

आयकर अपीलीय अधिकरण, अहमदाबाद न्यायपीठ 'A' अहमदाबाद ।
IN THE INCOME TAX APPELLATE TRIBUNAL
“A” BENCH, AHMEDABAD

BEFORE SHRI RAJPAL YADAV, VICE PRESIDENT AND
SHRI WASEEM AHMED, ACCOUNTANT MEMBER

आयकर अपील सं./I.T.A. No. 415/Ahd/2018
(निर्धारण वर्ष / Assessment Years : 2012-13)

Late Shri Navinchandra Sakalchand Dalal Legal Heir Dipak N. Dalal 5, Shalimar, Krishna Society, Panchvati, Ahmedabad 380006 Gujarat	बनाम/ Vs.	Income Tax Officer Circle 5(2)(3), Ahmedabad
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AAUPD3656R		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)

अपीलार्थी ओर से /Appellant by :	Shri S. N. Divatia, A.R.
प्रत्यर्थी की ओर से / Respondent by :	Shri Deelip Kumar, Sr.D.R.

सुनवाई की तारीख / Date of Hearing	10/02/2020
घोषणा की तारीख /Date of Pronouncement	11/03/2020

आदेश/ORDER

PER WASEEM AHMED - AM:

The captioned appeal has been filed at the instance of the assessee against the order of the Commissioner of Income Tax(Appeals) - 5, Ahmedabad (CIT(A) in short) dated 04/12/2017 relevant to Assessment Year (AY) 2012-13.

2. The Assessee has raised following grounds of appeal:

- "1.1 *The appellant, being dissatisfied with CIT(A) order dated 4-12-2017, confirming quantum addition of Rs. 1,51,01,302 in respect of long term capital gain on sale of fully let-out property (having undemarcated plot area of 4292 sq. mtrs. alongwith different super-structures thereupon admeasuring 2030.10 sq. mtrs.), presents this appeal*
- 2.1 *It is submitted that the AO has no valid jurisdiction u/s 148 as*
- (i) *Notice u/s 148 was issued on 28-1-2015 in name of deceased assessee viz; Shri Navinchandra Sakalchand Dalai (who had expired on 3-11-2013)*
 - (ii) *There was prima facie no new material or information, particularly as registered sale deed is always within public domain right at the time of processing ROI*
 - (iii) *In any case, FMV of property sold as at 1-4-1981 has not been subject matter of "reasons recorded" u/s 148*
- 3.1 *The CIT(A)/the AO failed to appreciate that*
- (i) *The appellant was imperfect owner of property on several counts, entire property sold was in occupation of old tenants / subtenants/sub-lessees (since last more than 20 years) /encroachers, the property sold suffered from mandatory limitations and several adversities, have imperfect titles, subject to several riders such as pending vacation and civil suits, illegal encroachments, Urban Land Ceilings (and Regulations) Act, 1976 (ULCJ acquisition of land area of 5023 sq. mts., Gujarat HC granting injunction against the appellant/the buyer to maintain status quo in ULC matter and SLP there against still pending before SC.*
 - (ii) *ULC Authority could not demarcate its acquired land area and hence the buyer effectively bought the property (4292 sq. mtrs.) without identification*
 - (iii) *There were illegal occupants also, encroachments by anti-socials, one false "Possession Note" obtained from Makarba Panchayat, one room put up by watchman of deceased tenant, liquor sale, gamblings etc. from the property etc.*
 - (iv) *The VO allowed meagre 15% deduction in aggregate for tenants, pending disputes, imperfect title etc. which reduction is not commensurate with facts and circumstances.*
 - (v) *The AO furnished to the appellant valuation report (as of date of sale] dated 23-3-2016 by the VO as part of assessment order dated 30-3-2016 u/s 143(3) r.w.s. 147*
 - (vi) *The CIT(A) has erred, without appreciation of law and facts, in holding that report of VO is on a very sound basis.*
- 4.1 *It is submitted that in specific facts of the case, "Rent capitalization method" (rent receivable of appr. Rs.142,020 per annum), is reasonable and fair method of valuation, though the VO worked out FMV by employing "Land and Building" method estimating land FMV at Rs.140.13 lacs and of super structures at Rs.135.95 lacs, total FMV Rs.276.09 lacs which is factually incorrect, since the*

super-structures have been renovated / put up by respective tenant occupiers, the appellant did not own the superstructures and in any case the superstructures have been highly overvalued

- 5.1 *It is submitted that the AO ought to have examined the buyer regarding sale consideration paid and his justification, to record status of property, its location, size, shape, surrounding locality, encroachment status, illegal activities, civil suits, ULC proceedings, additional stamp duty paid etc. and present position of the property bought to meet the end of Justice and if necessary to afford the appellant opportunity of rebuttal or cross-examination of the buyer.*
- 6.1 *It is submitted that the appellant has been 92 years old, he was under lots of stress, tension and anguish undergoing aforesaid crucial problems beyond his capabilities. The appellant, as advised, therefore made distress sale in utmost hurry at best available price, after negotiating hard with the buyer at fag end of his life."*

3. The assessee in the 2nd ground of appeal has challenged the validity of the assessment framed under section 147 of the Act on the ground that the notice under section 148 of the Act was issued upon the dead person.

