

आयकर अपीलीय अधीकरण, न्यायपीठ – “B” कोलकाता,
IN THE INCOME TAX APPELLATE TRIBUNAL “B” BENCH: KOLKATA
 (समक्ष) श्री ऐ. 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. 843/Kol/2015
Assessment Year: 2008-09

M/s. Vantage Suppliers Pvt. Ltd. (PAN: AACCV6184F)	Vs.	Deputy Commissioner of Income-tax, Central Circle-4(2), Kolkata.
Appellant		Respondent

Date of Hearing	04.09.2018
Date of Pronouncement	30.11.2018
For the Appellant	Shri M. D. Shah, AR
For the Respondent	Shri Robin Choudhury, Addl. CIT, Sr. DR

ORDER

Per Shri A.T.Varkey, JM

This appeal preferred by the assessee is against the order of the Ld. CIT(A)-21, Kolkata dated 26.05.2015 for AY 2008-09.

2. Though the assessee raised 3 grounds of appeal but the sole issue involved is against the action of Ld. CIT(A) in confirming the addition of Rs.5,17,50,000/- as unexplained cash credit u/s. 68 of the Income-tax Act, 1961 (hereinafter referred to as the “Act”), which sum represented amounts received by the assessee towards share capital and share premium.

3. Briefly stated facts are that the assessee company filed its return of income for the A.Y. 2008-09 u/s 139(1) of the Act on 25.09.2008 declaring NIL income. The return of income was processed u/s 143(1) of the Act on 20.07.2009. Subsequently, the assessment was re-opened u/s 147 of the Act by issuing notice u/s 148 of the Act dated 11.08.2010. The assessment was completed u/s 147/143(3) of the Act on 21.12.2010 at the assessed income of Rs.38,370/-. Later on, the Commissioner of Income-tax, Kolkata-I, Kolkata

initiated the proceedings u/s 263 of the Act. The order passed u/s 143(3)/147 of the Act dated 21.12.2010 was set aside by the CIT, Kol-I , Kolkata u/s 263 of the Act vide order dated 11.03.2013 (wrongly noted by AO as 26/03/2013). The said order u/s. 143(3)/147 of the Act dated 21.12.2010 had been set aside u/s 263 for the reason that the assessee company had introduced substantial amount of share capital and share premium in the assessment year 2008-09, but the AO had done verification only on test check basis and he did not examine the issue of introduction of share capital and share premium in detail. Subsequent to the order u/s.263, the AO i.e. the DCIT, Central Circle - XIX, Kolkata initiated the assessment proceedings and passed an order u/s 147/143(3)/263/143(3) of the Act on 31.03.2014 at the assessed income of Rs.5,17,88,370/-. While completing the reassessment the AO made an addition of Rs.5,17,50,000/- u/s 68 of the Act on account of introduction of share capital and share premium subscribed by various shareholders in the year under consideration. During the course of reassessment proceedings, on perusal of the Balance Sheet of the assessee company as on 31.03.2008, it was observed by the AO that in the year under consideration the assessee company had raised share capital of Rs.5,17,50,000/- by issuing 2,58,750 equity shares of face value of Rs.10/- each at a premium of Rs.190/-. The AO noted that assessee company was incorporated only on 11.01.2008 and within a time period of less than three months had come up with the issue of share capital of more than Rs.5 crore and that too, with a premium of 19 times the face value of each share. On observing this, the AO was of the opinion that the substantial amount of Rs.5,17,50,000/- credited in the books of account of the assessee company in the garb of share capital including share premium needs investigation. According to him, the AO carried out the investigation by issuing summons u/s 131 of the I.T. Act to the directors of the assessee company as well as that of the share subscribing companies at their given addresses. But, according to AO, most of summons were returned unserved by the India Post. However, the AO notes that one person namely Shri Rakesh Kumar Choubey appeared in compliance to summon issued to him. The AO notes that the summon to Shri Rakesh Kumar Choubey was issued to him in the capacity of a Director of two subscribing companies i.e. M/s Zoom Dealcom Pvt. Ltd. and. M/s Aastha Vincom Pvt. Ltd. The statement of Shri Choubey was recorded u/s 131 of the Act on 24.03.2014 in which he

