IN THE INCOME TAX APPELLATE TRIBUNAL "B" BENCH, KOLKATA
[Before Shri Rajpal Yadav, Vice President (KZ)& Shri Rajesh Kumar, Accountant Member]

I.T.A. No. 270/Kol/2022
Assessment Year: 2014-15

Super Iron Foundry, 7, Rabindra Sarani, 3rd Floor, Kolkata-700 001. (PAN: AAMFS3073P)	Vs.	Assistant Commissioner of Income-tax, Circle-36, Kolkata.
Appellant		Respondent

Date of Hearing	01.11.2022
Date of Pronouncement	11.01.2023
For the Appellant	Shri Miraj D. Shah, AR
For the Respondent	Shri P. P. Barman, Addl. CIT

ORDER

Per Shri Rajesh Kumar, AM

This is an appeal preferred by the assessee against the order of Ld. CIT(A), National Faceless Appeal Centre (NFAC),Delhi dated 16.03.2022 for AY 2014-15.

2. There are only two effective issues raised by the assessee in the various grounds of appeal. The first issue raised by the assessee is against the confirmation of addition of Rs.4,76,50,000/- by Ld. CIT(A) as made by the AO on account of unsecured loan raised from M/s. Fairplan Vincom Pvt. Ltd. u/s. 68 of the Act and the second issue raised by the assessee is against the confirmation of addition of Rs.21,87,350/- by Ld. CIT(A) as made by AO on account of interest on above unsecured loan.

3, The facts in brief are that return of income was filed on 28.11.2014 showing total income of Rs.20,45,832/-. The case of the assessee was selected for scrutiny under CASS and statutory notices were duly issued and served upon the assessee. During the assessment proceeding, the AO observed that assessee had taken unsecured loan from M/s. Fairplan Vincom

Pvt. Ltd. to the tune of Rs.5,23,50,000/- and accordingly, the assessee was called upon to file the necessary evidences/information proving the identity, creditworthiness of the loan creditor and genuineness of the transaction, which were duly filed before the AO. The AO also in order to independently verify the transaction issued notice u/s. 133(6) of the Act to the above lender but the notice was returned unserved. Thereafter, the assessee again provided the correct address and the AO issued summon u/s. 131 of the Act to the said investor through notice server but the same could not be served again. The assessee finally produced the director of the investment company before the AO and his statement was recorded on 13.12.2016 u/s. 131 of the Act. In the said statement, the director of the investor company admitted that he arranged an accommodation entry of Rs.5,23,50,000/- in the form of unsecured loan to M/s. Super Iron foundry for the assessee and charged commission @ 2.5%. Accordingly, the assessee was given a show cause vide letter dated 14.12.2016 by the AO as to why the said unsecured loan should not be added u/s. 68 of the Act as unexplained cash credit along with interest of Rs.21,87,350/- which was replied by the assessee vide letter dated 20.12.2016. Finally, the AO rejected the contentions of the assessee and added Rs.5,23,50,000/- u/s. 68 of the Act along with interest expenses of Rs.21,27,350/- to the income of the assessee in the assessment framed u/s. 143(3) of the Act vide order dated 27.12.2016.

4. In the appellate proceeding the Ld. CIT(A) partly allowed the appeal of the assessee after taking into consideration the contentions of the assessee by observing and holding as under:

> *"It is fruitful and not out of place to mention here that:-*
>
> *1.ln this case appellant Firm or its director or its Ld. A/R did not co-operate with the Ld. AO inthe assessment proceedings to arrive at the 'TRUTH'*
>
> *2. In this case one Shri Ishwar Dayal Sharma, director of the claimedlender company during FY 2013-14 relevant for AY 2014-15 i.e. AY under consideration in this appeal and who was produced during assessment proceedings by none other than the Ld. AIR himself on behalf of theappellant firm in assessment*

3. In this case appellant firm was asked to produce the director of the claimed lender company viz. Fairplan Vincom Pvt. Ltd. as the onus to prove identity, creditworthiness and genuineness of transaction was lying on it. A/R of appellant couldn't produce Mr. Ishwar Dayal Sharma. (who was director of company during F.Y. 2013-14). His statement was recorded on 13.12.2016 under oath u/s 131 of the Act when he was produced by the Ld. AIR (of the appellant firm) himself during assessment proceedings.

4. In this case regarding the plea of appellant that Mr. Abhishek Saklecha and Akhilesh Saklecha were directors of Fairplan Vincom Pvt. Ltd., it is true that they are present directors of the company but assessee's plea is misplaced because Mr. Ishwar Dayal Sharma was one of the directors of company during financial year 2013-14. Even he was signing all the papers on behalf of company during that time. The same is evident from his statement. (refer answer to question 6,7 and 9). Also, A/R of assessee himself has produced Mr. Ishwar Dayal Sharma, when he was asked to produce the director of company.

