

THE INCOME TAX APPELLATE TRIBUNAL  
"SMC" Bench, Mumbai  
Shri Shamim Yahya (AM)

I.T.A. No. 1734/Mum/2021 (A.Y. 2010-11)

Rekha Prakash Nichani 1302, Krypton Towers Prabhadevi Mumbai-400 025.  PAN : ABZPN8121H (Appellant)	Vs.	CIT(APPPEALS) Pratishtha Bhavan M.K. Road New Marine Lines Mumbai-400 020.  (Respondent)
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Assessee by	Shri Prakash Nichani
Department by	Shri Pravin Salunkhe
Date of Hearing	31.03.2022
Date of Pronouncement	25.04.2022

ORDER

This appeal by the assessee is directed against the order of learned CIT(A) dated 29.7.2021 pertains to A.Y. 2010-11.

2. The grounds of appeal read as under :

On the facts and circumstances of the case and in law the Learned Commissioner of Income (CIT) Tax (Appeals), National Faceless Appeal Centre erred, in dismissing the Grounds as mentioned in the order dated 29-07-2021 and as a result thereof dismissed the Appeal (hereinafter referred to as "the impugned order").

Para 8 of the Impugned Order with regard to Grounds No.1, LI & 1.2

1 The learned CIT ought to have held that the ITO erred in issuing and serving notice u/s 148 (of the Income Tax Act, 1961) to the appellant and passing order u/s 144 r.w.s. 147 of the Income Tax Act, 1961. The best judgement assessment is bad in law and against the principles of natural justice.

1.1 The learned CIT ought to have held that serving notice at the address of the husband of the assessee (i.e. Office No.9, Hind Rajasthan Chambers, Fort, Mumbai 400023), who was a practicing Advocate, which notices were received by the clerk "Kumbhar" of the neighboring office (i.e. Office No. 10) would tantamount to the logical conclusion that the appellant did not receive any notice u/s 142(1) issued and served by the Assessing Officer and failed that the Assessing Officer had committed a grave error

in not serving the notice at the address available of the Assessee which was given to the department and available to the department.

1.2 The Learned CIT failed to appreciate that the Assessee had put on record her residential address i.e. flat No. G-5/2, Shabnam building, Sion, Mumbai 400022 and yet NOT A SINGLE NOTICE was served on that address. But the Assessing officer, on his own whims and fancies chose to serve notice at the address of the husband of the Assessee-Appellant which is 14 km away.

1.3 The Assessee is truly unfortunate that she had to battle with health problems of family members as well as personal health problems, which were not easily diagnosed at the relevant time. The learned CIT has no reason to disbelieve the factual aspect of the matter, in particular when the Appellant herself is a cancer patient and battling for survival. Moreover, the Appellant, had no source of taxable income during the relevant period and accordingly, the Appellant had not filed the Income Tax returns.

1.4 The learned CIT failed to appreciate that the Assessing Officer had not recorded the reasons for re-opening of the assessment.

Para 9 of the impugned order with regard to Ground Nos. 2, 2.1 and 3

2. The learned CIT Failed to appreciate that the bank accounts-Saving and O/D TDR account with DCB bank are joint bank account of the Appellant with the Advocate husband Prakash Vishindas Nichani and that since the Assessment was ex-parte, how could the relevant material be put forward about the deposits made by the husband of the Appellant.

2.1 The learned CIT failed to appreciate that details of sources of cash deposits could have been produced only by the husband of the Appellant and not by the Assessee herself and that too, if there was a proper opportunity being provided for at the hearing of the Assessment proceedings. BUT in the instant case, the Assessment proceedings were ex-parte and hence, no material could be produced.

2.2 The Learned CIT failed to appreciate that the assessee had clearly stated in the Appeal and WRITTEN SUBMISSIONS, that if any further clarifications or documents are required, the Appellant was willing to provide the same but the proceedings being FACELESS, there was no communication or exchange of dialogue in this regard. HENCE, the Appellant PRAYS for physical hearing of the present APPEAL.

2.3 The learned CIT has not given a plausible reason for disbelieving her case that the transactions in both the bank accounts - Saving as well as ODA O/D TDR account are belonging/pertaining to the husband Advocate Prakash Nichani of the appellant, the joint holder in both the bank accounts, which was evident from the fact that all the transactions were personally done by the husband of the Appellant.

2.4 The Learned CIT has not given sufficient or cogent reasons for following the precedents/judgments relied upon by the Appellant.

