

आयकर अपीलीय अधिकरण, कोलकाता पीठ “बी”, कोलकाता
IN THE INCOME TAX APPELLATE TRIBUNAL “B” BENCH: KOLKATA
श्री राजेश कुमार, लेखा सदस्य एवं श्री संजय शर्मा न्यायिक सदस्य के समक्ष
[Before Shri Rajesh Kumar, Accountant Member & Shri Sonjoy Sarma, Judicial Member]

I.T.A. Nos. 551 & 552/Kol/2021
Assessment Year: 2012-13

M/s A.J. Mill Store Agency Pvt. Ltd. (PAN: AABCA 9021 B)	Vs.	ITO, Ward-2(1), Kolkata
Appellant / (अपीलार्थी)		Respondent / (प्रत्यर्थी)

Date of Hearing / सुनवाई की तिथि	10.11.2022
Date of Pronouncement/ आदेश उद्घोषणा की तिथि	28.11.2022
For the Appellant/ निर्धारिती की ओर से	Shri Miraj D Shah, A.R
For the Respondent/ राजस्व की ओर से	Shri Sudipto Guha, CITDR

ORDER / आदेश

Per Rajesh Kumar, AM:

These are the appeals preferred by the assessee against the orders of the Ld. Commissioner of Income Tax (Appeals)-NFAC, Delhi (hereinafter referred to as the Ld. CIT(A)"] even dated 15.11.2021 for the AY 2012-13.

2. First we shall adjudicate in ITA No. 551/Kol/2021 for AY 2012-13.
3. The assessee has challenged the order of Ld. CIT(A) on jurisdictional issue as well as on merit. We would like to adjudicate first the legal issue raised by the assessee in ground no. 6 which is extracted below:

“6. For that the reopening assessment u/s 148 of the I T Act, 1961 was bad in law as in the reason recorded there was no allegation of failure of the assessee to disclose the material for assessment, and hence the reopening be declared to be bad in law and the reassessment order by quashed”.

4. Facts in brief are that the assessment in this case was framed u/s 143(3) vide order dated 26.03.2015 wherein an addition of Rs. 2,57,00,000/- was made on account of share capital and share premium after calling for information/details from the assessee. Thereafter the case of the assessee was reopened u/s 147 of the Act by issuing notice u/s 148 dated 27.03.2019 which was apparently after the period of four years from the end of relevant assessment year and again the assessment was framed u/s 143(3) read with Section 147 vide order dated 16.12.2019 wherein the addition was made to the tune of Rs. 2,73,00,000/- in respect of share capital and share premium. Pertinent to state that the case of the assessee was reopened after the AO received information from the DDIT(Inv)-2(2), Kolkata dated 11.03.2019 that during the FY 2011-12 the assessee company bank account was credited with Rs. 2,73,00,000/- received from various entities which were shell companies.

5. In the appellate proceedings, the assessee challenged the legal issue before the Ld. CIT(A) however the appeal of the assessee was dismissed by the first appellate authority by observing and holding as under:

6. Decision in Appeal:

6.1. The matter has been considered. The assessment order, written submission of the appellant and related judicial rulings on the subject matter has been carefully perused.

6.2 Grounds of appeal 1-9 challenge the legality of the notice issued u/s 148 and the reassessment completed under section 147 of the Act. The appellant has stated that the notice is a defective notice which is issued without any application of mind as the same was issued in a printed format without striking off the irrelevant portions of the said notice and that the reasons recorded by the Assessing Officer does not satisfy the requirements of Section 147 of the Act. The assessment order has been perused and it is seen that the reason for reopening is on the basis of information received from the Investigation wing, Kolkata as per which the appellant has been mentioned by name as being a beneficiary of accommodation entries and in receipt of huge amounts in its bank account. On the basis of this information the AO had reason to believe that income had escaped assessment and was justified in reopening proceedings under section 147. In this regard reliance is placed on the case of Vasudev Fatandas Sawlani Vs Santosh Kumar, 2018-TIOL-2305-HC-AHM-IT, of Gujarat High Court wherein the appellants writ petition was dismissed by the Hon'ble court by holding that when

issuing notice for re-opening assessment, the AO is only required to show reasonable belief that income escaped assessment & is not required to establish the same beyond reasonable doubt. Accordingly these grounds of appeal are dismissed.”

