

**IN THE INCOME TAX APPELLATE TRIBUNAL
CHANDIGARH BENCHES 'A, CHANDIGARH**

BEFORE MS. DIVA SINGH, JUDICIAL MEMBER
AND MS. ANNAPURNA GUPTA, ACCOUNTANT MEMBER

**ITA No. 311/CHD/2013 &
ITA Nos. 606 to 608/CHD/2012
A.Ys : 2004-05, 2007-08 to 2009-10**

Shri Harbans Lal Malwa,
Through L/H Shri Bhushan Kumar Malwa,
Luxmi Street, Amrik Singh Road,
Bathinda.
PAN No.:ACMPM1776H

Vs

The DCIT,
Central Circle-1,
Ludhiana.

(Appellant)

(Respondent)

Appellant by : Shri N.K.Garg, Advocate
& Shri Vibhor Garg, CA
Respondent by: Dr. Gulshan Raj, CIT (DR)

Date of hearing : 10.05.2018
Date of Pronouncement : 28.06.2018

ORDER

PER BENCH

These four appeals filed by the assessee are being decided by a common order for the sake of convenience. By these appeals, the assessee assails the correctness of the respective orders of the CIT(A)-I Ludhiana dated 04.01.2013 pertaining to 2004-05 assessment year and separate orders dated 21.03.2012 pertaining to 2007-08 to 2009-10 assessment years.

2. Before addressing the specific grounds raised by the assessee in 2004-05 assessment year, it is pertinent to note that in the remaining three appeals, it was a common stand of the parties before the Bench that the issues have to be remanded back on account of the peculiar facts and circumstances of the case. It was submitted by the parties that not only the assessment order is passed ex-parte in all these appeals, but even in the proceedings before the CIT(A), the assessee did not participate and the impugned orders were also passed ex-parte. Accordingly, the parties were in agreement that these orders may be remanded subject to ld. AR's undertaking that the assessee shall participate fully and fairly in the remand proceedings and not abuse the

trust reposed. The differences amongst the parties was only on the issue as to which forum the remand be directed. Whereas the ld. AR requested for a remand to the AO, the ld. CIT-DR on the other hand, submitted that remand may be made to the CIT(A) as the assessee at best could be said to have been deprived of the opportunity to place facts and evidences before the said Authority. Accordingly, it was his prayer that in the interests of justice, the appeals may be remanded to the CIT(A) and not the AO. The ld. AR relying on the fact that the assessment orders in all the four years are ex-parte orders requested that the issues may be remanded to the AO. Having recorded the agreement of the parties to the extent they were in agreement that remand is necessitated. It was deemed appropriate to have the respective submissions in ITA 311/CHD/2013 pertaining to 2004-05 assessment year where the assessee admittedly participated in the proceedings before the CIT(A) and then arrive at an appropriate conclusion in the subsequent years.

3. It is seen that in ITA 311/CHD/2013 pertaining to 2004-05 assessment year, the grounds raised by the assessee are as under :

“1. That the impugned appellant order is bad both in law as well as on facts and liable be quashed because the assessment has been completed in the name of dead person.

2. That the Ld CIT(A) wrongly and illegally confirmed the action Ld AO in treating Sh. Bhushan Kumar as Legal representative of Sh. Harbans Lai Malwa against the facts and circumstances of case and without considering the evidence and pleading on record.

3. That the learned CIT(A) has erred in law and on facts by holding that sufficient opportunity has been provided to the appellant as per notice u/s 153A dated 28-01-2009 and u/s 142(1) dated 15-01-2010 issued and served but remained un-complied with without appreciating that notice in questions which remained un-complied has been issued to Harbans Lai Malwa not to the appellant. Moreover, has been issued much before the date of death of late Shri Harbans Lal Malwa who died on 11 -12-20 10.

4. That the Ld CIT(A) wrongly and illegally confirmed the action of Ld AO in completing the assessment u/s 144 against the facts and circumstances of case and confirmed the addition rejecting all the grounds of appeal in summary manner.