4. The brief facts of the case are that the assessee namely Shri Navinchandra S Dalal (now deceased assessee) filed his return of income dated 28-03-2013 declaring total income at Rs. 64,570/- which was processed under section 143(1) of the Act dated 06-05-2013. The AO subsequently found that the sale consideration Rs. 1.34 crore shown by the assessee in the income tax return on the basis of sale deed was less than the value adopted for the purpose of stamp duty amounting to Rs. 3,30,35,360/-. Accordingly, the AO was of the view that the assessee was required to adopt the sale consideration as adopted for the purpose of the stamp duty in pursuance to the provisions of section 50C of the Act. But the assessee has not done so. As a result the income of the assessee has escaped assessment. Thus the AO issued notice under section 148 of the Act upon the assessee dated 28.01.2015.

5. The legal representative of the deceased assessee namely Shri Deepak N. Dalal in response to such notice submitted that the

original return filed dated 28.03.2013 should be treated as the return filed under section 148 of the Act.

6. The assessee before the AO challenged the validity of the proceedings initiated under section 148 of the Act for various reasons. But the AO disregarded the contentions of the assessee and framed the assessment under section 147 of the Act, in the name of legal representative namely Shri Deepak N. Dalal vide order dated 30-03-2016 determining the total income at Rs. 1,51,65,870/- only.

7. However, the assessee 1st time before the learned CIT (A) contended that the notice under section 148 of the Act, was issued in the name of the dead person. Therefore, the AO should have issued the fresh notice under section 148 of the Act in the name of the legal representatives. However, the learned CIT (A) disregarded the contention of the assessee by observing that the intimation about the death of the assessee was never communicated to the AO. As such, the AO in the absence of sufficient information, has rightly issued notice under section 148 of the Act in the name of the deceased assessee and framed the assessment in the name of legal representative.

8. Subsequently, the learned AR before us submitted as under:

"2.1 The brief facts giving rise to this appeal are that the said appeal was filed by him in his representative capacity as the legal heir of the deceased father Shti Navinchandra Sakalchand Dalai who had expired on 03-11-2013. The deceased father had two sons- myself and younger one- Dilip and one daughter- Harshila. My father used to stay with my brother during the time when he died and he looked after managed his all financial & other matters.

2.2 The deceased father had filed original ITR on 28-3-2013 declaring total income of Rs. 64,570/-. Later on the AO issued notice u/s 148 on 28-1-2015 on account of difference in stamp duty value and sale deed. Since the said notice was issued on the present appellant as the LR of the deceased assessee, he complied with in good faith and cooperated in the assessment proceedings, though he was strictly

speaking not the LR in view of no asset inherited by him or intermeddled in the estate of the deceased anyway nor looked after/managed financial affairs of the deceased prior to his death. Hence the AO completed re-assessment u/s 143(3) r.w. s. 147 on 30-3-2016 on the total income of Rs.1,51,65,870/- after making addition of Rs. 1,51,01,302/- invoking sec 50C.

2.3 Meanwhile the appellant came to know that his brother Sh Dilip Dalai had sold immovable property Vasana which was claimed as received on inheritance from the father under his WILL executed on 26-1-2013 and he had inherited all the estate left by my deceased father. On coming to know the same, the appellant addressed letter dt. 11-8-2016 to ITO Ward-5(2)93) A'bad narrating all facts with evidence and requested AO to implead his brother Sh Dilip Dalai as LR of the deceased and continue the proceedings against him and also recover the demand from him because the appellant had not received any property from his father. The appellant again informed AO vide letters dt. 5-3-2018 and 17-3-2018 to take up the proceedings for recovery against his brother. However no reply or action was taken in this direction by AO. Therefore the appellant has raised in this contention in the present proceedings.

