

**IN THE INCOME TAX APPELLATE TRIBUNAL KOLKATA BENCH 'B', KOLKATA**  
[Before Dr. Manish Borad, Accountant Member & Shri Sonjoy Sarma, Judicial Member]

**I.T.A. No. 588/Kol/2020**  
**Assessment Year : 2012-13**

ITO, Ward-13(1), Kolkata	Vs.	M/s. Gitika Commodities Pvt. Ltd. [PAN: AABCG 0378 B]
Appellant		Respondent

Date of Hearing	24.11.2022
Date of Pronouncement	16.01.2023
For the Assessee	Shri Anil Kochar, Advocate
For the Revenue	Shri P.P. Barman, Addl. CIT

**ORDER**

**Per Sonjoy Sarma, JM:**

The present appeal has been preferred by the revenue against the order of Ld. CIT(A)-5, Kolkata (hereinafter referred to as the "ld. CIT(A)" dated 16.09.2020 for A.Y. 2012-13. The revenue has raised the following grounds of appeal:

*"i. Whether on the facts and circumstances of the case, ld. CIT(A) has erred in deleting the addition of Rs. 2,10,00,000/- made by the AO u/s 68 on account of unexplained cash credit for non fulfilling the conditions thereof.*

*ii. Whether on the facts and circumstances of the case, ld. CIT(A) has erred in restricting the estimated expenses to 10% inspite of non compliance of the assessee throughout the assessment proceedings.*

*iii. That the department craves leave to add, alter, amend, modify, abrogate, substitute, delete and/or rescind all or any of the grounds of appeal on or before the final hearing."*

2. Brief facts of the case are that assessee filed its return of income on 10.09.2012 declaring total income of Rs. 33,180/- for the assessment year 2012-13. The assessee company raised share capital for an amount of Rs. 2,10,00,000/- through issuance of shares of face value of Rs. 10/- at a premium of Rs. 90/-. The case of the assessee was selected for scrutiny through Cass. Accordingly, notices u/s 143(2) of the Act was duly served upon the assessee. Later on 04.06.2014, notice u/s 142(1) of the Act was also issued upon the assessee. In response to such notices, the AR of the

assessee had filed requisitioned documents viz. – ROC- Form No. 2, ROC – Form No. 18, bank statement for F.Y. 2011-12, copy of the audited accounts and copy of the ITR – V. However, during the assessment proceeding, the assessee company has failed to explain the amount of Rs. 2,10,00,000/- in its books of account in the form of share capital and share premium and similarly notice u/s 131 of the Act was issued upon the Director of the company and it was not complied with as alleged in the assessment order by the ld. AO. During the pendency of the instant proceeding, I.T. Departmental restructuring of 2014, cases as per jurisdiction and due to this process case of the assessee was transferred to ITO, Ward-13(2), Kolkata. Simultaneously fresh notice u/s 142(1) was issued for service upon the assessee but deputed inspector in this regard inform that there was no such company at the given address and even director of the company could not be traced. Therefore, the inspector affixure the notices at the conspicuous place of the entrance of the building at the given address of the assessee company. After this process, the ld. AO made an addition of Rs. 2,10,00,000/- in the hands of the assessee on the ground that the genuineness and creditworthiness of the investor could not be verified and treat the entire share capital including the share premium amount totaling to Rs. 2,10,00,000/- unexplained cash credit in the hands of assessee vide order dated 27.03.2015 which was framed u/s 144 of the Act.

