

आयकर अपीलीय अधिकरण, न्यायपीठ – “B” कोलकाता,
IN THE INCOME TAX APPELLATE TRIBUNAL “B” BENCH: KOLKATA
 (समक्ष) श्री ऐ. 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. 488/Kol/2016
Assessment Year: 2008-09

Neelkamal Tradelink Pvt. Ltd. (PAN: AACCN7978F)	Vs.	Income-tax Officer, Wd-6(3), Kolkata
Appellant		Respondent

Date of Hearing	17.09.2018
Date of Pronouncement	27.09.2018
For the Appellant	Shri Subash Agarwal, Advocate
For the Respondent	Md. Usman, CIT, DR

ORDER

Per Shri A.T.Varkey, JM

This appeal preferred by the assessee is against the order of the Ld. CIT(A)-6, Kolkata dated 03.03.2016 for AY 2008-09.

2. The assessee has preferred this appeal against the order of Ld. CIT(A) wherein he has upheld the order passed by the AO which was completed u/s. 143(3)/263/147 of the Act (hereinafter referred to as the “Act”) on 29.03.2014. In this case the assessment order passed u/s. 147/143(3) of the Act on 30.04.2010 assessing the total income at Rs.25,271/- and against declaring total income of Rs. Nil. Later on, on 30.03.2013, an order u/s. 263 of the Act was passed by the Ld. CIT setting aside the order passed u/s. 147/143(3) of the Act directing the AO to do fresh assessment and spelt out guidelines for conducting the fresh assessment in the following manner:

“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 to examine the source of realization from the liquidation of asset 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.”

3. The assessee company preferred an appeal before the Tribunal against the said order u/s. 263 of the Act. Meanwhile, reassessment proceeding pursuant to order u/s. 263 of the Act was initiated against the assessee. In the said assessment order, the AO made an addition of Rs.10,23,50,000/- on account of share capital including share premium as unexplained cash credit u/s. 68 of the Act. Aggrieved by the said order, the assessee preferred an appeal before the Ld. CIT(A), who confirmed the action of AO. Aggrieved, assessee is before us.

4. We have heard rival submissions and gone through the facts and circumstances of the case. We note that the Ld. CIT while exercising his revisional power u/s. 263 of the Act has found fault with the assessment order dated 30.04.2010 and directed the AO to 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. And that 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. He further directed the AO to examine the directors as well as examine the circumstances which necessitated the change in directorship if applicable. He was also directed to examine the directors on oath to verify their credentials and reach a logical conclusion regarding their controlling interest. He also directed AO to examine the source of realization from the liquidation of asset shown in the balance sheet after the change of Directors, if any. However, we note that AO's investigation as per his own words as stated as under:

“In the instant case, on perusal of records it appears that during the financial year under consideration the assessee company incorporated with a capital of Rs.1,00,000/- and further raised share capital amounting to Rs.51,12,500/- by issuing 05.11250 lacs equity shares of face value of Rs.10/-- at a premium of Rs.190/-- by private placement amounting to Rs.9,71,37,500/-. During the year total 18 [eighteen] number of shareholders as per Form-

2 filed before the ROC. It has also been observed from the balance sheet furnished that during the assessment year under consideration there are investment to the tune of Rs.10,22,50,000/-. Perusal of the records revealed that the assessee company utilized funds received from the issue of shares in making of the said investment.

During the course of hearing, the A/R of the assessee produced the books of accounts like cash book etc. and Bank statement[s] in original which have been examined. He also furnished the other details/documents etc., which have also been perused. Information was also sought for by issuing notices u/s.133[6] of the LT. Act,1961 from various shareholders and reply[s] received are placed on record.

To verify the justification of the share capital and share premium received, the identity, creditworthiness and genuineness of the above 18 [eighteen], alleged shareholders, summons u/s.131 of the I.T. Act, 1961 were issued to the Principal Officers [the, then Directors] of the assessee company. But, it has been observed that none has been appeared. Even the AIR of the assessee failed to produce the then Directors. The onus of the assessee company to prove identity, creditworthiness and genuineness of the transactions are hence not discharged. Therefore, the identity, creditworthiness and genuineness of the above 18 [eighteen] alleged shareholders remain unexplained.

It is also to be mentioned that the share capital, reserve and surplus, net worth, turnover of the assessee company also remained unexplained which are necessary for an investor to consider before an investment is made. It leads to the conclusion that if there was investment, then, it was done without minimum business prudence and therefore is not usual, as it lacks the motive of profit or gain. Here, since the then Directors failed to appear before the undersigned, hence, I am of the opinion that they have lacked regarding the normal business prudence.

