

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHES "C", MUMBAI**

BEFORE SHRI G. MANJUNATHA (AM) AND SHRI RAM LAL NEGI (JM)

**ITA No. 3910/MUM/2015
Assessment Year: 2009-10**

Mr. Colwyn Thomas Fernandes, Flat No. 2, Resham Apartments, Church Road, Marol, Andheri (E), Mumbai - 400018 PAN: AAKPF3700C	Vs.	The Income Tax Officer, Ward - 20(1)(2), Mumbai
(Appellant)		(Respondent)

Assessee by : Shri Shashank Dundu (AR)

Revenue by : Shri Abi Rama Kartikiyen (DR)

Date of Hearing: 18/07/2019
Date of Pronouncement: 26/07/2019

ORDER

PER RAM LAL NEGI, JM

The assessee has filed the present appeal against the order dated 13.03.2015 passed by the Commissioner of Income Tax (Appeals)-36 (for short 'the CIT(A), Mumbai, for the assessment year 2009-10, whereby the Ld. CIT(A) has dismissed the appeal filed by the assessee against the assessment order passed u/s 144 r.w.s 147 of the Income Tax Act, 1961 (for short the 'Act').

2. Brief facts of the case are that the AO issued notice u/s 148 to the assessee on the basis of AIR information to the effect that the appellant had purchased house property for a total consideration of Rs. 87.82 lacs. Since, the assessee did not respond to the notices issued by the AO, the assessment was completed u/s 144 r.w.s. 147 of the Act determining the total income of the assessee at Rs. 49,12,800/-. Aggrieved by the assessment order, the assessee challenged the sale before the Ld. CIT (A). The Ld.CIT (A) fixed the appeal for

hearing on 12.02.2015 and issued summons to the assessee. Since, the assessee did not appear before the Ld. CIT (A), the Ld. CIT (A) proceeded ex-parte to dispose of the appeal on the basis of facts available on record. Accordingly, the Ld. CIT (A) dismissed the appeal filed by the assessee. Against the said order passed by the Ld. CIT (A), the assessee is in appeal before the Tribunal.

3. During pendency of the appeal, the assessee submitted the revised grounds of appeal inter alia challenging the impugned order passed by the Ld. CIT (A) confirming the assessment order passed by the AO on the ground that the Ld. CIT (A) has wrongly confirmed the assessment order passed by the AO without giving a reasonable opportunity of being heard to the assessee. The revised grounds of appeal read as under:-

“1. The learned CIT(A) has erred in confirming the total addition of Rs.49,12,800/- made by the Assessing Officer without appreciating that no reasonable opportunity of being heard was given to the Assessee and hence the order may be set aside.

2. Without Prejudice to the above, the learned commissioner has erred in passing the order without going into the merits of the case or perusing the available records and merely relying on the Assessing Officer's order without application of mind and hence the addition may be deleted.

3. Without prejudice to the above, the Learned CITA) has erred in confirming the order of the Assessing Officer with respect to the following additions made:

(i) Difference in Receipts as per ITS and P&L a/c of Rs. 1,405/-.

(ii) Interest on National Savings Certificate taxed on accrual basis without considering the time of Maturity and made an addition of Rs.4,380/-.

(iii) Disallowance of Payment of Rent of Rs.2,70,000/- u/s 40(a)(ia) where S.40(a)(ia) cannot be invoked since S.44AB is not applicable to the Assessee.

(iv) Disallowance of Advertising Expenses of Rs.1,59,665/- u/s 40(a)(ia) which could not have been

made since there are no advertising expenses incurred and hence S.40(a)(ia) cannot be invoked.

(v) Interest on FD and Miscellaneous receipts in Bank Account amount to Rs.20,000/- and Rs.16,558/- respectively.

(vi) Addition of Drawings for self and Family amounting to Rs.2,49,000/- based on estimation of total drawings of Rs.4,20,000/- of Assessee based on Assessee's lifestyle which is adhoc and without any reason.

(vii) Difference in amount of Loan taken from wife as reflected in wife's bank account and Assessee's books amounting to Rs.32,380/-.

(viii) Cash deposits in bank amounting to Rs.7,83,000/- added u/s 68 as unexplained.

(ix) Difference between Salary Statement and P&L a/c amounting to Rs.1,02,090/- added to the total income.

(x) Disallowance u/s 43B on account of payment Service tax shown in Balance sheet amounting to Rs.5,87,281/- cannot have been made since such expenditure was never debited to the P&L a/c.

(xi) Disallowance of expenses debited in P&L a/c amounting to Rs.1,87,000/- out of the total expenses of Rs.7,48,908/-, being 25% on adhoc basis, on the assumption that excessive expenses were claimed.

(xii) Disallowance of investment in property being loan from wife amounting to Rs. 15,00,000/-.

(xiii) Disallowance of investment in property being addition of Personal Savings as unexplained Cash Credits amounting to Rs. 10,00,000/-.”

