

आयकर अपीलिय अधीकरण, न्यायपीठ – “C कोलकाता,
*IN THE INCOME TAX APPELLATE TRIBUNAL
KOLKATA BENCH “C” KOLKATA*

Before **Shri S.S.Godara, Judicial Member** and
Dr. A.L. Saini, Accountant Member

ITA No.1144/Kol/2017
Assessment Year :2011-12

Swatipushp Dealers Pvt. Ltd. Flat No.101, 1 st Floor, 18, Prince Anwar Shah Road, Kolkata-33 [PAN No.AAPCS 5069 P]	V/s.	Income Tax Officer, Ward-11(2), Ayakar Bhawan, P-7, Chowringhee Square, Kolkata-69
अपीलार्थी /Appellant	..	प्रत्यर्थी/Respondent

अपीलार्थी की ओर से/By Appellant	Shri S.M. Surana, Advocate
प्रत्यर्थी की ओर से/By Respondent	Dr. P.K. Srihari, CIT-DR
सुनवाई की तारीख/Date of Hearing	25-04-2019
घोषणा की तारीख/Date of Pronouncement	17-05-2019

आदेश /ORDER

PER S.S.Godara, Judicial Member:-

This assessee's appeal for assessment year 011-12 arises against the Pr.Commissioner of Income Tax-4, Kolkata's order dated 25.04.2016 passed in case No.Pr.CIT-4/U/s.263/2015-16/619-621, involving proceedings u/s 263 of the Income Tax Act, 1961; in short 'the Act'.

Heard both the parties. Case file perused.

2. It appear that the assessee's twin folded pleadings in the instant appeal challenge correctness of PCIT's action revising the regular assessment in question dated 31.01.2014 thereby directing the Assessing Officer to treat its share capital / premium receipts of ₹ 9,90,000 and ₹8,81,10,000/-; respectively as unexplained cash credits. It emerges that assessee has

received the said share premium @ 99/- per share having face value of ₹10. It issued 99,000/- shares to this effect therefore. The Assessing Officer framed his regular assessment in issue. The said assessment order forming of record before us appears to have added an amount of ₹949 on account of general expense and accepted the assessee's share capital / premium in question.

3. Case file indicates that the PCIT thereafter sought to revise the impugned assessment in sec. 263 proceedings on the ground that the Assessing Officer had failed to examine the veracity of assessee's share capital / premium during the course of scrutiny. And also that he had failed to take account the crucial fact that assessee had not carried out any business activity so as to justify the said exorbitant share premium of ₹990/-. The PCIT's revision notice dated 6.11.2015 and 29.02.2015 returned back unserved. He therefore concluded that the assessee had been avoiding service of notice. The PCIT then adverted the assessee's books of account including profit and loss account and balance-sheet to hold its share applicants as paper transaction as per the investigation wing, Kolkata's investigation report making it clear that it was a device used for providing active entry for routing of unaccounted money in the form of share capital. He therefore directed the Assessing Officer to add the assessee's share capital / premium of ₹8,91,00,000/- as unexplained cash credits.

4. We have given our thoughtful consideration to rival contentions against and in support of the PCIT's direction under challenge. We make it clear at the outset that the assessee has failed to rebut the correctness of the PCIT's assessment of revision jurisdiction u/s. 263 of the Act in principle. There is no material on the case file suggesting the Assessing Officer to have undertaken all due inquiries to verify identity, genuineness and creditworthiness of the assessee's investor parties. Its only case during the course of hearing is that it could not receive sec.263 show-cause notice and therefore the matter be restored back to the lower authorities. Our attention is invited to this tribunal's order in *Jubilee Commotrade (P) Ltd. vs. CIT* in **ITA No.1179/Kol/2016**

decided on 10.08.2016 restoring identical issue back to the Assessing Officer as under:-

"2. The Assessee is a company. The nature of business of the assessee is making investments. For A.Y.2012-13 the assessee filed return of income on 10.09.2012 declaring a loss of Rs.25,850/-. An order of assessment u/s 143(3) of the Act was passed by the AO on 26.03.2014. The assessee had during the previous year allotted 32,00,000 lakhs number of equity shares of Re. 1/- per share. Again during the previous year the assessee company had allotted 2,91,750 number of equity shares of Re.1/- per share at a premium of Rs.999/- per share. Thus the assessee received a sum of Rs.2,91,750/- towards share capital and Rs.29,14,58,250/- towards share premium.

