

**IN THE INCOME TAX APPELLATE TRIBUNAL “B SMC” BENCH  
KOLKATA**

**BEFORE SHRI SANJAY GARG, JUDICIAL MEMBER  
AND SHRI GIRISH AGRAWAL, ACCOUNTANT MEMBER**

**ITA No.186/Kol/2023  
Assessment Year: 2012-13**

Moontree Niketan Pvt. Ltd. 5, Clive Row, Dalhousie, Kolkata-700001. (PAN: AAHCM8056A)	Vs.	Income Tax Officer-4(1), Kolkata.
<b>(Appellant)</b>		<b>(Respondent)</b>

**Present for:**

Appellant by : Shri Manoj Kataruka, AR  
Respondent by : Smt. Ranu Biswas, Addl. CIT, DR

Date of Hearing : 20.04.2023  
Date of Pronouncement : 21.06.2023

**ORDER**

**PER GIRISH AGRAWAL, ACCOUNTANT MEMBER:**

This captioned appeal filed by the assessee is against the order of Ld. CIT(A), National Faceless Appeal Centre (NFAC), Delhi vide order No. ITBA/NFAC/S/250/2022-23/1048967915(1) dated 20.01.2023 against the order of ITO, Ward-4(2), Kolkata u/s. 143(3) of the Income-tax Act, 1961 (hereinafter referred to as the “Act”), dated 29.03.2013.

2. Assessee has raised the following grounds of appeal, which reads as under:

*“1. That on the facts and in the circumstances of the case the action of the Ld. CIT(A) to enhance the income by Rs.9,95,00,000/- u/s 68 of the Act is contrary to the material facts on records and the addition made by the Ld. CIT(A) is arbitrary, excessive and illegal.*

*2. That on the facts and in the circumstances of the case the action of the Ld. CIT(A) to make addition of Rs.9,95,00,000/- u/s 68 of the Act is illegal arbitrary and excessive.*

3. *That without prejudice to the above grounds and on the facts and in the circumstances of the case the action of the Ld. CIT(A) to enhance income without opportunity of hearing is illegal, arbitrary and excessive.*

4. *That the order of the Ld.CIT(A) enhancing the income is arbitrary, excessive and illegal.*

5. *That the above grounds of appeal will be argued in details at the time of hearing and the appellant craves leaves to submit additional grounds of appeal if any and or alter, vary, modify or rectify the statement of facts and grounds of appeal at or before the time of hearing.”*

3. Brief facts of the case are that during the year under consideration, assessee had raised fresh share capital of Rs.9.95 Cr. comprising of 99,500 shares at a face value of Re.1/- each with share premium of Rs.999/- per share. In the assessment order passed u/s. 143(3) of the Act, ld. AO has noted that *“it was found that the allotment of these shares was made by mode ‘other than cash’. In other words, the assessee has received investment in shares of other companies as the consideration for the shares allotted by it. The assessee has thus, brought in Rs.9,94,00,500/- as premium.*

*The relevant details of the issue of shares namely details of distinctive numbers of shares allotted, sources of investment, copies of agreements for transfer of shares, proof of address and PANs and IT Returns and Audited Final accounts and balance sheets of the allottees were furnished.”*

3.1. Ld. AO further noted that various details relating to the investor companies were filed. However, no bank account statements or fund flow was filed. On this observation of the Ld. AO, it is important to note that he has already made an observation extracted above that allotment of shares was

made by mode 'other than cash' and, therefore, bank account statement would not serve any purpose.

3.2. Notices u/s. 133(6) of the Act were issued on all the share subscribers who replied to the same by furnishing all the details and explanation along with relevant corroborative documents. All these are placed on record in the paper book filed by the assessee containing 267 pages. Ld. AO also issued summons u/s. 131 to the directors of the assessee and the share subscribing companies which remained uncomplished. Ld. AO completed the assessment after considering the submissions made by the assessee and discussing several case laws as well as modus operandi involved in the business of 'Jamakharchi companies'. He treated the transaction of raising of share capital as well as the investment made by the company as sham and held that capital as well as investment of the company as on 31.03.2012 is treated as 'Nil'.

