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

I.T.A. No. 521/Kol/2017
Assessment Year: 2009-10

Bihari Distributors Pvt. Ltd. (PAN: AADCB6286B)	Vs.	Income-tax Officer, Wd-14(1), Kolkata
Appellant		Respondent

Date of Hearing	24.09.2018
Date of Pronouncement	16.10.2018
For the Appellant	Shri Miraj D. Shah, FCA
For the Assessee/Cross Objector	Shri P. K. Srihari, CIT, DR

ORDER

Per Shri A.T.Varkey, JM

This appeal preferred by the assessee is against the order of the Ld. CIT(A)-5, Kolkata dated 05.12.2016 for AY 2009-10.

2. The assessee has preferred this appeal against the ex parte order of Ld. CIT(A) wherein he has upheld the order passed by the AO which was completed u/s. 144/143(3)/263/147 of the Income Tax Act 1960 (hereinafter referred to as the "Act") on 31.03.2015. In this case the assessee company filed its return of income electronically on 19.08.2009 showing total income of Rs.1608/-. The same was assessed u/s. 143(1) of the Act on returned income. Thereafter, the AO found that a letter was filed by the authorized signatory of the assessee company on 21.01.2011 stating that "during the financial year 2008-09 relevant to AY 2009-10 they have received commodities profit of Rs.25,207/- from various sources, but the same was not booked in the accounts by mistake. Thus, escapement of identical amount of income". As a result, the case was reopened by issuance of notice u/s. 148 of the Act and subsequently, order u/s. 143(3)/147 of the Act was passed on

11.05.2011 raising a net demand of Rs.9,817/-. Later, the case was taken up by proceedings u/s.263 of the Act. The Ld. CIT found from relevant records that an amount of Rs.14,22,39,000/-(including premium) was introduced as fresh share capital by issue of 294400 numbers of shares to 20 applicants (as per list submitted during the proceedings u/s 147 of the Act) with face value Rs.10/-and premium of Rs.490/- and order was passed on 07.02.2014 considering the above order of the AO as erroneous and prejudicial to the interest of revenue and was set aside with the direction that the AO should pass the assessment order after conducting independent, detailed and complete enquiries into the subscription to the share capital and premium to the extent of Rs.490/- introduced in this case. It was also directed to pass a speaking order after providing a reasonable opportunity to the assessee company and verify the source of share capital including the share premium of all the subscribers and rotation of money through various hands so as to ascertain the true nature of transaction which will bring to the force, the reality of the transactions. For giving effect to the order of Ld. CIT, the AO issued notices u/s. 131 of the Act to all the 20 share allottee parties as per list specified in the assessment order. According to AO, some of the notices were served and some returned unserved but none appeared. Later on, with a view of final opportunity to the assessee a letter dated 13.03.2015 along with a summon u/s. 131 of the Act was issued for personal appearance of the Director of the assessee company on 13.03.2015 wherein the assessee's director was directed to produce all the share allottee parties to prove their identity, genuineness of the transactions and to establish their creditworthiness along with ROC details of the allottee company, bank statement, books of accounts, cash book/bank book and copies of the AGM meeting. According to AO, since there was no compliance from the part of the assessee company to the direction dated 13.03.2015, he proceeded to complete the assessment to the best of his judgment u/s. 144 of the Act on the basis of the details and information available on record and treated the entire share capital received by the assessee company to the tune of Rs.14,22,39,000/- during the year under consideration as unexplained cash credit and added back to the income of the assessee 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 AO has given effect to the Ld. CIT's order passed u/s. 263 of the Act by passing the best judgment assessment on 31.03.2015. However, the main grievance of the assessee is that no proper opportunity was given to the assessee to prove identity, creditworthiness and genuineness of the transaction. For that the Ld. AR drew our attention to page 5 of the assessment order and specifically to para 11 from where we note that the AO has received the records only on 18.03.2015 and he has passed the impugned assessment order on 31.03.2015 i.e. within a period of 12 days wherein he was pleased to saddle the entire share application money as the income of the assessee. The Ld. AR pleads before us that within 12 days the assessment could not have been property made and there has been gross violation of natural justice. So, we find force in the submission of the Ld. AR that 12 days were insufficient for the AO to frame the assessment order. Therefore, according to Ld. AR, 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 aforestated."

5. 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 aforestated it has to go back to AO……."

6. 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 form the fact that the transactions were through banking channels, it does not necessarily following 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 Section148 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."

7. 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 ld 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.

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

Order is pronounced in the open court on 16/10/2018

Sd/-	Sd/-
(M. Balaganesh)	(A. T. Varkey)
Accountant Member	Judicial Member

Dated: 16th October, 2018

Jd.(Sr.P.S.)

Copy of the order forwarded to:

1 Appellant – M/s. Bihari Distributors Pvt. Ltd., 4th floor, Room No. 401À, 154, Lenin Sarani, Kolkata-700 013.
2 Respondent – ITO, Ward-14(1), Kolkata.
3 CIT(A)-5, Kolkata. (sent through e-mail)
4 CIT , Kolkata
5 DR, Kolkata Benches, Kolkata (sent through e-mail)

/True Copy, By order,

Sr. Pvt. Secretary