

**IN THE INCOME TAX APPELLATE TRIBUNAL
KOLKATA 'B' BENCH, KOLKATA**

(Before Sri J. Sudhakar Reddy, Accountant Member & Sri Aby T. Varkey, Judicial Member)

ITA No. 1924/Kol/2018
Assessment Year: 2012-13

M/s. Strong Construction Co. Pvt. Ltd.....Appellant
Bina Residency
Mangal Vatika
Ground Floor
Ward No. 25, Shaktigardh
Road No. 1, Milanpally
Siliguri - 734005
West Bengal
[PAN : AADCS 5292 E]

Income Tax Officer, Ward-9(4), Kolkata.....Respondent

Appearances by:

Shri Soumitra Choudhury, Advocate & Sri Joydeep Chakraborty, Advocate, appeared on behalf of the assessee.

Shri Robin Choudhury, Addl. CIT Sr. D/R, appearing on behalf of the Revenue.

Date of concluding the hearing : November 14th, 2018

Date of pronouncing the order : November 30th, 2018

ORDER

Per J. Sudhakar Reddy, AM :-

This appeal filed by the revenue is directed against the order of the Learned Commissioner of Income Tax -18, Kolkata, (hereinafter the "Id.CIT(A)"), passed u/s. 250 of the Income Tax Act, 1961 (the 'Act'), dt. 15/03/2018, for the Assessment Year 2012-13.

2. The assessee is a company and during the previous year it has raised share capital amounting to Rs. 1,50,00,000/-, including share premium of Rs. 1,49,25,000/-. The assessing officer made an addition u/s 68 of the Act. Aggrieved the assessee carried the matter in appeal. The Id. first appellate authority upheld the order of the Assessing Officer and confirmed the addition. Aggrieved the assessee is in appeal before us.

4. We have heard rival contentions. On careful consideration of the facts and circumstances of the case, perusal of the papers on record, orders of the authorities below as well as case law cited, we hold as follows:-

4.1. Before the Ld. CIT(A), the assessee has specifically stated that no summons u/s 131 of the Income Tax Act, 1961, stated to have been issued by the Assessing Officer were received by the assessee. It was also argued that the assessing officer has not made any independent enquiry, to disprove the claim of the assessee company. The argument of the assessee company is that the Ld. CIT(A) has passed a mechanical order without considering the legal position and the facts of the case. The ld. Counsel for the assessee further submits that the AO has not given adequate opportunity to the assessee and has passed an order without proper enquiry. The ld. D/R, though not leaving his ground, ultimately agrees that this matter may be restored to the Assessing Officer for fresh adjudication, in accordance with law.

We find that this bench of the ITAT in all such cases has been restoring the matter to the file of the Assessing Officer for fresh adjudication.

5. In the case of Sriram Tie Up Pvt. Ltd. supra at para 6 and 7 held as follows:

“6. 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 assessees 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 t 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 judgements

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.

7. 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."

6. The Kolkata Bench of the ITAT has passed similar order in many cases on the same issue of additions made u/s 68 of the share capital. It has set aside the

assessment to the file of the AO for fresh adjudication, on the lines stated in the above order after giving the assessee adequate opportunity of being heard.

7. Keeping in view the totality of the facts and circumstances of the case and also the orders of the Co-ordinate Bench of the Tribunal in similar matters, we set aside this issue to the file of the AO for fresh adjudication and in accordance with law, after giving the assessee adequate opportunity of being heard. Accordingly the appeal of the assessee is allowed for statistical purposes.

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

Kolkata, the 30th day of November, 2018.

Sd/-
[Aby T. Varkey]
Judicial Member

Dated : 30.11.2018
{SC SPS}

Sd/-
[J. Sudhakar Reddy]
Accountant Member

Copy of the order forwarded to:

1. M/s. Strong Construction Co. Pvt. Ltd
Bina Residency
Mangal Vatika
Ground Floor
Ward No. 25, Shaktigardh
Road No. 1, Milanpally
Siliguri – 734005
West Bengal

2. Income Tax Officer, Ward-9(4), Kolkata

3. CIT(A)-

4. CIT- ,

5. CIT(DR), Kolkata Benches, Kolkata.

True copy
By order

Assistant Registrar
ITAT, Kolkata Benches