

आयकर अपीलीय अधीकरण, न्यायपीठ – “B” कोलकाता,
IN THE INCOME TAX APPELLATE TRIBUNAL “B” 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. 2043/Kol/2016
Assessment Year: 2011-12

Eastern Copper Manufacturing Co. (PAN: AAACE7015Q)	Vs.	Deputy Commissioner of Income-tax, Circle-9, Kolkata.
Appellant		Respondent

Date of Hearing	19.09.2018
Date of Pronouncement	16.11.2018
For the Appellant	Shri Subash Agarwal, Advocate
For the Respondent	Shri Kapil Mondal, JCIT, Sr. DR

ORDER

Per Shri A.T.Varkey, JM

This appeal preferred by the assessee is against the order of the Ld. CIT(A)-16, Kolkata dated 30.08.2016 for AY 2011-12.

2. Ground no.2 of assessee’s appeal is against the order of Ld. CIT(A) in confirming the addition made by the AO of Rs.1,70,00,000/- by invoking sec. 68 of the Income-tax Act, 1961 (hereinafter referred to as the “Act”) on account of receipt of share application money.

3. Briefly stated facts are that during the course of assessment, the AO observed that the assessee raised share application money to the tune of Rs.1.7 cr. against which shares were allotted in the next year consisting of 34000 shares of face value of Rs. 10/- each issued at a premium of Rs. 490/- per share. The assessee was asked to prove the identity and creditworthiness of the persons through whom money were taken, but, according to AO, since no compliance was made by the assessee company, the AO made an addition of Rs.1,70,00,000/-. Aggrieved, assessee preferred an appeal before the Ld. CIT(A) who confirmed the action of AO. Aggrieved, assessee preferred this appeal before us.

4. We have heard rival submissions and gone through the facts and circumstances of the case. At the outset, the Ld. AR brought to our notice that no proper opportunity was given to the assessee by the AO when he framed the assessment. According to Ld. AR, neither proper opportunity was given to the assessee by the AO to discharge the onus casted upon it to prove the identity, creditworthiness and genuineness of transaction of shares introduced in the assessee company nor the AO provided the remand report which was sought for by the Ld. CIT(A). It was brought to our notice by the Ld. AR that the notices have been served on few share subscribers. We note that the entire addition has been made on the basis that the directors of the assessee company did not appear for that it was brought to our notice that the assessee got only one week's notice period which was insufficient because directors were out of town, so could not attend the hearing before AO. In the light of the above, we find that no proper opportunity was given to assessee by AO during the assessment proceedings. Therefore, we are inclined to set aside the order of Ld. CIT(A) and restore the matter to the file of AO by applying the ratio of the decision of Hon'ble (three judge bench) of the Hon'ble Supreme Court in Tin Box Company Vs. CIT (2001) 249 ITR 216 (SC) wherein it has been 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.

5. 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."

6. 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 since the ld DR could not contradict the fact that assessee did not get proper opportunity before the AO during assessment 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.

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

Order is pronounced in the open court on 16/11/2018

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

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

Dated: 16th November, 2018

Jd.(Sr.P.S.)

Copy of the order forwarded to:

- 1 Appellant – Eastern Copper Manufacturing Co. Pvt. Ltd., 42/1, Strand Road, 2nd floor, Kolkata-700 007.
- 2 Respondent – DCIT, Circle-9, Kolkata.
- 3 CIT(A)-16, Kolkata. (sent through e-mail)
- 4 CIT , Kolkata
- 5 DR, Kolkata Benches, Kolkata (sent through e-mail)

/True Copy,

By order,
Assistant Registrar