

**IN THE INCOME TAX APPELLATE TRIBUNAL, 'F' BENCH
MUMBAI**

**BEFORE: SHRI AMIT SHUKLA, JUDICIAL MEMBER
&
SHRI GAGAN GOYAL, ACCOUNTANT MEMBER**

**ITA No.3152/Mum/2011
(Assessment Year : 2005-06)**

Shri Jagdish R Mookhey 410, Anant Deep Chambers, 273/77, Narsh Natha Street Mumbai- 400 009	Vs.	ITO 11(2)-4, Mumbai
PAN/GIR No.AAGPM6714C		
(Appellant)	..	(Respondent)

**ITA No.2956/Mum/2011
(Assessment Year :2005-06)**

ITO 11(2)-4, Mumbai	Vs.	Shri Jagdish R Mookhey 410, Anant Deep Chambers, 273/77, Narsh Natha Street Mumbai- 400 009
PAN/GIR No.AAGPM6714C		
(Appellant)	..	(Respondent)

Assessee by	Shri N Subramniam
Revenue by	Shri Ujjawal Kumar Chavan
Date of Hearing	04/09/2023
Date of Pronouncement	30/10/2023

आदेश / O R D E R

PER AMIT SHUKLA (J.M):

The aforesaid cross appeals have been filed by the assessee as well as by the Revenue against order dated 28/01/2011

passed by CIT (A)-3, Mumbai for the quantum of assessment passed u/s. 143(3) r.w.s.147 for the A.Y.2005-06.

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2. In the aforesaid appeal the only issue for adjudication before us is, whether the 'reasons recorded' by the ld. AO u/s.148 were communicated to the assessee during the course of assessment proceedings or not. Here in this case, this issue was adjudicated by the Tribunal vide order dated 29/11/2013 wherein, the Tribunal has held that, as per the order sheet entry dated 08/12/2009, the reasons for reopening was given by ld A.O vide letter dated 18/12/2009 alongwith show-cause notice u/s.142(1). However, this finding of the Tribunal was challenged before the Hon'ble High Court wherein the Hon'ble High Court has set aside this issue to the Tribunal vide judgment and order dated 06/12/2016 in Income Tax Appeal No.965 of 2014. For the sake of ready reference, the entire judgment of the High Court is reproduced hereunder:-

1. This Appeal under Section 260A of the Income Tax Act, 1961 (the Act") challenges the order dated 29th November 2013. passed by the Income Tax Appellate Tribunal ("the Tribunal') The impugned order is in respect of Assessment year 2005-06

2. The appellant has urged the following two questions of law for our consideration.

(1) On the facts and in the circumstances of the case and in law, whether the Income Tax Appellate Tribunal was justified the reopening of assessment although the reasons recorded for

reopening of the assessment were not furnished to the appellant till the completion of the assessment?

(2) On the facts and in the circumstances of the case and in law, whether the Income Tax Appellate Tribunal was justified in reopening of assessment although there was no new tangible material evidence brought on record by the Respondent A.O?

3 Question No. 1.

(a) It is case of the appellant that the reasons in support of the notice for reopening dated 19/1/2009 were not furnished to him Therefore, it is submitted that the Assessment Order passed on the re-assessment notice dated 19/1/2009 is completely without jurisdiction

(b) The impugned order of the Tribunal holds that the reasons in support of the reopening notice dated 19/1/2009 was served upon the appellant. In support the impugned order relies upon the Order Sheet entry dated 8th December 2009 which reads as under:

"as reasons for reopening given vide this office letter dt. 8.12.2009. A show cause along with notice u/s 142(1) issued."

(c) We have perused the reply to the show cause notice and prima facie it does not indicate the reasons for reopening was served upon the appellant.