3.3. Aggrieved, assessee went in appeal before the Ld. CIT(A) who dismissed the appeal and at the same time enhanced the income by Rs. 9.95 Cr. u/s. 68 of the Act in respect of share capital and share premium. It is important to note the fact that in the assessment completed by the Ld. AO, no addition was made of Rs.9.95 Cr. in respect of share capital and share premium or the investment made by the assessee but were treated as "Nil". However, while dismissing the appeal of the assessee, Ld. CIT(A) has enhanced the income of the assessee by Rs. 9.95 Cr. whereas income originally assessed by the Ld. AO is at Rs.7,200/- on

which a demand of Rs.2,100/- was raised. Aggrieved, assessee is in appeal before the Tribunal.

4. Ld. Counsel for the assessee submitted that all the relevant details and evidence to explain the identity, creditworthiness and genuineness of the transactions were placed on record and the assessee had fully discharged its initial burden casted u/s. 68 of the Act. Ld. Counsel stated that the nature of these credits is towards share capital and share premium which is by mode other than cash from allottees who are income tax assessee. He further stated that assessee has explained the source and nature of these credits and has brought on record all the documentary evidence in this respect.

5. Ld. Counsel also referred to various documents and details furnished in respect of each of the eleven investing companies, all of which are placed in the paper book. He referred to document set of one such company to demonstrate, detailed documents furnished, to establish identity and creditworthiness of the investing companies and the genuineness of the transaction. The documents furnished in respect of each of the investing companies which are listed in the index to the paper book placed on record, are as under:

Sl No.	Particulars	Pages Nos.	Filed before	
			AO	CITA
1.	Copy of the return filing acknowledgement, & audited accounts of the assessee for AY 2012-2013.	<u>01 - 14</u>	✓	
2.	Copy of the master data of the assessee company.	<u>15</u>	✓	
3.	Copy of the receipt along with Form No.2 and details of shareholders with their addresses as filed before AO.	<u>16 -21</u>	✓	
4.	Copy of the assessee company Board Resolution for issue of shares	<u>22</u>	✓	
5.	Copy of the Pan Card of the assessee company.	<u>23</u>		
6.	Copy of the notice u/s 250 issued by NFAC dated 03.1.2023 for AY 12-13 proposing to enhance to the income.	<u>24 - 25</u>		
7.	<b>COPY OF DOCUMENTS IN SUPPORT OF THE IDENTITY, CREDITWORTHINESS OF SHARE APPLICANTS AND GENUINNESS OF TRANSACTION FILED IN THE COURSE OF HEARING</b>			
	<b>A. Silvertoss Dealtrade Pvt Ltd. (Rs.99,00,000/-)</b>			
	- Master data of the company	<u>26</u>	✓	
	- Copy of Notice u/s 133(6) issued by the AO and reply filed.	<u>27 - 28</u>	✓	
	- Certificate explaining source of funds	<u>29</u>	✓	
	- Copy of the ledger account of the party.	<u>30</u>	✓	
	- Copy of the return filing acknowledgement for AY 2012-13	<u>31</u>	✓	
	- Copy of the audited accounts	<u>32 - 45</u>	✓	
	- Details of investments.	<u>46</u>	✓	
	- Copy of the assessment order u/s 143(3) for AY 2011-2012.	<u>47 - 48</u>	✓	
	<b>B. Velocity Commercial Pvt. Ltd.(Rs.97,00,000/-)</b>			
	- Copy of Notice u/s 133(6) issued by the AO and reply filed.	<u>49 - 50</u>	✓	
	- Certificate explaining source of funds	<u>51</u>	✓	
	- Copy of the ledger account of the party.	<u>52</u>	✓	
	- Copy of the return filing acknowledgement for AY	<u>53</u>	✓	✓

