decision of the Hon'ble Delhi High Court has been upheld by the Hon'ble Supreme Court. Special Leave Petition bearing No.7409/2018 has been dismissed by the Hon'ble Supreme Court on 6.4.2018. He placed on record copy of both decisions.

6. I have duly considered submissions of both parties and gone through the record. Question before me is, whether assessment order is sustainable even if it was passed in the name of a deceased person. While considering this issue in the case of Hasmukhbhai K. Barot, a detailed examination was made and after putting reliance upon the order of Third Member in the case of Shri Sikandar Lal Jain, Division Bench of ITAT, Ahmedabad has held that the assessment order is not sustainable because notice was issued in the name of deceased person as well as assessment has been framed in the name of deceased person. This order of the Division Bench was also authored by me. The discussion made in that order reads as under:

“7. We have considered rival contentions and gone through the record carefully. We find that the AO had issued notice under Section 158BD on 21.6.2004 upon Shri Kantilal B. Barot. Copy of the notice is available at page no.25. His legal heir, Shri Hasmukhbhai K. Barot, has pointed out to the AO vide letters dated 6.6.2004 and 23.6.2006 that Shri Kantilal B. Barot was expired on 27.12.2001. Thus, it is an established fact that notice under section 158BD was issued upon a deceased person. The

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question before us, whether this inherent defect in the notice can be legalized with the help of section 292BB. The learned counsel for the assessee submitted that section 292BB was considered by the Special Bench of the ITAT in the case of Kuber Tobacco Vs. DCIT, 117 ITD 273 wherein it has been observed that this provision is prospective in nature. It was brought in statute w.e.f. 1.4.2008 and hence, it was not effective when the notice under section 158BD was issued. Therefore, the department cannot get any benefit from this section. Apart from this, we find that Third Member of the ITAT in the case of Sikandar Lal Jain (supra) has made lucid enunciation the law on this issue, and hence, the notice issued upon a deceased person would not be valid one for initiating the proceedings. The discussion made in the order is worth to note, as under:

“12. Now coming to the second issue whether the notice issued in the name of a dead person is a valid notice or not. Can the proceedings be initiated against a dead person ? The facts of the case clearly speak that the notice under section 148 was issued in the name of the assessee who has already expired on 17-11-2002. Shri Sikandar Lal Jain, the assessee, has submitted the return up to the assessment year 2002-03. His return for assessment year 2003-04 was filed on 26-3-2004 by his wife Smt. Uma Rani Jain as his legal heir. The said return was processed by the Assessing Officer on 2-7-2004 and refund was granted in the name of Smt. Uma Rani Jain as legal heir of the assessee. Thus, the fact regarding the death of the assessee was very much in the record of the Assessing Officer. Under these facts, the Assessing Officer initiated the proceedings in the name of Shri Sikandar Lal Jain by recording the reasons as well as issuing of the notice under section 148 dated 21-3-2005. For a valid initiation of the proceedings under section 147, in my opinion, issuance of a valid notice within the limitation period as well as recording of the reasons is essential. The service of the notice on the assessee is also necessary. A reading of sections 147, 148 and 149 makes it clear that the notice has to be issued to the assessee. Issuance of the notice to the assessee, as I have already held, is essential for valid proceedings. The assessee is defined under section 2, sub-section (7) which lays down as under :

"(7) "assessee" means a person by whom any tax or any other sum of money is payable under this Act, and includes—

(a)every person in respect of whom any proceeding under this Act has been taken for the assessment of his income or

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assessment of fringe benefits or of the income of any other person in respect of which he is assessable, or of the loss sustained by him or by such other person, or of the amount of refund due to him or to such other person ;

- (b) every person who is deemed to be an assessee under any provision of this Act;*
- (c) every person who is deemed to be an assessee in default under any provision of this Act;"*

From the reading of this section, it is apparent that 'assessee' means a person by whom any tax or any sum of money is payable under this Act and also includes even every person who is deemed to be an assessee under any provision of the Income-tax Act. The person is defined under section 2, sub-section (31) which includes an individual. 'Individual' means a single human being distinct from a group of human beings. Now, the question arises whether the person who has already expired, can be regarded to be a human being so as to fall within the definition of 'individual'. Notice in this case is not issued in the name of the legal representatives of the assessee but issued in the name of an individual who has already expired on 17-11-2002. Therefore, it cannot be said that there was an individual in existence in the name of Shri Sikandar Lal Jain in whose name notice is issued as on the date when the proceedings under section 147 was initiated or the notice under section 148 was issued. Under the 1922 Act, the word "individual" did not necessarily refer to a natural human being but also included a juristic person like a Hindu idol, but under the 1961 Act definition, there is a separate appropriate specification "every artificial juridical person.....". Similar view has been taken by the Hon'ble Andhra Pradesh High Court in the case of Deccan Wine & General Stores v. CIT [1977] 106 ITR 111, in which it was categorically held that an individual under the Income-tax Act, 1961 means only a human being. The issuance of a valid notice is a foundation for the validity of the re-assessment. There is a clear cut distinction between the precedent and procedure. The defect in the procedure will not normally amount to lack of jurisdiction. The notice prescribed under section 148 for the purpose of initiation of reassessment proceedings is not a mere procedural requirement, but is a condition precedent to the validity of reassessment. If no notice is issued or if the notice issued is shown to be invalid, the proceedings initiated by the Assessing Officer would be invalid and void. The assessment framed on the basis of such invalid proceedings will be invalid. A notice issued to