However, there is compliance In respect of notices issued u/s.133(6) to the shareholders, the replies received are examined and perused. On examination of such replies it seems that all these companies are conduit companies popularly known as name lenders, which are being used to allow only book entries by colouring the same in the shape of transactions as appeared' in their replies. It appears that the assessee company had arranged its own money and routed it through these companies in the garb of share capital and share premium. It therefore leads to the conclusion that the alleged shareholders made no investment and inclusion of them in the list of shareholders are deceptive. The assessee company resorted to such manipulation in transaction to give an appearance of genuineness, which are in fact sham transactions.

Above all, the handsome premium which is very much unusual being invested in such a newly incorporated unlisted company is also remained unexplained. There has been a specific observation made by the Ld CIT, Kolkata-II, Kolkata as contained in the order u/s.263 of the I. T. Act,1961 that;

"The A.O seems to have missed the larger picture and unwittingly has ended up giving a certificate of genuineness -of share capital by passing the impugned order. This by itself establishes that such orders are erroneous and prejudicial to the interests of the Revenue administration. "

Thus, as it is amply clear from the observations made by the CIT, Kolkata-II, Kolkata as spelt out in the order u/s.263 of the I. T. Act,1961, that the transactions of share capital subscription shown by the assessee was only apparent and is not a real one, rather it was not genuine and bogus. Until and unless the assessee can provide adequate satisfactory

evidence that the case of the assessee is different, the observation made by the Ld. CIT, Kolkata-II, Kolkata during the revision proceedings is very much correct and as per the law. In this case, the assessee failed to prove beyond reasonable degree of certainty that the fact in case of the assessee company is otherwise than what has been observed in the proceedings u/s.263 of the I.T. Act, 1961. It is, therefore, logical to hold that in its case, the transaction revolving around the raising of share capital and the investments thereof have been prejudicial to the interest of revenue.

Considering the facts, circumstances and the order passed u/s.263 dated 30-03-2013, the sum so credited amounting to Rs.10,22,50,000/- in the books of the assessee company for the relevant previous year from 18 [eighteen]alleged shareholders and Rs.1,00,000/- initial share capital is hereby treated as bogus and charged to Income Tax being income of the assessee company for the assessment year 2008-09 u/s.68 of the I.T.Act, 1961.”

5. We note that while giving effect to the order passed u/s. 263 of the Act by the AO, Ld. CIT's direction has not been complied with. Ld. AR drew our attention to page 5 of the reassessment order wherein we note that the Ld. AR of the assessee had produced the books of account like cash book, bank statement in original etc., which the AO acknowledges to have been examined. Thereafter, AO admits that Ld. AR of assessee also furnished other details/documents. It has also been acknowledged by the AO that he sought information by issuing notice u/s. 133(6) of the Act from various shareholders and replies have been received from them which he has placed on record along with assessment records. However, he resorted to saddling the addition or take an adverse view against the assessee was because the summons u/s. 131 of the Act to the erstwhile directors of the assessee company during the AY 2008-09 could not respond, so the AO, he drew adverse inference against the assessee and mulct the addition. According to Ld. AR, this action of the AO is not as per the guidelines given by the Ld. CIT in his 263 order and it was pointed out to us by Shri Subhas Agarwal that there is a violation of natural justice because when the old/erstwhile directors are summoned, assessee company should have been put to notice so that the assessee would also have tried its best to procure the presence of it's old directors. However, no such action has been taken by the AO, therefore, according to Ld. AR, no proper opportunity has been granted to the assessee during the reassessment proceeding. From the aforesaid facts narrated above, 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. In such a scenario, 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, appeal of assessee is allowed for statistical purposes.

Order is pronounced in the open court on 27/09/2018

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

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

Dated: 27th September, 2018

Jd.(Sr.P.S.)

Copy of the order forwarded to:

- 1 Appellant – M/s. Neelkamal Tradelink Pvt. Ltd., 50, Sir Hari Ram Goenka Street, 2nd floor, Room No. A-10, Kolkata-700 007.
- 2 Respondent – ITO, Ward-6(3), Kolkata.
- 3 CIT(A)-6, Kolkata. (sent through e-mail)
- 4 CIT, Kolkata.
- 5 DR, Kolkata Benches, Kolkata (sent through e-mail)
- .

/True Copy,

By order,

Sr. Pvt. Secretary