	2012-13		
	- Copy of the audited accounts	<u>54 - 65</u>	✓
	- Details of investments.	<u>66</u>	✓
	- Copy of the assessment order u/s 143(3) for AY 2009-2010	<u>67 - 68</u>	✓
<b>C. Pyramid Tie-Up Pvt. Ltd (Rs.95,00,000/-)</b>			
	- Master data of the company	<u>69</u>	✓
	- Copy of Notice u/s 133(6) issued and replied by assessee.	<u>70 - 71</u>	✓
	- Certificate explaining source of funds	<u>72</u>	✓
	- Copy of the ledger account of the party.	<u>73</u>	✓
	- Copy of the return filing acknowledgement for AY 2012-13	<u>74</u>	✓
	- Copy of the audited accounts	<u>75 - 86</u>	✓
	- Details of investments.	<u>87</u>	✓
	- Copy of the assessment order u/s 143(3) for AY 2009-2010	<u>88 - 90</u>	✓
<b>D. Jackpot Towers Pvt. Ltd (Rs.93,00,000/-)</b>			
	- Master data of the company	<u>91</u>	✓
	- Copy of Notice u/s 133(6) issued and replied by assessee.	<u>92 - 93</u>	✓
	- Certificate explaining source of funds	<u>94</u>	✓
	- Copy of the ledger account of the party.	<u>95</u>	✓
	- Copy of the return filing acknowledgement for AY 2012-13	<u>96</u>	✓
	- Copy of the audited accounts	<u>97-108</u>	✓
	- Details of investments.	<u>109</u>	✓
	- Copy of the appeal order u/s 250 for AY 2011-2012	<u>110-117</u>	✓
<b>E. Jackpot Agencies Pvt Ltd. (Rs.91,00,000/-)</b>			
	- Copy of Notice u/s 133(6) issued by the AO and reply filed.	<u>118-119</u>	✓
	- Certificate explaining source of funds	<u>120</u>	✓
	- Copy of the ledger account of the party.	<u>121</u>	✓
	- Copy of the return filing acknowledgement for AY 2012-13	<u>122</u>	✓
	- Copy of the audited accounts	<u>123-134</u>	✓
	- Details of investments.	<u>135</u>	✓
	- Copy of the assessment order u/s 143(3) for AY 2009-2010	<u>136-137</u>	✓
<b>F. Golden Vincom Pvt. Ltd. (Rs.88,00,000/-)</b>			
	- Master data of the company	<u>138</u>	✓
	- Copy of Notice u/s 133(6) issued by the AO and reply filed.	<u>139-140</u>	✓
	- Certificate explaining source of funds	<u>141</u>	✓
	- Copy of the ledger account of the party.	<u>142</u>	✓
	- Copy of the return filing acknowledgement for AY 2012-13	<u>143</u>	✓

