

आयकर अपीलीय अधीकरण, न्यायपीठ – “A” कोलकाता,
IN THE INCOME TAX APPELLATE TRIBUNAL “A” BENCH: KOLKATA
 (समक्ष) Before श्री जे. सुधाकर रेड्डी, लेखा सदस्य एवं/and श्री ऐ. टी. वर्की, न्यायीक सदस्य)
 [Before Shri J. Sudhakar Reddy, AM & Shri A. T. Varkey, JM]

I.T.A. No. 1262/Kol/2017
Assessment Year: 2012-13

Amrit Kunj Capital Markets Ltd. (PAN: AACCA4048E)	Vs.	Income-tax Officer, Wd-3(1), Kolkata.
Appellant		Respondent

For the Appellant	Shri D. S. Damle, FCA
For the Respondent	Shri Christopher Jenome Singh, JCIT, Sr. DR

Date of Hearing	10.12.2018
Date of Pronouncement	28.12.2018

ORDER

Per Shri A.T.Varkey, JM

This appeal preferred by the Assessee is against the order of Ld. CIT(A)-9, Kolkata dated 30.03.2017.

2. At the outset, it has been brought to our notice by the ld AR of the assessee that the Ld. CIT(A) has not applied his mind and has passed a cryptic order without considering the material placed on record. It was brought to our notice that the impugned order of the Ld. CIT (A) is an ex parte and non-speaking order and since the Ld. CIT(A) has not discussed the matter on merits and without evaluating the evidence placed on record makes the order bad in law and AO's order was passed under section 144 of the Act, despite the shareholders filing all documents to prove identity, creditworthiness and genuineness of the transaction. We note that the Ld. CIT(A) has passed the order as under:

“The Appellant has filed an appeal against the order passed on 26/03/2015 by the Assessing Officer u/s 144 of the Income Tax Act, 1961. Notice u/s 250 was served on the appellant as well as on the AO.

In this case, notice u/s 250 was issued on 27/10/2016 by which date of hearing was fixed on 16/11/2016, however, neither anybody attended nor any written reply was received on the part of the appellant. Therefore, a fresh notice dated 07/12/2016 was issued but there was no compliance on the part of the appellant. On 15/12/2016, the AR of the appellant attended and filed written submission in duplicate by which a remand report was sent to the AO for examination and comments on 16/12/2016 and the case was adjourned to 17/01/2017. On 17/01/2017, neither anybody attended nor any written reply was submitted on the part of the appellant. Therefore, a fresh notice dated 17/03/2017 was issued and on the said date the AR of the appellant attended and the case was adjourned to 30.03.2017 as the remand report was not yet received. On 30.03.2017 there was no compliance on the part of the appellant.

Since there is no compliance during the appellate proceedings and there is no new fact/details available for consideration, I do not find any infirmity in the AO's order. Therefore, appeal is dismissed."

Aggrieved, the assessee has preferred this appeal before us.

3. We have heard rival submissions and gone through the facts and circumstances of the case. We note that the AO has made addition u/s. 144 of the Act, which is the *best judgment assessment* since, according to AO, the assessee did not participate during the assessment proceedings. On appeal, the Ld. CIT(A) has taken note of the fact that the assessee's AR attended before him and had filed written submission along with documents in duplicate which prompted the CIT(A) to call for a remand report from the AO for examination and comments on 16/12/2016. However, after the Ld. CIT(A) acknowledges that no remand report was received from the AO, he observes that since there is no compliance during the appellate proceedings and there is no new fact/details available for consideration, he found no infirmity in the AO's order. So, he dismissed the appeal of assessee. We note that the Ld. CIT (A)'s order is per-se contradictory. After having noted that the assessee had attended and had filed written submission before him and the CIT(A) had sought a remand report from the AO for examination and comments, the Ld. CIT(A) after taking note that AO has not forwarded any remand report, has dismissed the appeal for non-compliance on the part of assessee cannot be countenanced. We note that the assessment order has been passed by the AO u/s. 144 of the Act, however, we note that during the assessment proceeding before the AO the share-subscribers have duly responded to notice u/s. 133(6) of the Act and they (share-subscribers 8 in numbers) have filed documents before AO (annexed in paper book pages 16-124) and the Ld. CIT(A), to discharge the onus casted upon the assessee u/s. 68 of the Act. However, the AO neither mentioned about it nor has found any fault in respect to the documents referred to supra.

The AO has made the addition of share capital plus premium on the ground that directors of Assessee Company did not turn up along with directors of shareholding companies. And during appeal when assessee has furnished documents and written submissions to discharge the onus casted upon it as required u/s. 68 of the Act, in the interest of justice and fair play, the Ld. CIT (A) ought to have obtained the remand report from AO before proceeding to pass the appellate order. Taking into consideration the fact that the assessment order was passed by AO u/s. 144 of the Act, despite all the documents filed and since the assessee has filed detailed written submission along with documents to prove identity, creditworthiness and genuineness of the transaction, the Ld. CIT (A) should have insisted that AO to give his remand report before disposing off the appeal on merit. The impugned order of the Ld. CIT(A) is, therefore, set aside and since the AO has passed section 144 *best judgment assessment* we are of the opinion that assessee did not get proper opportunity before the AO and relying on the three Judges Bench's decision in Tin Box Company Vs. CIT (2001) 249 ITR 216 (SC) wherein the Hon'ble Supreme Court 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."

Relying on the aforesaid order of Hon'ble Supreme Court Tin Box Company (supra) we remand the matter back to AO to de-novo frame the assessment. Needless to say, assessee to be provided adequate opportunity of being heard. And after hearing the assessee, the AO to pass a speaking order. Appeal of assessee is allowed for statistical purposes.

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

Order is pronounced in the open court on 28/12/2018

Sd/-
(J. Sudhakar Reddy)
Accountant Member

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

Dated: 28th December, 2018

Jd.(Sr.P.S.)

Copy of the order forwarded to:

- 1 Appellant – Amrit Kunj Capital Markets Ltd., 1, British Indian Street, 6th floor, Room No. 605, Kolkata-700 069.
- 2 Respondent – ITO, Ward-3(1), Kolkata
- 3 CIT(A)-9, Kolkata. (sent through e-mail)
- 4 CIT , Kolkata
- 5 DR, Kolkata Benches, Kolkata (sent through e-mail)

/True Copy,

By order,

Sr. Pvt. Secretary