

IN THE INCOME TAX APPELLATE TRIBUNAL “B” BENCH: KOLKATA
[Before Shri A. T. Varkey, JM and Dr. (Shri) Arjun Lal Saini, AM]

I.T.A No. 1086/Kol/2015 A.Y 2009-10

I.T.O. Ward 5(4), Kolkata	Vs.	M/s. Ekta Tracom Pvt. Ltd PAN: AABCE 9870A
Appellant		Respondent

Date of Hearing	05.08.2019
Date of Pronouncement	30.10.2019

For the Appellant	Shri Radhey Shyam, CIT, ld. DR
For the Respondent	Shri Akkal Dudhwewala,ACA, ld.AR

ORDER

PER SHRI A.T. VARKEY, JM

This appeal is preferred by the revenue against the order of Ld. CIT (Appeals) ,
8, Kolkata dated 12-05-2015 for the assessment year 2009-10.

2. Grounds of appeal of the revenue as revised are as under:-

1. On the facts and circumstances of the case, the CIT(A) erred in not appreciating the facts that the genuineness of the transaction named as share capital subscribed, was not established by merely filing PAN no., IT Returns copies and confirmation.

2. The Ld. CIT(A) erred in considering only the compliance made u/s 133(6) as sufficient to satisfy the material ingredients u/s.68 and did not consider the fact of non-compliance to the notices issued u/s131 in order to verify the identity & creditworthiness of the shareholders as well as the genuineness of the transactions which was not established to the satisfaction of the AO during the course of assessment proceedings in pursuant to order u/s.263 of the I.T.Act.

3. The CIT(A) erred in facts and circumstances of the case in not examining any of the parties whose identity was sought to be established himself, though he was well within his rights to do so.

4. The Ld. CIT(A) ignored the facts that the registration of the companies under ROC and utilization of banking channels do not grant legitimacy to the transaction made by them and in such circumstances appearance of parties to explain the transactions in question becomes extremely crucial to establish the identity, genuineness and creditworthiness of the shareholders. In such circumstances, the Ld. CIT(A) erred in deleting the addition of Rs. 14,20,75,000/- in respect of share capital made u/s 68 of the Act.

5. The department craves leave to add, modify or alter any of the ground(s) of appeal and 1 or adduce additional evidence at the time of hearing of the case.

3. Brief facts of the case as noted by the AO is that the assessee filed its return of income on 14-08-2008 declaring total loss of Rs. 13,677/- Later on the case was taken up for scrutiny. Return was processed u/s. 143(1) of the Income Tax Act 1961[herein after the Act] and later section 148 notice was issued for re-opening the assessment u/s. 147 of the Act and thereafter, the AO passed his order u/s. 147/(143(3) of the Act on 02-02-2011 determining the total income at Rs. 37,000/-. Later on the Id. CIT, Kolkata-II, Kolkata revised the said order dt. 02-02-2011 u/s. 263 of the Act and was pleased to set aside the order of the AO dt. 2-2-2011 by order dt. 26-03-2014 with a direction to make the assessment afresh. Thereafter, the AO was pleased to add the share application money of Rs.14,20,75,000/- including share premium of Rs. 13,92,33,500/- received by the assessee during the year as unexplained cash credit u/s. 68 of the Act. Aggrieved, the assessee preferred an appeal before the Id. CIT(A), who was pleased to allow the appeal of the assessee and deleted the addition. Aggrieved, the revenue is before us.

4. Having heard both the parties, we note that AO in the second round had initially issued notices u/s. 133(6) of the Act against the twenty (20) share subscribers. Out of which the notices could not be served upon six (6) share subscribers. And so fourteen (14) share subscribers were served the section 133(6) notices. When confronted by the AO about non-service of notice to six (6) share subscribers, the assessee furnished the new addresses of them and the AO resend the notices to six (6) share subscribers to its new address and they were duly served. Thereafter, it is revealed that all the share subscribers have filed documents before the AO to substantiate their identity,

creditworthiness and genuineness of their transactions with the assessee. However, without disclosing these pertinent facts of his enquiry the AO has drawn adverse inference against the assessee by concluding as under:-

“ In order to verify the genuineness of the said transactions and to verify the identity and creditworthiness of the shareholders of the assessee company, notice u/s 131 of I.T. Act was issued to directors of all of the shareholder companies of the assessee. They were asked to appear personally before the undersigned and to produce/ furnish details / documents in support of the justification for the investment made by them in the assessee company and other details as asked for. But, none of them appeared before the undersigned. In view of the above, a show-cause letter was issued to the assessee on 18.03.2014 informing the said facts and to show cause as to why share application money received by it should not be treated as bogus and why the same should not be treated as its unaccounted money introduced in its books of accounts as share application money. Assessee was also asked vide this letter as to why the said share application money should not be treated as bogus and unexplained cash credit in its books as per the provisions of section 68 of I. T. Act., but the assessee failed to put forward any explanation till the date of passing of this order.

From the aforesaid facts and discussion it is evident that has no explanation to offer in this regard which reveals that the assessee introduced its own unaccounted money in the form of share application money, to legalize the same.

