

IN THE INCOME TAX APPELLATE TRIBUNAL “D” BENCH : KOLKATA

[Before Hon’ble Shri S.S.Godara, JM & Hon’ble Shri M.Balaganesh, AM]

I.T.A No. 509/Kol/2018

Assessment Year : 2008-09

M/s Fortune Vincom Pvt. Ltd.  
[PAN: AABCF 1964 A]  
(Appellant)

-vs-

ITO, Ward-5(4), Kolkata  
(Respondent)

For the Appellant : Shri M.D. Shah, AR

For the Respondent : Shri Radhey Shyam, CIT DR

Date of Hearing : 26.12.2018

Date of Pronouncement : 01.01.2019

**ORDER**

**Per M.Balaganesh, AM**

1. This is an appeal of the assessee directed against the order passed by the Learned Commissioner of Income Tax (Appeals) – 6, Kolkata (in short the ld CITA) in Appeal No. 273/CIT(A)-6/Kol/2015-16 dated 28.6.2016 against the order of assessment framed by the Learned Income Tax officer, Ward -6(4), Kolkata (in short the ld AO) u/s 143(3)/263/143(3)/147 of the Act dated 26.3.2014 for the Asst Year 2008-09.

2. The only to be decided in this appeal is as to whether the Id CITA was justified in upholding the addition made u/s 68 of the Act towards share application money in the sum of Rs 7,65,00,000/-, in the facts and circumstances of the case.

3. The brief facts of this issue is that the assessee is deriving income from share dealing and investments as per the assessment order. The return of income for the Asst Year 2008-09 was filed on 28.3.2009 declaring total loss of Rs 283/-, which was duly processed u/s 143(1) of the Act. Later the assessment was reopened by issuance of notice u/s 148 of the Act and re-assessment was completed u/s 147/143(3) of the Act on 30.4.2010 determining total income at Rs 17,720/-. This re-assessment was subjected to revision proceedings u/s 263 of the Act by the Id CIT on the ground that the Id AO had not properly enquired and verified the genuineness and source of share application money / share capital as well as the identity and creditworthiness of the shareholders who had applied for shares of the company. Hence the Id CIT passed the revision order u/s 263 of the Act on 28.3.2013 by setting aside the order passed by the Id AO u/s 147/143(3) of the Act dated 30.4.2010 with certain specific guidelines regarding investigation to be carried out while assessing the assessee de novo. The Id AO in the consequential proceedings giving effect to the order of Id CIT u/s 263 of the Act, had reproduced the relevant portion of the Id CIT's directions. The Id AO observed that the assessee had raised share capital by issuing 382500 shares of Rs 10 each with premium of Rs 190 each and thereby raised a total amount of Rs 7,65,00,000/-. A notice u/s 142(1) of the Act calling for certain details was issued on the assessee asking it to produce and submit certain details and documents at the last known address of the assessee. There was no response from the assessee to this notice. Summons u/s 131 of the Act was issued to the Directors of the shareholder companies. But no compliance was made against such summons. The Id AO accordingly observed that the transactions of share capital are not genuine one in as much as the assessee had failed to produce the persons who were directors

of the assessee during the relevant period, failed to produce the shareholders before the Id AO for verification of share capital investments obtained from them. He also observed that the identity and creditworthiness of the shareholders could not be explained. Accordingly, he brought the receipt of share application money in the total sum of Rs 7,65,00,000/- to tax as unexplained cash credit u/s 68 of the Act.

4. The Id CITA observed that since the source of assessee company's share capital remained unexplained in the light of the failure of the directors to attend personally and explain the business prudence of the investments and their own credentials, the addition on the facts of the case had been rightly made u/s 68 of the Act. Accordingly the Id CITA upheld the action of the Id AO. Aggrieved, the assessee is in appeal before us.

5. We have heard the rival submissions. According to the assessee, the shareholders of the assessee had duly responded to notices issued u/s 133(6) of the Act directly to the Id AO by giving proper replies with regard to details called for by the Id AO in the first round. Therefore, according to assessee, the identity of shareholders stands proved. According to Id AR, the verification of the credentials of the shareholders were directed to be verified by the Id AO on his own and not through the assessee as per the directions of the Id CIT in his order u/s 263 of the Act. The Id AR also relied on the decision of the *Hon'ble Supreme Court in the case of Tin Box Company vs CIT reported in 249 ITR 216 (SC)* wherein it was held that:-