5. That the Ld CIT(A) has erred in law and on facts by holding that as per Power of Attorney Shri Harbans Lai Malwa has all the rights of owner and could transfer the said property to any one for what ever price deemed fit and also to utilize the proceeds thereof by mis-stating the facts whereas the Power of Attorney has been given with a specific purpose i.e. authorizing for doing Intkal only in favour of the purchaser whose name is mentioned in the Power of Attorney. Therefore, the addition confirmed on mis-statement of facts be deleted.

4. The relevant facts of the case are that a search was conducted u/s 132 at the residential premises of the assessee Shri Harbans Lal Malwa and his family members on 07.08.2008. In view of some incriminating

documents found and seized in the course of the search, notice u/s 153A dated 28.01.2009 was issued to the assessee. However, no return was filed in response to the said notice. As per record, notice u/s 142(1) dated 15.01.2010 was issued requiring the assessee to file his return of income which also remained un-complied with. Thereafter, show cause notices were issued on 22.02.2010 and 15.04.2010 which also remained un-complied with. As a result thereof, the AO was left with the only option of passing the best judgement assessment order based on seized material for which purposes also a show cause notice dated 29.11.2010 was specifically issued to the assessee. Still the assessee failed to appear and also did not file any return. However on 16.12.2010, an unsigned un-authenticated FAX message was sent to the AO stating that on the night of 11.12.2010, the assessee passed away. The record shows that promptly thereafter on 16.12.2010 itself, the AO issued a notice to Shri Bhushan Kumar, legal heir at House No. 3849, Laxmi Street, Amrik Singh Road, Bathinda to appear on 23.12.2010 alongwith notice and copy of the Show Cause Notice dated 29.11.2010. In response to that, Shri Parshotam K. Singla appeared on the said date alongwith Power of Attorney dated 22.12.2010 executed by Shri Bhushan Kumar Malwa, son of the assessee narrating the following facts :

"Kindly refer to your letter No. DQT/CC-I/LDH/10- 11-873 dated 16-12-2010 on the subject cited above which SKIS received by me today ie on 22-12-2010.

In this connection, it is respectfully submitted that my father remained ill and confined to bed since September, 2008 and died on 11-12-2010 and the Bhog Ceremony (Rasam Pagri) of My father shall be held on 24-12-2010. It is therefore, requested that a suitable and sufficient tittle may very kindly be given to me to appear before your honor after 24th December, 2010 so that I may be able to co-operate with the department after going through the record of my father lying with the department as I have no knowledge about his affairs.

Power of Attorney in favour of Shri Parshotam K. Singla, Advocate is enclosed herewith."

4.1 The record shows that in response to the said request, time was granted by the AO and the "assessee" was required to file explanation, if any by 29.12.2010. It is seen that the assessee filed the following explanation :

"That as per definition of legal representative provided in section 2 (29) of the Income Tax Act has the meaning assigned to it in section 2 (11) of the Civil Procedure Code, 1908 (5 of 1908) is as under

"Legal representative means a person who in law represents the estate of a deceased person, and includes any person who intermeddle with the estate of the deceased and

inhere a party sues or is sited in a representative character the person on whom the estate devolves on the dead) of the party so suing or sued. "

In view of the above, it is submitted that I have not inherited any property of the deceased Shri Harbans Lal Malwa, the assessee. It is further submitted that no Will has been left by him. Therefore, I cannot be treated as his legal representative. "

5. The AO not convinced with the explanation, was of the view that since Shri Bhushan Kumar also was engaged and/or helped his father in the same business of sale and purchase either on commission basis or otherwise and considering the fact that he was also residing at the very same premises alongwith Shri Harbans Lal Malwa concluded that he was the legal heir of Shri Harbans Lal Malwa and thus proceeded to conclude the assessment ex-parte u/s 144 by an order passed on 30.12.2010.

