

आयकर अपीलीय अधीकरण, न्यायपीठ – “C” कोलकाता,
IN THE INCOME TAX APPELLATE TRIBUNAL “C” BENCH: KOLKATA

(समक्ष)Before श्री ऐ. टी. वर्की, न्यायीक सदस्य

एवं/and श्री एम .बालागणेश, लेखा सदस्य)

[Before Shri A. T. Varkey, JM & Shri
M.Balaganesh, AM]

I.T.A. No. 1103/Kol/2016
Assessment Year: 2009-10

Sankalp Vincom Pvt. Ltd. (PAN: AAMCS6767M)	Vs.	Income-tax Officer, Wd-9(4), Kolkata
Appellant		Respondent

Date of Hearing	21.02.2018
Date of Pronouncement	23.03.2018
For the Appellant	Shri Soumitra Choudhury, Advocate
For the Respondent	Shri Saurabh Kumar, Addl. CIT, Sr. DR

ORDER

Per Shri A.T.Varkey, JM

This is an appeal filed by the assessee against the order of Ld. CIT(A)-3, Kolkata dated 10.03.2016 for AY 2008-09.

2. The main grievance of the assessee is against the action of the Ld. CIT(A) in confirming the addition of Rs.9,02,50,000/- made by the AO on account of unexplained cash credit by invoking the provisions of sec. 68 of the Income-tax Act, 1961 (hereinafter referred to as the “Act”).

3. Brief facts of the case are that assessee filed its original return of income on 30.06.2009 declaring total income of Rs.1410/- which was processed u/s. 143(1) of the Act. Subsequently, the case was reopened by AO after issuing notice u/s. 148 of the Act since there was reason to believe that income had escaped assessment within the meaning of sec. 147 of the Act. Thereafter, the assessment order u/s. 147/143(3) of the Act was passed on 25.02.2011 assessing the total income at Rs.60,410/-. Thereafter, the CIT on perusal of the

assessment record observed that the issue of share capital of Rs.9,02,50,000/- (including huge share premium), had not been properly examined by the AO inasmuch as no independent inquiries had been carried out. Later on, on 25.03.2013, an order u/s. 263 of the Act was passed by the CIT-3, Kolkata setting aside the order passed u/s. 147/143(3) of the Act on 25.02.2011 directing the AO to do assessment afresh since according to CIT the assessment order passed by the AO was erroneous and prejudicial to the interest of the revenue.

4. In the reassessment proceedings taken up in consequence to the order u/s. 263 of the Act, the AO found that the assessee had raised share capital of Rs.9,02,50,000/- during the year. Thereafter, the AO issued summons to the directors of the shareholder/subscriber companies to examine the identity, creditworthiness and genuineness of the alleged shareholders and genuineness of the transactions, to which there was no response. Therefore, according to the AO, the identity, creditworthiness and genuineness remained unexplained and, therefore, he treated the share capital of Rs.9,02,50,000/- as bogus and added the same in terms of sec. 68 of the Act as unexplained cash credit vide order dated 31.03.2014. On appeal, the Ld. CIT(A) was pleased to confirm the same. Aggrieved, the assessee is before us.

5. We have heard rival submissions and gone through the facts and circumstances of the case. The main grievance of the assessee is that sufficient opportunity was not granted to the assessee by the AO during the reassessment proceedings. According to the Ld. Counsel, the AO asked for documents and details from the assessee which have been furnished before him and this fact has been acknowledged by the AO at page 2 of his order wherein he has clearly stated "*a letter was receive from the A/R of the assessee on 26.02.2014 submitting various details including a list of shareholders showing allotment of shares*". Thereafter, in the month of March, 2014 i.e. summons u/s. 131 of the Act was issued against the directors of the assessee company at their respective addresses fixing the date of hearing on 12.03.2014. Taking note that none of the directors appeared before him, the AO jumped in to conclusion that the assessee had failed to prove the identity, creditworthiness and

genuineness of the shareholders and the premiums. Therefore, he treated the amount credited to the tune of Rs.9,02,50,000/- in the books of account of the assessee company for the relevant assessment year as bogus and charged to income tax u/s. 68 of the Act.

