

**IN THE INCOME TAX APPELLATE TRIBUNAL  
“B” BENCH, SURAT**

**BEFORE SHRI AMARJIT SINGH, ACCOUNTANT MEMBER &  
Ms. MADHUMITA ROY, JUDICIAL MEMBER**

ITA Nos.444, 445 & 446/Ahd/2017  
(Assessment Years : 2008-09, 2009-10 & 2010-11)

Late Shri Bavanji R. Dhingani, Through L/h Shri Harsukhlal B. Dhingani, GF-301, Shreenathji Apartment, Old Padra Road, Vadodara – 390 015.	Vs.	Income Tax Officer, Ward -1(2)(3), Vadodara.
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[PAN No. AUAPD 8890 P]

(Appellant)

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(Respondent)

<b>Appellant by :</b>	Ms. Urvashi Shodhan, A.R.
<b>Respondent by :</b>	Shri Mudit Nagpal, Sr.D.R.

<b>Date of Hearing</b>	02/01/2019
<b>Date of Pronouncement</b>	10/01/2019

ORDER

**PER BENCH:**

These instant appeals filed by the assessee are against the orders dated 22.08.2016, 22.08.2016 & 06.09.2016 passed by the Commissioner of Income Tax (Appeals)-5 & 1, Baroda arising out of the penalty orders dated 23.12.2015 for the Assessment Years 2008-09, 2009-10 & 2010-11 under section 271(1)(c) of the Income Tax Act, 1961 (hereinafter referred as “The Act”) with the following grounds:

1. *“Ld. CIT(A) erred in law and on facts in confirming penalty levied by AO of Rs.1,05,500/- u/s 271(1)(c) of the Act on income disclosed pursuant to notice issued u/s 148 of the Act. Ld CIT(A) erred in not appreciating that AO accepted returned income without making further addition or disallowance. Ld. CIT(A) ought to have deleted penalty levied in absence of furnishing of inaccurate particulars or concealment of income.”*

The issues involved in these cases are identical and thus the same are heard analogously and are being disposed of by a common order. ITA No.444/Ahd/2017 for A.Y. 2008-09 is taken as the lead case.

2. The brief facts leading to the case is this that during the enquiry conducted by the ADIT(Inv.)-II, Baroda, the assessee has disclosed his undisclosed income of Rs.6,36,384/-. It was further noticed that the assessee has not filed any relevant return of income and therefore the case was reopened on 31.03.2015 by issuance of notice u/s 148 of the Act. In response to the said notice the assessee filed his return of income for the A.Y. 2008-09 on 16.06.2015 declaring his gross income at Rs. 6,36,380/- and net taxable income at Rs. 5,36,380/- along with agricultural income of Rs. 2,35,700/-. The assessment u/s 143(3) r.w.s. 147 thereafter was finalized on 22.06.2015 determining total income of the assessee at Rs.5,36,384/-. The penalty proceeding was also initiated on the said issue for concealment of particulars of income. The revenue's case is this that the assessee willfully did not file his return of income in terms of provision of Section 139(1) of the Act and the amount which has been declared by the assessee during enquiry was nothing but a resultant of such enquiry as well as the proceeding u/s 148 of the Act. Ultimately, the Learned Assessing Officer came to a conclusion that the assessee concealed the particulars of income to the extent of Rs.5,36,384/- and penalty to the tune of Rs.1,05,500/- was thus levied. In appeal, such penalty was confirmed. Hence, the instant appeal before us.

3. At the time of the hearing of the matter, the Learned Counsel appearing for the assessee submitted before us that the assessee before filing of return on 31.07.2010 paid tax on 30.01.2010. On 26.06.2011, the original assessee died and thereafter a notice u/s 148 of the Act was issued on the deceased on 31.03.2015. He further submitted that it is a settled principle of law that the notice u/s 148 of the Act cannot be served upon a dead person. Further that, all particulars with the return of income was filed by legal heirs of

the assessee and there was never any concealment of income by the legal representatives of the assessee and thus penalty on that score is not tenable. On the other hand, Learned DR relied upon the order passed by the authorities below.

