

आयकर अपीलीय अधिकरण, कोलकाता पीठ 'सी', कोलकाता
IN THE INCOME TAX APPELLATE TRIBUNAL "C" BENCH: KOLKATA
श्री संजय गर्ग न्यायिक सदस्य एवं श्री राजेश कुमार, लेखा सदस्य के समक्ष
[Before Shri Sanjay Garg, Judicial Member & Shri Rajesh Kumar, Accountant Member]

I.T.A. No. 565/Kol/2018
Assessment Year : 2012-13

Yuthika Commercial Pvt. Ltd. (PAN: AAACY 2332 E)	Vs.	DCIT, Circle-9(2), Kolkata
Appellant / (अपीलार्थी)		Respondent / (प्रत्यर्थी)

Date of Hearing / सुनवाई की तिथि	25.05.2023
Date of Pronouncement/ आदेश उद्घोषणा की तिथि	25.07.2023
For the Appellant/ निर्धारिती की ओर से	Shri Miraj D Shah, A.R
For the Respondent/ राजस्व की ओर से	Shri Vijay Kumar, Addl. CIT, Sr. DR

ORDER / आदेश

Per Shri Rajesh Kumar, AM:

This appeal preferred by the assessee is against the order of the Ld. Commissioner of Income Tax(Appeals)-3, Kolkata (hereinafter referred to as the Ld. CIT(A)”) dated 23.01.2018 for the AY 2012-13.

2. The only issue raised by the assessee in the various grounds of appeal is against the confirmation of addition of Rs. 5,42,00,000/- by the Ld. CIT(A) thereby upholding the order of AO wherein the addition was made as unexplained cash credit u/s 68 of the Act.

3. Facts in brief are that the assessee filed return of income on 20.09.2012 declaring total income of Rs. Nil with carrying forward of loss of Rs. 2,42,80,600/- which was processed u/s 143(1) of the Act. Thereafter the case of the assessee was selected under scrutiny and statutory notices were duly issued and served on the assessee. The AO during the assessment proceedings observed that during the year the assessee has raised share capital from two subscribers namely Pradeep K Dixit 66,750 equity shares and Bajrang Dealmark Pvt. Ltd. 68,750 equity share thereby raising an amount of Rs. 5,42,00,000/- as share capital/share premium. Accordingly the assessee was called upon by the AO to prove the identity, creditworthiness of the investors and genuineness of the transactions. Accordingly the assessee furnished its ITR, audited accounts ,bank statement , details(names and addresses of subscribers) and return of allotment etc. Similarly the assessee filed the evidences in respect of shares subscribers also comprising their ITRs , audited accounts ,share application forms ,share allotment letters and bank statements. The assessment order for 2011-12 and reply to 131 of the Act was also filed in case of Mr Pradeep kumar Dixit. In case of corporate subscriber the memorandum and articles of association was filed. However, there was no personal appearance of these share holders before the AO. Finally the AO added Rs. 5,42,00,000/- as unexplained cash credit to the income of the assessee in the assessment order passed u/s 143(3) dated 28.03.2015.

4. In the appellate proceedings, the Ld. CIT(A) also simply dismissed the appeal of the assessee by observing that the assessee has failed to furnish necessary evidences and therefore transactions of subscriptions of equity shares could not be verified. The Ld. CIT(A) in the same place recorded a finding that the assessee has produced certain documents before the AO but that could not be taken to be mean that the assessee has proved three ingredients as provided u/s 68 of the Act. Finally after discussing the various decisions of the Hon'ble Supreme Court in the case of CIT vs. Durga Prasad More (1971) 82 ITR 540 (SC) and Sumati Dayal vs. CIT (1995) 214 ITR 801 (SC) and also discussing the various decisions , the Id CIT(A) dismissed the appeal of the assessee.

