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

सर्वश्री श्री जी.सी.गुप्ता, माननीय उपाध्यक्ष, एवं अनिल चतुर्वेदी, लेखा सदस्य के समक्ष ।
BEFORE S/SHRI G.C. GUPTA, VICE-PRESIDENT AND ANIL CHATURVEDI, ACCOUNTANT MEMBER)

IT(SS)A No.594/Ahd/2012
[Block Period – 1.4.1986 to 1.8.1996]

Late Shri Chandrakant A. Gandhi By L/H. Shri Vinod C. Gandhi 119, Brahmpuri ni Pole, Patasa Pole Gandhi Road, Ahmedabad 380 001.	बनाम/Vs.	The ACIT, Cir.3 Ahmedabad.

PAN : AJUPG 6416 F

(अपीलार्थी / Appellant) **(प्रत्यर्थी / Respondent)**

निर्धारिती की ओर से/ Assessee by	:	Shri S.N. Divetia
राजस्व की ओर से/ Revenue by	:	Shri O.P. Batheja, Sr.DR.
सुनवाई की तारीख/ Date of Hearing	:	26th September, 2013
घोषणा की तारीख/ Date of Pronouncement	:	04.10.2013

आदेश / O R D E R

PER G.C. GUPTA, VICE-PRESIDENT: This appeal by the assessee for the block period 1.4.1986 to 1.8.1996 is directed against the order of the CIT(A)-XXI, Ahmedabad, dated 6.11.2012.

2. The only issue in this appeal is regarding validity of penalty levied under section 158BFA(2) of the I.T.Act, 1961. The ground no.2.1 is a legal issue raised by the assessee, and is being taken up first for disposal. The ground no.2.1 of the assessee is as under:

> *"2.1 The impugned order passed by the AO on the deceased assessee – late Shri Chandrakant A. Gandhi is bad in law and illegal because his son Shri Vinod C. Gandhi was brought on record as his legal heir and representative."*

3. The learned counsel for the assessee submitted that the penalty order passed under section 158BFA(2) of the Act was on the dead person, late Shri Chandrakant A. Gandhi. He submitted that the fact that the assessee has expired was brought to the notice of the AO time and again, and still the AO passed penalty order in the name of dead assessee. He referred to the show cause notice issued by the AO dated 1.3.2011 in the name of the dead assessee. He referred to the copy of the rectification application dated 17.2.2011 filed by the son of the deceased assessee with the AO intimating that the assessee, Shri Chandrakant A. Gandhi has expired. He submitted that law is settled on this issue that the penalty imposed on dead person is null and void. The learned DR has opposed the submissions of the learned counsel for the assessee. He submitted that not mentioning the name of son of late assessee as legal heir of his father is merely a clerical and typographic mistake, which does not render the order imposing the penalty as null and void. He

submitted that the AO has allowed opportunity of hearing to the assessee, and that the clerical error has not resulted in any adverse effect on the proceedings within the meaning of section 292B of the Act. He relied on the following decisions:-

i) Smt. Swaran Kanta Vs. CIT, 44 TAXMAN 68 (PUNJ. & HAR.);
ii) CIT Vs. Jagat Novel Exhibitors P. Ltd., 18 taxmann.com 138 (Delhi);
iii) Smt. Tapati Pal Vs. CIT, 124 TAXMAN 123 (Cal);
iv) ACIT Vs. Nageshwar Prasad, 63 ITD 29 (PAT.)(TM);

in supported the case of the Revenue. He relied on the order of the AO and the CIT(A).

4. We have considered rival submissions and have perused the orders of the authorities below. We find that the order imposing penalty under section 158BFA(2) of the Act has been passed in the name of the assessee late Shri Chandrakant A. Gandhi. We find that son of late Shri Chandrakant A. Gandhi was not impleaded as a legal heir in the order imposing penalty on the late assessee. We find that it is well settled that no penalty can be legally imposed on dead person, and the order imposing penalty on a deceased person shall be null and void. The decisions relied upon by the learned DR are clearly distinguishable. In Smt.Swaran Kanta Vs. CIT (supra), the facts were that the assessee has filed its return of income on 4.9.1975, and during the pendency of the assessment proceedings, he died on 7.3.1997. However, in the assessment proceedings his widow was

