

IN THE INCOME TAX APPELLATE TRIBUNAL "A", BENCH KOLKATA

BEFORE SHRI A. T. VARKEY, JM & DR. A.L.SAINI, AM

आयकरअपीलसं./ITA No.943/Kol/2016

(निर्धारणवर्ष / Assessment Year: 2008-09)

M/s. Swagatam Financial Consultants Pvt. Ltd. 7/1, Lord Sinha Road, 4 th Floor, Room No.409 & 411, Kolkata – 700 071.	Vs.	ITO, Ward-4(2),Kolkata Aayakar Bhawan, P-7, Chowringhee Square, Kolkata – 700 069.
स्थायीलेखासं./जीआइआरसं./PAN/GIR No. :AALCS 3078 E		
(Appellant)	..	(Respondent)

Appellant by :Shri Rajeeva Kumar, Advocate
Respondent by :Shri G. Hanshing, CIT

सुनवाईकीतारीख/ **Date of Hearing** : **12/04/2018**

घोषणाकीतारीख/**Date of Pronouncement** : **30/05/2018**

आदेश / O R D E R

Per Dr. A. L. Saini:

The captioned appeal filed by the Assessee, pertaining to Assessment Year 2008-09, is directed against an order passed by the Ld. Commissioner of Income Tax (Appeals)-2, Kolkata in appeal No.1363/CIT(A)-2/4(2)/2014-15, dated 22.12.2015, which in turn arises out of an order passed by the Assessing Officer u/s 147/143(3)/263/143(3) of the Income Tax Act, 1961 (hereinafter referred to as 'the Act') 25.03.2014.

2. At the out self itself,the Id. Counsel for the assessee, drew our attention to the fact that during the assessment proceedings, the Assessing Officer fixed the hearings on 14.02.2014 & 25.03.2014 and thereafter passed the order on 25.03.2014 itself. So, the solitary grievance of the assessee is that it has not got proper opportunity before the Assessing Officer to discharge his onus as required u/s 68 of the Act.

3. The Id. AR pointed out that the Assessing Officer has made the addition only because directors of the assessee company did not appear before him. The AR drew our attention to Id. CIT's order u/s 263 dated 28.03.2013 wherein Id. CIT has given following directions to the Assessing Officer:

“The A.O 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 Assessing Officer 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 Assessing Officer 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.”

4. From the perusal of the above direction, the Id. CIT has clearly directed the Assessing Officer to examine the genuineness and sources of share capital not on test cheque basis but in respect of each and every shareholder by conducting independent enquiry not through the assessee. We note that despite clear instructions of the Id. CIT, U/s 263 of the Act, the Assessing Officer has made addition merely because the assessee company's directors did not appear before him, which action is not in conformity with the order of the Id. CIT.

5. The Id. AR also drew our attention that on this similar facts, this Tribunal in ITA No.50/Kol/2017 in M/s. JLD Cement ,for AY 2008-09, has remitted the matter back to the file of the Assessing Officer, observing the following:

“The appeal filed by the assessee is against the order of Ld. CIT(A)-6, Kolkata dated 19.10.2016 for AY 2008-09.

2. The impugned order of Ld. CIT(A) is an ex parte order. The Ld. CIT (A) in order to decide the appeal ex parte has given the reason for doing so at para 1 and 2 of his order which is reproduced as under:

“1. Notice for hearing was issued by this office by speed post on 28.12.2015 fixing hearing on 28.01.2016. On 28.01.2016, a letter was filed requesting for adjournment and the hearing was adjourned to 19.02.2016. None appeared on 19.02.2017. One more hearing notice was issued on 22.09.2016

granting a hearing on 13.10.2016. However, the appellant did not attend on that date. Hence, it is clear that the appellant has nothing further to say in the matter.

2. It has been held by the Hon'ble Supreme Court in the case of CIT Vs. B. N. Bhattacharjee 118 ITR 461 that preferring appeal does not mean merely filing of the appeal but effectively pursuing it. This principle has also been followed in CIT Vs. Multiplan India (P) Ltd. 38 ITD 320 (Del) and Estate of Late Tukojirao Holkar vs. CWT 223 480 (MP). Law assists those who are vigilant and not those who sleep over their rights. The appellant has filed the appeal but has not taken care to avail of the opportunity of being heard. Hence, I have no option but to decide the appeal ex parte. In view of the absence of the appellant on the date of hearing, the appeal is being decided on the basis of the grounds of appeal, statement of facts and the assessment order.

