IN THE INCOME TAX APPELLATE TRIBUNAL "D" BENCH : KOLKATA

[Before Hon'ble Shri Aby. T. Varkey, JM & Shri M.Balaganesh, AM]

I.T.A No. 2363/Kol/2016

Assessment Year : 2009-10

Satyam Tradecom Pvt. Ltd. -vs- ITO, Ward-5(1),Kolkata
[PAN: AALCS 1734 P]
(Appellant) (Respondent)

For the Appellant : Shri Miraj D Shah.

For the Respondent : Shri A.K.Tiwari, CIT

Date of Hearing : 19.02.2018

Date of Pronouncement : 07.03.2018

ORDER

Per M.Balaganesh, AM

1. This is an appeal of the assessee directed against the order passed by the Learned Commissioner of Income Tax (Appeals) – 2, Kolkata (in short the ld CITA) in Appeal No. 44/CIT(A)-2/15-16 dated 1.9.2016 against the order of assessment framed by the Learned Income Tax officer, Ward -5(1), Kolkata (in short the ld AO) u/s 144/263/147/143(3) of the Act dated 23.3.2015 for the Asst Year 2009-10.

2. The Ground No. 1 raised by the assessee is general in nature and does not require any specific adjudication.

3. The first issue to be decided in this appeal is as to whether the ld CITA was justified in upholding the addition made u/s 68 of the Act towards share application money in the sum of Rs 9,54,50,000/- , in the facts and circumstances of the case.

4. The brief facts of this issue is that the assessee is an investment company. The return of income for the Asst Year 2009-10 was filed on 2.1.2010, which was duly processed u/s 143(1) of the Act on 4.11.2010. Later the assessment was reopened by issuance of notice u/s 148 of the Act and re-assessment was completed u/s 147/143(3) of the Act on 29.2.2012 determining total income at Rs 54,620/-. This re-assessment was subjected to revision proceedings u/s 263 of the Act by the ld CIT on the ground that the ld AO had not properly enquired and verified the genuineness and source of share capital as well as the identity and creditworthiness of the shareholders who had applied for shares of the company. Hence the ld CIT passed the revision order u/s 263 of the Act on 5.3.2014 by setting aside the order passed by the ld AO u/s 147/143(3) of the Act dated 29.2.2012 with certain specific guidelines regarding investigation to be carried out while assessing the assessee de novo. The ld AO in the consequential proceedings giving effect to the order of ld CIT u/s 263 of the Act, had reproduced the relevant portion of the ld CIT's directions. The notice u/s 142(1) of the Act calling for certain details vide letter dated 29.5.2014 was issued on the assessee asking him to produce and submit certain details and documents viz. complete list of the Directors of the company and bank accounts maintained in the name of the company along with branches, complete details of shareholding pattern of the company specifying the number of shares held by each shareholder and complete details of share application money received during the year along with a copy of related bank statement highlighting the relevant entries for such receipts. Another notice u/s 143(2) and 142(1) of the Act dated 8.12.2014 were issued fixing the date of hearing on 22.12.2014 was issued on the assessee which was not responded by the assessee. Later a summon u/s 131(1) of the Act was also issued to Directors of the assessee company as well as Directors of the alleged subscriber companies to appear personally. In cases of some of the subscriber companies, the notices could not even get served by the postal authority and such notices have been returned with postal remarks such as "Address cannot be looked out / Left/ Not Known", thereby denying the basic existence of such

company, at the very address, which was provided by the assessee company itself. The directors of the assessee company and subscriber companies failed to appear before the ld AO. Later the ld AO issued a show cause notice dated 18.2.2015 for hearing on 26.2.2015 asking to explain why best judgment assessment u/s 144 of the Act should not be done in its case on the basis of materials and details available on record. This time also the assessee failed to comply with the show cause notice. The ld AO accordingly concluded that there was no response from the side of the assessee company or from the end of the alleged subscriber companies.

5. The ld AO noticed from the balance sheet of the assessee that it had raised its capital by issuing 954500 equity shares at the rate of Rs 10 each and receiving share premium of Rs 8,59,05,000/- totaling to Rs 9,54,50,000/- during the year in question. The ld AO observed that the assessee failed to provide any details / documents in support of the share application money received and also failed to justify the basis of such a huge premium amount of the shares. It was the case of the assessee that the entire transactions of share application money was subject matter of verification by the ld AO in the re-assessment proceedings u/s 147 of the Act, wherein the entire details called for by the ld AO were filed already by the assessee and is there on record before the ld AO. It was pleaded that all the subscriber companies had responded to notices issued u/s 133(6) of the Act before the then AO during re-assessment proceedings. Since no one responded to the summons issued u/s 131 of the Act during the impugned proceedings (i.e giving effect proceedings to ld CIT order u/s 263) , the ld AO concluded that the identity of the shareholders could not be proved beyond doubt and due to lack of co-operation of the assessee, the shareholders creditworthiness could not be ascertained. The ld AO observed that from the analysis of the bank statement of the assessee, which were already on record, it was found that almost similar amount was debited from the account of the assessee almost on same day when this share application money was credited to the account of the assessee. From the profit and