3. The AO while framing the assessment U/S 143 (3) of the Act accepted the receipt of share capital by the assessee after making the following observations :-

"It is seen from the Form-2 filed during the relevant period under assessment that the company had allotted 32,00,000 No. of Shares @ Rs.1/- per Share thereby raising Share Capital of Rs. 32,00,000/- . And again the company had allotted 2,91,750 No. of Shares @ Rs.1/ - per Share thereby raising Share Capital of Rs.2,91,750/-. Each of these Shares was allotted @ Premium of Rs. 999/- per Share thereby raising Share Premium of Rs.29,4,58,2501-. Directors share capital is Rs.1,00,000/-.

Notice U/s 133(6) of I.T. Act, 1961 were issued to all the Share Holders. Replies from their ends have been received and examined and found to be in order.

Notice U/s.133(6) of I.T. Act, 1961 were also issued to some of the sources of the Share Holders. Replies from their ends have been received and examined and found to be in order."

4. The CIT in exercise of his powers U/S 263 of the Act was of the view that the aforesaid order of the AO was erroneous and prejudicial to the interest of the revenue as the AO failed to examine the capacity of the person making investments and the genuineness of the transactions of receipt of share capital by the assessee. The show cause notice issued by the CIT u/s 263 of the Act dated 04.02.2016 was served on 05.02.2016 by affixture by the Inspector of Income Tax, as the assessee could not be contacted at the given address. On the date fixed for hearing none appeared on behalf of the assessee. The CIT therefore passed an order u/s 263 of the Act on the basis of material available on record. The CIT in the aforesaid order observed as follows :-

"The relevant facts as appearing from the assessment order and record are that the assessee company has shown a turnover of Rs.0/- and Income of RS.(-) 25,8501- . It was noted that share capital of Rs.35,91,2501- and Share Premium of Rs.29,14,58,7501- was received by the assessee in lieu of 35,91,750/- nos. of shares issued. The assessee company does not show any business activities to justify receipt of such high premium for its share. Further the assessee has invested the amount received as share capital and premium in shares of other companies.

During the assessment proceeding, notice u/s. 131 of the I. T .Act. 1961 were not issued to the Directors, hence details remain unverifiable.

As has been pointed out above, there was no justification for issue of share at huge premium which clearly indicated that the transactions were not genuine

thereby attracting provisions of sec. 68 of IT. Act. Yet, as has been pointed out in the show cause notice, the A.O. did not make any enquiry to find out whether the transaction was genuine. The A.O. issued notices to subscribers of shares u/s. 133(6) on 03.02.2014 & 06.02.2014 requisitioning amongst other, audit report, total amount of investment in shares along with bank statement and details of premium paid and sources of fund thereof and copy of share application and share allotment advice. It is not under stood as to how from these documents/details, the genuineness of the transaction can be ascertained. The AO did not make any further enquiry on receipt of these details which were simply placed in the assessment record. In some cases such as M/s. Fairland Merchants Private Limited, the copy of bank statement was not submitted as there is no such mention in the letter dt, 28.02.2014 despite the AO as per notice dt. 06.02.2014 requisitioning the bank statement for the relevant period. This clearly indicates that even though the AO had requisitioned the details but had not gone through the same because had he gone through the details/records submitted, he would have discovered that M/s. Fairland Merchants Private Limited under cover of letter dt. 28.02.2014 had not submitted the copy of bank statement as requisitioned by him. Further I find that no consequential enquiry was conducted on receipt of the documents requisitioned. It is apparent therefore, that the assessment order suffers from grave error which has caused prejudice to the revenue as .the AO. have accepted the claim of the assessee without making enquiries which were required to be made in view of the relevant facts of the case, No enquiry had been made to ascertain the capacity and creditworthiness of the share subscribers.

From the above discussion it is obvious that the impugned assessment order is erroneous in so far as prejudicial to the interest of revenue. I therefore, hold that the assessment order dt. 26.03.2014 is erroneous in so far as prejudicial to the interest of revenue."

