

| आयकर अपीलिय अधिकरण न्यायपीठ, कोलकाता |
IN THE INCOME TAX APPELLATE TRIBUNAL
"B" BENCH, KOLKATA

BEFORE DR. MANISH BORAD, HON'BLE ACCOUNTANT MEMBER
&
SHRI SONJOY SARMA, HON'BLE JUDICIAL MEMBER

I.T.A. No. 11/Kol/2023
Assessment Year: 2012-13

M/s. Radison Projects Pvt. Ltd. 21, Camac Street Happy House Kolkata - 700016 [PAN : AAFCR7565P]	Vs	Income Tax Officer, Ward - 8(3), Kolkata
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अपीलार्थी/ (Appellant)		प्रत्यर्थी/ (Respondent)
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Assessee by :	Shri Soumitra Choudhury, Advocate & Shri Pranabesh Sarkar, Advocate
Revenue by :	Shri P.P. Barman, Addl. CIT, D/R

सुनवाई की तारीख/Date of Hearing : 02/03/2023
घोषणा की तारीख /Date of Pronouncement: 27/03/2023

आदेश/ORDER

PER DR. MANISH BORAD, ACCOUNTANT MEMBER :

This is the appeal preferred by the assessee against the order of the National Faceless Appeal Centre, Delhi (hereinafter referred to as the Ld. CIT(A)"), passed u/s 250 of the Income-tax Act, 1961 (hereinafter the 'Act'), dated 14/12/2022 for the Assessment Year 2012-13, on the following grounds of appeal:-

"1. For that on the facts of the case, the order passed by the Ld. C.I.T. (A) on 14.12.2022 which is completely arbitrary, unjustified and illegal.

2. For that on the facts of the case, the Ld. CIT(A) was not justified in confirming the addition of Rs.1,37,00,000/- made by the A.O. on account of share application money with share premium by wrongly treating the same as unexplained cash credit u/s 68 which is completely arbitrary, unjustified and illegal.

3. For that on the facts of the case, the Ld. CIT(A) ought to have considered that the assessee company had discharged its onus by furnishing all the relevant documents in connection with the share capital raised and also

proved the identity, creditworthiness of the share application and genuineness of transactions, thus his action is completely arbitrary, unjustified and illegal.

4. For that the issue relating to the raising of share capital is concluded in favour of the assessee by the judgment of the Hon'ble Supreme Court in the case of Lovely Export (P) Ltd. 216 CTR 195 holding that addition on account of share capital cannot be made in the hands of the recipient company.

5. For that on the facts of the case, the Ld. CIT(A) was wrong in disallowing 0.5% of average investment under rule 8D(2) (iii) amounting to Rs.34,250/- by invoking Sec. 14A which is completely arbitrary, unjustified and illegal.

6. For that on the facts of the case, the charging interest u/s. 234A & 234B amounting to Rs. 503,844/- & 16,01,532/- respectively which are mechanically wrong and illegal.

7. For that the appellant reserves the right to adduce any further ground or grounds, if necessary, at or before the hearing of the appeal."

2. Brief facts of the case are that the assessee is a Private Limited Company. Income of Rs.667/- declared in the return of income for Assessment Year 2012-13 filed on 12/09/2013. Case selected for scrutiny through CASS for the reason "large share capital received". Notice u/s 143(2) & 142(1) of the Act were issued and served upon the assessee. The Id. Assessing Officer during the course of assessment proceedings noticed that the assessee has issued 77400 shares at a face value of Rs.10/- per share and charged security premium of Rs.1,34,26,000/-, on 27400 shares @ Rs.490/- per share. The assessee was asked to explain the said sum to which the assessee filed replies. However, the Id. Assessing Officer was not satisfied and concluded the assessment treating it has unexplained fresh share capital and share premium, liable to be added u/s 68 of the Act. Minor disallowances u/s 14A of the Act made at Rs.10,833/-. Income assessed at Rs.1,37,11,500/-.