6. We have heard rival submissions and perused the material on record including the impugned appellate order. We find that the original assessment was framed u/s 143(3) vide order dated 26.03.2015 wherein in para 2, the AO noted that the assessee has issued shares at a face value of Rs. 10/- each at a premium of Rs. 490/- & Rs. 1990/- per share. We also observe that the AO also issued summon u/s 131 of the Act on 09.02.2015 directing the director of assessee company to appear on 16.02.2015 with certain details as were noted by the AO in para 3 sub-para 5 of the assessment order. We note that the AO has specifically called for the information/details from the assessee in respect of share holders, who were individuals/corporate entities and to whom the shares were allotted, along with details such as bank statements, share application forms, share allotment advices, share certificates, minutes of the board meetings, share holders KYC details etc. and any other ID proofs. The AO again issued show cause notice dated 17.02.2015 as no one appeared on the first date of hearing, fixing the date of hearing on which the counsel of the assessee appeared before the AO and adjournment was sought on the ground that the concerned director of the assessee company was out of station and accordingly the case was re-fixed on 17.03.2015. On 17.03.2015, Shri Ajay Agarwal, one of the directors of the assessee company appeared and his statement was recorded. The AO noted that Shri Ajay Agarwal is also one of the director of the share holding company M/s Zircon International Pvt. Ltd. and Shri Ajay Agarwal stated before the AO that M/s Zircon International Pvt. Ltd. is a group company under the same management. The AO also noted in the assessment order that the assessee had failed to produce the directors of other companies nonetheless all the necessary documents were filed before the AO as called for in respect of all the investors. Finally the AO noted that due to non compliance of the part of the shareholders the identity and creditworthiness of the shareholders and genuineness of the transactions of issues of share capital could not be verified thereby making an addition of Rs. 2,57,00,000/- to the income of the assessee.

Thus, we note that the issue has been examined by the AO in the original assessment proceedings and an addition of Rs. 2,57,00,000/- was made to the income of the assessee as stated above. Thereafter the case has been reopened after the period of four years from the end of relevant assessment year without there being any whisper in the reasons as to how the income has escaped due to non disclosure of material fact either in the return of income or during the assessment proceedings. In other words, the reopening can only be made by the AO u/s 147 of the Act under first proviso which states that the reopening can only be made after a period of four years if there is a failure on the part of the assessee to materially disclose any information which has resulted into escapement of income either in the return of income or during the assessment proceedings. But in the instant case before us the facts are different as in this case all these issues were examined in the original assessment proceedings by the AO by issuing notice to the assessee along with questionnaire as well as to the investors u/s 133(6) of the Act. We note that both the assessee as well the investors have filed the details/information as called for by the AO and thereafter the AO made an addition of Rs. 2,57,00,000/- to the income of the assessee in respect of share premium and share capital. Therefore the assessee cannot be attributed to have not disclosed any material fact which has led to escapement of income. In our considered view, the AO invalidly reopened the assessment u/s 147 of the Act as there was no valid reason to re-open the assessment u/s 147 of the Act. Accordingly the reassessment proceedings is held to be invalid in law and quashed.

7. Even on merit, the case of the assessee is very strong for the reasons that the amount of share capital and share premium have been added by the AO in the order passed u/s 143(3) of the Act wherein an addition of Rs. 2,57,00,000/- was made whereas in the reassessment proceedings, the addition was made of Rs. 2,73,00,000/- which is more by Rs. 33.00 Lacs. The Ld. CIT(A) partly allowed the appeal of the assessee by deleting the addition to the tune of Rs. 2,57,00,000/- on the ground that addition was already made in the original assessment order whereas the detailed remaining 33 lacs was sustained on the ground that amount shown in the show cause

notice dated 7.12.2019 by the AO was Rs. 2,73,00,000/0- which is more than the amount as per the reply dated 17.03.2015 filed by the assessee wherein the amount received from various six investors was shown at Rs. 2,57,00,000/-. The Ld. CIT(A) dealt with this issue in para 7.2 to 7.5 of the appellate order. For the sake of convenience, we reproduce the table on the basis of which the Ld. CIT(A) drew inference that the difference of Rs. 33,00,000/- was liable to be sustained:

Sl. No.	Name of the party from which fund received	As per show cause notice issued by AO dated 7.12.2019	As per reply dated 17.03.2015 of assessee	Difference in amount of column 3 & 4
1	2	3	4	5
1.	Excel Financial Consultants Pvt. Ltd.	Rs. 60,00,000/-	Rs. 77,00,000/-	
2.	Jagmangal Vanijya Pvt. Ltd.	Rs. 40,00,000/-	Rs. 40,00,000/-	
3.	Amtek Financial Consultants Pvt. Ltd.	Rs. 58,00,000/-	Rs. 55,00,000/-	Rs. 3,00,000/-
4.	ARS Financial Consultants Pvt. Ltd.	Rs. 30,00,000/-	Rs. 30,00,000/-	
5.	ARS Financial Consultants Pvt. Ltd .	Rs. 30,00,000/-		Rs. 30,00,000/-
6.	Zircon Infracon Pvt. Ltd.	Rs. 55,00,000/-	Rs. 55,00,000/-	
Total		Rs. 2,73,00,000/-	Rs. 2,57,00,000/-	Rs. 33,00,000/-

We note that all these parties have responded to the notices u/s 133(6) issued by the AO and confirmed the transactions and as per the information supplied by these parties the total investments in the share capital and share premium were Rs. 2,57,00,000/-

and not to Rs. 2,73,00,000/-. In the case of ARS Financial Consultants Pvt. Ltd. appearing at sr. no. 4 in the table , the said party confirmed to have made the investment of Rs. 30,00,000/- and was received by RTGS in the bank of the assessee. Similarly Amtek Financial Consultants Pvt Ltd. confirmed to have made investment of Rs. 55.00 lacs. We also note that the assessee has issued shares to 5 parties who were allotted equity shares on 31.03.2012 and the said amounts were also paid through bank RTGS and all parties in response to notices issued u/s 133(6) of the Act confirmed the investments. However the Ld. CIT(A) misconstrued the facts in respect of two investors as stated above and wrongly noted the investments at Rs. 58,00,000/- at sr. No. 3 and Rs. 30,00,000/- at sr. no. 4 & 5 were taken two times in the table and this has attributed to the difference of Rs. 33,00,000/-. Therefore we find that the addition partly confirmed by the Ld CIT(A) is without any basis. We have even examined the balance-sheet of both the investors placed in the paper book and found that the investments shown by the parties at sr. 3 was Rs. 55,00,000/- whereas investments at Sr. 4 & 5 was Rs. 30,00,000/- which was taken double the amount by taking the investment amount of Rs. 30,00,000/- two times at sr. 4 and 5. Considering these facts, we hold that even on merit that the addition was wrongly sustained by the Ld. CIT(A) upon wrong appreciation of facts on record. Accordingly the appeal of the assessee is allowed.

ITA No. 552/Kol/2021 for AY 2012-13

8. The common issue raised in various grounds of appeal is against the confirmation of addition of Rs. 2,57,00,000/- by Ld. CIT(A) thereby affirming the order of AO wherein the addition was made on account of unexplained cash credit u/s 68 of the Act.

9. Facts in brief are that during the year, the assessee has allotted equity shares of face value of Rs. 10/- each at premium at Rs. 490/- per share and at 1990 per share. During the course of assessment proceedings, the AO issued notice u/s 131 of the Act dated 9.2.2015 to the directors of the assessee company and asked to appear with

certain details as mentioned in para 3 of the assessment order at page no.1. The director of the assessee company Shri Ajay Agarwal appeared before the AO on 17.03.2015 and his statement was recorded. Mr. Ajay Agarwal stated that M/s Zircon International Pvt. Ltd. is a group company and he is director on that company also. However he failed to produce the directors of the other share holding companies nonetheless the assessee filed before the AO, the details of share capital and share premium as required by the AO comprising with names, addresses, PANs, bank statements, confirmations etc. The AO has also issued notices u/s 133(6) to the investors which were duly responded by the shareholders. The AO treated the share capital and share premium of Rs. 2,57,00,000/- as unexplained cash credit on the ground that the assessee has failed to produce the share subscribers and therefore the identity and creditworthiness of the shareholders and genuineness of the transactions could not be verified.