- Copy of the audited accounts	<u>144-155</u>	✓
- Details of investments.	<u>156</u>	✓
- Copy of the order u/s 143(1) for AY 2014-2015	<u>157-161</u>	✓
<b>G. Icon Trexim Pvt Ltd. (Rs.87,00,000/-)</b>		
- Copy of Notice u/s 133(6) issued by the AO and reply filed.	<u>162-163</u>	✓
- Certificate explaining source of funds	<u>164</u>	✓
- Copy of the ledger account of the party.	<u>165</u>	✓
- Copy of the return filing acknowledgement for AY 2012-13	<u>166</u>	✓
- Copy of the audited accounts	<u>167-178</u>	✓
- Details of investments.	<u>179</u>	✓
- Copy of the assessment order u/s 143(3) for AY 2009-2010.	<u>180-182</u>	
<b>H. Intime Management Consultancy Pvt Ltd. (Rs.85,00,000/-)</b>		
- Master data of the company	<u>183</u>	✓
- Copy of Notice u/s 133(6) issued by the AO and reply filed.	<u>184-185</u>	✓
- Certificate explaining source of funds	<u>186</u>	✓
- Copy of the ledger account of the party.	<u>187</u>	✓
- Copy of the return filing acknowledgement for AY 2012-13	<u>188</u>	✓
- Copy of the audited accounts	<u>189-200</u>	✓
- Details of investments.	<u>201</u>	✓
<b>I. Alankar Consultancy Services Pvt Ltd. (Rs.83,00,000/-)</b>		
- Copy of Notice u/s 133(6) issued by the AO and reply filed.	<u>202-203</u>	✓
- Certificate explaining source of funds	<u>204</u>	✓
- Copy of the ledger account of the party.	<u>205</u>	✓
- Copy of the return filing acknowledgement for AY 2012-13	<u>206</u>	✓
- Copy of the audited accounts	<u>207-218</u>	✓
<b>J. Touchstone Suppliers Pvt Ltd. (Rs.94,00,000/-)</b>		
- Master data of the company	<u>219</u>	✓
- Copy of Notice u/s 133(6) issued by the AO and reply filed.	<u>220-221</u>	✓
- Certificate explaining source of funds	<u>222</u>	✓
- Copy of the ledger account of the party.	<u>223</u>	✓
- Copy of the return filing acknowledgement for AY 2012-13	<u>224</u>	✓
- Copy of the audited accounts	<u>225-237</u>	✓
- Details of investments.	<u>238</u>	✓
- Copy of the assessment order u/s 143(1) for AY 2014-2015.	<u>239-244</u>	✓
<b>K. Jaguar Merchandise Pvt Ltd. (Rs.82,00,000/-)</b>		

- Master data of the company	<u>245</u>	✓	
- Copy of Notice u/s 133(6) issued by the AO and reply filed.	<u>246-247</u>	✓	
- Certificate explaining source of funds	<u>248</u>	✓	
- Copy of the ledger account of the party.	<u>249</u>	✓	
- Copy of the return filing acknowledgement for AY 2012-13	<u>250</u>	✓	
- Copy of the audited accounts	<u>251-263</u>	✓	
- Details of investments.	<u>264</u>	✓	
- Copy of the assessment order u/s 143(3) for AY 2009-2010	<u>265-267</u>	✓	

6. Ld. Counsel further submitted that Ld. AO in his order has arrived at an adverse view merely on the basis of non-production / attendance of the director of the assessee and share subscriber companies in the assessment proceedings, without finding any fault or deficiency with the exhaustive material placed on record. He also submitted that though none attended to the summon issued u/s 131 of the Act, all the details and documents were placed on record which have not been controverted by the authorities below in any manner, whatsoever. As per him, since Ld. AO was not impressed with these submissions who resorted to taking the entire share capital and along with share premium, totalling to Rs.9.95 Cr. as 'Nil' on the sole ground that compliance u/s. 131 of the Act by the directors of the assessee and share subscribing companies was not done by way of their personal appearance.

7. He strongly submitted that Ld. AO had not brought anything contrary to the undisputed facts and has merely acted on whims and fancies.

8. To buttress his submissions, Ld. Counsel placed reliance on the decision of Hon'ble Jurisdictional High Court of Calcutta in the case of *CIT v. Dataware Pvt. Ltd. in ITAT No. 263*

of 2011 dated 21.09.2011 wherein Hon'ble jurisdictional High Court held that -

*"After getting the PAN number and getting the information that the creditor is assessed under the Act, the Assessing officer should enquire from the Assessing Officer of the creditor as to the genuineness" of the transaction and whether such transaction has been accepted by the Assessing officer of the creditor but instead of adopting such course, the Assessing officer himself could not enter into the return of the creditor and brand the same as unworthy of credence."*

9. He placed further reliance on the decision of Hon'ble jurisdiction High Court of Calcutta in the case of *CIT Vs. Sagun Commercial P. Ltd.* (ITA No. 54 of 2001 dated 17.02.2011) wherein it was held as under:

*"After hearing the learned advocate for the appellant and after going through the materials on record, we are at one with the Tribunal below as well as the Commissioner of Income-tax (Appeals) that the approach of the Assessing Officer cannot be supported. Merely because those applicants were not placed before the Assessing Officer, such fact could not justify disbelief of the explanation offered by the assessee when details of Permanent Account Nos. payment details of shareholding and other bank transactions relating to those payments were placed before the Assessing Officer. It appears that the Tribunal below has recorded specifically that the Assessing Officer totally failed to consider those documentary evidence produced by the assessee in arriving at such conclusion.*