impleaded and notice was issued to her as legal heir of the assessee. The assessment was finalised in the presence of widow of the assessee on 10.3.1978, and in these facts, the Hon'ble High Court held that merely by virtue of mistake the name of the deceased was written at the top of the assessment order, which was simply a clerical error which has no adverse effect on the proceedings within the meaning of section 292B of the act. However, the Hon'ble High Court in the same para-3 of its order has made it clear that "no doubt, an order passed on a dead person is null and void but in the case in hand, order was not passed on the dead person but on the legal heir of the deceased." The Hon'ble High Court further observed that the situation would have been different, if the ITO had not impleaded the legal heir and if he had not given any hearing to the legal heir, and in that event, it could have been said that the order was passed on the deceased. We find that in the case before us, Shri Vinod C. Gandhi, son of the deceased assessee was never impleaded as a legal heir of his deceased father. We find that Revenue has not placed any material before us to suggest that any order bringing the legal heir of the deceased assessee on record, was passed by the AO, even in the order sheet maintained by him, and intimated to the legal heir of the assessee. The facts of the case before us are clearly at variance with the facts of the case before the Hon'ble High Court. In the case before the Hon'ble High Court, during the pendency of the assessment proceedings, the widow of the deceased assessee was impleaded as a legal heir, and

thereafter, a finding has been recorded that the ITO followed the procedure correctly as provided by section 159 and completed the proceedings. The Hon'ble Court found that title of the order, which was not happily worded, would not make the assessment order invalid. In the case before the Hon'ble High Court, it was specifically recorded by the Hon'ble High Court that the order was not passed on the dead person, but on the legal heir of the deceased. No such facts are present in the case before us. There is nothing on record to suggest that at any point of time, during the pendency of penalty proceedings, the legal heir of the deceased assessee was impleaded and brought on record. We find that in the facts of the case of the assessee, the decision of Hon'ble Punjab & Haryana High Court, rather supports the case of the assessee. In these facts of the case, we conclude that it was not merely a clerical mistake, but since the order imposing the penalty was passed on the dead person, the same is null and void, and penalty is liable to be cancelled on this ground alone.

5. In the case of CIT Vs. Jagat Novel Exhibitors (P) Ltd., (supra), relied upon by the ld. DR, the issue before the Hon'ble High Court was different, and the issue was that regarding object and purpose behind section 292B is that technical pleas on the ground of mistake, defect or omission in summons/notice should not invalidate assessment proceedings, when no confusion or prejudice is caused due to non-observance of technical formalities. In this case, before the Hon'ble High Court the plea of the assessee was that the notice was issued under section 148

were defective as the words "Private Limited" were missing. However, the address mentioned on all notices was correct. In these facts, the Hon'ble High Court held that the provision of section 292B shall apply and the object and purpose behind section 292B is to ensure that the technical plea on the ground of mistake, defect or omission in summons/notice would not invalidate the assessment proceedings, when no confusion or prejudice is caused due to non-observance of technical formalities. In the case before us, the issue is totally different, and the issue is whether the order imposing penalty could validly be passed on the deceased assessee, and in view of the fact that legal heir was never brought on record.

6. In the case of Smt.Tapati Pal Vs. CIT (supra) relied upon by the learned DR, the facts were that one Dr.G.C. Nandi, died on 28.7.1985 and the assessments were completed on 25.3.1986 on the legal heir Smt.Tapati Pal, and the penalty proceedings were also initiated against legal representative. The Hon'ble High Court approved the order of the Tribunal holding that the legal heir is fully responsible for default committed by the deceased as laid down by section 159, and the assessee is liable to be taxed and be treated as deemed assessee after death of her father and under the provisions of section 159, there was nothing wrong in initiating penalty proceedings against assessee after the death of her father. In this case, the assessment proceedings were completed on legal heir of the deceased person itself, and the penalty proceedings under section 271(1)(c) of the Act were

initiated against the legal heir, Smt. Tapati Pal, and therefore, in our view, the facts of this case are in total variance with the facts of the case before us.

7. In the case of ACIT Vs. Nageshwar Prasad (supra), relied upon by the ld. DR, the issue was that whether the penalty proceedings can validly be initiated and penalty can be levied on legal heirs when return of income was filed by the deceased during his life time, and when inaccurate particulars as to his income were furnished by the deceased in the said return. We find that in this case, before ITAT, Patna Bench, the penalty proceedings were initiated and penalty was levied on the legal heirs, and therefore, the Tribunal found that there is no infirmity in the order imposing penalty, although, the original return of income was filed by the deceased. In the case before us, penalty proceedings were never initiated or penalty levied on the legal heirs of the deceased, and in fact, the legal heirs were not brought on record by the AO before levy of impugned penalty. The facts of the case of the assessee before us are entirely different from the facts of the case before the Hon'ble High Court, and therefore, the case relied upon by the ld. DR is of no help to the case of the Revenue.