2.1. Aggrieved assessee carried in appeal before the ld. CIT(A) but failed to get any relief.

3. Further aggrieved, assessee is now in appeal before this Tribunal.

4. The ld. Counsel for the assessee submitted that, all the details to explain the share capital and share premium has been duly submitted. Most of the summons were duly served upon the investors. However, for non-appearance of the Directors of the investor companies, both the lower authorities confirmed the addition u/s 68 of the Act. It was submitted that the assessee discharged primary onus casted upon him to explain the said sum which has been received through banking channels from companies registered under the Ministry of Corporate Affairs and which are required to maintain the books of account which are subject to statutory audit and such reports are to be filed on the portal of Ministry of Corporate Affairs on an annual basis. All the alleged sums have been received through banking channels and source of funds has also been explained, which the investors received from other corporates. Further reliance was placed on a plethora of decisions including the latest decision of the ITAT Kolkata Bench of the Tribunal in the case of *Dharmvir Merchandise Pvt. Ltd. vs. ITO in ITA No. 1938/Kol/2018; order dt. 13/12/2022.*

5. On the other hand, the ld. D/R vehemently argued supporting the orders of the lower authorities.

6. We have heard rival contentions and perused the material available on record as well as case-laws cited. Addition u/s 68 of the Act, for unexplained share capital and share premium amounting to Rs.1,37,11,500/- is in challenge before us. During the year, assessee issued

77400 equity shares of face value of Rs.10/- and charged share premium of Rs.490/- per share and the same was subscribed by the following investors:-

SI No.	Name	Total Amount
1.	<i>Astbhuja Vincome Pvt. Ltd.</i>	37,00,000
2.	<i>Quantam Marketing Pvt. Ltd.</i>	50,00,000
3.	<i>Swarnsathi Vincom Pvt. Ltd.</i>	50,00,000
TOTAL		1,37,00,000

7.1. We further notice that assessee company has filed the following information before the lower authorities to prove the identity and creditworthiness of the investors, genuineness of the transactions and also source of source of the alleged funds received by the assessee company and the details of the same are extracted below:-

(A) ASTBUHA VINCOM PRIVATE LIMITED Total Amount Received - Rs.37,00,000.00	(i) Share Application (ii) Acknowledgement of Return of Income (iii) Audited Financial Statements as- on 31.03.2012. (iv) List of Investments as at 31.03.2012 (v) Company Master Data (vi) Allotment Advice (vii) Bank Statement (ix) Statement Source of Fund (x) Copy of Order Copy 143(3) dt. 23.03.2015
(B) SWARNSATHI VINCOM PRIVATE LIMITED Total Amount Received - Rs.50,00,000.00	(i) Share Application (ii) Audited Financial Statements as on 31.03.2012. (iii) List of Investments as at 31.03.2012 (iv) Company Master Data (v) Allotment Advice (vi) Vijaya Bank Statement. (vii) Statement Source of Fund
Documents relating to Source Party No. 1 - Panchshree Trademart Pvt. Ltd.	(i) Acknowledgement of Return of Income (ii) Audited Financial Statements as on 31.03.2012. (iii) Bank Statement (iv) Statement Source of Fund
(C) QUANTAM MARKETING PRIVATE LIMITED - Total Amount Received - Rs.50,00,000.00	(i) Share Application (ii) Acknowledgement of Return of Income (iii) Audited Financial Statements as on 31.03.2012 (iv) Company Master Data (v) Allotment Advice (vi) Bank Statement (vii) Statement Source of Fund

Documents relating to Source Party No. 1 - SAFALTA COMMERCE PVT. LTD.	(i) Acknowledgement of Return of Income (ii) Audited Financial Statements as on 31.03.2012. (iii) Statement Source of Fund
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8. On perusal of the above details, we notice that assessee has successfully explained the source of funds and also the source of source of funds received by the investor companies. The summons issued u/s 131 of the Act to the Directors of the assessee company as well as the subscriber companies were mostly served. Id. Assessing Officer failed to find any adversity or error in the documents filed before him. We also notice that Astbhuja Vincom Pvt. Ltd., is regularly assessed to tax and was subjected to scrutiny assessment u/s 143(3) of the Act for Assessment Year 2012-13 and Id. Assessing Officer has made additions . Investor companies are live and carrying out regular transactions. We also notice that all the share applicant companies had sufficient net worth which have been brought forward from the preceding years and which are sufficient enough to explain the source of investment. It was for the Assessing Officer to first point out some errors or inconsistencies in the documents and details filed by the assessee so as to shift the burden on the assessee which in the present case Id. Assessing Officer failed.