*We, therefore, find no reason to interfere with the decision passed by the Commissioner of Income-tax (Appeals) and the Tribunal below and answer the questions formulated by the Division Bench in the affirmative and against the Revenue. The appeal is, thus, dismissed."*

10. Reliance was also placed on the decision of Hon'ble Bombay High Court in the case of *CIT v. Creative World Telefilms P. Ltd.* [2011] 333 ITR 100 (Bom) wherein it was held as under:

*"In the case in hand, it was not disputed that the assessee had given the details of name and address of the shareholder, their PAN/GIR number and had also given the cheque number, name of the bank. It was expected on the part of the Assessing Officer to make proper investigation and reach the shareholders. The Assessing Officer did nothing except issuing summons which were ultimately returned back with an endorsement "not traceable". The Assessing Officer ought to have found out their details through PAN cards, bank account details or from their bankers so as to reach the shareholders*

*since all the relevant material details and particulars were given by the assessee to the Assessing Officer. In the above circumstances, the view taken by the Tribunal could not be faulted. No substantial question of law was involved in the appeal."*

11. Decision of Hon'ble Madras High Court in the case of *CIT v. Pranav Foundations Ltd. (2015) 229 Taxman 58 (Mad)* is also referred wherein it was held as under:

*"In view of the fact that all the four parties, who are subscribers of the shares, are limited companies and enquiries were made and received from the four companies and all the companies accepted their investment. Thus, the assessee has categorically established the nature and source of the said sum and discharged the onus that lies on it in terms of section 68. When the nature and source of the amount so invested is known, it cannot be said to undisclosed income. Therefore, the addition of such subscriptions as unexplained credit under section 68 is unwarranted."*

12. It was also submitted that audited Balance Sheet of each of the share applicant companies reflected the amount of investment made by them in the assessee as against their respective net worth. He thus, contended that Ld. AO has given the adverse treatment with a predetermined mind set. Further, according to him, they are all registered companies under the Companies Act, 1956/2013 and are active companies on the MCA portal.

13. Ld. Counsel also submitted that mere non-appearance of directors is no basis for invoking provisions of section 68 of the Act for which he placed reliance on the decision of Hon'ble Supreme Court in the case of *CIT v. Orissa Corporation (P) Ltd. (1986) 159 ITR 78 (SC)* wherein it was held as under:

*"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 the 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 was based on some evidence on which a conclusion could be arrived at, no question of law as such could arise.*

*The High Court was, therefore, right in refusing to refer the questions sought for. Decision of the High Court affirmed.”*

14. Ld. Counsel submitted that instead of pointing out any defect or discrepancy in the evidence and the details furnished by the assessee, Ld. AO proceeded to adopt adverse inference only on the ground that the directors of the subscriber companies and the assessee did not appear personally before him. In this respect, he placed reliance on the decision of Hon'ble Jurisdictional High Court of Calcutta in the case of *Crystal Networks Pvt. Ltd. v. CIT in [2013] 353 ITR 171 (Cal)*.

15. Per contra, ld. Sr. DR placed reliance on the order of the authorities below and submitted that assessee's own income has been infused in the guise of share capital through the allottee companies by adopting a mode of 'other than cash' in lieu of investment in shares of the allottee companies, to make appear a non-genuine transaction as a genuine one.

