

आयकर अपीलिय अधीकरण, न्यायपीठ – “B” कोलकाता,
*IN THE INCOME TAX APPELLATE TRIBUNAL
KOLKATA BENCH “B” KOLKATA*

Before **Shri Waseem Ahmed, Accountant Member** and
Shri S.S.Viswanethra Ravi, Judicial Member

ITA No.241/Kol/2017
Assessment Year:2009-10

Pinnacle Tie Up Pvt. Ltd. C/o RSVPC & Co. 41A, A.J.C Bose Road, 6 th Floor, Room No.613, Kolkata-17 [PAN No.AAEGP 8712 F]	बनाम / V/s.	Income Tax Officer, Ward-9(3), Aakar Bhavan, 5 th Floor, P-7, Chowringhee Square, Kolkata-69
अपीलार्थी /Appellant	..	प्रत्यर्थी /Respondent

अपीलार्थी की ओर से/By Appellant	Shri D.S. Damle, FCA
प्रत्यर्थी की ओर से/By Respondent	Md. Usman, CIT-DR
सुनवाई की तारीख/Date of Hearing	18-09-2017
घोषणा की तारीख/Date of Pronouncement	30-11-2017

आदेश /O R D E R

PER Waseem Ahmed, Accountant Member:-

This appeal by the assessee is against the order of Commissioner of Income Tax (Appeals)-3, Kolkata dated 05.12.2016. Assessment was framed by ITO Ward-9(3), Kolkata u/s 144/263/147/143(3) of the Income Tax Act, 1961 (hereinafter referred to as ‘the Act’) vide his order dated 18.03.2015 for assessment year 2009-10. Shri D.S. Damle, Ld. Authorized Representative appeared on behalf of assessee and Md. Usman, Ld. Departmental Representative appeared on behalf of Revenue.

2. Ground No. 1 to 3 are inter-related and therefore being taken up together. The issue raised by the assessee is that Ld. CIT(A) erred in confirming the order of Assessing Officer by sustaining the disallowance of ₹13.49 crores u/s 68 of the Act.

3. Briefly stated facts are that assessee is a private limited company and engaged in the business of investment in share and securities. The assessee during the year has issued 337250 equity shares having face value of ₹10/-along with the premium of ₹390/- per share. The assessee got a share capital of ₹13.49 crores during the year. The AO during the proceeding to check the veracity of the transactions required the assessee to furnish the following details:

- “1. Proof of identify-Voter Card/Passport/Driving license/PAN Card*
- 2. List of companies where you were Directors/shareholders with dates of appointment with DIN*
- 3. Proof of acknowledgement of filing IT Return along with copies of accounts.*
- 4. Details of transaction with the above assessee company along with complete bank statements*
- 5. Declaration of all sources of investment/transactions with the above party for the relevant assessment year.*
- 6. Please identify your family members who are directors in the companies mentioned in Sl. No.2 and their relationship with them.*
- 7.A write-up on justification of large share premium received/paid.*

However, the assessee in support of its share capital filed certain details of shareholders before the AO at the time of assessment proceedings. However, the AO was not satisfied with the details filed by the assessee in support of its share capital. The AO during the course of assessment proceedings also issued summons u/s 131 of the Act to the directors of the assessee-company as well as subscribers of the shares of the company for personal deposition. But there was no compliance by the directors of assessee-company and in view of the above, the AO treated the share capital of ₹13.49 crores as unexplained cash credit u/s 68 of the Act and accordingly added to the total income of assessee.