4. The assessee further filed an application for admitting additional evidence on the ground that since the authorities below have passed the assessment order and appellate order without affording a reasonable opportunity of being heard to the assessee and since the documents are vital for deciding the issues involved in the present appeal the same may be admitted as additional evidence. The Ld. counsel submitted that these

documents could not be produced before the authorities below due to prolong sickness of the assessee and further due to loss of the documents. Accordingly, the Ld. counsel submitted that since there was sufficient cause for not submitting these documents before the authorities below and since these documents are vital for just adjudication of the issues in question, the application of the assessee may be allowed and the additional evidence may be admitted in the interest of justice.

5. The Ld. counsel for the assessee further submitted that the Ld. CIT (A) has wrongly confirmed the assessment order passed by the AO in violation of the principles of natural justice as the assessee was not afforded a reasonable opportunity of being heard by the AO. The Ld. counsel further submitted that the assessee received notice u/s 142 (1) of the Act in 2011 with respect to the property purchased by him for Rs. 87.82 lacs and in response thereof the assessee furnished all the details. Further, the assessee received notice u/s 148 in the month of December 2012 and explained the cause of non-filing of the return of income for the AY 2009-10. The Ld. counsel further submitted that in the year 2009, some valuables and documents were stolen from the office of the assessee due to which the assessee could not file the return of income in time. The assessee lodged FIR with the concerned Police station copy of which was also produced before the AO. Further, the AO has passed the assessment order without appreciating the submissions made by the AO. In fact the assessee did not receive any the notice mentioned in the assessment order dated 28.03.2013. Under these circumstances, the ld. CIT(A) ought to have set aside the ex parte order passed by the AO u/s 144 read with section 147 of the Act. Since, the assessee has not been afforded a reasonable opportunity of being heard by the authorities below, the order passed by the Ld.CIT (A) is liable to be set aside.

6. On the other hand, the Ld. Departmental Representative (DR) relying on the concurrent findings of the authorities below submitted that since the assessee failed to comply with the notices issued by the AO from time to time,

the Ld. CIT (A) has rightly upheld the order passed by the AO on the basis of material available on record. So far as the additional evidence is concerned, the Ld. DR opposed the application on the ground that the assessee should have produced the entire evidence before the authorities below.

7. We have heard the rival submissions and also perused the entire material on record in the light of the rival contentions of the parties. We notice that the AO has passed the order after issuing various notice to the assessee. On the other hand, the assessee's contention is that notices issued on different dates mentioned in the assessment order were not received due to wrong address mentioned thereon. As contended by the Ld. counsel, the said facts were conveyed to the AO vide e-mail dated 28.12.2012 and expressed its willingness to cooperate. The assessee also paid penalty amounting to Rs. 1,000/- in response to the notice issued u/s 221 (1) of the Act. We further notice that the Ld.CIT (A) has also passed the impugned order on the basis of material available on record. As pointed out by the Ld. CIT (A), the appeal was fixed for hearing on 12.02.2015, however, the assessee did not appear on the said date. On the next date of hearing i.e. on 20.02.2015, the AR asked for adjournment. Accordingly, the case was fixed for 12.03.2015. On 12.03.2015 again the assessee failed to appear before the CIT (A) and accordingly the CIT (A) passed the impugned order and dismissed the appeal filed by the assessee. The assessee has explained the reasons for non-appearance before the authorities below. Further as pointed out that the Ld. counsel for the assessee, the assessee wants to produce the copy of National Savings Certificate (NSC) showing date of investment and date of maturity, details of cash withdrawals from bank account of the assessee's wife, loan confirmation from wife affidavit by Colwyn Thomas Fernandes and his wife, source of income of assessee's wife and copy of bank statements of savings bank account showing payment to builder along with the letter from bank, showing loan taken from the bank.

8. In the light of the submissions of the Ld. counsel for the assessee, we are of the considered view that the aforesaid documents are vital for determining

the issues involved in the present appeal. Moreover, the assessee could not present its case before the authorities below during the assessment proceedings and during the appellate proceedings. Hence, we admit the documents submitted in the form of additional evidence i.e., Paper Book II containing 45 pages (starting from page No 57 to 101) by the assessee under rule 29 of the Income Tax Appellate Tribunal Rules. We further set aside the impugned order passed by the Ld. CIT(A) and send the appeal back to the AO for passing assessment order afresh in the light of the additional evidence placed on record after affording a reasonable opportunity of being heard to the assessee.

In the result, appeal filed by the assessee for assessment year 2009-2010 is allowed for statistical purposes.

Order pronounced in the open court on 26th July, 2019.

Sd/-

(G. MANJUNATHA)

ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक Dated: 26/07/2019

Alindra, PS

Sd/-

(RAM LAL NEGI)

JUDICIAL MEMBER

आदेश प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

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

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai