

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

[Before Sri J. Sudhakar Reddy, Accountant Member & Sri S.S. Viswanethra Ravi, Judicial Member]

**I.T.A. No. 1512/Kol/2016**  
Assessment Year: 2012-13

**Income Tax Officer, Ward-11(3), Kolkata.....Appellant**  
**P-7, Chowringhee Square**  
**6<sup>th</sup> Floor**  
**Kolkata - 700 069**

**M/s. Hitesh Distributors Pvt. Ltd.....Respondent**  
**50B, Orphangunj Market Road**  
**Khidderpore**  
**Kolkata - 700 023**  
**[PAN : AACCH 4713 N]**

**Appearances by:**

*Shri Manish Tiwari, FCA, appeared on behalf of the assessee.*

*Shri S. Dasgupta, Addl. CIT, DR appearing on behalf of the Revenue.*

Date of concluding the hearing : May 12<sup>th</sup>, 2018

Date of pronouncing the order : June , 2018

**ORDER**

**Per J. Sudhakar Reddy :-**

This appeal filed by the revenue is directed against the order of the Id. Commissioner of Income Tax (Appeals)-4, (hereinafter the 'Id. CIT(A)'), passed u/s 250 of the Income Tax Act, 1961 (the 'Act'), dt.05/05/2016, for the Assessment Year 2012-13.

2. The assessee is a company and is in the business of wholesale distribution of cement of reputed cement manufacturing companies. He filed its return of income declaring total income of Rs.9,72,750/-. The case was selected for scrutiny assessment u/s 143(3) of the Act as it is was in respect of large share capital and premium of Rs.4,09,10,000/-, during the year. On a query from the Assessing Officer, the assessee furnished a list of 23 shareholders. The company had issued 50 Lac shares and the amount received was Rs.4,09,10,000/-, which included share premium amount. The Assessing Officer in his order records that there was no response to summons issued u/s 131 of the Act to the Directors of the assessee company as well as to the 23 shareholders. On the ground that there was no response, he relied on the judgment of the Hon'ble Jurisdictional High Court in the case of *CIT vs. Precision Finance Pvt. Ltd. [208 ITR 463]*, *CIT v. Nipun Builders & Developers Pvt. Ltd. 30 Taxmann.Com 292 (Delhi) (2013)*, and made an addition u/s. 68 of the Act of the entire amount of Rs.4,09,10,000/-

3. Aggrieved the assessee carried the matter in appeal. The Id. First Appellate Authority observed that out of the aggregate amount of Rs.4,09,10,000/-, an amount of Rs.85,10,000/- was share application money received during the Assessment Year 2012-13 and hence the addition during the impugned Assessment Year, is bad in law. He deleted the same. On the balance amount of Rs.3,24,00,000/- received from 18 shareholders, he deleted the addition by holding that the Assessing Officer made the addition with a pre-determined mindset that the share application money received by the assessee is not genuine and that the transactions were an eyewash to bring its black money to circulation without paying tax to the revenue. He further observed that each of these shareholders were assessed to Income-tax, that the investment in question were duly reflected in their audited books of account and that they have filed income-tax returns and that they have responded to the notice issued to them u/s 133(6) of the Act, before the Assessing Officer during the course of assessment proceedings. He also found that the assessee had produced its books of accounts and filed various details and document as desired by the Assessing Officer and that the Assessing Officer had not considered any of this evidences. He further records that each of the shareholders have filed voluminous evidences before the Assessing Officer in response to the notices and that the Assessing Officer as ignored these details and failed to mention the same in his order. After referring to the case-law on the issue, he deleted the addition.

3.1. Further aggrieved, the revenue is in appeal before us.

4. The Id. D/R, Shri S. Dasgupta, submitted that the assessee has not co-operated before the Assessing Officer. He took this bench through the order of the Assessing Officer and pointed out that neither, the Principal Officer/Managing Director of the assessee company responded to the summons filed by the assessee nor have the 23 shareholders appeared before the Assessing Officer. He pointed out that the summons issued in case of M/s. Matrix Commodore Pvt. Ltd., M/s. City Wings Agencies Pvt. Ltd & M/s. Intimate Vanijya Private Ltd., were returned with the postal remarks "addressee moved". He vehemently contended that due to non co-operation and non furnishing of details before the Assessing Officer, reliance was rightly place by him on the decision in the case of *CIT v. M/s. Nipun Builders Pvt. Ltd. 30 Taxmann.com 292 (Delhi) 2013*, and addition made.