Considering the aforesaid facts and discussion, share application money of Rs. 14,20,75,000/- including share premium of Rs.13,92,33,500/- received by the assessee during the year is disallowed and added to the total income of the assessee as unexplained cash credit in the books of the assessee as per the provisions of section 68 of I. T. Act.”

5. On appeal, the Id. CIT(A) has deleted the addition taking note that assessee has discharged its onus and on the facts of the case section 68 addition was not warranted in this case. Aggrieved by the impugned action of Ld CIT(A), the Revenue is in appeal challenging the action of Id. CIT(A) deleting the addition u/s. 68 of the Act.

6. We note that pursuant to the Id. CIT's order u/s. 263 of the Act, the AO has framed the re-assessment wherein he made the addition u/s. 68 of the Act. We note that all the share subscribers twenty (20) in number has received the notice u/s. 133(6) of the Act as stated in para (4) supra and has filed the documents to substantiate their

respective identity, creditworthiness & genuineness of their respective transaction with the assessee. However, the AO has drawn adverse inference against the assessee for non-participation/absence of directors of share subscribing/assessee before him (AO) on 21/3/2014 in pursuance to his summons under section 131 of the Act dt. 15/3/2014. And the AO made the addition u/s. 68 of the Act. We note that AO for reasons best known to him, has not recorded the facts of service of section 133(6) notice to all share subscribers & that they have filed the documents pursuant to his notice as discussed in para (4) supra. This omission on the part of the AO not to record the facts which came to light on his enquiry during re-assessment proceedings cannot be countenanced. The AO who is a quasi judicial authority when discharging his duty of framing an assessment order has to be just, fair and reasonable in his actions. AO is duty bound to exercise his dual role of both an investigator as well as that of an adjudicator who should discharge his duty without fear or favour in an independent manner. So when he is discharging such an action, he has to record his action in a fair manner the facts which came to light, which he has not done in this case. Be that as it may be, we note that the ld. CIT(A) while passing the sec. 263 order has given certain guidelines to the AO which AO has reproduced in his order which is as under:-

“ *In view of the special facts and circumstances as well as the judicial decision relied upon, the impugned order u/s 148 is therefore, set aside u/s 263 of the IT Act and the A. O. is directed to :*

i) Examine the genuineness and source of share capital, not on a test check basis, but in respect of each and every shareholder by conducting independent enquiry not through the assessee. The bank account for the entire period should be examined in the course of verification to find out the money trail of the share capital.

ii) Further the A. O. should examine the directors as well as examine the circumstances which necessitated the change in directorship if applicable. He should examine them on oath to verify their credentials as director, and reach a logical conclusion regarding the controlling interest.

iii) The A. O. is directed examine the source of realization from the liquidation of assets shown in the balance sheet after the change of Directors, if any after conducting the inquiries & verification as directed above, the A. O. should pass a speaking order, providing adequate opportunity of being heard to the assessee.

The impugned order u/s 148 is accordingly set aside and assessment should be done afresh."

7. However, we note that from the action as noted by the Id. CIT(A) and as discussed at para (4) supra, we note that AO failed to follow the guidelines of Id. CIT(A) as stated above. Moreover, we note that all the share-subscribers have been served with the notices u/s. 133(6) of the Act and have complied with the requisitions as directed by the AO. However, the addition was saddled on the assessee for non-appearance of the directors of the share subscribing companies on 21/3/2014 before the AO pursuant to sec. 131 summons dt. 15/3/2014. We note that the- re-assessment order of AO is dt. 26/3/2014. So taking into the consideration the aforesaid facts, we are of the opinion that assessee did not get proper opportunity before the AO during re-assessment proceedings. So by relying on the decision of the Hon'ble Supreme Court in the case of 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.”

In the light of the facts noted supra as well as our finding that the assessee did not get proper opportunity before the AO during re-assessment proceedings and by relying on the decision of the Hon’ble Supreme Court in the case of Tin Box Company Vs. CIT (supra) we are inclined to set-aside the impugned order of the Ld CIT(A) and remand the matter back to the file of AO for de-novo re-assessment as per the guidelines of Id. CIT reproduced in para 6 supra and in accordance to law after hearing the assessee.

8. In the result, the appeal of the revenue is allowed for statistical purpose.

Order Pronounced in the Open Court on 30 October, 2019

Sd/-
Arjun Lal Saini
Accountant Member

Sd/-
A.T. Varkey
Judicial Member

Dated 30 -10-2019

PP(Sr.P.S.)

Copy of the order forwarded to:

1. Appellant/Revenue: I.T.O. Ward 5(4), P-7 Chowringhee Sq, Aaykar Bhawan, 8th Fl., Room No. 15, Kolkata-69.
2. Respondent/Assessee: M/s. Ekta Tracom P.Ltd Room No. 20, 3rd Fl., 16 Munshi Sadaruddin Lane, Kolkata-7.
3. CIT,
4. CIT(A), Kolkata.
5. DR, Kolkata Benches, Kolkata

**PP/SPS True Copy By By Order Assistant Registrar
ITAT Kolkata