5. ln this case Cross Examination: the Ld. AO has stated categorically in page no. 4 of the impugned Assessment Order dated 27.12.2016 that Appellant firm was also provided a certified copy of statement of Mr. Ishwar Dayal Sharma. It was also provided for an opportunity of cross-examination. But, the director of the Fairplan Vincom Pvt. Ltd. didn't turn up. He was given some more time but since director of Fairplan Vincom Pvt. Ltd. didn't turned (sic turn) up, the cross examination couldn't take place. Therefore, in the premises, for the reasons aforesaid, there has been in the facts and circumstances of the case, no infraction of any principle of natural justice by the absence of a formal opportunity of oral cross-examination.

5.1.5 Further, the appellant mentioned in para 5 of his Written Submission that he had returned Rs. 47,00,000 out of Rs. 5,23,50,000 and in para 31 of the same, the appellant mentioned that the claimed lender M/s. Fairplan Vincom Pvt. Ltd. had issued cheques/RTGS totalling Rs. 5,23,50,000 of which cheques worth Rs.47,00,000 were not cleared. Thus, the appellant had received loan of Rs.4,76,50,000 (5,23,50,000 minus 47,00,000). The lender had made the payment by account payee cheque/RTGS in the Federal Bank account no. 11030200067316 during the year. In light of above facts & circumstances and in law, the addition of Rs. 47,00,000 out of 5,23,50,000 is not sustainable and therefore, AO is directed to restrict the impugned addition to Rs. 4,76,50,000 after verification of cheques which were not cleared during the year under consideration. Therefore, ground no. 2 of appeal is partly allowed."

5. The Ld. AR vehemently submitted before the Bench that the order passed by the first appellate authority is wrong and against the principle of natural justice. The Ld. AR submitted that the assessee has filed all the details/information before the AO as well as before the Ld. CIT(A) evidencing the receipt of money from the loan creditor. The Ld. AR submitted that assessee has filed name, PAN no., bank statement, confirmation from the loan creditor including copy of ITR and NBFC certificate, loan agreement, loan confirmation of repayments as the loan was fully repaid till 30.09.2019, audited accounts, bank statements, source of source, TDS certificate and assessment order in the case of lender. The Ld. AR submitted that both the authorities below had not pointed any defects or infirmities in the evidences filed by the assessee with regard to the said unsecured loan. The Ld. AR submitted that the AO has recorded the statement of the director of the lender

company Shri Ishwar Dayal Sharma on 13.12.2016 which was recorded at the back of the assessee and despite being requested specifically for cross examination, the same was not granted to the assessee by the AO by citing the reason that the said person did not appear and the cross examination could not happen. The Ld. AR also submitted that the said statement given before the AO on 13.12.2016 had been retracted by Shri Ishwar Dayal Sharma and a copy of retraction is filed at page 110 to 112 of the paper book by way of affidavit. The Ld. AR specifically referred to certain paras of the affidavit and emphasized that Shri Ishwar Dayal Sharma has leveled serious allegation against the department by stating that when he appeared before the DCIT, Circle-36, the Ld. DCIT asked him not to leave his office. Thereafter, the Inspector attached to the DCIT took some details from Mr. Sharma and he was asked to wait outside. After 3to 4 hours, he was called again and asked to sign in a statement which was already kept ready and Ld. AR also referred to retracted statement wherein the lender stated that the loan given to assessee Shri Sharma is genuine loan and no cash was given by the assessee in lieu of the said loan. The Ld. AR finally argued that the addition made by the AO on the basis of the statement which has been retracted by Mr. Sharma and which too was recorded at the back of the assessee is against the principle of natural justice and therefore additions made on the basis of said statement have to be deleted. The ld. AR submitted that even in the assessment framed in the case of lender u/s. 143(3) of the Act the said transaction of loan has been accepted by the AO and a copy of which is placed at page 62 to 63 of the paper book. The Ld. AR relied on a series of decisions to defend his arguments as under:

i) Andaman Timber Industries Vs. CIT 2015(10)TMI 442 SC)

ii)CIT(Exemption) Vs. Mitra Parishad ITAT/91/2018 dated 12.09.2022 (Cal.)

iii)Pr. Commissioner of Income Tax Vs. M/s. Sreeleathers ITAT/18/2022 (IA No.GA/02/2022) dated 14.07.2022(Cal)

iii)CIT(E) Vs. Sanskriti Sagar, ITAT/46/2018 (GA No. 631 of 2018 dated 26.04.2022 (Cal).

iv)Pr. CIT Vs. M/s. Samapran Synthetics Pvt. Ltd. D.B IITA No.137/2018 dated 10.08.2018 (Raj.H.C.)

v)M/s. Lalbaba Seamless Tubes Pvt. Ltd. Vs. DCIT, ITA No. 2641/Kol/2019 dated 21.10.2022 (ITAT, Kol) .

vi)DCIT Vs. M/s. Diamond Bottling Plant Company ITA No. 894/Kol/2019 dated 31.12.2019 (ITAT, Kol).

6. The Ld. AR submitted that in all the aforesaid decisions it has been clearly laid that no addition can be made on the basis of statement which is retracted by the lender/investor and also no addition can be made where no cross examination was allowed to the assese. Finally the ld. AR prayed that the addition as sustained by the ld CIT(A) may kindly be deleted by allowing the appeal of the assessee.

