

आयकर अपीलिय अधीकरण, न्यायपीठ – “D” कोलकाता,
IN THE INCOME TAX APPELLATE TRIBUNAL “D” BENCH: KOLKATA
 (समक्ष) Before श्री जे. सुधाकर रेड्डी, लेखा सदस्य एवं/and श्री ऐ. टी. वर्की, न्यायीक सदस्य)
 [Before Shri J. Sudhakar Reddy, AM & Shri A. T. Varkey, JM]

I.T.A. No. 1825/Kol/2017
Assessment Year: 2008-09

M/s. Crystal Tie-up Pvt. Ltd. (PAN: AADCC3417H)	Vs.	Income-tax Officer, Ward-8(1), Kolkata
Appellant		Respondent

Date of Hearing	02.08.2018
Date of Pronouncement	08.08.2018
For the Appellant	Shri Ravi Tulsian, FCA
For the Respondent	Shri A. K. Tiwari, CIT, DR

ORDER

Per Shri A.T.Varkey, JM

This is an appeal filed by the assessee against the order of Ld. CIT(A)- 16, Kolkata dated 28.03.2017 for AY 2008-09.

2. The main grievance of the assessee in this appeal is against the action of Ld. CIT(A) in upholding by an ex parte order the addition of Rs. 7 cr. made by the AO, which, according to Ld. AR, was in violation of the principles of natural justice in having passed the ex parte order qua the assessee without affording adequate opportunity of being heard to the assessee and without ensuring the only notice fixing hearing on 22.02.2017 was ever served upon the assessee.

3. At the outset, Id. Counsel for the assessee submitted before us that the Ld. CIT(A) did not consider that the AO being influenced by the order of Ld. CIT passed u/s. 263 of the Act made the re-assessment and that too u/s. 144 of the Act (best judgment assessment) without affording proper opportunity of being heard to the assessee and ignoring all material evidences which were already on record submitted during assessment proceedings

and hence the addition of Rs. 7 cr. u/s. 68 of the Act sustained by him is erroneous and an arbitrary action. Hence, he urged before the bench to set aside the order of Ld. CIT(A) and restore the matter to the file of the AO for fresh adjudication. On the other hand, the Ld. DR relied on the order of Ld. CIT(A). We note that AO after receipt of Ld. CIT's order u/s. 263 of the Act dated 18.03.2014 had issued latter letter dated 22.05.2014 and 21.09.2014. Thereafter issued summons dated 02.03.2015 for appearance of the assessee company's director. The AO acknowledges that assessee had in fact filed "bunch of documents" at his office. However, strangely, AO says he did not examine the genuineness of the credit entry because of non-appearance of the directors of the assessee company has made the addition. Whereas we note that the Ld. CIT's direction in similar case was to make enquiries to unravel the modus operandi by investigation as per following guidelines:

"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:

"As per the direction of the Ld. CIT, Kolkata-II, Kolkata, the case has been set aside with the office of the undersigned directing to pass an order after examining and verifying the claim of the assessee-company. Accordingly, the case was re-fixed for hearing by way of issuing a letter dated 22.05.2014 and subsequently letter dated 21.09.2014.

3. Summon u/s 131 dt. 02.03.2015 was issued to the director being signatory authority of the assessee company for his personal appearance and for examining him on oath of the details as obtained and found in original assessment proceeding. In response to said summon, the said signatory authority failed to appear before to me. However, some bunch of documents were filed by the assessee company in the receiving section of this office on 11.03.2015. As a result of non-appearance of the Director of the assessee company, the details as obtained in original assessment proceedings were not examined and genuineness of the credit entry in the assessee's books of accounts could not be verified.

4. From the records and details, it was noticed that the company incorporated and formed in the year under review with authorized capital of Rs.36,00,000/-. During the year under consideration the assessee company had raised fresh share capital of Rs.35,00,000/- from 17 share applicants by issuing 350000 no. of shares having face value of Rs. 10/- and premium of Rs.190/- per share totaling to Rs.7,00,00,000/-.....

14. Considering the above facts and circumstances Rs.7,00,00,000/- is hereby treated as unexplained cash credit found in the books of the assessee during the AY 2008-09 and subsequently added back to the total income of the assessee.”

5. 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 are concerned. According to assessee, two statutory notices were issued by AO as noted by him in the assessment order i.e. dated 22.05.2014 and 21.09.2014. Thereafter AO issued summons dated 02.03.2015 to the directors of Assessee Company to appear before him. We note that 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 two dates were fixed for hearing [i.e. on 22.05.2014 and 21.09.2014] to Assessee Company and we note that on 11.03.2015 the assessee had in fact filed the relevant details which the AO himself acknowledges as bunch of documents filed in his office. However, since the director of Assessee Company could not appear before the AO in pursuance of the summons u/s. 131 dated 02.03.2015, the AO saddled the addition u/s. 144 (best judgment assessment) by drawing adverse inference without application of mind, which action of A.O. cannot be countenanced. 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.”

6. 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.....”

7. 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."

8. 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 AO 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), and the Id DR accepted that assessee did not get proper opportunity before the AO during reassessment proceedings, 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 08/08/2018

Sd/-
(J. Sudhakar Reddy)
Accountant Member

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

Dated: 8th August, 2018

Jd.(Sr.P.S.)

Copy of the order forwarded to:

- 1 Appellant – M/s. Crystal Tie-up Pvt. Ltd., 10, Middleton Street, 2nd floor, Kolkata-700 071.
- 2 Respondent – ITO, Ward-8(1), Kolkata
- 3 CIT(A)- 16, Kolkata (sent through e-mail)
- 4 CIT , Kolkata
- 5 DR, Kolkata Benches, Kolkata (sent through e-mail)

/True Copy,

By order,

Sr. Pvt. Secretary