16. We have heard the rival contentions and gone through the material placed on record. We note that Ld. AO without even going through and discussing the details submitted by the subscriber companies, insisted for personal appearance

to prove the identity, creditworthiness of the subscribers and the genuineness of the transactions. To our mind, Ld. AO could have taken an adverse view only if he could point out the discrepancies or insufficiency in the evidence and details furnished in his office and also as to what further investigation was needed by him by way of recording of statement of the directors of the assessee and the subscriber companies. We draw our force from the decision of the Hon'ble Bombay High court in the case of *PCIT v. Paradise Inland Shipping Pvt. Ltd.* [2017] 84 taxmann.com 58 (Pan) wherein it was held that once the assessee has produced documentary evidence to establish the existence of subscriber companies, burden would shift on the revenue to establish their case. We also draw our force from the decision of Hon'ble Jurisdictional High Court of Calcutta in the case of *Crystal Network Pvt. Ltd. v. CIT (supra)* which held as under:

*"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 CIT(Appeals) 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 produce of the assessee or not. When it was found by the CIT (Appeal) on fact having examined the documents that the advance given by the creditors have been established the Tribunal should not have ignored this fact finding."*

17. Ld. AO has not bothered to discuss or point out any defect or deficiency in the documents furnished by the

assessee of the share subscribing companies though receipt of replies to notices issued u/s 133(6) by these subscribers have been acknowledged by the stamping seal of the office of ld. AO, forming part of the paper book. These evidences furnished have been neither controverted by the Ld. AO during the assessment proceedings nor anything substantive brought on record to justify the adverse treatment given by him. Ld. AO has simply treated the amount of share capital and share premium as well as the investment as 'Nil' on the ground that assessee has not produced the directors / shareholders. Thus, going by the records placed by the assessee of all the share subscribing companies, it can be safely held that the assessee has discharged its initial burden and the burden shifted on the Ld. AO to enquire further into the matter which he failed to do so.

18. A perusal of the impugned order of the Ld. CIT(A) shows that the Ld. CIT(A) has not discussed anything about the material facts of the case. He has not pointed out any defect and discrepancy in the evidences and details furnished by the assessee but simply reproduced verbatim, the contents of order of Ld. AO and cited certain case laws even without pointing out as to how these were applicable to the facts and circumstances of this case. By simply reproducing such contents without discussing about the facts of the case, in our view, would not make the order of the Ld. CIT(A) justifiable speaking order and hence, the same is not sustainable as per law.

19. From the perusal of the paper book and the documents placed therein, it is vivid that all the share applicants are (i) income tax assesseees, (ii) they are filing their income tax returns, (iii) all the share applicants are having substantial creditworthiness represented by their capital and reserves.

20. It is also undisputed fact that all the share subscriber companies have been assessed u/s 143(3) /143(1) of the Act by their respective Assessing Officer. For this, their assessment orders/intimations are placed on record in the paper book. Accordingly, identity of these share subscriber companies cannot be doubted.

21. Considering the facts and circumstances of the case and the material placed on record, we find that assessee has discharged its onus to prove the identity and creditworthiness of the share subscribing companies and the genuineness of the transactions towards sum of Rs.9.95 Cr. raised during the impugned year. We, therefore, respectfully following the judgment referred hereinabove by the Hon'ble Courts and also considering the facts and circumstances of the case, are of considered view that since the assessee has sufficiently explained the identity and creditworthiness of the share subscriber companies and the genuineness of the transaction and since nothing contrary to the evidence filed by the assessee has been placed on record by the Revenue, except the reason that the directors failed to appear to the summons/notices issued u/s 131 of the Act, we set aside the order of the Id. CIT(A) deleting the addition by way of enhancement made by the Ld. CIT(A) towards share capital and share

premium u/s. 68 of the Act. Accordingly, grounds taken by the assessee in this respect are allowed.

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

Order is pronounced in the open court on 21<sup>st</sup> June, 2023.

Sd/-

(Sanjay Garg)  
Judicial Member

Sd/-

(Girish Agrawal)  
Accountant Member

***Dated: 21<sup>st</sup> June, 2023***

JD, Sr. P.S.

Copy to:

1. The Appellant:
  2. The Respondent:
  3. CIT(A), NFAC, Kolkata
  4. CIT, Kolkata
  5. DR, ITAT, Kolkata Bench, Kolkata
- //True Copy//

By Order

Assistant Registrar  
ITAT, Kolkata Benches, Kolkata