7. The Ld. DR on the other hand, relied on the orders of the authorities below.

8. We have heard rival submissions and gone through the material available on record. It is undisputed that assessee has raised unsecured loan of Rs. 5,23,50,000/- from Fairplan Vincom Pvt Ltd. on which interest has been paid after deduction of tax at source. We note that the assessee has filed various evidences/details in support of the said loan raised from M/s. Fair Plan Vincom Pvt. Ltd. (supra) comprising of ITR Acknowledgment, NBFC Certificate, Loan Agreement, Loan confirmation evidencing the taking of loan , loan confirmation of loan repayment , audited accounts, bank statement, source of source, TDS certificate , bank statement and assessment order for AY 2014-15 of the lender. The ld CIT(A) partly allowed the appeal of the assesse to the tune of Rs. 47,00,000/- on account of uncleared cheques by the lender so the addition sustained by the ld CIT(A) was to the tune of Rs. 4,76,50,000/-. As is apparent from the facts before us that the loan taken by the assessee was also repaid. We note that even the assessment has been framed in the case of the lender and no addition was made on account of money lent to the assessee. In this background ,the most important issue before us for adjudication is whether the addition made on the basis of a statement which is recorded at the back of the assessee and which is also subsequently retracted is correct or not. We observe from the AO that Shri Sharma, the director of M/s. Fair Plan Vincom Pvt. Ltd. has admitted in the statement recorded u/s 131 of the Act that he has arranged accommodation entries on various dates to the assessee and charged commission in lieu of arranging accommodation entries for the assessee on

commission basis. We further note that the said statement was retracted by Mr. Sharma vide affidavit dated 17.02.2017 wherein he has stated that during the course of his attendance before the DCIT, Circle-36, Kolkata his Chartered Accountant was asked to leave the office and he was asked to wait outside his chamber. He further stated that after 3/4 hours of waiting he was called and asked to sign in a statement which was already kept ready. We also note that Mr Sharma retracted the statement by stating that the loan given to assessee was a genuine loan and no cash was ever given by the assessee in lieu of the said loan. Thereafter, in para 9 of the affidavit, he stated in reply to question nos. 30 and 31 that loan was in fact given by M/s. Fair Plan Vincom Pvt. Ltd. to M/s. Super Iron Foundry. Considering these facts, we are of the considered view that the addition made on the basis of said statement cannot be sustained. Further, we note that assessee was not allowed cross examination of Shri Sharma despite specific request from the assessee and the AO stated that on the date fixed for cross examination the said person did not turn up and the said cross examination could not happen but this in our opinion is not the excuse for not allowing the cross examination. Therefore, the addition made on the basis of statement of a person which was retracted subsequently without allowing cross examination is bad in law. We note that the assessee has furnished all the evidences before the authorities below but no defect or deficiencies pointed out except the statement of lender which was also withdrawn and retracted as stated above. The case of the assessee finds support from several decisions as discussed below:

a)i) In the case of Andaman Timber Industries Vs. CIT (Supra) the Hon'ble Apex Court has been held as under:

> *"7. As mentioned above, the appellant had contested the truthfulness of the statements of these two witnesses and wanted to discredit their testimony for which purpose it wanted to avail the opportunity of cross-examination. That apart, the Adjudicating Authority simply relied upon the price-list as maintained at the depot to determine the price for the purpose of levy of excise duty. Whether the goods were, in fact, sold to the said dealers/witnesses at the price which is mentioned in the price-list itself could be the subject matter of cross-examination. Therefore, it was not for the Adjudicating Authority to presuppose as to what could be the subject matter of the cross-examination and make the remarks as mentioned above. We may also point out that on an earlier occasion when the matter came before this Court in Civil Appeal No. 2216 of 2000, order dated 17.03.2005 was passed remitting the case back to the Tribunal with the directions to decide the appeal on merits giving its reasons for accepting or rejecting the submissions.*

8. In view the above, we are of the opinion that if the testimony of these two witnesses is discredited, there was no material with the Department on the basis of which it could justify its action, as the statement of the aforesaid two witnesses was the only basis of issuing the Show-Cause Notice."

ii) In the case of CIT(Exemption) Vs. Mitra Parishad (supra) the coordinate bench kolkata has been held as under:

"We have heard Mr. Vipul Kundalia, learned senior counsel assisted by Mr. Anurag Roy, learned advocate for the appellant/revenue and Mr. Bhaskar Sengupta, learned advocate for the respondent/assessee.

