

आयकर अपीलीय अधीकरण, न्यायपीठ – “A” कोलकाता,
IN THE INCOME TAX APPELLATE TRIBUNAL “A” BENCH: KOLKATA
 (समक्ष)श्री पी. एम.जगताप, लेखा सदस्य एवं श्री ए.टी. वर्की,न्यायिक सदस्य)
 [Before Shri P.M. Jagtap, AM & Shri A. T. Varkey, JM]

I.T.A. No. 1043/Kol/2017
Assessment Year: 2008-09

M/s. Everest Dealer Pvt. Ltd. (PAN: AABCE8698N)	Vs.	Income-tax Officer, Wd-9(2), Kolkata.
Appellant		Respondent

Date of Hearing	04.12.2018
Date of Pronouncement	12.12.2018
For the Appellant	Shri Subash Agarwal, Advocate
For the Respondent	Shri Christopher Jenome Singh, 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 08.08.2016 for AY 2008-09.

2. Though the assessee has raised six grounds of appeal but the main issue involved is against the order of Ld. CIT(A) confirming the addition made by the AO of a sum of Rs.3,26,00,000/- on account of share application money as unexplained cash credit u/s. 68 of the Income Tax Act, 1961 (hereinafter referred to as the “Act”).

3. At the outset itself, the Ld. AR drew our attention to page 2 of the assessment order wherein we note that the AO had issued notice u/s. 131 of the Act to the assessee to produce its directors and since the directors did not appear before the AO, he had passed the reassessment order on 31.03.2014. It was brought to our notice that the notice of AO directing the assessee to produce the directors before the AO was fixed on 17.03.2014 and since the assessee’s directors were out of station, the assessee sought reasonable time to produce its directors. However, the AO did not give proper opportunity and passed the reassessment order within 13 days while giving effect to the CIT’s order u/s.263 of the Act. We note that at the fag end of the reassessment proceedings, the AO issued notice u/s 131 of

the Act to assessee to produce its directors on 17.03.2014 which the assessee could not comply because its directors were out of station and hence, the assessee failed to produce the directors. The AO thereafter made the impugned addition. We note that in similar cases the Ld. CIT has passed order u/s. 263 of the Act 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 identify 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.”

3. However, as noted above, the AO has not conducted any enquiry as directed by the Ld. CIT which guidelines the AO should have followed and since the assessee's directors were not in station in the last week when the reassessment order was passed, we are of the opinion that no proper opportunity has been granted to the assessee. 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.”

4. 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.....”

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

Order is pronounced in the open court on 12/12/2018

Sd/-
(P. M. Jagtap)
Accountant Member

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

Dated: 12th December, 2018

Jd.(Sr.P.S.)

Copy of the order forwarded to:

- 1 Appellant – M/s. Everest Dealer Pvt. Ltd., 107, Foreshore Road, Shibpur, Howrah-711102, West Bengal.
- 2 Respondent – ITO, Wd-9(2), 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,

Sr. Pvt. Secretary