

आयकर अपीलीय अधीकरण, न्यायपीठ – “A” कोलकाता,
IN THE INCOME TAX APPELLATE TRIBUNAL “A” BENCH: KOLKATA
 ((समक्ष)Before श्री ए. टी. वर्की, न्यायिक सदस्य एवं/and श्री एम .बालागणेश, लेखा सदस्य)
 [Before Shri A. T. Varkey, JM & Shri M. Balaganesh, AM]

I.T.A. No. 787/Kol/2016
Assessment Year: 2008-09

Trinity Vinmay Pvt. Ltd. (PAN: AACCT8425D)	Vs.	Income-tax Officer, Wd-4(2), Kolkata
Appellant		Respondent

Date of Hearing	04.04.2018
Date of Pronouncement	13.06.2018
For the Appellant	Shri Miraj D. Shah, AR
For the Respondent	Shri Sallong Yaden, Addl. CIT

ORDER

Per Shri A.T.Varkey, JM

The appeal filed by the assessee is against the order of Ld. CIT(A)-6, Kolkata dated 08.03.2016 for AY 2008-09.

2. At the outset, the learned AR brought to our notice that reassessment order passed by the AO was in gross violation of natural justice. According to Ld. AR, a perusal of the order of AO will reveal that only one date of hearing was fixed i.e. on 03.12.2013 and since the assessee company failed to produce the directors of the assessee company, the AO drew adverse inference against the assessee company and made the entire addition. The learned AR pointed out that on 03.12.2013, Shri P. Panda, AR of the assessee appeared and AO himself acknowledged that the relevant details were submitted. According to learned AR, therefore the AO ought to have given proper opportunity to assessee to represent and present its case during assessment proceedings. So, as per the Hon'ble (three judge bench) of the Hon'ble Supreme Court in Tin Box Company Vs. CIT (2001) 249 ITR 216 (SC) the reassessment has to be restored back to AO for fresh reassessment.

3. We note that the AO was giving effect to the order of Ld. CIT passed u/s. 263 of the Act on 30.03.2013 wherein the Ld. CIT has given the following guidelines as to how to investigate.

“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 examine the source of realization from the liquidation of assets shown in the balance sheet after the change of Directors, if any.”

4. However, we note that AO’s investigation as per his own words as stated as under:

“On receipt of the order u/s 263 dated 30.03.2013 a notice u/s 142(1) along with a letter of requisition dated 19/22.08.2013 was issued and duly served on the assessee. On 03.12.2013 Sri P. Panda, AR of the assessee appeared and submitted some relevant details.

The then Directors, Mr. Ashit Mullick and Mr. Shyam Sunder Agarwal, were summoned by issuing notice u/s 131 of the IT Act, 1961, in this office fixing hearing on 13.03.2014 to verify the genuineness and creditworthiness of the shareholders. The said summons were sent to them through postal authority. The said summon addressed to in the name of Mr. Ashit Mullick was served through postal authority. But summon in the name of Mr. Shyam Sunder Agarwal was returned unserved. Accordingly, a show cause was issued to the assessee on 14.03.2014 and duly served on the assessee mentioning that ‘as per address provided by you a notice u/s 131 was issued to Mr. Shyam Sunder Agarwal through postal authority which was returned unserved. Since the very existence of the then above director, remains unverified and unexamined, you are requested to explain why the entire share application money received by you will not be considered as unexplained income of your company’. But there was no compliance till passing of this order.

The fact is that the share capital of the company raised in F.Y. 2007-08. Only the then directors can explain and establish the genuineness of fresh share applicants. But there was no compliance by any of them till passing of this order. Due to their non-compliance with summons issued to them u/s 131 to appear before the undersigned, their statement could not be recorded to establish genuineness of the claim that they had raised the share capital in question in their capacity as the then directors of the assessee company during the year under consideration. Thus the direction contained in the order passed u/s 263/143(3)/147 by Ld. CIT-II, Kolkata to examine the directors on oath to verify their credentials as directors and reach a logical conclusion regarding the controlling interest could not be implemented due to the non-compliance of the then directors of the assessee company. Due to the non-appearance of Mr. Ashit Mullick and Mr. Shyam Sunder Agarwal (the then two directors of the company during the relevant previous year), their identity and the genuineness of their having actually worked as directors of the company during the year, as claimed remained unproven and consequently, the business of the assessee company and genuineness of the fresh share capital introduced during the year also remains unverified, unexamined and unexplained.”

5. 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 Id AR assailing the decision of AO.

6. However the main grievance of the assessee is noted before us 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 fixing hearing on 03.12.2013 and the directors of Assessee Company to appear before him on 13.03.2014, no other investigation was conducted by AO is discernable from the order. So, we find force in the submission of the Ld. AR that no proper opportunity before the AO during the reassessment proceedings because only one date of hearing i.e. on 03.12.2013 was given to Assessee Company and on that day the assessee had in fact filed the relevant details which the AO himself acknowledges. However, since the director of Assessee Company could not appear before the AO on 13.03.2014, the AO saddled the addition by drawing adverse inference which action of A.O. cannot be countenanced. Since proper opportunity was not given to assessee by AO during the reassessment proceedings we are 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.”

7. 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.....”

8. 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 13th June, 2018.

Sd/-
(M. Balaganesh)
Accountant Member

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

Dated : 13th June, 2018

Jd.(Sr.P.S.)

Copy of the order forwarded to:

1. Appellant – Trinity Vinmay Pvt. Ltd., C/o R. Singh & Associates, “Hastings Chambers”, 7C, Kiran Shankar Roy Road, Kolkata-700 001.
- 2 Respondent – ITO, Ward-4(2), Kolkata.
3. The CIT(A), - 6, Kolkata (e-mailed)
4. CIT ,
5. DR, ITAT, Kolkata. (e-mailed)

/True Copy,

By order,

Senior Pvt. Secy.