

IN THE INCOME TAX APPELLATE TRIBUNAL "A" BENCH : KOLKATA

[Before Hon'ble Shri S.S. Godara, JM & Hon'ble Shri Dr. Arjun Lal Saini, AM]

I.T. A No. 1597/Kol/2016 A.Y 2012-13

I.T.O Ward 10(1), Kolkata

Vs.

M/s. Smoothly Vintrade P.Ltd  
PAN: AAQCS 1614P

(Appellant)

(Respondent)

For the Appellant : Shri Radhey Shyam, CIT, Id.DR

For the Respondent : Shri Miraj D. Shah, FCA, Id.AR

Date of Hearing : 21-02-2019

Date of Pronouncement : 10-05-2019

**ORDER**

**Shri S.S. Godara, JM:**

1. This Revenue's appeal for assessment year 2012-13 arises against the CIT(A), 4, Kolkata's order dated 30-06-2016 passed in case no. ITA No. 764/CIT(A)-4/TRO-4/Kol/15-16 involving proceedings u/s 143(3) of the I.T Act, 1961 (in short 'Act').

Heard both the parties. Case file perused.

2. The Revenue's sole substantive ground/grievance raised in the instant appeal seeks to reverse the CIT(A)'s action deleting of an addition u/s. 68 of unexplained cash credit in relation to assessee's share capital/premium of Rs.12,78,67,165/- made in the course of assessment. The CIT(A)'s detailed discussion deleting the impugned amount as follows:-

*"4.2 I have considered the issue raised in the assessment order in the light of the arguments made by the appellant. The only issue involved is whether the share application money with share premium aggregating to Rs.12,78,00,000/- received by the appellant invites the mischief of the*

*provisions of s. 68 of the Act or not. I find from record that during the year the assessee company raised Equity Share Capital of Rs. 12.39.00,000/- along with premium and has received Rs.40,00,000/- as share application money pending allotment of shares. Although the sum total of money is Rs.12,79,00,000/- but the AO has made addition of Rs.12,78,00,000/- only. Accordingly, I confine attention to addition of Rs.12,78,00,000/- as unexplained cash credit u/s. 68 of the Act. Section 68 is reproduced as follows:*

*“68. Where any sum is found credited in the books of an assessee maintained for any previous year, and the assessee offers no explanation about the nature and source thereof or the explanation offered by him is not, in the opinion of the Assessing Officer, satisfactory, the sum so credited may be charged to income-tax as the income of the assessee of that previous year.”*

*4.3 According to this section, if identity, creditworthiness of the creditor and genuineness of the transaction is not proved or the explanation offered by the assessee is not, in the opinion of the Assessing Officer, satisfactory, the sum so credited may be charged to income-tax as income of the assessee of that previous year. In the instant case, the appellant had disclosed receipt of share application money including share premium money of Rs. 12,78,00,000/- from various share applicants. It is observed that the addition was made with the predetermined mindset that share application monies received by the appellant is not genuine as identity and creditworthiness of the shareholders were bogus in nature as they did not exist and the transactions were an eyewash only for bringing its black money into circulation without paying any tax to the revenue. Each of the share subscribers are regularly assessed to income tax; and the investments made by each of them are duly and fully reflected in their audited books of accounts as well as their income tax return. The appellant had duly filed its return of total income u/s. 139(1) of the Act in respect of the assessment year 2012-13. In the course of the assessment proceedings, the appellant in response to the requisitions made by the AO, from time to time, produced its audited books of accounts, filed copies of its audited annual accounts including various details and other documents as desired by the AO. The details and documents so produced and filed with the AO included, inter alia, full details of each of the share applicants, who had subscribed to the aggregate share capital as well as share premium money raised by the appellant during the assessment year under*

*appeal. The AO, on receipt of the aforesaid details from the appellant, issued notices u/s. 133(6) of the Act to the share subscribers. The replies received in response thereto by him from such share applicants were not considered by the AO. He doubted the genuineness of the said share capital and the creditworthiness of the share applicants and added the sum of Rs. 12,78,00,0000/- in respect of the entire share capital and share application money pending allotment to the total income of the appellant u/s. 68 of the Act on the premises that the said amounts represented unexplained cash credits which ultimately should form part of the total income of the assessee for the year under consideration.*