4.1. Coming to the order of the Id. CIT(A), he submitted that the amount of Rs.85,10,000/- was deleted as the amount in question was received by the assessee company during the previous year. He submitted that the allotment of shares were made during the year and hence, thought the amount was received during the earlier Assessment Year, the addition was rightly made during the year. He submitted that the Id.

CIT(A) has wrongly deleted the addition though non appeared to the notice issue u/s 131 of the Act. He prayed that the order of the Id. CIT(A) be restored in the alternative the Assessing Officer for fresh adjudication in accordance with law.

4.2. The Id. Counsel for the assessee contended that the order of the Assessing Officer was perverse and has not recorded the facts. He submitted that the Assessing Officer had issue notice u/s 133(6) of the Act, to all the shareholders and that they have replied to these notices and copies of the notices and the replies were place in the paper book of the assessee. He further submitted that the Assessing Officer had issued two show cause notices to the assessee copies of which were placed at page 23 of the paper book and submitted that replies to the showcause notice and the summons were given, copies of which were placed at page 24 & 26 of the paper book. He pointed out that the Assessing Officer has not mentioned even a word about the fact that he has given notice to all the parties u/s 133(6) of the Act and that he had received detailed replies from them with evidence and that he has given show cause notice to the assessee and the assessee has filed replies to these notices. He drew the attention of the Bench to the paper book filed by it consisting of 149 pages and took the bench through each of the evidences filed, such as confirmation letters, account copies, copies of returns of income filed, copies of annual accounts, copies of bank accounts, letter disclosing the current postal address of the parties etc.

The Id. Counsel for the assessee emphasised that this is not a case of paper companies or shell companies or *Jamakharchi* companies as it is not but a regular, well reputed company having a turnover of more than Rs.28 Crores. In its business of trading and distribution of cement. He pointed out that the turnover of the company has gone up to Rs.27.34 Crores for the year ended 31/03/2012.

He further pointed out that none of the shareholder companies are *jamakharchi* company or paper company and that they have declared business turnovers and incomes and made investments in number of concerns. He pointed out that it is not the case of the Assessing Officer that the shareholder companies are paper companies. Hence he submitted that the line of decisions that are being applied in the case of paper companies or shell companies cannot be applied to genuine companies which are doing genuine business and for raising share capital from genuine sources. He filed a copy of the certificate issued by a Chartered Accountant, justifying share premium charged by the assessee company on the share capital and submitted that no excessive premium has been charged and based on the evidence of the assessee company and its future projects, the share premium charged is very much justified. He further relied upon the judgment of the Hon'ble Bombay High Curt in the case of *CIT v. Gagandeep Infrastructure Pvt. Ltd. reported*

in [2017] 80 Taxmann 272 (Bombay). He relied on the order of the Id. CIT(A) as well as a number of case-law in support of his contentions.

5. Rival contentions heard. On a careful consideration of the fact 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:-

6. This is not a case of a paper company having negligible transactions or companies which were floated with the sole intention of converting unaccounted money without paying tax. This is a case of a company which is a wholesale distributor of cement. The assessee company distributes cements of reputed brand such as ACC, Laffarge, Century Cements, Binani Cements, Jaypee Cements etc. The turnover from this business during the year is more than Rs.27 Crores. We also find that the companies which have applied for and got allotted shares are also not shell companies i.e. companies which exist on paper without any assets or transactions during the year. The Assessing Officer has also not alleged as such. These companies from the details submitted, have significant revenues and assets. The details of which we would be discussing hereinafter. Thus, the requirements of law in examining the addition u/s 68 of the Act, in the case of such companies are different from the legal requirements applied to share capitals raised by paper companies without any transactions or assets.