9. Under these given facts and circumstances, we fail to find any merit in the action of the Id. Assessing Officer in invoking provisions u/s 68 of the Act. Our views are supported by the decision of this Tribunal in the case of *Dharmvir Merchandise Pvt. Ltd. (supra)*, wherein dealing with the same issue, this Tribunal considering the facts of the case and judicial precedents deleted the addition u/s 68 of the Act on similar grounds observing as follows:-

“9. We have heard rival contentions and perused the records placed before us. Addition u/s 68 of the Act for unexplained share capital and share premium of Rs. 1.40 Cr is in challenge before us. We notice that the assessee company issued fresh share capital during

the year of face value of Rs. 10/- and premium of Rs. 240/- per share and received 1.40 Cr from following three companies:

Sr No.	Name of the Share Applicant	Amount Received
1	Everlike Projects Pvt Ltd	50,00,000/-
2	Mahashakti Vintrade Pvt Ltd	50,00,000/-
3	Satyam Plywood Merchandise Pvt Ltd	40,00,000/-
	TOTAL	1,40,00,000/-

10. After the case being selected for scrutiny, ld. AO asked the assessee to explain the source of above referred sum of share capital and share application money. In response, the assessee submitted the following documents:

- i. Party Wise details of share capital raised during the year,
- ii. Form 2, Form 5 filed with ROC,
- iii. Memorandum and Article of Association,
- iv. Bank Statement for the year,
- v. Share Application Form,
- vi. Form 18 in support of registered office address of the company,
- vii. Audited accounts for the year,
- viii. Relevant Bank Statement for the year,
- ix. Form 18 in support of registered office address of these companies.

11. Thereafter, summons were issued to the Directors of the share subscriber companies as well as the Directors of the assessee company which were duly served upon the respective persons and the details as called for were filed which included the following:

- i. Photo Identity and Address Proof,
- ii. Narration of all debit and credit entries in relevant Bank statements,
- iii. Copies of all relevant ROC returns,
- iv. Sources of funds and utilisation of funds,
- v. Evidence of creditworthiness along with Income Tax Returns filed and
- vi. Copies of Audited Accounts and Tax Audit Report for the relevant AY.

12. We further, notice that ld. AO has not pointed out any defect and not questioned the correctness of any of the documents filed by the assessee company, share subscriber companies as well as the Directors. The only ground for making the addition is that the

Directors of the assessee company as well as the investor companies have not appeared personally before ld. AO in compliance to the summons issued u/s 131 of the Act and applying the decision of this Tribunal in the case of Bisakha Sales Pvt. Ltd. (supra).

13. So far as reliance placed by ld. AO on the decision of this Tribunal in the case of Bisakha Sales Pvt. Ltd. (supra) is concerned, we fail to find any merit as the facts of Bisakha Sales Pvt. Ltd. (supra) are distinguishable from the facts of the present case. Firstly for the reason that the case of Bisakha Sales Pvt. Ltd. (supra) was in connection of the revisionary order passed by ld. CIT(A) u/s 263 of the Act where it was alleged that ld. AO has not made proper enquiries with regard to the transaction of share application money received by the company, which however, is not the fact of the instant case where the issue relates to assessment proceedings carried out u/s 143(3) of the Act and complete and detailed enquiry has been conducted by ld. AO. In the assessment order, ld. AO has not brought any adverse material which could have remotely suggested that the unaccounted income of the assessee was brought in disguise of the share capital. Therefore, the decision of Bisakha Sales Pvt. Ltd. (supra) is not applicable on the present case.

