

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

(Before Sri J. Sudhakar Reddy, Hon'ble Accountant Member & Sri Aby T. Varkey, Hon'ble Judicial Member)

**ITA No. 2318/Kol/2018
Assessment Year: 2009-10**

Om Sai Vinimay Pvt. Ltd.....Appellant
C/o. Subash Agarwal & Associates
Advocates
Siddha Gibson
1, Gibson Lane
2nd Floor
Suite-213
Kolkata - 700 069
[PAN : AABCO 1108 K]

Vs.

Income Tax Officer, Ward-9(2), Kolkata.....Respondent

Appearances by:

Shri Subash Agarwal, A/R, appeared on behalf of the assessee.

Shri Jayanta Khanra, D/R, appearing on behalf of the Revenue.

Date of concluding the hearing : December 18th, 2020

Date of pronouncing the order : January 22nd, 2021

ORDER

Per J. Sudhakar Reddy, AM :-

This appeal filed by the assessee is directed against the order of the Learned Commissioner of Income Tax (Appeals) – 3, (hereinafter the “ld. CIT(A)”), passed u/s. 250 of the Income Tax Act, 1961 (the ‘Act’), dt. 02/03/2017, for the Assessment Year 2009-10.

2. The assessee is a company and during the previous year it raised share capital amounting to Rs. 3,11,50,000/-, including share premium. The assessing officer made an addition u/s 68 of the Act, of this amount due to non-appearance of the directors of the share applicant companies and the directors of the assessee company, in response to notices u/s 131 of the Act. Hence he held that the genuineness of the credit could not be proved. Aggrieved the assessee carried the matter in appeal before the ld. First Appellate Authority. The ld. CIT(A) dismissed the appeal of the assessee *ex-parte*.

3. Further aggrieved the assessee is in appeal before us.

4. We have heard rival contentions. On careful consideration of the facts and circumstances of the case, perusal of the papers on record, orders of the authorities below as well as case law cited, we hold as follows:-

4.1. The ld. Counsel for the assessee submitted that the Assessing Officer, without giving proper opportunity and only on the ground that, the directors of the share applicants/holder companies and directors of the assessee company, have not appeared before him or, were not produced before him, made the addition u/s 68 of the Act. It is also seen that the Assessing Officer has issued summons u/s 131 of the Act to the directors of the company for their personal appearance but since these could not be served, there was no compliance. The Assessing Officer passed a best judgment assessment u/s 144 of the Act, dt. 20/03/2015. He submitted that the notice of hearing issued by the ld. CIT(A) was also not served on the assessee and hence the assessee could not appear before the ld. CIT(A). The ld. CIT(A) passed an *ex-parte* order. He prayed that the issue may be remanded back to the file of the Assessing Officer for fresh adjudication with a direction to the Assessing Officer to provide adequate opportunity of being heard to the assessee.

4.2. The ld. D/R, though not leaving his ground ultimately submitted that the matter may be set aside to the file of the Assessing Officer for fresh adjudication, in accordance with law.

5. After hearing both sides we are of the opinion that this case has to be restored to the file of the Assessing Officer as no adequate opportunity was given to the assessee. The Assessing Officer states that the summons was issued u/s 131 of the Act. There is no record to show that these summons/notices were served. The Assessing Officer concluded, on the basis of surmises and conjectures that, the transactions were not genuine. The ld. CIT(A) passed an *ex-parte* order. This is violation of principles of natural justice. But we find that notice of hearing was not served on the assessee. We find that this bench of the ITAT in all such cases has been restoring the matter to the file of the Assessing Officer for fresh adjudication in accordance with law.

5.1. In the case of *Sriram Tie Up Pvt. Ltd vs. ITO in I.T.A. No. 1104/Kol/2016*, Assessment Year: 2009-10 order dt. March 21, 2018, at para 6 and 7 held as follows:

“6. In the case of *M/s. Sukanya Merchandise Pvt. Ltd. vs ITO (ITA 291/Kol/2016 dated 15.12.2017)* cited by the learned counsel for the assessee, a similar view has been taken by the Co-ordinate Bench of this Tribunal and the similar issue relating to the addition made under section 68 on account of share capital contribution by treating the same as unexplained cash credits is restored back by the Tribunal to the file of the A.O. in almost similar situation after recording its observations / findings as under:

We note that the AO pursuant to the order of Ld. CIT had taken note of the directions of the Ld. CIT and issued notice u/s. 142(1) dated 16.08.2013 and has acknowledged that the assessee had furnished the copy of final account, I. T. Acknowledgement, bank statement for the relevant period evidencing the receipt of share application money from the share applicants. Thereafter, the AO makes certain inferences based on the list of shareholders and taking note of the bank statement furnished by the assessee. We note that after the initial notice dated 16.08.2013, thereafter the AO had issued the notice on 26.02.2014 which has been reproduced at page 3 of the reassessment order, wherein AO required the directors of the assessee company to be present before him on 06.03.2014. However, according to the Ld. AR, the assessee received the notice only on 07.03.2014 and thereafter, the assessee requested the AO to provide another opportunity of hearing vide its letter dated 20.03.2014. Thereafter, the AO fixed the date of hearing on 12.03.2014 vide notice dated 10.03.2014. So, according to the assessee company since the directors were not in station till 23.03.2014, the Ld. AR had requested for adjournment till that time. Though the AO has stated that he has issued summons on 24.03.2014 to the assessee company to produce the directors of the company before him on 26.03.2014, the assessee company contended that it has not received the said summon and, therefore, could not make the personal appearance. The AO has drawn adverse conclusion basically because of non-appearance of the directors of the assessee company and that of the shareholder companies. We note that initially the AO started the enquiry on 16.08.2013 which was complied by the assessee by submitting documents which has been acknowledged by the AO. Thereafter, the enquiry was started only at the fag end of February 2014 and the assessee company had informed the AO that their directors were out of station till 23.03.2014. In the light of the aforesaid facts, we are of the opinion that the assessee did not get fair opportunity to present the evidences before the AO so, there was a lack of opportunity as aforesaid, therefore, it has to go back to AO.

8. We also note that Ld. Cit while setting aside the order of the AO which was passed u/s. 147/143(3) of the Act, the Ld. CIT gave certain guidelines to follow for conducting deep investigation. We also note that similarly placed assessee had challenged the exercise of revisional jurisdiction u/s. 263 of the Act before this Tribunal in those cases one of it of *Subha Lakshmi Vanijya Pvt. Ltd. Vs. CIT in ITA No. 1104/Kol/2014 dated 30.07.2015*, wherein the Tribunal was pleased to uphold the order passed by the Ld. CIT passed u/s. 263 of the Act, which we learn to have been confirmed by the Hon'ble jurisdictional High Court and the SLP preferred against the decision of the Hon'ble jurisdictional High Court has been dismissed by

the Hon'ble Supreme Court. Therefore, similar order of the Ld. CIT passed u/s. 263 of the Act has been upheld. We note that the AO while giving effect to the CIT's 263 order has noted that the assessee company has in fact furnished the documents sought by him to his notice u/s. 142(1) of the Act. However, the AO took the adverse view against the assessee on the plea that the directors of the assessee company and share subscribing companies had not appeared before him on 26.03.2014 and after taking note that none appeared on 26.03.2014 concluded on the same day 26.03.2014 that entire amount of share application money received along with premium amounting to Rs.8,06,00,000/- which has remained unexplained and added to the income of the assessee. 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 of 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 in 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. 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 following 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."

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. We, therefore, consider it fair and proper and in the interest of justice to set aside the orders of the authorities below on the issue in dispute and restore the matter to the file of the A.O. to decide the same afresh after giving the assessee proper and sufficient opportunity of being heard and after taking into consideration the entire evidence already available on record as well as other documentary evidence which the assessee may choose to file in support of its case on the issue."

6. The Kolkata Bench of the ITAT has passed similar orders in many cases on the same issue of additions made u/s 68 of the share capital and has set aside the assessment to the file of the AO for fresh adjudication with a direction that Assessing Officer may examine the evidence already on record as well as other documentary evidences which the assessee may file before him and adjudicate the issue in accordance with law.

7. Keeping in view the totality of the facts and circumstances of the case and also the orders of the Co-ordinate Bench of the Tribunal in similar matters, we set aside this issue to the file of the AO for fresh adjudication in accordance with law, after giving the assessee adequate opportunity of being heard.

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

Kolkata, the 22nd day of January, 2021.

Sd/-
[Aby T. Varkey]
 Judicial Member

Dated : 22.01.2021
 {SC SPS}

Sd/-
[J. Sudhakar Reddy]
 Accountant Member

Copy of the order forwarded to:

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2. Income Tax Officer, Ward-9(2), Kolkata

3. CIT(A)-
4. CIT- ,
5. CIT(DR), Kolkata Benches, Kolkata.

True copy
By order

Assistant Registrar
ITAT, Kolkata Benches