6.1. With this background, we examine the assessment order. In our view, the Assessing Officer has not brought the facts on record. He has issued notice u/s 133(6) of the Act to all the shareholders and has also issue showcause notice to the assessee. In response, to the notices issued u/s 133(6) of the Act, the shareholders have complied therewith and have filed bank statements, copy of their income tax returns, audited accounts on various dates. The list is as follows:-

<u>Sl.</u>	<u>Name</u>	<u>list of documents attached</u>	<u>Compliances made U/s 133(6)</u>
1	<i>Mooncity Dealcom Pvt. Ltd.</i>	<i>Income Tax Return</i>	<i>On 05.12.2014</i>
2	<i>Appear Commotrade Pvt. Ltd.</i>	<i>Acknowledgement, Audited.</i>	<i>On 09.12.2014</i>
3	<i>Arch Vinimay Pvt. Ltd.</i>	<i>Accounts with Balance Sheet, Bank Statement (relevant part)</i>	<i>On 05.12.2014</i>
4	<i>Crown Vintrade Pvt. Ltd.</i>		<i>Reply filed</i>
5	<i>Dayanidhi Commercial Ltd.</i>		<i>On 08.12.2014</i>
6	<i>Dayanidhi Vyapaar Ltd.</i>		<i>On 09.12.2014</i>
7	<i>Everest Commotrade Pvt. Ltd.</i>		<i>On 05.12.2014</i>
8	<i>Giriraj Commosales Pvt. Ltd.</i>		<i>On 09.12.2014</i>
9	<i>Intime Vanijya Pvt. Ltd.</i>		
10	<i>Involved Suppliers Pvt Ltd</i>		<i>On 05.12.2014</i>

11	Longview Tie Up Pvt. Ltd.		On 08.12.2014
12	Matrix Commotrade Pvt. Ltd.		Reply filed
13	Pace Tradelink Pvt. Ltd.		On 08.12.2014
14	Padmakshi Vyapaar Ltd.		On 09.12.2014
15	Plazma Vanijya Pvt. Ltd.		On 09.12.2014
16	Ratnakar Dealers Pvt. Ltd.		Reply filed
17	Umang Dealmark Pvt. Ltd.		On 08.12.2014
18.	Zigma Tie-up Pvt. Ltd.		Reply filed

6.1.1. In response to the summon u/s 131 of the Act, the assessee replied that all the requirements were complied to the notices u/s 133(6) of the Act and that the shareholders are not in the control of the assessee and hence the Assessing Officer may enforce the attendance by exercise of his powers under the Act. Regarding the companies which had modified their addresses, the current address was given. As far as the summons u/s 131 of the Act was concerned, it was submitted that in compliance to these summons, Mr. Babulal Agarwal appeared before the Assessing Officer. The reply was filed on 26/02/2015. The Assessing Officer issue a show cause letter dt. 16/03/2015 to the assessee. The assessee filed a reply on 24.03.2015, a copy of which is placed at pages 16 to 18 of the paper book. None of these aspects have been mentioned by the Assessing Officer in the assessment order for the reasons best known to him. Despite the assessee filing voluminous evidences, the Assessing Officer in a perverse manner records that there is not co-operation, whatsoever from the assessee. In our view, the Id. CIT(A) has correctly appreciated the facts and evidences brought on record by the assessee. He also corrected the wrong doings of the Assessing Officer in not bringing on record any of the evidences and replies of the assessee during the course of the assessment proceedings. At para 6.3. & 6.4., the Id. CIT(A) held as follows:-

*“6.3. 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 humble 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 applicant 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.*

*6.4 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 acknowledgments 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 AY 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. It is observed that share application money with share premium provided to the appellant company vis-a-vis the Share Capital & Reserves appearing in the Balance Sheet of respective share holders works to negligible percentage as shown below:"

<u>Name of Share holder Companies</u>	<u>Share Capital, Reserves &amp; Surplus</u>	<u>Application Money</u>	<u>Percent age (%)</u>
Monocity Dealcomm Pvt. Ltd.	8,98,67,882	10,00,000	1.11
Appear Commotrade Pvt. Ltd.	5,77,15,944	29,00,000	5.02
Arch Vinimay Pvt. Ltd.	8,77,20,696	25,00,000	2.85
Crown Vintrade Pvt. Ltd.	4,55,58,564	4,50,000	0.99
Dayanidhi Commercial Pvt. Ltd.	10,48,23,691	24,00,000	2.29
Dayanidhi Vyapar Pvt. Ltd.	49,78,86,195	25,00,000	0.50
Everest Commotrade Pvt. Ltd.	6,26,92,809	12,00,000	1.91
Giriraj Commonsales Pvt. Ltd.	6,99,84,928	10,00,000	1.43
Intime Vanijya Pvt. Ltd.	4,82,06,680	8,00,000	1.66
Involved Suppliers Pvt. Ltd.	8,33,63,119	30,00,000	3.60
Longview Tie-up Pvt. Ltd.	5,62,35,738	27,00,000	4.80
Matrix Commodeal Pvt. Ltd.	3,62,80,000	5,00,000	1.38
Pace Tradelink Pvt. Ltd	6,35,54,553	28,00,000	4.41
Padmakshi Vyapar Pvt. Ltd.	10,48,37,304	14,50,000	1.38
Plazma Vanijya Pvt. Ltd.	8,20,02,463	31,50,000	3.84
Ratnakar Dealers Pvt. Ltd.	6,89,13,712	1,00,000	0.15
Umang Dealmark Pvt. Ltd.	9,29,36,921	26,50,000	2.85
Zigma Tie-up Pvt. Ltd.	6,25,00,000	13,00,000	2.08