2.4 The appellant contends that the presnt proceedings should be restored back to the file of AO for the following reasons:

*(i) **Firstly**, the AO has failed to appreciate that in order to continue any proceedings against the deceased, the notice has to be issued to all the iegal heirs/representatives as held in case of **Chootharmal Wadhuram (80 ITR 3GO)(Guj)** wherein it is held that:*

"Where a person dies leaving more than one legal representatives, the ITO must proceed to assess the total income of the assessee by serving notice under s. 22(2) or s. 34, as the case may be, on all the legal representatives. If the notice is served on only one legal representative, there would be no complete representation of the estate or, to use the words of Salmond, "of the person of the deceased". One only out of several legal representatives would not represent the whole interest of the deceased and if the whole interest of the deceased is not represented before the ITO, it is difficult to see how the ITO can proceed to assess the total income of the assessee. The assessment must on principle and authority be made on those who represent the whole interest of the assessee—his entire estate—and assessment on only one of them who partially represents the estate of the deceased, cannot be regarded as sufficient to bind the estate of the deceased "

*(ii) **Secondly**, Without prejudice to the above, it is submitted that when the present appellant who was issued notice u/s 148 but he objected specifically to his being proceeded against on the ground that there was other LR and he had inherited the entire estate of the deceased, he too should be brought on record to complete the assessment and further proceedings. When the AO has ignored this objection and completed the proceedings, the same are vitiated unless it is covered by the exception. The failure to implead all the LRs is not irregularity but illegality and vitiate the assessment.*

In CIT v Jai Prakash Singh's (219 ITR 737)(SC), it was held that the fact of the death of the assessee and the names of legal representatives were intimated to the ITO and still the assessment was completed without bringing all the legal representatives on record and without service of notice upon all of them. On appeal, it was contended that the assessment was wholly invalid and without jurisdiction. But the contention was rejected on the ground that there was an irregularity and not a nullity and the assessment was set aside and a fresh assessment was ordered after service of notice on all the legal representatives. The Tribunal concurred in the decision of the appellate authority. On a reference, it was held that since the entire body of legal representatives of the deceased assessee was not served and one of the legal representatives who was served, was not proved to have represented the other legal representatives, the assessment was null and void and that fresh assessment could have been ordered only if law permitted and there was no bar,

(iii) **Thirdly, it is submitted that** in case the failure to issue notice on all the LRs as irregularity, the entire assessment is liable to be set aside and the AO should be directed to make fresh assessment after issuing notice to appellant's brother who has bequeathed all the estate of the deceased father. The appellant had time & again requested to take proceedings against his brother but neither any order was passed on said applications nor any inquiry was made to ascertain who had received the estate of the deceased.

(iv) **Lastly,** it is submitted that direction may be given to AO to issue notice and implead said son-Sh Dilip Dalai as LR which is material and relevant for the purposes of assessment u/s 159(4) and it is not for excluding income from one person and include in the income of another. The person to be assessed is one- deceased but the proceedings are continued against such LR who inherits the assets of the deceased."

9. On the other hand the learned DR vehemently supported the order of the authorities below.

10. We have heard the rival contentions of both the parties and perused the materials available on record filed before us. From the preceding discussion we find that admittedly the notice under section 148 of the Act, was issued in the name of the deceased assessee. Thus the notice issued under section 148 was defective which is not curable as it goes to root of the matter. Similarly the assessment framed in the name of deceased or non-existent entity is also invalid. This view has been also confirmed by the various courts including the Hon'ble Apex court.

11. However, the difficulties arises before the revenue that how it comes to know before issuing a notice that, whether an assessee is existing and non-existing. What is the remedy for the Revenue if the notice is issued in the name of deceased assessee due non availability of information. In this regard Hon'ble Calcutta High Court in the case of CIT vs. Shaw Wallace Distilleries Ltd reported in [2016] 70 taxmann.com 381 has held that if the legal representative does not divulge the information to the AO about the non-existence or not brought the fact before AO during the assessment proceeding. Then such proceeding should be treated as valid.

12. Whereas the Hon'ble Gujarat High Court in the case of *Chandreshbhai Jayantibhai Patel vs. ITO reported in [2019] 101 taxmann.com 362* held that notice issued in the name of deceased assessee will remain invalid as the issue of notice is jurisdictional issue and the same is not curable under section 292B. However the Hon'ble court clarified that the only remedy available to Revenue is to issue a fresh notice in the name of legal representative if the notice not bared by the time.

13. Coming to the present fact of the case it is also undisputed fact that the AO never had any clue about the death of the assessee as well as there was no intimation from the side of the legal representative of the assessee about such fact. Moreover, the assessee never challenged the validity of the proceedings under section 147 of the Act before the AO on the ground that the notice was issued upon the dead person. However, we find that the assessment was framed in the name of the legal representative as evident from the assessment order dated 30.03.2016 which is available on record. Thus it is transpired that the AO was very

much aware during the assessment proceedings under section 147 of the Act about the death of the assessee.