The short issued involved in this appeal is whether the Commissioner (Exemption) (CIT(E) was justified in cancelling the registration granted in favour of the respondent society that too with retrospective effect. The learned tribunal has allowed the appeal filed by the respondent taking note of the fact that the opportunity to cross-examine the persons who were in charge of the company which had extended a donation of Rs. 50 lacs to the assessee was fatal. That apart, on facts the tribunal found that the amount of Rs.50 lacs was being utilised for purchase of property and, therefore, even though the receipt of donation has to be treated as unexplained receipt of the assessee as per Section 68, the addition cannot be made because the assessee itself has applied the entire receipt for the objects of the assessee society. Further, the learned tribunal after taking note of the various decisions of the High Court, on facts, found that the assessee has shown the donation as corpus fund and had applied the same by advance money to the land and building which was shown in the balance-sheet as at 31.3.2011 which was placed before the learned tribunal in the form of a paper book. The learned tribunal also found that the application of the said fund was admittedly for a charitable purpose in tune with the objects of the assessee society. Furthermore, the tribunal noted that the revenue did not dispute the fact that the donations received by the respondent were not applied for charitable purposes. Thus, on the grounds mentioned in the order the tribunal came to the conclusion that the activities of the assessee society cannot be terminated to be ingenuine or it cannot be held that the their activities are not in accordance with the objects of the assessee trust.

Mr. Kundalia, learned counsel for the appellant/revenue placed reliance on the decision of the Hon'ble Supreme Court in the case of Commissioner of Income Tax (Exemptions) Kolkata Vs. Batanagar Education and Research Trust, reported in (2021) 9 SCC 439. On going through the said decision we find that the same is factually distinguishable as in the said case the Hon' ble Supreme Court brought out the answers which were culled out from the managing trustee of the said trust. A questionnaire had been given by the department. In the case on hand the tribunal has noted that in spite of specific request made by the assessee for cross-examination of two persons, namely, Sri Swapan Ranjan Dasgupta and Sri Kishen Bhawshingka which was rejected on the ground that the assessee society has indulged in ingenuine activities. In fact, substantial part of the order passed by the learned tribunal has been devoted on the correctness of denial to afford an opportunity to cross-examine those two persons.

Thus, we find that the tribunal has considered the factual position and granted relief to the assessee. Thus, the appeal (ITAT/91/2019) is dismissed and the substantial questions are answered against the revenue."

iii) In the case of Pr. Commissioner of Income Tax Vs. M/s. Sreeleathers, the coordinate bench has been held as under:

"3. We have heard Mr. Vipul Kundalia, learned Senior Standing Counsel along with Mr. Anurag Roy, learned Advocate for the appellant ITAT 18 OF 2022 and Mr. Avratosh Mazumder, learned

Senior Advocate assisted by Mr. Avra Mazumder and Mr. Md. Bilwal Hossain, learned Advocates for the respondents.

4. Before we examine the correctness of the order passed by the Tribunal and consider whether a substantial question of law arises for consideration in this appeal we need to take note of Section 68 of the Act. This provision deals with cash credits. It states that 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. The crucial words in the said provision are "assessee offers no explanation". This would mean where the assessee offers no proper, reasonable and acceptable explanation as regard the amount credited in the books maintained by the assessee. No doubt the Income Tax Act places the burden of proof on the tax payer. However, this is only the initial burden. In cases where the assessee offers an explanation to the credit by placing evidence regarding the identity of the investor or lender along with their conformations, it has been held that the assessee has discharged the initial burden and, therefore, the burden shifts on the Assessing Officer to examine the source of the credit so as to be justified in referring to Section 68 of the Act. After the Assessing Officer puts the assessee on notice and the assessee submits the ITAT 18 OF 2022 explanation with regard to the cash credit, the Assessing Officer should consider the same objectively before he takes a decision to accept or reject it. In Srilekha Banerjee & Ors. Versus CIT 4, it was held that if the explanation given by the assessee shows that the receipt is not of income nature, the department cannot convert good proof into no proof or otherwise unreasonably reject it. On the other hand, if the explanation is unconvincing, the same can be rejected and an inference shows that the amount represents undisclosed income either from a disclosed or an undisclosed source [CIT Versus Mohanakala (P) 5]. The explanation given by the assessee cannot be rejected arbitrarily or capriciously, without sufficient ground on suspicion or on imaginary or irrelevant grounds (Lal Mohan Krishna Lal Paul Versus CIT 6 and Anil Kumar Singh Versus CIT 7).

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 8 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 9, the onus of proving (1963) 49 ITR 112 (2007) 291 ITR 278 (SC) (1944) 12 ITR 441 (Cal) (1972 84 ITR 307 (Cal) (1958) 34 ITR 328 (Mad) (1973) 87 ITR 349 (SC) ITAT 18 OF 2022 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 ITAT 18 OF 2022 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 ITAT 18 OF 2022 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 where 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.

6. For all the above reasons, we find that no question of law much less, substantial question of law arises for consideration in this appeal.

7. Accordingly, the appeal fails and is dismissed. No costs."

iii) In the case of CIT(E) Vs. Sanskriti Sagar, the coordinate bench has been held as under:

"2. We have heard Mr. Vipul Kundalia, Learned Senior Standing Counsel for the appellant assisted by Mr. Anurag Roy, Learned Advocate and Mr. Ashim Chowdhury and Mr. Soham Sen, Learned Advocates for the respondent.