6. We note that the reassessment order passed by AO, pursuant to the order passed u/s. 263 of the Act by Ld. CIT was passed on 25.03.2013, the main grievance of the assessee is that it did not get proper opportunity to place the evidence before the AO to satisfy him as to the identity, genuineness and creditworthiness of the shareholders. Therefore, the Ld. AR relied on the order of (three judge bench) the Hon'ble Supreme Court in Tin Box Company Vs. CIT (2001) 249 ITR 216 (SC) 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 :

“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 aforesaid.”

7. On the other hand, 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 evidence before the AO to substantiate the identity, genuineness and creditworthiness of the share subscribers. The AO has noted that the

assessee did not cooperate 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 order was passed on 25th March, 2013. We note that the Ld. CIT invoked the revisional jurisdiction u/s. 263 of the Act and found that the assessee company had raised share capital of Rs.9,02,50,000/- during the year in question and since the AO had not enquired into the source of the share capital infused into the assessee company by verifying the identity, genuineness and creditworthiness of the shareholders, the Ld. CIT found that the AO while doing assessment did not exercise the role of investigator and, therefore, the order of AO was found to be erroneous so far as prejudicial to the interest of the revenue and directed the 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 note that in the said backdrop the Ld. CIT has given certain guidelines which we can say was in order to facilitate a thorough deep investigation into the case and for that we note that the Ld. CIT had given the following directions:

xxxiv) 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.

xxxv) 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.

xxxvi) The AO is directed 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."

8. We note that the AO pursuant to the order of Ld. CIT while giving effect to the order of CIT has given notices to the assessee company initially on 07.11.2013 which could not be served on the assessee company for change of address and the AO acknowledges the fact that Shri Alok Jain, CA, the AR of the assessee company appeared on 26.11.2013 and furnished the new address of the assessee company. Thereafter a notice was issued on 06.02.2014 which AO notes was not complied with by the assessee company. However, the

AO acknowledges that the A.R of assessee had written a letter to him on 26.02.2014 furnishing various details including a list of share holders showing allotment of shares. Thereafter, the AO has issued summons u/s. 131 of the Act fixing the date of appearance of the directors of the assessee company on 12.03.2014 and since they did not appear before him, concluded that the assessee failed to prove the identity, creditworthiness and genuineness of the transaction and made addition u/s. 68 of the Act. Thus, we note that the AO has drawn adverse conclusion basically because of non-appearance of the directors of the assessee company. It is not discernible from the order of the AO as to what all details and documents were submitted by the A.R of the assessee vide letter dated 26.02.2014. However, according to the A.R of the assessee claimed before us that the assessee company pursuant to the notice of the AO had submitted the following documents before the AO, which fact has been stated before the Ld. CIT(A) which fact is evident from the averments recorded by Ld. CIT(A) at pages 2 and 8 of the impugned order which is reproduced as under:

*“(b) It is humbly submitted that during the assessment proceeding, the assessee-company has submitted all the relevant documents viz., **ITR acknowledgement and final accounts and bank statement of the assessee.***

(c) It is further submitted that the A.O. issued notices u/s 133(6) to share applicants. contributing share capital including share premium of Rs. 9,02,50,000/-. All the share holders has submitted their replies.

Copies of the same are annexed in the paper book in the end of the papers relating to respective shareholder, which were also submitted by them containing pages 19 to 292 in the paper book. Thus, the share applicants had filed the ITR acknowledgement, Final accounts and bank statement along with other details at the time of assessment proceedings, which proves that the transactions are genuine. The various documents viz. ITR Acknowledgement, final accounts, bank statement etc. relating to the share applicants are annexed.

*d) **The share applicants in their replies also explained the source of fund from which investment was made. Hence, the documents filed by the share applicants duly proved the creditworthiness and genuinity of the transactions.***

*e) It is further submitted that **as per the Balance Sheets of the share applicant companies, the amount of the investment in the assessee-company was much less than their net worth.** The investment in the assessee company was made by them through account payee cheques. As such, identity, genuinity and creditworthiness - all the three ingredients required were proved in the instant case.”*

We note that despite filing voluminous documents running from pages 19 to 292 of paper book, the AO has made a passing remark that details were submitted with list of shareholders, clearly exposes the non-application of mind. Moreover, it was brought to our knowledge, notices were not issued to the existing directors of the shareholder companies and the AO did not even bother to inform the assessee company at any stage about the alleged non-compliance on the part of the directors, which fact was also pleaded before Id CIT(A) and have been recorded at page 8 of his order. We note that only on March, 2014, the AO issued summons u/s. 131 of the Act against the directors of the assessee company and too (NOT TO THE EXISTING DIRECTORS) and thereafter he framed assessment against the assessee on 31.03.2014.