14. Now the question arises whether the AO has available time limit to issue fresh notice under section 148 when he comes to know the fact that the assessee is deceased? In this the provision of section 149 (1) reads as under:

149. (1) No notice under section 148 shall be issued for the relevant assessment year,—

(a) if four years have elapsed from the end of the relevant assessment year, unless the case falls under clause (b) or clause (c);

(b) if four years, but not more than six years, have elapsed from the end of the relevant assessment year unless the income chargeable to tax which has escaped assessment amounts to or is likely to amount to one lakh rupees or more for that year;

15. On perusal of the provision of the clause (b) of sub-section 1 of the section 149, we note that the AO has available time of six years from the end of relevant assessment year i.e. 31.03.2013 which ends as on 31.03.2019. Admittedly, the assessee died dated 03-11-2013 and the notice was issued upon him under section 148 of the Act dated 28.01.2015. In this connection we note that the AO was not aware about the death of the assessee at the relevant time when he issued notice under section 148 of the Act. Therefore, in our considered view the notice issued by the AO under section 148 of the Act cannot be held as invalid in view of the fact that the AO during the relevant time was unaware of such vital fact. Therefore, the AO cannot be faulted for issuing notice in the name of the deceased assessee under section 148 of the Act in the present given facts and circumstances. But the AO during the proceedings became aware of the fact about the death of the assessee, hence he framed the assessment in the name of legal representative but without issuing the notice under section 148 of the Act to them (legal representatives) despite having the time for

doing so. However, the pertinent fact is that the legal representative never raised any question about the issuance of notice to the other legal representatives during the assessment proceedings but raised 1st time before the 1st appellate authority. Therefore, non-implication of all the legal heirs can amount to a procedural defect which will not make the assessment invalid. In holding so we find support and guidance from the order of the Hon'ble Supreme Court in the case of CIT Vs. Jai Prakash Singh reported in 219 ITR 737 wherein it was held as under:

In the instant case, I did not raise an objection before the ITO that unless and until notices to all the other legal representatives were sent, assessment orders could not be made. He raised this question for the first time in the appeals preferred by him before the AAC and thereafter before the Tribunal. It appeared rather curious that J, who had voluntarily filed the returns of income, should raise this issue; no other legal representative of the deceased had come forward with such a plea.

The High Court was not right in holding in these circumstances that the assessment orders made were null and void. They were not. At worst, they were defective proceedings or irregular proceedings, as had been rightly held by the AAC and the Tribunal.

The principle emerging from the decision in Estate of Late Rangalal Jajodia v. CIT [1971] 79 ITR 505 (SC), is that an omission to serve or any defect in the service of notices provided by procedural provisions does not efface or erase the liability to pay tax, where such liability is created by distinct substantive provisions. Any such omission or defect may render the order made irregular depending upon the nature of the provision not complied with, but certainly not void or illegal.

The appeals were, accordingly, allowed and the judgment of the High Court was set aside.

In view of the above, we do not find any merits in the ground of appeal raised by the assessee. Hence we dismiss the same. However, it is also pertinent to note that the provisions of section 159 of the Act require to implicate all the legal heirs in the proceedings initiated under section 147 of the Act. The provisions of section 159 of the Act reads as under:

Legal representatives.

¹¹ **159.** (1) Where a person dies, his legal representative shall be liable to pay any sum¹² 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.

In view of the above, we set aside the entire assessment framed under section 147 of the Act to the AO to frame the same afresh in the name of all the legal heirs as per the provisions of law.

16. As we have set aside entire proceedings to the file of the AO for fresh assessment, we refrain ourselves from adjudicating the issue on merit. Hence, the assessee succeeds on the technical issue raised by him for the statistical purposes.

17. In the result the appeal of the assessee is allowed for the statistical purposes.

This Order pronounced in Open Court 11/03/2020

Sd/-
(RAJPAL YADAV)
VICE PRESIDENT
Ahmedabad: Dated 11/03/2020

Sd/-
(WASEEM AHMED)
ACCOUNTANT MEMBER

True Copy

S. K. SINHA

आदेश की प्रतिलिपि अग्रेषित / Copy of Order Forwarded to:-

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2. आवेदक / Assessee
3. संबंधित आयकर आयुक्त / Concerned CIT
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5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, अहमदाबाद /
DR, ITAT, Ahmedabad
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By order/आदेश से,

उप/सहायक पंजीकार
आयकर अपीलीय अधिकरण, अहमदाबाद ।