

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

[Before Shri P.M. Jagtap, Hon'ble Vice President-KZ & Shri Aby T. Varkey, Hon'ble Judicial Member]

I.T.A. No. 1951/Kol/2019
Assessment Year: 2009-10

Primerose Traders Pvt. Ltd.....Appellant
13A, Prasanna Kumar Tagore Street
Ground Floor
Kolkata - 700 006
[PAN: AAACP 7934 M]

Vs.

Income Tax Officer, Ward - 5(2), Hooghly.....Respondent

Appearances by:

Shri Manish Tiwari, FCA, appeared on behalf of the assessee.

Shri Supriyo Pal, JCIT, Sr. D/R, appearing on behalf of the Revenue

Date of concluding the hearing : October 25th, 2019

Date of pronouncing the order : October 25th, 2019

O R D E R

Per Aby T. Varkey, JM :-

This appeal filed by the assessee is directed against the order of the Id. Commissioner of Income Tax (Appeals) - 7, Kolkata, (hereinafter the 'Id. CIT (A)'), passed u/s 250 of the Income Tax Act, 1961 (the 'Act'), dt. 10/07/2019, for the Assessment Year 2009-10.

2. At the outset, it has been brought to our notice that the Id. CIT(A) has passed an *ex-parte* order. It was also brought to our notice that the Assessing Officer has also passed an *ex-parte* order. The Id. Counsel for the assessee submitted that the showcause notice issued by the Assessing Officer was only at the fag end of March, 2015 and since there were number of share subscribers, the assessee did not get sufficient opportunity to bring all the evidences as well as the directors of the share subscriber companies, before the Assessing Officer. The Assessing Officer on the ground of such non-compliance on part of the assessee drew adverse inference against the assessee and made the impugned addition u/s 68 of the Act.

On appeal, the Id. CIT(A), though had sent few notices, the assessee did not receive the same and the last notice the assessee received, was after the date of

hearing. Therefore, the ld. A/R, relying on the judgment of the Hon'ble Supreme Court in the case of *Tin Box Co. vs. CIT* reported in [2001] 249 ITR 216 (SC), prays that the assessee be given an opportunity to appear before the Assessing Officer.

2.1. The ld. D/R opposes the plea of the assessee and does not want us to give the assessee any more opportunities.

3. Heard rival contentions. We are not reiterating the averments taken by the rival parties above. After going through the records, we are of the opinion that the assessee did not get sufficient opportunity to appear before the Assessing Officer, during the assessment stage. The Hon'ble Supreme Court in the case of *Tin Box Co. (supra)*, under similar circumstances has laid down the ratio of law as under:-

"1. 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 straightway agree with the assessee's submission that the ITO 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.

2. 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.

3. The appeals are allowed. The order under challenge is set aside. The assessment orders, 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. No order as to costs."

4. Respectfully following the decision of the Hon'ble Supreme Court (*supra*), we set aside the order of the ld. CIT(A) and remand the matter back to the file of the Assessing Officer, for *de novo* adjudication, in accordance with law. Needless to say that proper opportunity shall be granted to the assessee.

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

Kolkata, the 25th day of October, 2019.

Sd/-
[P.M. Jagtap]
 Vice President

Sd/-
[Aby T. Varkey]
 Judicial Member

Dated : 25.10.2019
 {SC SPS}

Copy of the order forwarded to:

1. Primerose Traders Pvt. Ltd
13A, Prasanna Kumar Tagore Street
Ground Floor
Kolkata - 700 006

2. Income Tax Officer, Ward - 5(2), Hooghly

3. CIT(A)-

4. CIT- ,

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

True copy

By order

Assistant Registrar
ITAT, Kolkata Benches