3. The respondent assessee is a society registered under Section 12A of the Act, such registration having been granted on 20.02.1989. Survey ITAT NO. 46 OF 2018 operation under Section 133A of the Act was conducted on M/s. Herbicure Health Care Bio-Herbal Research Foundation (Herbicure) and during the course of survey, it came to light that Herbicure was engaged in money laundering and providing accommodation entries to different individuals and organizations, by way of accepting

donations and returning the same to the donors through web of financial transactions after retaining the commission and by accepting money by cash or through web of financial transaction and giving donations after retaining the commission. A sworn statement was recorded from the founder Director of Herbicure. By relying upon the said sworn statement and certain answers given by the Director of Herbicure, the Commissioner of Income Tax, (Exemptions), Kolkata [CIT(E)] was of the opinion that from the records in the financial year 2010-2011, the assessee received donations amounting to Rs. 85,000/- from Herbicure, which led to issuance of show cause notice dated 02.12.2015 calling upon the assessee to show cause as to why the registration granted under Section 12A should not be withdrawn/cancelled under Section 12AA(3) of the Act for alleged fake activities and indulging in money laundering. The respondent assessee by reply dated 21.12.2015 stated that the donations of Rs. 85,000/- from Herbicure was received by cheque, it was credited to their bank account and it was applied for the objects of the trust. Further it was stated that the activities of the trust and application of income to the charities are genuine and they are in accordance with the objects of the trust. The assessee emphatically denied the allegations that they have made payment in cash to Herbicure. After receipt of the reply, the CIT(E) by order dated 06.01.2017 cancelled the registration granted to the assessee under ITAT NO. 46 OF 2018 Section 12A of the Act. Aggrieved by such order, the assessee preferred appeal before the Tribunal, contending that the cancellation of the registration by order dated 06.01.2017 with retrospective effect from 01.04.2010 is bad in law; the reasons given by the CIT(E) for cancellation of the registration are contrary to law and on facts. Further it was contended that the registration was cancelled without examining the genuineness of the activities of the assessee and without any evidence whatsoever, the CIT erred in holding that the activities of the assessee are not being carried out in accordance with the objects of the assessee. Further it was contended that the CIT(E) erred in cancelling the registration even though the genuineness of the donations was confirmed by herbicure subsequently. Further it was contended that the CIT(E) cancelled the registration without affording an opportunity to the assessee to cross examine the Director of Herbicure and therefore the order is in violation of the principles of natural justice. Further, the CIT(E) failed to record any satisfaction with regard to the conditions prescribed in Section 12AA (3) of the Act and therefore exceeded its jurisdiction. Further the CIT ignored the fact that there is no iota of evidence that the activities of the assessees are not genuine and the cancellation of the registration based upon a non-verified statement of the third party is illegal. Retrospective cancellation of the registration with effect from 01.04.2010 is not provided under the provisions of the Act. The tribunal considered the contentions raised by the assessee, examined the entire facts, took note of the statement recorded from the Director of Herbicure, kept in mind the parameters to be fulfilled under Section 12AA (3) of the Act and found that the donations received by the assessee from ITAT NO. 46 OF 2018 Herbicure for a sum of Rs. 85,000/- was duly accounted for in the profit and loss account as Corpus Donation and there was no evidence on record to show that cash was paid by the assessee which in turn reached the hands of the Herbicure which was returned in the form of donation to the assessee after retaining the commission. The tribunal also analysed the answers given by the Director of Herbicure to various questions which were posed to him when the statement was recorded from him and found that there is absolutely no evidence to show any connection between the brokers and the assessee and there was nothing to indicate that the assessee indulged in money laundering. The assessee placed reliance on the decision of the Kolkata Tribunal in Shri Mayapur Dham Pilgrim and Visitors Trust, Nadia Versus Commissioner of Income Tax (Exemption), Kolkata in ITA No. 1165/Kol/2016 dated 03.05.2017. The tribunal after taking note of the decisions observed that the facts in the case of Shri Mayapur Dham Pilgrim and Visitors Trust was also identical but observed that the facts of the assessee's case stand on a much better footing than the case of the assessee in Shri Mayapur. Further the tribunal held that there is neither any allegation in the order passed by the CIT nor any findings that any of the conditions as stipulated under Section 12AA (3) of the Act were attracted and consequently the cancellation of the registration was held to be bad in law and accordingly quashed. Aggrieved by such order, the revenue is before us by way of this appeal.

4. The Learned Senior Standing Counsel for the appellant would vehemently contend that the tribunal committed an error in quashing the order passed by the CIT(E) which was taking note of the fact money ITAT NO. 46 OF 2018 laundering was being carried out by the assessee trust with

Herbicure and this fact was not properly taken note of by the tribunal. Further the tribunal ignored the findings rendered by the CIT that the activities of the assessee are not genuine. It is further submitted that the case has to be viewed in its entirety and the nexus has been established which will go to show that the assessee was indeed engaged in money laundering and the order of the Commissioner cancelling the registration was fully justified. The Learned Senior Standing Counsel placed reliance on the decision of the Hon'ble Supreme Court in Commissioner of Income Tax (Exemptions), Kolkata Versus Batanagar Education and Research Trust 1. We have heard the Learned Advocates appearing for the respondents on the above submissions.

