

आयकर अपीलीय अधिकरण
कोलकाता 'सी' पीठ, कोलकाता में
**IN THE INCOME TAX APPELLATE TRIBUNAL
KOLKATA 'C' BENCH, KOLKATA**

श्री राजेश कुमार, लेखा सदस्य

एवं

श्री संजय शर्मा, न्यायिक सदस्य

के समक्ष

Before

SRI RAJESH KUMAR, ACCOUNTANT MEMBER

&

SONJOY SARMA, JUDICIAL MEMBER

I.T.A. No.: 194/KOL/2023

Assessment Year: 2012-13

Sankatsathi Mercantile Pvt. Ltd.....Appellant
[PAN: AARCS 1013 M]

Vs.

ITO, Ward-5(2), Kolkata.....Respondent

Appearances by:

Sh. Sushil Kumar Pransukha, CA, appeared on behalf of the Assessee.

Sh. Arun Kanti Dutta, Sr. DR, appeared on behalf of the Revenue.

Date of concluding the hearing : July 31st, 2023

Date of pronouncing the order : August 22nd, 2023

ORDER

Per Rajesh Kumar, Accountant Member:

This is an appeal preferred by the assessee against the order of Learned Commissioner of Income-tax (Appeals)-NFAC, Delhi [hereinafter referred to as Ld. 'CIT(A)'] dated 27.01.2023 for the Assessment Year (in short 'AY') 2012-13.

2. The issue raised in the first ground of appeal is against the order of Ld. CIT(A) confirming the addition of Rs. 1,75,20,000/- as made by The Assessing Officer (in short ld. 'AO') u/s 68 of the Act in respect of share capital and share premium.

3. The facts in brief are that the assessee filed its return of income on 06.02.2013 declaring total income at Rs. NIL. Thereafter, the case of the assessee was selected for scrutiny under CASS and accordingly the notice u/s 143(2) of the Act was duly issued and served upon the assessee. Ld. AO observed from the balance sheet that the assessee has received share application money of Rs. 1,76,20,000/-. Ld. AO noted that the assessee company was incorporated with 10,000 shares of Rs. 10/- each and further issued 10,800 & 19,200 equity shares having face value of Rs. 10/- & 3.50/- at a premium of Rs. 990/- & 346.50/- thereby raising an amount of Rs. 1,75,20,000/- during the year. The assessee furnished before Ld. AO evidences proving the identity, creditworthiness of the investors and genuineness of the transactions comprising of names, addresses, PAN, bank statement of the assessee as well of the subscribers evidencing the account payee cheques, share application forms etc. Ld. AO also issued notice u/s 133(6) of the Act to the share subscribers in order to verify the genuineness of these transactions which were duly replied by the share subscribers by filing the necessary details comprising of bank statements, nature of business, details of directors, company's PANs, ITRs, tax audit reports, balance sheets, profit and loss accounts, number of shares allotted with amount of application money, mode of payments and bank statements,

source of investments with their PAN and ITRs, annual return filed before ROC. Ld. AO also issued summons u/s 131 of the Act to the shareholders which were not complied with. Ld. AO also issued summons u/s 131 of the Act to the director of the assessee company on 11.02.2015 which was also not complied with. Finally, Ld. AO treated the share application money raised during the year of Rs. 1,76,20,000/- as unexplained and added the same to the income of the assessee on the ground that summons issued u/s 131 of the Act were not complied with.

4. In the appellate proceedings, Ld. CIT(A) confirmed the order of Ld. AO by relying on the decision of Hon'ble Supreme Court in the case of *PCIT Vs. NRA Iron and Steel Pvt. Ltd.* reported in [2019] 412 ITR 161 (SC) and decision of Hon'ble Calcutta High Court in the case of *CIT Vs. Precision Finance (P.) Ltd.* reported in [1994] 208 ITR 465 (Cal).

5. After hearing the rival contentions and perusing the material on record we find that the assessee has raised Rs. 1,76,20,000/- by issuing equity shares to six subscribers which were body corporates. The assessee has filed the necessary evidences comprising of names, addresses, PANs, copy of bank statements, audited balance sheets, profit and loss accounts, confirmation letters, details of the directors, copy of ITRs, tax audit reports etc. Besides, we note that the notices issued to the subscribers u/s 133(6) of the Act were also responded by the investors by furnishing the necessary details as called for by Ld. AO comprising the nature of business, details of the directors, their PANs, ITRs, tax audit reports, balance sheets, profit and loss accounts, mode

of payments and bank statements, source of investments with their PANs and ITR s and annual returns filed before the ROC. We note that Ld. AO instead of doing any further verification on the evidences filed by the assessee and the subscribers, has straightaway jumped to the conclusion that identity, creditworthiness of the investors and genuineness of the transactions were not substantiated for the reason that summons issued u/s 131 of the Act to the share subscribers as well as the directors of the assessee company were not complied with. In our opinion, mere non-compliance to the summons issued u/s 131 of the Act are not enough to make addition u/s 68 of the Act without doing any further verification for want of any defect or discrepancy in the documents furnished by the assessee as well as filed by the subscribers in response to the notice u/s 133(6) of the Act. 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.”

6. 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 Jewellok 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. 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.

8. The second issue raised by the assessee in the grounds of appeal is against the confirmation of addition of Rs. 35,775/- made by Ld. AO u/s 14A of the Act read with Rule 8D(2)(iii) of the Income Tax Rules, 1962.

9. The facts in brief are that Ld. AO observed during the course of assessment proceedings that the assessee has not disallowed any expenses u/s 14A of the Act despite holding investments in shares and securities and invoked the provisions of section 14A of the Act by relying on the CBDT Circular no. 5/2014 dated 11.02.2014.

10. Ld. CIT(A) dismissed the appeal of the assessee by holding that the disallowance u/s 14A of the Act does not depend upon the fact whether the items of expenses debited or not debited to the profit and loss account and since the investments were made in the unlisted equity shares in order to earn profit there is no infirmity in the order of the AO in making this disallowance.

11. After hearing rival contentions and perusing the material on record we note that there is no exempt income earned by the assessee during the year. Both the authorities below have harped on the fact that the investments made by the assessee are capable of yielding exempt income and thus, invoked the provisions of Section 14A of the Act read with Rule 8D(2)(iii) of the Rules. In our opinion, the disallowance u/s 14A of the Act can only be made if the assessee has earned exempt income during the year. The case of the assessee is supported by the decision of Hon'ble Delhi High Court in the case of *Chem Invest Ltd. vs. CIT in ITA 749/2014* dated 2.9.2015. We therefore, respectfully following the ratio laid down by the Hon'ble Courts, set aside the order of Ld. CIT(A) and direct Ld. AO to delete the addition made u/s 14A of the Act read with Rule 8D of the Rules.

12. In the result, the appeal filed by the assessee is allowed.

Kolkata, the 22nd August, 2023.

Sd/-

[Sonjoy Sarma]
Judicial Member

Sd/-

[Rajesh Kumar]
Accountant Member

Dated: 22.08.2023

Bidhan (P.S.)

Copy of the order forwarded to:

- 1. Sankatsathi Mercantile Pvt. Ltd., 89, North Wing, R.N.,
262, N.S. Road, Kolkata-700 001.**
- 2. ITO, Ward-5(2), Kolkata.**
3. CIT(A)-NFAC, Delhi.
4. CIT-
5. CIT(DR), Kolkata Benches, Kolkata.

//True copy //

By order

Assistant Registrar
ITAT, Kolkata Benches
Kolkata