loss account and balance sheet of the assessee, it is evident that the assessee had not carried out any business activity. He concluded that this proves that the assessee has introduced its own unaccounted fund in the form of share application money to legalise its own black money. Therefore, the sum reflected by the assessee in the Balance Sheet as share capital and share premium was added back in the hands of the assessee as unexplained cash credit u/s 68 of the Act to the tune of Rs 9,54,50,000/-. Aggrieved, the assessee preferred an appeal before the ld CITA , who was pleased to dismiss the appeal and thus confirmed the action of the ld AO.

6. Aggrieved, the assessee is in appeal before us on the following grounds:-

> *2. For that in the facts and circumstances of the case the Ld. Commissioner of Income Tax (Appeals) passed the appellate order without giving proper opportunity of hearing to the assessee.*
>
> *3. For that the Assessment order passed on 23.03.2015 was not in terms of direction passed in the order u/s 263 of the I.T. Act, 1961. Hence, the said assessment order is liable to be set aside.*
>
> *4. For that in the facts and circumstances of the case the order u/s 263 of the I.T. Act, 1961 was bad in law hence, the consequential order u/s 144/263/147/143(3) of the I.T. Act, 1961 was bad in law and should be quashed.*
>
> *5. For that in the facts and circumstances the Ld. Commissioner of Income Tax (Appeals) erred in upholding the addition of Rs. 9,54,50,000/- on account of share application money being added as cash credit u/s 68 of the I.T. Act, 1961. The addition is not called for and hence the same be deleted.*

7. We have heard the rival submissions. According to the assessee, the shareholders of the assessee had duly responded to notices issued u/s 133(6) of the Act directly to the ld AO by giving proper replies with regard to details called for by the ld AO. Therefore, according to assessee, the identity of shareholders stands proved.

According to ld AR, subsequently when the ld AO noticed that the directors of the shareholder companies did not appear before him personally along with the directors of the assessee company, then the ld AO issued show cause notice to assessee for invoking best judgement assessment and thereafter, concluded that the assessee could not prove the identity and creditworthiness of the shareholders. Accordingly to the ld AR, despite the fact that the ld AO was in receipt of the revisional order of the ld CIT on 5.3.2014 and after a lapse of considerable time, the ld AO started issuing notices to the share subscribers in addition to issuing notice to the assessee and its directors. Later the ld AO had drawn adverse inference against the assessee and therefore, no proper opportunity was granted to the assessee company to assist the ld AO in proving the identity, genuineness and creditworthiness of the shareholders. The ld AR relied on the decision of the *Hon'ble Supreme Court in the case of Tin Box Company vs CIT reported in 249 ITR 216 (SC)* wherein it was held that:-

> *"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 :*
>
> *"We will straightaway agree with the assessee's submission that the Income-tax Officer 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.*
>
> *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.*

> *The appeals are allowed. The order under challenge is set aside. The assessment order, 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 afore stated."*

8. In response to this, the ld DR vehemently opposed this plea of the assessee and contended that the assessee company was very well aware of the revisional order passed by the ld CIT and should have brought all evidences before the ld AO to substantiate the identity, genuineness and creditworthiness of share subscribers. The ld AO has noted that the assessee did not co-operate with the assessment proceedings and , therefore, the assessee cannot be given another innings. We note that the ld CIT's exercise of revisional jurisdiction u/s 263 of the Act setting aside the 147/143(3) order was passed on 5.3.2014. The ld AO while giving effect to the order of the ld CIT has noted that he had issued summon u/s 131 of the Act to the directors of the shareholder companies , who had not appeared before him on 22.12.2014 , the ld AO thereafter gave assessee another notice on 18.2.2015 as to why the best judgement assessment should not be resorted to and after fixing the hearing on 26.2.2015. The ld AO after noticing that none appeared on behalf of the assessee, concluded that the assessee had not co-operated and , therefore, according to him, the identity and genuineness of the shareholder subscriber companies could not be established beyond doubt and, therefore, he made the addition of Rs 9,54,50,000/- . We note that the ld CIT invoked the revisional jurisdiction u/s 263 of the Act and found that the assessee company in its Balance Sheet has shown to have infused equity share capital of Rs 9,54,50,000/- on premium of Rs 8,59,05,000/- and since the ld AO had not enquired into the source of the share capital and premium infused into the assessee company by verifying the identity, genuineness and creditworthiness of the shareholders, the ld CIT found the AO while doing assessment did not exercise the role of investigator and, therefore, the order of ld AO is erroneous so far as prejudicial to the interest of the revenue and directed the ld AO to make fresh assessment after taking into consideration the pernicious practice of converting black money by the modus

operandi as described by the ld CIT. We also noted in the said backdrop, the ld CIT has given certain guidelines which were can say in order to facilitate deep investigation into the case and for that we note that the ld CIT had given the following directions:-