6. The assessee assailed the legality of the order passed by the AO before the CIT(A).

7. Pursuant to the dismissal of assessee's appeal by the CIT(A), the present appeal has been filed.

8. The ld. AR assailing the said order submitted that his counsel Shri Singla appearing before the CIT(A) did not represent the issues properly. Neither the full and correct facts were brought to the notice of the said authority nor the legal position thereon was addressed. It was his submission that firstly Shri Harbans Lal was not the sole legal heir of Shri Bhushan Kumar as there were four other legal heirs also. It was also his submission that these details have never been asked for by the tax authority and the assessee also apparently not aware of the legal position, has not addressed these aspects. However, the law, it was submitted, is clear as issuance of notice on one legal heir by itself may be a compliance of law but all legal heirs should have been brought on record by the department which has not been done. It was submitted that though the counsel has only argued that Shri Harbans Lal Malwa has not inherited any property from Shri Bhushan K Malwa and thus, he cannot be said to be solely representing the assets of the deceased person but the fact remains that Shri Bhushan K. Malwa had four other legal heirs also who ought to have also been brought on record by the AO. It was also his submission that the CIT(A) has selectively taken up the fact that there was a Power of Attorney executed in favour of the assessee by Shri Harbans Lal Malwa and thus, he has justified his actions. It was his submission that Power of Attorney was executed to

only represent Mr. Bhushan K Malwa before different authorities to ensure transfer/mutation etc. formalities for his property business so that Shri Harbans Lal Malwa did not need to do the running around. It was submitted that by no stretch of imagination, it could be understood to mean that the other legal heirs were deprived of their inheritance and thus need not be brought on record by the department. The Power of Attorney in favour of Shri Bhushan K. Malwa, it was submitted, was only for the limited purpose of mutation etc. only.

9. The ld. DR though relied on the order, however, was unable to state how a Power of Attorney executed for a limited purpose, could be termed to be a 'will'/ Instrument of inheritance.

10. We have heard the rival submissions and perused the material on record. On considering the peculiar facts as have been addressed by the parties in the earlier part of this order, we hold that the ignorances of the counsel of the assessee or for that matter of the assessee cannot decide the issues of inheritance.

10.1 On going through the record, it is noticed that the CIT(A) has also extracted the submissions qua the limited purpose for which the Power of Attorney was issued in favour of Shri Bhushan K. Malwa in the impugned order at page 6 as under :

*".....in respect of property purchased and sold by other persons and attorney has been given in the name of late Shri Harbans Lal Malwa was **only complete certain formalities after the registration, and, as such, no element of profit is involved in that transaction.** Therefore, no addition in his hand is called for. The same be deleted."*

10.2. It is seen that after recording these, he came to the following conclusion :

"10 I have considered the basis of additions made by the Assessing Officer. It is apparent that the appellant had been engaged in the purchase and sale of property and in the process used to Power of Attorney mode to effect purchase and sales so as to obviate the requirement of registration of the property. The language of Power of Attorney in favour of Sh. Harbans Lal Malwa makes it amply clear that he had all the rights of owner and could transfer he said property to anyone for whatever price deemed fit and also to utilize the proceeds thereof. The appellant has not brought on record any evidence in the form of the confirmations from the sellers/purchasers to show that Sh. Harbans Lal Malwa was merely meant to use the Power of attorney for documentation/procedural purposes. The onus was entirely upon the appellant to show that no amount had been invested in the purchase of said properties through Power of Attorneys which had not been done. In the circumstances, the addition made by the AO is confirmed."

10.3. On going through the above, we are of the view that the conclusion has been arrived at on an incorrect understanding of law. A Power of Attorney for facilitating buying and selling of properties where Shri Bhushan Kumar admittedly was a property dealer, cannot be confused with a 'will' or instrument of inheritance whereby the testator sets his seal in writing of his intention to assign his assets in favour of one person disowning all other legal heirs. Thus, since the issue is being remanded back, we deem it appropriate in the peculiar facts and circumstances, of the present case not to make any further observations except for the fact that the Power of Attorney executed by Shri Bhushan K Malwa for the purposes of completing formalities qua registration of specific property by itself cannot be understood to be equivalent of either a 'will' or can be considered to be an instrument by which all the assets stood assigned in favour of a particular person to the exclusion of all his other legal heirs who consequently stood divested of their inheritance. In the facts of the present case, the Power of Attorney was merely an instrument to facilitate the running of the property dealers' business and not for the purposes of inheritance. It is necessary to see whether the deceased infact left any 'will' or not, however, since in the facts of the present case, there is no such submission, argument or evidence on record, it can safely lead to the conclusion that Shri Bhushan Kumar Malwa may have passed away without a 'Will'. In these circumstances, the legal heirs of the said person have to be brought on record and the assessee alone cannot be said to be the sole legal heir. We note that all notices have been issued by the Department to the assessee as he was alive till 11.12.2010. It is further seen that before the passing of the order, the AO issued notice to Shri Harbans Lal Malwa who was represented by a counsel and did participate in the proceedings. Accordingly, we hold that at this stage at the first instance itself, it was incumbent upon the counsel representing before the AO to bring to the notice of the AO the remaining legal heirs of Shri Bhushan Kumar. The fact that Shri Harbans Lal was ignorant of the procedures, the same cannot be expected or accepted either from his counsel or the AO. It goes without saying that in the circumstances where the assessee is ignorant of the procedures and requirements of law, it was incumbent upon the AO to make efforts to bring on record the legal heirs of Shri Bhushan K Malwa. We note neither the play of law in the peculiar facts and