4. We have heard the Learned Representative appearing for the respective parties, we have perused the relevant materials available on record. It appears from the records that the assessee during the penalty proceedings filed a reply before the Learned AO which was received by the Revenue on 09.07.2015 with the following submissions:

*“With reference to above subject matter our submission as follows:*

- 1. The assessee has died on 26.06.2011 at the age of 71 years.*
- 2. Due to old age and not literate he has not filed return u/s 139.*
- 3. On receipt of notice and within time limit prescribed by the AO the legal heir has duly submitted all particulars with return of income and co-operated fully with the AO.*
- 4. If we go through the return filled by the legal heir we find the AO has made assessment without any addition to particulars presented by the legal heir. The assessee has paid all the liability at the time of filing of the return.”*

Further that, the said submissions was supplemented by another written submissions dated 14.12.2014 made by the assessee stating that:

*“The assessee has paid the tax amount of the A.Y. 2008-09 before issuing notice by the revenue.”*

Considering such submissions made by the assessee, the Learned AO passed order as follows:

- 4. I have duly gone through the reply of the AR of the assessee vis-a-vis the fact of the case. The undersigned find that the reply of the AR of the assessee is untenable & not acceptable. It is undisputed fact that in spite having taxable income of Rs.5,36,384/- the assessee had not voluntarily filed his relevant Return of income. Secondly, the assessee has paid the whole of taxes on his taxable income only after the Departmental efforts i.e. the enquiry conducted by the ADIT (Inv.)-II, Baroda. Furthermore, another undisputed fact of the case is that the assessee has filed his Return of Income on 16.06.2015 in consequence of the proceedings conducted u/s.148 of the Act. The finding of the aforesaid*

*facts clearly reveals that the assessee has concealed his particulars of income to the extent of Rs.5,36,384/-.*

*Thus, from the totality of the prevalent facts & circumstances of the instant case, it is reasonably inferred that the assessee had concealed the particulars of income to the extent of Rs.5,36,384/-.*

*The fact referred to in the present case is also squarely covered by the provisions of the **Explanation-1 of the Sec. 271(1)(c) of the Act**, which are reproduced as under:-*

***(A), such person fails to offer an explanation or offers an explanation which is found by the [Assessing] Officer or the [\*\*\*] {Commissioner (Appeals)} for the commissioner] to be false, or***

*It is noteworthy to mention here that in view of the judgment of the **Hon'ble ITAT, Patna in the case of ACIT Vs. Nageshwar Prasad dated-24.03.1997**, the penalty u/s.271(1)(c) of the Act can be levied against the legal heir of the deceased assessee.*

*From corollary of totality of facts and circumstances of the instant case. I am of considered opinion that the assessee has concealed his particulars of income to the extent of **Rs.5,36,384/-** as discussed above. The penalty u/s 271(1)(c) of the Act amounting to Rs.1,05,500/- is thus, levied.”*

During the appellate proceeding, the assessee further submitted as follows:

*"The legal heir of the assessee has furnished return of income in pursuant to the notice u/s 148 on 16th June, 2015 with gross income of Rs.636420/- and net taxable income of Rs.536420/- along with agriculture income of Rs.235700/-. Later on the Ld. AO had final/zed the assessment under section 143(3) r.w.s 147 of the Act on 22.06.2015 without any addition or disallowance.*

*Then after the Ld AO has issued notice for levy of penalty under section 271(1)(c) on the ground that during the enquiry conducted by the ADIT(Inv)- II, Baroda the assessee has disclosed his undisclosed income of Rs.636384/- considering the provisions of Explanation - 1 of the Section 271(1)(c)of the Act.*

*Detail of Explanation -1 of Section 271(1)(c)*

*The Ld. AO had not consider full wordings of the explanation - 1 of section 271(1)(c) while making order of penalty. The actual wordings of the section*

271 (1)(c) with explanation -1 is as under:

"Section 271(1) - If the Assessing Officer or the Commissioner (Appeals) [or the Commissioner] in the course of any proceedings under this Act, is satisfied that any person –

- (a) .....
- (b) .....
- (c) has concealed the particulars of his income or furnished inaccurate particulars of such income, or
- (d) .....

He may direct that such person shall pay by way of penalty-

*Explanation 1.*— Where in respect of any facts material to the computation of the total income of any person under this Act,—

- (A) such person fails to offer an explanation or offers an explanation which is found by the Assessing Officer or the Commissioner (Appeals) or the Commissioner to be false or
- (B) such person offers an explanation which he is not able to substantiate and I fails to prove that such explanation is bona fide and that all the facts relating to the same and material to the computation of his total income have been disclosed by him],

Then the amount added or disallowed in computing the total income of such person as a result thereof shall, for the purposes of clause (c) of this sub-section be deemed to represent the income in respect of which particulars have been concealed."

Here, the Ld. AO had not consider the last portion of the section 271(1), i.e., 'the amount added or disallowed in computing total income be deemed to represent the income in respect of which particulars have been concealed' which indicates that it is only the addition or disallowance to the total income that would represent the income for the purposes of levy of penalty within the meaning of the Explanation 1 to section 271(1)(c). In other words, if no addition or disallowance is made in computing total income then there will not be any income which can be deemed as income in respect of which particulars have been concealed.

The above view was also considered by Hon. Tribunal - AHD in case of DCIT Vs Dr. Satish B. Gupta. It Appeal No. 1482(AHD) of 2010. Copy of decision of Hon. Tribunal - Ahmedabad is enclosed herewith for your kind reference."