denied any knowledge about the assessee company or the subscriber companies and he stated that he was a peon with a company and he had no PAN and not being assessed to tax. From the statement of Shri Choubey it was concluded by the AO that the subscriber companies had used his name as director. The AO further opined that the results of the investigations discussed above clearly bring forth the fictitious identity of the subscriber companies and also established the fact that introduction of the share capital in the assessee company is not genuine. Therefore, the AO issued a show cause letter dated 25.03.2014 to the assessee company along with the copy of the statement of Shri Rakesh Kumar Choubey to explain as to why sum of Rs.5,17,50,000/- credited in its books of account as share capital should not be treated as cash credit u/s 68 of the Act. In response, vide letter dated 30.03.2014, it was submitted before the AO that everyone is busy in the closing of accounts, time barring assessments and other allied works. Since the assessee did not turn-up and had no explanation to offer, the AO treated the sum of Rs.5,17,50,000/- as unexplained cash credit u/s 68 of the Act and added to the income of the assessee company. Aggrieved, assessee preferred 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. We note that the AO was giving effect to the order of Ld. CIT passed u/s. 263 of the Act on 11.03.2013 wherein the Ld. CIT has given the following guidelines as to how to investigate.

“Hence, the order passed by the AO u/s. 143(3) r/w 147 for the AY 2008-09 is erroneous and prejudicial to interest of the revenue and therefore the order is set aside to be framed de novo as per following directions. The AO should make comprehensive and detailed enquiries into the source of subscription to the share capital. The AO should pass the assessment order after conducting independent detailed and complete enquiries into the documents filed in support of subscription to the share capital and premium to the extent of Rs.5,17,50,000/- introduced in this case. The AO should trace the source of share capital by enquiring into the various layers through which the money has been introduced in this company as share capital and also examine the directors of subscriber companies by issuing summons u/s. 131 of the I. T. Act. The AO should not confine himself to conducting enquiries into the subscribers to the share capital only on selective basis. The AO should also call upon the assessee to indentify the persons who are shown as directors of these companies and examine them on oath to verify their credential as directors. The AO should pass speaking order after providing reasonable opportunity to the assessee and verifying 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 fore, the reality of the transactions.”

5. However the main grievance of the assessee is that no proper opportunity was given to the assessee to discharge the onus casted upon it as required in sec. 68 matters. We note that AO recorded the statement of a director of to share subscribing companies i.e. Shri Rakesh Kumar Choubey on 24.03.2014 and issued notice to assessee on the next day on 25.03.2014 to show cause along with a copy of the said director's statement and passed the reassessment order dated 31.03.2014 (i.e. within six days). According to Ld. AR, the assessee got only two days to rebut and it was pointed out by the Ld. AR that in response to notice u/s. 133(6) of the Act, four share holders have confirmed to the AO that they were share holders – (i) M/s. Hanuman Vinimay Pvt. Ltd., (ii) M/s. Doyen Vanijya Pvt. Ltd., (iii) M/s. Astha Vincom Pvt. Ltd., (iv) M/s. Zoom Dealcom Pvt. Ltd. and drew our attention to pages 1 to 6 of paper book. We note that other than the notice issued u/s. 133(6) to assessee and shareholders (supra) no other investigation was conducted by AO as is discernable from the order. As noted above, only less than six days assessee got to rebut, so, we find force in the submission of the Ld. AR that no proper opportunity the assessee got before the AO during the reassessment proceedings. Since notice u/s. 133(6) of the Act could be served upon the four share subscribers and confirmation was received from them and just because the director of Assessee Company failed to appear before the AO, the AO saddled the addition by drawing adverse inference which action of A.O. cannot be countenanced in the light of the fact that the shareholders had filed confirmation pursuant to sec. 133(6) notice. Since proper opportunity was not given to assessee by AO during the reassessment proceedings, we are of the opinion that assessee should 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.”

6. 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 aforesaid it has to go back to AO.....”

7. 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."

8. 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.

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

Order is pronounced in the open court on 30/11/2018

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

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

Dated: 30th November, 2018

Jd.(Sr.P.S.)

Copy of the order forwarded to:

- 1 Appellant – M/s. Vantage Suppliers Pvt. Ltd., Asha Chambers, 6B, Bentinck Street, Room No. 25, Kolkata-700 001.
- 2 Respondent – DCIT, Central Circle-4(2), Kolkata.
- 3 CIT(A)-21, Kolkata. (sent through e-mail)
- 4 CIT, Kolkata.
- 5 DR, Kolkata Benches, Kolkata (sent through e-mail)

/True Copy,

By order,

Sr. Pvt. Secretary