

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

[Before Hon'ble Shri J.Sudhakar Reddy, AM &amp; Smt. Madhumita Roy , JM ]

**ITA.No.924/Kol//2016**  
Assessment year : 2011-12

Legendry Fabrics (P)Ltd.  
Kolkata  
(PAN: AABCL 8845 L)  
(Appellant)

-versus-

I.T.O., Ward-6(2),  
Kolkata  
  
(Respondent)

For the Appellant: Shri Siddhartha Agarwal, Advocate  
For the Respondent: Shri G.Hangshing, CIT

Date of Hearing : 28.05.2018.

Date of Pronouncement : 01.06.2018.

**ORDER**

**PER MADHUMITA ROY, JM**

The instant appeal has been filed before us by the assessee against the order dated 19.05.2014 passed by the Commissioner of Income Tax (appeals) 6, Kolkata under section 143(3) of the Income Tax Act, 1961 (Act), for A.Y.2011-12 arising out of the order dated 28.03.2014 passed by the Income Tax Officer, Ward-6(2), Kolkata.

2. The sole ground raised in the appeal to this effect that whether the CIT(A) was justified in confirming the addition of Rs. 55,42,00,000/- made by the AO on account of share capital by wrongly treating the same as unexplained cash credit under Section 68 of the Act in the facts and circumstances of the case.

3. The fact of the case is this that during the assessment proceedings the AO found that, during the year under consideration the assessee had received share capital of Rs. 55,42,00,000/- which included share premium of Rs. 53,15,29,000 @ Rs. 1990/- per share, in respect of 2,67,100 shares issued to 19 different Pvt Ltd Companies. The AO found that the appellant had no business activity, it was its first year of operation and net income of Rs. 1923 only had been declared. Yet, shares had been issued at a premium of Rs.1990. The AO also made the following observations:

“(i) Examination of details furnished by the shareholder companies revealed that the said companies and companies from whom some of shareholder companies had received money which was invested as share capital in the appellant company, had four to five common addresses and few common directors viz Shri Sandip Kumar, Shri Saroj Kumar Das & Shri Pravin Kumar Mishra etc.

ii) The aforesaid companies did not have any activities, any fixed assets and had declared nominal returned income. The average bank balance was nominal and the immediate source of investment in the share capital was sales proceeds of share of similar companies.

iii) In the case of the assessee company, there were no fixed assets and the closing bank balance stood at Rs.88160. Almost entire funds raised as share capital were utilised for investment in unquoted shares of private limited companies and profit motive was absent.

(iv) Verification of the bank account revealed that the bank account had been opened around the same time as when the share capital was received and sums deposited had been immediately withdrawn. The details of deposit and withdrawals were reproduced in the assessment order. Thus, there were huge transactions in the bank account for a limited period and the balance in the account was nominal.

The AO issued Summons to the directors of the assessee company and shareholder/subscriber companies to examine the identity and creditworthiness of the alleged shareholders and genuineness of the transaction as also justification for the investment made by them. Such summon was issued. On 26.02.2014, notices u/ s 131 was issued to the Director of the assessee company for recording of statement under oath to inquire into the real facts behind the raise of share capital by the assessee company. The following details were asked for by issuing summons:

"Address proof of your company. Please produce any utility bill like electricity bill, water bill etc as evidence.

Your photo identity and residential proof

Your income tax return along with P/L & balance sheet and Bank Statement for the AY 2011-12 onwards,

The bank statement of your company along with books of accounts for F. Y.2010- 11 i.e. A. Y 2011-12.

Copy of annual return of the company filed before ROC for F. Y 2006-07 onwards.

If there is any change in Directorship from the relevant previous year, then you are requested to come along with the previous Director, along with all the documents as referred above of the then Director.

Please also produce evidences to prove identity, genuineness and creditworthiness of share applicants for the relevant F. Y.”

Simultaneously , summon u/ s 131 were issued to some of the Directors of all share applicant companies on 26.02.2014 to appear before undersigned on 11.03.2014 for their personal appearance for recording the statement on oath and also to substantiate the identity of the share applicants and also look into the genuineness and creditworthiness of share applicants. But neither there was any compliance from the part of the assessee company nor from the investors companies in compliance to the summons issued.

Further a show cause letter was issued to the Directors of assessee company on 21.03.2014 through emails asking to appear before undersigned on 24.03.2014 for personal appearance and recording his statement on oath. But, there was no compliance. Therefore process of verification of identity, genuineness of the transaction and creditworthiness of the share applicants could not be looked into.

4. Since there is no compliance of the directors of the share holders companies the learned AO on the basis of the details furnished by the assessee passed an order of addition.

5At the time of hearing of the instant appeal the ld. AR argued in favour of the assessee as it appears from the fact stated above. He further submits before the ld. CIT(A) the assessee has specifically stated that no independent enquiry has been made by the AO to disprove the claim of the assessee company in spite of having all the relevant documents relating to the transactions, identity, creditworthiness and genuineness of the share holders and the AO has passed an order in a mechanical

manner. However, the ld. Counsel for the assessee further submits that the AO has not given sufficient/adequate opportunity while passing the order of addition. The ld. AR prays for a direction to restore the matter to the file of the AO for considering the matter afresh.

5. The ld. AR relied upon the judgment of ITO vs Nilkanth Finbuild Ltd in ITA No.2821/Del/2009. He further relied upon the judgement passed by the Coordinate Bench of this Ld. Tribunal in the case of M/s Sriram Tie up Pvt. Ltd. Vs ITO. The ld. AR forcefully argued before us for remanding the matter to the file of the AO for reconsideration of the issue on the basis of the documents already placed before the authorities below. However the ld. DR agrees to the same.

6. We have heard the representatives of both the parties. We have perused the materials available on record. We find in the judgment passed by the ITAT Delhi while dismissing the appeal preferred by the revenue it was held that even if the issue of share capital is taxed no addition can be made in assessee's hands if identity of share holder is established. The assessee is not required to show source of shareholders funds. Another identical issue was also considered and passed by the Coordinate Bench of this Tribunal in the case of Shri Ram Tie Up Pvt. Ltd., (supra). The ld. Tribunal considering the view taken by another coordinate bench of this ld. Tribunal in the case of M/s. Sukanya Merchandise Pvt. Ltd. vs ITO " ITA NO.291/Kol/2016 dated 15.12.2017 set aside the order passed by the ld. CIT(A). The observations made in the said judgment of M/s Sukanya (supra) is 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 t 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 aforestated 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 form 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. "*

6.1. We therefore respectfully following the judgement passed by the Coordinate Bench of this Tribunal, set aside the order passed by the authorities below on the issue in dispute and restore the matter to the ld. AO to decide the same denovo upon giving

a reasonable opportunity of hearing to the assessee upon taking into consideration the entire evidence already placed before the authorities below as well as other documentary evidences which the assessee may choose to file in support of his case on the issue.

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

**Order pronounced in the Court 01.06.2018.**

Sd/-  
[J.Sudhakar Reddy]  
Accountant Member

Sd/-  
[ Madhumita Roy ]  
Judicial Member

Dated : 01.06.2018.

[RG Sr.PS]

Copy of the order forwarded to:

1. Legendry Fabrics Pvt. Ltd., 7A, Bentick Street, Kolkata-700001.
2. I.T.O., Ward-6(2), Kolkata
3. C.I.T.(A)- 6, Kolkata      4. C.I.T-2, Kolkata
5. CIT(DR), Kolkata Benches, Kolkata.

True Copy

By order,

Senior Private Secretary  
Head of Office/D.D.O, ITAT Kolkata Benches

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