



IN THE INCOME TAX APPELLATE TRIBUNAL SURAT BENCH, SURAT

BEFORE SHRI AMARJIT SINGH, JM & SHRI O.P.MEENA, AM

**ITA No.2389/Ahd/2014
(Assessment Year 2010-11)**

Hansaben L. Patel Through Her Legal, Heir Ushaben M. Kantharia, A-4 Jeevandeep Flats, Opp. Kadampalli Society, Timaliyawad, Nanpura, Surat.	ITO, Ward-5(2) Surat.
PAN/GIR No.AUVPP6911G	
Appellant)	.. Respondent)

Assessee by	Shri Mihir M. Shah
Revenue by	Shri B. P. K. Panda (Sr. DR)
Date of Hearing	24/09/2019
Date of Pronouncement	30/09/2019

ORDER

PER AMARJIT SINGH (J.M):

The assessee has filed the present appeal against the order dated 03.06.2014 passed by the Commissioner of Income Tax (Appeals) –Majura Gate, Surat [hereinafter referred to as the “CIT(A)”] relevant to the A.Y.2010-11.

2. The assessee has raised the following grounds: -

1. *That the learned C.I.T. (Appeal)-I Surat has grievously erred in Law and on facts by rejecting the fact that notice issued u/s 143(2) on 27-09-11 in the name of dead person is invalid, the fact about the death of the assessee was already known to the jurisdictional assessing officer, (intimation of same was given on 21 -09-11 along with necessary documentary evidence, well before the time of issue of first notice u/s 143(2)) and consequently, treating the entire assessment as null and void and therefore the assessment needs to be quashed.*
2. *Without prejudice to above, on facts and in the Law, the Ld. C.I T (Appeal)-I Surat erred in confirming the order of Assessment Officer holding that the sum of Rs. 3,00,000 was assessable as cash credits u/s 68 without providing an sufficient opportunity to furnish the confirmations there of.*
3. *That the learned CIT(A)-I has grievously erred in Law and on facts by allowing the addition made on the basis of making a change in opinion and treat the income of short term capital gain on sale of shares of Rs. 214,884/- as business income and long term capital gain on sale of shares of Rs.354,844/- which was exempt u/s 10(38) of the Act. As business income of the appellant u/s 28 of the Act purely based on presumption, the practice which was consistently followed to show it as investments in earlier years and also not providing the sufficient opportunity to furnish the details in its support and therefore, the addition required to be deleted.*
4. *The appellant craves leave to add, alter, amend any ground of appeal.”*



3. The brief facts of the case are that the assessee filed her return of income on 24.09.2010 declaring total income to the tune of Rs.8,59,110/- for the A.Y. 2010-11. The return was processed u/s 143(1) of the I. T. Act. The assessee was in the business of trading in shares and securities. The case was selected for scrutiny. Notice u/s 143(2) of the Act dated 27.09.2011 and notice u/s 142(1) of the Act dated 19.01.2012 in the name of Smt. Ushaben M. Kantharia L/h of late husband of Smt. Hansaben L. Patel was duly issued and served upon her. C.A. Shri Mihir Shah issued the letter dated 03.02.2012 requesting to drop the assessment proceeding as the notice u/s 143(2) of the Act was issued in the name of dead person. Thereafter, another notice u/s 142(1) of the Act dated 27.11.2012 was issued to the legal heir of the assessee and served. After the reply of the assessee, the objection raised by AO on account of drop the assessment proceeding in view of the service of notice to the dead person was declined. On verification, it was also found that the assessee has taken the unsecured loan in sum of Rs.17,40,000/- from the four persons mentioned below:-

S. No.	Name of the person	Amount (Rs.)
1	Shri Dipen S. Shah	1,00,000/-
2	M. B./ Kanthariya (HUF)	5,60,000
3	Pradip J. Doshi	2,00,000
4	Ushaben M. Kantharia	8,80,000
	Total	17,40,000

4. The assessee failed to prove the genuineness of the loan in sum of Rs.3,00,000/-, therefore, the same was added to the income of the assessee. The assessee shown the long term capital gain in sum of Rs.3,54,844/- which was claimed as exempt from tax. Since the assessee was in profession of dealing in share and securities, therefore, the claim of the assessee was declined and Rs.3,54,844/- was added to the income of the assessee. The assessee has also showed the short term capital gain in sum of Rs.2,14,884/-. Since the assessee in the business of dealing of share and securities, therefore, the short term capital gain in sum of Rs.2,14,884/- was also denied and added to the income of the assessee. The total income of the assessee was assessed to the tune of Rs.15,13,954/-. Feeling aggrieved, the assessee filed an appeal before the CIT(A)



who dismissed the appeal of the assessee, therefore, the assessee has filed the present appeal before us.