8. In the case before us, the legal heir was never impleaded or brought on record. The show cause notice for penalty was not issued, as legal heir of the deceased, and therefore, it cannot be said that non-mentioning of the name of the legal heir and writing

of name of the deceased at the top of the penalty order is merely a clerical error. In our considered view, where legal heirs of the deceased was brought on record and was impleaded in the proceedings as legal heir, and only mistake is in writing of the name of the deceased on the top of the order passed by the AO, the same shall be simply a clerical error and shall have no adverse effect on the proceedings within section 292B of the Act. However, if the AO has failed to bring the legal heirs on record and the legal heirs has not been impleaded, it cannot be said that it is merely a clerical error to be saved by the provision of section 292B of the Act, and such an order passed on the dead person shall be null and void, and has to be quashed. In this case, the facts of the case leaves to only conclusion that the order imposing penalty was passed on the deceased, and therefore, is null and void, and the penalty on the dead person is liable to be cancelled on this ground alone and accordingly, we cancel the penalty levied under section 158BFA(2) of the Act.

9. The assessee has taken other grounds of appeal on merits of the case as under:

> *"1.1 The order passed u/s.250 confirming the penalty of Rs.9,04,473/- levied u/s.158BFA(2) on 18.3.2011 for block period by ACIT, Cir.3, Ahmedabad is wholly illegal, unlawful and against the principles of natural justice.*
>
> *1.2 The ld.CIT(A) has grievously erred in law and or on facts in passing the impugned order without considering fully and properly the submissions made and evidence produced by the appellant.*

> *3.1 The ld.CIT(A) has grievously erred in law and on facts in upholding that the appellant had willfully evaded the undisclosed income and the explanation offered was not satisfactory.*
>
> *3.2 That in the facts and circumstances of the case as well as in law, the ld.CIT(A) ought to have upheld that the appellant had committed default u/s.158BFA(2) by willfully evading the undisclosed income.*
>
> *3.3 The ld.CIT(A) has grievously erred in holding that the appellant had committed default u/s.158BFA(2) and thereby levied penalty of Rs.9,04,473/-"*

10. The learned counsel for the assessee submitted that even on merits of the case, the assessee is not liable to penalty as only source of income of the assessee is agriculture, assessed by the department over number of years, year after year, and no other source of income can be established by the department. Accordingly, even if the some deposit is found to be not satisfactorily explained by the assessee, the same could not be assessed as undisclosed income of the assessee. He submitted that ITAT, Ahmedabad in the quantum appeal of the assessee has allowed only the credit of its agricultural income declared in the income-tax return for the block period, and credit of earlier years (prior to block period) income was not allowed to the assessee. He submitted that ITAT has directed the AO to compute undisclosed income by taking the figure of savings from agricultural income at 40% for some years, 60% for some other years and 80% in succeeding years. He submitted that the basis of determining the saving figures of the assessee for the block

period is merely on estimate, and that no penalty under section 158BFA(2) was imposable, where the part of the addition has been sustained on merely estimate basis. He submitted that imposition of penalty in the facts of the case of the assessee is not mandatory as held by Hon'ble Apex Court in Hindustan Steel Ltd. Vs State of Orissa, 83 ITR 26 (SC).

11. The learned DR vehemently opposed submissions of the learned counsel for the assessee. He submitted that five diaries were seized having business transaction with one L.T.Shroff of the assessee, and the Tribunal has restricted the addition to the extent of Rs.15,07,455/- by holding that the same as not agriculture income of the assessee. He submitted that the proviso to section 158BFA(2) makes the levy of penalty mandatory, once the assessed income is found to be more than returned income. He relied on series of decisions in support of his case viz. (i) CIT Vs. Becharbhai P. Parmar, 341 ITR 499 (Guj), Kandoi Bhogi Lal Mool Chand Vs. DCIT, 341 ITR 271 (Guj), Meenaben J. Bhansali Vs. ACIT, IT(SS)A.No.55/Ahd/2009 (ITAT, Ahmedabad), CIT Vs. Heera Construction Co. (P.) Ltd. 337 ITR 359 (Ker), (iv) Smt.Madhuben R. Barot Vs. ACIT, 18 taxmann.com 227 (Ahd), (v) CIT Vs. Smt.Anju R. Innani, 191 TAXMAN 350 (Bom) in support of the case of the Revenue.