4. Aggrieved, assessee preferred an appeal before Ld. CIT(A). The assessee before Ld. CIT(A) submitted that the proceedings were initiated by AO in terms of the direction issued by the Ld. CIT u/s 263 of the Act. The necessary directions issued by the Ld. CIT under section 263 of the Act are given below:-

- “i. The AO should conduct independent detailed and complete into subscription to share capital and premium.*
- ii. The AO should trace the source of share capital by enquiring into various layers through which the money has been introduced in the assessee company as share capital and premium.*
- iii. Further the AO should examine the directors of subscribing companies by issuing summons u/s. 131 of the Act having jurisdiction over subscriber company.*
- iv. The AO should conduct independent enquiries to verify the documents filed before him in respect of proof of subscription to the hare capital.*
- v. The AO should pass a speaking order, providing adequate opportunity of being heard to the assessee and verifying the source in, rotation of money through various hands.”*

But the AO has not complied with the direction issued by Ld.CIT u/s 263 of the Act for making fresh assessment.

Besides the above, the assessee also submitted that all the necessary details with regard to identity, creditworthiness and genuineness of transactions of share capital were duly filed in the original assessment proceedings u/s 143(3) of the Act. However, Ld. CIT(A) disregarded the contention of assessee by observing as under:-

“5. I have carefully considered the facts of the case, the material on record and have also perused the accounts in the ITR filed. It is seen that the shareholders have made subscription towards share capital of the newly incorporated applicant company at a huge premium. The assessee company has issued 3,37,250 equity shares with a face value of Rs.10/- at a premium of Rs.390/-. There is virtually no business activity and no dividend income, the Profit & Loss Account shows an income of Rs.621/-. There is no fixed asset in the Balance Sheet and the closing bank balance Rs.10,821/-. The share capital received has been utilized almost in entirely investing in unquoted shares of other private companies, as such profit motive appears to be entirely absent in this case. The pieces of evidence pointed out go to show that there is reason to entertain the belief it could be a case of money laundering the kind of share capital build up cases that were discussed threadbare in the Hon'ble jurisdictional ITAT order in the case of M/s Subha Lakshmi Vanijya Pvt. Ltd. vs. CIT [ITA No.1104/Kol/2014 dt. 30/07/2015 and an intrusive enquiry was required.

In private Ltd. companies generally persons known to directors or shareholders directly or indirectly subscribe to the shares. Upon receipt of money, the share subscribers do not become incommunicado. In such cases assessee cannot simply furnish details and remain quiet when summons are reserved upon it for deeper inquiry.

Notices and summons have been issued and opportunity given to assessee can be seen from the body of assessment order.

A company which has been recently incorporated without Assessment Year track record does not in any way justify a premium. Unless the assessee files all the relevant details regarding raising of share capital and unless the directors appear and depose, it is not clear as to whether any due diligence was done by the subscribing companies, whether any peculiar or personal reason was valid for the investment or whether any arrangement was made for the protection of cease by

merely furnishing the names, address and PAN particulars or relying on entries in the Registrar of Companies website. The relationship of the assessee to the applicants is closer than arms length in such cases. Also the concept of “shifting onus” does not mean that once certain facts are provided, the assessee’s duties are over. If on verification, the information becomes unverifiable, the onus shifts back to the assessee. Faltering at this stage , the consequence is addition u/s. 68. Neither the directors of the assessee company nor the share subscribers appeared before the Assessing Officer in response to the summons. Onus to prove the three ingredients is on the assessee as the facts are only within the assessee’s knowledge. The details available reflect some paper work or documentation but genuineness, creditworthiness and identity are deeper and obtrusive. Verification of all aspects was needed but due to complete non-compliance the applicant’s case falls flat. The highest court of the land has laid down the Human Probability Test to analyze the genuineness of the entry through logical analysis in the case of CIT Vs. DURGA PRASAD MORE (1971) 82 ITR 540 (SC) and also followed in the case of SUMATI DAYAL Vs. CIT (1995) 214 ITR 801 (SC), Applying the test of human probability and preponderance of probability as laid down by the Apex Court to the surrounding facts and circumstances of this case, the claim being made cannot be sustained before the test of Human Probabilities. The addition of Rs.13,49,00,000/- u/s 68 is confirmed.”