*4.4 It is observed that the AO had issued notices u/s 133(6) of the Act to each of the share applicants. Such notices were duly served upon the respective share applicants at their respective addresses on the records of the appellant. Service of such notices u/s 133(6) of the Act to each of the share applicants at their respective known addresses proves their respective identities. It is further observed that the corporate share applicants are registered under the Companies Act, 1956 and are on the records of Registrar Of Companies functioning under Ministry of Corporate Affairs, Government of India and the individuals are having Permanent Account numbers. In fact, each of the share applicants has responded to the statutory notices issued to them u/s 133(6) of the Act. In their respective replies, the share applicants had disclosed, inter alia, their Permanent Account Numbers along with the acknowledgment of submission of their return of income and furnished audit report and financial statements which in my humble opinion proves their identities to the hilt. It is also observed that each of the share applicants maintained bank accounts: and copies of their respective bank accounts from which they made payments to the appellant for subscribing to the shares issued to them, was filed by each of them before the AO. Further, each of the share applicants accepted the fact that they had subscribed to the shares issued by the appellant; and that such transactions were duly reflected in their respective books of accounts, as well as in their audited Balance Sheets, These facts, in my opinion, clearly prove the genuineness of the transactions.*

*4.5 It is also observed that each of the share applicants explained the source of funds in their respective replies to notice u/s. 133(6) of the Act, from which they made payments to the appellant for subscribing to its share capital. The facts furnished on record by the share applicants, in my*

*opinion, clearly prove their source of funds, and their capacity for making such payments and accordingly, the criteria of their creditworthiness is proved. The AO has not found any defect and/or deficiency in the source of funds explained by the share applicants through their replies to the statutory notices issued u/s. 133(6) of the Act to them and accordingly, this precondition is also satisfied in the circumstances.*

*4.6 It is also observed that every share applicant in their respective replies to the statutory notices issued u/s. 133(6) of the Act, furnished copies of their income tax acknowledgements evidencing filing of income tax returns by each of them, copies of their audited accounts including Balance Sheets wherein such investments made by each of them in the subscription of share capital issued by the appellant are duly reflected as also copies of their bank statements for the relevant period from which such subscription monies were paid by them respectively and copy of the allotment advise received by them from the appellant in respect of shares allotted to them. The return of allotment as well as the annual return for the assessment year 2012-13 filed by the appellant with the Registrar of Companies, Ministry of Corporate Affairs, further categorically proves the fact of allotment of shares to the share applicants. It is further observed that the net worth of the each of the share applicants, as disclosed in their Balance Sheets, far exceeded the amount of investments made by them in the shares of the appellant company. It is accordingly observed that it adequately prove their creditworthiness to make investment in the share capital of the appellant. The aforesaid facts underlined by evidences clearly prove the identity of the share applicants, their capacity and source of funds, as well as the genuineness of the transactions in relation to the share capital issued by the appellant, which was subscribed to by each of them. Thus, it is proved beyond any doubt or dispute that the share applicants are actually found to have subscribed to the share capital issued by the appellant, in the impugned previous year relevant to the assessment year under appeal, as clearly evident not only from their respective books of accounts, but also from their audited accounts filed with the income tax authorities in relation to their own income tax assessments, and the sources of such funds are also explained by each of the share applicants in their replies addressed to the AO. However, the AO had not brought these indisputable facts on record but acted on his whims and fancies. It is observed that the burden which lay on the appellant in relation to s. 68 of the Act. has been duly discharged by it and nothing further remains to be proved by it on the issue. There is*

*no evidence on record to show that the identities of the share applicants are not proved and/or that the introduction of share capital by them was not genuine and/or the source of investment was not fully explained to the satisfaction of the AO. Since the conditions precedent for discharging of burden under the provisions of s. 68 of the Act are met with adequate evidence, the addition made under such pretext deserves to be deleted*

*4.7 Further the Hon'ble Supreme Court in CIT vs. Lovely Exports Ltd. (2008) 216 CTR 195 (SC) wherein has held as under: -*

*"2. Can the amount of share money be regarded as undisclosed income under section 68 of IT Act, 1961? We find no merit in this Special Leave Petition for the simple reason that if the share application money is received by the assessee company from alleged bogus shareholders. whose names are given to the AO, then the Department is free to proceed to reopen their individual assessments in accordance with law. ..*

*In other words, it is observed that if share application money is received by an assessee from subscribers whose names are given to the AO. are allegedly bogus. Then the Revenue is free to proceed to reopen their individual assessments in accordance with law. The facts of the present are on a better footing to the one as decided above. In the instant case, all the share applicants had confirmed their investment with the appellant and as such, there was no basis for the AO to come to any a verse conclusion and accordingly, the entire amount received by the appellant on account of share application as well as share premium monies cannot be regarded as undisclosed income u/s 68 of Act.*