5. In order to invoke the power under Section 12 AA (3) of the Act a statutory duty has been cast upon the CIT(E) to examine as to whether the activities of the Trust or Institution are not genuine or are not being carried out in accordance with the objects of the Trust or Institution. Thus, we are required to see as to whether any finding of fact has been recorded by the CIT(E) on these two aspects which are primordial for the exercise of power under Section 12AA(3) of the Act. As noted above, the show-cause notice proposing cancellation was solely based upon a statement recorded from the Director of Herbicure. The CIT(E) in its order has quoted the various questions posed to the said Director and the answers given by him. Thereafter, the CIT(E) proceeds to state that the assessee has received Rs. 85,000/- as donation from Herbicure and Herbicure was involved in money laundering and therefore, the assessee was directed to show cause as to (2021) 9 SCC 439 ITAT NO. 46 OF 2018 why their registration should not be cancelled as they were also engaged in money laundering. The assessee submitted his reply denying the allegations and stating as to how the donation was received by cheque and was credited in the bank account of the assessee and the donation was applied for the objects of the assessee. Further, the assessee categorically stated that their activities are in accordance with the objects of the Trust and are genuine. In spite of such reply having been given by the assessee, we find that the CIT(E) has not considered the reply, nor brought on record anything to show that the activities of the assessee are not genuine or the activities are not being carried out in accordance with the objects of the Trust. In fact, the order passed by the CIT(E) narrates certain facts about Herbicure, extracts Section 12AA(3) of the Act and holds that the activities of the assessee are not genuine and are not being carried out in accordance with the objects of the society and, therefore, the registration has been cancelled. Mere use of the words and sentences as contained in Section 12AA(3) of the Act, would not be sufficient. The CIT(E) has to record a finding on fact as to how the activities of the assessee are not genuine and how the activities of the assessee are not being carried out in accordance with the objects of the Trust. In the absence of any such factual conclusion, we find that the Tribunal was right in setting aside the order of cancellation. In fact, the Tribunal after elaborately going through the facts, taking note of the answers given by the Director of Herbicure to the various questions posed to him found that there is nothing on record to indicate that the assessee was in contact with the brokers, nor there was any evidence brought on record to show that the assessee was engaged in money laundering as it may be a ITAT NO. 46 OF 2018 case of the department that Herbicure was indulging in money laundering. That by itself would not be sufficient to hold that the assessee was also indulging in money laundering in the absence of any evidence to connect the assessee with the money laundering activities of Herbicure. Thus, after examining the facts, the Tribunal found that there is no evidence to show that the two conditions required to be fulfilled under Section 12AA(3) of the Act, stand attracted warranting cancellation of the registration. Thus, in the absence of any incriminating material to connect the assessee with the money laundering activities of the third party, there was absolutely no justification for cancellation of the registration granted in favour of the assessee that too with retrospective effect. The decision in Batanagar Educational Research Trust is clearly distinguishable on facts as in the said case the Hon'ble Supreme Court took note of the answers given to various questions posed to the managing trustee of the Batanagar Trust. It was held that the Trust therein misused the status enjoyed by them by virtue of registration under Section 12AA(3) of the Act. Further, there was material to indicate that the assessee therein received donation by way of cheques out of which certain money was brought back or returned to the donors in cash and on facts it was established by the revenue that they were all bogus donations. As pointed out above, there is no iota of evidence brought on record by the CIT(E) to connect the assessee with the money laundering activities of Herbicure. Furthermore, there is no specific reference to the assessee in the

answers given by the Director of Herbicure to the various questions posed to him during the course of the survey operations. Precisely, for such reason the Tribunal has recorded that there ITAT NO. 46 OF 2018 is no evidence to conclude that the assessee was also engaged in money laundering activities. A bare perusal of the order passed By the CIT(E) dated 06.01.2017 will clearly show that the cancellation is solely based upon the money laundering activities of Herbicure. The CIT(E) did not consider the explanation offered by the assessee as to how the donation was received by cheque and it was credited to the bank account of the assessee and the donation was applied to the objects of the assessee in Trust, were recorded any factual finding on the submissions made by the assessee. Thus, the order passed by the CIT(E) was wholly unsustainable. If the CIT(E) proposed to rely upon the statement of a third party to form an opinion that the assessee is also involved in money laundering activities, the basic principle of natural justice would require that the entire documents based on which the CIT(E) formed such prima facie opinion, should have been made available to the assessee and if third party statement is to be relied on then the third party should have been made available for a cross-examination by the assessee. In fact, a specific ground was canvassed by the assessee by contending that no opportunity of cross-examination was allowed to them and therefore, the order was in violation of the principle of natural justice. The contention advanced by the assessee was perfectly right and justified and the Tribunal after taking note of the entire facts has found that there is no iota of evidence against the assessee to justify the allegation of money laundering. Therefore, in our considered view, the Tribunal rightly set aside the order of the CIT(E) and allowed the appeal filed by the assessee. We find no ground to interfere with the said order. Accordingly, the appeal is ITAT NO. 46 OF 2018 dismissed and the substantial questions of law are answered against the revenue."