*"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 afore stated."*

6. In response to this, the Id DR vehemently opposed this plea of the assessee and contended that the assessee company was very well aware of the revisional order passed by the Id CIT and should have brought all evidences before the Id AO to substantiate the identity, genuineness and creditworthiness of share subscribers. The Id AO has noted that the assessee did not co-operate with the assessment proceedings and , therefore, the assessee cannot be given another innings. We note that the Id CIT's exercise of revisional jurisdiction u/s 263 of the Act setting aside the 147/143(3) order was passed on 28.3.2013. The Id AO while giving effect to the order of the Id CIT has noted that he had issued summon u/s 131 of the Act to the directors of the shareholder companies , who had not appeared before him , the Id AO thereafter gave assessee another notice as to why the addition should not be made in the hands of the assessee in the facts and circumstances of the case. The Id AO after these enquiries had proceeded to hold that the identity, creditworthiness and genuineness of the shareholder subscriber companies could not be established beyond doubt and, therefore, he made the addition of Rs 7,65,00,000/-. We note that the Id

CIT invoked the revisional jurisdiction u/s 263 of the Act and found that the assessee company in its Balance Sheet has shown to have infused equity share capital of Rs 7,65,00,000/- at a premium of Rs 190/- per share and since the Id AO had not enquired into the source of the share capital and premium infused into the assessee company by verifying the identity, genuineness and creditworthiness of the shareholders, the Id CIT found the AO while doing assessment did not exercise the role of investigator and, therefore, the order of Id AO is erroneous so far as prejudicial to the interest of the revenue and directed the Id AO to make fresh assessment after taking into consideration the pernicious practice of converting black money by the modus operandi as described by the Id CIT. We also noted in the said backdrop, the Id CIT has given certain guidelines which were given in order to facilitate deep investigation into the case and for that, we note that the Id CIT had given the following directions:-

*“i) Examine the genuineness and source of share capital, not on the 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. With the aforesaid directions, the Id CIT set aside the order of the Id AO which was passed u/s 147 / 143(3) of the Act. 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 Subhalakshmi Vanijya Pvt Ltd vs CIT in ITA No.

1104/Kol/2014 dated 30.7.2015, wherein the Tribunal was pleased to uphold the order passed by the Id 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. We note that the shareholders had duly replied during the original re-assessment proceedings confirming the factum of investments before the Id AO . The Id AO chose to issue summons to the directors of the shareholders companies who did not appear before him which lead to Id AO drawing adverse inference against the assessee by resorting to make addition towards share application money u/s 68 of the Act.

7.1. We find that it is not in dispute that the entire transactions of share capital and share premium was the subject matter of verification in the re-assessment proceedings by the Id AO, wherein the shareholders had duly responded to notice u/s 133(6) of the Act by confirming the fact of making investments in the assessee company. The shareholders had also duly furnished their income tax assessment particulars. Pursuant to directions of the Id CIT u/s 263 of the Act, the Id AO was mandated to make direct verifications about the genuineness of the transactions and creditworthiness of the shareholders by making necessary specific enquiries as listed out supra. The Id CIT had specifically directed the Id AO to make enquiries directly from the shareholders and not through the assessee. Hence non-appearance of the assessee or non-submission of details before the Id AO intentionally or unintentionally does not make any relevance here. The Id AO admittedly did not resort to make enquiries in the manner stated by the Id CIT u/s 263 of the Act inspite of the fact that all the necessary details were very much available before him. The Id CIT had directed the Id AO to investigate into multiple layers of the investment in shares made by respective shareholders and identify the ultimate person holding controlling interest including the change in shareholding, directorship etc and then

take the entire matter to its logical conclusion to bring out the facts on record. From the perusal of the assessment order, we find that this has not been done by the Id AO. In this regard, we would like to place reliance on the decision of *Hon'ble Delhi High Court in the case of CIT vs Jansampark Advertising & Marketing Pvt Ltd in ITA No. 525/2014 dated 11.3.2015* wherein after noticing inadequate enquiry by authorities below, the court had 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 follow 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 enquiry' 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.”*

7.2. In view of the aforesaid findings in the facts and circumstances of the case and respectfully following the decision of Hon'ble Delhi High Court supra, we deem it fit and appropriate, in the interest of justice and fair play, to remand the matter back to the file of the Id AO for de novo assessment and to decide the matter as mandated by the Id CIT in section 263 order, after giving sufficient opportunity of being heard to the assessee. Accordingly, the Grounds raised by the assessee are allowed for statistical purposes.

8. The Ground No. 7 raised by the assessee is general in nature and does not require any specific adjudication.

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

**Order pronounced in the Court on**

**01.01.2019**

Sd/-

[S.S. Godara]  
Judicial Member

Sd/-

[ M.Balaganesh ]  
Accountant Member

Dated : 01.01.2019  
SB, Sr. PS

Copy of the order forwarded to:

1. M/s Fortune Vincom Pvt. Ltd., 4, Raja Woodmunt Street, Kolkata-700001.
2. ITO, Ward-5(4), Kolkata, P-7, Chowringhee Square, Kolkata-700069.
- 3..C.I.T.(A)-
4. C.I.T.- Kolkata.
5. CIT(DR), Kolkata Benches, Kolkata.

True copy

By Order

Assistant Registrar  
ITAT, Kolkata Benches