

**IN THE INCOME TAX APPELLATE TRIBUNAL
KOLKATA BENCH (B), KOLKATA
[Before Shri P.M. Jagtap, Vice President & Shri S.S. Viswanethra Ravi, JM]**

**I.T.A. No. 1112/Kol/2017
Assessment Year: 2009-10**

Alphatech Acres Pvt. Ltd.....Appellant
(Formerly, Dwarkapati Suppliers Pvt. Ltd.)
A.C. Bhuteria & Co., 2, India Exchange Place,
2nd Floor,
Kolkata - 700 069.
[PAN: AADCD 0771 B]

ITO, Ward 9(1), Kolkata.....Respondent
P-7, Chowringhee Square,
Kolkata - 700 069.

Appearances by:

Shri A.K. Gupta, FCA appearing on behalf of the Assessee.

Md. Usman, CIT(DR) appearing on behalf of the Revenue.

Date of concluding the hearing : September 27, 2018

Date of pronouncing the order : October 31, 2018

ORDER

Per P.M. Jagtap, Vice President

This appeal filed by the assessee is directed against the order of Ld. CIT(A) - 16, Kolkata dated 22.03.2017 passed ex-parte whereby he confirmed the addition of Rs. 7,73,00,000/- made by the AO to the total income of the assessee by treating the share capital amount of Rs. 7,73,00,000/- as unexplained cash credit u/s 68 of the Income Tax Act, 1961.

2. The assessee in the present is a company which is engaged in the business of trading in shares and investments. The return of income for the year under consideration was filed by it on 07.11.2009 declaring a total income at Rs. 290/-. Although the said return was initially processed by the AO u/s 143(1) of the Act, the assessment was subsequently reopened and in the assessment completed u/s

147/143(3) vide an order dated 17.03.2011, the total income of the assessee was determined by the AO at Rs. 27,290/-. Thereafter the said assessment was set aside by the Ld. CIT vide an order dated 26.03.2013 passed u/s 263 of the Act with the direction to the AO to make the assessment afresh after conducting thorough and detailed enquiries regarding the identity and creditworthiness of the shareholders through which the transaction of share capital to the tune of Rs. 7.73 crores was made in the case of the assessee during the year under consideration.

3. In pursuance of the order passed u/s 263, a notice u/s 142(1) was issued by the AO on 24.07.2013 in response to which the details required by the AO were filed by the assessee including the list of share-holders. The AO issued notices u/s 133(6) to all the share-holders which were mostly returned back unserved. He also issued summons u/s 131 of the Act to the directors of the assessee company on 26.02.2014 which remained uncomplied with. Relying inter alia on the decision of the Hon'ble Supreme Court in the case of **Sumati Dayal vs CIT 214 ITR 801** and **CIT vs Durga Prasad More 82 ITR 540**, the Assessing Officer held that the genuineness of the relevant transactions involving subscription of share capital in the case of the assessee was required to be considered by applying the test of human probability. He also held that onus of establishing identity and capacity of the concerned credits/subscribers and the genuineness of the relevant transactions was on the assessee. Since the assessee, according to the AO, had failed to discharge the said onus satisfactorily, share capital contribution amounting to Rs. 7.73 crores was treated by the AO as unexplained cash credit u/s 68 and the same

was added by him to the total income of the assessee in the assessment completed u/s 143(3)/263/147/143(3) of the Act vide an order dated 29.03.2014.

4. Against the order passed by the AO u/s 143(3)/263/147/143(3), an appeal was preferred by the assessee before the Ld. CIT(A) and since there was no compliance on the part of the assessee to the notices issued by him fixing the said appeal for hearing from time to time, the Ld. CIT(A) dismissed the appeal of the assessee vide his appellate order dated 22.07.2017 passed ex-parte and confirmed the addition made by the AO u/s 68. Aggrieved by the order of the Ld. CIT(A), the assessee has preferred this appeal before the Tribunal.

5. We have heard the arguments of both the sides and also perused the relevant material available on record. The learned counsel for the assessee has raised a preliminary issue regarding the lack of proper and sufficient opportunity given by the A.O. to the assessee as well as the non-consideration by him of the relevant documentary evidence furnished by the concerned share-holder applicants in response to the notices issued under section 133(6). As pointed out by him, specific direction was given by the Ld. CIT(A) to the A.O. in the order passed under section 263 to conduct thorough and detailed enquiries regarding the identity and creditworthiness of the share-holders through whom the introduction of share capital to the tune of Rs. 7.73 crores was made in the case of the assessee during the year under consideration. He has contended that although notices under section 133(6) were issued by the A.O. to all the share

applicants, the relevant documentary evidence furnished by them in response to the said notices in the form of statement of source of funds, copies of relevant bank statements, copies of allotment advices, copies of IT returns and audited accounts etc. was not taken into consideration by the A.O. while deciding the issue under section 68 and this position clearly evident from the assessment order passed by the A.O. is not disputed even by the learned DR.

