

आयकर अपीलीय अधीकरण, न्यायपीठ – “A” कोलकाता,
IN THE INCOME TAX APPELLATE TRIBUNAL “A” BENCH: KOLKATA
 (समक्ष) श्री ए. टी. वर्की, न्यायीक सदस्य एवं डॉ. अर्जुन लाल सैनी, लेखा सदस्य)
 [Before Shri A. T. Varkey, JM & Dr. A. L. Saini, AM]

I.T.A. No. 445/Kol/2017
Assessment Year: 2009-10

Avaneesh Commotrade Pvt. Ltd. (PAN:AAHCA5519J)	Vs.	Income-tax Officer, Wd-9(1), Kolkata.
Appellant		Respondent

Date of Hearing	14.06.2018
Date of Pronouncement	21.08.2018
For the Appellant	Shri A. K. Tibrewal, FCA
For the Respondent	Shri G. Hangshing, CIT, DR

ORDER

Per Shri A.T.Varkey, JM

This appeal preferred by the assessee is against the order of Ld. CIT(A)-16, Kolkata dated 08.02.2017 for AY 2009-10.

2. Though the assessee raised 6 grounds of appeal but the sole issue involved is against the action of Ld. CIT(A) in confirming the addition of Rs.15,31,00,000/- as unexplained cash credit u/s. 68 of the Income-tax Act, 1961 (hereinafter referred to as the “Act”), which sum represented amounts received by the assessee towards share capital and share premium.

3. At the outset, the learned AR brought to our notice that reassessment order passed by the AO dated 29.03.2014 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 18.09.2013 and thereafter the AO acknowledges the fact that assessee had filed details called for on 07.02.2014 and then summons were issued u/s. 131 of the Act to directors of

the assessee company on 26.02.2014 fixing the case on 11.03.2014 and since the assessee company failed to produce the directors and the notices u/s. 133(6) of the Act could not be served on share subscribers, the AO drew adverse inference against the assessee company and made the entire addition. We note that on 07.01.2014, Shri Vinay Kr. Gupta, Id AR of the assessee appeared and AO himself acknowledged that the relevant details were submitted and therefore adverse view ought not to have been taken against the assessee without affording proper opportunity to it. According to learned AR, therefore, the AO failed to give proper opportunity to assessee to represent and present its case during assessment proceedings. So, as per the Hon'ble (three judges 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 11/18.03.2013 wherein the Ld. CIT has given the following guidelines as to how to investigate.

“The AO is directed to carry out through and detailed enquiries in the case. He should carry out inquiries about the various layers through which the share capital has been rotated. The AO is also directed to summon the present and past Directors of the assessee company and the subscriber companies and examine them. The AO should also examine as to when this company was sold. At that point of time the fictitious assets such as shares in other companies or loans given to other companies is converted back into cash by credit in the assessee company's bank account. The source of this money also needs to be examined.... ”

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

“Accordingly a notice u/s 142(1) dated 24.07.2014 (must be 24.07.2013) was issued calling for inter alia, details of share holders and fixing the case on 18.09.2013. Due to non-compliance refixation letter was issued on 07.01.2014. In response to that Sri Vinay Kumar Gupta, AR has filed details on 07.02.2014. From the details filed it was noted that there was a list of share holders to whom allotment of 7,65,500 shares amounting to Rs. 15,31,00,000/- were made. Notice u/s 133(6) calling for various details including the source of fund for investment in the assessee company were issued on 17.02.2014. Out of them, notices u/s 133(6) issued to M/s. Bikaner Derivatives. & Commodities Pvt. Ltd., M/s. Churni Tie-up Pvt. Ltd., came back unserved on 11.03.2014 whereas notices to M/s. Nand Vincom Pvt. Ltd., M/s. Sujali Fashion P. Ltd., M/s. Bhola Commodeal Pvt. Ltd. came back unserved on 12.03.2014 and that to M/s. Mayank Commotrade Pvt. Ltd., M/s. Sindhu Tracom Pvt. Ltd., M/s. Shalimar Tie-up Pvt. Ltd. came back unserved on 13.03.2014 whereas that to M/s. Atlast Commodeal Pvt. Ltd., M/s. Sutanuti Vyapaar Pvt. Ltd. came back unserved on 14.03.2014. Further, summons 131(1) were also issued to all the directors of the company on 26.02.2014 fixing the case on 11.03.2014 but no compliance was made. Since the letters issued to the subscriber companies as well as the summons issued to the directors could not be served, it is reasonable to conclude that the very existence of the assessee company is under question..... I am of the considered view that this is nothing but a case where the assessee has introduced

its own undisclosed fund in the garb of subscription by shareholders. As the identity as well as the creditworthiness of the shareholders could not be established, a sum of Rs.13,30,50,000/- shown as share capital contribution in the books of the assessee is added back to the total income u/s. 68 of the I. Tax Act, 1961.”

5. So, we note from the aforesaid investigation carried out by the AO it is not as per the guidelines of the Ld. CIT which is one aspect which has been pointed out by the ld AR assailing the decision of AO.

6. 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. We note that other than a notice fixing hearing on 18.09.2013 and the summons to directors of Assessee Company to appear before him on 11.03.2014, and notice u/s133(6) to share subscribers, 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 the assessee got before the AO during the reassessment proceedings. Since notice u/s. 133(6) of the Act could not be served upon the share subscribers and because the director of Assessee Company failed to appear before the AO, the AO saddled the addition by drawing adverse inference which action of A.O. cannot be countenanced in the light of the fact that the AO himself acknowledges that assessee had filed details called for on 07.01.2014. Since proper opportunity was not given to assessee by AO during the reassessment proceedings, we are of the opinion that assessee should 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 21st August, 2018

Sd/-
(Dr. A. L. Saini)
Accountant Member

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

Dated : 21st August, 2018

Jd.(Sr.P.S.)

Copy of the order forwarded to:

1. Appellant – M/s. Avaneesh Commotrade Pvt. Ltd., C/o Late Badal Saha, Naschinda, Ghoshpara, Near Ghosh Para, P.O. Bally, Howrah-711227.
2. Respondent – ITO, Ward-9(1), Kolkata.
3. CIT(A)-16, Kolkata. (sent through e-mail)
4. CIT – , Kolkata.
5. DR, ITAT, Kolkata. (sent through e-mail)

/True Copy,

By order,

Sr. Pvt. Secretary