14. So far as merits of the case are concerned, we find that the assessee has successfully discharged its onus by filing complete details of the share subscriber companies including their bank statement, audited financial statements, Form no. 18 in support of registered office address, source and utilization of funds, copies of ITRs, copies of all relevant company returns. Even the photo identity, address proof of the Directors of the assessee company and the subscriber companies have been filed directly by these Directors to ld. AO. On the basis of these facts undoubtedly the assessee has successfully discharged the onus which lay upon it by producing all the evidences for proving the identity and creditworthiness of the investors and the genuineness of the transaction. Merely non-appearance of the Directors cannot be a basis for treating the share application money as unexplained or non-genuine. We find support from the judgment of Hon'ble Gujarat High Court in the case of Rohini Builders (supra) relying on the judgment of Hon'ble Apex Court in the case of Orissa Corporation Pvt. Ltd. (supra) (relevant extract:

“Merely because summons issued to some of the creditors could not be served or they failed to attend before the Assessing Officer, cannot be a ground to treat the loans taken by the assessee from those creditors as non-genuine in view of the principles laid down by the Supreme Court in the case of Orissa Corporation (1986) 159 ITR 78. In the said decision the Supreme Court has observed that when the assessee furnishes names and addresses of the alleged creditors and the GIR numbers, the burden shifts to the Department to establish the Revenue's case and in order to sustain the addition the Revenue has to pursue the enquiry and to establish the lack of creditworthiness and mere non-compliance of summons issued by the Assessing Officer under section 131, by the alleged creditors will not be sufficient to draw and adverse inference against the assessee. in the case of six creditors who appeared before the Assessing Officer and whose statements were recorded by the Assessing Officer, they have admitted having advanced loans to the assessee by account payee cheques and in case the Assessing Officer was not satisfied with the cash amount deposited by those creditors in their bank accounts, the proper course would have been to make assessments in the cases of those creditors by treating the cash deposits in their bank accounts as unexplained investments of those creditors under section 69.”

15. Our view is supported by Tradelink Carrying (P.) Ltd. vs ITO pronounced on 20.12.2019 reported in [2020] 113 taxmann.com 520 (Kolkata-Trib.), wherein the Hon'ble jurisdictional ITAT held that:

“34. In this case on hand, the assessee had discharged its onus to prove the identity, creditworthiness and genuineness of the share applicants, thereafter the onus shifted to AO to disprove the documents furnished by assessee cannot be brushed aside by the AO to draw

adverse view cannot be countenanced. In the absence of any investigation, much less gathering of evidence by the, Assessing Officer, we hold that an addition cannot be sustained merely based on inferences drawn by circumstance. Applying the propositions laid down in these case laws to the facts of this case, we are inclined to allow the appeal of the assessee.

35. To sum up section 68 of the Act provides that if any sum found credited in the year in respect of which the assessee fails to explain the nature and source shall be assessed as its undisclosed income. In the facts of the present case, both the nature & source of the share application received was fully explained by the assessee. The assessee had discharged its onus to prove the identity, creditworthiness and genuineness of the share applicants. The PAN details, bank account statements, audited financial statements and Income Tax acknowledgments were placed on AO's record. Accordingly all the three conditions as required u/s. 68 of the Act i.e. the identity, creditworthiness and genuineness of the transaction was placed before the AO and the onus shifted to AO to disprove the materials placed before him. Without doing so, the addition made by the AO is based on conjectures and surmises cannot be justified. In the facts and circumstances of the case as discussed above, no addition was warranted under Section 68 of the Act. Therefore we delete the addition of Rs 5,60,000/- and consequently the appeal of assessee is allowed.

36. In the result, the appeal of the assessee is allowed."

16. Similar view also taken in the case of *Satyam Smertex (P.) Ltd vs DCIT reported in [2020] 117 taxmann.com (Kolkata - Trib.) pronounced on 29-05-2020 where the Hon'ble jurisdictional ITAT held that:*

"30. To sum up section 68 of the Act provides that if any sum found credited in the year in respect of which the assessee fails to explain the nature and source, it shall be assessed as its undisclosed income. In the facts of the present case, both the nature & source of the share application received was fully explained by the assessee. The assessee had discharged its onus to prove the identity, creditworthiness and genuineness of the share applicants. the PAN details, bank account statements, audited financial statements and Income Tax acknowledgments were placed on AO's record, including that of the directors and share holders of share subscribing entities as discussed supra. Accordingly all the three conditions as required u/s. 68 of the Act i.e. the identity, creditworthiness and genuineness of the transaction was placed before the AO and the onus shifted to AO to disprove the materials placed before him. Without doing so, the addition made by the AO and confirmed by Ld. CIT(A) are based on conjectures and surmises, so their impugned action cannot be justified. In the facts and circumstances of the case as discussed above, no addition was warranted under Section 68 of the Act. Therefore, we do allow the appeal of assessee and direct deletion of addition of Rs 16 cr under section 68 of the Act."