3. Dissatisfied with the above order, assessee preferred an appeal before the ld. CIT(A) wherein the ld. CIT(A) allowed the appeal of the assessee in respect of instant issue by setting aside the addition made by the ld. AO in respect of share capital & share premium totaling to Rs. 2,10,00,000/- by giving comprehensive findings while deciding the appeal of the assessee, the ld. CIT(A) giving detailed findings from 5.1 to 5.6 at page no. 23. to 25 in the appellate order. While doing so, the ld. CIT(A) has given reasons to the effect that the assessee has filed all the relevant documents/financed qua raising the share capital and share premium entire details of PAN, bank statement, audited financial statement and IT return filing acknowledgement of the subscribers were furnished by the applicant. Since the

subscribers were body corporate registered with ROC and assessed to income tax for the last several years and during the course of the assessment proceedings, the subscribers confirmed the transactions and had filed relevant details/documents and explained the source of fund. Thus the assessee discharged the onus cast upon the assessee to prove the identity & creditworthiness of the subscribers of the equity shares and genuineness of the transaction. The Id. CIT(A) in his order also noted that during the course of assessment proceedings, the subscribers of the shares filed all the details, documents and financed in respect of subscriber of shares and nothing adverse could be found therein. However, the addition of share capital raised during the year of Rs. 2,10,00,000/- was made by the AO merely based on surmises and conjectures. While passing the order by the Id. CIT(A) also gave details findings in para 4.6 and discuss in respect of each of share subscribers and their identity and as well as creditworthiness of such subscriber and also genuineness of the transaction as the share application money was paid and received through banking channel. Besides that those transactions were duly accounted for in the books of shareholders. Finally, the Id. CIT(A) after relying on various decisions rendered by the assessee deleted the addition on the ground that the Id. AO miserably failed to prove that subscribers of the equity shares did not have the creditworthiness or the transactions were not genuine. Besides that the addition to other evidences, the appellant during the course of assessment proceedings had submitted a letter from the subscribers in respect of confirming the investment made in appellant company. The Id. CIT(A) while allowing the appeal of the assessee he had viewed that the confirmation letter prima facie are to be considered correct unless evidences were brought on record to falsify the claim made therein and thus the Id. CIT(A) allowed the appeal of the assessee by directing the AO to delete the addition made by the Id. AO in respect of instant issue.

4. We after hearing the rival contention and perusing the material available on record, we noticed that the assessee has raised share capital of Rs. 2,10,00,000/- by issuing equity shares of face value of Rs. 10/- at a premium of 90/- per shares. We observe that during the assessment proceedings, the assessee has furnished all the

details in support of share capital and share premium raised by the assessee. Besides that in response to notice u/s 133(6), the shareholders confirmed the transactions and also filed relevant details/documents in support of such investment made in assessee company. We note that the assessee has filed names, address & PAN of the investors, copies of share allotment advice, copies of share application forms, bank statements, statement giving complete details of share application money received during the year, copy of form no. 2 evidencing return of allotment and copy of form 5 for increase in authorized capital. We also note that the AO has issued notice u/s 133(6) to all the investors for carrying out independent verification of these transactions which are duly responded by these investors by filing all the requisite details comprising shares subscribed, ledger accounts, bank statements, explanation for source of funds, ITRs and audited financial statements and also assessment order framed u/s 143(3) in all the cases. The copy of which are placed before us at page no. 1 to 226 in the paper book. We also note that the AO has issued summon u/s 131 to the directors of the assessee company to produce managing directors of the share subscribing companies which were not complied with and this is the sole reason for making the addition in the hands of the assessee. The AO has not pointed out any defect or deficiency in the evidences filed by the assessee as well as by the investors. The Ld. CIT(A) has allowed the appeal of the assessee after taking into account all the above facts and has given a detailed findings of fact that AO has not pointed out any defect in the evidences by the assessee as well as by the share subscribers and mainly harped on the non-production of managing directors of the share subscriber companies to make the addition. The Ld. CIT(A) has noted that the assessee has discharged its onus by filing all the details and evidences which were the part of the record and therefore the addition made by the AO was wrong and ordered to be deleted. In view of these facts, we do not find any infirmity in the order of Ld. CIT(A) as the assessee has discharged its onus by filing all the details in the assessment proceedings. Moreover, the assessment framed u/s 143(3)/147/144 of the Act in all the cases of investor were also furnished before both the authorities below and copies of assessment order were also enclosed in the PB as stated hereinabove. Considering these facts, we do not find any infirmity in the