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. 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."

6.2. The Hon'ble Supreme Court in the case of *CIT v. Lovely Exports Ltd.* 216 CTR 195 SC, held as follows:-

*"Section 68 of the Income-tax Act, 1961 - Cash credit - If share application money is received by assessee-company from alleged bogus shareholders, whose names are given to Assessing Officer, then Department is free to proceed to reopen their individual assessments in accordance with law but this amount of share money cannot be regarded as undisclosed income under section 68 of assessee-company"*

The Hon'ble Delhi High Court in the case of *Commissioner of Income-tax v. Nipun Builders & Developers (P.) Ltd.* [2013] 30 taxmann.com 292 (Delhi) held:

***Section 68 of the Income-tax Act, 1961 - Cash Credit - Share application money - Assessment year 2004-05 - In course of assessment, Assessing Officer noticed that assessee claimed to have received certain amount as share capital from different companies - In order to ascertain genuineness of transactions, Assessing Officer issued summons to subscriber companies which were returned unserved with remarks 'no such company' - Inspector sent to addresses for verification confirmed said fact - Moreover assessee failed to produce principal officers of subscriber companies who could explain sources from which share subscription was made - Whether in aforesaid circumstances, Assessing Officer was justified in adding share subscription money to assessee's taxable income as unexplained deposits - Held, yes [Para 13] [In favour of revenue]***

7. Recently, the Hon'ble Jurisdictional High Court in the case of *Id. Pr. CIT-1, Kolkata vs. M/s. Steel Emporium Ltd.* in GA NO.3275 OF 2016 WITH ITAT NO.354 OF 2016, 14th May, 2018, held as follows:-

*"The third ground is on account of share application money. The assessing officer found that several of the applicants for issuance of further shares in the assessee shared the same 12, Waterloo Street address as the assessee and that one individual had accepted notices under Section 133(6) of the Act, though different rubber stamps were used along with the signature. The Tribunal was satisfied that the identities of the applicants for shares in the assessee had been established. No legal question arises as a result of such finding."*

8. Applying the propositions of law laid down in these case-law, to the facts of this case, and on examination of the papers on record and the evidences filed by the assessee, we find that the share applicants are genuine companies having substantial assets, incomes and activities and are not shell companies or paper companies or *jamakharchi companies* and that they have filed all necessary evidence before the Assessing Officer to that extent and that the assessee has responded to all the notices issued by the Assessing Officer including notices u/s 131 of the Act and the Assessing Officer has not brought on record any evidence to controvert the submissions of the assessee. Under these facts and circumstances,

we find no fault with the order of the Id. First Appellate Authority and uphold the same.

9. In the result, appeal of the revenue is dismissed.

**Kolkata, the**

**day of June, 2018.**

**[S.S. Viswanethra Ravi]**  
Judicial Member

**[J. Sudhakar Reddy]**  
Accountant Member

Dated : .06.2018  
{SC SPS}

*Copy of the order forwarded to:*

**1. Income Tax Officer, Ward-11(3), Kolkata  
P-7, Chowringhee Square  
6<sup>th</sup> Floor  
Kolkata - 700 069**

**2. M/s. Hitesh Distributors Pvt. Ltd  
50B, Orphananj Market Road  
Khidderpore  
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3. CIT(A)-  
4. CIT- ,  
5. CIT(DR), Kolkata Benches, Kolkata.

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By order

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