ISSUE NO.1

5. We have heard the argument advanced by the Ld. Representative of the parties and perused the record. The Ld. Representative of the assessee has argued that the notice u/s 143(2) of the Act was issued upon the dead person and nowhere served upon with the name of the legal heir of the dead person, therefore, the assessment order in question is not liable to be sustainable in the eyes of law, hence, is liable to be set aside. However, on the other hand, the Ld. Representative of the revenue has refuted the said contention. It is not in dispute that the notice u/s 143(2) of the Act was issued on 27.09.2011 in the name of the Smt. Hansaben L. Patel which lies at page no.89 of the paper book. Hansaben L. Patel had already been expired on 02.03.2011. Death certificate is on the file which lies at page no. 91 of the paper book which clears that the Hansaben L. Patel had died on 02.03.2011. It is quite clear that the notice u/s 143(2) of the Act was issued with the name of dead person. Even after the reply, no notice u/s 143(2) of the Act was issued with the name of legal heir of Smt. Hansaben L. Patel. Since the notice was issued with the name of the dead person, hence, the proceeding of u/s 143(2) of the Act is not liable to be sustainable in the eyes of law. In this regard, we find support of the decision of Hon'ble'ble ITAT Mumbai Bench in the case of **Shri Avinash V. Vyas Vs. ITO in ITA. No.3538 & 3539/M/2010 dated 20.07.2011**. The relevant finding is hereby reproduced as under.-

“7. We have considered the rival submissions made by both the sides, perused the orders of the Assessing Officer and the CIT(A) and the paper book filed on behalf of the assessee. We have also considered the various decisions cited before us. Admittedly in this case, the assessment was reopened by the Assessing Officer on the basis of examination of details furnished during the assessment proceedings for A.Y. 2005-06. The assessee vide letter dt.24.12.2007 addressed to the Assessing Officer during assessment proceedings for A.Y. 2005-06 has mentioned the name of the assessee as Late Sita Vinod Vyas. The copy of the death certificate of the assessee has been filed in paper book page 32 which was filed before the Assessing Officer as per certification by the legal heir of the assessee and the same has not been disputed by the revenue. The return of income in response to notice u/s.148 has been



filed in the name of Late Sita Vinod Vyas and the certification has been done by Dr. Avinash Vinod Vyas, legal heir of Late Sita Vinod Vyas. The computation statement filed along with the return of income also mentions name of the assessee as Late Sita Vinod Vyas by Dr. Avinash Vinod Vyas. All the above things should have prompted the Assessing Officer to issue notices to the legal heirs of Late Sita Vinod Vyas. However, we find the notice u/s.143(2) Dt.1.11.2008 has been issued to Mrs. Sita Vinod Vyas. Even the assessment order u/s.143(3)/147 has been issued in the name of Late Sita Vinod Vyas. This type of conduct on the part of the Assessing Officer shows that either he was unaware of the law he was administering or failed to understand the law.

7.1 It has been held by the Hon'ble Supreme Court in the case of CIT Vs. Amarchand N. Shroff 48 ITR 59 that an order passed by the Assessing Officer against a dead person becomes a nullity. In the instant case, sufficient material was available before the Assessing Officer that the assessee has died. Still the Assessing Officer has passed the order against a dead person. Therefore, in our opinion the entire assessment proceedings becomes a nullity. The various decisions relied on by the CIT(A) are distinguishable and not applicable to the facts of the present case. We, therefore, quash the assessment and the Ground No.1 raised by the assessee is allowed.

7.2 The Hon'ble Supreme Court in the case of Kapurchand Shrimal Vs. CIT reported in 131 ITR 451 has held that an appellate authority has the jurisdiction as well as the duty to correct all errors in the proceedings under appeal and to issue, if necessary, appropriate directions to the authority against whose direction the appeal is preferred to dispose of the whole or any part of the matter afresh, unless forbidden from doing so by nature. In light of the above, the Assessing Officer is at liberty to initiate fresh proceedings or to continue the proceedings from where the irregularities intervened, if otherwise permissible under the law.

8. Since the assessee succeeds on this preliminary ground, we are not adjudicating the other grounds as well as the additional grounds raised by the assessee as these become academic in nature."

6. In view of the said finding, the assessment order u/s 143(3) of the Act is not liable to be sustainable in the eyes of law. Moreover the Hon'ble High Court of Madhya Pradesh in the case of **CIT Vs. Prabhawati Gupta (1998) 231 ITR 188 (MP)** has held as under:-

"It was an admitted fact that the assessee died before the proceedings for assessment were completed. Since the proceeding had not been completed and it was yet to be completed, therefore, it was incumbent under section 159(2) on the ITO to have brought the legal representative of the deceased on record and proceeded from the stage where it was left at the time of death of the deceased. According to the findings of the Tribunal, the proceedings had not been completed before the death of the assessee, therefore, the Tribunal had rightly held that the assessment should be completed under section 159(2). In this view of the matter, we the view taken by the Tribunal was correct."



ITA No. 2389/Ahd/2014
A.Y.2010-11

7. The assessee has also relied upon the some more decisions but it is quite clear that the notice u/s 143(2) of the Act was issued with the name of dead person and subsequently joining the proceeding by legal heir nowhere validate the proceeding. Taking into account all the facts and circumstances mentioned above, we are of the view that the assessment u/s 143(3) of the Act is not liable to be sustainable in the eyes of law, therefore, we set aside the same and decide the issue in favour of the assessee against the revenue.

ISSUE Nos. 2 to 4

8. Since the issue no. 1 has been decided in favour of the assessee, therefore, deciding the issue no. 2 to 4 would only be academic in nature.

9. In the result, the appeal filed by the assessee is hereby ordered to be allowed.

Order pronounced in the open court on this 30/09/2019

Sd/-

Sd/-

(O. P. MEENA)
ACCOUNTANT MEMBER

(AMARJIT SINGH)
JUDICIAL MEMBER

सुरत/ Surat, Dated: 30/09/2019/Vijay Pal Singh, Sr.PS

Copy of order sent to- Assessee/AO/Pr. CIT/ CIT (A)/ ITAT (DR)/Guard file of ITAT.

By order

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Assistant Registrar, Surat