It appears from the record that in response to the notice under section 148 of the Act, the legal heirs of the assessee filed its return of income on 16.06.2015 and the Learned Assessing Officer assessed such income tax liability as 'Nil' by passing an order u/s 143(3) r.w.s. 147 on 22.06.2015. The Learned AO has issued notice u/s 274 for levy of penalty u/s 271(1)(c) and imposed penalty of Rs.1,05,500/-. It further appears that the Learned AO without any proper justification only on the basis of the income disclosed by the assessee imposed penalty. While doing so the Learned AO relied on the judgment passed by the **Hon'ble ITAT, Patna Benches in the case of ACIT-vs-Nageshwar Prasad** wherein for levy of penalty from legal heirs of the assessee the AO added and/or disallowed an amount in computing the total income during the course of assessment. But in the case in hand, no such addition and/or disallowance was made during the course of assessment by the Learned AO. Therefore, the judgment so relied upon by the Learned CIT(A) is not applicable to the instant case of the appellant. In fact the Learned CIT(A) confirmed the penalty on the basis of the finding and/or opinion formed by the Learned AO.

Apart from that no false detail was found to be furnished in the said return of income filed by the legal heir, neither any false submissions or inaccurate particulars in the return of income was submitted by the legal heir of the assessee which can culminate into the order imposing penalty. Further that, when the death of the original assessee on 26.06.2011 was already made known to the Learned AO by way of written submission during the penalty proceedings challenging the very legality of issuing the notice u/s 148 of the Act on the deceased which is admittedly bad in law, the penalty proceeding ought to have been dropped by the Learned AO. The judgment on the similar set of facts as relied upon by the Learned Counsel appearing for the assessee has also been taken care of by us. The penalty cannot be levied on the legal representatives when a assessee is died well before filing of assessment in question as already been discussed and upheld by the said judgment in favour of the assessee. The relevant portion whereof is narrated herein below:

5. *We have heard both sides and perused the case files. Relevant facts stands narrated in the preceding paragraphs. It has come on record that the assessee expired well before issuance of section 153A notice (supra). The appellant is widow/legal representative of the deceased-assessee. The authorities below have imposed the impugned penalties on her. We find that section 159 of the Act prescribes liability of an assessee's legal representatives 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.*

*(4) Every legal representative shall be personally liable for any tax payable by him in his capacity as legal representative if, while his liability for tax remains undischarged, he creates a charge on or disposes of or parts with any assets of the estate of the deceased, which are in, or may come into, his possession, but such liability shall be limited to the value of the asset so charged, disposed of or parted with.*

*(5) The provisions of sub-section (2) of section 161, section 162, and section 167 shall, so far as may be and to the extent to which they are not inconsistent with the provisions of this section, apply in relation to a legal representative.*

*(6) The liability of a legal representative under this section shall, subject to the provisions of sub-section (4) and sub-section (5), be limited to the extent to which the estate is capable of meeting the liability."*

*A perusal of the above said statutory provision makes it clear that a penalty imposed under the Act nowhere made liability of a legal representative. The legislature has already categorized section 159 in the array of 'special' cases. The same is liable to be strictly interpreted. We observe in these facts and background of the case that the legislature itself has not included a penalty as a legal representative's liability when an assessee dies well before framing of an assessment in question. We also deem it proper to observe that section 271(1)(c) is a penal provision which cannot be equated with a demand arising from an assessment framed. The Revenue fails to refer to any statutory provision in this regard. We draw support from hon'ble jurisdictional high court's decision in ACIT vs. Late Shrimant P.P. Gaekwad (2009) 313 ITR 192 (Guj.) holding on similar lines under the Wealth Tax law. Therefore, we delete the impugned penalties imposed on the deceased assessee's legal representative."*

Respectfully following the judgment passed by the Co-ordinate Bench, it is held that penalty cannot be imposed upon the legal heirs of the original deceased assessee by the authorities in the given situation. In that view of the matter the penalty levied by the authorities below is hereby deleted.

6. In the result, assessee's appeal is allowed.

**This Order pronounced in Open Court on**

**10/01/2019**

Sd/-  
( AMARJIT SINGH )  
**ACCOUNTANT MEMBER**

Sd/-  
( Ms. MADHUMITA ROY )  
**JUDICIAL MEMBER**

Ahmedabad; Dated 10/01/2019  
*Priti Yadav, Sr.PS*

**आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :**

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. संबंधित आयकर आयुक्त / Concerned CIT
4. आयकर आयुक्त(अपील) / The CIT(A)-5 & 1, Baroda
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, अहमदाबाद / DR, ITAT, Ahmedabad
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

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