> *"In view of the special facts and circumstances as well as the judicial decision relied upon the impugned order u/s 148 is therefore, set aside u/s 263 of the IT Act and the AO is directed to:*
>
> *(i) Examine the genuineness and source of share capital, not on a test check basis, but in respect of each and every shareholder by conducting independent enquiry not through the assessee. The bank account for the entire period should be examined in the course of verification to find out the money trail of the share capital.*
>
> *(ii) Further the AO should examine the directors as well as examine the circumstances which necessitated the change in directorship if applicable. He should examine them on oath to verify their credentials as director and reach a logical conclusion regarding the controlling interest.*
>
> *(iii) The AO is directed to examine the source of realization from the liquidation of assets shown in the balance sheet after the change of Directors, if any*
>
> *After conducting the inquiries & verification as directed above, the AO should pass a speaking order, providing adequate opportunity of being heard to the assessee.*
>
> *The impugned order u/s 148 is accordingly set aside and assessment should be done afresh."*

9. With the aforesaid direction, the ld CIT set aside the order of the ld AO which was passed u/s 147 / 143(3) of the Act. We also note that similarly placed assessees had challenged the exercise of revisional jurisdiction u/s 263 of the Act before this tribunal in those cases , one of it of Subhalakshmi Vanijya Pvt Ltd vs CIT in ITA No.

1104/Kol/2014 dated 30.7.2015, wherein the Tribunal was pleased to uphold the order passed by the ld CIT passed u/s 263 of the Act , which we learn to have been confirmed by the Hon'ble Jurisdictional Hig Court and the SLP preferred against the decision of the Hon'ble Jurisdictional High Court has been dismissed by the Hon'ble Supreme Court. We note that the shareholders had duly replied during the original re-assessment proceedings confirming the factum of investments before the ld AO . The ld AO chose to issue summons to the directors of the shareholders companies who did not appear before him which lead to ld AO drawing adverse inference against the assessee by resorting to make best judgement assessment. We find that the assessment order has been passed u/s 144 of the Act on the ground of non-cooperation by the assessee. Similarly the ld CITA also had passed an exparte order for non-service of notice and non-appearance of the assessee. In this regard, we find that the address of the assessee noted by the ld CITA in his order is "M/s Satyam Tradecom Pvt Ltd , 9/12, Lal Bazar Street, 1st Floor, Block-A, Kolkata -700001" , whereas the address noted in the assessment order is "M/s Satyam Tradecom Pvt Ltd , 9/12, Lal Bazar Street, 1st Floor, Block-A, Room No. 9, Kolkata -700001". The ld AR stated that Lal Bazar street is a huge place and in the absence of specific mention of Room Number, it is not practically not possible to serve any notice. In the instant case, the notices of the ld CITA as tabulated in his order could not be served on the assessee as he had not mentioned the 'Room No. 9' in the said notice. He stated that similar mistake could have been committed by the ld AO also while sending certain notices, which in his opinion, were not complied with by the assessee.

9.1. We find that it is not in dispute that the entire transactions of share capital and share premium was the subject matter of verification in the re-assessment proceedings by the ld AO, wherein the shareholders had duly responded to notice u/s 133(6) of the Act by confirming the fact of making investments in the assessee company. The shareholders had also duly furnished their income tax assessment particulars.

Pursuant to directions of the ld CIT u/s 263 of the Act, the ld AO was mandated to make direct verifications about the genuineness of the transactions and creditworthiness of the shareholders by making necessary specific enquiries as listed out supra. The ld CIT had specifically directed the ld AO to make enquiries directly from the shareholders and not through the assessee. Hence non-appearance of the assessee before the ld AO intentionally or unintentionally does not make any relevance here. The ld AO admittedly did not resort to make enquiries in the manner stated by the ld CIT u/s 263 of the Act in spite of the fact that all the necessary details were very much available before him. The ld CIT had directed the ld AO to investigate into multiple layers of the investment in shares made by respective shareholders and identify the ultimate person holding controlling interest including the change in shareholding, directorship etc and then take the entire matter to its logical conclusion to bring out the facts on record. From the perusal of the assessment order, we find that this has not been done by the ld AO. In this regard, we would like to place reliance on the decision of *Hon'ble Delhi High Court in the case of CIT vs Jansampark Advertising & Marketing Pvt Ltd in ITA No. 525/2014 dated 11.3.2015* wherein after noticing inadequate enquiry by authorities below, the court had held as under:-

> *"41. We are inclined to agree with the CIT(Appeals), and consequently with ITAT, to the extent of their conclusion that the assessee herein had come up with some proof of identity of some of the entries in question. But, from this inference, or form the fact that the transactions were through banking channels, it does not necessarily following that satisfaction as to the creditworthiness of the parties or the genuineness of the transactions in question would also have been established.*
>
> *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 Section148 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). His approach not having been adopted, the impugned order of ITAT, and consequently that of CIT(Appeals), cannot be approved or upheld."