a dead person, in my opinion, cannot be regarded to be a notice issued to an individual as he cannot be a person to be an assessee. In consequence thereof, it cannot be regarded to have been issued to an assessee. No doubt, under section 2, sub-section (7) of the Income-tax Act, his legal representatives being different human beings from Shri Sikandar Lal Jain, are deemed to be the assessee in view of the provisions of section 159 of the Income-tax Act. Section 159(1) stressed that where a person dies, his legal representatives 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. Similarly, section 159(2) also empowers the Assessing Officer to take the proceedings against the legal representatives which he should have taken against the deceased if he had survived. Section 159(2) nowhere authorizes the Assessing Officer to take the proceedings against the individual who has already expired, that is why the legal representative under section 2(7) are regarded to be assessee. It emanates that the assessee in the case of a deceased person will be the person who are regarded to be the legal heirs of the deceased as they can be regarded to be the human being. The notice under section 148 has to be issued on the assessee, i.e., individual (human being). A person who has already expired cannot be regarded to be a human being as on the date when the notice was issued in this case. Only legal heir can be regarded to be the individual. In view of the clear mandates of the provisions of section 2(7) and sub-sections (1), (2) and (3) of section 159, I am of the opinion that the notice issued in the name of a dead person is not a valid notice. In the absence of issuance of a valid notice, the proceedings initiated under section 147 cannot be said to be valid one. Since both the parties have argued this issue extensively relying on a number of case laws claimed to be in their favour, I am bound to discuss all these case laws before giving any final verdict and accordingly these cases are discussed in the following paragraphs as under:

.....”

8. *During the course of hearing, section 159 of the Income Tax Act, was also brought to our notice. This section provides a mechanism for putting tax liability upon the legal representative, who inherited the property of the deceased.*

9. *This aspect has also been considered by the Tribunal in the case of Sikandar Lal Jain extracted (supra). Third Member has held that section*

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159(2) nowhere authorize the AO to take proceeding against the individual who has already expired, that is why the legal representative under section 2(7) are regarded to be assessee. This aspect can also appreciated by an example, viz. an assessee died leaving behind four legal representatives. The AO issued notice on the deceased. One of the legal representatives participated in the proceedings and the AO passed assessment order. All the four legal representatives had inherited property of the deceased. Can tax liability imposed upon the deceased assessee will be recovered from the rest of the legal representatives, who inherited the property, but did not participate in the proceeding, because they had not received any notice ? Section 292BB will not help the AO in this situation. Therefore, considering from all angles, we find that notice issued by the AO upon the deceased is defective notice and no valid assessment order could be passed. Respectfully following the order of the ITAT in the case of Sikandarlal Jain (supra), we allow the first ground of appeal and quash the assessment order. “

7. Let me consider judgment relied upon by the ld.DR in the case of Sky Light Hospitality LLP (supra). It filed return for the assessment year 2010-11. It was converted into limited liability partnership on 13.5.2016 under Limited Liability Partnership Act, 2008. A tax evasion petition was received by the department and report was prepared. On the basis of that report, notice was issued in the name of M/s.Sky Light Hospitality Pvt.Ltd. Question arose before the Hon'ble Delhi High Court whether alleged defect in the notice of non-mentioning name of Sky Light Hospitality LLP is fatal for the assessment proceedings or not. Hon'ble High Court after referring a large number of decisions arrived at a conclusion that in fact notice was meant for Sky Light Hospitality LLP. All facts were narrated relating to this concern in the reasons recorded for reopening of the assessment. There was merely an omission or defect in the notice by not making mention of name. Thus, Hon'ble High Court has held that section 292B would take care of this aspect. The Hon'ble High Court has dismissed writ petition and upheld issuance of notice as well as reopening of the assessment. SLP of this judgment was dismissed by the Hon'ble Supreme Court. Hon'ble High Court has considered judgment referred to it with regard to impact of passing assessment in the name of deceased

person. Hon'ble High Court concurred with these decisions and held that if assessment order was passed in the name of non-existing person, then it will be illegal. It is imperative upon me to take note of discussion made by the Hon'ble High Court:

“17. In the context of the present writ petition, the aforesaid ratio is a complete answer to the contention raised on validity of the notice under Section 147/148 of the Act as it was addressed to the erstwhile company and not to the limited liability partnership. There was no doubt and debate that the notice was meant for the petitioner and no one else. Legal error and mistake was made in addressing the notice. Noticeably, the appellant having received the said notice, had filed without prejudice reply/letter dated 11.04.2017. They had objected to the notice being issued in the name of the Company, which had ceased to exist. However, the reading of the said letter indicates that they had understood and were aware, that the notice was for them. It was replied and dealt with by them. The fact that notice was addressed to M/s Sky Light Hospitality Pvt. Ltd., a company which had been dissolved, was an error and technical lapse on the part of the respondent. No prejudice was caused.

18. Petitioner relies on Spice Infotainment Ltd. vs. Commissioner of Service Tax, (2012) 247 CTR 500. Spice Corp. Ltd., the company that had filed the return, had amalgamated with another company. After notice under Section 147/148 of the Act was issued and received in the name of Spice Corp. Ltd., the Assessing Officer was informed about amalgamation but the Assessment Order was passed in the name of the amalgamated company and not in the name of amalgamating company. In the said situation, the amalgamating company had filed an appeal and issue of validity of Assessment Order was raised and examined. It was held that the assessment order was invalid. This was not a case wherein notice under Section 147/148 of the Act was declared to be void and invalid but a case in which assessment order was passed in the name of and against a juristic person which had ceased to exist and stood dissolved as per provisions of the Companies Act. Order was in the name of non-existing person and hence void and illegal.

19. Spice Infotainment Ltd.(supra) refers to decision of Allahabad High Court in Sri Nath Suresh Chand Ram Naresh v. CIT, (2006) 280 ITR 396 (All). We have examined the decision in Sri Nath Suresh Chand Ram Naresh (supra) and would observe that facts were peculiar. There was oral partition of the Hindu undivided family, M/s Munna Lal Moti Lal, on

death of the “Karta”, Moti Lal. Capital was divided amongst three brothers, who were the coparceners. Controversy was regarding legality of oral partition that was not recognized by the Revenue. Re-assessment notices were issued, in the name of M/s Sri Nath Suresh Chand Ram Naresh, Karta Shri Nath. “Nil” return was filed along with letter stating that no business was conducted in the name of the assessee and notices were wrongly issued. Revenue had asserted that this notice was meant to assess M/s Munna Lal Moti Lal though the notice was to another assessee, who was also existing in law. Recording this factual matrix, the notice under Section 148 and assessments made were held to be invalid.

20. Commissioner of Income Tax v. Dimension Apparels Private Limited, (2015) 370 ITR 288 (Del) and Commissioner of Income Tax v. Intel Technology India (P.) Ltd., (2016) 380 ITR 272 (Kar) follow the ratio and decision in the case of Spice Infotainment Ltd. (supra), as assessment orders had been passed in the name of the non-existing assessee. These cases are therefore distinguishable.

21. Our attention was drawn to Parashuram Pottery Works Co. Ltd. v. ITO, Circle I, Ward A, Rajkot, (1977) 106 ITR 1 (SC) which records that the Assessing Officer entrusted with the task of calculating and realising tax should familiarise themselves with the relevant provisions and become well versed with the law on the subject. This is a salutary advise. Indeed there have been lapses and faults resulting in the present litigation. Notice under Section 147/148 of the Act was issued at the end of the limitation period. Noticeably, Assessment Order for the assessment year 2013-2014 was passed on 31.03.2016, one year earlier. Second lapse is also apparent. Despite correctly noting the background, notice under Section 147/148 of the Act was not addressed in the correct name and even the PAN Number mentioned was incorrect. Nevertheless, human errors and mistakes cannot and should not nullify proceedings which are otherwise valid and no prejudice had been caused. This is the effect and mandate of Section 292B of the Act.”

8. A perusal of paragraph-17, 18, 19 of the above judgment would indicate that they are in favour of the assessee in the case before me. The assessee is not harping upon any irregularity in the notice, rather he is challenging the very jurisdiction over the assessee, on account of issuance of notice in the name of a deceased person, and further, even after coming to know about status of the assessee as a deceased, passing of an assessment order in the name of deceased

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person would not be sustainable. Therefore, I allow this ground of appeal and quash the assessment order. Consequently, I do not deem it necessary to adjudicate other issues on merit.

9. In the result, appeal of the assessee is allowed.

Pronounced in the Open Court on 23rd April, 2018.

**Sd/-
(RAJPAL YADAV)
JUDICIAL MEMBER**

Ahmedabad; Dated, 23/04/2018