

आयकर अपीलिय अधीकरण, न्यायपीठ – “B” कोलकाता,
IN THE INCOME TAX APPELLATE TRIBUNAL “B” 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. 140/Kol/2016
Assessment Year: 2011-12

M/s. Khambhalia Traders Pvt. Ltd. (PAN: AAECK1237C)	Vs.	Income-tax Officer, Wd-1(3), Kolkata
Appellant		Respondent

Date of Hearing	10.10.2018
Date of Pronouncement	31.10.2018
For the Appellant	Shri Ravi Tulsian, FCA
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)-3, Kolkata dated 10.12.2015 for AY 2011-12.

2. At the outset the Ld. AR brought to our notice that the assessee company was incorporated on 15.09.2010 so the accounts for the period between 15.09.2010 and 31.03.2011 (i.e. AY 2011-12 was the first period of operation of the assessee company). The AO noted that this was the first year of the operation of the assessee company and had declared total income of Rs.2851/-. The case was selected for scrutiny through CASS for the reason that huge share capital was introduced. The AO noted that the assessee had issued shares of face value of Rs. 1/- at a premium of Rs.99/- and though the assessee company had furnished the list of shareholders to whom the shares were allotted along with the premium and the notice u/s. 133(6) dated 29.11.2013 was issued by the AO to the shareholders and having received the replies from the shareholders, thereafter the AO issued notice u/s. 131 of the Act on 13.03.2014 to the directors of the assessee company for recording their statement on oath. However, since the director of assessee company did not

turn up, the AO added the entire share application money along with the premium to the tune of Rs.91,35,00,000/- u/s. 68 of the Act. Aggrieved, the assessee preferred an appeal before the Ld. CIT(A) who confirmed the action of AO. Aggrieved, assessee is before us.

3. According to Ld. AR, the assessee company since was incorporated only on 15.09.2010 as a Private Ltd. Company under the Companies Act, 1956 and this assessment year being the first year of its operation earned gross income of Rs.59,491/- from commodities trading profit through the MCX. The company was incorporated with authorized share capital of Rs.2,00,00,000/- divided into 2,00,00,000 equity shares of Rs. 1 each. According to him the issued/subscribed paid up share capital was Rs.1,41,35,000/- divided into 1,41,35,000 equity shares of Rs. 1 each fully paid up, Reserve and Surplus as on 31.03.2011 includes share premium of Rs.90,43,65,000/-. It was brought to our notice by the Ld. AR that promoters initially subscribed to 1,00,000 equity shares of Rs.1 each whereby paid up equity share capital was raised to Rs. 50 lakhs. On 29.03.2011, the assessee company issued 91,35,000 equity shares of Rs. 1 each at a premium of Rs. 99/- each to eight shareholders. Thus, share premium amount stood at Rs.90,43,65,000/- being Rs.99/- per share of 91,35,000 equity shares. The names of the shareholders to whom 91,35,000 shares were issued are given as under:

Sl. No.	Name of the shareholder	No. of shares	Share capital (Amount)(Rs.)	Share premium (Amount)(Rs.)	Total share Capital (Amount) (Rs.)
1	Newage Vinimay Pvt Ltd	8,00,000	8,00,000	7,92,00,000	8,00,00,000
2.	Gaurav Vinimay Pvt. Ltd.	4,50,000	4,50,000	4,45,50,000	4,50,00,000
3.	Gujarat NRE Energy Resources Ltd.	8,60,000	8,60,000	8,51,40,000	8,60,00,000
4.	Critical Mass Multilink Ltd	7,25,000	7,25,000	7,17,75,000	7,25,00,000
5.	Madhur Coal Mining Pvt Ltd	3,00,000	3,00,000	2,97,00,000	3,00,00,000
6.	Wonga Traders Pvt Ltd.	20,00,000	20,00,000	19,80,00,000	20,00,00,000
7.	Mahanidhi Vyapaar Pvt. Ltd.	20,00,000	20,00,000	19,80,00,000	20,00,00,000
8.	Bhachau Traders Pvt. Ltd.	20,00,000	20,00,000	19,80,00,000	20,00,00,000
	Total	91,35,000	91,35,000	90,43,65,000	91,35,00,000

4. The Ld. AR pointed out that all 91,35,000 shares were allotted to the group concerns of the assessee. The fresh issue along with earlier issues increased the paid up capital to Rs. 1,41,35,000/- divided into 1,41,35,000 equity shares of Re.1/- each and share premium of Rs. 99/- per share.