5. The Ld. A.R vehemently submitted before the Bench that the assessee has filed all the evidences as required by the AO comprising share allotment chart, copy of ITR, audited accounts, bank statement of the assessee besides names and addresses of the share applicants. The Ld. A.R also stated that the assessee has also filed in respect of share investor M/s Pradeep Kumar Dixit copies of ITR, audited accounts, share application Form, share allotment letter, bank statement, reply filed u/s 131 of the Act, and assessment order for AY 2011-12. Similarly the Ld. A.R stated that the documents in respect of corporate subscribers M/s Bajrang Dealmark Pvt. Ltd. the assessee has filed ITR, audited accounts, share application form, share allotment letter, bank statement and memorandum and article of association etc. The Ld. A.R submitted both the authorities below have failed to point out any defect or deficiency in the documents filed by the assessee and merely concluded that the assessee has failed to prove the identity and creditworthiness of the investors and genuineness of the transactions. The Ld. A.R stated that the assessee also filed all the evidences and has discharged its onus which thereafter shifted on the revenue to carry out further enquiry and investigate the matter and bring the material to the contrary to prove that investments received by the assessee were not genuine. The Ld. A.R submitted that even the source of source was proved by the assessee whereas the same was not required to be proved in AY 2012-13. The Ld. A.R by referring to the audited accounts and bank statements tried to prove that these investors have sufficient sources to invest in the assessee company and therefore adverse inference drawn by the authorities below is without any basis and just based on conjectures and surmises of the AO which has been affirmed by the Ld. CIT(A). The Ld. A.R submitted that mere non-production or non-appearance of the investors before the AO could not justify the addition when all the evidences are before the AO as well as Ld. CIT(A). In defense of argument the Ld. A.R relied on the following decisions:

1. *CIT vs. Orissa Corporation Ltd. in [1986] 159 ITR 78 (SC)*

2. Crystal Networks (P)Ltd vs CIT reported in 353 ITR 171 (C)

3. ITO Vs M/s Cygnus Developers India Pvt. Ltd. (ITA No. 282/Kol/2012)

4. CIT Vs Orchid Industries (P) Ltd 397 ITR 136 (Bom)

6. The Ld. D.R on the other hand relied on the orders of authorities below by submitting that the assessee has failed to prove identity and creditworthiness of the investors and genuineness of the transactions and just filed certain papers to prove the investment received by the assessee were genuine. Under this circumstances, the Ld. D.R by relying heavily on the order of Ld. CIT(A) submitted that the order of Ld. CIT(A) needs to be affirmed.

7. We have heard the rival contentions and perused the material on record. The undisputed facts are that the assessee has raised money of Rs. 5,42,00,000/- from two investor one is individual and second is group corporate. The assessee has filed all the documents however the personal presence of the investors was not made before the AO. We note that the AO, instead examining and enquiring into the material further, has straightaway jumped to the conclusion that these are unexplained. Similarly the Ld. CIT(A) has affirmed the findings of AO on this issue without passing any speaking order by merely discussing the decision in the case of Durga Prasad More (supra) and Sumati Dayal (supra) and by discussing the human probability. In our opinion, when the assessee has filed all the documents before the authorities, they are duty bound to investigate the matter and conduct necessary enquiries and only base conclusion on the basis of result of search enquiry. However we note that in the present case, no further investigation or enquiry was conducted either by the AO or by the Ld. CIT(A). Even the documents furnished by the assessee were not commented. We also observe that this is not a case of shell companies or bogus accommodation entries. Under the circumstances we are not in a position to concur a conclusion drawn by the Ld. CIT(A). The mere non-production of share holders before the AO can not be the reason for making the addition. We note that despite having filed all the evidences, no enquiry was done and the Ld. CIT(A) has simply

affirmed the finding of the AO by holding that no identity and creditworthiness of the creditors could not be proved by the assessee by ignoring all the evidences placed before him. Under the circumstances, we are not in a position to sustain the order of Ld. CIT(A). We find support from the decision of Hon'ble Supreme Court in the case of Orissa Corporation Ltd. (supra)

“That in this case the respondent 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 numbers were in the file of the Revenue. The Revenue, apart from issuing notices under Section 131 at the instance of the respondent, 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 creditworthy. There was no effort made to pursue the so-called alleged creditors. In those circumstances, the respondent could not do anything further. In the premises, if the Tribunal came to the conclusion that the respondent had discharged the burden that lay on it, 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 arose. The High Court was right in refusing to state a case.”

7.1 The case of the assessee is also 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.”

7.2. 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.”

7.3. Similar ratio has been laid down by the Hon'ble Mumbai High Court in the case of CIT Vs Orchid Industries (P) Ltd (supra) by holding that provisions of section 68 of the Act can not 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 .

8. 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 the 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 25th July, 2023

Sd/-
(Sanjay Garg /संजय गर्ग)
Judicial Member/न्यायिक सदस्य

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

Dated:25th July, 2023

SB, Sr. PS

Copy of the order forwarded to:

1. Appellant- Yuthika Commercial Pvt. Ltd., 207, Maharshi Devendra Road, Kolkata-700007
2. Respondent – DCIT, Circle-9(2), Kolkata
3. Ld. CIT(A)- 3, Kolkata
4. Pr. CIT- , Kolkata
5. DR, Kolkata Benches, Kolkata (sent through e-mail)

True Copy

By Order

Assistant Registrar
ITAT, Kolkata Benches, Kolkata