12. We have considered rival submissions and have perused the copies of various documents and case laws filed by both the

parties. We find that the assessee is liable to succeed on merits of the case also. The assessee has only source of agricultural income, and no other source of income could be established by the department. Accordingly, even if certain part of the assessee's explanation with regard to deposits with some financial entity is not proved, since the assessee has only agriculture income, unproved part of the deposits could be arguably claimed to be out of agriculture income only. Moreover, we find that the Tribunal in the quantum appeal of the assessee has allowed the benefit of credit of agriculture income of the assessee relating to the block period only. The claim of the assessee is that the credit for the amount available with the assessee, out of savings from agriculture income of past many years, as on the first date of block period, was not allowed by the Tribunal. We find that in the quantum appeal of the assessee, the Tribunal has directed to take the savings from the agriculture income at 40% for period upto the assessment year 1992-93 and at 60% for the assessment years 1993-94 and 1994-95 and in the subsequent years at 80% of the agricultural income was directed to be taken as savings of agriculture income of the assessee, and the AO was directed to give credit to the assessee accordingly. We find that the total undisclosed income under section 158BD was determined at Rs.36,47,355/- by the AO and after allowing appeal-effect by the ITAT, the same was reduced to Rs.15,07,455/-. We find that the facts of the case may justify the part of the addition to the extent of Rs.15,07,455/-, sustained by

the Tribunal, but in our view, are not sufficient to justify the imposition of penalty under section 158BFA(2) of the Act. It is well settled now that the assessment proceedings and penalty proceedings are different and independent to each other. The addition or part of the addition could be sustained on the preponderance of probabilities, but in penalty proceeding, some proof is required, to impose penalty on the assessee. We find that the savings of the assessee from agriculture income have been determined by the Tribunal by fixing certain percentage ranging from 40% to 80% for different years involved in the block period, and that is by way of estimation only. In CIT Vs. Dr.Giriraj Agarwal Giri, (2012) 253 CTR (Raj) 109, Hon'ble Rajasthan High Court held that where the additions are based on estimation only, it can be said to be correct and it can be incorrect also, and therefore, the penalty was wrongly imposed by the AO under section 158BFA(2) of the Act and no substantial question of law is involved in the present case. In Shri Yogesh M. Shah Vs. DCIT, IT(SS)A.No.605/Ahd/2011 vide their order dated 7.9.2012, Ahmedabad Tribunal cancelled the penalty levied under section 158BFA(2) by holding that the conduct of the assessee does not seem to be mala fide and that explanation filed by the assessee in this regard was found to be bona fide. It is well settled that the penalty proceedings are penal in nature, and onus of proving the assessee to be guilty is on the Revenue in order to impose the penalty on the assessee. We are not impressed with the argument of the learned DR that in

accordance with the provision of section 158BFA, the imposition of penalty is mandatory. In Hindustan Steel Ltd. Vs. State of Orissa, 83 ITR 26 (SC), the Hon'ble Supreme Court held as under:

> *"An order imposing penalty for failure to carry out a statutory obligation is the result of a quasi-criminal proceeding, and penalty will not ordinarily be imposed unless the party obliged, either acted deliberately in defiance of law or was guilty of conduct contumacious or dishonest, or acted in conscious disregard of its obligation. Penalty will not also be imposed merely because it is lawful to do so. Whether penalty should be imposed for failure to perform a statutory obligation is a matter of discretion of the authority to be exercised judicially and on a consideration of all the relevant circumstances. Even if a minimum penalty is prescribed, the authority competent to impose the penalty will be justified in refusing to impose penalty, when there is a technical or venial breach of the provisions of the Act or where the breach flows from a bona fide belief that the offender is not liable to act in the manner prescribed by the statute."*

We find that very purpose of allowing opportunity of hearing to the assessee implies that authorities may refuse to impose the penalty, where there is technical or venial breach of provision of the Act and the conduct of the assessee is *bona fide,* and any other interpretation shall render the provision of allowing opportunity of hearing to the assessee as futile. In this case, before us, the only source of income being agriculture and that the credit for past savings from agriculture income, prior to the block period, having not been allowed in the quantum proceedings, and figure of addition having been determined on

estimate basis, applying the average rate of 40%, 60% and 80% for working out the figures of savings from agricultural income in different years of block period, and the part of the addition having been sustained by the Tribunal on estimation only, we hold that penalty imposed under section 158BFA(2) is liable to be cancelled on merits also and is accordingly cancelled, the grounds of the appeal of the assessee is allowed.

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

Order pronounced in Open Court on the date mentioned hereinabove.

Sd/-	Sd/-
(अनिल चतुर्वेदी / ANIL CHATURVEDI)	**(जी.सी.गुप्ता/G.C. GUPTA)**
लेखा सदस्य /ACCOUNTANT MEMBER	**उपाध्यक्ष /VICE-PRESIDENT**

Copy of the order forwarded to:

1) : Appellant
2) : Respondent
3) : CIT(A)
4) : CIT concerned
5) : DR, ITAT.

BY ORDER

DR/AR, ITAT, AHMEDABAD