

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. 1800/Kol/2016
Assessment Year: 2008-09

Nupur Tie Up Pvt. Ltd. (PAN: AACCN6943Q)	Vs.	Income-tax Officer, Wd-6(3), Kolkata
Appellant		Respondent

Date of Hearing	20.02.2018
Date of Pronouncement	28.03.2018
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.6,18,00,000/- 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 15.10.2008 declaring loss of (-) Rs.5528/- which was processed u/s. 143(1) of the Act. Subsequently, the case was reopened by 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 20.07.2010

assessing the total income at Rs.18,472/-. Thereafter, the CIT on perusal of the assessment record observed that the issue of share capital of Rs.6,18,00,000/- (including huge share premium), had not been properly examined by the AO inasmuch as no independent inquiries had been carried out. Later on, on 30.03.2013, an order u/s. 263 of the Act was passed by the CIT, Kol-II, Kolkata setting aside the order passed u/s. 147/143(3) of the Act on 20.07.2010 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 of the order u/s. 263 of the Act, the AO found that the assessee had raised share capital of Rs.6,18,00,000/- during the year which included premium @ Rs.190/- per share. 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.6,18,00,000/- as bogus and added the same in terms of sec. 68 of the Act as unexplained cash credit. 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 from the assessee which have been furnished before him to his satisfaction which fact has been acknowledged by the AO at page 4 of his order wherein he has clearly stated that assessee has produced the books of account viz. cash book etc. along with the bank statement in original and that they were examined by him. Thereafter, at the fag end of the February, 2014 i.e. on 27.02.2014 a summon u/s. 131 of the Act was issued against both the directors of the assessee company at their respective addresses which has been shown in pages 4 and 5 of his order. Taking note that none of the directors appeared before him, the AO jumped in 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.6,17,00,000/- in the books of account of the assessee company for the relevant assessment year from 21 share holders 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 31.03.2014, 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. 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 30th 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.6,18,00,000/- during the year in question which included share premium @ Rs.190/- per share 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:

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 taken note of the direction of the CIT and has reproduced the direction at page 4 of his order, however, has given notices to the assessee company and acknowledged the fact that Shri Vinay Kr. Gupta the AR of the assessee company appeared at the time of furnishing details before him. The AO also acknowledges that the case has been discussed

with the AR. The AO acknowledged that the assessee had also produced the books of account viz. cash book etc. along with bank statement in original which were also examined. Thereafter, the AO has issued summons u/s. 131 of the Act dated 27.02.2014 to both the directors of the assessee company and since both of them 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, when all he had summoned the AR of the assessee company. However, from the acknowledgment of the AO regarding meetings held with the AR of the assessee, and his recording of satisfaction in respect to the compliance made by the Ld. AR of the assessee which included production of documents like books of account etc. We note that only on 27.02.2014, the AO issued summons u/s. 131 of the Act against the directors of the assessee company and thereafter he framed assessment against the assessee.

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 assessee 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 the 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 the summons dated 27.02.2014 and after taking note that none appeared concluded that entire amount of share application money received along with premium amounting to

Rs.6,17,00,000/- 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."

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 28.03.2018

Sd/-
(M. Balaganesh)
Accountant Member

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

Dated : 28th March, 2018

Jd.(Sr.P.S.)

Copy of the order forwarded to:

1. Appellant – Nupur Tie Up Pvt. Ltd., C/o D. J. Shah & Co., Kalyan Bhavan, 2, Elgin Road, Kolkata-700 020.
2. Respondent – ITO, Ward-6(3), Kolkata.
3. The CIT(A) , Kolkata.
4. CIT , Kolkata
5. DR, Kolkata Benches, Kolkata

/True Copy,

By order,

Sr. Pvt. Secretary