The assessee being aggrieved by this order of Ld. CIT(A) came in 2nd appeal before us.

5. Ld. AR before us filed paper book which is running from pages 1 to 413 and submitted that all the details of the subscribers of shares were duly filed before the AO at the time of original proceedings. All the subscribers of shares of the company duly filed their replies in response to the notice issued u/s 133(6) of the Act. Ld. AR further drew our attention on pages 83 to 413 where following details were placed:-

- (i) Reply in response to the notice u/s. 133(6) of the Act;
- (ii) Copy of share application form;
- (iii) Copy of share allotment letter;
- (iv) Copy of bank statement highlighting transactions
- (v) Copy of ITR acknowledgement for Assessment Year 2009-10 along with audited accounts;
- (vi) Confirmation with the source of fund utilized for the purchase of shares;
- (vii) Copy of assessment order passed u/s. 147/143(3) of the Act.

On the other hand, Ld. DR submitted that all the subscribers of the shares of the assessee company are bogus companies which are indulged in converting unaccounted money in accounting form. The assessee has not filed necessary details in support of share capital transactions before the Ld. CIT(A) during appellate stage.

In rejoinder Ld. AR submitted that Ld. CIT(A) refused to accept the documents which were filed before the AO. In support of assessee's claim Ld. AR has filed the copy of affidavit which is placed on record.

6. We have heard the rival contentions of both the parties and perused the material available on record. From the aforesaid discussions we observe certain undisputed facts as detailed below:-

- a) The assessee, during the year has no business but it had issued shares at the exorbitant premium;
- b) The share capital and premium of the assessee was accepted in assessment made u/s 143(3)/147 of the Act;
- c) Subsequently the matter was picked up for revision u/s 263 of the Act and the same was revised vide order dated 13.03.2014 with the direction to make *de novo* assessment. The relevant extract of the order is reproduced below:-

“18. In view of the above, the order passed by the Assessing Officer is erroneous and prejudicial to the interest of revenue & hence, the order passed by the AO is set-aside with the direction that he/she should pass the assessment order after conducting independent detailed and complete enquiries into the subscription to the share capital and premium to the extent of Rs.13,49,00,000/- introduced in this case. The AO should trace the source of share capital by enquiring into the various layers through which the money has been introduced in this company as share capital and also examine the directors of subscriber companies by issuing summons u/s.131 of the IT Act. The AO should send information to the AOs having jurisdiction over the subscriber company to the share capital regarding its investment into share capital & premium paid. The AO should conduct independent enquiries to verify the documents filed before him in respect of proof of subscription to share-capital. The AO should not confine himself to conducting enquires into the subscribers to the share capital only on selective basis. The AO should also call upon the assessee to identify the persons who are shown as directors of the assessee company and examine on oath to verify their credential as directors. The AO should pass speaking order after providing reasonable opportunity to the assessee and verifying the source of share capital including the share premium of all the subscribers and rotation of money through various hands so as to ascertain the true nature of transactions which will bring to the fore, the reality of the transactions.”

In view of the above, AO initiated the assessment proceedings u/s. 144/263/147/143(3) of the Act.

6.1 On perusal of the above facts we note that the direction issued by Ld. CIT u/s. 263 of the Act has not been complied with by the AO in the consequential order. The necessary directions can be summarized as under:-

- i) *The AO should conduct independent detailed and complete into subscription to share capital and premium.*
- ii) *The AO should trace the source of share capital by enquiring into various layers through which the money has been introduced in the assessee company as share capital and premium.*
- iii) *Further the AO should examine the directors of subscribing companies by issuing summons u/s 131 of the Act. He should also send information to AOs having jurisdiction over subscriber companies.*
- iv) *The AO should conduct independent enquiries to verify the documents filed before him in respect of proof of subscription to the share capital.*
- v) *The AO should pass a speaking order providing adequate opportunity of being heard to the assessee and verifying the source in rotation of money through various hands.*

The order of AO just records the fact that the summons were issued to the directors of assessee-company as well as to some subscribers of the share capital. The relevant extract of the AO's finding is reproduced below:-

“... .. Hence, summons u/s. 131(1) of the Income Tax Act 1961 was issued on 04/02/2015 to the directors of the assessee company and also some subscriber companies for personal deposition and also to produce the following details.”