As regards the reasons given for not following the precedent in CIT Vs. Roshan Lal Sheth, the Learned CIT failed to consider that the precedent was applicable in toto and the only difference was that in the present case, no opportunity was given to the Assessee for remaining present before the Income Tax Assessing Officer and the case was not decided on merits but was decided ex-parte.

2.5 The learned CIT erred in holding that the Assessee - Appellant could not provide proof that she had not operated the bank accounts. There can be no proof in the negative. The Assessing Officer randomly took cognizance of a single account in DCB BANK. The Assessing Officer took pains in obtaining bank statement of DCB Bank, even though no Income Tax Returns were filed by the Assessee. Based on the "deposits" only an ex-parte order was passed. When the Assessee has challenged the order on the ground that all banking transactions were done solely by her husband, the learned CIT could have called for transactions from DCB Bank to verify the same and/or called upon the Assessee to produce the Bank records by summons to the Bank officials. Thus, the precedent CIT Vs. Savitri Shukla could have clearly applied to the present case.

2 The Learned CIT failed to consider that all the above actions of the Assessing Officer were arbitrary, erroneous and unlawful and hence, the same ought to have been quashed.

3 Without prejudice to above, the income assessed is higher and not a best judgment assessment.

5. The Learned CIT ought to have held that the Assessing Officer had erred in levying interest u/s. 234A, 234B and 234C of the Income-tax Act, 1961;

6. The appellant was not served notice/s issued u/s 142(1) by the Learned Assessing Officer and shall accordingly modify, add or delete any of the above ground or grounds of appeal on receipt of all the notices.

7. As per the order dated 23/03/2020 passed by the Hon'ble Supreme Court of India in Suo Motu Writ Petition (Civil) 3 of 2020, the appellant states that the limitation period for filing all petitions/applications/suits/appeals/all other proceedings before all Tribunals/ Courts in India was extended and therefore can be condoned. Without prejudice if this Hon'ble authority comes to the conclusion that there is a delay in filing the present appeal then the applicant herein craves leave to file a separate application for condonation of delay inter alia on ground that the applicant was under joining treatment for COLON CANCER and due to the application side effects of CHEMOTHERAPY the applicant had

limited time to attend to the present matter. Without prejudice to above, the Appellant states that the impugned order was served on the e-mail address of the applicant and it was only on the 31<sup>st</sup> of July, 2021 that the applicant checked her e-mail and discovered the aforementioned impugned order.

8 The Appellant prays for a PHYSICAL HEARING and be given an opportunity to be heard in the interest of principle of natural justice as well as the peculiar facts and circumstances of the present appeal.

9 The appellant states that the impugned Order u/s. 250 has been annexed as required. However, the same has been downloaded and printed from the Income Tax e-Portal and is therefore not required to be certified.

The appellant craves leave to add, alter, amend, modify or delete any of the above ground or grounds of appeal.”

3. In this case assessment order was framed under section 144 of the I.T. Act for cash deposit in bank account on the ground of assessee not responding to notices.

4. Upon assessee's appeal learned CIT(A) held as under :

“6.0. The assessment order and the submissions of the appellant are gone through carefully. The AO affirmed in the assessment order that the notices issued u/s 148, 142(1), 271(1)(b) and show-cause letters were served through postal authorities. The details of notices issued and service done by post are illustrated in tabular form. Notice u/s 142(1) dated 09.02.2015 was served on the assessee through notice server on 09.02.2015. It was considered by the assessing officer that the assessee had not responded to the any of the notices. Therefore, the AO had resorted to pass the order u/s 144 r.w.s 147 of the I T Act bringing the cash deposits in the bank account of the assessee and interest earned to tax.

7.0. The grounds of appeal and submissions of the appellant are considered and each ground is adjudicated as under:

8.0. Ground No.1, 1.1 &1.2:

The ground raised was with regard to service of notices. The notices were served on the address where the assessee's husband Sri Prakash V Nichani was practicing as advocate who is proprietor of M/s P V Nichani & Co. It is confirmed by the appellant in the submissions as well as in the affidavit that the notice u/s 148 of the Act was served on the assessee in the month of March' 2014. However, the appellant elucidated that due to severe medical problems faced by the family members the reply to the said notice could not be given. Further, the appellant claimed that the subsequent notices were not served on the assessee. Whereas, it is clear from the assessment order