9. We also note that Ld. CIT while setting aside the order of the AO which was passed u/s. 147/143(3) of the Act, the Ld. CIT gave certain guidelines to follow for conducting deep investigation. 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 Subha Lakshmi Vanijya Pvt. Ltd. Vs. CIT in ITA No. 1104/Kol/2014 dated 30.07.2015, 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 High Court and the SLP preferred against the decision of the Hon'ble jurisdictional High Court has been dismissed by the Hon'ble Supreme Court. Therefore, similar order of the Ld. CIT passed u/s. 263 of the Act has been upheld. We note that the AO while giving effect to the CIT's 263 order has noted that the assessee company has in fact furnished various details documents sought by him to his notice u/s. 142(1) of the Act. However, the AO took the adverse view against the assessee on the plea that the directors of the assessee company had not appeared before him on 12.03.2014 and after taking note that none appeared concluded that entire amount of share application money received along with premium amounting to Rs.9,02,50,000/- which has remained unexplained and added to the income of the assessee. We also note that one of the major grievance of the assessee is that no notices were in fact issued against the existing shareholders of the assessee company and wondered as to how they could have complied by appearing before the AO, which strengthen its plea for lack of

opportunity and makes the order of AO fragile for violation of natural justice. We also note that the Ld. CIT after looking into the pernicious practice of converting black money into white money has given the guidelines to AO as to how the investigation should be conducted to find out the source of source. Since similar order of the Ld. CIT passed u/s. 263 of the Act has been upheld by the Tribunal as well as by the Hon'ble Calcutta High Court as well as the SLP has been dismissed by the Hon'ble Supreme Court, similar order of the Ld. CIT has to be given effect to as directed by the Ld. CIT. We take note that the Ld. CIT with his experience and wisdom has given certain guidelines in the backdrop of black money menace should have been properly enquired into as directed by him. The AO ought to have followed the investigating guidelines and method as directed by him to unearth the facts to determine whether the identity, genuineness and creditworthiness of the share subscribers. We note that the Hon'ble Supreme Court in three judges bench in the case of Tin Box, (supra), has held that since there was lack of opportunity to the assessee at the assessment stage itself, the assessment needs to be done afresh and thereby reversed the Hon'ble High Court, Tribunal and CIT(A)'s orders and remanded the matter back to AO for fresh assessment. So, since there was lack of opportunity as aforesaid it has to go back to AO. We also note that the Hon'ble Delhi High Court in the case of CIT Vs. Jansampark Advertising & Marketing Pvt. Ltd. in ITA No. 525/2014 dated 11.03.2015 wherein after noticing inadequate enquiry by authorities below have 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 from the fact that the transactions were through banking channels, it does not necessarily follow 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 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). His approach not having been adopted, the

impugned order of ITAT, and consequently that of CIT(Appeals), cannot be approved or upheld."

10. In view of the aforesaid order and in the light of the Hon'ble Supreme Court's decision in Tin Box Company (supra) and taking into consideration the fact the order of the Ld. CIT passed u/s. 263 of the Act in similar cases being upheld up to the level of Apex Court, and taking note of Hon'ble Delhi High Court's order in Jansampark Advertising & Marketing Pvt. Ltd. (supra), we set aside the order of the Ld. CIT(A) and remand the matter back to the file of AO for de novo assessment and to decide the matter in accordance to law after giving opportunity of being heard to the assessee.

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

Order is pronounced in the open court on 23.03.2018

Sd/-
(M. Balaganesh)
Accountant Member

Sd/-
(Aby. T. Varkey)
Judicial Member

Dated : 23rd March, 2018

Jd.(Sr.P.S.)

Copy of the order forwarded to:

1. Appellant – Sankalp Vincom Pvt. Ltd., 147, Nilgunge Road, Belghoria, Kolkata-700 056
2. Respondent – ITO, Ward-9(4), Kolkata.
3. The CIT(A) , Kolkata.
4. CIT , Kolkata
5. DR, Kolkata Benches, Kolkata

/True Copy,

By order,

Sr. Pvt. Secretary