Thus, an inference can be drawn that the AO has not conducted the enquiry for examination in the manner as directed by the Ld. CIT u/s 263 of the Act.

Similarly, we also note that the assessee in the instant case has filed written submission before Ld. CIT(A) and it has not appeared personally during appellate proceedings. Thus, it is transpired that assessee did not appear before Ld. CIT(A) personally to attend the hearing. In this regard it was submitted that Ld. CIT(A) refused to accept the necessary supporting evidence despite a specific request was made by assessee vide letter dated 18.11.2016. The relevant extract of the letter is reproduced below:-

“13. We seek permission to produce the copies of documents related to the transactions with regard to identity, creditworthiness and genuineness of share applicants to whom shares were allotted during the year.”

During course of arguments, Ld. AR for the assessee filed an affidavit in support of assessee's claim which reads as under:-

"I Pramod Sharma son of Late Sh. Ramdin Sharma, the Director of Pinnacle Tie-up Private Limited situated at 14C, Maharshi Devendra Road, 4th floor, Kolkata-700007 aged about 57 years, do hereby solemnly declare and affirm as follows:

1. That I am Director of Pinnacle Tie-up Private Limited situated at 14C Maharishi Devendra road, 4th floor, Kolkata-700007.
2. That I am duly authorized and competent to swear this affidavit on behalf of the company.
3. That the document in the paper book having serial no. 18 to 27 consisting of page no. 83 to 252 are the copies of documents which were filed before the Assessing Officer ITO-Ward-9(3), Kolkata during the course of original assessment proceeding.
4. That the document in the paper book having serial no. 29 to 38 consisting of page no. 253 to 413 were obtained from the shareholders and presented before the Ld. CITA-3/Kolkata during the course of appellate proceeding. The Ld. CITA-3/Kolkata refused to admit the same. These documents were necessary to support the ground of appeal of the appellant.
5. That the statements are based on records and are true and correct to the best of our knowledge and belief.

Sd/- Pramod Sharma

DECLARANT

Sworn in present of at Kolkata
On this the 1st day of August 2017

Identified by me
Sd/- Arun Kr. Sarka
C.M.M.'s Court Kolkata

Kaml Kumar Paul
Notary Govt. of India
Regd.No.2700/04
2 & 3 Banshall Street
Kolkata-001"

From the above we note that the ld. CIT-A refused to accept the documents which assessee wanted to file during the proceedings.

Indeed, the Co-ordinate Bench in the case of *Subha Lakshmi Vanijya Pvt. Ltd. vs. CIT [ITA No.1104/Kol/2014 dated 30.07.2015]* has upheld the order passed u/s 263 of the Act but there the issue was that whether the order of the AO is erroneous in so far prejudicial to the interest of Revenue. Thus it can be inferred that the issue on merit was not decided by the Hon'ble ITAT in the case of *Subha Lakshmi Vanijya Pvt. Ltd.(Supra)*. The relevant extract of the order is reproduced below :

"It is, therefore, held that the proceedings u/s. 263 of the Act to revise the order dated 21.2.2013 passed by the AO u/s. 147 of the Act, are valid and cannot held to be without jurisdiction. Accordingly, this issue is also decided against the assessee."

6.2 We also note that the order of ld. CIT u/s 263 of the Act in the case of *Subha Lakshmi Vanijya Pvt. Ltd. (supra)* got merged with the order of Hon'ble ITAT which

was subsequently confirmed by the Hon'ble Jurisdictional High Court in the case of Rajmandir Estate Pvt. Ltd. Vs. Pr. CIT reported in 386 ITR 162. Thus, we accordingly note that the direction issued by the Id. CIT u/s 263 of the Act was affirmed by the Hon'ble Jurisdictional High Court. Therefore, in our considered view, the AO was under the obligation to follow the direction given by the Id. CIT u/s 263 of the Act.