17. From the above decision, we note that it has been held again and again by the jurisdictional ITAT, Kolkata that in a case, where the assessee had discharged its onus to prove the identity, creditworthiness and genuineness of the share applicants, the onus shifts on ld. AO to disprove the documents furnished by assessee so as to draw adverse view and in the absence of any investigation, much less gathering of evidence by ld. AO, additions cannot be sustained merely based on inferences drawn by circumstance or made on surmises and conjectures.

18. Therefore, after going through the various details and documents placed before us, we find that assessee has successfully discharged primary onus casted upon it to explain the source of alleged share capital and share premium. Ld. AO did not find any fault or any shortcoming in the compliances made by the appellant company. It is also an evident fact that the only basis for making the alleged addition by ld. AO was non-appearance of the Directors of the share allotted company but as claimed by ld. Counsel for the assessee, the time allowed for compliance was too short and the assessee filed all the confirmations in respect of such share subscribers which were not doubted by ld. AO. Facts are brought to

our notice out of the eight shareholders five have been assessed for the same assessment year u/s 143(3) of the Act and complete details of their financials and bank transactions have been examined by ld. AO in the scrutiny proceedings. This is also an admitted fact that each of the shareholders were duly served notice u/s 133(6) of the Act which is sufficient to prove the identity of such shareholders. As far as the genuineness of the transaction is concerned, the same have taken place through banking channel which is traceable from the origin to the destination of such payments and further confirmed from the documents furnished before us. All these transactions are duly recorded in the respective balance sheets of the shareholder companies. Creditworthiness of the transaction is also proved from the fact that all the shareholder companies were having more than sufficient share capital and reserve and surplus fund for giving share application money. Even otherwise ld. AO has not made the addition for charging of higher share premium and has made the addition of unexplained cash credit but still charging of share premium is a commercial decision and the same can be challenged only with sufficient documentary evidence. It thus brings to a conclusion that since the assessee filed complete details of identity and creditworthiness of the share subscribers and genuineness of the transaction before ld. AO, the onus shifted to ld. AO to disprove the material placed before him and without doing so the additions made by ld. AO are based on conjectures and surmises and the impugned additions cannot be justified and therefore, the impugned action of ld. AO cannot be held to be justified.

19. Our view is further supported by following judicial pronouncements:

"i) CIT vs. Gagandeep Infrastructure (P) Ltd. 80 taxmann.com 272 (Bombay) wherein it was held by High Court that the proviso to section 68 of the Act has been introduced by the Finance Act 2012 with effect from 1st April, 2013. Thus it would be effective only from the Assessment Year 2013-14 onwards and not for the subject Assessment Year. In fact, before the Tribunal, it was not even the case of the Revenue that Section 68 of the Act as in force during the subject years has to be read/understood as though the proviso added subsequently effective only from 1st April, 2013 was its normal meaning. The Parliament did not introduce to proviso to Section 68 of the Act with retrospective effect nor does the proviso so introduced states that it was introduced "for removal of doubts" or that it is "declaratory". Therefore it is not open to give it retrospective effect, by proceeding on the basis that the addition of the proviso to Section 68 of the Act is immaterial and does not change the interpretation of Section 68 of the Act both before and after the adding of the proviso.

ii) PCIT vs. Chain House International (P) Ltd. 98 taxmann.com 47 wherein Madhya Pradesh High Court held that "The question raised by the revenue in regard to issuing the share at a premium is purely a question of fact. It is a prerogative of the Board of Directors of a company to decide the premium amount and it is the wisdom of shareholder whether they want to subscribe to shares at such a premium or not and moreover the section 68 does not envisages any law on share premium it only requirement is to identity of the investors, the genuineness of the transaction and the creditworthiness of the share applicants which same has been discharged by the respondent authority and the HIGH COURT OF M.P. BENCH AT INDORE Pg. No.--58-- (ITA No.112/2018 & Other connected matters) same has been accepted by the appellate authorities thus, the same cannot be reconsidered in these appeals as it is a pure question of fact." SLP preferred by revenue was dismissed by Hon'ble Supreme Court and the same is reported in 103 taxmann.com 435(SC).