circumstances has been considered or canvassed nor the specific facts of the present case have been brought to the notice of the CIT(A). In the circumstances holding that the specific finding of the CIT(A) is not correct either on facts or on law, the same is set aside. Accordingly, the issue is restored back to the file of the CIT(A) with the direction to pass a speaking order in accordance with law after giving the assessee a reasonable opportunity of being heard. While arriving at the conclusion, we have given due consideration to the objections of the Sr. DR who has canvassed that CIT(A) can call for report from the AO to bring the remaining legal heirs on record for which purpose, we direct that the “assessee” shall file an affidavit naming the legal heirs of Shri Bhushan K Malwa before the CIT(A) who can then direct the AO to carry out necessary enquiries etc. and bring the correct legal heirs on record. The impugned order accordingly, is set aside back to the file of the CIT(A) with a direction to pass a speaking order in accordance with law after giving the assessee a reasonable opportunity of being heard.

10.4. Before parting, it is deemed appropriate to note that the assessee admittedly could not participate in the proceedings before the AO as the assessee remained largely ill and ultimately passed away within a few days of passing of the assessment order. We have also seen that one of the legal heirs of the assessee participated in the proceedings but admittedly did not have sufficient time as the assessment was becoming time barred and before the CIT(A), the assessee remained ignorant of the legal requirements and admittedly was also not assisted by his counsel. It is seen that the First Appellate Authority also did not address the facts and consequently the position of law. Accordingly, accepting the departmental prayer, in the circumstances, the Remand back has been directed to the CIT(A) directing that correct and relevant facts are brought on record. These observations have been made to support the direction that the CIT(A) shall admit fresh evidences which the assessee may seek to place in support of his claim as admittedly there is lack of effective opportunity before the AO. However, it is hoped that the opportunity so provided in good faith is not abused and the assessee makes proper compliances by fully and fairly participating in the proceedings before the CIT(A) as failing which we make it clear the CIT(A) would be at liberty to pass an order on the basis of the material available on record. Accordingly, the appeal of the assessee is allowed for

statistical purposes. Said order was pronounced in the Open Court at the time of hearing itself.

11. The issues in the remaining appeals since dependent on the outcome of the above appeal, it was common stand of the parties before the Bench that the assessee could not participate in the proceedings before the AO as the assessee passed away within a few days of the passing of the assessment order, however, even before the First Appellate Authority in the group of three appeals, the assessee did not participate. It is seen that notice in these appeals was also served upon Shri Harbans Lal Malwa, the son with whom the assessee was residing and he has participated through a counsel, however admittedly full facts and evidences could not be placed before the AO as the order was passed on 31.12.2010 and the case was becoming time barred. These observations have been made again to support the direction that the CIT(A) shall admit fresh evidences which the assessee may seek to place in support of his claim as admittedly there is lack of effective opportunity before the AO. Said order was pronounced in the Open Court at the time of hearing itself.

12. In the result, all appeals of the assessee are allowed for statistical purposes.

Order pronounced in the Open Court on 28.06.2018.

Sd/-

(ANNAPURNA GUPTA)
ACCOUNTANT MEMBER

Sd/-

(DIVA SINGH)
JUDICIAL MEMBER

'Poonam'

Copy to:

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

Asstt. Registrar
ITAT, Chandigarh.