10. In the appellate proceedings, the Ld. CIT(A) dismissed the appeal of the assessee by observing and holding as under:

“6.3 It is seen the AO has noted that the notices issued u/s 131 to the Directors of the Companies from whom share application money was received, to furnish their statement regarding the genuineness of the transaction, remained un-complied with. Only one of the Directors Shri Ajay Agarwal who is a Director of M/s Zircon International Pvt. Ltd. and Director in the assessee company recorded his statement under oath and confirmed the transaction between the assessee and M/s Zircon International Pvt. Ltd. M/s Zircon International Pvt. Ltd. had paid Rs. 2,72,42,000/- as share capital money and the same has been deducted from the total amount by the AO in the computation of assessed income. For the remaining amounts mere submission of confirmation in response to notice u/s 133(6) has not been accepted by the AO as sufficient proof for creditworthiness of the applicant companies.

6.4 During appellate proceedings also no supporting documents or additional evidence has been submitted to show the genuineness of the transaction. This is all the more noteworthy in view of the fact, that the case of the appellant was reopened in March 2019 on the basis of information received from the Investigation Wing, Kolkata that the assessee company was a beneficiary of accommodation entries provided by the bank account of paper/ shell companies for layering funds. The appellant's submission that the money was paid through bank accounts and was therefore genuine is not borne out by the facts revealed in the investigations by the Department. Accordingly, the addition made by the AO of Rs 2,57,00,000/- u/s 68 of the Act is confirmed. Grounds of appeal 1-4 are dismissed.”

11. After hearing the rival contentions and perusing the material on record, we find that the AO has made addition on the ground that the assessee has failed to produce the directors of the subscribing companies as required in the summons issued u/s 131 dated 9.2.2015 though candidly admitting that the assessee has filed all the necessary details before the AO in respect of increase in share capital and share premium. We even note that the notices issued u/s 133(6) of the Act to the investors were duly responded furnishing all the details and evidences qua the share subscriptions. The AO added the amount merely on the ground that since the subscribers of the shares were not produced personally, the impugned increase in share capital and share premium could not be verified and remained unexplained. The Ld. CIT(A) simply confirmed the order of the AO without giving any reasoned findings. We have perused the facts as placed before us and find that in respect of each share subscribers the assessee has produced ITR, audited accounts, share application form, share allotted letter, bank statement, certificate of incorporation, memorandum of article, reply filed in response to notice u/s 133(6) of the Act and even some cases source of source was also filed. Thus we note that the transactions of increase in shares are adequately explained. We also note that in some cases, even the assessment framed in the case of share subscribers were also filed before the AO. The ground for addition was non-production of share subscribers before the AO without commenting on the evidences filed by the assessee investors/share subscribers u/s 133(6) of the Act. In our considered view, the addition cannot be made merely on the ground that the share subscribers were not produced before the AO when all the evidences qua the said transactions were available on record. The case of the assessee finds support from the decisions which were cited before us and are discussed hereunder:

a) In the case of *M/s Anis Ahmad And Sons vs. CIT(A), Kanpur & Anr* in Civil Appeal No. 582 of 2008 dated 22.01.2008, , the Hon'ble Supreme Court has held as under:

“13. Having considered the respective contentions of the learned counsel for the parties and having gone through the entire material on record, we are of the view that the impugned

judgment and order of the High Court cannot be sustained. The record reveals that for the year 1983-84, the Assessing Authority had accepted the claim of the appellant-assessee dealing in the business of hides and skins as 'a Commission Agent'. The appellant-assessee filed a chart of payments made to the purchasers by the traders through the appellant-assessee acting as a Commission Agent. The five traders, who appeared before the Assessing Authority, have supported the claim of the appellant-assessee to be 'a Commission Agent' and not 'a Trader' and the Assessing Authority has accepted their evidence holding the appellant-assessee as a Commission Agent in respect of the transactions conducted with them by the traders. The appellant-assessee could not be held responsible for non-appearance of those five traders to whom the summons were issued by the Assessing Authority, as they are residing outside the State of U.P. For non-appearance of those traders, no adverse inference ought to have been drawn by the authorities below and the appellant-assessee has led satisfactory evidence that its business is only that of the Commission Agent and not 'a Trader' dealing in the goods. Now, the subject-matter of assessment for the year 1984-85 has been opened by the Revenue after a lapse of about 10-11 years holding the appellant-assessee as 'Trader' in respect of dealers who are now living outside the State of U.P. The appellant-assessee could not be treated unequally between those traders who had appeared before the Assessing Authority and supported the claim of the appellant-assessee and on the contrary drawing adverse inference against the appellant-assessee for non-appearance of other five traders to whom summons of the Assessing Authority could not be served. On this ground itself, the order of the Assessing Authority cannot be found reasonable, tenable and justified. As noticed above, the Assessing Authority for the assessment year 1983-84 had accepted the claim of the appellant-assessee having acted as Commission Agent in respect of the same articles which were brought by the sellers to the Arhatdaars in the Mandi for sale."

b) In the case of H.R. Mehta vs. ACIT, Mumbai in ITA No. 58 of 2001 dated 30.06.2016, the Hon'ble Bombay High Court has held as under:

"11. We have therefore proceeded to hear and decide the matter unassisted by the revenue. In the course of his submissions Mr. Tralshawala had pressed into service inter alia the decision of the Calcutta High Court in Mather and Platt (India) Ltd. (supra) and submitted that merely because a person is not found at an address after several years it cannot be held that he is non-existent and that the assessee had discharged his primary onus by identifying the source of the amount paid. The Court observed that once the primary onus is discharged, the onus shifted to the revenue to verify genuineness of the transaction. In the present case no such effort was made by the revenue. We find that in Hastimal (supra) the Madras High Court observed that after a lapse of several years the assessee should not be placed upon the rack and called upon to explain not only merely, the origin and source of his capital contribution but the origin of origin and the source of source as well. In yet another case of Bahri Brothers (P) Ltd. (supra) the Division Bench of Patna High Court observed that where the assessee upon whom the initial burden lies, produces bank certificate to establish that the transaction was carried out through account payee cheques thus disclosing the identity of the creditors as also the source of income, the burden shifts on to the department and the department cannot add the cash credits to his income from undisclosed source."

c) In the case of PCIT-9, Kolkata vs. Sree Leathers(Sreeleathers) in ITAT/18/2022 (IA No.:GA/02/2022) dated 14.07.2022, the Hon'ble Calcutta High Court has held as under:

5. Further to be noted that where the assessee furnishes full details regarding the creditors, it is up to the department to pursue the matter further to locate those creditors-and-examine their creditworthiness. It has been further held in *Sivan Pillai (AS) Versus CIT (1958) 34 ITR 328 (Mad)* that while drawing the inference, it cannot be assumed in the absence-of any material that there has been some illegalities in the assessee's transaction. Thus, more importantly as held –by the Hon'ble Supreme Court in *CIT Versus Daulat Ram Rawatmull (1973) 87 ITR 349 (SC)*, the onus of proving that the appellant was not the real was on the party who claims it to be so. Bearing the above legal principles in mind, if we examine the case on hand, it is clear that the assessing officer issued show cause notice only in respect of one of the lender M/s. Fast Glow Distributors. The assessee responded to the show cause notice and submitted the reply dated 22.12.2017. The documents annexed to the reply were classified under 3 categories namely: to establish the identity of the lender, to prove the genuineness of the transactions and to establish the creditworthiness of the lender. The assessing officer has brushed aside these documents and in a very casual manner has stated that mere filing PAN details, balance sheet does not absolve the assessee from his responsibility of proving the nature of transaction. There is no discussion by the assessing officer on the correctness of the stand taken by the assessee. Thus, going by the records placed by the assessee, it could be safely held that the assessee has discharged his initial burden and the burden shifts on the assessing officer to enquire further into the matter which he failed to do. In more than one place the assessing officer used the expression "money laundering." We find such usage to be uncalled for as the allegations of money laundering is a very serious allegations and the effect of a case of money laundering under the relevant Act is markedly different. Therefore, the assessing officer should have desisted from using such expression when it was never the case that there was any allegations of money laundering. Paragraph 5.4 and 5.5 of the assessment order are all personal perception and opinion of the assessing officer which needs to be ignored. Much reliance was placed on the statement of Shri Ashish Kumar Agarwal, which statement has been extracted in full in the assessment order and it cannot be disputed that there is no allegation against the assessee company in the said statement. There is no evidence brought on record by the assessing officer to connect the said entry operator with the loan transaction done by the assessee. Therefore, the statement is of little avail and could not have been the basis for making allegations. The assessing officer ignored the settled legal principle and in spite of the assessee having offered the explanation with regard to the loan transaction, no finding has been recorded as regards the satisfaction on the explanation offered by the assessee. Therefore, the assessing officer ignored the basic tenets of law before invoking his power under Section 68 of the Act.

Fortunately, for the assessee, CIT(A) has done an elaborate factual exercise, took into consideration, the creditworthiness of the 13 companies the details of which were furnished by the assessee. More importantly, the CIT noted that all these companies responded to the notices issued under Section 133 (6) of the Act which fact has not been denied by the assessing officer. On going through the records and the net worth of the lender companies, the CIT has recorded the factual findings that the net worth of those companies is in crores of rupees and they have declared income to the tune of Rs. 45,00,000/- and 75,00,000/-. Therefore, the assessing officer if in his opinion found the explanation offered by the assessee to be not satisfactory, he should have recorded so with reasons. We find that there is no discussion on the explanation offered by the assessee qua, one of the lenders. Admittedly, the assessee was not issued any show cause notice in respect of other lenders. However, they are able to produce the details before the CIT(A) who had in our view rightly appreciated the facts and circumstances of the case. As pointed out earlier, the assessing officer brushed aside the explanation offered by the assessee by stating that merely filing PAN details, balance sheet does not absolve the assessee from his responsibilities of proving the nature of transactions. It is not enough for the assessing officer to say so but he should record reasons in writing as to

why the documents which were filed by the assessee along with the reply dated 22.12.2017 does not go to establish the identity of the lender or prove the genuineness of the transaction or establish the creditworthiness of the lender. In the absence of any such finding, we have to hold that the order passed by the assessing officer was utterly perverse and rightly interfered by the CIT(A). The Tribunal re-appreciated the factual position and agreed with the CIT(A). The tribunal apart from taking into consideration, the legal effect of the statement of Ashish Kumar Agarwal also took note of the fact that the notices which were issued by the assessing officer under Section 133 (6) of the Act to the lenders were duly acknowledged and all the lenders confirmed the loan transactions by filing the documents which were placed before the tribunal in the form of a paper book. These materials were available on the file of the assessing officer and there is no discussion on this aspect. Thus, we find that the tribunal rightly dismissed the appeal filed by the revenue.

d) In the case of M/s Diagnostics vs. CIT & Anr in ITA No. 153 of 2004 dated 04.03.2011, the Hon'ble Calcutta High Court has held as under:

“After hearing Mr. Sen, the learned advocate appearing on behalf of the appellant, and Mr. Agarwal, the learned advocate appearing on behalf of the Revenue and after going through the materials on record, we agree with the Tribunal below that so far as the purchases from M/s Soma Enterprises and M/s Imprint's-N-Trade were concerned, the alleged payments being made in cash and the amount involved being Rs. 50,675/- and Rs. 1,00,737/- respectively during the relevant Assessment year and at the same time, the appellate having failed to produce any of the aforesaid parties except the bills alleged to be raised by those two concerns, the Tribunal below was justified in disbelieving those transactions and we do not find any reason to interfere with such finding which is basically a finding of fact based on appreciation of material evidence.