iv) In the case of Pr. CIT Vs. M/s. Samapran Synthetics Pvt. Ltd. (supra) , the Hon'ble Rajasthan High Court has been held as under:

"After hearing the learned counsel for the appellant and going through the various orders passed by the authorities concerned, we find that AO had made additions merely on the statement of Shri Praveen Kumar and Shri Uttam Singh Hinger, whereas, they have already retracted from the statement by way of specific affidavits filed by them. On the other hand, no other evidence was produced by the appellant herein to show that cash was paid by the Company to Shri Praveen Kumar Jain or any other person for accommodating the entries.

In these circumstances, we find that the assessee succeeded in proving its identity and bonafide of the shares and the transactions. Thus, it being a pure question of fact, we find no reason to interfere in the impugned order.

Dismissed accordingly."

v) In the case of M/s. Lalbaba Seamless Tubes Pvt. Ltd. Vs. DCIT (Supra) the coordinate bench has been held as under:

"7. After hearing the rival contentions and perusing the material on record, we find that the assessee has raised share capital from seven investors by issuing equity shares at premium the details whereof are given at page 2 in para 3 of assessment order . We note that during the course of assessment proceedings the AO called for various details/documents from the assessee in respect of investments and the investors which were duly supplied to the AO. Besides the AO issued notice u/s 133(6) to these companies calling for certain information/evidences which were duly furnished by all the investors and are available on record. We note that AO has not issued summons u/s 131 of the Act to the directors of the investor companies however made an addition on the basis that directors were not brought or produced by the assessee. We note that the assessee has furnished all the evidences during the assessment proceedings which are available at page 1 to 631 of PB-2

which comprised of ITR's, audited financial statements, bank statements, source of investments etc. We also note that these investors were too selected for scrutiny assessments and assessment were framed u/s 143(3) of the Act and no addition was made in the hands of the investors except M/s Clubside Dealcom Pvt. Ltd. in which the entire amount of money raised to the tune of Rs. 36.53 Cr was added to the income, out of which the said company had invested in the share capital of the assessee. Therefore ,we find merit in the contentions of the Ld. A.R that once the addition made in the hands of subscribing company, no further addition could be made as this amounts to double addition of the same amount. The case of the assessee finds support to the decision of Kolkata bench in the case of ITO Vs Happy Structure ITA No. 1977/Kol/2016 A.Y. 2012-13 order dated 22.05.2019 which referred and relied on the another decision of coordinate bench in the case of DCIT Vs M/S Maa Amba Towers ITA No. 1381/Kol/2015 A.Y. 2012-12 order dated 10.10.2018. Similar ratio has been laid down by the coordinate bench recently in the case of Steelex India (P) Ltd Vs ITO ITA No. 2666/Kol/2019 A.Y. 2012-13 order dated 09.09.2022.

8. We note that share subscribers have also filed sworn affidavits confirming the said investments and source of investments copies whereof have been filed at page 109 to 113. We further note that all the companies are active and have invested the money out of their own resources as is apparent from the details filed by the assessee as comprised in from page 58 to 67 of PB. It is also undisputed that a survey was conducted on Shri K.M. Naita who controlled the M/s Clubside Dealcom Pvt. Ltd. and during survey it was revealed that the said company was providing accommodation entries. However the said fact was never brought to the notice of the assessee during the assessment proceedings of the assessee. We also note that Mr. Sushil Kumar Naita has given a sworn affidavit a copy of which is filed at page 110 of PBstating that no accommodation entry was ever provided to the assessee. We note that said affidavit was available before both the authorities below but has remained uncontroverted. Mr. K.M. Naita was neither examined by the AO nor any cross-examination was afforded to the assessee. It is settled legal position that the statement given during survey cannot be used to make addition in the hands of the assessee unless the assessee was allowed to cross-examine the person who gave statement which was used against the assessee to make the addition. The case of the assessee finds support from the decision of Hon'ble Supreme Court in the case of Kishinchand Chellaram (supra) and Hon'ble Allahabad High Court in the case of CCE vs. Shyam Traders (supra). We note that the assessee has proved the source and source of source of all these investors even though the same is not required to be proved in the instant assessment year as the amendment is applicable prospectively as has been held by the Hon'ble Bombay High Court in the case of Gangadeep Infrastructure (supra).