5. According to Ld. AR, post the equity share allotment during the year, following was the position of shareholding pattern in the books of the assessee:

Name of the shareholder	% of Holding	No. of shares held	Value of shares @ 1	Share premium Rs.99	Total share application money received
Arun Kumar Jagatarmka	7	10,00,000	10,00,000		10,00,000
Arun Kumar Family Trust	10	15,00,000	15,00,000		15,00,000
Girdharilal Arun Kumar Family Trust	10	15,00,000	15,00,000		15,00,000
Mona Jagatarmka	7	10,00,000	10,00,000		10,00,000
Newage Vinimay Pvt Ltd	6	8,00,000	8,00,000	7,92,00,000	8,00,00,000
Gaurav Vinimay Pvt Ltd.	4	4,50,000	4,50,000	4,45,50,000	4,50,00,000
Gujarat NRE Energy Resources Ltd.	7	8,60,000	8,60,000	8,51,40,000	8,60,00,000
Critical Mass Multilink Ltd	5	7,25,000	7,25,000	7,17,75,000	7,25,00,000
Madhur Coal Mining Pvt. Ltd	3	3,00,000	3,00,000	2,97,00,000	3,00,00,000
Wonga Traders Pvt Ltd	14	20,00,000	20,00,000	19,80,00,000	20,00,00,000
Mahanidhi Vyapaar Pvt Ltd.	14	20,00,000	20,00,000	19,80,00,000	20,00,00,000
Bhachau Traders Pvt Ltd.	14	20,00,000	20,00,000	19,80,00,000	20,00,00,000
Total	100	1,41,35,000	1,41,35,000	90,43,65,000	91,85,00,000

6. The Ld. AR pointed out that the assessee company and all its share applicant companies are group concerns and the individual share applicants are either common directors or managers of the group to manage day to day activities of the assessee company and its group companies. Therefore, it is submitted that since all the share applicants are

either group concerns or common directors, no outside funding was involved in the assessee company.

7. The Ld. AR drew our attention to a chart which shows the Directors of all the concerned companies for the subject assessment year are as under:

Khambhalia Trader Pvt. Ltd.	Newage Vinimay Pvt Ltd	Gaurav Vinimay Pvt Ltd	Gujarat NRE Energy Resources Ltd.	Critical Mass Multilink Ltd	Madhur Coal Mining Pvt. Ltd	Wonga Traders Pvt Ltd	Mahanidhi Vyapaar Pvt Ltd.	Bhachau Traders Pvt Ltd.
A.K.Jagatramka	P.R. Kannan	P.R. Kannan	A.K.Jagatramka	A.K.Jagatramka	P.K.Agarwal	P.K.Agarwal	A.K.Jagatramka	A.K.Jagatramka
Mona Jagatramka	P.K.Agarwal	S.R.Sarker	Mona Jagatramka	P.K.Agarwal	B.N.Agarwal	B.N.Agarwal	B.N.Agarwal	Mona Jagatramka

8. Drawing our attention to the aforesaid chart, the Ld. AR explained and brought to our notice the following facts:

- A.K. Jagatramka is a common director in Khambhalia Traders Pvt Ltd, Gujarat NRE Energy Resources Ltd, Critical Mass Multilink Ltd, Mahanidhi Traders Pvt Ltd and Bhachau Traders Pvt Ltd and is the Chairman cum Managing Director in Gujarat NRE Coke Ltd being the flagship company of the group.
- Mona Jagatramka is common director in Khambhalia Traders Pvt Ltd, Gujarat NRE Energy Resources Ltd and Bhachau Traders Pvt Ltd and is a Director Gujarat NRE Coke Ltd being the flagship company of the group.
- P.R. Kannan is a common director in Newage Vinimay Pvt Ltd and Gaurav Vinimay Pvt Ltd. and is the CFO in Gujarat NRE Coke Ltd being the flagship company of the group.
- P.K. Agarwal is a common director in Newage Vinimay Pvt Ltd, Critical Mass Multilink Ltd, Madhur Coal Mining Pvt Ltd, Wonga Traders Pvt Ltd and was the senior Vice President of Gujarat NRE Coke Ltd being the flagship company of the group.
- B.N. Agarwal is a common director in Madhur Coal Mining Pvt Ltd, Wonga Traders Pvt Ltd, Mahanidhi Vyapaar Pvt Ltd and was the ex- Employee of Gujarat NRE Coke Ltd being the flagship company of the group.

9. Thus the Ld. AR submitted from the aforesaid facts that all the share applicants are group concerns and have common directors and therefore identity is proved.

10. Thereafter, our attention was drawn to the following table which will give a picture of the funds received by the assessee company in the form of share capital from various share applicants:

SL.No.	Name of the Company	Amount (Rs in crores)
1.	Bhachau Traders Pvt Ltd (BTPL)	20.00
2.	Critical Mass Multilink Ltd (CMM)	7.25
3.	Gaurav Vinimay Pvt Ltd (GVPL)	4.50
4.	Gujarat NRE Energy Resources Ltd (GNERL)	8.60
5.	Madhur Coal Mining Pvt Ltd (MCMPL)	3.00
6.	Newage Vinimay Pvt Ltd (NVPL)	8.00
7.	W onga Traders Pvt Ltd (WTPL)	20.00
8.	Mahanidhi Vyapaar Pvt Ltd (MVPL)	20.00
	Total	91.35

11. It was also brought to our notice that during the course of assessment proceedings in response to notice dated 29.07.2013 u/s. 142(1) served by the Ld. A.O., the assessee company vide reply dated 12.08.2013 submitted the following documents:

- Brief note in respect of business activities of the company
- List of shareholders with their names, address and PAN
- Copies of share application received from shareholders
- Copy of Form -2 (Return of Allotment) filed with Registrar of Companies
- List of Investments showing name of company, face value, cost price and number of shares, copies of Company's application along with allotment advice.
- Details of sundry creditors of Rs.11,030/-
- Basis of writing off preliminary expenses alongwith supporting evidence
- Details of Miscellaneous Income credited in the profit & Loss account
- Copy of Bank Statement along with Bank Reconciliation Statement.