3. From a reading of the above reasoning, it is evident that Ld. CIT (A) fixed the hearing of the appeal only on three dates i.e. on 28.01.2016, 19.02.2016 and on 13.10.2016 and since none represented on behalf of assessee, has passed the ex parte order. As per the Ld. AR, the assessee did not receive any notice of hearing fixed on 13.10.2016, therefore according to Ld. AR, the impugned order is fragile for violation of natural justice. The Ld. CIT (A) found fault with the assessee not appearing before him on 13.10.2016 came to the conclusion that assessee is not interested in pursuing the appeal is not correct, when the facts as recorded by Ld. CIT(A) that assessee had filed an adjournment application before him on 28.01.2016, so the Ld. CIT(A) ought to have given opportunity to assessee to represent and present its case during appellate proceedings. So, we note that assessee did not get proper opportunity before the first appellate authority during the appellate proceedings.

4. Coming to the AO's order, we note that the AO was giving effect to the order of Ld. CIT passed u/s. 263 of the Act on 26.03.2013 wherein the Ld. CIT has given the following guidelines as to how to investigate.

“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. However, we note that AO's investigation as per his own words as stated at para 4 is as under:

“4. It was noticed from the Balance Sheet of the assessee that assessee has received a share application money of Rs.141,99,47,500/- during the year in question. To verify the genuineness of the said transactions and to verify the identity and creditworthiness of the shareholders of the assessee company, notice u/s. 131 of I. T. Act was issued to directors of the assessee company along with the directors of the shareholder companies on test check basis. They were asked to appear personally before the undersigned and to produce/furnish details/documents in support of the justification for the investment made by them in the assessee company and other details as asked for. But none of them appeared before the undersigned. After that a letter was

issued to the assessee on 20.03.2014 informing the said facts and was also asked to show cause as to why share application money received by it should not be treated as bogus and why the same should not be treated as its unaccounted money introduced in its books of accounts as share application money. Assessee was also asked vide this letter as to why the said share application money should not be treated as unaccounted cash credit in its books as per the provisions of section 68 of I. T. Act. But, assessee failed to put forward any explanation till the date of passing of this order.

6. So, we note that investigation as per the guidelines of the Ld. CIT has not been adhered to by the AO that is one aspect which has been pointed out by the ld AR assailing the decision of AO.

7. However the main grievance of the assessee is that no proper opportunity was given to the assessee to discharge the onus casted upon it as required in sec. 68 matters. According to assessee, no statutory notices were served upon it. We note that other than a notice dated 01.05.2013, the AO has not given any details of the statutory notices, when it was issued etc., date on which it was fixed for hearing etc. are not discernable from the investigation conducted by AO (supra). So, we find force in the submission of the Ld. AR that no proper opportunity was given to assessee by AO during the reassessment proceedings and so we are, therefore, of the opinion that assessee did not get proper opportunity before the AO during reassessment proceedings. The Hon'ble (three judge bench) of the Hon'ble Supreme Court in Tin Box Company Vs. CIT (2001) 249 ITR 216 (SC) 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."

8. In similar case this Tribunal in ITA No.393/Kol/2016 in M/s. Star Griha (P) Ltd. Vs. ITO for AY 2008-09 dated 15.12.2017 has observed as under:-

“.....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. 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 (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.....”

9. 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.

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

Therefore, taking note of the decision of Coordinate Bench of this Tribunal in ITA No.50/Kol/2017 in M/s. JLD Cement ,for AY 2008-09(supra), we are inclined to set aside the order of the Id. CIT(A) and remand the matter back to the file of the Assessing Officer to conduct inquiries as suggested by the Id. CTI, under section 263 of the Act, after giving proper opportunity to the assessee.

6. In the result, the appeal filed by the assessee is allowed for statistical purposes.

Order is pronounced in the open court on 30.05.2018.

Sd/- (A. T. VARKEY) न्यायिक सदस्य / JUDICIAL MEMBER	Sd/- (A. L. SAINI) लेखा सदस्य / ACCOUNTANT MEMBER
कोलकाता /Kolkata;	
दिनांक/ Date: 30/05/2018	
(RS, Sr.PS)	

आदेशकीप्रतिलिपिअग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी/The Appellant- M/s. Swagatam Financial Consultants Pvt. Ltd.
2. प्रत्यर्थी/ The Respondent- ITO, Ward-4(2), Kolkata
3. आयकरआयुक्त(अपील) / The CIT(A),
4. आयकरआयुक्त/ CIT
5. विभागीयप्रतिनिधि, आयकरअपीलीयअधिकरण, कोलकाता/ DR, ITAT, Kolkata
6. गार्डफाईल / Guard file.
सत्यापितप्रति

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By Order

Senior Private Secretary,
Head of Office/D.D.O,
I.T.A.T, Kolkata Benches,
Kolkata.