9. Finally we note that both the authorities have reached and based their conclusions to make addition on the fact that the directors of the subscribing companies were not produced before the AO which in no way could not be the basis for making addition as the assessee has filed all the necessary documents before the authorities below proving the identities , creditworthiness of the investors and genuineness of the transactions. The case of the assessee is squarely covered by the decisions of Hon'ble Calcutta High Court in the case of Crystal Networks Pvt. Ltd. vs. CIT(Supra) wherein it has held that where all the evidences were filed by the assesse proving the identity and creditworthiness of the loan transactions , the fact that summon issued were returned un-served or no body complied with them is of little significance to prove the genuineness of the transactions and identity and creditworthiness of the creditors. The relevant portion of the decision is extracted below:

"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 creditworthiness. As rightly pointed out by the learned counsel that the Ld. CIT(A) has taken the trouble of examining of all other materials and documents viz., confirmatory statements, invoices, challans and vouchers showing supply of bidi 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 note. When it was found by the Ld. CIT(A) on fact having examined the documents that the advance given by the creditors have been established the Tribunal should not have ignored this fact findings. Indeed the Tribunal did not really touch the aforesaid fact finding of the Ld. CIT(A) 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 463, the Supreme Court has observed as follows:

"The Income-Tax Appellate Tribunals 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 records its findings on all the contentions raised by the assessee and the Commissioner, in the light of the evidence and the relevant law."

The Tribunal must, in deciding an appeal, consider with due care all the material facts and record its findings on all contentions raised by the assessee and the Commissioner, in the light of the evidence and the relevant law. It is also ruled in the said judgment at page 465 that if the Tribunal does not discharge the duty in the manner as above then it shall be assumed the judgment of the Tribunal suffers from manifest infirmity.

Taking inspiration from the Supreme Court observation we are constrained to hold in this matter that the Tribunal has not adjudicated upon the case of the assessee in the light of the evidence as found by the Ld. CIT(A). We also found no single word has been spared to up set the fact finding of the Ld. CIT(A) that there are materials to show the cash credit was received from various persons and supply as against cash credit also made.

Hence, the judgment and order of the Tribunal is not sustainable. Accordingly, the same is set aside. We restore the judgment and order of the Ld. CIT(A). The appeal is allowed."

The case of is also covered by the decision of the coordinate bench by ITO Vs M/s Cygnus Developers India Pvt. Ltd. (supra) the operative part whereof is extracted below:

"8. We have heard the submissions of the learned D.R, who relied on the order of AO. The learned counsel for the assessee relied on the order of Ld. CIT(A) and further drew our attention to the decision of Hon'ble Allahabad High Court in the case of CIT vs. Raj Kumar Agarwal vide ITA No. 179/2008 dated 17.11.2009 wherein the Hon'ble Allahabad High Court took a view that non-production of the director of a Public Limited Company which is regularly assessed to Income tax having PAN, on the ground that the identity of the investor is not proved cannot be sustained. Attention was also to the similar ruling of the ITAT Kolkata bench in the case of ITO vs. Devinder Singh Shant in ITA No. 208/Kol/2009 vide order dated 17.04.2009.

9. We have considered the rival submissions. We are of the view that order of Ld. CIT(A) does not call for any interference. It may be seen from the grounds of appeal raised by the revenue that the revenue disputed only the proof of identity of share holder. In this regard it is seen that for AY 2004-05 Shree Shyam Trexim Pvt. Ltd. was assessed by ITO, Ward-9(4), Kolkata and the order of assessment u/s 143(3) dated 25.01.2006 is placed in the paper book. Similarly Navalco Commodities Pvt. Ltd. was assessed to tax u/s 143(3) for AY 2005-06 by ITO, Ward-9(4), Kolkata by order dated 20.03.2007. Similarly Jewellock Trexim Pvt. Ltd. was assessed to tax for AY 2005-06 by the very same ITO, Ward-9(3), Kolkata assessing the assessee. In the light of the above factual position which is not disputed by the revenue, it cannot be said that the identity of the share applicants remained not proved by the assessee. The decision of the Hon'ble Allahabad High Court as well as ITAT, Kolkata Bench on which reliance was placed by the learned counsel for the assessee also supports the view that for non-production of directors of the investor company for examination by the AO it cannot be held that the identity of a limited company has not been

> *established. For the reasons given above we uphold the order of Ld. CIT(A) and dismiss the appeal of the revenue."*
>
> In the instant case before us also, the assesse has furnished all the evidences proving identity and creditworthiness of the investors and genuineness of the transactions but neither AO nor ld CIT(A) commented on these evidences filed by the assessee. Considering these facts in the light of ratio laid down in the decisions as discussed above, we set aside the order of Ld. CIT(A) and direct the AO to delete the addition."

Considering the facts and ratio laid down in the decisions as discussed above, we are inclined to set aside the order of ld. CIT(A) and direct the AO to delete the addition.

9. In the result, the appeal of assessee allowed.

Order is pronounced in the open court on 11th January, 2023.

Sd/-	Sd/-
(Rajpal Yadav) Vice President	(Rajesh Kumar) Accountant Member

Dated: 11th January, 2023

JD, Sr. PS

Copy of the order forwarded to:

1. Appellant–
2. Respondent .
3. CIT(A), NFAC, Delhi.
4. CIT, . ,
5. DR, ITAT, Kolkata,

True Copy By Order

Assistant Registrar
ITAT, Kolkata Bench, Kolkata