

आयकर अपीलिय अधीकरण, न्यायपीठ – “D” कोलकाता,
IN THE INCOME TAX APPELLATE TRIBUNAL “D” 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. 1778/Kol/2016
Assessment Year: 2008-09

Tolasariya Vinyog Pvt. Ltd. (PAN: AAAC9756F)	Vs.	Income-tax Officer, Wd-4(4), Kolkata
Appellant		Respondent

Date of Hearing	20.02.2018
Date of Pronouncement	23.03.2018
For the Appellant	Shri Miraj D. Shah, AR
For the Respondent	Shri A. K. Tiwari, CIT

ORDER

Per Shri A.T.Varkey, JM

This is an appeal filed by the assessee against the order of Ld. CIT(A)-6, Kolkata dated 28.07.2016 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.9,29,50,000/- made by the AO on account of share application money being added as 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 15.09.2008 declaring income of Rs.10,270/- which was processed u/s. 143(1) of the Act. Subsequently, the case was reopened by issuing notice u/s. 148 of the Act and passed order u/s. 147/143(3) of the Act on 30.06.2010 determining total income of Rs.63,015/-. Thereafter, on receiving proposal for examining the records and upon considering the same,

the Ld. CIT observed that requisite and proper inquiries were not conducted regarding the identity and creditworthiness of the shareholders and the impugned order was passed mechanically without application of mind which rendered the assessment order erroneous and prejudicial to the interest of revenue. Thereafter, the Ld. CIT set aside the order of the AO passed u/s.147/143(3) of the Act for fresh assessment vide her order passed u/s. 263 of the Act on 26.03.2013. In the light of the aforesaid order of the Ld. CIT, the AO in order to give effect to the order of Ld. CIT, case was fixed for reassessment hearing on 07.10.2013, thereafter on 24.02.2014 and on 04.03.2014 to produce the three directors of the assessee company. Taking note that directors did not appear before him the AO concluded that the identity, creditworthiness and genuineness of the alleged shareholders could not be proved. According to AO, since the Directors of the Assessee Company could have given an explanation to the issues involved, and because of their non-cooperation of the Directors leads to the conclusion that the Assessee is not confident to justify the source of capital introduced and accordingly, share application money of Rs 9,29,50,000/- received by the Assessee Company during the year was disallowed and added to the total income of the Assessee as unaccounted cash credit in the Books of the Assessee as per provisions of section 68 of the Act. On appeal, the Ld. CIT(A) was pleased to confirm the same. Aggrieved, the assessee is before us.

4. 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. According to the Ld. Counsel, the AO issued notice/summons three times dated 07.10.2013, 24.02.2014 and 04.03.2014 for which compliance could not be made by the assessee company. According to Ld. Counsel, during the reopened assessment proceedings the assessee had produced all the documents to prove the identity, creditworthiness and genuineness of the share capital which are already in the file of AO and the Ld. CIT's revisional order asked the AO to 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". So, the AO after issuing three notices to assessee company came to conclusion that assessee failed to prove the identity,

creditworthiness and genuineness of the transaction, thereafter became active only in the fag end of February i.e. on 24.02.2014. According to the assessee, the notice by the AO dated 04.03.2014 required the three directors of the assessee company to attend on 14.03.2014 to produce all documents which could not be complied because the directors are not in the control of the assessee company. According to Ld AR, it cannot be lost sight that all relevant documents to discharge the onus on assessee to prove identity, creditworthiness and genuineness of the share transactions were in the possession of AO and the AO while giving effect to CIT's 263 order ought to have enquired as directed by him not through the assessee and took us to the following direction of Id. CIT:

“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.”

5. Without following the express direction of Ld. CIT to examine the genuineness and source of share capital, not on test check basis, by conducting independent enquiry not through assessee, it was brought to our notice that the AO has mentioned in his order that the directors of the assessee company was summoned vide notice dated 04.03.2014 for personal appearance of the three directors on 14.03.2014 and thereafter passed the order on 29.03.2014. 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 29.03.2014, 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 when the documents to discharge the initial onus is already in his file. 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.”

6. 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 in March, 2013. 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.9,29,50,000/- and since the 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 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 at the sake of repetition.

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.”

7. We note that the AO pursuant to the order of Ld. CIT had taken note of the directions of the Ld. CIT and issued three notices altogether dated 07.10.2013, 24.02.2014 and 04.03.2014. After the first letter dated 07.10.2013, thereafter, the enquiry was started only at the fag end of February 2014 and the reassessment was framed on 29.03.2014. In the light of the aforesaid facts, we are of the opinion that the assessee did not get fair opportunity to present the evidences before the AO so, there was a lack of opportunity as aforesaid, therefore, it has to go back to AO.

8. 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 he had issued three notices to the assessee company. However, the AO took the adverse view against the assessee on the plea that the three directors of the assessee company had not appeared before him on 14.03.2014 and after taking note that none appeared on 14.03.2014 concluded on 29.03.2014 that entire amount of share application money received along with premium amounting to Rs.9,29,50,000/- which has remained unexplained and added to the income of the assessee. 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."

9. 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.

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

Order is pronounced in the open court on 23rd March, 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 – M/s. Tolasariya Vinyog Pvt. Ltd., C/o, D. J. Shah & Co., Kalyan Bhavan, 2, Elgin Road, Kolkata-700 020.
2. Respondent – ITO, Ward-4(4), Kolkata.
3. The CIT(A) , Kolkata.
4. CIT , Kolkata
5. DR, Kolkata Benches, Kolkata

/True Copy,

By order,

Sr. Pvt. Secretary