

**आयकर अपीलिय अधिकरण, कोलकाता पीठ “सी”, कोलकाता**  
**IN THE INCOME TAX APPELLATE TRIBUNAL “C” 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. No. 2501/Kol/2019**  
**Assessment Year: 2012-13**

|   |     |                           |
|---|-----|---------------------------|
| M/s Lucky Agencies Pvt. Ltd.<br>(PAN: AABCL 3770 G) | Vs. | ITO, Ward-1(4), Kolkata   |
| Appellant / (अपीलार्थी)                             |     | Respondent / (प्रत्यर्थी) |

|  |                             |
|--|-----------------------------|
| Date of Hearing / सुनवाई की तिथि             | 01.02.2023                  |
| Date of Pronouncement/ आदेश उद्घोषणा की तिथि | 23.02.2023                  |
| For the Appellant/ निर्धारिती की ओर से       | Shri Abhishek Bansal, A.R   |
| For the Respondent/ राजस्व की ओर से          | Shri Vijay Kumar, Addl. CIT |

**ORDER / आदेश**

**Per Rajesh Kumar, AM:**

This is the appeal preferred by the assessee against the order of the Ld. Commissioner of Income Tax (Appeals)-17, Kolkata (hereinafter referred to as the Ld. CIT(A)”) dated 31.01.2019 for the AY 2012-13.

2. The only effective issue raised by the assessee is against the confirmation of addition of Rs. 3,30,00,000/- by Ld. CIT(A) thereby upholding the order of AO wherein the said addition was made on account of share capital and share premium being unexplained cash credit.

3. Facts in brief are that the assessee filed return of income showing loss of Rs. 1,13,875/-. The case of the assessee was selected for scrutiny and statutory notices were duly issued and served on the assessee. In reply to said notices the assessee company produced the books of account, audited annual accounts and other relevant information as called for which were examined and verified by the AO during the course of the assessment proceedings. The AO observed that during the year the assessee has raised 3,30,00,000/- by way of share capital and share premium. Accordingly AO issued notice to the assessee to furnish the details/evidences qua the said share subscribers. The AO also issued summons u/s 131 of the Act to the directors of the assessee company as well as the directors of the share subscribing companies. The assessee filed all the details as called for by the AO comprising names & addresses along with PANs of share subscribers, Form 20 and Form 2 filed with the ROC, copies of bank statement, ITR and annual report of the assessee besides filing the evidences in respect of share subscribers. The assessee also filed PAN nos., bank statements, board resolutions, copies of incorporation certificate, annual audited accounts, confirmations, share allotment confirmation certificates etc., in respect of all the share subscribers. However the directors of the assessee company did not appear before the AO nor did the share subscribers. Finally the AO added this amount to the income of the assessee u/s 68 of the Act as unexplained cash credit on the ground that identity, creditworthiness of the investors, source of funds of the share subscribers and genuineness of the transactions could not be verified as due to non-compliance of summon u/s 131 in the assessment framed u/s 143(3) of the Act dated 23.03.2015.

4. In the appellate proceedings, the Ld. CIT(A) simply dismissed the appeal of the assessee on the ground that there was non-compliance of the summons on the part of the assessee.

5. The Ld. A.R vehemently submitted before us that the compliance of notice before the Ld. CIT(A) could not be made due to the notice being sent on the wrong address. The Ld. Counsel of the assessee pointed out that the notice was supposed to

be sent on the address mentioned in the memorandum of appeal i.e. 12, Mysore Colony, Chembur, Mumbai-400074 whereas notices were sent at 6, Khairu Place, 2<sup>nd</sup> Floor, Kolkata-700071 and thus compliance could not be made. The Ld. A.R. submitted that the assessee has made full compliance before the AO by filing all the evidences including proof of identity and creditworthiness of the investors/subscribers and genuineness of the transactions. The Ld. A.R referred to the statement showing returned income, net worth of the share applicants and submitted that the investment ranging from 0.64% to 7.82% were made of the total net worth of the assessee company. The Ld. A.R submitted that the investor companies had sufficient resources to invest in the assessee share capital/share premium. The Ld. A.R argued that during the course of assessment proceedings, the assessee has filed names and addresses, copies of audited annual accounts, bank statements, share allotment advice, confirmation of investments etc. However the AO has not pointed out any defects and deficiency in the evidences/ details furnished by the assessee and simply made the addition on the ground that neither assessee nor the share subscribers have complied with the summons issued u/s 131 of the Act. The Ld. A.R submitted that the addition made on the basis of just non-compliance of the summon when all the evidences were filed is not justified and is against the ratio laid down in various decisions. In defense of his arguments the Ld. A.R relied on the decision of Co-ordinate Bench of Kolkata in the case of M/s Starland Vinimay Pvt. Ltd. vs. ITO, in ITA No. 574/Kol/2020 dated 24.01.2023, decision of Hon'ble Calcutta High Court in the case of Crystal Networks Pvt. Ltd. vs. CIT 353 ITR 171 (Cal ) and the decision of the coordinate bench by ITO Vs M/s Cygnus Developers India Pvt. Ltd. (ITA No. 282/Kol/2012). The Ld. A.R. also referred to various other decisions to support his arguments that no addition can be made u/s 68 of the Act where identity and creditworthiness of the investors and genuineness of the transactions are established. In defense of his arguments the Ld. Counsel for the assessee relied on the following decisions:

- i) PCIT vs. Ami Industries (India) Pvt. Ltd. in ITA 1231 of 2017 (Bom-HC)
- ii) CIT vs. Gangadeep Infrastructure Pvt. Ltd. in ITA 1613 of 2014 (Bom-HC)

- iii) CIT vs. Orchid Industries Pvt. Ltd. in 397 ITR 136 (Bom-HC)
- iv) Pr. CIT vs. Apeak Infotech in 397 ITR 148 (Bom-HC)
- v) Pr. CIT vs. Laxman Industrial Resources Ltd. in 397 ITR 106 (Del-HC)
- vi) CIT vs. Expo Globe India Ltd. in 361 ITR 147 (Del-HC)
- vii) CIT vs. Lovely Exports Ltd., in 216 ITR 195 (SC)
- viii) CIT vs. Steller Investment Ltd. in 251 ITR 263 (SC)

The Ld. A.R therefore prayed that the appeal of the assessee may kindly be allowed as the assessee has discharged its onus whereas the authorities below has failed to carry on the necessary investigation and enquiry and simply relied on the non-compliance of summons u/s 131 of the Act.

6. The Ld. D.R on the other hand relied heavily on the order of authorities below by submitting that nobody appeared in response to the summons issued u/s 131 of the Act and therefore the identity and creditworthiness of the investors and genuineness of the transactions could not be verified. The Ld. D.R therefore prayed that the authorities below may kindly be given one more opportunity to examine and verify the evidences or the appeal of the assessee may kindly be dismissed.

7. After hearing the rival contentions and perusing the material on record, the undisputed facts are that the assessee filed various evidences/records before the AO as called for during the assessment proceedings. The evidences comprised of share application forms, board resolutions passed by the subscriber companies, bank statements of the subscribers, PAN nos, incorporation certificates, audited annual accounts, loan confirmations, share allotment certificates etc. We note that the assessee has also filed annual report of the assessee, Form 20 and form 2 filed with ROC, bank statement etc. The only reason given by the AO for making the addition is the non-compliance to summons u/s 131 of the Act to the directors of the assessee

company as well as of the subscribers however no defects or deficiency was point out in the evidences/details filed before the AO. We also note that the investors/subscribing companies were having sufficient net worth and resources to invest in the equity capital of the assessee. Considering these facts and circumstances , we are of the view that the assessee has discharged its onus by filing all the necessary evidences and addition was made on the ground that neither assessee nor the subscribers complied with the summon issued u/s 131 of the Act and thus the identity and creditworthiness of the investors and genuineness of the transactions cannot be verified. In our considered view, the mere non compliance to summons issued u/s 131 of the Act or non appearance of the directors of the subscribing companies before the AO cannot be 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 353 ITR 171 (Cal ) 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. (ITA No. 282/Kol/2012) 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."*

8. Similar ratio has been laid down by the Hon'ble Mumbai High Court in the case of CIT Vs Orchid Industries (P) Ltd 397 ITR 136 by holding that provisions of section 68 of the Act cannot be invoked for the reasons that the person has not appeared before the AO where the assessee had produced on records documents to establish genuineness of the party such as PAN ,financial and bank statements showing share application money . In the instant case before us also, 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. Besides all the four investors have also furnished complete details/evidences before the AO which proved the identity , creditworthiness of investors and genuineness of the transactions. 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 set aside the order of Ld. CIT(A) by allowing the appeal of the assessee.

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

Order is pronounced in the open court on 23<sup>rd</sup> February, 2023

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

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

Dated: 23<sup>rd</sup> February, 2023

SB, Sr. PS

Copy of the order forwarded to:

1. Appellant- M/s Lucky Agencies Pvt. Ltd., 12, Mysore Colony, Chembur, Mumbai-400074
2. Respondent – ITO, Ward-1(4), Kolkata
3. Ld. CIT(A)-17, Kolkata (Sent through e-mail)
4. Pr. CIT- , Kolkata
5. DR, Kolkata Benches, Kolkata (sent through e-mail)

True Copy

By Order

Assistant Registrar  
ITAT, Kolkata Benches, Kolkata