12. It was also submitted that pursuant to notice u/s. 133(6) of the Act issued upon all shareholders on 29.11.2013 which was served on 14.12.2013 the AO called for the following information:

- Nature and purpose of transaction with copy of ledger account for the period from 01.04.2010 to 31.03.2011
- Number of shares applied for and allotted alongwith details of payment of share premium with copy of share application.
- Particulars of payment showing cheque no, date of payment, amount with copy of bank statements reflecting such amount.
- Source of fund for such investment
- Copy of Profit & Loss account, Balance Sheet, Schedule of Investment, and copy of receipt of filing IT Return.
- Reason behind purchase of shares with such high premium
- Whether shares are still being held.

13. In response to the said notice, the shareholders vide letter dated 19.12.2013 furnished information and confirmed that the shares are still being held. Cheque number, date of payment, amount and copy of bank statement was furnished. Balance Sheet, Profit & Loss Account, Acknowledgment of IT Return were also filed along with ledger account of transactions.

14. On 13.03.2014, the Ld. A.O. issued summons u/s. 131 of the Act upon the directors of shareholding companies to appear personally and to produce:

- Address proof of company by way of electricity bill, water bill etc
- Personal photo identity and residential proof
- Personal IT Return, profit & Loss Account, Balance Sheet with bank statement
- Bank statements of company alongwith books of accounts especially the documents to substantiate the transactions with the assessee company in F.Y. 2010-11
- Copy of annual return of the company filed before ROC for F.Y. 2010-11 onwards
- In case of change of Director, appearance shall have to be made with the previous director

15. It was brought to our notice that the summons alleged to have been issued on 13.03.2014 was actually served in the office of respective company shareholder on 19.03.2014 afternoon with a direction to make appearance on 20.03.2014. Further, since the said notice u/s. 131 of the Act was served on 19.03.2014, it was not possible for the directors to prepare with all the documents within a short span of half a day and represent before the A.O. on 20.03.2014. In response to the said notice, the directors of the share applicant companies vide letter dated 20.03.2014 submitted that details such as number of shares applied and allotted, details of payments made along with Bank Statement, Balance Sheet, profit & Loss Account and IT Return Acknowledgment for A.Y. 2011-12 were already provided vide letter dated 23.12.2013.

16. It was pointed out that after the said reply dated 20.03.2014, the Income Tax Officer issued no further notice to the directors of the share applicant companies to comply with the summon u/s 131 of the Act or to personally represent before the A.O. After examining all the details filed by the assessee company, shareholders of the assessee company and the directors of the share applicant companies the A.O. opined that verification of identity, genuineness and creditworthiness of the share applicants could not be done because the assessee company and the shareholders failed to comply to the summons. Thus the entire amount of share application money received along with premium to the tune of Rs.91,35,00,000/- was added u/s 68 of the Act.

17. In the light of the aforesaid facts it was contended before us that the assessee had successfully explained the source of source of receipt by matching each entry with the bank statement and thus, the assessee has successfully proven the source of source and origin of origin of the receipts as envisaged u/s. 68 of the Act. It was reiterated by the Ld. AR that the Balance Sheet and ITR Acknowledgement were also submitted at the time of hearing. However, we note that the bank statement showing the sources of fund was being submitted before us for the first time. In such a scenario, for the ends of justice and fair play for both the parties and since the assessee could not produce the directors at the fag end of the assessment, on which ground alone the share capital along with the premium was added u/s.

68 of the Act, therefore, we hold that proper opportunity was not 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.”

18. 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."

19. 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 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.

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

Order is pronounced in the open court on 31/10/2018

Sd/-
(M. Balaganesh)
Accountant Member

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

Dated: 31st October, 2018

Jd.(Sr.P.S.)

Copy of the order forwarded to:

- 1 Appellant – M/s. Khambhalia Traders Pvt. Ltd., Block 'C', 5th floor, 22, Camac Street, Kolkata-700 016.
- 2 Respondent – ITO, Ward-1(3), Kolkata.
- 3 CIT(A)-3, Kolkata. (sent through e-mail)
- 4 CIT , Kolkata
- 5 DR, Kolkata Benches, Kolkata (sent through e-mail)

/True Copy,

By order,

Sr. Pvt. Secretary