However, as regards the payments made to M/s. Selvas Photographies are concerned amounting to Rs.3,12,302/-, we find that those have been made by account payee cheques and those have been encashed through the bankers of M/s. Selvas Photographies. It appears that according to the appellant, at the time of assessment, the appellant had no business transaction with M/s. Selvas Photographics and consequently, the said party did not co-operate with the Assessing Officer. However, the transaction having taken place through account payee cheques, we are unable to accept the contention of Mr. Agarwal, the learned advocate appearing for the Revenue that the transaction was a nonexistent one. If an assessee took care to purchase materials for his business by way of account payee cheques from a third party and subsequently, three years after the purchase, the said third party does not appear before the Assessing Officer pursuant to the notice or even has stopped business, the claim of the assessee on that account cannot be discarded as non-existent. In the case before us, the Revenue has not put forward any other ground, such as, it was not a genuine transaction for other reasons but has simply rejected the claim on the ground as if there was no such transaction.”

e) In the case of Hon'ble Jurisdictional High Court in case of Crystal Networks (P)Ltd vs CIT reported in 353 ITR 171 (Cal) wherein it has held as under:

“10. We find considerable force of the submissions of the learned counsel for the appellant that the Tribunal has merely noticed that since the summons issued before assessment returned unserved and no one came forward to prove. Therefore, it shall be assumed that the

assessee failed to prove the existence of the creditors or for that matter the creditworthiness. As rightly pointed out by the learned counsel that the Commissioner of Income-tax (Appeals) has taken the trouble of examining of all other materials and documents, viz., confirmatory statements, invoices, challans and vouchers showing supply of bidis as against the advance. Therefore, the attendance of the witnesses pursuant to the summons issued, in our view, is not important. The important is to prove as to whether the said cash credit was received as against the future sale of the product of the assessee or not. When it was found by the Commissioner of Income-tax (Appeals) on facts having examined the documents that the advance given by the creditors have been established the Tribunal should not have ignored this fact finding. Indeed the Tribunal did not really touch the aforesaid fact finding of the Commissioner of Income-tax (Appeals) as rightly pointed out by the learned counsel. The Supreme Court has already stated as to what should be the duty of the learned Tribunal to decide in this situation. In the said judgment noted by us at page 464, the Supreme Court has observed as follows :

"The Income-tax Appellate Tribunal performs a judicial function under the Indian Income-tax Act; it is invested with authority to determine finally all questions of fact. The Tribunal must, in deciding an appeal, consider with due care all the material facts and record its finding on all the contentions raised by the assessee and the Commissioner, in the light of the evidence and the relevant law."

After perusing the ratio laid down in all the above decisions , we are of the considered view that addition cannot be made on the ground that the investors were not personally produced or did not comply with the summons, when the evidences qua the transactions were filed before the AO. Therefore, considering the facts of the case in the light of the aforesaid decisions, we are inclined to set aside the order of Ld. CIT(A) and direct the AO to delete the addition.

12. In the result, both the appeals of the assessee are allowed.

Order is pronounced in the open court on 28th November, 2022

Sd/-
(Sonjoy Sarma /संजय शर्मा)
Judicial Member/न्यायिक सदस्य

Sd/-
(Rajesh Kumar/राजेश कुमार)
Accountant Member/लेखा सदस्य

Dated: 28th November, 2022

SB, Sr. PS

Copy of the order forwarded to:

1. Appellant- M/s A.J. Mill Store Agency Pvt. Ltd., 5th Floor, Room No. 25, 13, Ganesh Chandra Avenue, Kolkata-700013
2. Respondent – ITO, Ward-2(1), Kolkata
3. Ld. CIT(A)-NFAC-Delhi
4. Pr. CIT- , Kolkata
5. DR, Kolkata Benches, Kolkata (sent through e-mail)

True Copy

By Order

Assistant Registrar
ITAT, Kolkata Benches, Kolkata