iii) CIT vs. Kamdhenu Steel & Alloys Limited [ITA No.972 of 2009] dated 23.12.2011 wherein the Delhi High Court in a batch of 11 appeals was required to adjudicate on the very issue of addition made by the A.O u/s 68 in respect of share application monies received by the assesseees as alleged unexplained cash credit. In all these cases, the Department had alleged that the share application monies were received from persons who were 'entry operators' and the monies received by way of share application was nothing but was routing of unaccounted money of assessee in the form of subscription to share capital. However, in the assessments made the A.Os had not brought on record any material or evidence to substantiate such finding. Accordingly, on appeal the appellate authorities had deleted the additions made u/s 68 of the Act.

iv) CIT vs. Orissa Corpn (P) Ltd. 159 ITR 78 where the Court held that "In this case the assessee had given the names and addresses of the alleged creditors. It was in the knowledge of the Revenue that the said creditors were income-tax assesseees. Their index number was in the file of the Revenue. The Revenue, apart from issuing notices under [section 131](#) at the instance of the assessee, did not pursue the matter further. The Revenue did not examine the source of income of the said alleged creditors to find out whether they were credit-worthy or were such who could advance the alleged loans. There was no effort made to pursue the so called alleged creditors. In those circumstances, the assessee could not do any further. In the premises, if the Tribunal came to the conclusion that the assessee had discharged the burden that lay on him then it could not be said that such a conclusion was unreasonable or perverse or based on no evidence. If the conclusion is based on some evidence on which a conclusion could be arrived at, no question of law as such arises."

20. *We, therefore, respectfully following the judgments referred herein above by the Hon'ble Courts and also considering the facts and circumstances of the case, are of the considered view that since the assessee has placed sufficient documents and materials on record to prove the identity and creditworthiness of the shareholders and the genuineness of the transaction of receiving share capital and share premium, invoking the provisions of Section 68 of the Act was not justified in the instant case. We, therefore, reverse the finding of the CIT(A) and delete the addition of Rs. Rs.1.40 Cr made u/s 68 of the Act and allow all the grounds raised by the assessee.*

21. *In the result, the appeal filed by the assessee is allowed.*

10. Respectfully following the ratio laid down by this Tribunal considering the plethora of decisions and under the given facts and circumstances of the case, we set aside the finding of the Id. CIT(A) and delete the addition made u/s 68 of the Act. Thus, Ground Nos. 1 to 4 are allowed.

11. As far as Ground No. 5 regarding disallowance u/s 14A of the Act is concerned, the Hon'ble Delhi High Court *PCIT Vs. Era Infrastructure (India) Ltd. (ITA 204/2022)* judgment dt. 20/07/2022, has held that the amendment made in Section 14A of the Act by Finance Act, 2022, will be applicable prospectively and also held that disallowance u/s 14A of the Act should not exceed the exempt income earned by the assessee during the year. Therefore, since the assessee has not earned any exempt income during the year as stated by the Id. Counsel for the assessee and this fact being observed by the lower authorities also, we reverse the finding of the Id.

CIT(A) and delete the alleged disallowance made u/s 14A of the Act at Rs.10,833/-. Accordingly, Ground No. 5 is allowed.

12. Ground No. 6 and 7 are general in nature.

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

Order pronounced in the Court on 27th March, 2023 at Kolkata.

Sd/-

(SONJOY SARMA)
JUDICIAL MEMBER

Sd/-

(DR. MANISH BORAD)
ACCOUNTANT MEMBER

Kolkata, Dated 27/03/2023

**SC Sp/2*

आदेश की प्रतिलिपि अग्रेषित / Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent
3. संबंधित आयकर आयुक्त / Concerned Pr. CIT
4. आयकर आयुक्त (अपील) / The CIT(A)-
5. विभागीय प्रतिनिधि , आयकर अपीलीय अधिकरण, कोलकाता/DR,ITAT, Kolkata,
6. गार्ड फाई/ Guard file.

आदेशानुसार/ BY ORDER,
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Assistant Registrar
आयकर अपीलीय अधिकरण
ITAT, Kolkata