(d) Mr. Tralshawala, learned Counsel appearing for the appellant- assessee in support of his submissions state that no reasons were furnished to the appellant. He invites our attention to page 11 of the paper book filed by the Revenue

(pg.20 of appellant's paper book) wherein the acknowledgment card of the packet sent on 9/12/2009 by the Revenue bears the description of the contents of the packet as "provided reasons for reopening but the same does not bear signature of any recipient. In contrast he invited our attention to the fact that two other notices containing the Show Cause Notice dated 7th December, 2009 and 8th December, 2009 sent by the Revenue on 9/12/2009 alongwith acknowledgement card received by the appellant on 11 December, 2009 bears signatures of the appellant as a recipient on the acknowledgment cards,

(c) At this Mr. Chhotaray learned Counsel appearing for the Revenue pointed out that all the three communications were dispatched with acknowledgement cards bearing consecutive dispatch numbers 10, 11 and 12 on 9/12/2009. The two communications containing Show Cause Notices bearing numbers 10 and 11 dated 9/12/2009 were received by the appellant on 11th December, 2009, However, with regard to the third packet containing reasons for reopening bearing no. 12 also dispatched on 9/12/2009 had in fact been returned by the postal authorities. The envelope in which the reasons were allegedly sent as shown to us contains the words 'R-to" just above the address of the sender Assessing Officer. The envelope appears to bear a further endorsement "INT 8A-12-12-2009 Mr. Chhotaray submits that this would indicate that the appellant assessee was deliberately avoiding accepting the reasons recorded for reopening of the notice which the Revenue tried to serve upon the appellant-assessee.

(1) On enquiry, we were informed that this returned envelope was not produced before the Tribunal by the Revenue This possibly for the reason that before the Tribunal it was not the appellant-assessee's case that the reasons for reopening which were allegedly sent to him were not received by him in absence of the signature on the acknowledgment card. This submission on the basis of the acknowledgement card was not made by the appellant before the Tribunal as he learnt of this non acknowledgment only after hearing before the Tribunal was

over Therefore the same was not even referred to in the affidavit filed before the Tribunal by the appellant.

4. A decision on the above aspect requiring factual determination is most critical to decide the rights of the parties. Therefore we admit Q. No.(1) as giving rise to substantial question of law. At the request of the Counsel. the appeal itself is taken up for final hearing on the above QNo (1) of Law

5. In view of the facts stated herein above, the impugned order of the Tribunal to the extent it concludes that the reasons in support of the reopening notice was served upon the appellant and the reliance by tite appellant on the postal acknowledgment card to support his contentions that no reasons for reopening notice was received by him would require investigation The Revenue has produced before us the envelope containing the reasons for reopening which it alleges has been not accepted / returned by the appellant This is an issue which would require determination of facts by the Tribunal. It is axiomatic that the person who claims that he has not been served with the reasons in support of the Show Cause Notice cannot urge the same, if it is found that he has deliberately avoided receiving the reasons in support of the reopening notice. No party can take advantage of lus own wrong.

6. However, at this stage we make no comment on the rival contentions as it is subject to a factual determination to be carried out by the Tribunal. Since we are setting aside the impugned order of the Tribunal essentially on the ground that the Tribunal is to decide afresh the issue of service of the reasons recorded in support of the re-opening notice upon the appellant assessee, we have not considered Q No (2) as formulated herein above. This for the reason that the answer to question now restored to the Tribunal is foundational. Therefore if the answer to factual determination is that reasons were not served, all other issues would become academic.

7 However, as we are setting aside the entire impugned order and restoring it to the Tribunal, it would decide all issues afresh in accordance with law.

(8) It is once again reiterated that question no.2 as proposed by the appellant has not been considered by us even remotely The entire appeal would be decided afresh. The Tribunal would consider the appeal on its own merits All Contentions left open.

(9) Appeal disposed of in the above terms. No costs.

3. Thus, to adjudicate this issue, the appeal has been fixed for hearing.

4. This Tribunal vide order sheet entry dated 08/08/2023 has asked the ld. DR for the Revenue to prepare a complete paper book of records. In compliance thereof, the Revenue has filed paper book dated 10/08/2023 which contain the following documents:-

Sr. No.	Particulars	Date
1	Assessment order u/s. 143(3) of the I.T. Act.	12/12/2007
2	Audit objection raised by ITO, IAP-11, Mumbai.	10/10/2008
3	Reopening reasons recorded and approval of competent authority.	19/01/2009
4	Notice u/ s 148 and proof of acknowledgement (RPAD slip)	19/01/2009