*4.8. Therefore. considering the totality of the facts and circumstances of the case, I find substance in the argument of the AIR that the appellant has made its case that the identity of the share applicants are established beyond doubt and on enquiries made by the AO there is no adverse finding reached on this aspect. Admittedly, all the share applicants are existing assesseees under the Act which establish the identity and authenticity of the share applicants. About the genuineness of the transactions there is no any adverse finding in the assessment order which is distinct to the facts brought on record by the appellant during the course of assessment proceeding. The creditworthiness of the share applicants as regards their subscription to the share capital is proved by submission of their return, audited annual accounts, their bank statement and replies to notice u/s.*

*133(6) of the Act as depicted hereinabove. The net worth of such subscribers is in excess of the amount invested by each of them as explained hereinabove. The addition made by AO is based on extraneous parameters no germane for deciding the issue. The AO had not dealt with the issue judiciously and consistently with the evidence adduced during the course of the assessment proceedings by the appellant and the replies of the share applicants in respect of the share capital do not warrant the inference that such share application monies received is unaccounted cash credit. Hence, I am inclined to accept the arguments tendered by the A/R of the appellant in this respect, In view of the above, I have no hesitation to hold that the impugned addition made by invoking the provisions of s. 68 by the AO is not justified in the circumstances and accordingly, direct him to delete such addition of Rs 12 78,00,000/- made on this count. Thus, these grounds are allowed.”*

3. We have heard the rival contentions and carefully gone through the facts of the case and the orders of the lower authorities. The Revenue vehemently contends during the course of hearing the Assessing Officer had rightly made the impugned addition as the assessee failed to prove the identity genuineness and creditworthiness of its shareholders/investors/subscribers in issue. He takes us through CIT(A)'s findings deleting the impugned addition and submits that the Assessing Officer could not verify the assessee's investor parties/subscribers during the course of assessment and therefore the CIT(A) ought not to have deleted the impugned addition in absence of such a vital factual verification. The assessee fails to dispute this clinching fact that the Assessing Officer had not enable to verify the investor parties/subscribers for the purpose of genuineness and creditworthiness of the share capital/premium in issue. We notice in this backdrop of the facts this tribunal's decision in ITO V/s Primeline Sales P.Ltd ITA No. 2264/Kol/16 decided on 16-01-2019 has restored the similar issue back to the Assessing Officer on account of lack of verification as follows:

*“2. The assessee is a company and during the previous year it has raised share capital amounting to Rs. 11,01,00,000/-, including share premium of Rs. 9,96,00,000/-. The assessing officer made an addition u/s 68 of the Act. Aggrieved the assessee carried the matter in appeal. The ld. first appellate*

authority deleted the addition made by the Assessing Officer u/s 68 of the Act and granted relief to the assessee. Aggrieved the revenue is in appeal before us. 3. 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. Before us, the ld. D/R, submits that the Assessing Officer was not given adequate opportunity to examine all the details filed on record before the ld. CIT(A) and that new evidence were brought on record. He prayed that the issue may be remanded back to the file of the Assessing Officer for fresh adjudication in light of all the evidences on record.

4.2. The ld. A/R, though not leaving his ground did not raise any objection to the matter being set aside to the file of the Assessing Officer for fresh adjudication.

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.

5. In the case of *Sriram Tie Up Pvt. Ltd.* supra 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 assessees 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 "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. The Kolkata Bench of the ITAT has passed similar order in many cases on the same issue of additions made u/s 68 of the share capital. It has set aside the assessment to the file of the AO for fresh adjudication, on the lines stated in the above order after giving the Assessing Officer an opportunity to examine the evidence already on record as well as other documentary evidences which the assessee has filed at the appellate stage or further may choose to file in support of his case.*

*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. Accordingly the appeal of the revenue is allowed for statistical purposes.”*

4. We adopt the above detailed reasoning *mutatis mutandis* to restore the matter back to the Assessing Officer for fresh adjudication after affording adequate opportunity of hearing to the assessee.

5. This Revenue's appeal is allowed for statistical purpose in above terms.

**Order pronounced in the Court on 10 -05-2019**

Sd/-

[ Dr. Arjun Lal Saini ]  
Accountant Member

Dated :10 -05-2019

Sd/-

[ S.S.Godara ]  
Judicial Member

**\*\*PRADIP, Sr. PS**

Copy of the order forwarded to:

1. Appellant/Department: Income Tax Officer, Ward 10(1), P-7 Chowringhee Sq., 3<sup>rd</sup> Fl., Kolkata-69.
2. Respondent/Assessee: M/s. Smoothly Vintrade Pvt. Ltd. AD-76, Salt Lake City, Sector-I, Kolkata-64.
- 3..C.I.T(A).- 4. C.I.T.- Kolkata.
5. CIT(DR), Kolkata Benches, Kolkata.

True copy

By Order

Assistant Registrar  
H.O./D D.O Kolkata

TAXPUNDIT.ORG