5. The CIT thereafter observed that despite opportunity the assessee failed to produce material to satisfactorily explain the receipt of share capital and share premium for the very same reason given in the show cause notice u/s 263 of the Act. The CIT concluded as follows :-

"Further, despite opportunity having been granted as pointed out above the assessee failed to establish credit worthiness and capacity of the investors. In consideration of the above facts, I hold that the sum of Rs.29,50,50,000/- (Rs.3S,91,750/- being share capital and Rs. Rs.29,14,58,2S0/- being share premium) received by the assessee during the period under consideration is the assessee's own income and is assessed as income of the assessee for the instant assessment year. The assessed income as per assessment order dt.26.03.2014 is thus enhanced. The AO. is accordingly directed to pass consequential order giving effect to this order."

6. Aggrieved by the order of the CIT the assessee has preferred the present appeal before the Tribunal.

7. The Id. Counsel for the assessee has filed before us an application to admit the following additional grounds of appeal.

"For the Ld.CIT erred in passing the order u/s.263 when no opportunity of being heard was granted nor any notice or intimation or information with regard to the initiation of the proceedings and reasons therefor were communicated to the appellant and as such the order is bad in law."

Keeping in mind the issue raised in the additional ground is a legal ground and could be decided on the basis of facts available on record and keeping in view of the decision of the Hon'ble Supreme Court in the case of National Thermal Power Corporation 229 ITR 383, we admit the additional ground for adjudication.

8. We have heard the submissions made on behalf of the assessee. This Tribunal had dealt with the identical case in which identical issues had been considered and decided in the case of Subhlakshmi Vanijya Pvt. Ltd. Vs CIT in **ITA No.1104/Kol/2014**. This Tribunal has drawn the following conclusions:-

"A. Contention of (he assessee that since the AO of the assessee-company was not empowered to examine or make any addition on account of receipt of share capital with or without premium before amendment to section 68 by the Finance Act, 2012 w.e.f. A.y. 2013-14 and hence the CIT by means of impugned order u/s 263 could not have directed the AO to do so, is unsustainable.

B. Failure of the AO to give a logical conclusion to the enquiry conducted by him gives power to the CIT to revise such assessment order, by holding that;-

i) the enquiry conducted by the AO in such cases can't be construed as a proper enquiry;

ii) CIT u/s 263 can set aside the assessment order and direct the AO to conduct a thorough enquiry, notwithstanding the jurisdiction of the AO in making enquiries on the issues or matters as he considers fit in terms of section 142(1) and 143(2) of the Act, which is relevant only up to the completion of assessment;

iii) Inadequate inquiry conducted by the AO in the given circumstances is as good as no enquiry and as such. the CIT was empowered to revise the assessment order;

iv) The order of the CIT is not based on irrelevant considerations and further in the present circumstances, he was not obliged to positively indicate the deficiencies in the assessment order on merits on the question of issue of share capital at a huge premium; and

v) the AO in the given circumstances can't be said to have taken a possible view as the revision is sought to be done on the premise that the AO did not make enquiry thereby rendering the assessment order erroneous and prejudicial to the interest of the revenue on that score itself.

C. In the given facts and circumstances of all such cases, the notices u/s 263 were properly served through affixture or otherwise. Further the law does not require the service of notice u/s 263 strictly as per the terms of section 282 of the Act. The only requirement enshrined in the provision is to give an opportunity of hearing to the assessee, which has been complied with in all such cases.

D. Limitation period for passing order is to be counted from the date of passing the order u/s 147 read with sec. 143(3) and not the date of Intimation issued u/s 143(1) of the Act, which is not an order for the purposes of section 263. In all the cases, the orders have been passed within the time limit.

E. The CIT having jurisdiction over the AO who passed order u/s 147 read with section 143(3), has the territorial jurisdiction to pass the order u/s 263 and not other CIT.

F. Addition in the hands of a company can be made U/S 68 in its first year of incorporation.

G. After amalgamation, no order can be passed U/S 263 in the name of the amalgamating company. But, where the intention of the assessee is to defraud the Revenue by either filing returns, after amalgamation, in the old name or otherwise, then the order passed in the old name is valid.

H. Order passed u/s 263 on a non-working day does not become invalid, when the proceedings involving the participation of the assessee were completed on an earlier working day.