order of Ld. CIT(A) which is otherwise a very reasoned and speaking order passed after discussing various factual details about each and every subscribers in para 4.4 to 4.14, such their source of investments, creditworthiness etc. In our opinion, non-production of directors of the investors cannot be a ground for making addition in the hands of assessee u/s 68 of the Act when the other evidences relating to the raising share capital and also qua the share subscribers are available on record as furnished by the assessee and also the cross-verification done by the AO on the basis of notices issued u/s 133(6) as discussed above. 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 assessee 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, the assessee has furnished all the evidences proving identity and creditworthiness of the investors and genuineness of the transactions but AO has not commented on these evidences filed by the assessee. The AO simply harped on the non production of managing directors of the share subscribing companies to make the addition which is not correct. The ld CIT(A) has passed a very reasoned and speaking order discussing all facts and satisfaction of all the ingredients of section 68 of the Act while allowing the relief as stated above. Under these facts and circumstances and considering underlying facts in the light of ratio laid down in the decisions as discussed above, we are inclined to uphold the order of Ld. CIT(A) by dismissing ground no. 1 of the revenue.

5. In respect of another issue regarding disallowance of expenditure to the tune of 20% by the AO and while deciding the appeal of the assessee, the ld. CIT(A) restricted such expenditure to the tune of 10% is bad in law as stated by the ld. DR. The ld. DR placing reliance on the assessment order, argued that the ld. AO has rightly disallowed the expenditure to the tune of 20% debited in the profit & loss account of the assessee company on account of employee benefit expenses and other expenses. While deciding the appeal of the assessee, the ld. CIT(A) has erred in restricting the estimated the

expenses to 10% inspite of non-compliance of the assessee throughout the assessment proceeding. Therefore, disallowance made by the ld. AO is not faulty and hence disallowance made by the AO must be sustained. On the other hand, ld. AR placing reliance on the order passed by the ld. CIT(A). He further contended that the ld. AO may disallowed 20% on account of employee benefit expenses and other expenses without any basis and without any valid reason. Moreover, the accounts of the company were well audited by the qualified chartered accountant, therefore, the ld. CIT(A) restricted the disallowance on account of expenditure to the tune of 10% (Rs. 2,29,972/-) need not required to be interfered any more by this Tribunal.

6. We after hearing the rival submission on this issue and examining the order passed by the authorities below. We have noticed that the assessee company has submitted its copy of audited profit & loss account before the ld. AO and the ld. AO without giving any reason disallowed the expenditure to the tune of 20% on account of employee benefit expenses and other expenses. Therefore, such disallowance made on estimated basis without any cogent reason for the same shall be unlawful and prejudicial to the interest of assessee and while considering this aspect, the ld. CIT(A) has rightly decided the issue by disallowing the expenditure to the tune of 10% (Rs. 2,29,972/-) in the hands of assessee. As such we do not find any infirmity in the order passed by the ld. CIT(A), therefore, we sustained the order passed by the ld. CIT(A). However, grounds raised by the revenue on this issue are also rejected.

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

Order is pronounced in the open court on 16.01.2023

Sd/-

Sd/-

(Manish Borad)  
Accountant Member

(Sonjoy Sarma)  
Judicial Member

Dated:16.01.2023

*Biswajit, Sr. PS*

Copy of the order forwarded to:

1. Appellant- ITO, Ward-13(1), Kolkata.
2. Respondent – M/s. Gitika Commodities Pvt. Ltd., 104/1, Ground Floor, Foreshore Road, Ramkrishnapur-711102.
3. Ld. CIT
4. Ld. CIT(A)
5. Ld. DR

True Copy

By Order

Assistant Registrar  
ITAT, Kolkata Benches, Kolkata