5	Notice issued u/s. 142(1) alongwith show-cause notice arid proof of acknowledgement (RPAD slip)	07/12/2009
6	Assessee letter seeking copy of reasons	07/12/2009
7	Notice issued u/s. 142(1) alongwith show-cause notice and proof of acknowledgement (RPAD slip)	08/12/2009
8	Letter to assessee provide reason for reopening and proof of dispatch window cover RPAD slip	08/12/2009
9	Assessee reply to notice u/s. 142(1)	16/12/2009
10	Order Sheet photocopy showing details of hearings, issue of notices and letters.	
11	Assessment order u/s. 143(3) r.w.s.147 of the I.T. Act.	29/12/2009
12	CIT (A) order	28/01/2011
13	ITAT order - ITA No. 3 152 & 2956/M/2011 cross appeal Assessee and Department	23/04/2013
14	ITAT order - MA/276/2013- (ITANo.3152/M/2011 Assessee appeal.)	29/11/2013

15	High Court order ITA No. 965/2014 (Assessee)	06/12/2016
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5. The ld. DR submitted that, from the records it could be seen that –

- Separate envelop which included reasons of reopening was issued on 8/12/2009.
- The address is correct.
- RPAD slip mentioned the content as "reasons", Original envelop, RPAD slip, reasons were produced before the Hon'ble bench and examined by the bench.
- Assessee participated and cooperated in the subsequent assessment proceedings.
- Assessee did not raise this objection in the subsequent proceedings till the completion of assessment.
- Assessee did not raise this objection of non-acceptance of reasons in the appellate proceedings in front of CIT(A)
- Assessee raised this objection of non-communication of reasons in the appellate proceedings in front of Hon'ble ITAT first time. ITAT dismissed the contention of the assessee. Para 7.2 of that order observed that "A careful perusal of the order sheet vis-à-vis the reply filed by the assessee clearly establishes that the assessee was well communicated with the reasons for reopening...".
- Assessee raised this objection of non-acceptance of reasons in the appellate proceedings in front of Hon'ble High Court, which set aside the matter to Hon'ble ITAT.

6 The ld. DR further submitted that from the above documents it could be seen that reasons were issued and served to the assessee which has mentioned not only in the order sheet entry dated 08/12/2009 but also there is a letter issued by the ld. AO dated 08/12/2009 communicating the reasons which was sent through speed post on 09/12/2009 and the envelop clearly mentioned documents including the reasons for reopening. He further submitted that once the assessee has not challenged the communication of reasons before the ld. CIT (A) and has participated in the proceedings, therefore, it cannot be said that the reasons cannot be communicated.

7. Apart from that, he submitted that the notice has been served in accordance with the law alongwith reasons recorded and even if there is such mistake, notice will not become invalid as per Section 292B of the Act. Assessee did not raise this issue at any stage before the ld. AO or ld. CIT (A). Further, service of notice has been provided in Section 282 and once communication has been sent through speed post at correct address, it is deemed to be service as per Section 27 of General Clauses Act, 1897. In support, he has also relied upon various decisions.

8. On the other hand, ld. Counsel for the assessee submitted that the same documents were there before the Tribunal in the original round of proceedings, however, even at that stage department could not establish that the said communication of reasons recorded was served upon the assessee at all or not.

Precisely for this reason and on these facts, it was challenged before the Hon'ble High Court and all these aspects have been discussed in detail by the Hon'ble High Court. After examining these details, Hon'ble High Court has remanded back this issue to the Tribunal as to whether there was service of reasons recorded or not in support of the reopening notice issued to the assessee. Further, he submitted that in so far as other notices u/s 142(1) sent, same were duly received and complied with, however, when the assessee specifically asked for copy of the reasons vide letter dated 07/12/2009 which has been purportedly sent by a separate envelop by speed post on 09/11/2009, however, nowhere the record as produced by the department that same was received by the assessee or was served upon the same address. He further pointed out that other notices u/s.142(1) have been duly served on the same address, however, communication letter on 08/12/2009 sent on 09/12/2009, nowhere there is anything on record that said notice has been served. Once in all other notices, the acknowledgement of service is there, however, on this communication there is no acknowledgment of service and that is the reason why assessee had challenged before the Tribunal and also before the Hon'ble High Court that despite request made by the assessee, reasons for reopening was never communicated. Assessee has also filed an affidavit dated 13/08/2012 wherein he has categorically stated that assessee had specifically requested copy of audit objections and copy of reasons recorded. However, the same was not supplied and re-

assessment was completed on 29/12/2009. He further pointed out that in the department's paper book, the proposal for approval of reasons recorded and the reasons which has been stated to be communicated vide letter dated 08/12/2009 is different in so far as concluding paragraphs are concerned. In this case, till this date and even in the paper book submitted by the department nothing is there on the record that communication for reasons recorded was ever served upon the assessee.

