

IN THE INCOME TAX APPELLATE TRIBUNAL "A" BENCH, MUMBAI
BEFORE SHRI ABY T. VARKEY, JM AND SHRI PRASHANT MAHARISHI, AM

आयकर अपील सं/ I.T.A. No.2233/Mum/2023
(निर्धारण वर्ष / Assessment Year: 2012-13)

Ashwin Saksena Rajesh Ratilal Shah & Co. 4/69, Chaitanya Nagar, Sneha C.H.S Ltd. Nehru Road, Vakola Bridge, Santacruz-East, Mumbai- 400055.	बनाम/ Vs.	ITO, Ward-16(1)(1) Room No.436A, 4 th Floor, Aayakar Bhawan, M. K. Road, Mumbai-400020.
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : ALIPS6354E		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)

Assessee by:	Shri M. M. Golvala/ Shri Rajiv Gandhi
Revenue by:	Shri Manoj Kumar Sinha (Sr. AR)

सुनवाई की तारीख / Date of Hearing: 10/10/2023
घोषणा की तारीख /Date of Pronouncement: 25/10/2023

आदेश / ORDER

PER ABY T. VARKEY, JM:

This is an appeal preferred by the assessee against the order of the Ld. Commissioner of Income Tax (Appeals)/(NFAC), Delhi dated 27.04.2023 for the assessment year 2012-13.

2. At the outset, the Ld. AR of the assessee drawing our attention to the assessment order passed dated 16.11.2018 u/s 144 of the Income Tax Act, 1961 (hereinafter "the Act") after reopening the assessment u/s 148 of the Act submitted that AO has passed the assessment order *ex-parte* without hearing the assessee; and issued notice to earlier address of assessee which got changed because assessee changed the address after separating from his wife; and to support such a contention has filed a sworn affidavit placed at page no. 73 to 75 of the



ITA No.2233/Mum/2023
A.Y. 2012-13
Ashwin Saksena.

PB, wherein he stated that the AO had issued notice u/s 148 and 142(1) of the Act in the address at Mumbai whereas the assessee was staying at Goa (*address given in the affidavit*). Therefore, according to the Ld. AR, the assessment has been framed by the AO without hearing the assessee and without considering the relevant documents to correctly assess the income of the assessee and prayed to restore the assessment back to the file of AO for *de-novo* assessment and for that cited the decision of the Hon'ble Supreme Court in the case of Tin Box Company Vs. CIT (249 ITR 216) (SC).

3. The Ld. DR opposing the plea of the assessee to restore the matter back to the file of the AO submitted that the assessee has not filed the return of income as per Section 139(1) of the Act and was in receipt of Rs.1,71,72,452/- and the TDS deducted was to the tune of Rs.16,81,464/-; and despite receipt of such amount did not file the return of income (ROI) u/s 139(1) of the Act. According to Ld. DR even after receiving notice u/s 148 of the Act, he didn't bother to file the ROI and did not comply with the notices u/s 142(1) of the Act despite the AO issuing notice four (4) times as evident from the perusal of the assessment order dated 16.11.2018. According to the Ld. DR, the Ld. CIT(A) has considered the plea of the assessee that he was under depression and couldn't comply with the notices issued by the authorities. And therefore, he does not want us to grant the prayer of assessee to restore the assessment back to the file of the AO for *de-novo* assessment.



ITA No.2233/Mum/2023
A.Y. 2012-13
Ashwin Saksena.

4. We have heard both the parties and perused the records. It is noted that the assessee has not filed the return of income u/s 139(1) of the Act. Later the case of the assessee was selected for scrutiny based on AIR information and after the approval from the Pr. CIT-16, Mumbai. The AO had issued notices u/s 148 of the Act dated 17.03.2018 for AY. 2012-13. However, the assessee did not respond to the notices issued. Thereafter by AO issued notice u/s 142(1) of the Act four (4) times to the assessee. According to the AO, despite notices served upon the assessee there was no compliance on the part of the assessee. Thereafter, the AO took note of the fact that TDS has been deducted on payment made to assessee, and to verify the same issued notices u/s 133(6) of the Act to them for information regarding details of payments made to the assessee. And thereafter, the AO issued show cause notice dated 05.10.2018 to the assessee proposing certain additions. However, the AO noticing that the intimation was received back from the postal authorities with the remark that “*Intimation unclaimed*”, the AO issued another notice dated 12.11.2018 and served a notice personally at assessee’s address on 13.11.2018 viz “*1002, Green View Tower, Shantiniketan, Air India Colony, Yari Road, Andheri (W), Mumbai-400061*”. And the AO notes that the tenant received that notice. And thereafter, the AO passed the assessment order dated 16.11.2018 wherein he made an addition of Rs.87,28,132/-. Aggrieved, the assessee preferred an appeal before the Ld. CIT(A) who deleted addition of Rs.2,85,957/- (*unexplained expenditure payment of Credit Card bills added by the AO u/s 69C of*



ITA No.2233/Mum/2023
A.Y. 2012-13
Ashwin Saksena.

the Act) and confirmed the balance addition. Aggrieved, the assessee is before us.