The facts of the present case are exactly identical of *Subha Lakshmi Vanijya Pvt. Ltd.* (Supra). Therefore, we hold that the AO was under the obligation to follow the directions issued by the Id. CIT in his order u/s 263 of the Act. However, on perusal of the consequential order of the AO we find that direction has not been complied with in totality as discussed above.

6.3 We also note that the principles laid down in by the Hon'ble ITAT in the case of *Subha Lakshmi Vanijya Pvt. Ltd.* (supra) cannot be applied to the present case as it is arising out of the giving effect order in pursuance to the provisions of section 263 of the Act. Thus, the impugned order passed u/s. 263 of the Act is the mother order on the basis of which fresh proceedings were initiated. Thus, the directions issued u/s. 263 of the Act cannot be brushed aside. In our considered view, the cognizance of the directions issued u/s. 263 of the Act is very important to the share capital transactions.

6.4 We also draw support from the principles laid down by the Hon'ble Delhi High Court in the case of *CIT Vs. Jansampark Advertising & Marketing Pvt. Ltd.* in ITA 525/2014 vide order dated 11 March 2015 wherein it was held as under:-

“42. The AO here may have failed to discharge his obligation to conduct a proper inquiry to take the matter to logical conclusion. But CIT(Appeals), having noticed want of proper inquiry, could not have closed the chapter simply by allowing the appeal and deleting the additions made. It was also the obligation of the first appellate authority, as indeed of ITAT, to have ensured that effective inquiry was carried out, particularly in the fact of the allegations of the Revenue that the account statements reveal uniform pattern of cash deposits of equal amounts in the respective accounts preceding the transactions in question. This necessitated a detailed scrutiny of the material submitted by the assessee in response to the notice under Section 148 issued by the AO, as also the material submitted at the stage of appeals, if deemed proper by way of making or causing to be made a “further inquiry” in exercise of the power under Section 250(4). This approach not having been adopted, the impugned order of ITAT, and consequently that of CIT(Appeals), cannot be approved or upheld.”

6.5 In view of above proposition and in the interest of natural justice and fair play we are inclined to restore the matter to the file of AO for fresh adjudication in accordance with the law and in the light of above stated discussion after providing reasonable opportunity of being heard to assessee. Consequently, ground of assessee's is allowed for statistical purpose.

7. **In the result, for statistical purpose, the appeal of assessee is treated as allowed.**

Order pronounced in open court on 30/11/2017

Sd/-
(न्यायिक सदस्य)
(S.S.Viswanethra Ravi)
Judicial Member
*Dkp, Sr.P.S

Sd/-
(लेखा सदस्य)
(Waseem Ahmed)
Accountant Member

दिनांक:- 30/11/2017 कोलकाता / Kolkata

आदेश की प्रतिलिपि अग्रेषित / Copy of Order Forwarded to:-

1. अपीलार्थी/Appellant-Pinnacle Tie Up Pvt. Ltd., C/o RSVPC & Co. 41A, A.J.C. Bose Road, 6th Floor, Room No.613, Kolkata-17
2. प्रत्यर्थी/Respondent-ITOWard-9(3), Aakar Bhavan, 5th Fl, P-7 Chowringhee Square, Kolkata-69
3. संबंधित आयकर आयुक्त / Concerned CIT
4. आयकर आयुक्त- अपील / CIT (A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण कोलकाता / DR, ITAT, Kolkata
6. गार्ड फाइल / Guard file.

/True Copy/

By order/आदेश से,

Sr. Private Secretary
Head of Office/DDO
आयकर अपीलीय अधिकरण,
कोलकाता