9. We have heard both the parties on this issue. The issue which has been remanded back to us by the Hon'ble High Court as to whether the reasons recorded by the ld.AO was communicated or served upon the assessee during the course of re-assessment proceedings. The Hon'ble High Court as noted above, has taken clear note of the fact that the Tribunal has given a finding that ld. AO has noted in the order sheet entry dated 08/12/2009 and the reasons for reopening was given vide office letter dated 08/12/2009 when a show-cause notice u/s.142(1) was issued. The reply of the show-cause notice does not communicate that the reasons of reopening were served on the assessee. Another point which has been highlighted that the envelop mentioning provided reasons for reopening does not bear signature of any recipient, whereas the other envelopes on which notice u/s.142(1) was issued on 07/12/2009 & 08/12/2009 sent on 09/12/2009 alongwith acknowledgement card received on 11/12/2009, bears the signature of the assessee as a

recipient on the acknowledgment cards. However, there was no such acknowledgement in the envelope through which Revenue has stated that reasons were communicated and were served to the assessee. On this background the Hon'ble High Court has remanded back this issue to decide it afresh.

10. From the perusal of the records submitted by the department in the paper book, we find there is a letter dated 08/12/2009, copy of which is appearing in pages 17 & 18 alongwith photo copy of envelop of speed post sent on 09/12/2009 mentioning providing reasons for reopening. But, there is no acknowledgement of receipt by the assessee nor there is any acknowledgement card of service. It is seen from the very same documents which were also there before the Hon'ble High court, and no further record has been produced that the said communication letter dated 18/12/2009 was served upon the assessee or the speed post sent on the same address was actually served on the assessee. On the same date other two notices in two different envelopes have been received where there is an acknowledgement of the assessee. Thus, it is very difficult to accept that there is another envelop dispatching the reasons recorded presumed to have been served, because there is no record of any service sent, nor there is any acknowledgement that the assessee has refused to receive the notice or any endorsement by the postal authorities that the same notice has been returned back or has been refused to be accepted. In so far as various arguments which have been raised by the ld. DR

cannot appreciated, because the mandate of the Hon'ble High Court is to decide, whether there is an record of service of reasons recorded on the assessee or not, which as noted above, there is no such record of service of such reasons recorded. Whether provisions of Section 292B or notice has been served u/s.282(2) of General Clauses Act to presume that there was a deemed service now cannot be entertained, because as mandated by the Hon'ble High Court, we have to decide this issue afresh on the basis of service of reasons recorded. Once, the reasons recorded have not been communicated or has been served upon the assessee, then it is violation of law laid down by the Hon'ble Supreme Court in the case of G.K. Drive Shafts (India) Ltd 259 ITR 19. Assessee after the service of notice/s.148 if assessee ask for reasons recorded and had challenged this issue and also specifically requested that the material for reopening as well as the reasons recorded has not been served upon the assessee, then same has to be complied with and if same has not been provided then the whole proceedings u/s.148 in absence of providing reasons recorded to the assessee is bad in law and same is quashed.

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11. Since we have already quashed the assessment order, the appeal of department becomes infructuous.

12. In the result, appeal of the assessee is allowed and appeal of the Revenue is dismissed.

Order pronounced on 30th October, 2023.

Sd/-
(GAGAN GOYAL)
ACCOUNTANT MEMBER

Mumbai; Dated 30/10/2023
KARUNA, *sr.ps*

Sd/-
(AMIT SHUKLA)
JUDICIAL MEMBER

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. CIT
4. DR, ITAT, Mumbai
5. Guard file.

//True Copy//

BY ORDER,

(Asstt. Registrar)
ITAT, Mumbai