9.2. In view of the aforesaid findings in the facts and circumstances of the case and respectfully following the decision of Hon'ble Delhi High Court supra, we deem it fit and appropriate, in the interest of justice and fair play, to remand the matter back to the file of the ld AO for de novo assessment and to decide the matter as mandated by the ld CIT in section 263 order, after giving sufficient opportunity of being heard to the assessee. Accordingly, the Grounds 2 to 5 raised by the assessee are allowed for statistical purposes.

10. The next issue to be decided in this appeal is as to whether the disallowance u/s 14A of the Act in the sum of Rs 1,01,658/- could be made in the facts and circumstances of the case.

10.1. The ld AO observed from the balance sheet of the assessee that it had made investment of Rs 10,31,50,000/- in unquoted equity shares of certain companies, fully paid up. He observed that the assessee had not received any exempt income. He invoked the provisions of Rule 8D(2) and arrived at the disallowance of Rs 2,97,125/- under third limb of Rule 8D(2) of the Rules. However, he restricted the said disallowance to Rs 1,01,658/- , being the total expenditure claimed in the profit and loss account by the assessee. The ld CITA dismissed the appeal of the assessee ex parte for non-appearance. Aggrieved, the assessee is in appeal before us on the following grounds:-

6. For that in the facts and circumstances the Ld. Commissioner of Income Tax(Appeals) erred in upholding the addition of Rs. 1,01,658/- on account of

14A of the I.T. Act, 1961. The addition is not called for and hence the same be deleted.

7. The appellant craves leave to produce additional evidences in terms of Rule 29 of the Income Tax (Appellate Tribunal) Rules, 1963.

8. For that the ld. Commissioner of Income Tax (Appeals) did not permit the assessee to produce relevant documents/evidences in the course of the hearing. Hence, the appellate order was bad in law for want of opportunity and proper hearing and thus be quashed.

10.2. We have heard the rival submissions. We find that the provisions of section 14A of the Act will set into motion only in the event of assessee deriving exempt income. In the instant case, it is not in dispute that the assessee had not derived any exempt income. Reliance is placed on the following decisions in this regard:-

CIT vs Chettinad Logistics (P) Ltd – (2017) 80 taxmann.com 221 (Mad HC)
CIT vs Holcim India Pvt Ltd in ITA No. 486 /2014 (Delhi HC)
Cheminvest Ltd vs CIT reported in 378 ITR 33 (Delhi HC)

Hence respectfully following the aforesaid decisions, we direct the ld AO to delete the disallowance made u/s 14A of the Act in the sum of Rs 1,01,658/-. Accordingly, the Grounds 6 to 8 raised by the assessee are allowed.

11. The Ground No. 9 raised by the assessee is only with regard to non-grant of credit for self assessment tax paid in the sum of Rs 2,253/-. We direct the ld AO to verify this claim of the assessee and if found to be correct, then the same should be given credit in the assessment. Accordingly, the Ground No. 11 raised by the assessee is allowed for statistical purposes.

12. The Ground No. 10 raised by the assessee is with regard to charging of interest u/s 234A / 234B/ 234C and 234D of the Act which is consequential in nature. We direct the ld AO to re-compute the same as per law.

13. The Ground No. 11 raised by the assessee is general in nature and does not require any specific adjudication.

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

Order pronounced in the Court on 07.03.2018

Sd/-	Sd/-
[A.T. Varkey]	[M.Balaganesh]
Judicial Member	Accountant Member

Dated : 07.03.2018

SB, Sr. PS

Copy of the order forwarded to:
1. Satyam Tradecom Pvt. Ltd., C/o, D.J.Shah & Co., Kalyan Bhawan, 2, Elgin Road, Kolkata-700020.
2. ITO, Ward-5(1), Aayakar Bhawan, P-7, Chowringhee Square, Kolkata-700069.
3. C.I.T(A)- , Kolkata 4. C.I.T.- Kolkata.
5. CIT(DR), Kolkata Benches, Kolkata.

True copy

By Order

Senior Private Secretary
Head of Office/D.D.O., ITAT, Kolkata Benches