I. Order u/s 263 cannot be declared as a nullity for the notice having not been signed by the CIT, when opportunity of hearing was otherwise given by the CIT.

J. Refusal by the Revenue to accept the written submissions of the assessee sent after the conclusion of hearing cannot render the order void ab initio. At any rate, it is an irregularity.

K. Search proceedings do not debar the CIT from revising order u/s passed u/s 147 of the Act."

9. The Id. Counsel for the assessee however submitted that in the group of cases decided by the Tribunal in which the lead order has been passed in the case of Subhlakshmi Vanijya Pvt. Ltd. (supra), the CIT in exercise of his powers u/s 263 of the Act had not directed the addition of the sum received as share capital and share premium but has set aside the order of AO and directed the AO to make a fresh enquiry with regard to the creditworthiness of the share applicants and the genuineness of the transactions. It was submitted by him that in the present case, no notice u/s 263 of the Act was served on the assessee personally before the impugned order was passed. The proper course for the CIT in such circumstances would have been to set aside the order of the AO dated 26.03.2014 and direct the AO to conduct fresh enquiry as was done in the group of cases decided by this Tribunal in which the lead order was passed in the case of Subhlakshmi Vanijya Pvt. Ltd. (supra). It was his submission that there was no material before the CIT to come to a conclusion that the receipt of share capital and share premium was not satisfactorily explained by the assessee. He therefore prayed that the order u/s 263 of the Act should be quashed.

10. We have considered his submissions and are of the view that as was done in the similar group of cases which was considered by this Tribunal and in which the lead order was passed in the case of Subhlakshmi Vanijya Pvt. Ltd. (supra), the CIT ought to have set aside the order of AO and direct the AO to make fresh enquiry with regard to the receipt of share capital and share premium by the assessee during the previous year. As rightly pointed out by the Id. Counsel for the assessee, since the proceedings u/s 263 of the Act were concluded ex-parte, the Assessee had no occasion to place material to satisfactorily explain the receipt of share capital and share premium by the Assessee. There was however no material on the basis of which the CIT could have come to the conclusion that the receipt of share capital and share premium was not satisfactorily explained by the assessee. As rightly contended by the Id. Counsel for the assessee, the CIT ought to have set aside the order of the AO and directed the AO to conduct fresh enquiry on the lines indicated in the order of this Tribunal in the case of Subhlakshmi Vanijya Pvt. Ltd. (supra). We therefore modify the order of CIT and direct the AO to make fresh enquiry with regard

to the receipt of share capital and share premium during the previous year after affording Assessee opportunity of being heard. With these observations the appeal of the assessee is treated as partly allowed.”

The Revenue is fair enough in not disputing the above legal developments. We therefore adopt the learned co-ordinate bench's reasoning *mutatis mutandis* to restore the instant lis back to the Assessing Officer for afresh adjudication of assessee's share capital / premium issue as per law after affording adequate opportunity of hearing. We make it clear before parting that we have upheld the PCIT's revision exercise in principle.

5. This assessee's appeal is allowed for statistical purposes in above terms.

Order pronounced in the open court 17/05/2019

Sd/-
(लेखा सदस्य)
(Dr.A.L. Saini)
(Accountant Member)
Kolkata,
*Dkp, Sr.P.S

Sd/-
(न्यायिक सदस्य)
(S.S.Godara)
(Judicial Member)

दिनांक:- 17/05/2019 कोलकाता ।

आदेश की प्रतिलिपि अग्रेषित / Copy of Order Forwarded to:-

1. अपीलार्थी /Appellant-Swatipushp Dealers P Ltd. Flat No.101, 1st Floor, 18, Price Anwar Shah Road, Kolkata-33
2. प्रत्यर्थी/Respondent-ITO Wd-11(2), Ayaka Bhawan, P-7, Chowringhee Sq. Kolkakta-69
3. संबंधित आयकर आयुक्त / Concerned CIT Kolkata
4. आयकर आयुक्त- अपील / CIT (A) Kolkata
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, कोलकाता / DR, ITAT, Kolkata
6. गार्ड फाइल / Guard file.

/True Copy/

By order/आदेश से,

सहायक पंजीकार
आयकर अपीलीय अधिकरण,
कोलकाता ।