6. As further submitted by the learned counsel for the assessee even the summons issued by the A.O. to the directors of the assessee company were not served in time to enable them to comply with the same. He has contended that no further opportunity however was given by the A.O. to the assessee company or even its directors to comply with the requirements and support and substantiate their case by explaining the relevant cash credits representing share capital contribution in terms of section 68. Keeping in view all these relevant facts and circumstances of the case which are clearly evident from the record, we find merit in the contention of the learned counsel for the assessee that the assessment under section 143(3)/147/263/143(3) was made by the A.O. without giving proper and sufficient opportunity of being heard to the assessee and without considering the relevant documentary evidence filed by the concerned share applicants in response to the notices issued under section 133(6).

7. In the case of M/s. Sukanya Merchandise Pvt. Ltd. vs ITO (ITA 291/Kol/2016 dated 15.12.2017) cited by the learned counsel for the assessee, a similar view has been taken by the Co-ordinate Bench of this Tribunal and the similar issue relating to the addition made

under section 68 on account of share capital contribution by treating the same as unexplained cash credits is restored back by the Tribunal to the file of the A.O. in almost similar situation after recording its observations / findings as under:

We note that the AO pursuant to the order of Ld. CIT had taken note of the directions of the Ld. CIT and issued notice u/s. 142(1) dated 16.08.2013 and has acknowledged that the assessee had furnished the copy of final account, I. T. Acknowledgement, bank statement for the relevant period evidencing the receipt of share application money from the share applicants. Thereafter, the AO makes certain inferences based on the list of shareholders and taking note of the bank statement furnished by the assessee. We note that after the initial notice dated 16.08.2013, thereafter the AO had issued the notice on 26.02.2014 which has been reproduced at page 3 of the reassessment order, wherein AO required the directors of the assessee company to be present before him on 06.03.2014. However, according to the Ld. AR, the assessee received the notice only on 07.03.2014 and thereafter, the assessee requested the AO to provide another opportunity of hearing vide its letter dated 20.03.2014. Thereafter, the AO fixed the date of hearing on 12.03.2014 vide notice dated 10.03.2014. So, according to the assessee company since the directors were not in station till 23.03.2014, the Ld. AR had requested for adjournment till that time. Though the AO has stated that he has issued summons on 24.03.2014 to the assessee company to produce the directors of the company before him on 26.03.2014, the assessee company contended that it has not received the said summon and, therefore, could not make the personal appearance. The AO has drawn adverse conclusion basically because of non-appearance of the directors of the assessee company and that of the shareholder companies. We note that initially the AO started the enquiry on 16.08.2013 which was complied by the assessee by submitting documents which has been acknowledged by the AO. Thereafter, the enquiry was started only at the fag end of February 2014 and the assessee company had informed the AO that their directors were out of station till 23.03.2014. In the light of the aforesaid facts, we are of the opinion that the assessee did not get fair opportunity to present the evidences before the AO so, there was a lack of opportunity as aforesaid, therefore, it has to go back to AO.

8. *We also note that Ld. Cit while setting aside the order of the AO which was passed u/s. 147/143(3) of the Act, the Ld. CIT gave certain guidelines to follow for conducting deep investigation. We also note that*

similarly placed assessee had challenged the exercise of revisional jurisdiction u/s. 263 of the Act before this Tribunal in those cases one of it of Subha Lakshmi Vanijya Pvt. Ltd. Vs. CIT in ITA No. 1104/Kol/2014 dated 30.07.2015, wherein the Tribunal was pleased to uphold the order passed by the Ld. CIT passed u/s. 263 of the Act, which we learn to have been confirmed by the Hon'ble jurisdictional High Court and the SLP preferred against the decision of the Hon'ble jurisdictional High Court has been dismissed by the Hon'ble Supreme Court. Therefore, similar order of the Ld. CIT passed u/s. 263 of the Act has been upheld. We note that the AO while giving effect to the CIT's 263 order has noted that the assessee company has in fact furnished the documents sought by him to his notice u/s. 142(1) of the Act. However, the AO took the adverse view against the assessee on the plea that the directors of the assessee company and share subscribing companies had not appeared before him on 26.03.2014 and after taking note that none appeared on 26.03.2014 concluded on the same day 26.03.2014 that entire amount of share application money received along with premium amounting to Rs.8,06,00,000/- which has remained unexplained and added to the income of the assessee. 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 of 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 in 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. 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."

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.

8. We, therefore, consider it fair and proper and in the interest of justice to set aside the orders of the authorities below on the issue in dispute and restore the matter to the file of the A.O. to decide the same afresh after giving the assessee proper and sufficient

opportunity of being heard and after taking into consideration the entire evidence already available on record as well as other documentary evidence which the assessee may choose to file in support of its case on the issue.

9. In the result, the appeal of the assessee is treated as allowed for statistical purpose.

Order Pronounced in the Open Court on 31st October, 2018.

Sd/-

(S.S. Viswanethra Ravi)
JUDICIAL MEMBER

Sd/-

(P.M. Jagtap)
VICE PRESIDENT

Dated: 31/10/2018

Biswajit, Sr. PS

Copy of order forwarded to:

1. Alphatech Acres Pvt. Ltd., (formerly Dwarkapati Suppliers Pvt. Ltd., A.C. Bhuteria & Co., 2, India Exchange Place, 2nd Floor, Kolkata – 700 001.
2. ITO, Wd-9(1), P-7, Chowringhee Square, Kolkata – 700 069.
3. The CIT(A)
4. The CIT
5. DR

True Copy,

By order,

Assistant Registrar / H.O.O.
ITAT, Kolkata