5. The Ld. AR drawing our attention to the sworn affidavit placed at page no. 73 to 75 of PB brought to our notice that the assessee is presently residing at “276, Konir Gauvim, Thivim, Goa, 403502”. According to him, his earlier address was A-14, Gautam Apartment, 7 Bungalow, Versova, Mumbai-400061. According to him, he is a physicist and was undergoing therapy for clinical depression due to a family problem. And since he was at Goa and under medication, he did not receive notices issued at the address noted by the AO viz “1002, Green View Tower, Shantiniketan, Air India Colony, Yari Road, Andheri (W), Mumbai-400061”. This fact of non-receipt of statutory notices is corroborated by the averment of the AO as well as the assertion made by the assessee in his sworn affidavit, that the notice couldn't be served upon the assessee (*u/s 148 of the notice as well as u/s 142(1) of the Act notice*). In the light of the aforesaid factual finding, we find that the assessee did not get proper opportunity before the AO during assessment proceedings. In such a scenario, the assessment needs to be *denovo* framed by the AO. For such a proposition, we rely on the decision of the Hon'ble Supreme Court in the case of Tin Box Company (*supra*) wherein the Hon'ble Supreme Court has held as under: -

“ *It is unnecessary to go into great detail in these matters for there is a statement in the order of the Tribunal, the fact-finding authority, that reads thus :*



ITA No.2233/Mum/2023
A.Y. 2012-13
Ashwin Saksena.

"We will straightway agree with the assessee's submission that the ITO had not given to the assessee proper opportunity of being heard . " That the assessee could have placed evidence before the first appellate authority or before the Tribunal is really of no consequence for it is the assessment order that counts . That order must be made after the assessee has been given a reasonable opportunity of setting out his case . We, therefore, do not agree with the Tribunal and the High Court that it was not necessary to set aside the order of assessment and remand the matter to the assessing authority for fresh assessment after giving to the assessee a proper opportunity of being heard .

2 . Two questions were placed before the High Court, of which the second question is not pressed . The first question reads thus :

"1 . Whether, on the facts and in the circumstances of the case, the Tribunal was justified in not setting aside the assessment order in spite of a finding arrived at by it that the Income-tax Officer had not given a proper opportunity of hearing to the assessee ?"

In our opinion, there can only be one answer to this question which is inherent in the question itself: in the negative and in favour of the assessee .

3 . The appeals are allowed . The order under challenge is set aside . The assessment orders, that of the Commissioner (Appeals) and of the Tribunal are also set aside . The matter shall now be remanded to the assessing authority for fresh consideration, as aforestated . No order as to costs . "



ITA No.2233/Mum/2023

A.Y. 2012-13

Ashwin Saksena.

6. Taking note that the assessee did not get proper opportunity during the assessment proceedings, we are of the opinion that the assessee should be granted opportunity of hearing by AO. Therefore, we set aside the impugned order of the Ld. CIT(A) and restore the assessment back to the file of the AO. And the assessee is directed to file written submission/relevant documents and request of hearing if it desires as per Rules. Since the assessee has requested for reason for reopening the assessment, the AO may given a copy of the same, since it is noted that assessee has filed the return of income before the AO. And the assessee is at liberty to raise the legal grounds as well as file the relevant documents to support his ROI. The assessee to file the correct/latest address/email to the AO; and assessee to be diligent and the AO to frame de-novo assessment in accordance to law.

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

Order pronounced in the open court on this 25/10/2023.

Sd/-

(PRASHANT MAHARISHI)
ACCOUNTANT MEMBER

Sd/-

(ABY T. VARKEY)
JUDICIAL MEMBER

मुंबई Mumbai; दिनांक Dated : 25/10/2023.
Vijay Pal Singh, (Sr. PS)



ITA No.2233/Mum/2023

A.Y. 2012-13

Ashwin Saksena.

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

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

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

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