that the subsequent notices were served through postal department. If the addressee is not available on the given address the notices sent through speed post would have been claimed by someone who is well known to the assessee. Further, the important point to be considered here is that the address to which notices were sent belonged to the assessee's husband who is an advocate and running proprietary concern in the said premises. He must have arranged someone to look after the things in his absence. It is clear that the notice u/s 148 of the Act was served on the assessee and same was accepted in the affidavit. Further, the subsequent notices were also served through postal department in the proper address only. Further, the appellant claimed that the reasons for re-opening of assessment were not provided but the assessee has not provided any evidence acknowledgement that he indeed asked for reason re-opening. If the assessee had made request to provide reasons to reopening of assessment and the AO had not considered the same, then it would have strengthened the assessee's case. But, the assessee had not furnished any evidence proving that the request was made to provide the reason for reopening of assessment. In view of the above the ground nos. 1,1.1 & 1.2 are dismissed.

9.0. Ground nos. 2, 2.1 & 3:

The appellant stated that the bank accounts under consideration are jointly held with her husband. The first holder of the joint account is the assessee. The appellant claimed that though said bank accounts are jointly held the transactions made were belonged to her husband. It can be observed from the submissions of the appellant that there were cash deposits in the bank accounts. Further, the appellant stated that the all the transaction of cash deposits and cheques are accounted for by her husband. To that effect the appellant's husband had given affidavit. However, an affidavit alone is not sufficient. The appellant should have furnished the details of sources for the cash deposits with material evidence and filing of return of income showing the relevant income. The appellant should have clearly explained with material evidence in respect of sources for cash deposits and payment of taxes on the same.

9.1. Further, the appellant relied upon the case laws which are not applicable to the assessee's case. In respect of CIT Vs Roshan Lal Seth, the deposits were appeared in the records of the assessee's husband's name. Whereas, in the case of assessee the appellant failed to prove that the cash deposits were recorded in the books of the assessee's husband. Further, with regard to CIT Vs Smt. Savitri Devi Shukla, the appellant could not prove that she had not operated the said bank accounts. It is also difficult to explain that who deposited the cash in the bank accounts and to whom the cash was belonged to. It is clear that merely relying on the affidavit it cannot be decided that the cash deposits in the bank account did not belong to the assessee. The appellant did not discharge the onus cost on her. Therefore, the ground nos. 2, 2.1 and 3 are dismissed.

11.0. Based the adjudication of the ground nos. 1, 2 and 3 the ground nos. 4 and 5 are dismissed. The ground no. 5 is with regard to levy of interest u/s 234A, 234B and 234C of the I T Act which are consequential and dependants

- on filing of return, admission of total income and determination of total income. Therefore, the ground no.5 is not considered for adjudication.”
5. Upon careful consideration I note that the assessee’s plea of reasonable cause of suffering from cancer for not providing the necessary details before the authorities below is cogent. Hence, I deem it appropriate to remit the issue to the file of learned CIT(A) to consider the issue afresh after giving the assessee proper opportunity of being heard.
6. I also note that the assessee’s plea of lack of service of notice has been rejected in a cryptic manner by the learned CIT(A) in his order. In this order learned CIT(A) has observed that notice was served at the office address of the husband of the assessee. Thereafter learned CIT(A) surmises that assessee must have been informed by the husband. Further surmise of the learned CIT(A) is that the assessee’s husband must have arranged somebody to receive the assessee’s notices at his office address. These surmises have no legs to stand judicial scrutiny . There is no estoppel as to law. When learned CIT(A) is himself accepting that notice was not served upon the address of the assessee in the revenue record, it is beyond comprehension how learned CIT(A) is considering that assessee’s plea of lack of service of notice is liable to be rejected. The order in this regard is absolutely contradictory. It is settled law that lack of service of notice is jurisdictional defect and is not curable one at that. That cannot be brushed aside even after accepting that notice was not served at the proper address. In this view of the matter I direct learned CIT(A) to pass a speaking order on this issue taking into account the observation hereinabove.
7. In the result, this appeal by the assessee is allowed for statistical purposes.

Order pronounced in the open court on 25.04.2022.

Sd/-  
(SHAMIM YAHYA)  
ACCOUNTANT MEMBER

Mumbai; Dated : 25/04/2022

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent
3. The CIT(A)
4. CIT
5. DR, ITAT, Mumbai
6. Guard File.

//True Copy//

*PS*

BY ORDER,

(Assistant Registrar)  
ITAT, Mumbai